

Short notes on:

## **HIV Positive Employees and Prospective Employees**

### ***Introduction***

South Africans who are positively diagnosed with HIV (human immunodeficiency virus) have long been discriminated against in various spheres of life. In particular, HIV positive South Africans find it incredibly difficult to secure gainful employment due to Employers being reluctant to hire them for various reasons, inclusive but not limited to, the fear that HIV is easily transmitted, that employees will abuse their sick leave entitlements due to their HIV status or that HIV positive employees or prospective employees are simply not fit to work. However, South African Courts have taken a firm stance in protecting HIV positive employees as well as prospective employees from unfair discrimination and numerous Court judgments have been handed down in this regard.

### ***Case law on HIV positive Employees and prospective Employees***

The Constitutional Court in *Hoffmann v South African Airways* is the leading case in respect of setting out its views on the legal protection of HIV positive employees and prospective employees. In this case, the Court found that South African Airways' refusal to employ a man on the grounds of his HIV positive status, constituted unfair discrimination, impaired his constitutional right to dignity and violated his constitutional right to equality.

The Constitutional Court held further that any discrimination based on the HIV status of an employee or prospective employee is unconstitutional, unreasonable and an unjustifiable infringement of the right to not to be discriminated against in the workplace.

Based on its findings, the Constitutional Court ordered South African Airways to offer employment to the HIV positive prospective employee, and definitively pronounced its views on the issue of HIV positive employees and prospective employees, finding that South Africans diagnosed with HIV have been subjected to extreme prejudice, marginalisation and stigmatisation due to their status as they rank as one of the most vulnerable persons within South Africa and should thus be afforded the full protection of the law.

## ***HIV testing of Employees by Employers***

Regrettably, since the judgment handed down in the Constitutional Court in *Hoffmann v South African Airways*, Employers have still not complied with the principles of the judgment in employment practices, recruitment and the workplace in general.

For example, the South African National Defence Force have flagrantly and continuously enforced a HIV testing policy whereby any employee or prospective employee who tests HIV positive would be automatically excluded from being recruited, deployed externally or promoted within the South African National Defence Force despite the High Court of Pretoria having already made its stance on the issue clear in the case of *South African Security Forces Union v Surgeon General (SASFU)* by agreeing with the principles set out by the Constitutional Court in the *Hoffman v South African Airways* case. The Pretoria High Court found the HIV testing policy to be unconstitutional and ordered that it be set it aside, directing further that the South African National Defence Force formulate a new HIV policy.

Years after the *South African Security Forces Union v Surgeon General (SASFU)* judgment, the Pretoria High Court again found against the South African National Defence Force in *Dwenga and Others v Surgeon-General of the South African Military Health Services and Others*. The Court held that the South African National Defence Force was implementing these policies in a manner that made it impossible for any HIV positive employee or prospective employee to be recruited, deployed externally or promoted. The Court found further that the South African National Defence Force had still been discriminating unfairly against HIV positive employees and prospective employees and once again ordered the South African National Defence Force to evaluate its policies and formulate new and fair workplace and employment policies and practices in this regard.

Not only have the highest Courts in South Africa made it clear that discrimination in the workplace on the grounds of HIV status is prohibited, the Department of Labour has also published a Code of Good Practice on HIV and Aids, which has been signed by the Minister of Labour and gazetted. The primary objective of the Code is to eliminate unfair discrimination and stigma in the workplace based on real or perceived HIV status and to promote access to equitable employee benefits and employment protection for HIV positive employees.

## **Conclusion**

According to Statistics South Africa 2019's mid-year population estimates, approximately 18,7% of South Africans aged 15 to 49 years are HIV positive, with the total number of South Africans living with HIV estimated at approximately 7,97 million. South Africans who are HIV positive need not fear unfair discrimination or unfair treatment in the workplace or fear not being employed on the basis of their HIV positive status as the highest Courts in South Africa have handed down unanimous and clear judgments resulting in an abundance of case law which presently exists for employees or prospective employees who find themselves being discriminated against to rely on.

