

**Nanditume v Minister of Defence
(2002) AHRLR (NaLC 2000)**

Nanditume v Minister of Defence
Labour Court, 10 May 2000
Judge: Levy
Previously reported: 2000 NR 103

Equality, non-discrimination (discrimination on the grounds of HIV status, 23, 37, 38)
Work (employment discrimination, 28, 37)

Levy AJ

[1.] In this matter the applicant is represented by Mr DF Smuts assisted by Ms MJ Figueira, while respondent is represented by Mr TJ Frank SC.

[2.] The issue raised in this application is whether the exclusion on the grounds of HIV status alone of a prospective applicant for enlistment in the Namibian Defence Force (hereafter NDF) constitutes unfair discrimination as contemplated in section 107 of the Labour Act (Act 6, 1992).

[3.] On 12 September 1997, by way of notice of motion supported by a solitary affidavit, applicant applied to court for an order:

- (1) Directing that respondent discontinue discriminating against the applicant on the grounds of being HIV positive in respect of his application for enlistment in the Namibian Defence Force (hereafter NDF);
- (2) Directing respondent to process applicant's application for enlistment in the NDF, without having regard to the applicant's HIV status;
- (3) Granting to the applicant such further and/or alternative relief as this Honourable Court deems fit.

[4.] The solitary affidavit referred to above was attested by applicant himself and annexed to his affidavit were certain relevant documents to which I shall at a later stage refer.

[5.] The respondent opposed the application and filed an answering affidavit made by Mr Erastus Negonga, the Permanent Secretary in the Ministry of Defence. The defence also filed a solitary affidavit. The applicant replied to this and he annexed an affidavit by Dr Malcolm Steinberg MB ChB (Wits), MSc Epidemiology (London), and with extensive qualifications in the field of human immunodeficiency (hereafter HIV and Public Health).

[6.] When the case was called on 26 October 1998, the court, appreciating the magnitude of the issues involved, referred the matter for the hearing of oral evidence (such evidence to include the evidence of persons who had not made affidavits), provided written statements of the evidence which they intended to give, were served on the respective litigants. The court also ordered discovery. It is necessary to refer specifically to paragraphs 1 and 2 of the aforesaid order of court. They are as follows:

- (1) The application is referred for the hearing of oral evidence on a date and time to be arranged with the registrar of this Court, on the question whether the

respondent's exclusion of the applicant from enlistment in the NDF on the grounds of his HIV status alone, is a reasonable criterion as contemplated by s 107(2) of the Labour Act 1992.

(2) The evidence shall be that of any witness that the parties or either of them may elect to call ...

[7.] It will be observed that paragraph 1 of the order of court of 26 October 1998 is not the same as claims 1 and 2 of the notice of motion. Notwithstanding, the explicit terms of the foregoing sub-orders, both counsel informed this court that the mutual intention was not to replace claims 1 and 2 of the original notice of motion. Those claims still remain for decision. The ambit of the inquiry, however, was substantially extended.

[8.] Furthermore, notwithstanding the wording of paragraph 2 of that court's order, this court was still to take into account not only the oral evidence given in court but also the affidavits already filed, save and except that in respect of the written statement of one Alex van den Heever, who did not testify. Therefore only pages 150-4, and pages 178-9 were to be considered. [9.] In consequence of the foregoing, this court had to consider the evidence and affidavits of the following compassionate and learned persons:

On behalf of the applicant:

1. Dr Malcolm Steinberg, MB ChB, MSc Epidemiology (London), Diploma Occupational Health, Managing Director of HIV Management Services (Pty) Ltd, Programme Leader of National AIDS Research Programme, World Bank consultant on AIDS in South Africa, Medical Association of South Africa's HIV Clinical Guidelines Committee.
2. Abduraman Achmat Researcher in the Active AIDS Law Project in South Africa.
3. The applicant's affidavits. He did not testify orally.

On behalf of respondent:

1. Dr Clive Evian, MB ChB, MSc (Community Health), Director and Consultant of HIV/AIDS, Director of Aids Consulting Unit for Alexander Forbes, Director of City of Johannesburg AIDS Programme.
2. Mr Charles Murray Harebottle, BSc Eng (Mech), MSc Eng (Ind), Henly Graduate Management Diploma, Corporate Management Consultant of Business and Practice Development. Involved in strategic response programmes to deal with HIV/AIDS.
3. Major Freddie Maiba, Namibian Defence Force, Operations Division and in charge of Policy and Planning. Formerly Military Engineer Instructor, Intelligence Physical Training Instructor, Intelligence Research Officer, Tactical Training Instructor. Has attended several courses in foreign countries.
4. Colonel Jakobus Johannes Crouse, B Com LLB, SANDF officer specialising in medical legal sphere of SANDF, particularly HIV/AIDS epidemic in South Africa; active in programmes to combat HIV/AIDS epidemic.
5. Mr Erastus Negonga, Permanent Secretary, Ministry of Defence, who made the opposing affidavit, but did not testify orally.

Mr Alex van den Heever, a health economist, manager of Gauteng Health Department, MSc Econ (UCT), and experienced researcher in respect of HIV/AIDS economics, did not give oral evidence but relevant parts of his written and supplementary statements were referred to.

[10.] It is common cause between the litigating parties that human immunodeficiency virus (HIV) is a condition found in some human beings which predisposes a person with HIV to, and culminates in, acquired immunodeficiency syndrome, AIDS, within a period, on average of approximately 8 to 12 years. AIDS, however, is not a single

disease but a collection of illnesses which affect people infected with HIV. Infection with the HIV virus initiates a process which causes a slow, steady destruction of those cells known as CD4 T-Lymphocytes. These cells, according to the medical evidence, are an important component of the human immune system, which becomes progressively weaker, destroying the body's ability to fight infections and certain cancers. When the CD4 T-Lymphocytes cell count has been severely depleted, the immune system becomes so weak that the body succumbs to certain infections and cancers. Collectively these are called 'opportunistic diseases'. When this occurs the person is said to have AIDS.

[11.] If a person tests HIV positive, it does not mean that such person has AIDS, nor does it mean that such person is ill, nor that such person will become ill soon. It may take several years, on average 8 to 12 years, for the HIV to damage the immune system so much that the person can be said to be ill. Furthermore, it may take one and a half to two months after being infected with HIV for there to be signs that an infected person has in fact become HIV positive. This is known as the 'window period'. Therefore a blood test which indicates that a person is HIV positive is not an indication of that person's health on that date, while a person who tests negative may nevertheless be HIV positive. Two other tests are necessary to determine whether an HIV-positive person is ill. The first is to ascertain the infected person's CD4 count. This is measured as the number of cells per cubic millimetre of blood and indicates the degree of damage to the immune system. The lower the CD4 count, the more damaged the immune system is. CD4 counts below 200 cubic millimetre are associated with more rapid development of AIDS-related diseases. The second test necessary to ascertain the health of the person who is HIV positive is known as the viral load test. It measures the amount of virus multiplying in the blood at a given time.

[12.] A high viral load indicates high levels of viral infection and a shorter time to the inevitable development of the 'disease'. Obviously some people with HIV have low viral loads and some have high viral loads. A low viral load means a slower rate of disease progression. The experts agreed that a person with a CD4 count below 200 and a viral load in excess of 100 000 would not be fit for military duty.

[13.] There are drugs, that is, medicines and treatment, which help to delay the onset and severity of the 'opportunistic infections', that is, AIDS proper. In the long run, however, it is at present an incurable and fatal condition which for convenience is called the 'AIDS disease'.

[14.] In many countries of Africa it has reached epidemic proportions; these include Namibia and the Republic of South Africa, as well as their neighbours. It poses an economic and financial threat to those African states with fragile economies.

[15.] It is a disease which, relatively, has only recently been identified. It is transmitted in only a few ways but largely by a mother who is infected with the disease transmitting it at birth to her baby and predominantly through sexual intimacy between two persons one of whom is infected. It is not transferred via toilet seats or swimming pools or the sharing of food utensils or touching infected persons, nor is it transmitted in urine, faeces or sweat from the body nor in saliva.

[16.] Because of the origins of the disease, the way it is transmitted, and its rampant magnitude, ignorance and prejudice have shrouded all aspects of the disease including its treatment and control.

[17.] Since time immemorial the world has had visitations of plagues and epidemics. But never before has the world been able to face a plague or giant epidemic with the scientific technology which is available today. Never before have commerce and industry rallied to the side of medical research and never before has there been such a

concentrated effort in the social and educational fields to control this plague and, if possible, eliminate it. In the same vein, certain states have legislated or issued guidelines for the implementation of policies to combat the disease or to ameliorate the suffering of those who have it. The United Nations has also made pronouncement in respect thereof.

[18.] In Namibia, the National Defence Force and the Police Force are not excluded from the operation of the Labour Act 1992, the state being regarded as the employer. On 3 April 1998 and in *Government Gazette* no 1835, Namibia issued 'Guidelines for the Implementation of a National Code on HIV/AIDS in Employment'.

[19.] These guidelines are therefore applicable to the NDF but they are only guidelines, and do not have the force of law.

[20.] Clause 6(2)(1) of the 'Guidelines' provides:

Job access:

There should be neither direct nor indirect pre-employment tests for HIV. Employees should be given the normal medical tests of current fitness for work and these tests should not include testing for HIV.

Clause 6(5) provides:

HIV testing or training:

In general, there should be no compulsory HIV testing for training. HIV testing for training should be governed by the principle of non-discrimination between individuals with HIV infection and those without and between HIV/AIDS and other comparable health/medical condition.

Clause 6(6)(2) provides:

Employees with HIV-related illness should have access to medical treatment and should be entitled, without discrimination, to agreed existing sick leave provisions.

Clause 6(6)(3) provides that HIV-infected employees should work under normal conditions so long as they are fit to do so and if they can no longer do so, they should be offered alternative employment 'without prejudice to their benefits'.

[21.] While the foregoing guidelines may well be implemented in certain instances, in others they could be economically impossible. As far as the military is concerned section 65(2) of the Defence Act (Act 44 of 1957) requires recruits to undergo a medical examination.

[22.] Mr Negonga lists some of the diseases for which recruits are examined. Any medical examination of a recruit must be fully carried out. In the light of what has been said above, if the test is to ascertain whether a recruit is fit for military service, an HIV test only will not achieve this purpose. In addition to the HIV test, there must be a CD4 count test and a viral load test. If the military does not and will not do these latter two tests then the HIV test should also be abandoned. It will not achieve the purpose for which medical examinations are held.

[23.] In the supporting affidavit to his notice of motion the applicant said that he had been a former plan combatant and a member of SWAPO's National Liberation Struggle in exile from 1976 to 1989, and while in exile had undergone military training at Thobias Hainyeko Training Centre. In September 1996, he sought enlistment in the Namibian Defence Force. On 11 September 1996 applicant went to the Oshakati State Hospital, where blood was taken for the purposes of an HIV test. The results of the test were sent to the Okahandja base of the NDF. On 26 September 1996, at the Okahandja base, applicant was informed by Dr Shaenda, a medical officer in the NDF, that he had tested positive, and that because he was HIV positive, he would not be accepted by the NDF.

[24.] In his affidavit applicant asserted that, except for being HIV positive, he was in

sound health, and in proof thereof he annexed to his affidavit a medical report made and signed by a district surgeon or medical officer of the state. From this it appears that applicant was at that date in good and sound health. It is apparent from this comprehensive medical report that applicant had a thorough clinical examination. At the foot of this medical report, the following question is posed to the doctor:

Do you consider that the applicant is in good health and free from any physical or mental defect, disease, or infirmity which should be likely to interfere with the proper performance of duty as a 'Government Service Official in any part of South West Africa?' (For South West Africa read Namibia.)

To this question, the medical officer replied in the affirmative and signed and dated the medical report 31 October 1996, that is, approximately one month after the applicant, to the knowledge of respondent, had tested positive for HIV.

[25.] It is therefore abundantly clear that the sole and only ground for refusing to enlist applicant as a member of the NDF was because he was HIV positive and that he was, nevertheless, at that time fit and able to perform the usual duties and functions in the NDF.

[26.] It is furthermore relevant to observe that it was respondent's doctor, acting in the course and scope of his duties, who certified that applicant was in sound and good health and capable of performing his duties anywhere in Namibia.

[27.] Applicant avers in his supporting affidavit that the conduct of the NDF in refusing to enlist him solely on the basis of his HIV status constitutes discrimination in an unfair manner as contemplated by section 107 of the Labour Act, given his ability and capacity to do the duties as an NDF member. In the alternative, applicant says he was discriminated against on the impermissible ground of disability, by the respondent in conflict with section 107 of the Act.

[28.] At this stage, it is necessary to consider the provisions of section 107 of the Labour Act, as far as it is relevant hereto. Section 107(1) provides:

Subject to the provisions of section 106 and subsection (2) of this section, if, upon an application made to the Labour Court in accordance with the provisions of part IV by any person, the Labour Court is satisfied (a) that any person has discriminated or is about to discriminate in an unfair manner or is so discriminating against him on the grounds of his ... disability, in relation to his employment ... the Labour Court may - (i) issue an order in terms of which such person is ordered - (aa) in the case of continuing acts of unfair discrimination ... to discontinue any such acts as may be specified ... (bb) to perform or to refrain from performing any act specified ... (ii) make any such other order as the circumstance may require.

[29.] The respondent originally filed only an affidavit made by Mr Erastus Negonga, the Permanent Secretary for the Ministry of Defence.

[30.] Mr Negonga admits that the applicant was rejected solely on the grounds that he tested positive for HIV, but denies that this is discrimination in an 'unfair manner'.

[31.] It is common cause that there are military personnel in the NDF who are HIV positive. When the NDF was established there was no testing for HIV and personnel who were HIV positive may have been recruited. Furthermore, Mr Negonga says in his affidavit that 'military personnel are a population group notably at risk for developing and transmitting sexually transmitted diseases (STD) including HIV'.

[32.] Consequently, certain personnel may well have acquired HIV subsequent to enlistment. Mr Negonga does not state how many HIV-positive persons are in the NDF, but it appears from his own affidavit that the numbers are not small. Mr Negonga sets out in considerable detail the humane way persons who suffer from HIV and AIDS are treated in the military. He says that when a member of the NDF is diagnosed as HIV

positive or with AIDS, the NDF accepts responsibility and follows a 'policy of non-discrimination as far as possible'. It disciplines persons who discriminate against HIV/AIDS personnel and where necessary deploys infected personnel to other positions 'where they run less risk of the process accelerating' but, this, he says, means 'rearranging personnel in the NDF. Such people are permitted to attend clinics and they receive "immune boosters" and hospitalization if necessary. They and their families receive counselling.' It is apparent therefore from the affidavit of Mr Negonga that the NDF has a large number of personnel who are infected with HIV/AIDS and that the NDF is geared to cope with these. The NDF is therefore complying with the clauses 6(6)(2) and 6(6)(3) of the Guidelines for Implementation of a National Code for HIV/AIDS and is to be commended for doing that.

[33.] The applicant annexed to his supporting affidavit a reference from the Secretary General of Swapo which relates and confirms that the applicant was in the party's National Liberation Struggle from 1976 to 1989 and that he underwent military training at Tobias Hainyeko Training Centre. The Secretary recommends him as an 'employee'. If this is read with the medical report of 31 October 1996 that he is fit to do duty anywhere in Namibia, the refusal to enlist him constitutes discrimination particularly as there are in the ranks of the NDF persons who are HIV positive and in some of these persons the disease has progressed to the extent that the persons concerned have been 'deployed to other positions where they run less risk of the process accelerating'.

[34.] Furthermore, the cost factor does not arise. The 'Guidelines' enjoin employers to pay for medication and, according to Mr Negonga, if the necessity for medical treatment arises the machinery for doing so is already in place.

[35.] Apparently because of the large numbers of persons in the military who are HIV positive, Dr Clive Evian, who was called by respondent to testify, conceded that an HIV test not followed by a CD4 and viral load test before enlistment cannot be justified on the basis of keeping 'the military an aids-free workplace'.

[36.] The case for applicant in this regard was considerably strengthened when Major Maiba, testifying for respondent, said that personnel in the military, although it is a high risk environment, are not tested for HIV once they have enlisted. This applies even if they are selected to leave Namibia for peacekeeping operations in other countries in breach of a specific request made by the United Nations.

[37.] By reason of the foregoing, I find that the exclusion of applicant from the military, solely because he was found to be HIV positive, constituted in September 1996, discrimination in an unfair manner, in breach of section 107 of the Labour Act.

[38.] The act of unfair discrimination occurred in September 1996, that is approximately four years ago. I repeat what I have said previously. The medical experts who testified agreed that an HIV-positive person can be as fit and as healthy as any other normal person in similar circumstances, but as that person's CD4 count decreases and the viral load increases, such person's well-being progressively deteriorates. Clinically, as soon as the CD4 drops below 200 such person is said to suffer from AIDS. A combination of these two indicators can serve as a prognosis as to the time period that will elapse before a person will suffer from AIDS proper. The two medical experts were in agreement that a person with a CD4 count below 200 and a viral load in excess of 100 000 would probably be incapable of participating in the strenuous and exacting work as required in the fighting units of the military. Common sense tells one that the different departments or divisions or categories or branches of the military have different degrees of stress, physical and mental, and this is confirmed by Mr Negonga in his affidavit where he says HIV-positive personnel are

transferred to such departments. Major Maiba says at present no one is allocated to a particular department or activity when such person enlists. This only happens, he says, after everyone has done his or her basic training. The Major says this basic training is strenuous. Both medical experts were of the opinion that a person who contracts HIV is fit and healthy for several years and that the training routine would not be to his or her detriment. Dr Steinberg in fact said that regular exercise would be to such persons' benefit. This, however, depends on the progress of the 'disease' in later years. It is therefore essential that the date when the HIV virus is contracted be established as accurately and as soon as possible. In this regard the cooperation and good faith of the recruit is essential. A comprehensive and proper test after basic training will enable the military authorities to place an HIV-infected person in a suitable department of the NDF.

[39.] In the instant case, the applicant was not frank with the court. He was diagnosed in September 1996 as being HIV positive, but he did not inform the court when he thought he may have contracted the condition. If he had contracted it four or five years prior to September 1996, to grant an order that respondent enlist him now could be saddling the respondent with a recruit who could not do the basic training nor any of the duties which may arise in the military. Applicant must therefore be prepared to subject himself to the CD4 test and to the viral load test.

[40.] The order of the court therefore is:

(1) Respondent shall enlist applicant in the NDF should applicant re-apply for enlistment, provided the applicant's CD4 count is not below 200 and his viral load is not above 100 000.

(2) The medical examination to which respondent is obliged to subject applicants shall include an HIV test together with a CD4 count test and a viral load test and no person may be excluded from enlistment into the NDF solely on the basis of such person's HIV status where such person is otherwise fit and healthy unless such person's CD4 count is below 200 and his viral load is above 100 000.