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PRE-EMPLOYMENT HIV/AIDS TEST: AN EMERGING TREND OF DISCRIMINATION IN NIGERIA*

ABSTRACT

HIV/AIDS has been around for over a quarter of century. The HIV/AIDS epidemic is one that knows no geographical class, caste, gender and sexual borders. The fear of discrimination has prevented many people from seeking treatment or disclosing their status openly.

In the context of employment, PLWHA are often denied employment at the time of recruitment on account of their HIV status. While those already in employment are discriminated against by their co-workers and employers, and their employment are frequently terminated.

This paper examines the right of persons living with HIV/AIDS and shall contend that PLWHA should not be discriminated against when applying for employment and in the course of employment.

Keywords

Discrimination, HIV/AIDS, Pre-employment testing, human rights.

INTRODUCTION

HIV/AIDS has been around for over a quarter of a century, in spite of this, the stigma surrounding the disease has not subsided. The HIV/AIDS epidemic is one that knows no geographical class, caste, gender and sexual borders. The fear of discrimination has prevented many people from seeking treatment or disclosing their status openly. People Living with HIV/AIDS (PLWHA) have been turned away from health care services, denied housing and employment, shunned by friends and colleagues, divorced by their spouses amongst others. The

* **J O Lokulo-Sodipe**, B.A (Unimaid); LL.B; LL.M (Lond); B.L. Lecturer, Faculty of Law, University of Ibadan, Ibadan, Nigeria.

worst kind of discrimination faced by PLWHA has been in the area of employment.

In the context of employment, PLWHA are often denied employment at the time of recruitment on account of their HIV status. While those already in employment are discriminated against by their co-workers and employers, and their employment are frequently terminated.¹ The HIV/AIDS epidemic has drastically affected labour, which in turn slows down economic activity and social progress. The vast majority of people living with HIV/AIDS in Africa are between the ages of 15-49 in the prime of their working lives.²

This paper examines the right of persons living with HIV/AIDS and shall contend that PLWHA should not be discriminated against when applying for employment and in the course of employment. This issue is pertinent for employment because of the high incidence of HIV/AIDS on the African Continent. It is reported that Sub-Saharan Africa accounts for over 67% of the world-wide incidence of HIV/AIDS.³ Nigeria has the third largest population of people living with HIV/AIDS (PLWHA), with roughly four (4) million PLWHA.⁴ The current 5.2% adult HIV prevalence rate, combined with Nigeria's large and fast growing population of over 140 million which ranks Nigeria third in the world in terms of the global AIDS burden⁵ makes this issue a topical one for Nigeria as a country. The segments of the population affected most are the youths and people within the productive age bracket most of who constitute the nation's workforce.⁶

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1. The case of Georgina Ahamafulé who was sacked by her former employer for being HIV positive is an example. 7 years later her case is still unresolved. Sometime in 2000, the presiding Judge barred her from entering the courtroom for fear that she might infect others. See Nigeria: Workplace Policy to protect HIV-Positive People is "toothless" in PlusNews. Retrieved from www.plusnews.org on 16th December, 2010.
 2. www.avert.org on 1st Dec, 2009.
 3. UNAIDS: Global Facts & Figures 09. Retrieved from www.unaids.org on 30th December, 2009.
 4. "Nigeria: Discrimination against workers with HIV". Retrieved from <http://communicatinglaborrights.wordpress.com> on 1/12/2009.
 5. The Futures Group International Policy Project/Nigeria, Request for Proposals on Research on The Impact of HIV/AIDS on Education in Nigeria, Sponsored by USAID, p. 3; www.policyproject.com
 6. "Nigerian National Policy on HIV/AIDS in the Workplace". Retrieved from www.naca.gov.ng on 3rd December, 2009.

With the potential problems of dealing with workers living with HIV/AIDS in terms of chronic illness resulting in absenteeism and low productivity and increased medical expenses, it is not surprising that employers should ordinarily be reluctant to employ HIV-positive applicants and tend to exclude such applicants through pre-employment testing for HIV/AIDS.⁷ In the same vein, access to employment for HIV-positive persons is a matter of human rights, in particular, the right not to be discriminated against unfairly and the right to human dignity.

In other words, if a person successfully went through selection process and is found suitable for employment but the blood test indicates that he is HIV-positive, can his/her prospective employer lawfully deny him employment solely on the ground that he is HIV-positive? Better still, can the recent requirement of series of medical examination including blood test for HIV/AIDS before confirmation of appointment be sustained in the light of the constitutional provisions prohibiting discrimination? Can an employer lawfully deny an employee confirmation of his appointment solely on the ground of his HIV/AIDS status? All the above issues shall be the major consideration in this article.

PRE-EMPLOYMENT HIV/AIDS TESTING AND FUNDAMENTAL HUMAN RIGHTS

As mentioned above, prospective employees are required to undergo medical examinations before their employment process is concluded. One of such tests is the HIV/AIDS test. Compulsory pre-employment HIV/AIDS tests raise human rights issues, chief of which is whether they are permissible under local and international human rights legislations.

The concept 'Human Right' refers to the basic rights and freedom to which all human beings are entitled, including life, liberty, freedom of thought and expression, equality before the law and material well

7. Sam Rugege, 'A Summary of Some Cases on HIV/AIDS' (2001) 5(2) Law, Democracy & Development 237.

being. The UDHR and subsequent human rights treaties and documents describe what governments and societies should not do to people and what they should guarantee for all people in society. The scope and dimensions of human rights are evolving. Development on the older notion of natural rights is succinctly described thus:

*“The human rights concept is not static. The conception of the substance and scope of the term human rights has been and continues to be, subject to change in pace with the evolution of society. Originally, attention was mainly focused on civil and political rights... However, developments have steadily progressed towards an enlargement of the human rights concept, in which economic social and cultural rights are also included. This applies to such fundamental rights as freedom from starvation and destitution and the right to work, social security and cultural self-expression. There is a close link between civil and political rights on one hand and economic and social rights on the other...”*⁸

Articles 23 and 24 of the United Nations Declaration of Human Rights (UDHR), 1948 provide for the right to work and protection from unemployment and unfavourable conditions of work, equal pay for equal work and just remuneration and the right to leisure respectively. Similarly, the African Charter on Human and Peoples Rights (ACHPR), 1981 also recognizes most of these economic and social rights.⁹ It is noteworthy that the ACHPR has been domesticated in Nigeria¹⁰ in compliance with the requirement of section 12 of the 1999 Nigerian Constitution which provides that: “[n]o treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.”

With the ratification and domestication of the ACHPR, it is submitted that its provisions on Social and Economic Rights are therefore

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8. See the White paper on the Norwegian Ministry of Foreign Affairs to the Parliament St. Meld, no 93 (1976 – 77) cited by Asbjorn Eide, 'Linking Human Rights and Development: Aspects of the Norwegian Debate' in Human Rights, Development and Foreign Policy: Canadian Perspectives, ed. Irving Brecher (The Institute for Research in Public Policy, Canada, 1989) 15.
 9. See arts 14, 15, 16, 17 and 22.
 10. See section 1 of the Ratification and Enforcement Decree (now Act) No. 2 of 1983, Now Cap 10, Laws of the Federation of Nigeria (LFN) 1990.

enforceable in Nigeria. Thus, in *Chief Gani Fawehinmi v Gen. Sani Abacha*¹¹, Court of Appeal, per Dairu Musdapher, JCA (as he then was) held”

“It seems to me that the learned trial judge erroneously acted when he held that the African Charter contained in Cap 10 of the Laws of the Federation of Nigeria 1990 is inferior to the Decrees of the Federal Military Government. It is common place that no government will be allowed to contract out by local legislation, its international obligations. It is my view that notwithstanding the fact that Cap 10 was promulgated by the National Assembly in 1983, it is a legislation with international flavour and the ouster clauses continued in Decree No 107 of 1993 or No. 12 of 1994 cannot affect its operation in Nigeria.”

Similarly in *Comptroller of Prisons v Adekanye & Ors*¹² per Sulaiman Galadima, JCA held:

“...I subscribe entirely to the observation of Musdapher, JCA in Chief Gani Fawehinmi v Gen. Sani Abacha (1996) 9 NWLR (pt 475) 710 at 746-747 that the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap. 10 is superior to our municipal laws on questions of human rights.” However, the truth of the matter is that the realization of economic and social rights depends on a given level of economic and social development of the society in question.¹³ On this, Maurice Cranston,¹⁴ observed as follows: *“...economic and social rights can rarely, if ever, be secured by legislation alone...for a government to provide social security, it needs to do more than make laws. It needs to have access to very great wealth...”*

It is said that the international politics of human rights during the Cold War gave rise to the promulgation of two distinct bills of rights, namely,

11. (1996) 9 NWLR (pt 475) 710 at 746.

12. (1999) 10 NWLR (pt 623) 400 at 426; see also, Chima Ubani v Director of S.S.S. (1999) 10 NWLR (pt 625), 129; Ogugu v The State (1994) 9 NWLR (pt 366) 1; Oshevire v British Caledonian Airways (1990) 7 NWLR (pt 163) 507 at 519; Guardian Newspapers Ltd v A-G. Federation (1995) 5 NWLR (PT 398) 703; The Registered Trustees of the Constitutional Rights Project v The President of the Federal Republic of Nigeria (1994) 4 Journal of Human Rights Law and Practice 218.

13. Oyajobi, A.V., “Human Rights and Social Justice in Nigeria: Issues, Dilemmas and Challenges.” (1993) Vol. 3, Nos. 1-3 Journal of Human Rights Law & Practice 7 at 16.

14. Maurice Cranston, “What are Human Rights?” (New York, Basic Books, 1962) 38-39.

the International Covenant on Civil and Political Rights (ICCPR), 1966 and the International Covenant on Economic Social and Cultural Rights (ICESCR), 1966. While the former requires immediate implementation, the later provides for progressive realization.¹⁵ States are required to implement progressively to its capacity, economic social and cultural rights in the covenant. Resources and capacity of States vary. Richer States would have more capacity to implement those rights than poor States. Therefore, each State is expected to implement those rights at the pace of its resources, though progressively. There is no doubt, implementation of these rights required great financial implication.

One time Commonwealth Secretary General, S.S. Ramphal had once observed:

*“The fundamental rights of humanity are not limited to those civil and political rights which the west has packaged for export, but must encompass also those economic and social rights for whose denial of the developed world-including the west – remains substantially accountable...”*¹⁶

It is submitted that the concept of ‘human rights’ should mean not just absence of discrimination on grounds of sex, race, religion, etc., it should also entail right to live in peace and freedom, the right to live with human dignity, the right to create and use one’s abilities, the right to basic human needs, both material and non-material.

Compulsory pre-employment HIV/AIDS testing touches two aspects of human rights, namely, the right to privacy and the right not to be discriminated against. The right to privacy protects against arbitrary intrusion into a person’s privacy, family life and correspondence, telephone and telegraphic communication.¹⁷ This right may be waived by consent. Where consent has been given, for instance, to have tests conducted, such test results may not be used in a discriminatory manner in the allocation of burden and benefits.

15. Art 2(1) of CESC.R.

16. Commonwealth Records of Recent Events, No. 21 (January – March 1977) 12-14.

17. Section 37 of the 1999 Constitution; Art 12 UDHR; Art 17 ICCPR.

With regards to pre-employment HIV/AIDS testing and the right to privacy, it is argued that, by taking the test, a potential employee consented to the medical examination and, therefore, the employer cannot be seen to have violated his right to privacy. In our view, however, given the high rate of unemployment in Nigeria, there is an element of coercion involved whenever an employee is subjected to requirements that he would not voluntarily comply with, were he/she not in dire need of a job. The other fundamental human right which the compulsory pre-employment HIV/AIDS testing may also violate is the right against discrimination. This is the main focus of this paper.

WHAT IS DISCRIMINATION?

The word 'discrimination' may be defined as treating one differently from another.¹⁸ It has also been defined as a distinction based on the personal characteristics of an individual resulting in some disadvantage to that individual.¹⁹ The International Labour Organisation defines discrimination as:

"(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' organizations, where such exist, and with other appropriate bodies."*²⁰

Thus, if persons under same circumstances and conditions are treated differently, there is discrimination.²¹ It involves unfair treatment or denial of normal privileges to persons because of their race, age, sex, nationality or religion. A failure to treat all persons equally where no reasonable distinction can be found between those favoured and those

18. Words and Phrases, permanent edition., St. Paul, Minn. West Publishing Co. Vol. 12A, p 362.

19. Nwafor Elike v. Ihemereme Nwakwoala And Ors (1984) -SC.155/1983.

20. Art. 1.1. ILO Convention C111 - 'Discrimination (Employment and Occupation) Convention 1958.

21. State v Pate, 138 p. 2d, 1006, 1009, 47 N.M 182.

not favoured.²²

Discrimination in employment is usually on the basis of sex, age, race, nationality, religion or being handicapped.²³ To discriminate is to single out for unfavourable treatment.²⁴

In Britain for instance, the problems of discrimination against certain classes of employee are tackled by the Sex Discrimination Acts, 1975 and 1986 and the Race Relation Act, 1976. Under the Sex Discrimination Act, discrimination arises where an employer or prospective employer treats a woman less favourably than he would treat a man or vice versa. Under this Act, discrimination are in three forms namely, direct discrimination, indirect discrimination and discrimination by victimization.²⁵ Under the Race Relation Act, 1976, it is an offence for an employer to discriminate against an employee on account of his colour, race, ethnic or national origin. Thus, it is unlawful to discriminate when recruiting employees.

The known categories or grounds of discrimination that have received world-wide recognition are: sex, race, colour, ethnic, or national origin, and religion. But the pertinent question is this: Are these categories or grounds of discrimination closed? Can there be any other grounds for discrimination apart from those listed above? There are no specific human rights provisions relating to discriminating against PLWHA. However, Art 2 of the UDHR provides that "everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."²⁶

The right against discrimination is derived from the "inherent dignity of the human person."²⁷ The ILO Convention C111 [Discrimination

22. Black's Law Dictionary, 6th ed., p. 467.

23. Ibid.

24. The New Webster's Dictionary of the English Language, International ed., p. 270.

25. Abbott, K.R. & Pendlebury, N., Business Law, 6th ed., p. 359.

26. See also Art. 2(1) ICCPR; Art 2(2) ICESCR.

27. Para 2 of the Preamble to the ICCPR.

(Employment and Occupation) Convention, 1958] provides that each member state should:

“Declare and pursue an 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”.

CONSTITUTIONAL PROVISIONS

Section 17(3)(a) of the 1999 Constitution of the Federal Republic of Nigeria²⁸ provides:

“The state shall direct its policy towards ensuring that –

(a) All citizens, without discrimination on any group whatsoever, have the opportunity for securing adequate means of livelihood as well as adequate opportunity to secure suitable employment.”

The Nigerian Constitution like most written Constitutions in African sets out the objectives and state policy goals which the government is obliged to pursue for the better life of its citizens. Directive principles in chapter II of the Constitution enjoin the state to ensure that its policies and actions aim toward the full realization of Economic, Social and Cultural Rights such as health, education, employment, and so on. However, section 6(6)(c) of the Constitution provides that the judicial powers vested (by the Constitution) on the courts “shall not extend ... to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the fundamental objectives and directive principles of state policy set out in chapter 2 of the Constitution.”

The above quoted section 6(6)(c) of the Constitution ousts the jurisdiction of the courts in respect of complaints on breach of economic, social, and cultural rights. Thus, the jurisdiction of courts over right to work (section 17) among others has been removed by section 6(6) (c) of the Constitution. In *Uzoukwu v Ezeonu II*,²⁹ the Nigerian Court of Appeal said concerning economic and social rights that:

28. Cap 23 LFN 2004.

29. (1991) 6 NWLR (pt 200) 708 at 761-762.

“There are other rights which may pertain to a person which are neither fundamental nor justiciable in the court. These may include rights given by the Constitution as under the fundamental objectives and directive principles of state policy under chapter 2 of the Constitution.”

Thus, in a number of cases concerning chapter II of the Constitution, the courts have declined to offer any remedy pleading non-justiciability clause in section 6(6) (c) of the Constitution.³⁰

The necessary deduction one can draw from the above is that once the right to work as enunciated in section 17 of the Nigerian 1999 Constitution is not justiciable, flowing from section 6(6) (c) of the same Constitution, then an employer has unlimited power not to employ any prospective applicant who is HIV positive. Furthermore, such an employer has the right to deny a prospective employee, employment or refuse to confirm his appointment based on his/her HIV status. The legality, correctness or otherwise of such decision or act shall be examined shortly in the light of international Treaties and Conventions.

INTERNATIONAL TREATIES ON ECONOMIC RIGHTS

International human rights law relating to employment and the HIV/AIDS include Articles 23 of the UDHR, the ICESCR, the ICCPR and the ACHPR. The principle of non-discrimination is fundamental to human rights law, and is of particular significance to both displaced people and those living with HIV/AIDS who frequently suffer from high levels of stigmatization and discrimination. This is reflected in Article 1 of the UDHR, the Preamble to the UN Charter and Article 2(2) which states that these rights apply without discrimination of any kind as to ‘race; colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.

Certain provisions relating to the right to work of a person suffering from HIV/AIDS as mentioned in UDHR are as follows:

- I). Right to life, liberty and security of person.

30. Archbishop Anthony Olubunmi Okogie v Attorney General of Lagos State (1981) 2 NCLR 337.

ii) No person must be subjected to forced testing and /or treatment or otherwise cruel or degrading treatment.

iii) Everyone, including persons living with a positive 'HIV' diagnosis has a right to work and participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

iv) All, including persons living with a positive HIV diagnosis are equal before the law and are entitled without any discrimination to equal protection by the law.

Article 23 of the UDHR, provides:

"Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment.

Everyone, without any discrimination, has the right to equal pay for equal work..."

Article 15 of ACHPR provides:

*"Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present charter without distinction of any kind such as race, origin, group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status."*³¹

The International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights are two covenants that protect a range of economic, social and cultural rights without discrimination based on creed, political affiliation, gender or race. Non discrimination is a basic tenet of the human rights movement, enshrined in these two covenants. Article 6(1) of the ICESCR is also relevant for our consideration and it provides:

"The state parties to the present covenant shall recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take

31. Underline is mine for emphasis.

appropriate steps to safeguard this right."

All the above quoted International and Regional Human Rights Treaties have been ratified by Nigeria.³² However, a ratified treaty is not legally enforceable in Nigeria unless legislature makes law to incorporate it into the law of the country.³³ Of all the ratified human rights treaties and conventions, only the African Charter on Human and Peoples' Rights and the United Nations Convention on the Rights of the Child have been incorporated into domestic law. The provisions of section 6(6) (c) of the 1999 Constitution which make non justiciable the provisions of Chapter 2 of the 1999 Constitution negates the principles and spirit of the International Covenant on Economic, Social and Cultural Rights. The greatest violation of the human rights of Nigerian people has remained the denial of economic, social and cultural rights.

RIGHT TO EMPLOYMENT OF PEOPLE LIVING WITH HIV/AIDS

One of the effects of the HIV/AIDS epidemic is that it has dramatically affected labour, which in turn slows down economic activity and social progress. In Nigeria, an estimated 3.1% of adults between the ages of 15-49 – in the prime of their working lives, live with HIV/AIDS.³⁴ As noted earlier, the worse kind of discrimination faced by PLWHA has been in the area of employment.

As observed earlier in this paper, the right to work is not expressly enshrined in the 1999 Nigerian Constitution. Though, its existences in the Universal Declaration of Human Rights and African Charter on People's Rights are not in doubt. Since the right to work in Nigeria is under the state policy and directive principles which is not justiciable, can one then say that the right to be protected against discrimination in

32. See also Art. 2 ILO Convention C111 – "Discrimination (Employment and Occupation) Convention of 1958, which requires state members to declare and pursue policies which are, given their national conditions and practices, designed to promote equality of opportunities and treatment in respect of employment and occupation, with a view to eliminating any form of discrimination.

33. See section 12 of the 1999 Nigerian Constitution.

34. UNAIDS (2009) Report on the Global AIDS Epidemic. Retrieved from www.unaids.org/globalreport/Global_report.htm on 3/1/2010.

the right to work of persons living with HIV/AIDS is equally not justiciable. In other words, can an employer legally sack his employee on the ground of his HIV status? Can confirmation of appointment be refused on the ground of HIV/AIDS status?

In Nigeria, PLWHA are losing their jobs or are being denied employment on account of their status.³⁵ In *Taire Johnson v Book Industries (Nigeria) Ltd and Another*,³⁶ the Plaintiff was dismissed from private employment on the basis of an erroneous diagnosis of HIV/AIDS arising from an employer's mandatory testing. The ICJ was of the opinion that both local and International legislations prohibit discrimination on the grounds of being HIV-positive.

A man (name withheld for fear of further stigmatization) was sacked 10 days after commencing a new job for failing an HIV test. Efforts to get him reinstated have been futile, despite the involvement of NACA which declared this action as wrong.³⁷

These cases continue to increase in spite of the National Policy on HIV/AIDS in Workplace.³⁸ Most of these cases are either not being prosecuted or have not been decided on by the courts because of the fear of spreading HIV/AIDS to others.³⁹

EXAMINATION OF CASES FROM OTHER JURISDICTIONS

South Africa and Namibia shall be our guiding countries being African countries like Nigeria. The two cases to be considered herein emphasize that access to employment for HIV - positive persons is a matter of human rights in particular the right not to be discriminated against unfairly and the right to human dignity.

The first case is *Hoffman v South Africa Airways (SAA)*⁴⁰ a South African case. In that case, South African Airways (SAA) refused to

35. NIGERIA: Workplace Policy to Protect HIV-positive people is "toothless" in PlusNews. Retrieved from www.plusnews.org on 16th Dec, 2010.

36. AHR AJ Casebook Series Vol.1. Retrieved from www.icj-kenya.org on 3rd Jan, 2010.

37. Plusnews, op. cit.

38. www.naca.gov.ng on 17th Dec, 2010.

39. Ibid.

40. 2000(11) BCLR 1235 (CC); 2001(1) SA 1 (CC).

employ Hoffman on the basis of his HIV status. SAA defended its decision on medical, safety and operational grounds, it argued that its flight crew had to be fit for world-wide duty and had to be vaccinated against yellow fever as they may be required to fly in yellow-fever endemic countries. It argued that HIV-positive persons may react negatively to the vaccination and therefore may not be vaccinated. Without such vaccination, however, they run the risk of contracting yellow fever and spreading it to fellow crew and to passengers. HIV-positive persons would also be prone to contracting opportunistic diseases such as tuberculosis and chronic diarrhea and could spread them to other flight crew and passengers.

Moreover, flight attendants suffering from opportunistic diseases would not perform their duties properly, especially in emergencies. SAA also offered an economic reason for exclusion. The life expectancy of HIV-positive persons was too short to justify the costs of training them. SAA further justified its action on the basis that other major airlines had similar employment practices. This case was brought before the enactment of the South African Employment Equity and the Promotion of Equality and Prevention of Unfair Discrimination Act. The court held that discrimination on the basis of HIV status was neither justifiable nor fair in terms of the Constitution or according to the available medical evidence. It ordered SAA to employ the appellant.

This is a sound policy judgment which is very instructive for other jurisdictions both in African and other continents. The decision to employ or not to employ a person living with HIV should therefore depend on the medical condition of the particular applicant. No consideration should be given to the perceptions and prejudices of members of the public regarding persons with HIV.⁴¹ People living with HIV must be treated with compassion and understanding. They should not be condemned to 'economic death' by the denial of equal opportunity in employment.

41. At239.

The decision of this case led to the enactment of the Employment Equity and the Promotion of Equality and Prevention of Unfair Discrimination Act in South Africa. The case and the statute are complemented by the Code of Good Practice on Key Aspects of HIV/AIDS and Employment issued by the Department of Labour pursuant to the Act.⁴² The South African Code was promulgated to eliminate unfair discrimination based on HIV status in the workplace and to promote a non-discriminatory workplace that allows PLWHA to be open about their status without fear of stigma or rejection.

The second case for our consideration is *N.v. Minister of Defence*.⁴³ The applicant in this case applied to be enlisted in the Namibian Defence Force (NDF). As part of the application process, he was required to undergo a medical examination including the HIV test. The NDF doctor who examined the applicant found him to be HIV-positive and informed him that because he was HIV-positive he would not be accepted by the NDF.

About one month after he tested HIV-positive, the applicant underwent a medical examination, "thorough clinical examination" by a medical officer of the state, who found him to be in good and sound health. The medical report included a question to the doctor whether he considered the applicant to be in good health and free from any physical or mental defect, disease or infirmity which was likely to interfere with the proper performance of duty as a government official in any part of Namibia. The medical officer replied in the affirmative.

The applicant filed an action at the Namibian Labour Court alleging that he was refused enlistment into the NDF on the sole ground that he was HIV-positive which, he argued, constituted unfair discrimination as envisaged in section 107 of the Namibian Labour Act of 1992. Alternatively, he averred that he was discriminated against on the impermissible ground of disability in conflict with section 107 of the Labour Act. He sought an order directing the respondent to discontinue discriminating against him and directing respondent to process

42. www.icj-kenya.org.

43. (2000)ILJ 999 (Labour Court of Namibia).

applicant's application for enlistment in the NDF. On the basis of the medical report, the court held that the applicant was, at the time of his application, in good health and fit to carry out any duties assigned to him and that the sole and only reason for refusing to enlist him into the NDF was his HIV status.

The court came to the conclusion that the exclusion of applicant from the military, solely because he was HIV-positive, constituted, at the time of his application for enlistment, discrimination in an unfair manner in breach of section 107 of the Labour Act. However, because the tests had been carried out four years before the hearing, the court held that it was not proper to order immediate enlistment since the applicant's condition could have deteriorated in the four years.

This case should encourage those in other African countries who test positive for HIV, but are otherwise healthy to apply for jobs for which they are qualified. Equally, potential employers should realize that testing HIV-positive does not pose a threat to others except in very limited, controllable circumstances and that HIV-positive persons who have not reached a certain stage in the progression of HIV can give many years of service and should not be denied the opportunity to work.⁴⁴

CODE OF PRACTICE ON HIV/AIDS AND THE WORLD OF WORK AND THE NATIONAL POLICY ON HIV/AIDS IN THE WORK PLACE

The ILO has defined a set of good practices relative to HIV/AIDS – Code of Practice on HIV/AIDS and the World of Work. These guidelines were put in place to address HIV/AIDS in the workplace. The code highlighted areas that require action. These include prevention of HIV/AIDS, management and mitigation of the impact on work, care and support of workers infected and affected and elimination of stigma based on real or perceived HIV status.

44. Sam Rugege, *op. cit.*, p. 241.

Furthermore, the code recognizes the cross-sectoral nature of HIV/AIDS and outlines the rights and responsibilities of different stakeholders; governments, employers, employers' organizations, workers and workers' organizations in the development of workplace based policies and programmes. It discourages testing as the condition for eligibility for national social security schemes and general insurance policies.⁴⁵ It makes provision for testing for surveillance purposes. These must however, comply with the ethics of scientific research.

Nigeria, in fulfilling its obligation as a member state of ILO, in April 2005 approved her own National Policy on HIV/AIDS in the Workplace. The policy provides that the government shall ensure that benefits under the national laws and regulations apply to workers living with HIV/AIDS as with workers suffering from any other chronic disease.⁴⁶ This provision buttresses the right against discrimination of PLWHA. Section 7.2.4 bars employers from engaging in or permitting any personnel policy or practice that discriminates against workers infected with or affected by HIV/AIDS. On its part, section 8.2 makes provision for protection from stigmatization, discrimination and exclusion.

By virtue of section 8.5, the rights of job seekers are protected. This section recommends that the only medical criterion for entry to employment is fitness to work. Noting that in view of the fact that the HIV infection does not in itself constitute a lack of fitness to work, nothing in the pre-employment examination shall oblige or require any candidate to declare his or her HIV status. It provides further that HIV screening shall not be required of job applicants or persons in employment. Instead, provision should be made for voluntary confidential pre and post test counseling services for workers and their family members

Given the fact that the greater proportion of PLWHA in Nigeria fall within the productive age thereby constituting the nation's workforce,

45. Section 8.2 of the National Policy on HIV/AIDS in the Workplace.

46. Section 7:1 National Policy on HIV/AIDS in the Workplace.

the response to the HIV/AIDS pandemic within the workplace is crucial to prevention, care and support of PLWHA and People affected by HIV/AIDS (PABA). The Workplace Policy on HIV/AIDS is a step in the right direction in that it paves way for government, employers and workers to take action on issues relating to HIV/AIDS as it affects various aspects of the workplace. However, it has not been backed by any legal instrument. It therefore remains a mere framework.

ENFORCEABILITY OF THE FUNDAMENTAL HUMAN RIGHTS PROVISIONS ON PRIVATE EMPLOYERS

It is submitted that the fundamental human rights provisions of the 1999 Constitution, are binding on government, and all other persons/bodies, whether public or private. This flows from the provisions of section 1 of the 1999 Constitution which provides thus: "*this Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria.*"⁴⁷ Private persons are therefore not excluded from observance of the fundamental rights of other persons or the fundamental rights provisions of the Constitution. Consequently, a PLWHA can enforce his/her fundamental human right against a private employer.

Be that as it may, the procedure for the enforcement of fundamental rights against government and public authorities is different from enforcing these rights against private individuals. Actions may be instituted in other areas of law to enforce fundamental human rights against private persons. These include prosecution in criminal law or civil action in any proper or convenient area of law. In this instance, violation of the right to freedom from discrimination may be prosecuted and enforced in other areas of law such as torts, contract and criminal law.

CONCLUSION

There is an undeniable link between human rights and public health. Human rights and public health share the common objective of

47. S.1(1) 1999 Constitution; Madu .v.Onusguluchi (1985) 6NCLR 365.

promoting and protecting the rights and well being of all individuals.⁴⁸ From the human rights perspective, this can best be accomplished by promoting and protecting the rights and dignity of everyone, with special emphasis on those who are discriminated against or whose rights are otherwise interfered with. Public objectives can best be accomplished by promoting health for all, with special emphasis on those who are vulnerable to threats to their physical, mental or social well-being. Thus health and human rights complement and mutually reinforce each other in the context of HIV/AIDS.⁴⁹

Discrimination on grounds of HIV/AIDS status impedes efforts made at fighting the disease, legitimizes widespread stigmatization and makes it hard for infected people to live normal lives. The promotion of non-discriminatory workplace environment will contribute positively to achieving the public health goal of reducing the rate of HIV infection in Nigeria. In view of the fact that a large number of PLWHA are those who are employed or of employment age, employment has now become a focal point. In the context of employment, PLWHA are often denied employment at the time of recruitment on account of their HIV status. While those already in employment are discriminated against by their co-workers and employers and employment are frequently terminated.

Compulsory pre-employment HIV/AIDS tests are clearly illegitimate in the sense that such tests invade the protected realm of privacy and they involve a degree of coercion wholly inconsistent with the integrity of individuals. This border on the infringement of the human rights of PLWHA and constitute an essential component in preventing transmission of HIV and reducing the impact of HIV/AIDS. To attain a non-discriminatory workplace environment, there is a need for anti-discriminatory legislation that should apply to both the public and private sectors and prohibit work related discrimination such as pre-employment HIV testing. This should be in tune with the UN AIDS Guidelines, 1966 which recommends among others things, the

48. Michaele Figuerira, Michaela and U Odendaal, William; "Testing the Awareness of the Nambian Public and Private Sectors as the Guidelines for the Implementation of a National Code on HIV/AIDS in Employment". Retrieved from www.lac.org.na on 18th February, 2010.

49. United Nations, HIV/AIDS and Human Rights: International Guidelines; 1988.

enactment or strengthening of anti-discrimination and other protective laws that protect people living with HIV/AIDS from discrimination in both the public and private sectors. The National Workplace Policy on HIV/AIDS is Nigeria's attempt at complying with this and the ILO's directive. However, as noted earlier, it has no legal force; it is therefore recommended that there should be improvement on this position as far as the country is concerned.

It is submitted that law alone cannot eradicate HIV/AIDS related discrimination. Eradicating corruption in terms of employment related matters will, therefore, require the concerted efforts of everyone. It is also recommended that given the psychological and financial effect of HIV/AIDS, the government and private companies have a duty to provide opportunities for counseling and voluntary testing for their employees to ensure fairness, equality and fair play.

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