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CASE NOTE

Defining the Limits of Permissible Employment Discrimination against Persons Living with HIV/AIDS in South Africa: *Hoffman* v. *South African Airways* [2000] 12 BLLR 1365

Introduction

Perhaps the most positive and exciting aftermath of the apartheid era is the construction of the new South Africa upon the foundation of a Constitution[1] and other legal instruments[2] that are unanimous and unambiguous in two respects. The first is in their proscription of unfair discrimination and the second is in their permission of statutory and other measures aimed at eliminating the effects of past discrimination on those groups of persons who were at the receiving end of same.[3] The provisions of these instruments as well as their tenor and spirit reveal an unmistakable national resolve to break from a culture of racial discrimination to a constitutionally protected culture of human rights for South Africans of all ages, classes and colours.[4] Without doubt, the most important of those provisions is the equality clause of the Bill of Rights[5] contained in the second chapter of the Constitution.[6] This probably follows from a realization of the fact that equality is fundamental to "the maintenance and propagation of human rights in a democratic body politic, particularly in an acutely divided society" such as South Africa.[7]

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[1] Constitution of the Republic of South Africa Act No. 108 of 1996 (hereafter, the "Constitution"). This Constitution which came into effect on 4 February, 1997 is the successor to the Republic of South Africa Constitution Act No. 2000 of 1993, now famous in South African legal discourse as the "Interim Constitution". From a legal historical perspective, the latter is an exceedingly special document for South Africa and its people because the first elections based on the principle of universal suffrage were conducted and the first majority and truly democratic government constituted thereunder.

[2] The most important of these instruments are the Employment Equity Act No. 55 of 1998 and the Labour Relations Act No. 66 of 1995.

[3] D. Davis, H. Cheadle and N. Haysom, *Fundamental Rights in the Constitution—Commentary and Cases*, Juta & Co., 1997, 59.

[4] *Shabalala & Others* v. *Attorney General, Transvaal & Another* 1996 (1) SA 725 (CC), per Mahomed, D.P., at para. 26.

[5] The now famous section 9 of the Constitution reads as follows:

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

[6] L. Du Plessis and H. Corder, *Understanding South Africa's Bill of Rights*, 1994, 139; and David *et al* above, n. 3, at 61.

[7] G. E. Devenish, *A Commentary on the South African Bill of Rights*, Butterworths, 1999, 35; and J. Murphy, "Property Rights and Judicial Restraint: A Reply to Chaskalson", (1994) *SAJHR* 385 at 390.

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Not surprisingly, the South African Constitutional Court has led the judiciary in the adoption of a robust and rigorous interpretation of the equality clause exhibiting uncompromising fidelity to the underlying ideals.[8] The essence of that interpretation is that the Constitution's guarantee of equality is a prescription, not for mere formal equality, but for substantive equality.[9] This is uniquely important in the South African context because substantive equality is a conception of equality that does not simply demand identical treatment of persons in identical situations but rather sanctions differential treatment aimed at achieving genuine social equality in the form of substantively equal outcomes.[10] The certain and intellectually compelling rationale for the overwhelming judicial and academic preference for the substantive approach to equality in the new South Africa was best articulated by Janet Kentridge as follows:

> "A formal approach to equality assumes that inequality is aberrant and that it can be eradicated simply by treating all individuals in exactly the same way. A substantive approach to equality, on the other hand, does not presuppose a just social order. It accepts that past patterns of discrimination have left their scars upon the present. Treating all persons in a formally equal way now is not going to change the patterns of the past, for that inequality needs to be redressed and not simply removed. This means that those who were deprived of resources in the past are entitled to an 'unequal' share of resources at present."[11]

Clearly, by permitting such differentiation, the Constitution essentially provides the incontestable premise for the legality and legitimacy of the all-encompassing and thoroughgoing social and institutional transformation that is underway in the new South Africa.[12]

Because apartheid society created and nurtured "legally entrenched inequalities and rigid socio-political stratification", its citizens were forced to accept a labour marketplace in which employment relationships featured diverse forms of discrimination.[13] Not surprisingly, it is in that marketplace that the equality clause and the statutes enacted pursuant thereto were expected to bring the most relief to members of the previously disadvantaged groups.[14] More importantly, those legal instruments were required to provide protection from discrimination

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[8] *Brink* v. *Kitshoff NO* 1996 (4) SA 197 (CC); *President of the Republic of South Africa and Anor* v. *Hugo* 1997 (4) SA 1 (CC); *Fraser* v. *Children's Court, Pretoria North* 1997 (2) SA 261 (CC); and *Nyamakazi* v. *President of Bophuthatswana* (1994) 1 BCLR 92 (B) at 126.

[9] Davis *et al* above, n. 3, at 61.

[10] Devenish, above, n. 7, at 39; and D. du Toit, D. Woolfrey, S. Godfrey, D. Bosch and S. Christie, *Labour Relations Law—A Comprehensive Guide*, Butterworths, 2000, 431.

[11] J. Kentridge, "Equality" in Chaskalson *et al* (eds.), *The Constitutional Law of South Africa*, Juta & Co, 1996, 14–4; and D. Davis, *Democracy and Deliberation—Transformation and the South African Legal Order*, Juta & Co, 1999, 82 (arguing that the rejection of a formal conception of equality is because of its fundamental disregard of established patterns of privilege and distribution).

[12] The obvious aim of all transformation initiatives in South Africa is, as far as is possible, to undo the damage caused by apartheid in depriving the non-white peoples and communities of this country of public services and resources for over four decades. In the pursuit of that lofty goal, government at the local, provincial and national levels has also had to make decisions and adopt/implement policies that treat members of the non-white majority more favourably than their white compatriots. The most common of such decisions and policies relate to the pricing of public services and the hiring of employees. They have thus far survived legal challenges only because of the said adoption of a substantive conception of equality. An excellent example of such a legal challenge is *The City Council of Pretoria* v. *Walker* 1998 (2) SA 363 (CC). For a legal philosophical discussion of the merits of such initiatives, see D. Meyerson, *Rights Limited*, Juta & Co, 1997, 157 et seq.

[13] Du Toit *et al*, above, n. 10, at 430.

[14] T. Cohen, "Justifiable Discrimination—Time to Set the Parameters", (2000) 12 *SA Merc LJ* 255; and M. Naidu, "The 'Inherent Job Requirement' Defence—Lessons from Abroad", (1998) 10 *SA Merc LJ* 173.

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in employment to persons who may have recently become vulnerable thereto as a result of contemporary social phenomena.[15] Into this latter category fall persons living with HIV/AIDS.[16]

In terms of the scale of the HIV/AIDS crisis, there is an emerging national consensus that South Africa is in the midst of an unfolding catastrophe. Intimidating statistics[17] reveal that six million of its people would have been infected by the end of the year 2000. Besides, it is estimated that 17 per cent of the population of over 40 million will be infected by the year 2006. While 700, 000 AIDS-related deaths are also predicted for the year 2005 alone, some 10 million South Africans are expected to have died from the pandemic by 2015. Just as incredible as the statistics is the intensely negative treatment that persons living with HIV/AIDS in South Africa have received both from their fellow citizens as well as from their employers. A leading commentator has suggested three reasons for the unparalleled stigmatization and extreme prejudice that has characterized the treatment of these persons, namely, the sexual dimension to the crisis, the early linkage of the disease to marginalized groups such as homosexuals, and the belief among some that HIV/AIDS is an appropriate divine punishment "visited upon those who have traded caution for hedonistic sexual pleasure".[18] Within the workplace, persons living with HIV/AIDS in South Africa have found themselves being refused employment, re-deployed or even dismissed without regard for their capacity to meet the relevant work requirements.[19]

The Facts

It was in the historical, legal and social context described above that the case of *Jacques Charl Hoffman* v. *SAA*[20] came before the Constitutional Court.[21] The relatively simple set of facts presented by the case were as follows. The appellant had applied for employment as a cabin attendant with the respondent airline (SAA). At the end of a four-stage selection process,[22] he, along with eleven others,

[15] Kentridge, above, n. 11, at 14–15.

[16] Acquired Immune Deficiency Syndrome (AIDS), perhaps the most dreaded terminal disease now known to humans, is caused by a virus known as the Human Immuno Deficiency Virus (HIV). Zackie Achmat *et al* (eds.), *HIV/AIDS and the Law*, Aids Law Project and Lawyers for Human Rights, 1997, 8.

[17] "Six Million Will Be HIV+ by Year End", *Daily Dispatch*, 17 May, 2000; "Statistics a Clarion Call to AIDS", *The Star* 4 March, 1999; and Department of Health, *Ninth National HIV Survey of Women Attending Antenatal Clinics of the Public Health Services* (1999), "AIDS Toll Can Still Be Reversed", *Sunday Times*, 19 November, 2000; "The Grim Ripper—Death Takes a Chunk out of SA Consumer Spending", *Sunday Times Business Times*, 28 January, 2001; and "Aids Halves SA's Population Growth", *Daily Mail & Guardian*, 7 February, 2001 <http://www.mg.co.za/mg/za/news.html>

[18] Charles Ngwena, "HIV in the Workplace: Protecting Rights to Equality and Privacy", (1999) 15 *SAJHR* 513 at 514.

[19] Ibid.

[20] [2000] 12 BLLR 1365. This case is unique and the judgment is deserving of rigorous academic deconstruction because it presented the Constitutional Court with its first opportunity to pronounce upon the treatment of persons living with HIV/AIDS in the South African labour marketplace.

[21] By virtue of s. 167(3)(a) of the Constitution, this court is the highest court in South Africa with respect to all constitutional matters including disputes alleging violations of the Bill of Rights, G. E. Devenish, *A Commentary on the South African Constitution* 1998, Butterworths, 222–226.

[22] The selection process consisted of a pre-screening interview, psychometric tests, a formal interview and a final stage involving role-play.

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was found to be a suitable candidate for employment.[23] However, entitlement to take up the employment was subject to a pre-employment medical examination, which included a blood test for HIV/AIDS. The medical examination found the appellant to be clinically fit and thus suitable for employment but the blood test results showed that he was HIV positive. As a result, the medical report on the appellant was revised to read that he was "H.I.V. positive" and therefore "unsuitable". The appellant was subsequently informed that he could not be employed as a cabin attendant in view of his HIV-positive status. He challenged the constitutionality, and therefore the legality, of this refusal to employ him.

The High Court Proceedings and Decision

Contending that the refusal of SAA to hire him constituted unfair discrimination and thereby violated his constitutional right to equality and human dignity, the appellant sought an order directing SAA to employ him as a cabin attendant. SAA denied the appellant's charge that he had been discriminated against unfairly. It asserted that the exclusion of the appellant from employment was dictated by the airline's employment practice, which required the exclusion of all persons who were HIV positive from employment as cabin attendants. The airline justified its employment practice on safety, medical and operational grounds. According to SAA, in order to be available for world-wide duty and to be able to effectively perform the emergency and safety procedures required in the course of the discharge of their duties, cabin attendants had to be vaccinated against yellow fever[24] and consistently to be in a satisfactory state of medical fitness. In the airline's view, persons who were HIV positive were unemployable as cabin attendants because they were prone to react negatively to the yellow fever vaccine, as well as to be prone to opportunistic diseases such as chronic diarrhoea and pulmonary tuberculosis. SAA also relied on the fact that other major airlines also operated similar employment practices.

The High Court held in favour of SAA and dismissed the appellant's suit.[25] This was based primarily on two critical findings of fact: (a) that the commercial operation of SAA and its public perception would be undermined if its employment practices did not promote the health and safety of the crew and passengers; and (b) that the ability of SAA to compete in the airline industry would be undermined if it were obliged to appoint HIV-infected persons as cabin attendants.[26] Accordingly, the court concluded that HIV-negative status was, at least for the moment, an inherent requirement for the job of cabin attendant and that, therefore, the appellant had not been unfairly discriminated against.[27]

There was unanimity amongst the medical experts, including the expert retained by SAA, that only one category of persons living with HIV/AIDS is unsuitable for employment as a cabin attendant. That category consists of those

[23] No evidence was adduced by SAA to the effect either that there were fewer than 12 vacant cabin attendant positions at the time the 12 individuals were selected for employment, or that the individuals selected still had to go through some further selection process to determine who amongst them were to fill the available positions.
[24] This is dictated by Guidelines issued by the National Department of Health.
[25] 2000 (2) SA 628 (W).
[26] Ibid., at paras. 26–28.
[27] Ibid., at para. 29.

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persons whose infection has reached the immunosuppression stage[28] and whose essential white blood cell[29] count has dropped below 300 cells per microlitre of blood. The unemployability of such persons as cabin attendants is, according to the evidence, due to two factors. First, these persons cannot be safely vaccinated against yellow fever because of their propensity to react negatively to the vaccine, and without the vaccination, they could not be available for world-wide duty, a requirement of all cabin attendant appointees. Second, this category of persons living with HIV/AIDS is prone to opportunistic diseases which are certain to affect their physical fitness in a manner rendering them incapable of performing some of the critical tasks of a cabin attendant. More specifically though, the medical evidence also showed that at the time of his medical examination, the appellant's infection had not progressed to the point where he could be placed in the above category. Furthermore, SAA did not test cabin attendants already in its employ for HIV/AIDS, and it permitted them to continue with their duties irrespective of how far their infection may have progressed.[30]

It followed, then, that the factual conclusion of the High Court that HIV-negative status was an inherent job requirement for a cabin attendant was not supported by the medical evidence proffered by the parties and admitted by the Court. Indeed, so great was the gulf between the medical evidence and the factual, as well as legal, conclusions reached by the High Court that SAA conceded very early in the appellate proceedings that its policy of excluding all prospective employees living with HIV/AIDS from employment as cabin attendants could not be justified on medical grounds.[31]

The Appellate Decision

The Constitutional Court took the view that it was manifestly unfair to subject the appellant to a policy that excluded all persons living with HIV/AIDS from employment as cabin attendants, irrespective of their medical condition which, as conceded by SAA, might not render such a person unsuitable for employment in that position. According to the Court, such discrimination, which was premised on prejudice and unfounded assumptions, was repugnant to the letter and spirit of the South African constitution.[32] In conclusion, the Court held that the denial of employment to the appellant because he was living with HIV impaired his dignity and constituted unfair discrimination. Accordingly, his right to equality guaranteed by section 9 of the Constitution had been violated. The Court granted the appellant the order of instatement which he sought, thereby compelling SAA to employ him as a cabin attendant.[33] The reasons why the Court considered

[28] This, according to the medical evidence, is the third of the four stages in the progression of HIV infection, at which the individual's body is unable to replenish the vast number of essential white blood cells that are destroyed by the actively replicating virus.

[29] These cells play an essential part in the proper functioning of the human immune system.

[30] Also, a person who applied within the "window period" during which the HIV infection cannot be detected would be appointed if found suitable. See above, n. 20, at 1366.

[31] *Hoffman* v. *SAA*, paras. 16 and 30.

[32] Ibid., at para. 32.

[33] Section 38 of the Constitution provides that "the court may grant appropriate relief" where a right contained in the Bill of Rights has been infringed. According to the Constitutional Court, "appropriate relief" must be a remedy that is fair and just in the circumstances of the particular case and, in making that determination, a court must undertake a balancing of the various interests that might be affected by the remedy. That balancing process should be guided by four objectives: (a) to address the wrong occasioned by the infringement of the constitutional right; (b) to deter future

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instatement as the most appropriate relief in the circumstances of this case were three-fold.[34] First, such an order is a basic element of the appropriate relief in the case of a prospective employee denied employment on grounds outlawed by the constitution. Second, instatement as a remedy strikes effectively at the source of the unfair discrimination. Finally, such an order is an expression of the general rule that where a wrong has been committed, the aggrieved person should, as far as is possible, be placed in a position identical to that in which he/she would have been but for the wrong suffered.

In terms of its scrutiny of the High Court decision, the Constitutional Court conceded that commercial requirements are and should remain an important consideration in determining the employability of an individual. However, the Court took the view that it was the responsibility of the South African judiciary, in interpreting and enforcing the equality clause, to strike down stereotyping and prejudice where they masqueraded as measures designed *bona fide* for the protection of legitimate commercial interests. According to the Court:

> "the *greater interests of society* require the recognition of the inherent dignity of every human being, and the elimination of all forms of discrimination."[35] [Emphasis added.]

The Court further indicated that even if it was true that an employer's commercial interests stood to suffer as a result of a widespread negative public perception of persons living with HIV/AIDS, that employer was still prohibited from excluding such persons from any part of its work force except those for which they have been proven to be unsuitable by incontrovertible medical evidence.[36] In other words, even where an employer's business enterprise faces certain demise as a result of the inevitable withdrawal of patronage by members of the public in reaction to the hiring of HIV-positive employees, that employer remains under a legal obligation to hire and retain such employees as long as the relevant public or client perception is founded on prejudice and/or hysteria about HIV/AIDS rather than upon current medical knowledge.

In the same vein, the Constitutional Court held that the constitutional right of prospective applicants for employment in the South African aviation industry not to be unfairly discriminated against could not be dictated or constricted by the policies of foreign airlines or commercial entities not subject to the South African Constitution. This was the Court's reaction to the argument of SAA, accepted by the High Court, that its foreign airline competitors strictly abide by an identical hiring policy with particular respect to cabin attendants. It follows that in the Court's view, even if compliance with the onerous obligations of the equality clause meant that a South African commercial entity, involved in a global industry, may suffer significant competitive/commercial disadvantage as

violations; (c) to make an order that can be complied with; and (d) to ensure fairness to all those who might be affected by the relief. Ibid., at paras. 43 and 45.

[34] Ibid., at para. 50.

[35] Ibid., at para. 34. The Court's decision is, in this respect, salutary for it reveals ample recognition of the fact that the Constitution and its underlying values and principles envisage a community zealous in its commitment to ensuring "equality of participation in the social, economic and political fabric of society". Davis, above, n. 11, at 72.

[36] *Hoffman* v. *SAA*, at para. 36.

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a result, that entity remains constitutionally bound not to discriminate in its employment policies.[37]

There are a number of pertinent observations that must be made here. First, the Court's reasoning appears to have proceeded on the basis of a recognition that there is a real risk of the judiciary upholding hiring decisions based on stereotyping and prejudice where, as in the present case, a judicial tribunal is invited and urged to adopt a robust and generous conception of legitimate commercial requirements supposedly unique to the circumstances of the defendant employer. In the Court's clearly apparent view, such a risk is not to be countenanced. Accordingly, legitimate commercial requirements will, in the Court's view, only suffice as justification for discrimination against HIV-positive employment applicants where there is credible, compelling and irrefutable evidence demonstrating with certainty that a decision to hire such an applicant will be incompatible with the continued prosperity of the employer. In other words, mere anecdotal evidence, as was presented by SAA in the present case, will not suffice. It is submitted that in practical terms, the Constitutional Court has, through the decision under review, introduced into South African employment law a burden of proof that will be almost impossible to meet by those employers refusing to hire HIV-positive persons on the basis of the dictates of commercial interests or unique operational requirements.

Second, the Court's decision revealed a clear mistrust of employer claims that legitimate commercial requirements may in fact constrain them from hiring persons living with HIV/AIDS. In reaching a decision founded in part on that distrust, the Court has, albeit tacitly, enjoined lower courts to subject such claims to the most rigorous judicial scrutiny. In the Court's reasoning, primacy must be given to the goal of protecting HIV-positive persons from prejudice and stereotyping and preserving their fundamental right to be judged on their merits.[38] According to the Court, in the unique context of South Africa where (a) widespread ignorance about HIV/AIDS has produced considerable hysteria, and (b) the people have only recently been liberated from institutionalized prejudice, protecting an employer's commercial interests is not a sufficient rationale for discriminating against an HIV-positive applicant.[39]

Third, the view articulated by the Constitutional Court in the *Hoffman Case* can be properly construed as an authoritative judicial statement that South Africa's national policy is and should be that prejudice and stereotyping are to be prevented at all cost, even in the context of the employment decision-making process. According to the Court, "SAA, as a state organ that has a constitutional duty to uphold the constitution", may not avoid that duty by bowing to prejudice and stereotyping.[40] Given that subsection 9(4) of the equality clause clearly postulates that the duty not to discriminate is borne by all natural and juristic

[37] In this respect, the message effectively sent out by the Constitutional Court judges to the managements of South African Airlines and other companies is that even where non-discrimination against HIV-positive prospective employment applicants may be self-destructive because market forces dictate otherwise, employers must proceed to act as such or face the full wrath of the law.

[38] *Hoffman* v. *SAA*, at para. 35.

[39] It is submitted that in terms of the construction of a hierarchy of values in the interpretation and determination of the fairness of employment discrimination, the Constitutional Court in the decision under review expressed, albeit unequivocally, preference for subjugating the value of promoting and protecting the commercial interests of employers to that of protecting the individual's right to be free from any form of unfair labour market discrimination.

[40] *Hoffman* v. *SAA*, at para. 37.

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persons resident in South Africa,[41] it is submitted that the decision under review is authority for the principle that no private individual or corporate employer in South Africa may, in its hiring decisions involving persons living with HIV/AIDS, respond to market or competitive pressures in a manner indicating that it has succumbed to prejudice and stereotyping.[42] To be sure, the uncompromising language of the Constitutional Court's decision effectively forbids employment discrimination against such persons even in those cases where cogent and compelling financial or commercial considerations suggest the need for some legal tolerance of prejudice and stereotyping in their most benign form exclusively for the purpose of promoting the economic interest and wellbeing of the society. The court's uncompromising and near-absolutist position was informed by its view that direct or indirect tolerance of prejudice must be taken as anathema if South Africa as a nation is to achieve the goal of equality entrenched in its constitution.[43]

Fourth, the Constitutional Court was, unlike the High Court, influenced by the sense that (a) HIV-positive persons in South Africa have been the subject of intense prejudice from the general population; and (b) given that they constitute a significant minority, these persons make up one of the most vulnerable groups in the South African society. These sentiments provided the basis for the Court's conclusion that any discrimination against persons living with HIV/AIDS can be interpreted as a "fresh instance of stigmatization" and therefore an assault on their dignity.[44]

Finally, bearing in mind that the Constitutional Court found the medical evidence most compelling and based its decision on the factual conclusion that the appellant was not physically unsuitable for employment as a cabin attendant, it becomes imperative that the Court's decision in *Hoffman* v. *SAA* be construed as allowing employers in SAA's position to do at least two things. First, they are entitled as a matter of legal principle to closely monitor HIV-positive employees, both old and new, in terms of their physical fitness and job performance. Second, the employer is entitled to re-deploy or even dismiss such an employee as soon as his/her HIV infection progresses to the point where he/she becomes medically incapable of meeting the inherent requirements of the job.[45] In other words, in the design and implementation of their performance-monitoring systems, a South African employer can set up a regime that treats HIV-positive employees differently by, for example, requiring them to make themselves available for blood and medical/physical fitness testing at pre-determined intervals without subjecting HIV-negative employees to the same requirement. Although such differential treatment appears *prima facie* pejorative and contrary to the protection

[41] Kentridge, above, n. 11, at 14–15.

[42] This is also consistent with s. 8(2) of the Constitution, which specifically provides that the provisions of the Bill of Rights are binding on natural as well as juristic persons where and to the extent applicable. The decision is the clearest indication thus far that private employers' power to hire and fire their employees is subject to the discipline of the Bill of Rights.

[43] *Hoffman* v. *SAA*, at para. 37.

[44] Ibid., at para. 28.

[45] For example, in the case of HIV-positive flight cabin attendants such as the appellant, the progression of the employee's infection through the third and fourth stages of the disease will and should be of special interest to the employer. This is because, according to current medical knowledge and evidence, the incapacity of the employee to be vaccinated against yellow fever and his/her vulnerability to opportunistic diseases will set in from the latter part of the infection's third stage. Certainly at that point it cannot be fairly suggested that an HIV-positive airline cabin attendant is still suitable for employment in that capacity.

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of the fundamental dignity of HIV-positive employees, it should survive judicial scrutiny because, as part of an employer's human resource management system,[46] it is based on sound and overwhelming medical knowledge and evidence and upon the sound commercial sense of ensuring that employees only remain at duty posts for which they have continuing employment suitability.[47] To that extent, such differential treatment is neither arbitrary nor inimical to the values of society but is rather sanctioned by social norms of fairness.[48]

Concluding Remarks

The equality clause of the South African Constitution was conceived as the bridge between a past characterized by legally institutionalized racial prejudice and a future in which all members of society will be accorded treatment consistent with their fundamental dignity as individuals, not as a favour but in compliance with clearly specified and readily enforceable dictates of the law. The immense socio-political importance of the basic values of unwavering respect for human dignity, fairness, substantive equality, non-discrimination and egalitarianism upon which the content of the equality clause is founded is the source of what can now be described as a judicial predisposition to strike down, as unconstitutional and therefore illegal, any law, decision, policy or practice wherever it can be credibly shown to be an instance of direct or indirect discrimination[49] against a person or group of persons without any compelling justification. Beyond becoming the latest expression of that unmistakable predisposition, the Constitutional Court's decision in *Hoffman* v. *SAA* demonstrates the Court's uncompromising fidelity to the said underlying values. Most importantly, it constitutes perhaps the first authoritative judicial indication that the non-discrimination and substantive equality dictates of the South African Bill of Rights will be construed and

[46] In the unique South and Southern African context in which the problem of HIV/AIDS has reached pandemic proportions, a robust and aggressive HIV-positive employee-monitoring regime may be critical to the preservation of some employers' commercial interests in the long term. The crucial and immense value of such a regime lies in the real possibility that it will make available employee health-status information on the basis of which the employer can effectively design and implement interventionist measures or strategies aimed at: (a) managing the health of HIV-positive employees in the best way possible, and thus elongating their working life to maximize the employers' return on their investment in the training of such employees; (b) recruitment and training of employment applicants who will be required to take the place of the HIV-positive employees at the end of the latter's working life; and (c) protect the health and safety interests of those members of the public who, in the course of patronizing the employer's business, may be served by HIV-positive employees.

[47] This is as distinct from an employee performance-monitoring system whose negative differential treatment of HIV-positive employees relative to their HIV-negative counterparts is founded on prejudice and stereotyping. *Kadiaka* v. *Amalgamated Beverage Industries* (1999) 8 LC 6.12.1; and Du Toit *et al.*, above, n. 10, at 434–442.

[48] Ibid. The employer will, however, need to be extremely careful in the design and implementation of the performance-monitoring system, especially in fixing the time periods/intervals that must elapse between the blood and medical fitness tests. Such caution will have to be exercised in ensuring that all the elements of the system, and the demands made on each HIV-positive employee, are based on credible medical evidence and are not in excess of the precautionary measures implicitly suggested by that evidence and the related medical knowledge as well as the operational requirements of the employer. Where such foundation is lacking or where such excess is present, the performance-monitoring system can be successfully impugned on the grounds that it is laden with a fatal element of arbitrariness and is largely informed by prejudice about the medical fitness of persons living with HIV/AIDS.

[49] For a concise and excellent discussion of what constitutes direct and indirect discrimination, see J. Kentridge, above, n. 11, at 14–22 et seq.

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enforced with the same rigour even in circumstances where economic and commercial imperatives might suggest otherwise.

However, from a commercial lawyer's perspective, the Constitutional Court's decision demonstrates a disturbing insensitivity to the commercial interests as well as the constitutional property and economic rights of South African employers. In that respect, the decision reveals a desperate need for a cautious balancing of rights and interests in the interpretation of the South African Bill of Rights. More specifically, the Constitutional Court must resist the temptation to stretch the obligations created by the equality clause in a way that is fundamentally harmful to the new South Africa.[50] While it is trite that such a clause can have no credibility and value as an instrument of social transformation unless it is purposively interpreted as having social and legal disadvantage and vulnerability as its targets, it is submitted that, at least on a literal reading of *Hoffman* v. *SAA*, the need for a cautious balancing of the relevant rights and interests is being overlooked in the emerging equality jurisprudence.

Furthermore, there is at least one other perspective from which the appellate judgment in *Hoffman* v. *SAA* may be said to be inconsistent with the best national interests of South Africa. Medical and public health management experts are unanimous in their view that the HIV/AIDS scourge afflicting South Africa will only be brought under control if there is a significant change in the sexual behavioural patterns currently prevalent within the populace.[51] A legal regime that contemplates and sanctions some negative differentiation between HIV-positive and HIV-negative employees and employment applicants[52] creates, albeit indirectly, a strong incentive for sexually responsible behaviour.[53] Such a regime would then become a critical and essential part of the nation's weaponry in the fight against HIV/AIDS, which South Africa cannot afford to lose. From a public health management policy perspective therefore, the wisdom of employment equity jurisprudence that is absolutely uncompromising in its demand for identical treatment of all employees and employment applicants, irrespective of their HIV status, is questionable. Indeed, it is plausible to suggest that the judgment under review is indicative of a clear judicial inclination to trade off economic prosperity for a strong human rights culture. In a society that faces daunting economic and public health challenges, it is doubtful whether that inclination represents a rational social choice.

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[50] It was on this premise that the South African Labour Appeals Court recently upheld an employer's decision not to offer permanent appointment to a pregnant female applicant who had earlier been found to be so appointable by the employer while unaware of the fact of her pregnancy. *Woolworths (Pty) Ltd* v. *Whitehead* (2000) 21 *ILJ* 571 (LAC).

[51] A. Hunter and C. Sunter, *AIDS—The Challenge for South Africa*, Human & Rousseau Tafelberg, 2000, 137–141; C. Ngwena, "Legal Responses to AIDS: South Africa" in *Legal Responses to AIDS in Comparative Perspective*, (ed.) S. Frankowski, Kluwer Law International, 1998, 166; and M. Galloway, "High Level of Knowledge but Low Behaviour change", (1999) 8 *AIDS Bulletin*, 28.

[52] Such a regime would feature employment jurisprudence that, *inter alia*, indicates a judicial disposition to consistently adopt a robust and generous interpretation of those concepts/considerations, such as that of the "inherent requirement of a job", on the basis of which negative differential treatment of persons is permissible in the new South Africa.

[53] The result of the inevitable rational response to the availability of that incentive will be a stemming of the tide of HIV infections in South Africa, now desperately sought by the health authorities at all levels of government.

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