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By

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I, Fritz Nghiishililwa hereby certify that the research and writing of this dissertation was carried out under my supervision.

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By

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HIV/AIDS has infected and affected people from all walks of life in their everyday activities. It is also true that since it was discovered scientist have worked tirelessly to try and find a cure. Meanwhile society’s response to this pandemic, has been stigma, discrimination and in some societies exposure or branding, or rejection. Despite the rights to equality, dignity, and privacy, those infected by the virus, found it hard to fit into society after the status was revealed, especially at their work places.

Upon independence, one of the key issues that were addressed after a long and brutal period of the apartheid regime’s labour system was the rights pertaining to all workers. Hence article 95 of the Namibian Constitution\(^1\) advocated and emphasised on the importance of these rights, as well as the need for government to make provision for them. Although the constitution does not clearly state the legal standing with regards to the rights of employees who are infected of affected by the pandemic as it was, the law currently applicable in this respect is the Labour Act 11 of 2007 as well as the National Policy on HIV/AIDS.

\(^1\) ‘The State shall actively promote and maintain the welfare of the people by adopting, *inter alia*, policies aimed at the following:..... enactment of legislation to ensure that the health and strength of the workers...’.”
This write up is aimed at highlighting the legal standing with regards to the rights of Namibian employees as far as HIV/AIDS is concerned. The paper will also critically analyse the right to dignity; the right to privacy; as well as the right to non discrimination in relation to employees who are affected and infected by HIV/AIDS. The study will further look at the implementation of the policies and relevant legislative provisions, in an attempt to ascertain the rights guaranteed to employees who are infected with HIV/AIDS, assessing the usefulness of these provisions in their endeavour to entrench basic labour rights and protections as well as to eradicate unfair labour practise.
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DEDICATION

I dedicate this paper to all employees who’s rights have been violated because of their HIV/AIDS status.
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Chapter 1:

1.1 Introduction

After a long history of apartheid, and racially discriminatory laws, Namibia introduced and entrenched chapter 3 of the Namibian Constitution1; which contains fundamental human rights and freedoms of individuals. One is inclined to link the introduction of a human rights based approach to the rights of the employees to the history of the contract labour system, when the employees’ rights such as the right to non discrimination, the right to privacy, and the right to confidentiality were virtually non existent especially for non white employees2.

With the constitutional era, came the entrenched provisions of chapter 3, which emphasize on the individual human rights.

Article 10 (2)3 prohibits discrimination and advocates for freedom from discrimination, this position is supported by article 8, which deals with the right to respect for human dignity. In light of the provisions in the Labour Act, as well as the National Code on HIV/AIDS in employment, and also the Namibian HIV/AIDS charter of rights, the Namibian system may be deemed to be making progress in upholding the basic human rights to non discrimination, privacy, and confidentiality as far as employees rights are concerned.

Currently, section 5 (2) (f)4, expressly provides that a person must not, discriminate in any employment decision directly or indirectly or adopt any requirement or engage in any

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1 Act No. 1 of 1990.


3 Article 10, Namibian Constitution.

4 Act No. 11 of 2007.
practice which has the effect of discrimination against any individual on the grounds of HIV/AIDS status. Should there be discrimination alleged, the complainant should prove that there is discrimination.

In its preamble, the National Policy in HIV/AIDS, states that an effective response to HIV/AIDS requires respect for, and protection and fulfilment of all human, civil political, economic, social, and cultural rights where all, people are guaranteed freedom, from discrimination on the grounds including HIV/AIDS status, in accordance with the provisions the Constitution of Namibia and existing international human rights principles, norms and standards.\(^5\)

A workshop held in 2004, resolved that the stigmatization of and discrimination of individuals who are HIV positive and families affected by HIV/AIDS should be done away with.\(^6\)

Case law has proved that Namibian Courts have handed down a number of judgments upholding the rights of individuals under the Bill of Rights, including the right of persons with HIV/AIDS, not to be dismissed based on their HIV/AIDS status.\(^7\)

The Promotion of a non-discriminatory workplace environment will thus contribute positively to achieving the public health goal of reducing the rate of HIV/AIDS infection in


\(^{7}\) Nanditume v Minister of Defence 2000 NR 103.
Namibia. This in turn will have positive impact for employees as far as reducing the impact of HIV/AIDS in the work place is concerned.\(^8\)

Furthermore with regards to the National Code on HIV/AIDS in Employment; the Legal Assistance Centre’s, AIDS Law Unit has carried out a survey to test the awareness and the attitudes of the Namibian Public and private sectors, on the guidelines for the implementation of a National Code on HIV/AIDS in Employment. The aim for the survey was to assess the extent to which the national code has been successful in achieving a culture of non discrimination in the workplace which indicated that the employers are aware of he provisions of the guidelines on the implementation of the National code on HIV/AIDS in employment, for HIV prevention and AIDS management.

### 1.2 Problem Statement

The Nanditume case\(^9\) is still the only case known to have gone as far as the courts to enforce an employee’s right to non discrimination on the grounds of HIV/AIDS\(^{10}\). In practical terms this either means that there are no more violations of the employees’ rights, or that the employees are afraid to report the violations because of the stigma that comes with being HIV positive, or that not all employees are aware of their rights as far as being HIV positive is concerned.

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9 Nanditume v Minister of Defence 2000 NR 103.

10 Interviews, August 2010.
What are the legal challenges causing this position, why is it that there are no more cases other than the Nanditume case that are reported as far as HIV/AIDS positive employees are concerned?

Hypothesis

This write up is based on the following supposition:

1. Employees do not disclose their HIV status to their employers or potential out of fear of being fired or out of fear of being denied their employment benefits.

2. Employees who have suffered discrimination on the basis of their HIV status seldom report their complaints because of the stigma that comes with being HIV positive.

3. Employers do not justify their decision to terminate an employee’s contract on the ground of an employees’ HIV positive status, as a result, not a lot of cases are reported.

Objective of the Paper

With the coming into force of the Namibian Constitution, the Namibian Legal system has made tremendous progress, as far as the rights of persons with HIV/AIDS are concerned. This write up is aimed at:

- Providing analysis on the question as to why there has been no more cases reported on the issue of discrimination, violation of the right to privacy confidentiality, and the right to dignity of employees that tested HIV positive,

- Bringing to light the factors that contribute to the fact that only a few cases have been reported since independence
• Comparing the position in Namibia with other jurisdictions such as South Africa and Canada in order to determine the most practical way in creating a better atmosphere for people infected and affected by HIV/AIDS

• Suggesting ways to improve awareness of the employees’ rights as far as HIV/AIDS is concerned among all employees.

Research Methodology

The way in which the author aims to conduct research is by using the qualitative method of research, whereby the author will conduct desk based research which will consist of an in-depth analysis of the Labour Act No 11 of 2007, and the National Policy on HIV/AIDS, as well as interviews conducted either telephonically or personally, as well as articles and case law and other research papers.
Chapter 2: The Link between Employees Rights and HIV/AIDS

2.1 Definition of the Concepts

In the previous chapter the author gave an outline of what the paper is about, what it’s aimed at achieving, as well as how the how the research will be conducted. This chapter introduces the definitional elements in the topic, and it subsequently gives a brief nexus between the notion of employees’ rights and that of HIV/AIDS. However for purposes of the paper only the key elements in the topic shall be defined.

In terms of the labour Act\textsuperscript{11}, an employee is defined as; an individual, other than an independent contractor, who works for another person and who receives or is entitled to receive remuneration for that work. It is also an individual who in any manner assists in carrying on or conducting the business of an employer.

\textit{Rights} are legal claims that entitle one to have something or to behave in a certain manner\textsuperscript{12}.

\textit{AIDS} is a human disease, caused by the \textit{HIV} virus, which is characterised by the progressive destruction of the body’s immune system\textsuperscript{13}. This epidemic has been said to cause negative impacts in the workplace in that, it negatively affects the demand for supply and quality of goods produced and services rendered. It creates a mismatch between human resources and

\textsuperscript{11}See sec 1, Act No. 11of 2007.

\textsuperscript{12} Oxford Advanced Learner’s Dictionary (2005).

\textsuperscript{13} Section 5 (1) (a), Act No 11 of 2007.
labour requirements. In light of this write up this is the context within which the disease shall be looked at.

For purposes of the paper, employee’s rights are understood as the tools that the law arms employees with against the potential abuse of the employment relationship by employers that are inherent in an employment environment where an employees’ HIV/AIDS status is concerned. These are primarily the rights to non discrimination; privacy and confidentiality, and human dignity.

It may be correctly argued that employees are guaranteed the rights to non discrimination, privacy and respect for human dignity under the Namibian Constitution by virtue of them being individuals, and in their capacity as employees the Labour Act 11 of 2007, which became operational on the 1st of November 2008, also places emphasis on employees right to non discrimination and equality as already stated in article 10, it also expressly prohibits discrimination of an employee or a job seeker on the grounds of HIV/AIDS.

Arguably employees rights have been incorporated in the Namibian legal system, to try and regulate employment relations, and prevent slavery, and other forms of inhuman treatment, inherent in employment settings, and are prone to be committed against employees, especially vulnerable ones.

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15 See section 5, of Act 11 of 2007.
16 Namibian Constitution.
2.2 Theories on the nexus between HIV/AIDS and employees rights

People living with HIV or AIDS face discrimination on a daily basis in a number of different ways. In many cases they are denied access to things like housing loans, insurance policies and medical benefits because of their HIV status. People with HIV or AIDS are also discriminated against at work – by their employers and even by their co-workers. This can take the form of being fired when a person’s HIV status is found out. In some cases the people living with HIV are not given promotion at work, or they are denied the same benefits that other employees, who are not HIV positive, have. Sometimes, the discrimination starts before the person is employed, as in the case where an employer refuses to accept applications from or to employ people living with HIV.\(^{18}\)

All persons with HIV have the legal right to privacy. Consequently, no employee is legally required to disclose his/her HIV status to his or her employer or to other employees. However, if the employee chooses to disclose his/her HIV status to the employer or other employees, this information may not be disclosed to others without the employee's express written consent. It is crucial to note that information is a prerequisite for consent\(^{19}\).

Although the Namibian Constitution does not expressly provide for employees rights as far as HIV/AIDS is concerned, it guarantees among other rights the following rights to all


individuals including employees, The right to equality and non discrimination\textsuperscript{22}; The right to privacy\textsuperscript{23}; The right to administrative justice\textsuperscript{24}; The right to respect of human dignity\textsuperscript{25}.

In practice people living with HIV/AIDS in Namibia suffer widespread stigma, discrimination and other rights abuses.\textsuperscript{26}

Article 95\textsuperscript{27}, states under the umbrella of state policy, that the state in promoting and maintaining the welfare of the people, shall adopt policies aimed at, The enactment of legislation to ensure that the health and strength of the workers, and to promote sound labour relations and fair employment practices;

People with HIV/AIDS often lose jobs when co-workers discover their HIV status.\textsuperscript{28}

\section*{2.3 Legal Standing}

\subsection*{2.3.1 The Labour Act No 11 of 2007}

The Labour Act no 11 of 2007 as enacted in pursuance of article 95\textsuperscript{29}, and whose objective includes\textsuperscript{30}, ensuring health safety, and welfare of employees, and protecting employees from

\textsuperscript{22}See article 10, Namibian Constitution.

\textsuperscript{23} Article 13, Namibian Constitution.

\textsuperscript{24}Article 18, Namibian Constitution.

\textsuperscript{25}Article 8, Namibian Constitution.

\textsuperscript{26} Interview, with HIV/AIDS Project Coordinator. 23 August 2010.

\textsuperscript{27} (Ibid.).

\textsuperscript{28} Rao D. Et al. (2009) “Details for Manuscript Number SSM-D-07-01816R2 “Stigma in the workplace: Employer attitudes about people with HIV in Beijing, Hong Kong, and Chicago”.

\textsuperscript{29} The Namibian Constitution, Act 1 of 1990.
unfair labour practices, provides Employees with the following rights as far as HIV/AIDS is concerned.

The **Right to non discrimination**, in that according to the act, persons must not discriminate in any decision directly or indirectly, or adopt or take part in any practise that has the effect of discriminating any body on the grounds of AIDS or HIV status\(^{32}\). This provision strengthens an employee’s right to non discrimination as far as their HIV/AIDS status is concerned.

The Act further states that, were an employee alleges discrimination on the ground of HIV/AIDS, such allegation must be proved by the one making such allegations, and once it has been argued that there has been discrimination, the onus lies with the respondent to prove that the alleged discrimination did not take place as per allegations, and the facts presented do not constitute discrimination as laid out in section.

Instances where the decision or conduct taken will not be deemed to constitute discrimination\(^{33}\) are:

- Where a decision was taken in the spirit of affirmative action to ensure that women, racially disadvantaged or people with disabilities enjoy employment opportunities at all levels of employment that are at leas equal to those enjoyed by other employees of the same employer, and are fairly represented in the work force of an employer\(^{34}\).

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\(^{30}\) The Preamble, Act No. 11 of 2007.

\(^{32}\) See sec 5(2).

\(^{33}\) (Ibid.: Section 5 (4)).

\(^{34}\) (Ibid.: Section 5 (4) (a)).
- Where an employer selects a person for purposes of employment or occupation, based on reasonable preconditions, including criteria based on the person’s ability, capacity productivity, and conduct in respect of the nature of the operational requirements and needs of the particular work or occupation in the line of business concerned\textsuperscript{35}.

- To differentiate, exclude, or prefer any person based on requirement of the job, which is there based on the nature of the business\textsuperscript{36}.

- Where the employer makes a decision that has been approved by the Employment Equity Commission in terms of the Affirmative Action Employment Act, no 28 of 1998\textsuperscript{37}.

- Where a decision has been taken to reassign a pregnant woman from her normal task, based on the condition of her pregnancy, provided that her benefits remain the same, and her salary will not be reduced\textsuperscript{38}.

- Where a decision is taken against a person with a disability which prevents him or her to carry out the functions required of him or her by the employment, or that such person is prohibited by law from carrying out the functions connected to the employment or occupation\textsuperscript{39}.

\textsuperscript{35} (Ibid.: Section 5 (4) (b)).
\textsuperscript{36} (Ibid.: Section 5 (4) (c)).
\textsuperscript{37} (Ibid.: Section 5 (4) (d)).
\textsuperscript{38} (Ibid.: Section 5(4) (e)) .
\textsuperscript{39} (Ibid.: Section 5 (4)(f)).
• It is further not discrimination, and according to the Act 40 it is a full defence where there are allegations of discrimination where, the decision taken was as a result of a choice an employer between individuals who share the alleged attribute alleged to be a ground of discrimination in section 5 subsection 241.

The right to Freedom of Association, an employer may not prejudice an employee or an individual seeking employment due to past, present or anticipated exercise of any rights vested in accordance with the Act, any other law or contract of employment, or collective agreement 42.

One may then interpret this to mean that an employer is prohibited by law from making a biased decision, based on the fact that such employee enforced his or her right to non discrimination for example, as guaranteed by the Act, as far as an employee or an individual seeking employment is concerned. Thus an employer is precluded from either not hiring or promoting an individual because such person either exercised or is exercising rights that are given to him or her by the Act, any other law, the employment contract, or a collective agreement. Furthermore an employer is not allowed to prejudice a person because the employer anticipates that such individual will exercise his or her rights in terms of the Act, any other law, employment contract, or collective agreement.

The right to privacy and confidentiality a person, or employer is not allowed by law to make a biased decision in respect of either an individual seeking employment, or an employee based on past, present, or anticipated disclosure of information that such individual

40 Act No. 11 of 2007.

41 (Ibid.: Section 5 (6)(b)).

42 (Ibid.: Section 6).
is required to provide in terms of the Act\textsuperscript{43}. In other words, an employer is prohibited from making a biased decision in respect of an individual seeking employment or an employee upon acquiring information that is legally required of them in terms of the Act or any other law.

The \textbf{Right to be provided with Reasons} for termination of employment contract, an employee is entitled to be provided with reasons in writing by the employer where such employee’s employment contract has been terminated by a notice.\textsuperscript{44} Where the person to be given reasons is an illiterate employee, reasons must be provided orally\textsuperscript{45}.

The \textbf{Right to Fair Dismissal}, the Act precludes an employer from unfairly dismissing an employee\textsuperscript{46}; it amounts to unfair dismissal when an employer dismisses an employee; whether or not notice was given, without a valid and fair reason.

\subsection*{2.3.2 The National Policy on HIV/AIDS}

The National Policy on HIV/AIDS which is enacted by Parliament, and aimed at providing an overall reference framework for all HIV/AIDS related policies and to guide the national HIV/AIDS responses in all sectors in society, provides that It is its intention to encourage institutions to fulfil their obligations for responding to HIV/AIDS and to serve as a guiding framework for coherent and sustained approach enhancing political commitment and participation of civil leadership at all levels.\textsuperscript{47}

\begin{itemize}
\item \textsuperscript{43} (Ibid.: Section 6 (b)).
\item \textsuperscript{44} (Ibid.: Section 30 (3)).
\item \textsuperscript{45} (Ibid.: Section 30 (4)).
\item \textsuperscript{46} (Ibid.: Section 33 (1)).
\item \textsuperscript{47} The National Policy on HIV/AIDS, (2007), p 1.
\end{itemize}
Some of the aims that the policy thus sets sight on are facilitating the reduction in stigma and discrimination, against people infected and affected by HIV/AIDS, as well as ensuring that people infected and affected by HIV/AIDS enjoy equal rights in a culture of acceptance and openness. Moreover, the Policy aims to ensure that equal opportunities are provided to all in mitigating the socio-economic impacts of HIV/AIDS.⁴⁸

One may concede that the National Policy is a tool created by Parliament in the national combat against the AIDS pandemic and at the same time to ensure that human rights of persons infected and affected by HIV/AIDS are protected and upheld.

With regards to the protection and empowerment of employees living with HIV/AIDS, it is provided in the policy statement that, sectoral and workplace policies should be implemented to effectively address the issue of discrimination on the grounds of HIV/AIDS, and steps should be taken to effectively eliminate stigma and discrimination in all institutions and the implementation of sectoral mandates.

This means that an employer is in terms of the Policy obliged to establish a workplace Policy that ensures that no employee is discriminated on the grounds of their HIV/AIDS status, and it allows the employee in question to participate or perform their tasks in terms of the employment contract, as well as to take part in the establishment of the workplace policy.⁴⁹

The policy further provides that, a person should not be denied employment based on his or her HIV/AIDS status. People living with HIV/AIDS whose rights have been infringed upon can access independent, speedy, affordable, and effective legal procedures or administrative

⁴⁸ (Ibid.).

⁴⁹ (Ibid.).
procedure to seek redress. People who disclose their HIV/AIDS status should be protected\textsuperscript{50}. In other words, people who have come out publicly to disclose their HIV/AIDS status whether it’s at family level community or national level, should be subjected to practices that violate their rights such as the right to privacy, human dignity and the like just because they disclosed their status.

One can therefore infer from the above contention that in a given situation where a person after disclosing his or her HIV/AIDS status and later applies for employment, the National policy makes provision that their rights in terms of confidentiality, privacy should be protected and upheld. In other words the fact that such individual disclosed his status does not waive his rights.

In the work place unfair discrimination against people living with HIV/AIDS has been enabled by practices such as pre-employment testing of HIV, dismissals on the ground of testing HIV positive and denial of employment benefits\textsuperscript{51}.

One of the most effective ways; as determined by the policy, of reducing and managing the effect of HIV/AIDS is to effectively implement the HIV/AIDS Policy, a prevention treatment care, support and impact mitigation programme including TB screening, Directly Observed Therapy for TB and TB education.

Furthermore, an employee shall not be obligated or compelled to disclose his or her HIV status to their employer or other employees. However where the employee chooses to disclose his or her HIV status to his or her employer or to another employee, such

\textsuperscript{50} (Ibid.).

\textsuperscript{51} (Ibid.).
information shall not be disclosed to others without the employee’s consent express written consent52.

Employees are in terms of the policy permitted to continue carrying out their tasks in terms of their employment agreement at their place of employment, for as long as they are medically fit to do so. Should they be medically unfit to carryout their normal tasks, verifiable alternatives should be created to offer them employment or other reasonable arrangements without prejudice to their benefits. Where the employee becomes too ill to perform any work, an employer may terminate his or her employment on the ground of incapacity in accordance with the procedures laid down in the law53, following medical boarding procedures.

An employee living with HIV shall not be unfairly discriminated against or prejudiced any manner within the employment relationship, or within any employment policies or practices in terms of appointments, and the appointment process, including job placement; job classification or grading; remuneration, employment benefits and terms and conditions of employment; employee assistance programmes; the workplace and facilities; occupational health and safety; training and development; performance evaluation systems; promotion, transfer or demotion; disciplinary measures short of dismissal; dismissal and termination of employment including retrenchment and early retirement54.

The HIV status of an employee shall affect such employee’s eligibility for any occupational insurance or other benefit schemes provided for employees by an employer. Where in terms of any law, the eligibility of a person for any occupational or other benefit scheme is

52 (Ibid.).

53 See Sec 2 (c) and (f), and section 30 (1) Act No. 11 of 2007.

54 (Ibid.).
conditional to an HIV test, the conditions attached to HIV/AIDS shall be the same as those applicable in respect of any other comparable life threatening illnesses\(^{55}\).

An employee living with HIV/AIDS shall be afforded the same conditions as far as compassionate leave and sick leave are concerned, the same as those applicable to any employee in terms of the law\(^{56}\).

In terms of the policy an employee has the right to confidentiality, in respect of which the government must encourage disclosure of the status\(^{57}\).

### 2.3.3 The Namibian HIV/AIDS Charter of Rights

The Charter recognises that persons living with HIV/AIDS have the right to confidentiality and privacy regarding their health and HIV status. This right endures after death. Information about HIV status may not be disclosed to a third party without the consent of the person with HIV/AIDS, unless legally required.

The sharing of information regarding HIV status by the person living with HIV with others remains a matter of individual choice. However, this practice should be encouraged through appropriate counselling, education and the creation of a supportive environment and appropriate services to those affected by this disclosure. It should be explained to patients that in order to optimise treatment and care it may be necessary to disclose personal health

\(^{55}\) (Ibid.).

\(^{56}\) (Ibid.).

\(^{57}\) (Ibid.).
information to other health-care workers, but that this will only be done with the prior consent of the patient.\textsuperscript{58}

\subsection*{2.4 Implementation of workplace policies}

\textbf{De Beers Group}

The De Beers group workplace policy as far as employees who are HIV/AIDS positive are concerned is such that, employees are under no obligation to disclose their HIV status, and no pre employment testing is carried. For purposes of promotions or bursaries, no screening process is done, and when an employee’s status has been disclosed, such information is treated with the strictest confidentiality.\textsuperscript{59}

With regards to the rights of employees the charter recognises that the applicable legislation is the Labour Act and adds on to state that ‘people living with HIV/AIDS have the right to work, and should not be excluded from employment solely on the basis of their HIV status. Both employers and employees have a mutual responsibility to prevent discrimination on the basis of HIV status in the workplace.

There should be no compulsory testing for HIV in the workplace. Voluntary testing for HIV on the request of the employee should be done by a suitably qualified person in a health facility with the informed consent of the employee in accordance with normal medical ethical rules and with pre- and post-test counselling.

\textsuperscript{58} The Namibian HIV/AIDS Charter of Rights. P 2
Persons living with HIV/AIDS have the legal right to confidentiality regarding their HIV status in any aspect of their employment. An employee is under no obligation to inform his or her employer of his or her HIV status. Employees living with HIV/AIDS should continue to work under normal conditions in their current employment for as long as they are medically fit to do so. When on medical grounds they are unable to continue with normal employment, the normal rules regarding incapacity should apply.

Employers, in consultation with employees, should develop and implement appropriate workplace policies on HIV/AIDS, and provide a safe and healthy working environment for employees, including the provision of the necessary equipment and information, as well as the implementation of universal precautions to prevent transmission of HIV in the workplace. Where an employee accidentally contracts HIV in the course and scope of his or her employment, he or she shall be entitled to employee’s compensation.

**Sanlam Namibia**

Like De Beers Group, Sanlam Namibia also has a workplace policy on HIV/AIDS management in the workplace. According to their policy An HIV positive employee has the same rights as all other employees and therefore will be Protected against unfair discrimination. Such employee will be treated with dignity, compassion and respect. They will be afforded the same treatment as employees with other disabling conditions, diseases or terminal illnesses.

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An employee is further entitled to employee benefits as determined by the rules of such schemes, and is allowed to continue his/her normal work as long as he/she is able to maintain the required performance standards of the job.\(^6\)

He/she is expected to meet the same performance requirements that apply to other employees, when necessary, provided with reasonable accommodation to enable him/her to meet established performance standards.

An employee may be transferred to another department on condition that his/her doctor requests this in writing for medical reasons. Employees are encouraged to inform the medical aid fund of his/her condition and to become part of its wellness programme.

Trained counsellors will be made available to provide Aids counselling to Sanlam Namibia employees who are infected with or affected by HIV or Aids. Sanlam Namibia respects an individual's right to confidentiality and will regard any breach of confidentiality in a very serious light. Employees refusing to work with HIV-positive colleagues could face disciplinary action in line with Sanlam Namibia's disciplinary process. Sanlam Namibia's grievance procedure will apply to HIV- or Aids-related grievances.

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\(^6\) (Ibid.).
Chapter 3: The rights to Dignity, Privacy and Non Discrimination

South African Position

In its Preamble, the South African Constitution states, that it was created with the purpose (among others) to ‘[I]mprove the quality of life of all citizens and free the potential of each person.62 The Constitution63 further guarantees the right to Health and Safety in article 27 (1). In the South African Jurisdiction the equivalent legislation to the Namibian Labour Act 11 of 2007, which is applied as far as employment relationships are concerned is the Labour Relations Act 66 of 1995, the Basic Conditions of Employment Act 75 of 1997, the Employment Equity Act 199864, and the Constitution65.

In terms of section 213 of the Labour Relations Act66, an employee has been defined as ‘any person, excluding an independent contractor who works for another person or the state who receives or is entitled to receive any remuneration; and any other person who in any matter assists in carrying out or conducting the business of the employer’. Section 200A of the same Act provides that there is a presumption that unless the contrary is proven and regardless of the form of the contract; a person who works for another or renders services to any other person, is presumed to be an employee this is however determined by looking at the manner in which the person is subject the control and guidance of another person, as well as looking

62 The preamble, Act No. 108 of 1996.
63 Act No. 108 of 1996.
64 See also, HIV/AIDS Technical Assistance Guidelines. Published for the Chief Directorate of Labour Relations by the Labour Department: Chief Directorate of Labour Communication. ISBN No: 0-621-336566-4
65 (Ibid.).
at whether or not the hours of work of such person are subject to the control of another
person; whether the person is economically dependant on the person for whom he or she
renders services, and whether or not the person only renders services to one person.67

The Right to Equality and Non Discrimination, section 23 of the South African Constitution
provides that:

(I) “everyone has the right to fair labour practices

(ii) Everyone has the right to:

(a) To form and join a trade union

(b) To participate in the activities and programmes of a trade union, and

(c) To strike

The Right to Respect for Human Dignity; according to Barrett, In the case of Makwanyane,68
the underlying principle is whether society should persist with the notion of absolute equal
and inherent human dignity as a ground of governing human interactions.69

According to Liebenberg70, the inclusion of socio-economic rights as justifiable rights in the
South African Bill of Rights affirms the critical importance of material conditions to human
survival and development. The author further maintains that the decision in the Treatment


68 S v Makwanyane 1995 (3) SA 391 (CC).

vol 21: 525.

Action Campaign case\textsuperscript{71} emphasises on the notion of human dignity at work. What happened in this case was that, the government was being asked to provide a drug (Nevirapine) that prevented transmission of the HIV virus from the mother to the child. While there were additional costs, such as counselling and testing facilities, the court held that the government is well equipped to provide such services in hospital and clinics in the public health sector. She then concludes to say that, ‘for society to deny poor women and their newborns access to ‘a simple cheap, and potentially lifesaving medication, would clearly indicate a lack of respect for their human dignity as human beings entitled to be treated as worthy of respect and concern\textsuperscript{72}.

The Right to Privacy has been recognized as a separate right of personality at common law and by the courts\textsuperscript{73}, and it has been entrenched in sec 14 of the Constitution of the Republic of South Africa.\textsuperscript{74} According to Neethling\textsuperscript{75} courts have in the past been faced with the issue of protecting a person’s right to privacy with regards to his or her HIV/AIDS status, and have concluded that, an unauthorized blood test for AIDS (on a prisoner without his informed consent) constitutes a violation of the right to privacy.

\textsuperscript{71} Minister of Health v Treatment Action Campaign (2) SA 2002 (5) SA 721 (CC), in Liebenberg S.

\textsuperscript{73} National Media ltd v Jooste 1996 (3) SA 262 at 271-2, Jensen Van Vuuren v Kruger 1993 (4) SA 842 at 849.

\textsuperscript{74} Act no 108 of 1996.

With regards to the question whether a person’s HIV/AIDS status form part of his or her privacy, was said that it should be regarded as a private fact\textsuperscript{76}. According to Judge Madala\textsuperscript{77} private facts are those matters the disclosure of which will cause mental distress and injury to anyone possessed of ordinary feelings and intelligence in the same circumstances and in respect of which there is a will to keep them private.

Therefore to an employee, should his or her HIV/AIDS status be disclosed without his or her consent, it amounts to a clear violation of his or her right to privacy. South Africa has thus to a certain extent through case law, and legislation clearly expressed what amounts to a violation of an individual’s right to privacy, because a persons’ HIV/AIDS status due to its intimate and confidential nature, is a rule determined by a person to be private and remain so until he or she decides when and under what conditions it may be made public.\textsuperscript{78}

**The Issue of Routine Testing:**

Routine testing is the practice whereby a medical practitioner asks all of his or her patients whether or not they would like to be tested for HIV/AIDS, regardless of whether or not there is something unique to a given patient that suggests the presence of HIV/AIDS\textsuperscript{79}. One of the side effects that this has been thought to have is stigma and discrimination\textsuperscript{80}. According to Metz, although the state would not be violating the rights of people with HIV/AIDS through

\textsuperscript{76} (Ibid.).

\textsuperscript{77} (Ibid.).

\textsuperscript{78} (Ibid.: Section 6).


\textsuperscript{80} (Ibid.: Section 33).
routine testing, doing so would have the indirect effect of employers as well as other members of society violating their rights and ostracizing them\textsuperscript{81}.

3.1 Case Studies

THE LOCUS CLASSICUS CASE OF NANDITUME V MINISTER OF DEFENCE\textsuperscript{82}:

The facts of this case were these, the applicant applied to court seeking that to be enlisted in the Namibian Defence Force, in other words he applied for employment in the Namibian Defence Force, but his application was denied after a medical report later revealed that he is HIV positive.

The then applied to the Labour Court, and prayed that the court as follows:

(a) That the respondent\textsuperscript{83} discontinue discriminating him on grounds of him being HIV positive with regards to his application to be enlisted in the Namibian Defence Force;

(b) Secondly, that the court, direct the respondent to process his application without him taking the applicant’s HIV status in consideration;

(c) Further that the court grant any relief it deems fit in favour of the applicant.

The issue to decided in this case was, whether or not the exclusion of a prospective applicant for enlistment in the Namibian Defence Force on the grounds of HIV amounts to unfair discrimination as constituted in section 107 of the Labour Act 6 of 1992.

The court then held that the exclusion of the applicant from the Defence Force on the ground that he had tested HIV positive constituted unfair discrimination in contravention of section 107 of the Labour Act no 6 of 1992, especially since the applicant was still in good health.


\textsuperscript{82} Nanditume v Minister of Defence,2000 NR 103.

\textsuperscript{83} The Minister.
It was further stated in this case that, the Labour Act 6 of 1992 and the Guidelines for the implementation of a National Code on HIV/AIDS in employment applied in respect of the Namibian Defence Force as well as the Police.

In terms of clause 6(2)(1) of the Guidelines, there should be neither direct nor indirect pre-employment HIV testing. Employees should be given current tests to establish fitness for work, excluding HIV tests.

Furthermore, clause 6 (5) of the Guidelines provides that, there should be no compulsory testing for training, and that HIV testing for training should be regulated by the principle of non-discrimination between individuals with infection and those without, as well as between HIV/AIDS and other comparable medical/health conditions. Clause 6 (6) (3) provides that employee’s who is HIV positive should work under normal conditions as long as they are fit to do so, and if they are unable to work, they should be offered alternative employment ‘without prejudice to their benefits’.

In this case the applicant, had made submission that he is in good health, and is therefore able to carry out tasks that may be allocated to him, this was substantiated by a medical report from his doctor.

The court subsequently ordered that the respondent enlist the applicant in the Namibian Defence Force should he re-apply for enlistment, on condition that his CD4 count is below 200 and his viral load is not above 100 000. The court further held that no person should be excluded from enlistment into the Namibian Defence Force solely on the basis of their HIV status, unless their CD4 count is below 200, and his viral load is above 100 000.

Oshakati Lodge Case:

In February 2000, the owner of Oshakati Country Lodge in northern Namibia hired a doctor to conduct HIV tests on all the lodge's employees. Those who asked about the nature of the

84 These Guidelines are later on referred, and they lead to the adoption of the National Code on HIV/AIDS.
test were told it was for general hygiene\textsuperscript{85}. The test results were put up on the display board in the kitchen. Those who tested positive were not given counselling, and were listed as ‘reactive’.

The LAC is seeking monetary compensation for the emotional trauma experienced by the 22 employees, on the ground that the lodge owner and doctor violated the workers' rights to privacy and dignity, as contained in the Namibian Constitution, due to the fact that the workers never consented\textsuperscript{86}.

Reverend Lapan !oaob\textsuperscript{87}

After telling the Church about his HIV status, he became unemployed for about five years, and was provided only with accommodation and money. He requested that he be provided with employment however; according to him the church said that they cannot give him a job.

According to Chicalu\textsuperscript{88} this is a clear cut case of stigmatization failure to reasonably accommodate the employee. In that where the employer sees that the employee is unable to carryout his or her normal duties, the employer must provide the employee with alternative employment.


\textsuperscript{86} (Ibid.).

\textsuperscript{87} AIDS Law Unit, HIV/AIDS Rights Violation Education Video, Windhoek: Legal Assistance Centre.

\textsuperscript{88} Linda Ndumba Chicalu, Project Lawyer, at the AIDS Law Unit, Legal Assistance centre, Windhoek.
Hoffman v South African Airways\textsuperscript{89}

Mr Hoffman applied for a job as a cabin attendant with South African Airways (SAA) and was asked by SAA to go for an HIV test. The test showed that he was HIV positive. SAA refused to give Mr Hoffman the job because, they said, part of his job involved travelling to different countries and he would need to have a yellow fever vaccination. It is not advisable for someone with HIV to have these vaccinations. SAA said that this was an inherent requirement of the job (essential for the job) in the airline and therefore they couldn't employ him.

The case was referred to the Constitutional Court. The court was asked to decide if SAA had gone against Hoffman's rights to equality, dignity and fair labour practices.

The court decided:

- that SAA had discriminated against Hoffman
- the discrimination was unfair and infringed his dignity
- Being HIV negative was not an inherent requirement of the job of being a cabin attendant; they should have taken greater steps to investigate how Hoffman's immune system could have dealt with travelling and the possibility of getting a strange disease.

In the case of 'A' v South African Airways (SAA)\textsuperscript{90}, in the Johannesburg Labour Court, 'A' had applied for a job with SAA as a cabin attendant. He was asked to sign a consent form for an HIV test, but the test was not explained to him. 'A' was thus tested without informed consent and without any pre- or post-test counselling. SAA admitted that they had not

\textsuperscript{89} Hoffmann v South African Airways 2000 (2) SA 628; 2001 (10) BHRC 571; (2000) 3 CHRLD 146

\textsuperscript{90} \url{http://www.paralegaladvice.org.za/docs/chap09/03.html}. (Accessed on the 20th October 2010).
followed the rules regarding testing and informed consent. The court ordered them to pay compensation.\textsuperscript{91}

**Cases on Breach of Confidentiality and Privacy**

In the case well known Mcgeary case\textsuperscript{92}, AJA Harms upheld an appeal by the plaintiff’s executers, and overturned Judge Levy’s judgment in the Witwatersrand court, in which he dismissed a claim for damages on the ground of breach of the plaintiff’s right to privacy. What transpired in this case was that, the plaintiff applied for an insurance policy which required that he give a medical report showing his HIV status. The plaintiff then went to the first defendant, his doctor at the time, and he took an HIV test. The first defendant then sent the blood to the second defendant who owned a laboratory, for the results on the plaintiffs’ blood. The results came out positive and the second defendant informed the first defendant accordingly. The first defendant then called in the plaintiff and informed him of the results. The plaintiff was devastated and asked the first defendant not to disclose this information to anyone. The following day, while playing golf with the plaintiff’s former dentist, the first defendant disclosed the information he was asked not to, and soon thereafter the plaintiff, who moves in the same circles as the dentist, learned of this, and he telephoned the first defendant and asked him of this. The first defendant denied it and stated that it was the second defendant, the laboratory owner who tested the plaintiff’s blood that disclosed it. The plaintiff sued for damages in the Witwatersrand provincial court on the ground of breach of the right to privacy, but this was ruled against. On appeal the court upheld the appeal and stated that damages in the amount R5 000, 00 should be awarded to the plaintiff’s estate as he had deceased at the time of the appeal. The judge stated that:

\textsuperscript{91}(Ibid.).
\textsuperscript{92} Jansen Van Vuuren and Another NNO v Kruger 1993 (4) SA 842 (A).
“...the right of privacy is a valuable right...Aggravating factors include the fact that a professional relationship was abused notwithstanding an express undertaking to the contrary.”

In the case of *Harksen* the court established various factors that must taken into account when determining whether there is the element of unfairness. These factors are (i) the position of the complainants in society; (ii) the nature of the provision of power and the purpose sought to be achieved by it; and (iii) the extent to which the discrimination has affected the rights of the complainants and whether it has led to an impairment of their fundamental dignity.\(^9^3\)

In the case of *Kadiaka v Amalgamated Beverage Industries*\(^9^4\) the court held that it amounts to unfair discrimination if the conduct undertaken is purposeless and is of less importance to prejudice the rights of a job seeker, or is it is morally offensive.

The Canadian case of Thwaites v. Canada (Canadian Armed Forces[CAF]). Mr. Thwaites, a master seafarer in the CAF, filed a complaint against the CAF for terminating his employment because he was HIV-positive. The Human Rights Tribunal found that Thwaites had been discriminated against because of his disability, and that the CAF had failed in its legal obligation under the Canadian Human Rights Act to accommodate him according to his capabilities so that he can remain in employment for as long as possible. The court also held

93 Harksen v Lane NO & Others 1998 (1) SA 300 (CC).

94 (1999) 20 ILJ 373 (LC) at 384A-D.
that the increased risk posed by retaining a disabled person in the Forces had to be more than minimal risk before the Forces could justify dismissal outright. The decision was upheld by the Canadian Federal Court. However, shortly after the Thwaikes decision the Federal Court of Appeal took a step backward when it decided in two cases that the military could release or refuse to hire a person if retaining that person poses any greater risk than retaining an able-bodied member, regardless of how small that increase in risk might be.\footnote{Franklyn L. (2007). “A rights-based approach to addressing HIV/AIDS in the workplace: the role and contribution of the ILO and its constituents”. Law, Social Justice and Global Development Journal.}

In a Venezuelan case in 2003, a professional footballer was fired because he tested HIV positive. His employer carried out the test without his consent, and the result was made known to other players. The Labour Tribunal ordered his reinstatement with full employment benefits. In so doing, the tribunal also established an important precedent by ruling that the agreement signed by the footballer under pressure from his employer waiving his right was void.\footnote{(Ibid.).}

3.2 Effect of HIV/AIDS in the Work Place

**Stigma and discrimination:**

The major problem in employment relationships that causes the employees’ right to be violated is the stigma and discrimination that comes with knowledge of an employee’s status. This is counter productive for business because discriminatory HIV practices hamper
company operations and compromise employee health\textsuperscript{97}, in that such employee would be working under stress, and circumstances might even force him or her to quit his or her job because of the discrimination he or she faces at work, and as a result he or she would be unable to make a living and take care or himself. There are other effects that stigma has with regards to the work in general.

Stigma reduces the labour supply. Otherwise qualified and able workers fall out of the labour force as a result of discriminatory hiring and promotion practices. In a survey conducted in Trinidad and Tobago it was found that 50% of HIV positive persons do not apply for jobs because they fear discrimination and feel they will not be hired based on their status. (Pre-employment testing is permissible by law and commonly practiced in many Caribbean nations.) \textsuperscript{98}

This is a clear indication that should practices such as pre testing before employment be introduced in the Namibian system it would most likely have the same effect. People would fear applying for jobs out of fear of being discriminated against, due to the stigma that is attached to the state of being HIV positive status.

Stigma lowers workforce morale and diminishes the work environment. Even with a company policy in place the attitudes of fellow workers can also have a negative impact. Eskom, a South African utilities company with a long-standing HIV policy and workplace program, found that employees were more concerned about stigmatization by colleagues than about discrimination from their employers: more than 90% of employees agreed that


\textsuperscript{98} (Ibid.).
colleagues and family would ridicule and gossip, whereas only 23% feared they would lose their job if they tested positive\textsuperscript{99}.

In other words, regardless of workplace policies, if other workers become aware of the status of their co worker, their attitudes towards their colleagues are most likely to change and negatively affect him or her in that, their judgment would be flawed, and they would start acting differently towards him or her.

Stigma threatens employee health and curtails the potential benefits of a company’s HIV/AIDS workplace program. Some companies report that even when they have established HIV care and treatment services, a key challenge is encouraging employees who are infected with HIV to make use of these services. Fear of stigma discourages employees from learning their status and treating their condition because of concerns of confidentiality or privacy of service delivery\textsuperscript{100}.

**Declining productivity**\textsuperscript{101}

Declining levels of productivity due to increased absenteeism and organizational disruption lead to declining profits, unless production costs are declining at an even faster rate. Declining and fluctuating productivity makes it difficult for a company to meet supply demands from consumers, thus influencing its overall growth and development.

Absenteeism stemming from HIV/AIDS-related illness and care for sick family members leads to disruption of the production cycle, the under-utilization of equipment and use of

\textsuperscript{99} (Ibid.).

\textsuperscript{100} (Ibid.).

temporary staff, which can directly affect the quality of products and services.\textsuperscript{102} One sugar production and processing firm in Kenya noted increased absenteeism from 1995 to 1997, with 8000 days of work lost due to HIV-related illness.\textsuperscript{103}

Such illness and death lead to increased disorganization within the company workforce as a result of rising staff turnover, loss of skills, loss of tacit knowledge (gained from work experience and the company environment), declining morale and replacement costs. These costs are not immediately obvious and are difficult to quantify accurately. While almost everyone has heard of HIV/AIDS, misconceptions about HIV infection persist, even in developed countries.\textsuperscript{104}

If employees lack accurate information about HIV and AIDS, the smooth conduct of business can be affected by fears of becoming infected, which may lead to refusal to work with an employee who is known, or is rumoured, to have HIV or AIDS, as well as false beliefs and stigmatization, which can lead to the employee being mistreated; and discrimination in the making of personnel decisions—for example, the unjustified discharge of an employee who has HIV.\textsuperscript{105}

\textsuperscript{102} http://www.fao.org/mdg/22257-02ac8e4259567db8be5fdo13cd4f481.pdf (Accessed on the 14th November 2010).


With high levels of staff turnover, transmission of skills and knowledge becomes difficult. Loss of colleagues severely affects staff morale. Discrimination against people living with AIDS and disruption of work activities also take their toll on morale. These less visible organizational factors, built up over long periods of time, are critical for a more efficient, effective and ultimately productive workforce. In smaller companies, the effects of these losses are amplified.\(^\text{106}\)

**Increased costs**

Rising production costs for business not only affect current profit margins, but also future profits by reducing the investment capacity for increasing productivity, expansion, research and development, and workforce training and support.\(^\text{107}\)

HIV/AIDS increases costs in various ways:

**Recruitment and training**

Increased staff turnover and loss of skilled workers raise recruitment and training costs. Companies may have to employ extra labour to cope with staff fluctuations and losses. Research carried out in sub-Saharan Africa shows that, in some countries, infection rates are highest among urban dwelling, high-income, skilled men and their partners. In an economy with low education levels, enterprises dependent on highly educated staff may face higher replacement costs compared to enterprises with less skilled employees. In addition, scarcity


of skilled labour not only increases training costs but also results in demand for higher wages.\textsuperscript{108}

**Insurance cover and pensions**

Company life insurance premiums and pension fund commitments increase as a result of early retirement or death. This is particularly problematic in more advanced economies where such benefits are more comprehensive. For example, in Zimbabwe, over a two-year period, life insurance premiums quadrupled as a result of HIV/AIDS.

**Health management**

In cases where companies provide health care, the costs of this service increase significantly with rising HIV/AIDS rates. A study of a commercial agro-estate in Kenya showed that medical expenditure as a result of AIDS rose to over 400\% above that of projected expenditure without AIDS. These increased costs ultimately affect the level of benefits that a business is able to provide its workforce. Of course, the provision of health care is not just a cost but also an investment, because it can help prevent or limit sickness/absenteeism and workforce health risks. This is particularly relevant in countries where public health-care provision is limited and private health care expensive.\textsuperscript{109}

**Funeral costs**

Considerable costs are incurred by businesses that meet the funeral costs of employees. This practice is particularly prevalent in many parts of sub-Saharan Africa. Increased funeral costs are largely as a result of the high mortality due to HIV/AIDS. For example, in one year, Barclays Bank in Zambia experienced 36 AIDS-related deaths out of a total workforce of 1600 employees.\textsuperscript{110}


\textsuperscript{109} (Ibid.).

\textsuperscript{110} (Ibid.).
Chapter 4

Conclusion

After close analysis of the legal position of employees who are both affected and infected by the HIV/AIDS virus, it is clear that employees have all these rights in terms of law, and employers have even gone an extra mile to establish work place policies, that implement the legal rights to non discrimination, privacy, and dignity, yet you find cases such as that of Reverend Lapan whereby these rights are violated. One is therefore inclined to conclude that the reason HIV/AIDS related cases that have to do with employees rights to non discrimination, privacy, and dignity are seldom reported because of the stigma and discrimination that comes after their status has been disclosed to co workers. Another conclusion that may be drawn from the fact that employees who suffer discrimination and a violation of their right to privacy do not report their cases, is that in some cases they do not know where to get affordable legal assistance, and they suffer in silence.
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