

# Critical Analysis of Employer's Workplace Policies towards HIV Positive Employees

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## Table of Contents

Chapter One	Introduction	1
Chapter Two	International Labour Organisation	5
Chapter Three	South African Legal Framework	12
Chapter Four	Judicial Authority	27
Chapter Five	Employer's Policy	34
Chapter Six	Analysis: Will it work?	44
Chapter Seven	Conclusion	50
	Bibliography	53
	Plagiarism Form	58

## SUMMARY

This dissertation takes its focus from the plight of millions of South Africans living with HIV/AIDS. HIV sufferers count for 11.2 percent of our entire population. It has furthermore been predicted that in the next 10 years to come, 40 to 50 percent of the current workforce will be lost to HIV/AIDS.<sup>1</sup> Only certain people qualify for free government issued anti-retrovirals (HIV/AIDS medication), this leaves a large portion of people unable to afford their much needed medication. This ultimately leads to them becoming very ill and often unable to work. These statistics do not leave the South African employment situation with great confidence. Much legislation has been promulgated that prohibits the discrimination of those suffering from the disease and this legislation and its impact will be analyzed to see if it does meet the current needs of those suffering from HIV/AIDS. What will be discussed is how this legislation does not make available for the mechanism for employers to provide either the treatment or the access to a medical aid for their employees suffering from HIV. The cost of such a provision of treatment will be a great expense to any employer, especially those of a smaller nature. What will be dealt with is ways in which to encourage employers to implement such a scheme, through tax rebates and seeing the financial benefits of implementing such an arrangement. The provision of treatment encourages a better working relationship and reduces, amongst other things, the cost of staff replacement.

The Labour Relations Act<sup>2</sup> does offer employer's guidelines as to how HIV positive employees should be handled at the workplace. However these are just guidelines. What will be examined is how such a policy can be implemented in any workplace, the contents of such a policy and benefits of it being a compulsory workplace addition. Successful workplace policies and legislative guidelines will be used to create an ideal HIV workplace policy model.

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<sup>1</sup> Ghood and Conradie *HIV/AIDS Management Course for Healthcare Professionals* (2010) 374.

<sup>2</sup> The Labour Relations Act 66 of 1995.

The courts approach to HIV positive employees will be studied as they give a rough indication of whether HIV positive person's rights are being affected at the workplace. This will dictate to us whether there is a need for improvement and to what extent. What will be seen is that there are large gaps in the South African employment arena. HIV positive employees are falling through these gaps with no protection and no one willing to take on the challenge of helping to improve their lives.

# Chapter One

## Introduction

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### Chapter Content

<b>1.1 Introduction</b>	<b>1</b>
<b>1.2 Proposed Direction</b>	<b>2</b>
<b>1.3 Terminology</b>	<b>3</b>
<b>1.4 Conclusion</b>	<b>4</b>

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### 1.1 Introduction

South Africa has the highest number of people worldwide living with HIV. Between 5 and 6 million South Africans are infected with the disease.<sup>1</sup> It is projected that in the next 10 years to come, the number of employees that will be lost to HIV/AIDs will be equivalent to 40-50 percentage of the current workforce in many companies.<sup>2</sup> This figure is alarming as the repercussions of losing so many employees, will lead to detrimental effects for many companies (if not all) and the economy at large. Thus a comprehensive HIV/AIDS policy is imperative for the success of any business, no matter how big or small the company is.

Furthermore and perhaps more importantly is that HIV positive employees are still discriminated against in the workplace.<sup>3</sup> Even with all the protective legislation<sup>4</sup> that in no unclear terms prohibits discrimination based on a person's HIV status, HIV

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<sup>1</sup> Ghood and Conradie *HIV/AIDS Management Course for Healthcare Professionals* (2010) 9.

<sup>2</sup> *Idem* 374.

<sup>3</sup> *Allpass v Mooikloof Estates (Pty) Ltd t/a Mooikloof Equestrian Centre* [2011] JOL 26841 (LC).

<sup>4</sup> S 9 of the Constitution of the Republic of South Africa 1996. S 6 of the Employment Equity Act 55 of 1998.

positive employees still form part of a vulnerable group of employees exposed to much hardship.

## 1.2 Proposed Direction

Thus a clear problem exists in South African labour relations with regard to HIV positive employees. What will be discussed is ways in which employers can be encouraged and given incentives to implement policies in which they themselves give HIV positive employees antiretroviral drugs (hereinafter referred to as ARV's) or provide a medical aid that caters for it. The benefits of complying with such a concept will be enormous.<sup>5</sup> Protection by South African labour legislation will be investigated, to see if it gives enough protection to the rights of HIV positive employees and promote such incentive schemes. In particular the Employment Equity Act has a Code of Good Practice: HIV/AIDS and Employment.<sup>6</sup> This Code does give some guidelines as to how employers should handle HIV positive employees and the Code will be investigated as to whether it meets the needs of the current employment situation. International law, foreign law and its precedent will be examined to see if South Africa is in line with it. Although South Africa should be at the forefront of new ways to combat the disease and its consequences at the workplace, as South Africa has one of the highest infection rate worldwide. A look at South African case law will show how the courts' feel the matter should be dealt with. The common law duty that an employer has towards his employee's will be examined to see if providing ARV's fits into the duty.

Already some companies do have such workplace policies,<sup>7</sup> although they are some of the largest companies in South Africa, with greater resources than most. An analysis of these policies will be looked at to see if they can be implemented by other

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<sup>5</sup> A healthier, more productive workforce. Less absenteeism. Less costs in training new employees to replace the too incapacitated or dead ones. A more appreciative workforce.

<sup>6</sup> Employment Equity Act Code on HIV and AIDS and the World of Work, 1998.

<sup>7</sup> Telkom [http://www.telkom.co.za/about\\_us/human\\_resources/telkom\\_employee\\_wellness.html](http://www.telkom.co.za/about_us/human_resources/telkom_employee_wellness.html). Total [http://www.total.co.za/os/ossouthafrica.nsf/V5\\_OPM/77900975F2B58054C1256F3300561D38?OpenDocument](http://www.total.co.za/os/ossouthafrica.nsf/V5_OPM/77900975F2B58054C1256F3300561D38?OpenDocument), AngloAmerican <http://www.angloamerican.co.za/sustainable-development/safety-and-health/hiv-aids.aspx> are a few of such companies.

employers (especially smaller ones). A policy for HIV/AIDS at the workplace, that any employer can use, will be provided. Finally an analysis of whether it is viable for employers to provide ARV's to their employees will be considered, and the practicality of it.

Thus the need for such an analysis on HIV/AIDS in the workplace is imperative especially with regard to the many and far reaching effects it will and has already in the workplace.

### **1.3 Terminology**

Certain terms and concepts need to be fully explained.

Firstly, HIV or formally called human immunodeficiency virus is a retrovirus that causes AIDS (Acquired immune deficiency syndrome). There is no known cure for HIV. HIV is a retrovirus that primarily infects the vital organs of the human immune system. In the human body there are cells known as CD 4 cells. CD 4 cells helps to protect a person's immune system. When HIV is in the body, it causes CD 4 cells to be infected and destroyed faster than they can be replaced.<sup>8</sup>

Only in 2003 was a plan implemented by the South African government to provide persons with HIV with ARV's.<sup>9</sup> This was known as the Operational Plan for the Comprehensive HIV and AIDS Care, Management and Treatment for South Africa. To be able to get ARV's from government, a person's CD 4 count (which measures the number of disease-fighting cells in the blood) should be below 200. Exceptions to this policy are children and pregnant women infected with HIV/AIDS. This means that many people are extremely ill by the time they have qualified for ARV's and many die waiting to start the medication. Government as of August 2011 has announced that now those with a CD 4 count of 350 and less, will qualify for free ARV's.<sup>10</sup> CD 4 cells are critically important to help the body fight infections. The normal CD4 cell count ranges from 600-2000 cells. Generally a person is said to have AIDS when the CD4 count drops to 200 and below. The CD4 cell count is one

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<sup>8</sup> Ghoo and Conradie 35.

<sup>9</sup> <http://www.aids.org.za/page/treatment-care-and-support>.

<sup>10</sup> <http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=20673&tid=39322>.

of the most valuable and useful markers of the state of the immunity in a person with HIV/AIDS.<sup>11</sup>

## **1.4 Conclusion**

South Africa's HIV crisis is one that cannot be ignored. Legislation in many forms has been implemented on both the international and local level, but it will be questioned as to the effectiveness of such legislation and it will be examined as to whether there are gaps needed to be filled and in what ways.

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<sup>11</sup> [\\valorum\BibApps\CD\Aids\htm\home.htm](http://valorum\BibApps\CD\Aids\htm\home.htm) CD database. All-HIV/AIDS.

# Chapter Two

## International Labour Organisation

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### Chapter Content

<b>2.1</b>	<b>Introduction to the ILO</b>	<b>5</b>
<b>2.2</b>	<b>ILO Conventions, Recommendations and Codes</b>	<b>6</b>
<b>2.3</b>	<b>The United Nations</b>	<b>8</b>
<b>2.4</b>	<b>South Africa and the ILO</b>	<b>9</b>
	<b>2.4.1</b> <b>General Principles</b>	
	<b>2.4.2</b> <b>The ILO and the Constitution</b>	
<b>2.5</b>	<b>Conclusion</b>	<b>11</b>

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### 2.1 Introduction to the ILO

HIV and AIDS is a global pandemic. While the majority of its sufferers are in sub-Saharan African (specifically South Africa) the number of people affected by the disease is substantial enough, and far reaching enough, to justify international intervention or labour standards, with the implementation of goals. The International Labour Organisation (hereinafter referred to as the ILO) has addressed the matter in the form of the ILO's code of practice on HIV and AIDS and the World of Work in 2001 and in 2010 it implemented a recommendation on the same matter.

The ILO is an inter-governmental institution made up of member states that have signed the ILO's constitution.<sup>12</sup> It is the organisation that creates international law and monitors its implementation and general labour standards.<sup>13</sup> The ILO, formed after world war one and is a specialised agency of the United Nations.<sup>14</sup> The ILO's mission is to:

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<sup>12</sup> Rubin N *Code of International Labour law* Volume 1 (2005) 25.

<sup>13</sup> <http://www.ilo.org/global/about-the-ilo/lang--en/index.htm>. September 2011

<sup>14</sup> Rubin 25.

Advance the creation of decent work and the economic and working conditions that give working people and business people a stake in lasting peace, prosperity and progress.<sup>15</sup>

South Africa was a member state of the ILO when it was first founded, however it withdrew in 1964. South Africa did proceed to re-join in 1994 and has ratified all its core conventions.<sup>16</sup>

## 2.2 ILO Conventions, Recommendations and Codes

The ILO has various means of getting its point of interest across to its members, namely in the form of Conventions, Recommendations and Codes. Conventions are binding documents on member states. Two thirds of the members present must vote in favour of their implementation.<sup>17</sup> There are no conventions relating to HIV and AIDS issued by the ILO. However, there is both a Code<sup>18</sup> and a Recommendation.<sup>19</sup>

When the ILO issues a Code on a certain matter it is not intended to replace legislation, it is merely a practical guideline for government institutions, employers, employees and anyone else in the relevant field.<sup>20</sup> The ILO's Code of Practice on HIV and AIDS and the World of Work is one such example. Recommendations are also non-binding on ILO member states and only act as guidelines. The ILO thus has no binding document on what member states should implement into their legislation regarding HIV and AIDS. Thus member states must take it upon themselves to implement any Recommendation and Code issued.

The 2001 Code has many sections that are useful; however focus is only going to be placed on the most relevant sections to the topic of research. Section 5.2 states:

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<sup>15</sup> <http://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm>

<sup>16</sup> Van Niekerk, Christianson, McGregor, Smit and Van Eck *Law@Work* (2008) 20.

<sup>17</sup> *Idem* 21.

<sup>18</sup> The ILO Code of Practice on HIV/AIDS and the World of Work, 2001.

<sup>19</sup> Recommendation 200: Recommendation concerning HIV and AIDS and the world of work, 2010.

<sup>20</sup> ILO website <http://www.ilo.org/safework/normative/codes/lang--en/index.htm> September 2011-09-09.

## 5.2. Employers and their organizations

(a) Workplace policy. Employers should consult with workers and their representatives to develop and implement an appropriate policy for their workplace, designed to prevent the spread of the infection and protect all workers from discrimination related to HIV/AIDS.

Furthermore, with regard to employers giving employees medicine to suppress the effects of HIV and AIDs, the ILO states:

## 9.3. Occupational and other health services

(a) Some employers may be in a position to assist their workers with access to antiretroviral drugs. Where health services exist at the workplace these should offer, in cooperation with government and all other stakeholders, the broadest range of health services possible to prevent and manage HIV/AIDS and assist workers living with HIV/AIDS.

Lastly, with regard to a non-discriminatory workplace, the Code states in section 4.2:

In the spirit of decent work and respect for the human rights and dignity of persons infected or affected by HIV/AIDS, there should be no discrimination against workers on the basis of real or perceived HIV status. Discrimination and stigmatization of people living with HIV/AIDS inhibits efforts aimed at promoting HIV/AIDS prevention.

The ILO's Code can be seen to promote a workplace policy whereby an employer can offer treatment to HIV positive employees. Furthermore, it emphasises a discrimination free workplace with regard to HIV positive employees.

Many of the topics covered in the Recommendation issued by the ILO in 2010, are the same as those in the 2001 Code. This shows the importance that the ILO is placing on HIV/AIDS and the workplace. The Recommendation states, amongst other things that workers and their families should have access to treatment against the HIV/AIDS disease<sup>21</sup> and that no discrimination against HIV positive workers and job seekers<sup>22</sup> should be allowed. Furthermore the Recommendation deals with policies<sup>23</sup> and it states that workers should benefit from full access to health care services which can be provided through a number of schemes.

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<sup>21</sup> Recommendation 200, s 3(e).

<sup>22</sup> *Idem* s 3 (c).

<sup>23</sup> *Idem* s 17.

Both the ILO's Code and Recommendation, has shown support for a non-discriminatory workplace with a workplace policy that encourages employers to provide access to the relevant treatment to HIV positive employees. Although the ILO has no convention on HIV and AIDS, it does however have a core convention on discrimination.<sup>24</sup> It states in article 1 what it defines as discrimination:

1. For the purpose of this Convention the term **discrimination** includes--
  - (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;
  - (b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.

HIV and AIDS was an unknown disease at the time Convention 111 was created in 1958. Although it isn't listed as a specific ground it could be fall under the section on discrimination if the member state gives it that significance.<sup>25</sup> It is therefore compulsory<sup>26</sup> that member states that signed this convention must:

Pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

## 2.3 The United Nations

Over the years, the United Nations (hereinafter referred to as the UN) has issued a number of goals and declarations in its attempt to deal with HIV/AIDS. These issues, might not directly deal with those affected with HIV in the workplace, but as the ILO is a specialised agency of UN, its importance is significant. In 2001 the UN and all its

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<sup>24</sup> Convention 111.

<sup>25</sup> The Constitution of the Republic of South Africa has given it such a status as found in section 9 of the Constitution.

<sup>26</sup> Convention 111, article 2.

member states signed the Declaration of Commitment to HIV/AIDS.<sup>27</sup> This declaration gave a number of goals concerning those affected with HIV. In 2002, the UN established its Millennium Development Goals Campaign. One of its goals is to halt the spread of HIV/AIDS by 2015. It also wanted to ensure that there was universal access to treatment by 2010. In 2006 the UN adopted the Political Declaration on HIV/AIDS,<sup>28</sup> in which member states committed themselves to helping those with HIV and eradicating the disease. And in 2011, the UN further committed itself to the combating of the disease by adopting another Political Declaration on HIV/AIDS and by setting new goals for itself.<sup>29</sup>

The number of declarations on HIV/AIDS at the UN level does give an indication of how important the UN feels it is to help those affected by the disease and to help prevent any more people suffering from it.

## **2.4 South Africa and the ILO**

### **2.4.1 General Principles**

The Labour Relations Act<sup>30</sup> (hereinafter referred to as the LRA) states in section 1 (b) that one of its primary objects is to give effect to obligations incurred by the Republic as a member state of the ILO. The LRA continues on this line of thought in section 3, which states:

Any person applying this act must interpret its provisions-  
(c) in compliance with the public international law obligations of the Republic.

In the absence of any Convention on HIV and AIDS, South Africa could still fulfil its national obligations to the citizens by adhering to the standards set by the Code and Recommendation to implement legislation or policies on HIV/AIDs in the workplace. South Africa does seem to have ratified the ILO's standards set out in the Code and

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<sup>27</sup> <http://www.un.org/ga/aids/coverage/FinalDeclarationHIVAIDS.html>.

<sup>28</sup> [http://data.unaids.org/pub/report/2006/20060615\\_hlm\\_politicaldeclaration\\_ares60262\\_en.pdf](http://data.unaids.org/pub/report/2006/20060615_hlm_politicaldeclaration_ares60262_en.pdf).

<sup>29</sup> <http://www.unaids.org/en/aboutunaids/unitednationsdeclarationsandgoals/2011highlevelmeetingonai> ds/.

<sup>30</sup> The Labour Relations Act 66 of 1995.

Recommendation. The Employment Equity Act<sup>31</sup> contains a Code of Good Practice named, Key aspects of HIV/AIDs and Employment. The Code, amongst other things, sets out that discrimination based solely on an employee's HIV status is not allowed. The Code furthermore deals with a workplace HIV/AIDS policy and encourages every workplace to have one. This Code on key aspects of HIV/AIDS does seem to be in line with the main principles set out in the ILO's documentation. However, just like the ILO's Code and Recommendation, the Employment Equity Act does not impose any legal obligation on employers. Employers are free to use their discretion whether to accept and apply such a policy or not, without any legal consequences.

South African courts<sup>32</sup> have referred to the ILO's Recommendation 200 on HIV and the world of work, thus showing that South Africa does regard it as an important component in establishing proper HIV/AIDS legislation and policies.

Convention 111 is enforceable and must be ratified. Its influence can be seen in the Constitution, the LRA and the Employment Equity Act. South African legislation has gone even further than the ILO's convention in that it has a much larger list of grounds in which discrimination is prohibited (HIV/AIDS being inclusive on this list).<sup>33</sup>

## **2.4.2 The ILO and the Constitution**

The Constitution has shown its commitment to following international law through section 39 in that when interpreting the Bill of Rights, international law must be considered. This can be seen as the drafters placed a premium on the value of international law.<sup>34</sup> Furthermore the Constitution states in s233 that when interpreting legislation a court must prefer an interpretation consistent with one found in International law rather than one not consistent with it. There are a number of Constitutional cases that give specific reference to and show support to the ILO and

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<sup>31</sup> Employment Equity Act 55 of 1998.

<sup>32</sup> *Alpass v Mooikloof Estates (Pty) Ltd* [2011] JOL 26841 (LC). Para 40.

<sup>33</sup> S 6 of the Employment Equity Act 55 of 1998.

<sup>34</sup> Van Niekerk 26.

its Conventions, Recommendations and Codes.<sup>35</sup> This shows South Africa's commitment to fulfilling its international obligations. While the Codes and Recommendation aren't considered international legislation, their impact with regard to South Africa's approach to HIV/AIDS and the workplace has been embraced.<sup>36</sup>

## 2.5 Conclusion

The ILO with respect to HIV and AIDS seems to have done enough to cover the issue. This is said with reference to the fact that in most countries HIV and AIDS only affects a small percentage of the population. It is only in South Africa and a few other countries that such large numbers have the disease. It wouldn't be relevant for the ILO to issue a Convention on the matter of HIV and AIDS, making the Code and Recommendation sufficient to the needs of the ILO member states. It is, in my view, correct that it is up to the member states to choose if they wish to implement the ILO's Code and Recommendation and to what extent. This being said, the ILO should put pressure on member states to implement legislation similar to the Code and Recommendation on member states, member states whose HIV infection rate has led to a pandemic in the respective country. South Africa through enacting the LRA and the Employment Equity Acts Code of Good Practice: Key aspects of HIV/AIDS and employment, seems to be in accordance with the Code and Recommendation issued by the ILO.

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<sup>35</sup> Two such cases are *South African National Defence Force Union v Minister of Defence* (1999) 20 ILJ 2265 (CC) and *NUMSA v Bader Bop (Pty) Ltd* (2003) 2 BLLR 103 (CC).

<sup>36</sup> As is seen in the EEA's Code of Good Practice: Key aspects of HIV/AIDS and employment which has similar provisions to that of the ILO's code and recommendation.

# **Chapter Three**

## **South African Legal Framework**

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### **Chapter Content**

<b>3.1</b>	<b>Introduction</b>	<b>12</b>
<b>3.2</b>	<b>The Constitution of the Republic of South Africa, 1996</b>	<b>13</b>
3.2.1	Introduction to the Constitution	
3.2.2	Applicable Provisions	
<b>3.3</b>	<b>The Labour Relations Act 66 of 1995</b>	<b>15</b>
3.3.1	Introduction to the LRA	
3.3.2	Applicable provisions of the LRA	
3.3.3	The LRA and the Constitution	
<b>3.4</b>	<b>Code of good practice: key aspects of HIV/AIDS and Employment</b>	<b>18</b>
<b>3.5</b>	<b>The Employment Equity Act 55 of 1998</b>	<b>20</b>
3.5.1	Applicable provisions	
3.5.2	The EEA and the Constitution	
<b>3.6</b>	<b>The Basic Conditions of Employment Act 75 of 1997</b>	<b>22</b>
<b>3.7</b>	<b>The Common Law</b>	<b>23</b>
3.7.1	Employers Common Law duty	
3.7.2	Current Common Law position in South Africa	
<b>3.8</b>	<b>Conclusion</b>	<b>25</b>

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### **3.1 Introduction**

The South African legal framework dealing with HIV/AIDS is handled within numerous pieces of legislation and the common law. Their relevant sections will be examined to see what solutions (if any) they offer the HIV positive employee in terms of employee benefits.

## 3.2 The Constitution of the Republic of South Africa, 1996

### 3.2.1 Introduction to the Constitution

The Constitution<sup>37</sup> is the supreme law of South Africa and it states<sup>38</sup> that any conduct inconsistent with it is invalid. The Constitution first came into force in the form of an Interim Constitution; this was the result of multiparty negotiations.<sup>39</sup> The Constitution's effect on our legal system has been said to be revolutionary.<sup>40</sup>

The Constitution binds (as stated in section 8) the executive, judiciary, legislature and all organs of state. It has both vertical and horizontal application. Vertical in the sense that the state is restrained by the Constitution in what it does (laws it passes or its conduct that affects the people of South Africa).<sup>41</sup> The Constitution's horizontal application is the Bill of Rights explanation of the way natural or juristic persons must interact with one another.<sup>42</sup>

### 3.2.2 Applicable Provisions

There are a number of sections in the Constitution that are applicable to HIV/AIDS and the workplace. Section 23(1) states that everyone has the right to fair labour practices. The word "everyone" refers to both employers and employees who enjoy the right to fair labour practices. The judgement in *NEHAWU v University of Cape Town*<sup>43</sup> commented on the scope of protection granted by section 23(1). It said that the focus of section 23(1) is the relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both. Interests of

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<sup>37</sup> The Constitution of the Republic of South Africa, 1996.

<sup>38</sup> Section 2 of the Constitution.

<sup>39</sup> Cheadle M, Davis D and Haysom N *South African Constitutional Law: The Bill of Rights* (2002) 4.

<sup>40</sup> *Idem* 2.

<sup>41</sup> *Idem* 21.

<sup>42</sup> *Idem* 22.

<sup>43</sup> *NEHAWU v University of Cape Town* (2003) 5 BLLR 409 (CC).

both parties must be taken into consideration and a balance should be reached with regard to their competing interests.<sup>44</sup>

An employee that suffers from HIV/AIDS could find that receiving free ARV's from his or her employer could fit under the banner of fair labour practices. As there is no precise definition of fair labour practices in the Constitution, this could work to the advantage of employees.<sup>45</sup>

Another important provision is the right to equality.<sup>46</sup> It states that both the state and any person may not unfairly discriminate directly or indirectly on the grounds listed, although this is not a closed list. A ground not listed in the Constitution will still be considered discrimination if it is an analogous ground.<sup>47</sup> This is a ground with attributes or characteristics that have the potential to impair the fundamental dignity of a person.<sup>48</sup> While HIV/AIDS is not listed, it will still be seen as a ground that a person or the state may not unfairly discriminate against. This clause doesn't prevent discrimination (as there are circumstances when it needs to be used), it rather prohibits unfair discrimination.<sup>49</sup> It is through this section that the first case surrounding the non-employing of a person purely based on their HIV positive status served before the Constitutional Court.<sup>50</sup> The refusal to employ based on a blanket ban of HIV positive people was seen to be a violation of a person's constitutional right to equality.

Section 14 states that everyone has the right to privacy. This right can be seen as the right to be left alone.<sup>51</sup> Every person needs their "space" in which they are entitled to keep their personal information to themselves and not to share with the outside world. The right to privacy can be seen as the reinforcement of the concept

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<sup>44</sup> *NEHAWU v University of Cape Town* 40-41.

<sup>45</sup> Only the converse, namely an unfair fair labour practice is defined in the LRA in s185 and s186.

<sup>46</sup> S 9 of the Constitution.

<sup>47</sup> *Cheadle et al* 244.

<sup>48</sup> *Harksen v Lane No* 1998 (1) SA 300 (CC) 46.

<sup>49</sup> *Cheadle et al* 244.

<sup>50</sup> *Hoffman v South African Airways* (2000) 11 BCLR 1211 (CC).

<sup>51</sup> Warren and Brandeis *The Right to Privacy* (1890) 4 Harvard 193.

of democracy.<sup>52</sup> This is important as an employer may not force an employee to reveal their HIV status and furthermore it is that employee's choice as to whether or not they want others to know their HIV status.

Section 10 states that everyone has inherent dignity and the right to have their dignity respected. The right to human dignity is the foundation to many other rights, including physical integrity.<sup>53</sup> An HIV positive person's dignity can be violated in many ways in the workplace. Employers should see this right of their employees as motivation for implementing a workplace policy that promotes and respect a person's right to dignity.

Section 27 states that everyone has the right to have access to health care services. The state must take reasonable legislative steps to achieve the realisation of this right. This right is available to everyone and is aimed particularly to members of vulnerable groups, such as those with HIV/AIDS.<sup>54</sup> In this sense the state could enact legislation to compel or recommend employers to give anti-retrovirals to their HIV positive employees as part of a workplace policy; this would be in line with this Constitutional right.

## **3.3 The Labour Relations Act**

### **3.3.1 Introduction**

Current South African labour legislation came into effect in fulfilment of the Constitution. A new dispensation of labour legislation was needed to correct South Africa's history of inequality and the Labour Relations Act<sup>55</sup> (hereinafter referred to as the LRA) sought to do that.

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<sup>52</sup> Cheadle *et al* 191.

<sup>53</sup> *Idem* 273.

<sup>54</sup> *Idem* 496.

<sup>55</sup> Labour Relations Act 66 of 1995.

The first cases of HIV/AIDS were reported in South Africa in 1982.<sup>56</sup> It was in the 1990's that the virus reached explosive proportions. As previous labour legislation did not deal with HIV/AIDS and the problems associated with it, no reference will be made to the previous dispensation.<sup>57</sup>

### 3.3.2 Applicable provisions of the LRA

The most important right the LRA has to offer an HIV positive employee is the right not to be unfairly dismissed and the right to not be subjected to unfair labour practices.<sup>58</sup> This should ensure that HIV positive employees will have a fair chance at employment. A dismissal or a labour practice that is directly linked to an employee having a HIV positive status will be deemed to be automatically unfair. Section 187(1)(f) of the LRA directly states:

A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is that 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.

While a person's HIV status is not listed in the section, it will then have to be decided if it qualifies as automatically unfair under the term "or any arbitrary ground".<sup>59</sup> The term "arbitrary ground" has been seen to mean "a ground which is capricious or proceeding merely from will and not based on reason or principle."<sup>60</sup> From this, it does seem as though a person's HIV status might qualify as an automatically unfair dismissal as the dismissal will be on an arbitrary ground. This should be seen as the legislature's support for prohibiting unfair dismissals and unfair labour practices.

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<sup>56</sup> <http://www.hivsa.com/static/hiv-aids-in-south-africa>.

<sup>57</sup> Industrial Conciliation Act 28 of 1956.

<sup>58</sup> S185 LRA.

<sup>59</sup> Vettori "Employer Duties toward Employees infected with HIV/AIDS" (2007) *South African Mercantile Law Journal* 154.

<sup>60</sup> *Kadiaka v Amalgamated Beverage Industries* (1999) 20 ILJ 373 (LC) par 42.

However, just as the LRA supports HIV positive employees in this respect, the LRA does allow for dismissals based on incapacity.<sup>61</sup> An obvious issue with regard to an employee's capacity would be that a person (whose CD count is below a certain threshold) is not able to do their job properly or at all due to health reasons. Employers would be able to bring into play section 187(2)(a) as a defence for dismissing an HIV positive employee.<sup>62</sup> The employer will have to prove that the dismissal is not in fact discriminatory, but valid and fair. The test for substantive fairness for such a dismissal is whether it is fair to expect an employer to continue the employment relationship with regards to the merits of each case. The merits would be the health and subsequent physical abilities of the employee to continue working.

Legislation also allows employers to dismiss HIV positive employees on the ground of the job requiring a HIV negative person.<sup>63</sup> This inherent requirement of the job would be difficult to prove as blanket bans are not allowed.<sup>64</sup> An inherent requirement of a job means that the person must possess an "indispensable attribute".<sup>65</sup> Thus discrimination suffered by an individual can be justified.

While the LRA does indirectly deem the dismissal of a HIV positive person as an automatically unfair dismissal, the question remains as to whether the LRA does enough to help HIV positive employees. Nothing is enforceable on employers to take positive steps in helping HIV positive employees; instead the legislation simply offers

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<sup>61</sup> S 188 of the LRA, read together with s 192, states that a dismissal that is not automatically unfair, is unfair if the employer fails to prove-

- (a) that the reason for dismissal is a fair reason-
  - (i) related to the employee's conduct or capacity; or
  - (ii) based on the employer's operational requirements; and
- (b) that the dismissal was effected in accordance with a fair procedure.

<sup>62</sup> Grogan *Workplace Law* (2009)149.

<sup>63</sup> Vettorri (2007)154 and s188 LRA that states operational requirements.

<sup>64</sup> *Harmse v City of Cape Town* (2003) 6 BLLR 557 (LC) and *Dudley v City of Cape Town and Another* [2008] 12 BLLR 1155 (LAC).

<sup>65</sup> *Woolworths (Pty) Ltd v Whitehead* (2000) 21 ILJ 571 36.

defences. The LRA has implemented a Code of Good Practice on HIV/AIDS, as will be discussed below, however this is merely a guideline.

### **3.3.3 The LRA and the Constitution**

The LRA was assented to under the Interim Constitution.<sup>66</sup> LRA states in section 1 that one of its purposes is to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution. It should be noted that it was an omission on behalf of the legislature to not amend this section, as section 27 referred to the Interim Constitution. It in fact should read section 23 of the Constitution. That aside, the LRA must give life to the Constitution, especially with regard to section 23 and for our purposes the right to fair labour practices. The LRA and its provisions are not necessarily limited to only handle constitutional issues dealt with under section 23 of the Constitution. It can be said that the LRA and its structures can handle all labour and employment disputes as they are specialised in this field.<sup>67</sup> The LRA is the recommended structure through which people in the employment field must take their constitutionally based employment disputes through.

## **3.4 Code of Good Practice: Key Aspects of HIV/AIDS and Employment**

The Code of Good Practice: key Aspects of HIV/AIDS and Employment (hereinafter referred to as the Code) was enacted in 2000. The Code is the main front in which the LRA deals with HIV/AIDS in the workplace, and thus for this dissertations purpose is very important. It should however be noted from the outset that this code is merely a guideline and not enforceable<sup>68</sup> (unlike the other sections mentioned

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<sup>66</sup> Interim Constitution 1994.

<sup>67</sup> This approach to labour law can be inferred from the Constitutional Court cases of *Sidumo v Rustenburg Platinum Mines Ltd* (2007) 12 BLLR 1097 (CC) and *Gcaba v Minister of Safety and Security* (2009) 12 BLLR 1145 (CC). Both showed their support for employment matters (not just those covered under s 23 of the Constitution) being dealt with through LRA structures as it is a specialised system with specialised personnel handling the matters.

<sup>68</sup> Item 4.3 of the code.

above found in the LRA). It should also be noted that until this Code was enacted in 2000, nothing in the LRA gave mention to the issue of HIV in the workplace. Considering by the year 2000 what the HIV levels were, this seems a huge oversight on government's behalf.

The objectives of the Code<sup>69</sup> state exactly what the drafters wanted the purpose of the Code to be, a set of guidelines for employers and trade unions to implement so as to ensure individuals with HIV infection are not unfairly discriminated against in the workplace. Section 6 of the Code reinforces this concept further by stating that "no person shall be unfairly discriminated against within the employment relationship or within any employment policies or practices." The code then gives suggestions as to how to make it a discrimination free environment.

Item 7 of the Code handles the testing of HIV amongst employees and the confidentiality and disclosure of such information. This item states that no employee can be forced to take an HIV test<sup>70</sup> (unless permission is granted by the Labour Court). Further in item 7,<sup>71</sup> an employee is not required to disclose his HIV status to his employer and even if he does chose to reveal his status; the employer may not disclose this information to others in the workplace. This is so that employees will be protected against discrimination based on their HIV status in all stages of employment.<sup>72</sup> This also provides employers with protection as they will have the excuse of ignorance of the employees HIV status, which will protect them against discriminatory charges.<sup>73</sup>

This situation of living in ignorance can lead to one day the employer being confronted with either a very sick employee or one near death. This cannot have been the outcome the drafters of the Code envisioned. Thus the code can be seen as promoting a denialist attitude.

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<sup>69</sup> *Idem* item 2.

<sup>70</sup> *Idem* item 7.1.

<sup>71</sup> *Idem* item 7.2.

<sup>72</sup> Mischke "HIV Status and Dismissal, Exploring when the two are related" (2011) *Contemporary Labour Law* 86.

<sup>73</sup> Mische (2011) 87.

A secondary objective of the Code<sup>74</sup> is to support those individuals who are infected or affected by HIV/AIDS so that they may continue to work productively for as long as possible. This recommendation by the Code as well as its stance on giving all employees equal benefits<sup>75</sup> and it stating that strategies should be developed to handle the direct and indirect costs of HIV/AIDS in the workplace, show a support for what could be a compulsory workplace policy that entitles HIV positive employees to be given ARV's as part of their workplace benefits.

It is interesting to note that a rework of the Code has been made, however it has not been enacted yet. On the whole the new version seems in line with the current Code.

## **3.5 Employment Equity Act**

### **3.5.1 Applicable Provisions**

The Employment Equity Act<sup>76</sup> (hereinafter referred to as the EEA), just like the LRA, was enacted subsequent to the transformation of South Africa and hence deals with bringing equality to the workplace. The EEA is one of the few pieces of legislation that actually mention HIV directly and specifically prohibits discrimination on that ground in any employment policy or practice.<sup>77</sup> The discrimination can be in the form of an act or an omission as per section 10(2) of the act which states:

Any party to a dispute concerning this Chapter may refer the dispute in writing to the CCMA within six months after the act or omission that allegedly constitutes unfair discrimination.

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<sup>74</sup> Item 2.2 of the code.

<sup>75</sup> *Idem* item 10.

<sup>76</sup> Employment Equity Act 55 of 1998.

<sup>77</sup> S 6 of the EEA states, 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.

The EEA states in section 5 that, every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any policy or practice. It is important to note here, that case law<sup>78</sup> at one stage endorsed the view that the failure to take steps to promote equal opportunity constituted a breach of section 5.<sup>79</sup> However the LAC in *Dudley v City of Cape Town*<sup>80</sup> went against the *Harmse v City of Cape Town* judgement. These cases dealt with the individual right to affirmative action and that it cannot be used in stating an employee has been unfairly discriminated against in terms of section 5.

Section 60<sup>81</sup> of the EEA holds employers vicariously liable for their employee's actions in certain circumstances. In this instance, employers will be liable for the discriminatory conduct of one employee towards another employee, based on the fact of the latter employee's HIV status. An employer, to prevent himself from being held liable for such conduct, is encouraged then to implement policies to prevent inter-employee discrimination.<sup>82</sup> The legislature makes the employer take the necessary steps to eliminate the alleged conduct. This could be in the form of having a zero tolerance policy towards discrimination.

It is in the EEA, section 7,<sup>83</sup> that the legislation deals with the testing of HIV positive employees and it states that it is prohibited unless a Labour Court judgement has allowed otherwise. For the purposes of an employer wanting to give HIV positive

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<sup>78</sup> *Harmse v City of Cape Town* 1132.

<sup>79</sup> Vettori (2007)152.

<sup>80</sup> *Dudley v City of Cape Town and Another* [2008] 12 BLLR 1155 (LAC).

<sup>81</sup> If it is alleged that an employee, while at work, contravened a provision of this Act, or engaged in any conduct that, if engaged in by that employee's employer, would constitute a contravention of a provision of this Act, the alleged conduct must immediately be brought to the attention of the employer.

<sup>82</sup> Vettori (2007) 153.

<sup>83</sup> (1) Medical testing of an employee is prohibited, unless—

(a) legislation permits or requires the testing; or  
(b) it is justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of a job.

(2) Testing of an employee to determine that employee's HIV status is prohibited unless such testing is determined justifiable by the Labour Court in terms of section 50 (4) of this Act.

employees ARV's as a benefit of their employment, this requirement of court sanctioned testing is another hurdle the employer will have to overcome. A timeous and expensive hurdle.

The EEA, while heavily promoting a discrimination free workplace, fails to encourage the employer to give HIV positive employees the benefit of ARV's.

### **3.5.2 The EEA and the Constitution**

The Employment Equity Act states in its preamble that one of its purposes is to promote the Constitutional right to equality. This Act shows the importance the legislature has placed on equality for all, especially in the workplace. The right to equality in the workplace is of paramount importance with regard to HIV positive employees as often it is discrimination based purely on one aspect of the person (the positive status) that results in their dismissal or non-appointment.

## **3.6 Basic Conditions of Employment Act 75 of 1997**

The Basic Conditions of Employment Act<sup>84</sup> (hereinafter referred to as the BCEA) gives any employee basic conditions of employment. This ensures fair workplace treatment. The number of working hours is regulated by the Act, section 7 states that the number of hours must be regulated by the employer. Schedule one of the Act states that people must work towards a goal of an employee only working 40 hours a week. If this is adhered to, it will give an HIV positive employee time to see doctors, collect medicine and live a healthy lifestyle that is needed when one is HIV positive. Furthermore a Code of Good Practice on the Arrangement of Working time provides for night shift workers. It states that night shift employees must be informed of the health and safety hazards to such working conditions. This would be particularly important to HIV positive employees, who need a healthy lifestyle. Both these provisions, regarding the 40 hour work week and the health and safety mechanisms are all guidelines and are not enforced by law, making the implementation of them not compulsory.

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<sup>84</sup> Act 75 of 1997.

## 3.7 The Common Law

### 3.7.1 The Employers Common Law Duty

The common law places a duty on an employer to provide safe working conditions for his employees.<sup>85</sup> To establish whether the employer did in fact meet this duty, it has to be asked whether the reasonable person in similar circumstances would have only provided such facilities or would they have done more to improve the safety of the workplace to protect employees against physical and psychological harm.<sup>86</sup> This duty was explained in the case of *Van Deventer v Workmen's Compensation Commissioner*.<sup>87</sup> The Court held,<sup>88</sup>

An employer owes a common law duty to a workman to take reasonable care for his safety. The question arises in each particular case as to what reasonable care is required. This is a question of fact and depends upon the circumstances in each particular case. A master is in the first place under a duty to see that his servants do not suffer through his personal negligence, such as failure to provide a proper and safe system of working and a failure to provide proper and suitable plant, if he knows or ought to have known of such failure. He is not bound to give personal superintendence to the conduct of his workings and there are many cases in which it is in the interest of the workmen that the employer should not personally undertake such superintendence. He may for instance be not sufficiently qualified to do so. In that event the master would be liable for the negligence of persons so acting on his behalf. If a servant is employed on work of a dangerous character, the employer is bound to take all reasonable precautions for the workman's safety.

Employers can be held liable for their omissions as well, if they fail to prevent people from causing harm to their employees.<sup>89</sup> In certain circumstances a reasonable employer could have foreseen the potential for such harm and can be liable for preventing harm.<sup>90</sup> HIV/AIDS still has a general stigma attached to it towards people who are HIV positive, so it can be said to be reasonable to expect some sort of

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<sup>85</sup> Venter, Levy, Conradie, and Holtzhausen *Labour Relations in South Africa* (2009) 177.

<sup>86</sup> Van Jaarsveld *Principles and Practices of Labour Law* (2011) 201.

<sup>87</sup> *Van Deventer v Workmen's Compensation Commissioner* [1962] 4 All SA 64 (T).

<sup>88</sup> *Idem* 68.

<sup>89</sup> Brassey M *Employment and labour law* (2011) vol 1 at E4:30

<sup>90</sup> *Ibid.*

harassment towards an HIV positive employee.<sup>91</sup> Stemming from this expectation can mean that there is a common law duty on an employer to take the necessary precautionary measurements to prevent HIV positive employees from suffering from harassment at the workplace.<sup>92</sup> Constitutional provisions would also seem to support this common law duty.<sup>93</sup>

This common law duty can also be seen to extend to the employer's duty to protect its employees from other employees. In this sense an employer can be held vicariously liable for its employees conduct. Vicarious liability is defined as, liabilities which arises from one person's relationship with another. An employer is generally liable for the acts of the employee which are performed in the course and scope of the employment relationship.<sup>94</sup>

### **3.7.2 Current Common Law position in South Africa**

A case<sup>95</sup> that dealt with the employer's common law duty of care was heard in the Supreme Court of Appeal. While this case concerned the sexual harassment of one employee towards another, its principles are relevant for this topic. The employer had to pay the employee R800 000 based on the breach of his common law duty. The court said:<sup>96</sup>

This duty cannot in my view be confined to an obligation to take reasonable steps to protect them from *physical* harm caused by what may be called *physical* hazards. It must also in appropriate circumstances include a duty to protect them from psychological harm caused, for example, by sexual harassment by co-employees.

This dictates to us that an employer's policy in itself will not prevent the discrimination of one employee towards an HIV positive employee. An employer has

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<sup>91</sup> Vettori (2007) 156.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Idem* 157 and S 39(2) of the Constitution provides for developing the common law.

<sup>94</sup> Barker and Holtshausen *South African Labour Glossary* (1996) 162.

<sup>95</sup> *Media 24 Ltd and another v Grobler* [2005] 3 All SA 297 (SCA).

<sup>96</sup> *Idem* 64.

to be proactive in this regard to avoid being held liable. The common law position is thus still very relevant and if anything should encourage employers to actively implement their HIV policy in order to avoid a hefty fine. In this aspect, the common law provides the greatest consequence towards not complying with or implementing a policy dealing with HIV positive employees.

The common law provides a further remedy, namely *actio iniurarum* or a person's liability after injuring another's personality.<sup>97</sup> This affects a person's right to dignity. Someone who is HIV positive and is then ridiculed at the workplace for such can use the common law as an action against another. The right to privacy is also included in this right to dignity,<sup>98</sup> disclosing that someone is HIV positive, without that person's authority, is another way that this right can be violated. The common law gives the individual employee remedies to overcome any violations of his dignity or privacy in the workplace.

### **3.8 Conclusion**

South African legal framework encourages a discrimination free environment at the workplace. This is essential for any employee to feel safe at work, free of any prejudices that very often accompany people's attitudes towards HIV positive individuals. However the legal framework in general (besides a few common law duties on the employer) does not encourage employers to assist the workforce by regular information sessions and medical assistance and to help take charge of the situation of what has been predicted. It is predicted that in the next ten years 40-50 percent of the current workforce will be lost to HIV/AIDS.<sup>99</sup> The South African workforce will be almost halved, leaving behind a multitude of problems facing employers. Legislation can be greatly improved. Firstly, to either legally oblige employers to give employees ARVS as part of their benefits and secondly to reward employers for doing so.

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<sup>97</sup> Neethling, Potgieter & Visser *Law of Delict* (2010) 12.

<sup>98</sup> *Idem* 347.

<sup>99</sup> Ghood and Conradie HIV/AIDS Management Course for Healthcare Professionals (2010) 9.

Our Constitution, common law and legislation has the potential to develop into a force to tackle the problem of HIV in the workplace. However, legislation does not do enough to protect HIV employees in what is essentially their right to life.<sup>100</sup> It instead gives a variety of recommendations without any real consequences to non-enforcement. Employers will only implement a policy in which they provide the required medication to their employees if statutorily required to and hopefully be financially compensated, with regard to a tax refund, for taking that burden off the state. Employers also should be more educated on the reality of the situation that HIV/AIDS will have on its workforce. Maybe then they will be more proactive in their response to it.

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<sup>100</sup> S 11 of the Constitution.

# Chapter Four

## Judicial Authority

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### Chapter Content

<b>4.1</b>	<b>Introduction</b>	<b>27</b>
<b>4.2</b>	<b><i>Hoffman v SA</i></b>	<b>27</b>
<b>4.3</b>	<b><i>Allpass v Mooikloof Estates 2011</i></b>	<b>29</b>
<b>4.4</b>	<b>Other Relevant Case Law</b>	<b>30</b>
<b>4.5</b>	<b>International Case law</b>	<b>31</b>
	4.5.1 Indian Case Law	
	4.5.2 Botswana Case Law	
<b>4.6</b>	<b>Conclusion</b>	<b>33</b>

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### 4.1 Introduction

The position of HIV positive workers has always been a contentious issue. There are many cases dealing with HIV positive employees, ranging from unfair dismissals to unfair treatment and discrimination. These cases have been heard from the CCMA all the way to the Constitutional Court, with varying levels of success. Only certain of these cases have reflected on the benefits of a workplace policy, and where they have, it will be discussed.

### 4.2 *Hoffman v SAA*

The Constitutional Court in 2000 heard the matter of *Hoffman v South African Airways*.<sup>101</sup> The facts briefly were that Mr Hoffman had applied for a job as a cabin crew member at SAA. At the end of the selection process, Mr Hoffman was found to be a suitable candidate. Employment was subject to a medical examination. At the medical examination Mr Hoffman was clinically fit, except for the fact that he tested

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<sup>101</sup> *Hoffman v SAA* 2000 (11) BCLR 1211 (CC).

positive for HIV, subsequently SAA deemed him unsuitable.<sup>102</sup> SAA contended that they had this blanket ban on all HIV positive candidates as they thought that HIV positive persons could not get vaccinations against yellow fever and were more vulnerable to opportunistic diseases. They felt this would put their passengers at risk. Furthermore SAA felt that the life expectancy of persons with HIV would be too short to warrant the costs of training them.<sup>103</sup> This last thought of SAA's is very important for this dissertation, for if SAA had a HIV policy, they would be trying to do all that would be possible to keep their employees as healthy for as long as possible.

Once the appeal started, SAA's views on an HIV positive person's ability to receive yellow fever vaccinations was immediately against medical evidence.<sup>104</sup> Medical evidence states that only persons whose CD4+ count had dropped below 300, would not be able to receive a yellow fever vaccination.<sup>105</sup> The medical experts stated that with the invention of the treatment available, persons with HIV can live normal lives and are capable of doing any employment tasks for which they are qualified.<sup>106</sup> The Court stated that legitimate commercial requirements are important in seeing if a person can be employed, but stereotyping and prejudicing under the guise of commercial requirements cannot be allowed.<sup>107</sup> The Court further stated,<sup>108</sup> "the fact that some people who are HIV positive may, under certain circumstances, be unsuitable for employment as cabin attendants does not justify a blanket exclusion from the position of cabin attendant of all people who are HIV positive."

The Court having ruled in Hoffman's favour, in that he had been unfairly discriminated against, stated with regard to the plight of HIV positive persons,<sup>109</sup>

People who are living with HIV constitute a minority. Society has responded to their plight with intense prejudice. They have been subjected to systemic

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<sup>102</sup> *Idem* 5.

<sup>103</sup> *Idem* 7.

<sup>104</sup> *Idem* 8.

<sup>105</sup> *Ibid.*

<sup>106</sup> *Idem* 14.

<sup>107</sup> *Idem* 34.

<sup>108</sup> *Idem* 35.

<sup>109</sup> *Idem* 28.

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.

### **4.3 *Allpass v Mooikloof Estates 2011***

The case of *Allpass v Mooikloof Estates*<sup>110</sup> shows that HIV positive employees are still very much a group that are discriminated against at the workplace. A decade has passed between the ruling of the Constitutional case of *Hoffman v SAA*, yet HIV positive persons are still very much vulnerable in the workplace.

In this case, Mr Allpass was employed at MooiKloof Equestrian Centre, in what the employer said was a rather physically demanding job. Within two weeks of starting (and still within in the probation period) Mr Allpass filled in a form required by his employer. In this form he revealed he was HIV positive. Immediately, Mr Allpass was dismissed. The employer contended that the dismissal was based on Mr Allpass lying in saying that he was healthy to perform all the duties required for the job. However the court agreed with Mr Allpass in finding that he was dismissed based on his HIV positive status. With regard to his health, Mr Allpass had been living with HIV for 18 years, Mr Allpass testified that, "he attributed his excellent state of health to his commitment to a proper treatment regime involving health assessments, taking HIV medication regularly and working hard in an outdoor environment."<sup>111</sup>

The Court confirmed this by stating,<sup>112</sup>

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<sup>110</sup> *Allpass v Mooikloof Estates (Pty) Ltd t/a Mooikloof Equestrian Centre* [2011] JOL 26841 (LC).

<sup>111</sup> *Idem* 29.

<sup>112</sup> *Idem* 54.

The inescapable facts are that the applicant had no medical or physical impediment preventing him from performing his duties. This was not only his evidence and that of Prof Venter, but also Malan had been unable to dispute that (save for the two incidents related by Herbst) the applicant had acquitted himself well in a strenuous and demanding job. This renders spurious any notion that he was "severely ill" and belies the true rationale for his dismissal. The notion that HIV is synonymous with serious illness is however not unheard of. It emanates from a general stereotype about all people living with HIV, and which results in loss of dignity and a sense of self.

This indicates that even with all the new advances in HIV medication and education on HIV/AIDS, people are very ignorant to the reality of this very manageable disease.

#### **4.4 Other Relevant Case Law**

Many employers have gone to the Labour Court to get permission for testing their employees for HIV. The Court in the case of *Joy Mining Machinery*<sup>113</sup> said that employers have the need to test employees because they need to be proactive regarding the prevention of employees becoming infecting with HIV, employers need to treat the symptoms of the disease and that employers will be able to plan for contingencies and other eventualities.<sup>114</sup> In *Irvin and Johnson Ltd v Trawler & Line Fishing Union & others*<sup>115</sup> the court had to decide whether the envisaged anonymous and voluntary testing needed to be first considered by the Courts before it could be allowed. The employer wanted the testing as:

The applicant believes that it requires information on HIV prevalence in its workforce to assess the potential impact of HIV/AIDS on the workforce; to enable the applicant to engage in appropriate manpower planning so as to minimise the impact of HIV/AIDS mortalities and HIV/AIDS-related conditions on its operation; to enable it to put in place adequate support structures to cater for the needs of employees living with HIV/AIDS; and to facilitate the

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<sup>113</sup> *Joy Mining Machinery (A division of Harnischfeger (SA) (Pty) Ltd) v NUMSA & Others* [2002] 4 BLLR 372 (LC).

<sup>114</sup> *Idem* 25.

<sup>115</sup> *Irvin & Johnson Ltd v Trawler & Line Fishing Union & others* [2003] JOL 10639 (LC).

effective implementation of proactive steps to prevent employees from becoming infected with HIV/AIDS.<sup>116</sup>

The Court decided that the testing was not within the scope of the EEA and that the testing did not require the permission of the Labour Court.<sup>117</sup> This is important as it shows that as long as the testing is done voluntarily and anonymously, an employer doesn't need to go to the expensive lengths of getting the Labour Courts permission. Case law has also shown how employees are dismissed for not being able to fulfil their duties as they are too sick. In the unreported case of *Gumede v Natal Iron and Brass Foundry*<sup>118</sup> the court found that the employer had rightfully dismissed the employee as the HIV positive employee could not keep up with his required duties. The Commissioner here said<sup>119</sup>

An employer cannot be expected to keep employees in employment indefinitely. As the court said in Henn's case, supra, an employee's frequent and lengthy absences due to ill-health may justify termination at a point where an employer can no longer be expected to tolerate such absences. In the current matter, it was not the applicant's absences which impacted on the working relationship, but his inability to cope with the demands and targets of the job.

This shows that had the employer been forced to implement a policy in which HIV positive employees are encouraged to disclose their status early on and receive the needed medication that perhaps the employee would be healthy and fit enough to continue working.

## **4.5 International Case Law**

### **4.5.1 Indian Case Law**

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<sup>116</sup> *Idem* 4.

<sup>117</sup> *Irvin Johnson Ltd v Trawler & Line Fishing Union* 42.

<sup>118</sup> *Gumede v Natal Iron and Brass Foundry* [2010] JOL 25108 (MEIBC).

<sup>119</sup> *Idem* 7.

It should be noted that India has no laws regarding the discrimination of HIV positive persons<sup>120</sup> and that it is estimated that India has 2.5 million HIV positive people.<sup>121</sup>

In the case of *Mx Of Bombay Indian Inhabitant vs M/S. Zy And Another*,<sup>122</sup> MX, was employed in a public sector company. He was dismissed when he was tested positive for HIV. The Bombay High Court held in the employees favour, stating that an HIV positive person could not be denied recruitment to a job as long as he can perform his duties and as long as he does not pose a significant risk to others.<sup>123</sup> The Court stated,<sup>124</sup>

Taking into consideration the widespread and present threat of this disease in the world in general and this country in particular, the State cannot be permitted to condemn the victims of HIV infection, many of whom may be truly unfortunate, to certain economic death. It is not in the general public interest and is impermissible under the Constitution. The interests of the HIV positive persons, the interests of the employer and the interests of the society will have to be balanced in such a case. If it means putting certain economic burden on the State or the public Corporations or the society, they must bear the same in the larger public interest.

This is significant as it shows that India has also seen that HIV positive employees (without the support of their employers) can succumb to economic death.

#### **4.5.2 Botswana Case Law**

Botswana has 320 000 members of its population living with HIV/AIDS,<sup>125</sup> although it only has a population of just over 2 million. This shows that HIV is a serious problem in Botswana. In the case of *Lemo v Northern Air Maintenance (Pty) Ltd*,<sup>126</sup> an employee (who had HIV/AIDS) who had been ill for an extended period of time, was

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<sup>120</sup> Dastoor "A SWOT analysis of the Indian Legal System and the issues of people living with HIV in the context of SAATHII's Coalition Based Advocacy Project in West Bengal" (2009) 7.

<sup>121</sup> Idem 2.

<sup>122</sup> *Mx Of Bombay Indian Inhabitant vs M/S. Zy And Another* on 3 April, 1997.

<sup>123</sup> Dastoor (2009) 8.

<sup>124</sup> *Mx Of Bombay Indian Inhabitant vs M/S. Zy And Another* 56.

<sup>125</sup> <http://www.unaids.org/en/regionscountries/countries/botswana/>.

<sup>126</sup> *Lemo v Northern Air Maintenance (Pty) Ltd* 2004 (2) BLR 317 (IC).

dismissed. The court said that any employee with a life threatening disease (including HIV/AIDS) should be treated all the same. The court did express that an employee with HIV/AIDS must not be discriminated against, and that an employee cannot be dismissed solely because an employee is HIV positive. With regard to the correct medication the employee said,

This is so because as a general rule an HIV positive employee may for years, even decades, experience no interference with his or her capacity for service in fulfilment of the demands of his job. This is particularly so in this era where anti-retroviral drugs are readily available.

The court decided that the dismissal was procedurally and substantively unfair as the employer had not given the employee a proper hearing and furthermore, the employee's absenteeism had not been an issue in the past, and only once the employee's HIV status was revealed, was the employee dismissed. The court supported its decision by saying that other cases had followed this pattern in the past, "the golden thread that runs throughout the judgments is that it is incompetent to dismiss an employee solely on the grounds that such an employee is HIV positive."

## **4.6 Conclusion**

South African case law has shown that any form of discrimination in the workplace, based purely on a person's HIV status will not be tolerated. Case law has also shown its inclination to support workplace testing. International case law has revealed that other nations, affected by HIV/AIDS, in general, follow the line set out by the International Labour Organisation. South Africa has the unique position of being the nation most affected by HIV/AIDS; however it is important to note that our case law is in line with foreign countries judicial responses.

# Chapter Five

## Employer's Policy

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### Chapter Content

<b>5.1</b>	<b>Introduction</b>	<b>34</b>
<b>5.2</b>	<b>South African Employers' Policies</b>	<b>35</b>
5.2.1	Anglo American	
5.2.2	Total	
5.2.3	Telkom	
<b>5.3</b>	<b>Basic framework for Employment Policy</b>	<b>37</b>
5.3.1	Introduction	
5.3.2	Non-discriminatory	
5.3.3	Workplace Testing	
5.3.4	Disclosure and Confidentiality	
5.3.5	Workplace Education	
5.3.6	Workplace Treatment	
5.3.7	Example Policy	
<b>5.4</b>	<b>Conclusion</b>	<b>42</b>

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### 5.1 Introduction

Implementing an HIV/AIDS policy that provides anti-retroviral treatment either free or at a subsidized rate can be an expensive task. However taking such a step could in the long run save the employer money. By providing the needed medication to its employees, an employer can mitigate the costs that HIV/AIDS will have on its workforce.<sup>127</sup> Further motivating facts for implementing such a policy is that the

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<sup>127</sup> Barnett & Whiteside *AIDS in the 21<sup>st</sup> Century* (2006) 269.

employer can be seen as taking responsibility for its employees and potentially the community around it.<sup>128</sup> Some South African employers have risen to the challenge and their policies will be analysed in an attempt to create a policy that all employers can use.

## 5.2 South African Employers' Policies

### 5.2.1 Anglo American

Anglo American is the largest private sector employer with 76 000 employees in South Africa.<sup>129</sup> Anglo American states that 92% of all its employees have found out their HIV status through voluntary counselling and testing.<sup>130</sup> Anglo American's HIV policy applies to all its employees, on a global scale. From the outset its policy states in its introduction that, "the company's aim is to reduce the fear of HIV/AIDS and to make a contribution towards minimising the social, economic and developmental consequences of this epidemic."<sup>131</sup> Anglo's policy discusses in detail the rights of employees with HIV and their right to their information remaining confidential and not to be exposed to any form of discrimination. While Anglo will never force an employee to undergo a HIV test, they do encourage their employees to go, as they do "believe that counselling and testing for HIV is an important intervention that helps to link care and support for those with HIV infection to our broader prevention programmes aimed at turning the tide of the HIV/AIDS epidemic."<sup>132</sup> Anglo's policy makes it very clear that a person's HIV status will not constitute a basis for dismissal or non-hire.<sup>133</sup> Medical incapacitation due to HIV will be handled like all health conditions. Anglo offers free access to support and counselling for all their HIV positive employees and their employees dependants.<sup>134</sup>

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<sup>128</sup> *Idem* 269.

<sup>129</sup> <http://www.angloamerican.co.za/>.

<sup>130</sup> <http://www.angloamerican.co.za/about-us/key-facts.aspx>

<sup>131</sup> [www.angloamerican.com/~media/.../Anglo.../hiv\\_aids\\_policy.pdf](http://www.angloamerican.com/~media/.../Anglo.../hiv_aids_policy.pdf)

<sup>132</sup> *Idem* page 3.

<sup>133</sup> *Ibid.*

<sup>134</sup> *Ibid.*

Most importantly, for this dissertation's purpose is what Anglo and their member companies promise to do for the care, treatment and support for HIV positive employees.<sup>135</sup>

Group companies will endeavour to:

- keep HIV positive employees and their families healthy and productive for as long as possible, through early participation in HIV Disease Management Programmes;
- prevent opportunistic infections that account for most of the morbidity and mortality associated with AIDS, particularly TB;
- eliminate mother to child transmission (MTCT) of HIV with appropriate antiretroviral therapy (ART);
- offer appropriate and effective antiretroviral therapy (ART) on an affordable and sustainable basis for all employees and their dependants;
- arrange for alternative treatment support for employees receiving ART who leave the company for any reason, as well as for their dependants;
- arrange access to appropriate care, support and treatment for any long-term contractor diagnosed with HIV infection through company testing programmes.

Anglo offers employees a wide range of rights and benefits. While their policy doesn't outright state that they will offer their HIV positive employees free antiretroviral medication, they do offer it on an affordable and sustainable basis. A sustainable basis is very important as that by not taking the proper medication on a regular basis could lead to a person being resistant to medication.<sup>136</sup> A sustainable basis also encourages a healthy and long life, attributes needed to be a productive employee.

## **5.2.2 Total**

Total is a company based primarily in South Africa, with a few of its subsidiaries in Sub-Saharan Africa. Total states in its HIV policy that it will commit itself to an HIV/AIDS education programme amongst its employees and training will be made available to all employees. Furthermore Total will offer pre and post-test counselling

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<sup>135</sup> *Idem* page 4. Only the relevant points are listed.

<sup>136</sup> Ghood and Conradie *HIV/AIDS Management Course for Healthcare Professionals* (2010) 284.

services for those wishing to be tested.<sup>137</sup> Most importantly Total commits itself to referring affected employees to appropriate professionals (medical and or counselling services). While Total isn't offering the needed medication to its employees, it is showing a willingness to help affected employees, indicating a disposition to retain HIV positive employees.

### **5.2.3 Telkom**

Telkom is a leading communications services provider in South Africa and on the African continent.<sup>138</sup> Telkom is partly owned by the South African government. Telkom's HIV/AIDS Thusu project was founded in 1996 and its policy is an award winning policy, having received the Global Business Coalitions (GBC) Annual Awards for Business Excellence for its integrated Voluntary Counselling Testing and Treatment Programme. Telkom's main feature is that it provides free Anti-retroviral treatment to its infected employees.<sup>139</sup> This shows Telkom's commitment to the health of their employees and to keeping their employees.

## **5.3 Basic framework for Employment Policy**

### **5.3.1 Introduction**

A workplace policy regarding HIV/AIDS is imperative for any work place. By looking at some of the most successful workplace policies, legislation and other guides, a template of what the ideal HIV Aids workplace policy should be, will be discussed. Different sizes and needs of the workplace will influence the greater or lesser extent of the HIV facilities. The idea behind any good workplace policy (from this dissertations perspective) is having a workplace that encourages HIV positive employees to be open and honest about the disease. This can be seen as one way

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<sup>137</sup>[http://www.total.co.za/Os/ossouthafrica.nsf/VS\\_OPM/77900975F2B58054C1256F3300561D38?OpenDocument](http://www.total.co.za/Os/ossouthafrica.nsf/VS_OPM/77900975F2B58054C1256F3300561D38?OpenDocument).

<sup>138</sup> [http://www.telkom.co.za/about\\_us/company\\_profile.html](http://www.telkom.co.za/about_us/company_profile.html).

<sup>139</sup> [http://www.telkom.co.za/about\\_us/human\\_resources/telkom\\_employee\\_wellness.htm](http://www.telkom.co.za/about_us/human_resources/telkom_employee_wellness.htm)

to stop workplace discrimination and in the greater scheme of things, to stop the spread of the disease.<sup>140</sup>

### **5.3.2 Non-discriminatory**

All workplaces must be non-discriminatory. Employees must be hired, regardless of their HIV status and must not be dismissed based on their HIV status.<sup>141</sup> Employees must also treat each other with non-discriminatory attitudes, regardless of their personal beliefs. Disciplinary hearings for discriminatory behaviour, with consequences relevant to the nature of the discrimination, must be held in cases of such discrimination. The behaviour of employees amongst each other also includes the most senior of employees.

### **5.3.3 Workplace Testing**

All workplaces should encourage employees to be tested for HIV/AIDS.<sup>142</sup> People that are aware of their status are in control of the disease and can properly counteract its affects. All testing has to be voluntary and no employee will be compelled to do so. All testing must involve pre and post-test counselling. Counselling entails the discussion of prevention and other lifestyle changes, if the employee is tested HIV negative. If the employee is tested positive, counselling offers the opportunity for treatment to be discussed and how the employee will access the treatment (medical aid, government or employer paying for such treatment). Furthermore counselling offers the employee the opportunity for his HIV to be monitored (success of the medicine).<sup>143</sup> All results must remain confidential. It is the employee's choice to disclose his or her HIV status. A workplace that is tested for HIV and the employer is aware of the results enables the employer to formulate a

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<sup>140</sup> Viljoen *Righting Stigma: Exploring a rights-based Approach to Addressing Stigma* (2005) 75.

<sup>141</sup> This is however subject to the proviso that the employee is capable of doing his work regardless of his HIV status.

<sup>142</sup> This is subject to the EEA, s 7 and s 50(4).

<sup>143</sup> Viljoen101.

proper workplace strategy.<sup>144</sup> If there is a high prevalence of HIV amongst the employees, the employer will know that he will have to be very aggressive in formulating a HIV policy

### **5.3.4 Disclosure and Confidentiality**

Disclosure and confidentiality should also be addressed in the workplace. The Constitutional right<sup>145</sup> to privacy states that everyone has this right. This should be interpreted to include a person's HIV status remaining only their knowledge. An employer can never be entitled to know a person's HIV status. Employers should be aware that non-disclosure is often the result of employees fearing they may be stigmatized if they revealed their status to the workplace.<sup>146</sup> This fear can (if the right employment policy is implemented) be reduced or completely removed if the entire workplace is educated and that a strict non-discrimination policy is enacted. Such efforts can be seen as a workplace encouraging disclosure.<sup>147</sup> If the employee informs the employer of his HIV positive status, this information must remain confidential to the employer. It is only the employee who can inform more people at the workplace. This is in accordance with case law. In *Van Vuuren and Another NNO v Kruger*<sup>148</sup> a doctor breached his patient's right to privacy by telling others the patient suffered from HIV and was subsequently fined. Employers must be aware of such consequences.

### **5.3.5 Workplace Education**

All places of employment must allow for the education of employees to the facts of HIV/AIDS. There is a lack of clarity amongst many people about the reality of the

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<sup>144</sup> *Joy Mining Machinery (A division of Harnischfeger (SA) (Pty) Ltd) v NUMSA & Others* [2002] 4 BLLR 372 (LC) paragraph 25.

<sup>145</sup> S 14 of the Constitution of the Republic of South Africa, 1996.

<sup>146</sup> Viljoen 66.

<sup>147</sup> *Idem*72.

<sup>148</sup> *Van Vuuren and Another NNO v Kruger* 1993 (4) SA 842 (SAA).

disease and this creates stigmatisation and false perceptions, which can lead to discrimination. Education is not a once off thing. It should be done on a continuous basis that evolves as the disease evolves. The information must be up to date. Education and awareness can be achieved in many ways, for example, pamphlets, talks, or information via emails. Education can also be achieved through prevention tactics by having condoms (of a high quality) freely available, in accessible places. HIV/AIDS should not be a taboo topic and should be encouraged to be debated and talked. Motivational speakers (who are HIV positive) can also be invited to speak to the workforce. This can potentially show that people can live a normal life with HIV, a disease with the right medication, is manageable. Peer education<sup>149</sup> on HIV, by persons who either volunteer or are nominated, can also be used. The benefits are that peers can communicate more effectively as they know the language and in what way fellow employees will listen and understand.<sup>150</sup>

### **5.3.6 Workplace Treatment**

If an employee has decided to disclose his or her HIV status to an employer, the employer should do a number of things. Firstly, the employee's HIV status should remain confidential to the employer or Human Resources manager.<sup>151</sup> The employer should provide counselling for the employee, so that the employee can on an on-going basis speak about any problems they are facing while managing the disease. The employer should be flexible in allowing the employee to work overtime when they are capable of doing so, so that in times when the employee cannot perform his or her tasks, due to illness, hours would have been made up.

The employer should provide medication for the employee, if possible. The provision of treatment should be accompanied by access to a nurse or doctor on a regular basis to ensure that the employees are in good health. A visiting clinic, visiting either

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<sup>149</sup> One employee per 50 employees (as recommended by the Department of Labour) be nominated or volunteer will go for training and then conduct the peer education

<sup>150</sup> Dickinson "Workplace HIV/AIDS Peer Education in South African Companies" (2006) *Wits Business School* 6.

<sup>151</sup> HIV positives person's right to privacy is very important as was illustrated in *NM and Others v Charlie Smith, Patricia De Lille and others* CCT 69/05.

once a week or month, can be established for smaller workplaces or those with low numbers of HIV. This can potentially be incorporated with the Department of Health's visiting clinics. This is to ensure that the employee takes the medication so that the employee will be able to be a productive and useful person for the employer. The ensuring of employees taking their medication and the mutual trust and understanding through communication and co-operation between employers and employees, is one of the main reasons behind this dissertation. Gaps in taking the medication result in persons being immune to the medication, resulting in the individual not being able to fight the disease. This will further result in the employee being too sick to continue working, leaving him without an income. This will also affect the employer negatively, as the employer will incur costs in paying the employee severance, hire a new person and then train such an individual.

### **5.3.7 Example Policy**

We, \_\_\_\_\_ (insert company name) believe that our employee's well-being and health are key factors to the success of our business.

We acknowledge the detrimental affect HIV/AIDS can have on a workplace; however we believe that through the correct treatment (in early detection and continuous medication) a person can live a normal and successful life.

As a team we would take proactive steps to ensure that a high standard of health is maintained for both HIV positive and negative employees. Healthy lifestyle choices will be encouraged and where possibly implemented at the workplace. Good hygiene habits and healthy food choices, at the workplace will be enforced.

We demand a discrimination free workplace that will affect all aspects of a person's employment and will apply to all employees, regardless of their status.

A workplace atmosphere of openness, discrimination and disclosure is encouraged and management will go to great lengths to enforce this.

We encourage all employees to know their status and will provide mechanisms (either on site or off site testing) for those employees wishing to know their HIV status.

Any employee, who chooses to make known their status to management, will know that their status remains confidential. Alternative arrangements will be made to accommodate any employee who needs special provisions due to ill health caused by HIV/AIDS.

We will provide education on prevention, transmission and treatment of HIV/AIDS by having educational days at least every three months. These educational days will give correct information about HIV/AIDS, in an attempt to dispel any misgivings employees have regarding HIV/AIDS. Condoms will also be distributed in bathrooms and healthy sexual lifestyles are encouraged. New information and updates about HIV/AIDS will also be sent to employees via email or in exposed places in the workplace.

We have placed all our employees on medical aid \_\_\_\_\_ (insert medical aids name) which will supply the relevant treatment to any employee with HIV/AIDS.

**OR**

We have committed ourselves to supply any employee with HIV/AIDS with the relevant treatment.

This policy will be reviewed on a yearly basis so as to address the needs of the workplace and its employees with HIV/AIDS.

## **5.4 Conclusion**

Any workplace with a policy regarding HIV/AIDS will be of benefit to the workforce and inevitably to the employer. However, the more aware an employer is of the HIV situation in the workplace, the more effective a policy can be. An employer should be encouraged to see the benefits of a workplace policy, especially one that in some way offers HIV positive employees with treatment. Currently, only workplaces that

have the financial ability and employers with the motivation to implement such a policy can provide for their employees wellness. The next chapter will discuss ways that make it possible for employers to implement a workplace policy that allows for HIV treatment at the workplace or provision by the workplace.

# Chapter 6

## Analysis: Will it work?

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### Chapter Content

<b>6.1 Introduction</b>	<b>44</b>
<b>6.2 Theoretical Understanding</b>	<b>45</b>
<b>6.3 Current Employer Options</b>	<b>46</b>
<b>6.4 Proposed Legislation Changes</b>	<b>48</b>
<b>6.5 Conclusion</b>	<b>49</b>

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### 6.1 Introduction

It is recognized that the provision of treatment to HIV positive employees in the long run is a cost effective way to manage the potential risks that HIV positive employees can pose to a workplace.<sup>152</sup> The means of getting an employer to pay (either directly or indirectly) for its employee's medical treatment for HIV positive employees can be an expensive task initially. The cost of either placing employees on an adequate medical aid or providing the treatment itself is a costly endeavour. Involved in the cost of providing treatment also includes access to a medical nurse or doctor who has to ensure the treatment is working and responding well to the recipient, on a regular basis.

The benefits however far outweigh the costs. The economic losses alone would be dire to any employer if employee's HIV is left unattended.<sup>153</sup> If an employee is HIV positive, it is recommended that as soon as this is discovered, an employee should go straight on to ARV's. As is the current government policy, only persons with a CD

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<sup>152</sup> Ghood and Conradie HIV/AIDS Management Course for Healthcare Professionals (2010) 380.

<sup>153</sup> Vettori S "Employer Duties towards Employees Infected with HIV/AIDS" *South African Mercantile Law Journal* (2007) 162.

count of below 350 qualify for free ARV's.<sup>154</sup> This means that a person has to be very sick before they qualify. This person will then not be able to work to an employer's required standard (decreased productivity)<sup>155</sup> or worst case scenario, not at all. If an employee is not meeting the required level of performance, the employee is at risk of being dismissed for incapacity.<sup>156</sup> This will result in increased costs of rehiring and retraining.<sup>157</sup> Furthermore, if the employee does qualify for government issued ARV's and is capable of still working, once a month the employee will have to take the day off to get the ARV's. This will result in time and money lost to the employer. From this, there is also the potential of the assigned government clinic (that the employee attends) not having any available medication for the employee. This will result in the employee either not getting the medicine as needed or having to take another day's leave to source more. As was seen in May 2012, there was a shortage of HIV medication,<sup>158</sup> this led to employees having to take more leave to get their medication, ultimately causing the employer financial loss.

## 6.2 Theoretical Understanding

The concept of substantive equality is an important ideology for this approach. Substantive equality is when the law is made to ensure equality of outcome and is prepared to tolerate disparity of treatment to achieve this goal.<sup>159</sup> Substantive equality looks at the social and economic conditions of groups and individuals to see if their status differentiation is related to disadvantage.<sup>160</sup> Substantive equality aims to promote respect for equal dignity and worth for all.<sup>161</sup> This is relevant in the sense that without access to HIV medication, a person's self-worth is affected. Substantive

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<sup>154</sup> [http://www.doh.gov.za/list.php?type=HIV and AIDS&year=2012](http://www.doh.gov.za/list.php?type=HIV%20and%20AIDS&year=2012).

<sup>155</sup> Vettori (2007) 164.

<sup>156</sup> S188 of the Labour Relations Act states if the employee was dismissed due to his incapacity, the dismissal is not automatically unfair.

<sup>157</sup> Vettori (2007) 164.

<sup>158</sup> <http://www.sowetanlive.co.za/news/2012/05/30/aids-drug-shortage-in-6-provinces>.

<sup>159</sup> Currie and De Waal *The Bill of Rights Handbook* (2005) 232.

<sup>160</sup> Fredman "Redistribution and Recognition: Reconciling Inequalities" (2007) *SAJHR* 219.

<sup>161</sup> *Idem* 225.

equality can be seen as imposing positive obligations on a state.<sup>162</sup> A positive obligation on the state can be seen as the state reimbursing employers costs in their disbursing of the ARV's and related expenses. The state can implement legislation in order to affect this. In South Africa, substantive equality is the force behind social and economic transformation.<sup>163</sup> The case of *Hoffman v SAA*<sup>164</sup> (as previously mentioned) shows this substantive equality ideology to its full potential. The concept of substantive equality is important in understanding the need for the South African government to compensate employers who provide ARV's to their employees. This undertaking will be in line with substantive equality, a policy that South African courts endorse.

### 6.3 Current Employer Options

Currently there are options available to an employer to provide ARV's to his employees. The first is to pay the medical aid tariff (a medical aid that provides ARV's as part of the employees scheme) of employee, and the second is to provide the medicine itself. Both systems as will be explained, do allow some sort of tax deduction for the employer. However, not a cost deduction, just the tax on the cost.

The Income Tax Act<sup>165</sup> allows certain tax deductions from people that carry on a trade (employers). Section 11(a) allows the deduction of expenditure and losses from what the employer would normally pay for a taxable amount.<sup>166</sup> All amounts that an employer pays to an employee in terms of an agreement, are deductible from

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<sup>162</sup> Fudge "Redistribution Equality, the Supreme Court of Canada, and the Limits to Redistribution" (2007) *SAJHR* 235.

<sup>163</sup> Albertyn "Substantive Equality and Transformation in South Africa" (2007) *SAHJR* 255.

<sup>164</sup> *Hoffman v SAA* 2000 (11) BCLR 1211 (CC).

<sup>165</sup> Income Tax Act 58 of 1962.

<sup>166</sup> For the purpose of determining the taxable income derived by any person from carrying on any trade, there shall be allowed as deductions from the income of such person so derived-

(a) expenditure and losses actually incurred in the production of the income, provided such expenditure and losses are not of a capital nature;

the employer's income.<sup>167</sup> If an employer pays an employee's medical aid as part of the employee's salary, it would be considered an allowable deduction. However, most employees in South Africa are not members of a medical aid, so the effectiveness of this method regarding the provision of medication to HIV positive employees is questionable.<sup>168</sup>

The issue as to whether an employer can deduct the costs of supplying ARV's to his employees as an allowable expenditure must be determined. The paying of the medicine must fit under the definition of an allowable deduction. Namely, that it is an expenditure or loss that is actually incurred, during the year of assessment, in the production of income and that it is not capital in nature.

In terms of expenditure (meaning the action of spending funds)<sup>169</sup> this is what an employer would have to do to buy the medication. Actually incurred refers to the fact that the employer must have incurred the expenses, not necessarily paid for the cost of them, but he has incurred a liability.<sup>170</sup> As long as the employer has bought the ARV's, he would have incurred the expense, whether he paid for them immediately or bought them on credit. During the year of assessment, indicates that the expense must have occurred during that year of assessment.<sup>171</sup> In the production of income, gives rise to a potential problem as receiving medicine isn't in its nature in the production of income. Two questions have to be asked as to whether the expenditure is in the production of income.<sup>172</sup> The first is what gave rise to the expenditure? The second is whether the action is closely connected with the income-earning activities?<sup>173</sup> The first question in our case can be answered by the employee's HIV status gave rise to the expenditure. The second is that without the medicine, the employees would either die or be too ill to continue working. Thus, the

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<sup>167</sup> Stiglingh, Koekermoer, Van Schalkwyk, Wilcocks, & De Swart *South African Income Tax* (2012) 153.

<sup>168</sup> Ghood *et al* 380.

<sup>169</sup> Stiglingh *et al* 136.

<sup>170</sup> *Idem* 136.

<sup>171</sup> *Idem* 138.

<sup>172</sup> *Port Elizabeth Electric Tramway Co Ltd v Commissioner for Inland Revenue* 1936 CPD 241.

<sup>173</sup> Stiglingh *et al* 139.

medicine actually enhances the income of the workplace as without it, there would be fewer employees. The expenditure would also not be capital in nature.<sup>174</sup> Thus medicine that an employer gives an employee will be an allowable deduction. These allowable deductions should be one mechanism to encourage employers to either ensure their employees are on either a suitable medical aid or to actually give them the needed medication.

## 6.4 Proposed Legislation Changes

What is proposed is that South African legislation provides for a mechanism to compensate the employer for any real expenses that were incurred by providing the employee with the required medication. Included in this cost should be the cost of the testing, medical professionals for both the testing and counselling and ensuring the treatment is being taken and responded to correctly.

The Labour Relations Act<sup>175</sup> (hereinafter referred to as the LRA) should allow for the provision of reimbursing employers. This would encourage the implementation of the parts of the LRA and other legislation that are soft laws and essentially help protect HIV positive employees. While some might see this as an exercise that will create too many administrative problems, if this system allows for those affected by HIV/AIDS to receive the medication on time and on a sustainable basis, then it should be encouraged.

Employers must keep all receipts and expense reports of expenses they incurred in providing their employees with HIV related medication and then once a year file them with the South African Revenue Services (hereinafter referred to as SARS). SARS should then compensate the employers for expenses occurred by either reducing their tax or reimbursing the employer. A system that involves exchanging of money should be avoided, so a tax reduction should be the preferred method of

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<sup>174</sup> Things that are capital in nature are items that for the purposes of the employer are not sellable as part of the business. They are generally kept with the employer over a long time and help the employer make money. An example is law books in the hands of a lawyer. *CIR v Visser* (1937) T 276.

<sup>175</sup> Act 66 of 1995.

reimbursement. The Department of Health's involvement should be limited as much as possible, to ensure a swift and successful system.

This proposed scheme will not be implemented without a few persons criticizing it. Firstly the issue of HIV positive employees with a CD count greater than 350 needs to be discussed. As mentioned above. These persons are currently excluded from receiving free government issued medication, and this proposal involves government reimbursing employers' for all their employees' HIV related expenses. The South African government should take this as an opportunity to fully realise its HIV policy, and be willing to pay for all employees' HIV expenses. If the government fails to do so, then only employees with a CD count of 350 and less will qualify, which defeats the whole purpose of this proposal in trying to ensure a healthy and effective workforce. The second issue that might arise is from those persons who have HIV, with a CD count higher than 350, but are unemployed. This proposed system does not cater for their needs. If the proposed system does manage to be implemented and government undertakes to fully reimburse employers for all their employees HIV expenses, regardless of their CD count, then a potential discrimination case could be brought against the government. While this dissertation cannot deal with the intricacies of such a case, a discrimination law suit could potentially mean that the South African government would have to pay for all persons HIV medication, regardless of their CD count. Which would be a great success.

The funding of reimbursing employers for such expenses will firstly come from the department of health, who will receive a drop in the number of people receiving ARV's, as now many people will go to their employer for their medication instead. The administration costs will also be lessened as the numbers drop. Other sources could be money directly from USAID, or other such organisations. The National budget should be reviewed to allow for such a plan as it is in line with Section 27 of the Constitution<sup>176</sup> and will be for the greater good of all South Africans.

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<sup>176</sup> The Constitution of the Republic of South Africa, 1996. S 27 gives everyone the right to healthcare services, furthermore it states that legislation should be enacted to achieve this.

Legislation should be enacted that it will be compulsory for employers to implement such a policy. However if such legislation is merely a recommendation, then those employers who do provide ARV's to their employees should be rewarded. Rewarded in that their contribution would be a considerable factor in the Best Employer certificate evaluation. Perhaps those who participate in providing ARV's would be considered a preferred candidate for any government tendered work.

If this system is proposed it could encourage government to pay for all people's medication, regardless of their CD count. This system also cuts out the middle man. It's more streamlined and fewer people are available to blame if this system fails. This will result in employees receiving their medication on time and hassle free. Government should see this system in a positive light, employers' involvement in dispensing employees HIV medication, it will encourage employees to take their medication daily and at the correct time.<sup>177</sup> Failure to not adhering to taking the medication or only taking it intermittently, results in many negative health consequences to a person, including the treatment not working.<sup>178</sup>

## 6.5 Conclusion

Currently South Africa doesn't have an effective enough legislation to handle HIV/AIDS. Through the implementation of compensating employers who provide their employees with medication, allows a greater number of people to receive ARV's. This in turn will create a more productive workforce and in the long run will benefit the economy and society.<sup>179</sup> Such a system will not be easy to implement, it will take time, money and effort, but if successful, will help millions of South Africans.

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<sup>177</sup> Ghooed *et al* 287.

<sup>178</sup> *Idem* 284.

<sup>179</sup> Poku, Whiteside and Sandklaer *Aids and Governace* (2007) 245.

# Chapter 7

## Conclusion

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<b>7.1 Introduction</b>	<b>50</b>
<b>7.2 Summary of chapters</b>	<b>50</b>
<b>7.3 The way forward</b>	<b>51</b>

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### 7.1 Introduction

South Africa has a HIV prevalence rate of 11.2 percentage of the entire population. This accounts for 5.6 million people, out of a population of 50 million.<sup>180</sup> Currently 100 000 South Africans are infected yearly with HIV.<sup>181</sup> Importantly for working people, the percentage of adults aged 15 to 49 living with HIV is 17 percent.<sup>182</sup> It is this 17 percent that affects employers, workplaces and the economy. The country's HIV rate cannot be ignored and its detrimental effects on the workplace are just one of its consequences.

### 7.2 Summary of Previous Chapters

It has been noted that South Africa does have legislation dealing with the discrimination and testing of HIV employees, and this legislation is in accordance with international norms and standards. However, what was discovered was that our law was lacking when it came to enforcement of employer's policies, and any legislation enacted was merely a guideline for employers to follow, should they wish to. This leaves a gap in the area of HIV positive employees and making them particularly susceptible to dismissal based on their capacity to perform their jobs.

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<sup>180</sup> <http://www.unaids.org/en/regionscountries/countries/southafrica/>.

<sup>181</sup> [http://www.unaids.org/en/dataanalysis/knowyourresponse/countryprogressreports/2012countries/ce\\_ZA\\_Narrative\\_Report.pdf](http://www.unaids.org/en/dataanalysis/knowyourresponse/countryprogressreports/2012countries/ce_ZA_Narrative_Report.pdf) page 12.

<sup>182</sup> <http://www.unaids.org/en/regionscountries/countries/southafrica/>.

It was also shown that the Department of Health can only help so many people, when it comes to HIV medication. Only persons with a CD count of 350 or lower, qualified for government issued ARV's. This allows for many people to become very ill (often too ill to continue working). Once again this places HIV positive employees in a vulnerable position as their inability to work effectively without medication, can lead to their dismissal.

Case law revealed that while courts do support persons affected by workplace discrimination based on their HIV status, there is still workplace discrimination,<sup>183</sup> even with all our legislation prohibiting this. Persons bringing these cases to the courts indicate that either a workplace policy is non-existent at some workplaces, or its properly acknowledged by management and staff.

### **7.3 The way forward**

It was this discovered hole in the South African society, that lead to the idea of employers providing for their employees HIV medication. Employers would get a tax deduction on all costs related to the provision of the medication or an appropriate medical aid. While this system will create financial and administrative obligations on both the employer and the government, its benefits far outweigh this obstacle. The reliable distribution of the medication, the ability to monitor its intake, the wellness and health of employees and the enhanced workplace relations are just a few of the positive features of this proposed system. The improved health of employees, through the correct medication enables employees to be less at risk of being dismissed based on their capacity to properly perform their work.

An employer's policy regarding HIV positive employees must be implemented in every workplace. This sort of policy should not simply function as lip service towards the Labour Relations Act Code of Good Practice<sup>184</sup> that currently only recommends such a policy. Instead every workplace must fully incorporate such a policy into their workplace and that there be real consequences for failing to do so.

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<sup>183</sup> *Allpass v Mooikloof Estates (Pty) Ltd t/a Mooikloof Equestrian Centre* (2011) JOL 26841 (LC).

<sup>184</sup> Labour Relations Act 99 of 1995.

While the logistics of such a proposal are enormous, it is recommended that legislation be changed so that HIV workplace policies are not mere recommendations, but law. Failing to implement and follow such law must come with consequences. The South African labour arena cannot continue in its current fashion, which seems to be ignoring the HIV situation. Instead radical steps need to be taken to avoid a situation that has gone too far to be reversed.

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