

**PROTECTING EMPLOYEES LIVING WITH HIV/AIDS
IN THE WORKPLACE: A COMPARATIVE STUDY**

BY

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Laws (LLM)

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DECLARATION

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I acknowledge that I have read and understood the University's policies and rules applicable to postgraduate research, and I certify that I have, to the best of my knowledge and belief, complied with their requirements.

In particular, I confirm that I had obtained an ethical clearance certificate for my research (Certificate Number UZREC 171110-030 PGM 2012/3) and that I have complied with the conditions set out in that certificate.

I further certify I further certify that this dissertation is original, and that the material has not been published elsewhere, or submitted, either in whole or in part, for a degree at this or any other university.

I declare that this dissertation is, save for the supervisory guidance received the product of my own work and effort. I have, to the best of my knowledge and belief, complied with the University's Plagiarism Policy and acknowledged all sources of information in line with normal academic conventions.

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DEDICATION

To my parents and husband

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A lot of effort has gone into the writing of this dissertation. The many months of conceptualisation, thought and writing cannot be without sacrifice, not only on my part but also on the part of other persons. Firstly, I would like to thank Professor Desan Iyer, my supervisor, for providing the constant guidance and criticism that has shaped this dissertation into its current state.

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ABSTRACT

This dissertation takes its focus from the plight of millions of South Africans living with HIV/AIDS. The disease predominantly affects adults of a working age resulting in direct impact on the workforce. Protecting the HIV/AIDS positive worker is crucial to ensuring a harmonious working environment, limiting new infections and curbing pre-existing infections.

The focus of this study was to investigate the degree of protection or lack thereof extended to HIV/AIDS positive employees in the workplace. In an effort to analyse and explore the possible remedies available to HIV infected employees, it was necessary to conduct a comparative analysis between other international jurisdictions such as the United States of America and Australia. It was concerning to note that despite statutory and common law demands on employers to provide a safe working environment, there appears to be an increase in the number of HIV/AIDS occupational transmission cases worldwide. In an effort to address such challenges, specifically in South Africa, the researcher investigated the possibility of incorporating the doctrine of vicarious liability into the South African legal system more so against the backdrop of existing legislation in the form of Section 35(1) of the Compensation for Occupational Injuries and Diseases Act.

Investigations pertaining to the protection of employees took place through a comprehensive analysis at pre-employment, continued employment and dismissal stages. This was achieved through thorough review of literature, legislation, case laws, journal articles, reviews and gazetted articles both nationally and internationally.

A critical analysis of the existing legislation in South Africa purporting to protect HIV infected employees in the workplace suggests the need to move towards a progressive legal framework which incorporates a wider range of remedies available to the employee. The incorporation of the doctrine of vicarious liability into our legal system in future may be the solution to advancing the current legal framework and adequately addressing the plight of HIV positive employees. Its success would depend on certain factors being met, such as dual capacity being established and limitation to strict liability

cases. Such a progressive framework will hold employers responsible for failure to implement safety measures in respect of occupational exposure at the workplace, and allow for aggrieved employees to choose the mode in which they wish to claim compensation, allowing for a wider range of remedies in line their democratic right to freedom of choice.

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CHAPTER 1

TOPICAL ISSUES

1.1 Introduction

Since the beginning of the HIV epidemic, more than sixty million people have contracted HIV¹ and nearly thirty million deaths have been attributed to HIV-related causes.² Currently there are thirty-four million people now living with HIV/AIDS,³ of whom twenty-three million five hundred thousand reside in sub-Saharan Africa. The macro-economic effect of HIV in the workplace is substantial. HIV-related absenteeism, loss of productivity and the cost of replacing workers lost to the AIDS pandemic threaten the survival of businesses and industrial sectors in the ever increasing competitive global market.⁴ HIV/AIDS does not only affect impoverished families, communities and a large portion of the urban population, it also affects the workforce base of businesses.⁵ A crucial issue for employers seeking to promote equal opportunity in emerging markets is the question of how to treat employees who are affected by HIV/ AIDS in the workplace. This leads to further questions as to what policies are currently in place to protect vulnerable employees in the workplace and whether such policies are implemented according to international standards. In addressing such questions, my study will also focus on whether South Africa conforms to other international jurisdictions when addressing deficiencies in the legal system when it comes to HIV/AIDS infected employees and the recourses available to such employees for discrimination or occupational exposure in the workplace environment.

A significant cause for concern is the management of occupational exposure to HIV/AIDS. As stated in the American Journal of Medicine,⁶ occupational exposure to HIV/AIDS remains one of the biggest threats in the labour industry. Medical staff was

¹ Statistics: Worldwide *the regional Picture* available at: <http://www.amfar.org> accessed in August 2014.

² Ibid.

³ Ibid.

⁴ For macroeconomic impact on economy see <http://www.un.org> accessed in August 2014.

⁵ Ibid.

⁶ Carol M Mangione, Louise J Gerberding and Steven R Cummings *Occupational exposure to HIV: frequency and rates of underreporting of percutaneous and mucocutaneous exposures by medical house staff* American Journal of Medicine Volume 90 (1991) p.85-90.

identified as the most susceptible to exposure.⁷ Statistics of a cross-sectional survey revealed nineteen percent of respondents being accidentally exposed to HIV/AIDS infected blood.⁸ Necessary legal intervention seems necessary in managing occupational exposure to HIV/AIDS. Common law places a duty on an employer to provide safe working conditions for his/her employees.⁹ This duty was explained in the case of *Van Deventer v Workmen's Compensation Commissioner*¹⁰ where the Court held that an employer owes a common law duty to a workman to take reasonable care for his/her safety. Further resonating from this common law duty, employers are statutorily bound to provide a safe working environment free of risk to their employees.¹¹

A failure to adhere to these duties could render an employer liable. Currently, most employees are aware of recourse in terms of the Compensation for Occupational Injuries and the Diseases Act,¹² but most remain unaware of their right to claim through civil avenues. Notwithstanding the direct liability that may accrue to an employer for failure to provide a safe working environment, such employer can further be joined indirectly in an action based on an employee's intentional or negligent harming of another employee. The latter form of joinder, commonly known as the Doctrine of Vicarious liability, is seldom applied in the South African labour industry due largely to the existence of Section 35(1) of the Compensation for Occupational and Injuries and Diseases Act 130 of 1993 (COIDA) commonly referred to as the "Exclusivity Doctrine", which bars employees from claiming from employers for delictual damages arising during the course and scope of employment. The effect of Section 35(1) of COIDA¹³ removes the common law right of an injured employee to claim benefits through

⁷ Carol M Mangione, Louise J Gerberding and Steven R Cummings *Occupational exposure to HIV: frequency and rates of underreporting of percutaneous and mucocutaneous exposures by medical house staff* American Journal of Medicine Volume 90 (1991) p.85-90.

⁸ Ibid.

⁹ Robert Venter, Andrew Levy, Marinda Conradie and Maggie Holtzhausen *Labour Relations in South Africa* (2009) p.177.

¹⁰ *Van Deventer v Workmen's Compensation Commissioner* 1962 (4) All SA 64 (T).

¹¹ S 8 (1) of the Occupational Health and Safety Act 85 of 1993 states "Every employer shall provide and maintain, as far as reasonably practicable, a working environment that is safe and without risk to the health of his employees." S 2(1) and S 5(1) of the Mine Health and Safety Act 29 of 1996 resonate these provisions. Creating the obligation on the employer to provide as far as reasonable practicable, a safe working environment which includes minimising the risk to exposure of HIV infection.

¹² Compensation for Occupational and Injuries and Diseases Act 130 of 1993.

¹³ Compensation for Occupational and Injuries and Diseases Act 130 of 1993.

delictual avenues and compels an employee to address such claims with the Compensation Commissioner. Despite statutory and common law demands on employers to provide a safe working environment, there appears to be an increase in the number of HIV/AIDS occupational transmission cases worldwide. In addition, there appears to be a degree of confusion and ignorance on the part of the HIV infected employees in respect of recourses available to them. The researcher in seeking to provide a clearer framework in dealing with such cases will investigate the adequacy of the current legal framework in South Africa as well as explore the possibility of adopting a vicarious liability approach in future as a possible solution in dealing with the notion of employers escaping liability for third party exposure claims.

1.2 An Overview

This study aims through progressive literal analysis of available literature to investigate the degree of protection offered to HIV/AIDS infected employees within the South African legal system, and expose any deficiencies in the current legal system. The study will commence by providing an overview of HIV/AIDS in an attempt to eliminate any misconceptions surrounding the transmission of the virus. The study will also provide an overview of the effects of HIV/AIDS on the South African labour sector. A global overview of the laws and regulations governing HIV/AIDS will follow. Thereafter a thorough analysis of South African legislation will be conducted, including all relevant Constitutional and labour related legislation. Through this investigative process, it will become necessary to focus on the relevance and applicability of the common law Doctrine of Vicarious Liability in South Africa as a possible future delictual remedy. The restrictions placed on the application of the Doctrine in the form of Section 35(1) of COIDA¹⁴ will be analysed. Finally, a comparative analysis of other jurisdictions, such as Australia and the United States of America which will provide the ideal platform for an in-depth analysis with the South African legal framework. The reason for focusing on USA and Australia was based purely on population density. USA has been deemed the third most densely populated country in the world whereas Australia is one of the least densely populated countries in the world. Based on the inference that South Africa lies

¹⁴ Compensation for Occupational and Injuries and Diseases Act 130 of 1993.

in-between these two jurisdictions in terms of population density, there is a need to compare the respective standards. By focusing on international standards, the researcher will attempt to align South Africa with international best practices. Chapter seven will provide a brief literal review of the Doctrine, its origins, rational and requirements and further look at the practicalities of applying the Doctrine of Vicarious Liability. This study will then conclude by providing a list of recommendations to better manage the protection of HIV positive employees at the workplace.

1.3 Aims and Objectives of the Study

The fundamental aim of this study is to investigate the degree of protection or lack thereof extended to HIV/AIDS positive employees at the workplace. Investigations pertaining to the protection of employees will take place through a comprehensive analysis at pre-employment, continued employment and dismissal stages. The applicability of the Vicarious Liability Doctrine within a South African labour law context will be considered in conjunction with the restrictions placed by COIDA¹⁵. The study also aims to provide adequate understanding of the Doctrine in order to consider its incorporation into our legal system.

1.4 Research Questions

Through examination and investigation of international and national legal frameworks, the following questions will be answered.

To what extent are employees protected from discrimination and occupational exposure in terms of HIV/AIDS labour legislation in South Africa and how do we compare with other jurisdictions?

What are the remedies available to HIV/AIDS infected employees at pre-employment, continued employment and dismissal stages and are these remedies adequate?

¹⁵ Compensation for Occupational and Injuries and Diseases Act 130 of 1993.

1.5 Terminology

Certain terms and concepts need to be defined due to their recurrent usage throughout this study.

Discrimination is defined as the less favourable treatment of an individual attributable to protected characteristics.

Vicarious liability refers to a situation where someone is held responsible for the actions or omissions of another person. In a workplace context, an employer can be liable for the acts or omissions of its employees, provided it can be shown that they took place in the course of their employment.

Occupational exposure occurs during the performance of job duties and may place a worker at risk of infection. Exposure is defined as a percutaneous injury (e.g., needle stick or cut with a sharp object), contact of mucous membranes, or contact of skin (especially when the exposed skin is chapped, abraded, or afflicted with dermatitis or the contact is prolonged or involving an extensive area) with blood or other body fluids to which universal precautions apply.

CHAPTER 2

HIV/AIDS: AN OVERVIEW

In order to understand the severity of the virus being deemed “a global epidemic” it is crucial that the HIV/AIDS virus is understood in its totality. This chapter provides an overview of the HIV/AIDS virus by looking at its effect on the human body, the stages of the virus, the modes of transmission and misconceptions surrounding the virus. This chapter also portrays the seriousness of the virus as a global epidemic by analysing its prevalence and ramifications for the labour industry. This chapter further acknowledges the manifestation of discrimination and the stigmatisation surrounding the HIV/AIDS virus in the labour industry and discusses how to best curb the situation.

2.1 What is HIV/AIDS?

In an effort to better understand the repercussions of HIV/AIDS in the workplace, one needs to first understand the meaning of HIV/AIDS and the ramifications of such a disease. The acronyms HIV/AIDS refer to Human Immuno-deficiency Virus infection and the associated Acquired Immuno Deficiency Syndrome.¹⁶ The disease is acquired and not inherited as often believed. The disease is caused by a virus called the human immuno-deficiency Virus or HIV that enters the body from the outside. Immunity is the body's natural ability to defend itself against infection and disease. A deficiency is a shortcoming - the weakening of the immune system so that it can no longer defend itself against passing infections.¹⁷ A syndrome is a medical term for the collection of specific signs that occur together and are characteristic of a particular condition.¹⁸ HIV is a virus that attacks the body's immune system and progressively inactivates the body's ability to fight infections by debilitating or impairing the immune system's cells.¹⁹ Viruses are

¹⁶ Benjamin F. Neidl 'The Lesser of Two Evils: New York's New HIV and AIDS Partner Notification Law and Why the Right of Notification Must Yield to Public Health' Vol 73 (1999) Michigan: St. John's Law Review Association, p.23. According to the author: "...the term AIDS is an acronym for Acquired Immuno Deficiency Syndrome, a disease characterized by the gradual decrease of the body's immune system."

¹⁷ Ibid.

¹⁸ The Medical Dictionary available at <http://medical-dictionary.thefreedictionary.com>, accessed in June 2012.

¹⁹ San Francisco AIDS Foundation 'How AIDS is spread' (2006) Available at <http://www.sfaf.org/aid101/transmission.html>, accessed in June, 2012. The author states that HIV infection progressively reduces the

not technically alive and the virus ultimately needs to infect a cell in order to reproduce.²⁰ This is achieved by the virus hijacking the body's protein cells and concealing their DNA. The body unknowingly produces new viruses whilst producing essential protein cells crucial to existence.²¹ The main cell that HIV infects is called T-helper lymphocyte²² and the reason for such is that the T-helper cell contains the protein CD4²³ on its surface.²⁴ HIV requires CD4 to enter the cells that it infects. Once the HI virus is inside the T-helper cell, it proceeds to take over the cell and the virus then replicates.²⁵ This process occurs timeously and during the subsequent process the infected cells die.²⁶

AIDS is not a specific illness.²⁷ It is rather a collection of many different conditions that manifests itself in the body because the HI virus has weakened the immune system.²⁸ The body can no longer fight the disease, resulting in stimuli that constantly attack it.²⁹ HIV positive persons are consequently prone to more frequent and devastating infections due to a suppression of the immune system.³⁰ It is therefore more accurate to define AIDS as a syndrome of opportunistic diseases and infections, each with the ability to kill the infected person in the final stages of the disease.³¹

Opportunistic infections or diseases are caused by micro-organisms that do not normally become pathogenic in the presence of a healthy immune system because a

effectiveness of the immune system and leaves the individual susceptible to opportunistic infection and tumours.

²⁰ Ibid.

²¹ 'The life cycle of HIV' available at <http://www.aidsonline.org/hiv-life-cycle/>, accessed in January 2013.

²² The T-helper cell is a crucial cell in the immune system. It co-ordinates all other immune cells, therefore any damage or loss of the T-helper cell will seriously affect the immune system.

²³ CD4 is a co-receptor that assists the T cell receptor (TCR) in communicating with an antigen-presenting cell. Using its intracellular domain, CD4 amplifies the signal generated by the TCR by recruiting an enzyme, the tyrosine kinase lck, which is essential for activating many molecular components of the signaling cascade of an activated T cell.

²⁴ Ibid.

²⁵ 'The life cycle of HIV' opcit note 21.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Neidl op cit note 16.

³¹ Aids.Gov 'Opportunistic infections and their relationship to HIV/AIDS' available at <http://aids.gov> accessed in July 2012.

healthy immune system will kill them or render them inert.³² However when an immune system is unable to defend the body because it is being destroyed by HIV, opportunistic infections³³ will take the 'opportunity' to attack the body successfully.³⁴

2.1.2 Stages of HIV/AIDS

HIV progression can generally be broken down into four distinct stages: the primary infection stage, clinically asymptomatic stage, symptomatic HIV infection stage and progression from HIV to AIDS.³⁵ The primary HIV infection stage lasts for a few weeks and is often accompanied by flu-like symptoms.³⁶ This occurs after the initial infection. Research shows that in twenty percent of people the symptoms are severe enough to consult a doctor.³⁷ The primary flu-like illness is sometimes referred to as a sero-conversion illness.³⁸ Michael Carter wrote:

*"As many as 90% of those diagnosed with HIV will have experienced one or more of the following symptoms, usually within the first four weeks of initial exposure to the virus: fever, rash, headache, feeling generally unwell, aches and pains, mouth ulcers, sore throat, night sweats, weight loss, tiredness, swollen glands, and neurological symptoms like meningitis."*³⁹

Symptoms typically appear a few days to a few weeks after exposure to HIV and can persist for two to four weeks, although swollen glands may last longer.⁴⁰ Typically at

³² Aids.Gov 'Opportunistic infections and their relationship to HIV/AIDS' available at <http://aids.gov/hiv-aids-basics/staying-healthy-with-hiv-aids/potential-related-health-problems/opportunistic-infections/> accessed in July 2012.

³³ Common infections that may occur as a result of a compromised immune system are: Oral manifestations(oral candidiasis, oral hairy leukoplakia, herpes simplex (cold sores), varicella zoster and bacterial periodontal conditions), vaginal candidiasis, general lymphadenopathy(lymph nodes being larger than one centimetre in diameter), skin infections (warts, ringworms and folliculitis), respiratory infections(coughing, chest pain and fever) pneumonia, fatigue, tuberculosis.

³⁴ 'The life cycle of HIV' opcit note 21.

³⁵ AIDS online 'The different stages of HIV infection' available at <http://www.aidsonline.org/stages-of-hiv-infection/>, accessed in January 2013.

³⁶ Ibid.

³⁷ AIDS Guide 'The official guide book' (2010) p.87.

³⁸ NAM Aidsmap 'Diagnosing primary HIV infection' available at: <http://www.aidsmap.com/Primary-infection/page/1044761/>, accessed in July 2012.

³⁹ Ibid.

⁴⁰ AIDS Guide 'The official guide book' (2010) p.87.

this stage diagnosis is frequently missed, even if an HIV-antibody test is done.⁴¹ During this stage there is a large amount of HIV in the peripheral blood and the immune system begins to respond to the virus by producing HIV-antibody and cytotoxic lymphocytes.⁴² Such symptoms usually vanish within a week to a month.⁴³

The clinically asymptomatic stage follows and this stage can last for an average of ten years and is generally a symptom free stage, although there may be the presence of swollen glands.⁴⁴ During this stage the level of HIV in the peripheral blood drops to very low levels.⁴⁵ People remain infectious and HIV-antibodies are detectable in the blood. A recent study has shown the HIV is not dormant during this stage but very active in the lymph nodes.⁴⁶ More severe symptoms may not develop for ten or more years after HIV exposure to the body.⁴⁷ During this period, HIV multiplies, attacks, debilitates and destroys the body's immune systems' cells thereby exposing the body's natural defence mechanism to more opportunistic infections.⁴⁸ Gradually over time the immune system fails to contain the HI virus, resulting in many mild symptoms becoming more debilitating to the immune system.⁴⁹ This stage is known as symptomatic HIV-Infection. It is caused by the lymph nodes and tissues becoming damaged and worn out due to years of activity. The virus becomes more varied and powerful leading to the annihilation of more T-helper cells and the body failing to sustain the replacement of the

⁴¹ Ibid.

⁴² J Grief & B Golden *AIDS care at home: A guide for caregivers, loved ones and people with AIDS* (1994) p.17. A cytotoxic T cell (also known as T_C, Cytotoxic T Lymphocyte, CTL, T-Killer cell, cytolytic T cell, CD8+ T-cells or killer T cell) is a T lymphocyte (a type of white blood cell) that kills cancer cells, cells that are infected (particularly with viruses), or cells that are damaged in other ways.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ AIDS online 'Clinically asymptomatic stage' <http://www.aidsonline.org/stages-of-hiv-infection/stage2.php> accessed in January 2013.

⁴⁷ Ibid.

⁴⁸ According to South African Law Commission "Second Interim Report on Aspects of the Law Relating to HIV/AIDS: Pre-employment HIV testing", April (1999). "Opportunistic infections are the associated illnesses that a person infected with HIV virus suffers owing to the victim's reduced immune system. Once the human body is infected with the HIV virus, the body defences may continue to work for some time and the person may remain well. But for the majority of cases, the immune system begins to break down and the person infected becomes prone to minor or major opportunistic infections from which death may result. Opportunistic infections include tuberculosis, kaposi's sarcoma, which is a rare form of cancer, pneumonia and cytomegalovirus, which cause blindness and serious brain and lung damage."

⁴⁹ 'Clinically asymptomatic stage' op cit at 46.

damaged cells.⁵⁰ As the immune system becomes more impaired the illnesses become more severe.⁵¹ AIDS is the term clinically used to define and describe the latter stages or more serious infections of someone who is HIV positive.⁵²

2.1.3 Transmission of HIV/AIDS

Primarily HIV is spread through sexual intercourse.⁵³ It is also spread by HIV-infected blood passing directly into the body of another person⁵⁴ or by mother to child transmission.⁵⁵ Although HIV is present in saliva, tears and urine, the concentration of the virus present in the liquids are too low for successful transmission.⁵⁶ HIV can only be spread through virally contaminated bodily fluids entering the bloodstream of another.⁵⁷ The likelihood of HIV/AIDS transmission remains a threat in the workplace. According to Mathiason and Berlin, out of an estimated five and a half million health care workers in the United States of America, only four health-care workers actually became infected with HIV/AIDS on the job.⁵⁸ Literature suggests a low probability rate, but the chances of contraction are still present and pose a significant threat to the labour industry.

⁵⁰ *Clinically asymptomatic stage* op cit at 46.

⁵¹ Ibid.

⁵² Ibid.

⁵³ HIV-infection is sexually transmitted through unprotected penetrative vaginal or anal intercourse.

However one may also become infected through oral sex, if the lining of the mouth is exposed to infected seminal fluid or vaginal and rectal mucus-especially if the person providing the oral stimulation has sore gums, bleeding gums or inflammation in his/her mouth.

⁵⁴ This can occur via a blood transfusion, when he/she uses needles that are contaminated with HIV-infected blood to inject drugs; or when he/she is injured with blood contaminated needles, syringes, razor blades or other sharp instruments.

⁵⁵ This is also known as vertical transmission of HIV and is one of the major causes of HIV-infection of children. *"It is estimated that about 600 000 children are infected in this way each year. This figure accounts for 90% of HIV-infections in children."* HIV can be transmitted from an infected mother to her baby via the placenta during pregnancy, blood contamination during childbirth or through breastfeeding.

⁵⁶ AIDS online 'Clinically asymptomatic stage' <http://www.aidsonline.org/stages-of-hiv-infection/stage2.php> accessed in January 2013.

⁵⁷ This kind of direct entry can occur (1) through the linings of the vagina, rectum, mouth, and the opening at the tip of the penis; (2) through intravenous injection with a syringe; or (3) through a break in the skin, such as a cut or sore.

⁵⁸ See Garry G. Mathiason & Steven B. Berlin *Aids in the Healthcare, Business and Governmental Workplace* (1994) p. 731-735.

2.1.4 Misconceptions about the transmission of HIV/AIDS

There are many misconceptions regarding the transmission of HIV/AIDS which leads to social isolation and marginalisation in the workplace. Many people are uneducated or lack knowledge pertaining to HIV/AIDS. There is a general view that people may contract the virus from mere contact with an HIV positive person and this has resulted in severe segregation.⁵⁹ A 2007 survey conducted in a Chinese enterprise⁶⁰ found that fifty-three percent of the respondents would not take part in recreational activities with people with HIV, whilst fifty-six percent said they would not shake hands with a HIV positive person.⁶¹ Eighty-eight percent went on record saying they would not buy any products made by people with HIV.⁶²

In order to eliminate the misconceptions, one needs to be cognisant of the fact that HIV is not transmitted through other bodily fluids like sweat, tears, urine and vomit.⁶³ Nor is it transmitted by food or air by either coughing or sneezing.⁶⁴ There has not been a case where a person was infected by a household member, relative, co-worker or friend through casual everyday contact such as sharing eating utensils, recreational facilities or through hugging or kissing.⁶⁵ Screening blood supplies has virtually eliminated any risk of infection that could be transmitted through a blood transfusion.⁶⁶ Contrary to popular opinion, mosquitoes, fleas and other insects do not transmit HIV to the host.⁶⁷ After developing an understanding of the HIV/AIDS endemic, the modes of transmission and the misconceptions surrounding this disease we move onto the severity of this epidemic.

⁵⁹ See Garry G. Mathiason & Steven B. Berlin *Aids in the Healthcare, Business and Governmental Workplace* (1994) p. 731-735.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Ibid.

⁶³ Sue Albertyn and Dan Rosengarten "HIV and AIDS: Some Critical Issues in Employment Law" (1993) *South African Journal on Human Rights* p. 77-88.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid.

2.2 Prevalence of HIV/AIDS

HIV/AIDS has become an international epidemic. Statistics reveal that nearly seven thousand people on average contract HIV daily.⁶⁸ It is clear that HIV/AIDS remains one of the most serious health challenges in the world today.⁶⁹ Statistics worldwide reveal that nearly three hundred people are infected with HIV/AIDS hourly⁷⁰ and an estimated total of two million one hundred thousand were newly infected with HIV/AIDS in 2013.⁷¹ (Figure 1) depicts the adults and children estimated to be living with HIV/AIDS in 2013.⁷²

Adults and children estimated to be living with HIV | 2013

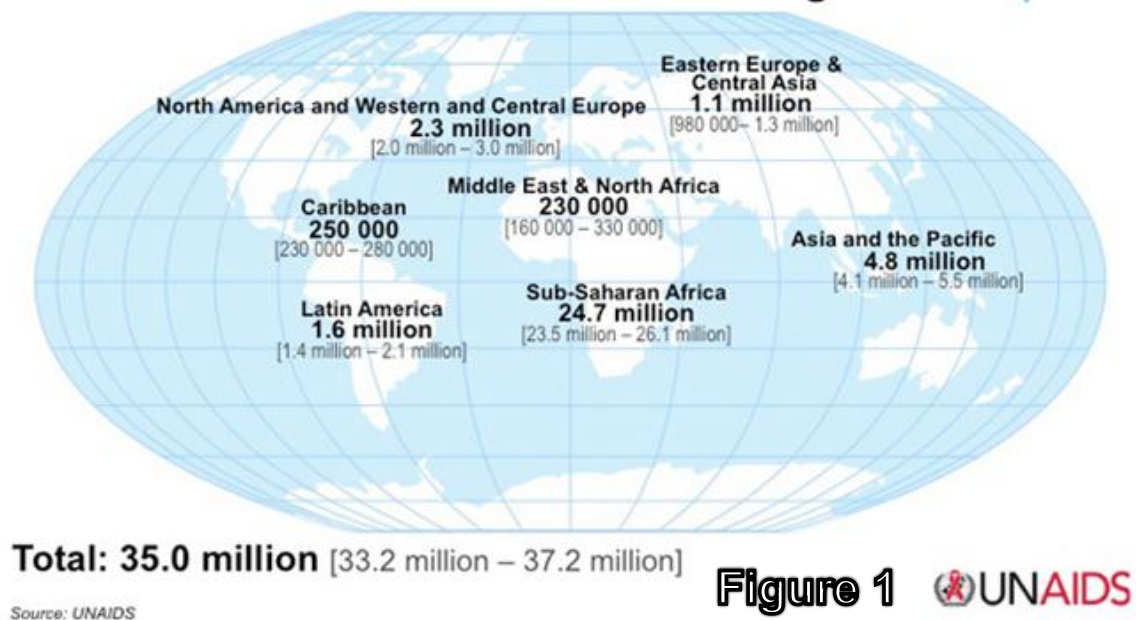


Figure 1 UNAIDS

These statistics expose Sub-Saharan Africa as the most vulnerable continent for HIV/AIDS infection. Geographically South Africa has the world's fastest growing HIV/AIDS epidemic.⁷³ Provincially it was noted that HIV rates are highest in highway, border, mining, plantation, migrant and informal settlement areas.⁷⁴ KwaZulu's

⁶⁸ Statistics: Worldwide *The regional Picture* available at: <http://www.amfar.org> accessed in August 2014.

⁶⁹ Ibid.

⁷⁰ Statistics: Worldwide *The regional Picture* available at: <http://www.amfar.org> accessed in August 2014.

⁷¹ Aids.gov *The global HIV/AIDS epidemic* available at: <https://www.aids.gov/federal-resources/around-the-world/global-aids-overview/> accessed in August 2014.

⁷² Ibid.

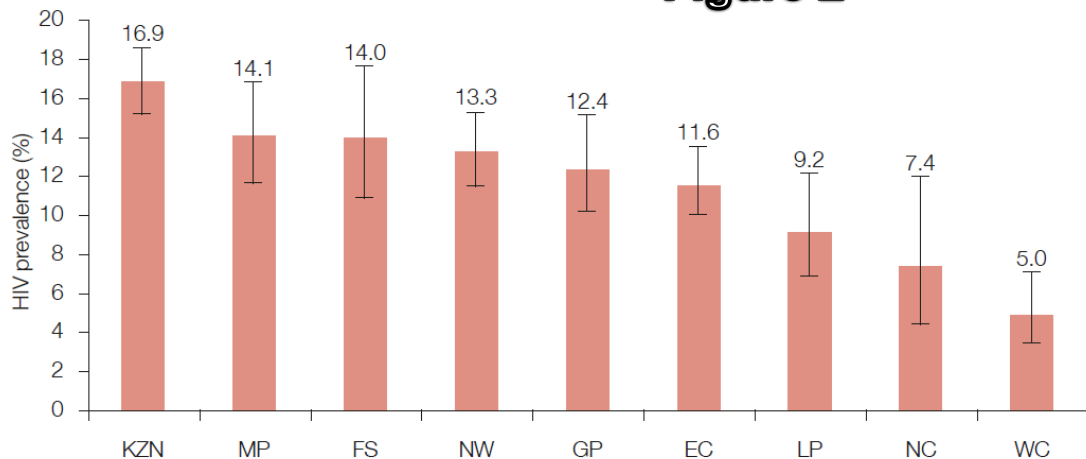
⁷³ Ibid.

⁷⁴ See FHi available at <http://www.fhi360.org/en/HIVAIDS/pub/guide/corrhope/corrhiv.htm>, accessed in February 2013.

Empangeni highway and plantation area, Mpumalanga's Secunda highway and mining town, Gauteng's Carletonville mining town, Free State's Welkom mining town, the North-West's Rustenburg mining town, and Northern Province's Messina highway and border town ranked as the hardest hit provinces.⁷⁵ (See Figure 2 below)⁷⁶

Provincial HIV/AIDS prevalence rates in 2012

Figure 2



Key: KZN – KwaZulu-Natal, MP – Mpumalanga, FS – Free State, NW – North West, GP – Gauteng, EC – Eastern Cape, LP – Limpopo, NC – Northern Cape, WC – Western Cape

These high HIV rates may prove to have a devastating impact on the economy as Kwa-Zulu Natal is home to the “big five” of industrial companies, and given the high HIV rates, production efficiency maybe halted, resulting in mass economic impact.

2.3 Ramifications of HIV/AIDS

More than thirty-four million people now live with HIV/AIDS.⁷⁷ Three million people died from HIV/AIDS in 2001, making it the world’s fourth leading cause of death, after heart disease, stroke and acute respiratory infection.⁷⁸ More than sixty-nine percent of people living with HIV/AIDS belong to Sub-Saharan Africa.⁷⁹ Considering the impact of

⁷⁵ See FHi available at <http://www.fhi360.org/en/HIVAIDS/pub/guide/corrhope/corrhiv.htm>, accessed in February 2013.

⁷⁶ Human Sciences Research Council *South African National HIV Prevalence, Incidence and Behaviour Survey*, 2012.

⁷⁷ Statistics: Worldwide *The regional Picture* available at: <http://www.amfar.org> accessed in August 2014.

⁷⁸ UNAIDS *Report AIDS epidemic update, December (2001)*.

⁷⁹ Statistics: worldwide available at <http://www.amfar.org>, accessed in January 2013.

HIV/AIDS on the economy, the pandemic has become a critical priority for the South African government, together with the business community. HIV/AIDS predominantly affects adults of working age.⁸⁰ These are generally the most productive years of a person's life thus resulting in a direct impact on the workforce. Tamar Kahn⁸¹ wrote: *"South African companies are starting to feel the effect of HIV/AIDS, and still have a long way to go in minimising the effect of the pandemic on business"*⁸²

According to a survey by the Bureau for Economic Research and the South African Business Coalition on HIV/AIDS, the largest of its kind surveying almost a thousand firms in the manufacturing, retail, wholesale, motor trade, building and construction sectors, almost a third of the companies surveyed said HIV/AIDS had already had a negative influence on profits. More than half expected it to adversely affect profitability in five years.⁸³

2.3.1 The Macro economic impact of HIV/AIDS

In 2000 the Bureau for Economic Research reported that HIV/AIDS has already reduced the economic growth rate by between zero point three percent and zero point four percent per annum. HIV/AIDS was deemed an epidemic that will reverse the progress in economic development, particularly through life expectancy.⁸⁴

However in general, it is difficult to assess the macro-economic impact as a variety of factors are interdependent.⁸⁵ It seems likely that direct and indirect costs resulting from HIV/AIDS might cause a shift from savings or long term investments to current expenditure and from productive planning and spending to potentially unproductive spending.⁸⁶ This will in turn limit fixed investments and stunt economic growth.⁸⁷ HIV/AIDS poses a serious threat to profitability as well as to competitiveness. Additional

⁸⁰ UNAIDS/WHO *Sub-Saharan Africa AIDS epidemic update regional summary*. Geneva UNAIDS and WHO (2007).

⁸¹ Tamar Khan 'HIV/AIDS takes its toll on SA companies, but few are prepared' *Health care systems trust bulletin* 11 December 2003.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Bureau for Economic Research: HIV/AIDS and the South African Economy, No. 8. 2000.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Ibid.

costs to the company occur through absenteeism from work, loss of labour and productivity, emotional stress, work stress, increased costs of medical Schemes of employees and pension benefits. Loss of skilled manpower, lower company performance and increased market wages for people with scarce skills. A reduction of high skilled labour might not be replaceable in the short run and a less experienced and particularly young workforce might result in declining productivity. HIV/AIDS may also result in an increase in training, recruitment and personnel turnover costs.

2.4 Stigma and Discrimination

In the year 2010, the Joint United Nations Programme on HIV/AIDS (UNAIDS)⁸⁸ reported that 71 percent of countries now have some form of legislation in place to protect people living with HIV/AIDS from discrimination.⁸⁹ However, Ban Ki-moon, Secretary-General of the United Nations, believes that almost all countries permit at least some form of discrimination. There are many ways that governments can actively discriminate against people or communities with or suspected of having HIV/AIDS. Many of these laws have been justified on the grounds that HIV/AIDS poses a public health risk.⁹⁰ Though some countries favour HIV positive employment, other countries have reacted differently.⁹¹ President Museveni of Uganda supports the national policy of dismissing or not promoting members of the armed forces who test positive for HIV/AIDS.⁹² The Chinese Government advocates compulsory HIV testing for any Chinese citizen who has been living outside of the country for more than a year. The UK legal system can prosecute individuals who pass the virus to somebody else, even if they did so without intent.⁹³ These findings give rise to the conclusion that although certain laws are in effect preventing and limiting discrimination, it is evident that discrimination due to HIV/AIDS still exists.

⁸⁸ The Joint United Nations Programme on HIV/AIDS, is an innovative partnership that leads and inspires the world in achieving universal access to HIV prevention, treatment, care and support. See www.unaids.org/en/.

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Joint United Nations Programme on HIV/AIDS op cit note 88.

⁹² Ibid.

⁹³ Ibid.

Developing a better understanding of HIV/AIDS related stigma and discrimination is essential for identifying the root of the problem and developing solutions to address them. Discrimination refers to the unjust or prejudicial treatment of different categories of people or things.⁹⁴ Discrimination is synonymous with unfairness.⁹⁵ Legally speaking discrimination occurs *“When a person is treated less favorably than someone else and that treatment is for a reason relating to the person’s protected characteristic”*⁹⁶ The discriminated individual or group is unable to enjoy basic human treatment and is denied the ability to realise their own freedom and happiness.

Discrimination is a form of behaviour motivated by stigma.⁹⁷ Stigma commonly refers to prejudice, negative attitudes, abuse and maltreatment directed at a certain group of people.⁹⁸ The stigma not only makes it more difficult for people trying to come to terms with HIV and manage their illness on a personal level, but it also interferes with attempts to fight the AIDS epidemic as a whole.⁹⁹ On a national level, the stigma associated with HIV can deter governments from taking fast, effective action against the epidemic. On a personal level it can make individuals reluctant to access HIV testing, treatment and care.¹⁰⁰ UN secretary- General Ban Ki Moon says:

“Stigma remains the single most important barrier to public action. It is a main reason why too many people are afraid to see a doctor to determine whether they have the disease, or to seek treatment if so. It helps make AIDS the silent killer, because people fear the social disgrace of speaking about it, or taking easily available precautions.

⁹⁴ Definition of discrimination available at www.wikipedia.com, accessed in January 2013.

⁹⁵ Not conforming to approved standards.

⁹⁶ Legal definition of discrimination available at <http://www.dls.org.uk/advice/disabilitydiscrimination.html>, accessed in January 2013.

⁹⁷ The consequences of stigma and discrimination are wide-ranging: being shunned by family, peers and the wider community, poor treatment in health care and education settings, an erosion of rights, psychological damage and a negative effect on the success of HIV testing and treatment.

⁹⁸ Avert HIV and AIDS stigma and discrimination <http://www.avert.org/hiv-aids-stigma.htm>, accessed in February 2012.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

*Stigma is the chief reason why the AIDS epidemic continues to devastate societies around the world.”*¹⁰¹

While stigma refers to an attitude or belief, discrimination refers to the actual behaviour that violates the rights and interests of the individual or group to which it is directed. Employment discrimination describes the denial of equal opportunities to an individual in the workplace. Employment discrimination can occur in a number of areas including but not limited to: recruitment, promotion, salary, training opportunities, labour protection and termination of employment. Suprabha Rao¹⁰² wrote that since the inception of the HIV/AIDS epidemic, people infected with the disease have faced unparalleled stigma and discrimination in all spheres of life.¹⁰³ In the labour industry people living with HIV/AIDS have constantly been denied jobs or removed from their present employment.¹⁰⁴ In addition to being denied jobs, at the time of recruitment they also face discrimination by co-workers and employers alike and are frequently terminated from their employment. Suprabha Rao¹⁰⁵ believes that discrimination is often more subtle and the HIV positive employees are gradually demoted or are just kept on the payroll and instructed not to attend work.

Similarly Atiya Bose and Kajal Bhardwaj¹⁰⁶ wrote that: *“People living with HIV today face segregation in schools and hospitals under cruel and degrading conditions, denial or loss of employment, arbitrary testing, violence and even murder.”* Atiya and Kajal¹⁰⁷ have identified three forms of discrimination on the basis of one’s HIV status in the field of labour. The first form involves the denial or restriction of access to such institutions. The second involves discrimination on the basis of ‘reasonable accommodation’ which entails any modification or adjustments made to the workplace to facilitate access or participation of HIV positive people. Thirdly there is the discriminatory impact of HIV

¹⁰¹ Ban KI Moon ‘The stigma factor’ *Washington Times online* 6 August 2008. available at <http://www.washingtontimes.com/news/2008/aug/06/thestigma-factor/>, accessed in March 2011.

¹⁰² Suprabha Rao ‘Employment of HIV positive persons: a case in point’ *Chilli breeze India* available at http://www.chillibreeze.com/articles_various/Administrative-Tribunal.asp#a, accessed in June 2011.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ Atiya Bose & Kajal Bhardwaj ‘legal issues that arise in the HIV context’ *Infochange HIV AIDS* February 2008.

¹⁰⁷ Ibid.

testing in employment.¹⁰⁸ HIV/AIDS related stigma is not a straightforward phenomenon as attitudes towards the epidemic and those affected vary massively.¹⁰⁹ Even within a firm reactions will vary between individuals and groups of people. Illustrative of this is a 2007 survey conducted by the Chinese University on “*public attitudes towards employing people living with HIV.*” Of the thousand respondents that participated only forty-seven point seven percent recognised equal rights to employment for people living with HIV/AIDS (PLWA), while forty-eight point eight percent believed that PLWA should be deprived of equal employment and four point five percent gave no clear answer.¹¹⁰ It is evident that discrimination and stigmatisation still exist despite several partially successful efforts to curtail it. The reasons could be various, ranging from lack of adequate implementation of labour legislation to non-existence of HIV/AIDS workplace policies or even insufficient knowledge on the epidemic as a whole.¹¹¹

2.5 Conclusion

This chapter has conceptualised HIV/AIDS and analysed its prevalence and the ramifications stemming from such. This chapter has highlighted the seriousness of the HIV/AIDS virus as well as the repercussions on the labour sector. The researcher has also sought to dispel any misconceptions in respect of the transmission of HIV/AIDS and further investigates the challenges facing the labour sector together with the macro economic effects in the future. The chapter further dealt with the issues of stigma and discrimination that commonly surround HIV/AIDS in the labour industry.

Evidently, HIV/AIDS has become an international epidemic posing a serious health challenge. South Africa remains one of the most vulnerable countries susceptible to HIV/AIDS, as demonstrated by statistical data. Profitability stands to be affected negatively if the HIV/AIDS virus is not managed effectively. Generally, discrimination towards HIV/AIDS positive people occurs daily. This is attributable to societal misconceptions regarding the virus as a whole; society has deemed it *contra bonos*

¹⁰⁸ Atiya Bose & Kajal Bhardwaj ‘*legal issues that arise in the HIV context*’ Infochange HIV AIDS February 2008.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Ibid.

*mores*¹¹² to associate with an HIV/AIDS positive person. This leads to restrictions both socially and from an employment perspective. Although the curtailment of the stigma surrounding the virus has a long way to go before full elimination, public awareness and clarification of the misconceptions surrounding the virus could in essence be a step closer to achieving this goal. If employees are fully aware of the disease and the low probability of contracting the virus at work, this could largely supplement a better, more united workplace.

The next chapter will provide a detailed literature review of all international and national policies governing the virus. It has been highlighted that HIV/AIDS poses a serious global threat with crucial consequences if not managed adequately. Subsequent chapters will analyse the legislation protecting HIV/AIDS positive people as a whole, and legislation protecting HIV/AIDS positive people in the workplace. The next two chapters will view international standards on the governance of HIV/AIDS, whilst also observing South Africa's approach to governance of HIV/AIDS in conformance with international standards. Lastly a comparative analysis will be conducted between the United States of America, Australia and South Africa.

¹¹² Defined as a standard against good morals.

CHAPTER 3

INTERNATIONAL INTERVENTIONS IN THE FIELD OF HIV/AIDS MANAGEMENT AND PREVENTION IN THE WORKPLACE

HIV/AIDS has been deemed a global epidemic which has necessitated international intervention in an effort to formulate standards and implement goals to better manage HIV/AIDS in the labour context. These international institutions comprise largely of the International Labour Organisation (ILO), the United Nations (UN), the Southern African Development Community (SADC) and the African Union (AU). This chapter will critically analyse the framework governing HIV/AIDS internationally in an effort to distinguish between the safeguards afforded to employers and employees in South Africa in comparison to other jurisdictions.

3.1 The International Labour Organisation

The International labour Organisation (ILO) is an Inter-Governmental institution comprising member states who have signed the ILO's Constitution.¹¹³ This Organisation is responsible for creating international laws and monitoring and implementing general labour standards. The ILO was formulated in 1919 as part of the treaty of Versailles that ended World War One. Security, humanitarian, political and economic considerations form the core of the Constitution governing the ILO.¹¹⁴

The main aim of the ILO is to promote rights at work, encourage decent employment opportunities, enhance social protection and strengthen dialogue on work related issues.¹¹⁵ In support of its aims the ILO has acquired more than ninety years of protection towards workers' dignity, livelihoods and the promotion of basic human rights.¹¹⁶ The ILO is deemed to be a body serving the society as whole, by formulating international policies and programmes to promote basic human rights. The ILO also aims to improve working and living conditions, enhance employment opportunities and create an international labour standard backed by a unique system to oversee its

¹¹³ Neville Rubin *Code of International Labour Law* Vol1 (2005) P.25.

¹¹⁴ International Labour Organization 'About the ILO' available at <http://www.ilo.org>, accessed in August 2014.

¹¹⁵ Ibid.

¹¹⁶ Ibid.

application. The ILO formulates and implements an active partnership with its constituents in an effort to assist countries in putting these policies into practice in an effective manner and training, educating and researching activities to help advance all these efforts.

There are currently one hundred and eighty five countries which are members of the ILO.¹¹⁷ South Africa was a founder member but withdrew in 1964. It re-joined in 1994 and has ratified all core Conventions.¹¹⁸ The ILO communicates with its members via Conventions,¹¹⁹ Codes and Recommendations. Conventions, as compared to Codes and Recommendations, are binding documents on member states. Codes and Recommendations are not binding on the member states and merely serve as guidelines for institutions, employers, employees and any other relevant persons in the field.

3.1.1 The ILO Code of Practice on HIV/AIDS¹²⁰

The ILO Code was published in 2001 with the core objective of providing guidance to policy makers, employers and worker organisations. It was further designed to formulate and implement appropriate workplace policies, and prevention and care programmes. In order to achieve the objective, the Code provided a set of guidelines to address the HIV epidemic in the world of work, helping to prevent the spread of the epidemic and mitigate its impact on workers and their families, ultimately providing social protection to help cope with the disease. Its further intention was to create non-discrimination in employment, gender equality, screening and confidentiality as a basis for addressing the epidemic in the workplace.

Section 4.2 of the ILO Code¹²¹ affirms the Code's objective by prohibiting discrimination against workers on the grounds of perceived or actual status. The Code affirms the belief that the stigmatisation caused by discriminating against HIV/AIDS positive

¹¹⁷ International Labour Organization 'About the ILO' available at <http://www.ilo.org>, accessed in August 2014.

¹¹⁸ A Van Niekerk, M Christianson, M McGregor et al *Law @ work* (2008) p.20.

¹¹⁹ Conventions are binding documents on member states, two-thirds of the members present must vote in favour of the implementation.

¹²⁰ The ILO Code of Good Practice on HIV/AIDS and the world of work, 2001.

¹²¹ Ibid.

individuals inhibits efforts aimed at HIV/AIDS prevention.¹²² Section 4.6 of the ILO Code¹²³ advocates the provision of pre-employment testing by forbidding HIV/AIDS screening of job applicants or persons in employment. Section 4.7 of the ILO Code¹²⁴ relates to confidentiality and offers no justification for requesting disclosure of HIV/AIDS related information from applicants or workers. It further states that there is no obligation on an employee to disclose his/her HIV/AIDS status to a fellow employee. All personal data and access regulating the data are bound by rules of confidentiality.¹²⁵ Section 8.1 of the ILO Code¹²⁶ further elaborates on the exclusion of pre-employment testing by forbidding HIV/AIDS testing at both recruitment and continued employment stages.

Section 5.2 (h) and (i) of the Code promotes risk reduction and management by laying out the employer's responsibility within the organisation. Section 5.2 (h) provides for employers ensuring a safe and healthy working environment.¹²⁷ Section 5.2 (i) provides for the employer's need to take additional measures to ensure that all workers are trained in universal precautions and are knowledgeable on procedures to be followed in the event of an occupational incident, further ensuring that all precautions are always

¹²² The ILO Code of Good practice on HIV/AIDS and the world of work, 2001, s 4.2 states '*In the spirit of decent work and respect for the human rights and dignity of persons infected or affected by HIV/AIDS, there should be no discrimination against workers on the basis of real or perceived HIV status. Discrimination and stigmatization of people living with HIV/AIDS inhibits efforts aimed at promoting HIV/AIDS prevention.*'

¹²³ Ibid. s 4.6 states: '*Screening for purposes of exclusion from employment or work processes HIV/AIDS screening should not be required of job applicants or persons in employment.*'

¹²⁴ The ILO Code of Good practice on HIV/AIDS and the world of work, 2001.

¹²⁵ The ILO Code of Good practice on HIV/AIDS and the world of work, 2001, s 4.6 states: '*There is no justification for asking job applicants or workers to disclose HIV-related personal information. Nor should co-workers be obliged to reveal such personal information about fellow workers. Access to personal data relating to a worker's HIV status should be bound by the rules of confidentiality...*'

¹²⁶ The ILO Code of Good practice on HIV/AIDS and the world of work, 2001, s 8.1 states: '*HIV testing should not be required at the time of recruitment or as a condition of continued employment. Any routine medical testing, such as testing for fitness carried out prior to the commencement of employment or on a regular basis for workers, should not include mandatory HIV testing.*'

¹²⁷ The ILO Code of Good practice on HIV/AIDS and the world of work, 2001, s 5.2 (h) provides: (h) '*Risk reduction and management. Employers should ensure a safe and healthy working environment, including the application of Universal Precautions and measures such as the provision and maintenance of protective equipment and first aid. To support behavioural change by individuals, employers should also make available, where appropriate, male and female condoms, counselling, care, support and referral services. Where size and cost considerations make this difficult, employers and/or their organizations should seek support from government and other relevant institutions.*'

observed.¹²⁸ Section 8.5 (a) and (b) of the Code¹²⁹ provides for a fundamentally crucial aspect of the employer's duty regarding occupational exposure and states the following:

'(a) where there is a risk of exposure to human blood, body fluids or tissues, the workplace should have procedures in place to manage the risk of such exposure and occupational incidents. (b) Following risk of exposure to potentially infected material (human blood, body fluids, tissue) at the workplace, the worker should be immediately counselled to cope with the incident, about the medical consequences, the desirability of testing for HIV and the availability of post-exposure prophylaxis, and referred to appropriate medical facilities. Following the conclusion of a risk assessment, further guidance as to the worker's legal rights, including eligibility and required procedures for workers' compensation, should be given.'

This forms an imperative part of the study, as notwithstanding the common law duty placed on the employer, the ILO Code of practice imposes a duty on the employer to ensure that the employees are safe in the workplace. The Code further provides procedures to be followed should occupational exposure to HIV occur.

3.1.2 The ILO HIV and AIDS Recommendation, 2010¹³⁰

Many provisions in the ILO Recommendation R200 are replicated from the 2001 Code of practice on HIV/AIDS and the world of work.¹³¹ The need for a Code and Recommendation highlights the importance the ILO places on management of HIV/AIDS in the workplace. Consideration should be given to provisions 30 -34 which govern occupational exposure and provides for a healthy and safe work environment essentially preventing HIV/AIDS transmission. The Recommendation proposes several

¹²⁸ The ILO Code of Good practice on HIV/AIDS and the world of work, 2001, s 5.2 states: (i) *'Workplaces where workers come into regular contact with human blood and body fluids. In such workplaces, employers need to take additional measures to ensure that all workers are trained in Universal Precautions, that they are knowledgeable about procedures to be followed in the event of an occupational incident and that Universal Precautions are always observed. Facilities should be provided for these measures.'*

¹²⁹ The ILO Code of Good practice on HIV/AIDS and the world of work, 2001.

¹³⁰ R200 HIV and AIDS Recommendation, 2010 (No 200).

¹³¹ The ILO Code of Good practice on HIV/AIDS and the world of work, 2001.

Conventions and suggestions regarding the promotion of a healthy workplace.¹³² Universal precautions and prevention measures are recommended to prevent exposure to HIV/AIDS. Among the required control measures are the need for work practice controls, personal protective equipment and post exposure prophylaxis.¹³³ Provision 32 proposes that employers in occupations involving the possibility of transmission educate and train their workers on transmission modes and prevention measures.¹³⁴ Provision 33 emphasises awareness-raising measures and the elimination of misconceptions surrounding transmission.¹³⁵ Provision 34 provides for the consideration of other Recommendations in addressing HIV/AIDS.¹³⁶ Other Recommendations provide for anti-discrimination in the workplace and the prohibition of pre-employment testing.¹³⁷

3.1.3 ILO Code of Practice on the Protection of Workers' Personal Data, 1996

This voluntary non-binding document intended to provide guidance in the development of legislation, regulations, workplace policies and practical measures assumed in the workplace. Principally, personal data of workers should not be collected except in conformity with national legislation, medical confidentiality and the general principles of

¹³² Prov 30 of the R200 HIV and AIDS Recommendation, 2010 (No 200) '30. *The working environment should be safe and healthy, in order to prevent transmission of HIV in the workplace, taking into account the Occupational Safety and Health Convention, 1981, and Recommendation, 1981, the Promotional Framework for Occupational Safety and Health Convention, 2006, and Recommendation, 2006, and other relevant international instruments, such as joint International Labour Office and WHO guidance documents.*'

¹³³ Prov 31 of the R200 HIV and AIDS Recommendation, 2010 (No 200) '31. *Safety and health measures to prevent workers exposure to HIV at work should include universal precautions, accident and hazard prevention measures, such as organizational measures, engineering and work practice controls, personal protective equipment, as appropriate, environmental control measures and post exposure prophylaxis and other safety measures to minimize the risk of contracting HIV and tuberculosis, especially in occupations most at risk, including in the healthcare sector.*'

¹³⁴ Prov 32 of the R200 HIV and AIDS Recommendation, 2010 (No 200) '32. *When there is a possibility of exposure to HIV at work, workers should receive education and training on modes of transmission and measures to prevent exposure and infection. Members should take measures to ensure that prevention, safety and health are provided for in accordance with relevant standards.*'

¹³⁵ Prov 33 of the R200 HIV and AIDS Recommendation, 2010 (No 200) '33. *Awareness-raising measures should emphasize that HIV is not transmitted by casual physical contact and that the presence of a person living with HIV should not be considered a workplace hazard.*'

¹³⁶ Prov 34 of the R200 HIV and AIDS Recommendation, 2010 (No 200) '34. *Occupational health services and workplace mechanisms related to occupational safety and health should address HIV and AIDS, taking into account the Occupational Health Services Convention, 1985, and Recommendation, 1985, the Joint ILO/WHO guidelines on health services and HIV/AIDS, 2005, and any subsequent revision, and other relevant international instruments.*'

¹³⁷ See provision 9-14 and 24-29 of Recommendation 200: Recommendation concerning HIV and AIDS and the world of work, 2010.

occupational safety and only when required.¹³⁸ Clause 5.13 specifically indicates that workers may not waive their privacy rights.¹³⁹ Clause 3.4¹⁴⁰ defines a worker as: '*any current or former worker or applicant for employment.*' The ILO Code of Practice on the Protection of Workers' Personal Data further reiterates article 4.6 of the ILO Code of Practice on HIV/AIDS and the world of work.

3.1.4 ILO Termination of Employment Convention, No 158, 1982

The ILO Termination of Employment Convention¹⁴¹ contains numerous legal provisions geared towards prevention of unfair termination of employment. This in essence also prevents dismissal of workers infected with HIV/AIDS. Article 4 prohibits termination of a worker's employment in the absence of a valid reason.¹⁴² Article 6¹⁴³ has strictly and forcefully precluded temporary absence from work due to illness or injury as valid ground for termination.

3.2 The United Nations

The United Nations (UN) plays an indispensable role in addressing contemporary and future global challenges. In this regard, the primary role of the UN is to maintain international peace and security, promote economic development as well as to promote and protect human rights.¹⁴⁴ South Africa was one of the fifty-one founding members of the UN in 1945.¹⁴⁵ Membership has now grown to one hundred and ninety two States.¹⁴⁶ The UN General Assembly suspended South Africa from participating in its work on 12 November 1974, due to international opposition to the policy of apartheid. South Africa was re-admitted to the UN in 1994 following its transition into a democracy.

¹³⁸ See clause 5 of the ILO Code of Practice on the Protection of Workers' Personal Data, 1996.

¹³⁹ The ILO Code of Practice on the Protection of Workers' Personal Data, 1996 clause 5.13. '*Workers may not waive their privacy rights.*'

¹⁴⁰ The ILO Code of Practice on the Protection of Workers' Personal Data, 1996.

¹⁴¹ Entered into force on 23 September 1985.

¹⁴² Article 4 of The Termination of Employment Convention No 158, States: '*The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.*'

¹⁴³ The Termination of Employment Convention No 158, 1982 '*Temporary absence from work because of illness or injury shall not constitute a valid reason for termination.*'

¹⁴⁴ The United Nations Official website available at <http://www.un.org/en/>, accessed in November, 2014.

¹⁴⁵ The United Nations Official website available at <http://www.un.org/en/>, accessed in November, 2014.

¹⁴⁶ Ibid.

Since 1994 the democratically elected government has pursued a foreign policy based on the centrality of the UN in a multilateral system.¹⁴⁷ South Africa is faithful to the purposes and principles of the UN Charter. It strongly advocates rule-based multilateralism. In pursuance of this objective, South Africa is an active participant in the main deliberative and subsidiary bodies of the UN.¹⁴⁸ Gradually through the years, the UN has issued numerous goals and declarations in an attempt to manage HIV/AIDS on a global level, although some omit to directly deal with HIV. Based on the ILO being a specialised agency of the UN it can be construed that a comprehensive approach would entail encompassing HIV in the relevant policies.

3.2.1 The Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) is the basic international pronouncement of indisputable and inviolable rights afforded to every human being. The Declaration was adopted by the UN assembly on 10 December, 1948 as a non-binding UN General Assembly resolution. It set forth a list of civil, political, economic, social and cultural rights. South Africa has ratified this declaration.

As suggested by the preamble the Declaration was designed to provide a common standard of achievement for all people and nations. The Assembly called upon every individual and organ of society to uphold the principles of the declaration and promote respect for the rights and freedoms imposed by the Declaration. It further called for promotion of progressive measures both nationally and internationally thereby securing the universal recognition and observance originally purported by the Declaration.

Article 2 of the UDHR¹⁴⁹ directed at entitlement also forms the foundation for the prohibition of discrimination in relation to the enjoyment of human rights. Articles 3 and 5 guarantee the South African Constitutional considerations enshrined in Section 11

¹⁴⁷ The United Nations Official website available at <http://www.un.org/en/>, accessed in November, 2014.

¹⁴⁸ Ibid.

¹⁴⁹ The Universal Declaration of Human Rights states: *'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. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.'*

and 12 respectively. The right to privacy, although considered a fundamental right, is provided for under article 12 of the declaration¹⁵⁰ which states the following:

'No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.'

The relevance of this provision in relation to HIV/AIDS is the prohibition of arbitrary interference with a person's privacy, thereby unequivocally restricting the routine screening for HIV for both current and prospective employees. Article 23(1) provides among other things obligations that everyone has the right to just and favourable conditions of work.¹⁵¹ In the context of the HIV/AIDS positive worker, the provision of article 23 will be applicable in dismissal cases, pre-employment testing and non-selection of prospective workers based on their HIV/AIDS status.

3.2.2 International Covenant on Economic, Social and Cultural Rights

Following twenty years of drafting debates the International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted, ratified and assented to on December 16, 1966. The Covenant contains some of the most significant international legal provisions establishing economic, social and cultural rights including the rights relating to working in just and favourable conditions. South Africa has ratified the Covenant.¹⁵² Article 6 of the ICESCR guarantees the right to work, more precisely the right of every person to gain their living by work that they freely choose or accept.¹⁵³

¹⁵⁰ The Universal Declaration of Human Rights.

¹⁵¹ Ibid, art 23: *'Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.'*

(2) Everyone, without any discrimination, has the right to equal pay for equal work.

(3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

(4) Everyone has the right to form and to join trade unions for the protection of his interests.'

¹⁵² South Africa ratified the covenant on 12 January 2015.

¹⁵³ The International Covenant on Economic, Social and Cultural Rights, art 6: *(1.) The States Parties to the present Covenant 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 appropriate steps to safeguard this right.(2.) The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive*

This guarantees against arbitrary discrimination regarding employment and protects against arbitrary termination of employment. The covenant further lays a good basis for the protection of HIV/AIDS positive workers in the employment sector. The provisions on non-discrimination ensure that HIV/AIDS status is not used as a basis for denial of employment or prospective employment. The Covenant can be invoked where a HIV/AIDS positive worker has been dismissed, declared redundant, unfairly transferred or denied employment. This stems from the state's obligation to protect against unemployment which envisages the requirement to ensure that HIV/AIDS positive workers remain in continuous employment and not unfairly dismissed.

Article 7 further places an obligation on the employer to provide safe favourable working conditions and specifically states: '*The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: ... (b) Safe and healthy working conditions...*'¹⁵⁴

3.2.3 The Declaration of Commitment to HIV/AIDS

In 2001, the UN and all member states signed the Declaration of Commitment to HIV/AIDS.¹⁵⁵ This was regarded as a matter of urgency as HIV/AIDS was viewed as a global epidemic of devastating scale and impact constituting a global emergency and one of the most formidable challenges to human life and dignity. The purpose of the session was to review and address the problem of HIV/AIDS in all aspects as well as to secure a global commitment to enhancing coordination and intensification of national, regional and international efforts, to combat it in a comprehensive manner. This was proposed to be attained through a number of goals, which needed to be complied with in an effort to better manage the HIV virus. These included aspirations on a global,

employment under conditions safeguarding fundamental political and economic freedoms to the individual.'

¹⁵⁴ The International Covenant on Economic, Social and Cultural Rights, art 7.

¹⁵⁵ Assembled at the United Nations, from 25 to 27 June 2001, for the twenty-sixth special session of the General Assembly convened in accordance with resolution 55/13.

national and regional level.¹⁵⁶ Among these were the recommendation pertaining to discrimination which stated: ¹⁵⁷

'By 2003, enact, strengthen or enforce as appropriate legislation, regulations and other measures to eliminate all forms of discrimination against, and to ensure the full enjoyment of all human rights and fundamental freedoms by people living with HIV/AIDS and members of vulnerable groups; in particular to ensure their access to, inter alia education, inheritance, employment, health care, social and health services, prevention, support, treatment, information and legal protection, while respecting their privacy and confidentiality; and develop strategies to combat stigma and social exclusion connected with the epidemic'

Article 69 pertaining to the policy framework in an employment context averred the following:

'By 2003, develop a national legal and policy framework that protects in the workplace the rights and dignity of persons living with and affected by HIV/AIDS and those at the greatest risk of HIV/AIDS in consultation with representatives of employers and workers, taking account of established international guidelines on HIV/AIDS in the workplace'

3.2.4 The 2011 Political Declaration on HIV and AIDS¹⁵⁸

The 2011 Political Declaration on HIV/AIDS was necessitated by the need to review the progress achieved in realising the 2001 Declaration of Commitment on HIV/AIDS and the 2006 Political Declaration on HIV/AIDS with a view to guiding and intensifying the global response to HIV and AIDS by promoting continued political commitment and engagement of leaders. A comprehensive response at the community, local, national, regional and international levels was required to halt and reverse the HIV epidemic and mitigate its impact. Article 77 – 79 introduced new goals in an effort to curb HIV/AIDS on a global level¹⁵⁹ Article 77 specifically provides for commitment to intensifying efforts to

¹⁵⁶ The Millennium Development Goals Campaign was established in 2002 with its main goal being to halt the spread of HIV/AIDS by 2015.

¹⁵⁷ Art 58 of the Declaration of Commitment to HIV/AIDS.

¹⁵⁸ Resolution 65/277 adopted by the General Assembly on 11 July 2011.

¹⁵⁹ The Political Declaration on HIV and AIDS art 77-79:

create legal, social and policy frameworks in a national context to eliminate stigma and discrimination in an employment context.

3.3 Southern African Development Community (SADC)

The Southern African Development Community (SADC) has been in existence since 1980 when it was formed in Lusaka, Zambia on April 1, 1980 as the Southern African Development Coordination Conference (SADCC) comprising of nine-majority ruled states in Southern Africa. Governed by the Lusaka Declaration- Southern Africa: Towards Economic Liberation, the aim of the SADCC was to coordinate development projects in order to lessen the economic dependence on the then apartheid South Africa. The founding Member States are: Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe. The transformation of the organisation from a Coordinating Conference into a Development Community (SADC) took place on August 17, 1992 in Windhoek, Namibia when the Declaration and Treaty was signed at the Summit of Heads of State and Government thereby giving the organisation a legal character. The Member States are Angola, Botswana, the Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe. The SADC has several Protocols, Codes and Declarations in place governing the management of HIV/AIDS in the workplace.¹⁶⁰

'(77).Commit to intensify national efforts to create enabling legal, social and policy frameworks in each national context in order to eliminate stigma, discrimination and violence related to HIV and promote access to HIV prevention, treatment, care and support and non-discriminatory access to education, health care, employment and social services, provide legal protections for people affected by HIV, including inheritance rights and respect for privacy and confidentiality, and promote and protect all human rights and fundamental freedoms, with particular attention to all people vulnerable to and affected by HIV;(78). Commit to review, as appropriate, laws and policies that adversely affect the successful, effective and equitable delivery of HIV prevention, treatment, care and support programmes to people living with and affected by HIV and to consider their review in accordance with relevant national review frameworks and time frames;(79). Encourage Member States to consider identifying and reviewing any remaining HIV-related restrictions on entry, stay and residence in order to eliminate them.'

¹⁶⁰ See SADC official website available at <http://www.sadc.int/> last accessed on 9 November 2016.

3.3.1 The Southern African Development Community, protocol on employment and labour

The SADC Protocol on Employment and Labour was formulated by acknowledgement of the need to place decent employment and social security at the centre of macro-economic and sectoral policies at global, regional and national levels.¹⁶¹ Article 7 relates to equal treatment and states that State Parties shall adopt laws and policies to ensure that every person is equal and accorded equal treatment and equal protection before the law.¹⁶² Article 7 (2) provides for the undertaking of the promotion of equal opportunity in employment, labour markets policies, legislation and social security thereby eliminating all forms of direct and indirect discrimination¹⁶³ on the grounds of sex, gender, colour, nationality, race, religion, language, ethnic or social origin, political opinion, pregnancy, marital status, disability, age, or HIV/AIDS. Article 12 regulates occupational health and safety from an employer's perspective and states that every worker, including the self-employed, have a right to a safe and healthy working environment.

Article 12 (2) provides for South Africa being a member state to this Protocol being obliged to take all reasonable and practicable steps towards achieving a progressively safe and healthy working environment this should be done through a national system and national programmes being invoked on occupational safety and health, in accordance with ILO Conventions on occupational health and safety. Article 12(3) provides for the adoption of measures to ensure that workers have the right to services that provide for the prevention, recognition, detection and compensation of work-related illness or injury including emergency cases, with rehabilitation and job security after injury and adequate compensation appropriately adjusted from time to time. Article 12(4) (d) states that South Africa being a member state shall ensure that workers have

¹⁶¹ See Acknowledgments, preamble of The Southern African Development community, protocol on employment and labour.

¹⁶² Article 7 (1) of The Southern African Development community, protocol on employment and labour.

¹⁶³ Article 7 (2). "State Parties undertake to promote equality of opportunity in employment and labour market policies and legislation and social security and to eliminate all forms of direct or indirect discrimination on grounds such as sex, gender, colour, nationality, race, religion, language, ethnic or social origin, political opinion, pregnancy, marital status, disability, age, or HIV and AIDS."

the right to information on workplace hazards and the procedures being taken to address them and to appropriate safety and health training during paid working time; and Article 12(5) regulates that occupational related diseases shall be in accordance with the most recent ILO Convention on occupational health and safety.

Article 13 pertains to health care and states that *“State Parties shall, having due regard to the means available, ensure that adequate health care is available to all residents in accordance with the relevant provisions of the SADC Health Protocol .”* Article 17 relates to persons with disabilities and subsection 1 provides that persons with disabilities are afforded the rights protected in the United Nations Convention on the Rights of Persons with Disabilities of 2006 more particularly employment and social protection rights. Article 17 (4) makes provision for HIV/AIDS to be considered and classified as a disability and affords employment protection and employment benefits.

3.3.2 The South African Development Community Code on HIV/AIDS and Employment.

This Code was formulated due to the persuasion of a group of NGO's and trade unions in South Africa and Zimbabwe to develop a regional Code of best practices around HIV/AIDS and employment.

Section 2 of the Code provides for the prohibition of direct or indirect pre-employment testing for HIV/AIDS. The Code provides that employees be given normal medical tests to ascertain their fitness for the specific job which prohibits HIV testing. Questions and inquiries into previous tests and behaviors is not permitted. Section 3 regulates workplace testing and confidentiality. This section provides for strict prohibition on compulsory workplace testing. Voluntary testing at the employees request and consent should only be carried out by a qualified health practitioner who is bound to medical ethics. HIV/AIDS positive individuals have the right to confidentiality in respect to their status. AN employee further bears no obligation to inform his/her employer of his/her status. Any information divulged should only be done with the employee's written consent. Section 3 applies to current and prospective employees and requires absolute discretion. Section 4 reiterates that job statuses, promotions or transfers should not

consider HIV/AIDS as a deciding factor. Section 6 relates to management of the illness and provides that no dismissal or retrenchment shall be enforced due to an employee's HIV/AIDS status. HIV/AIDS positive employees should have access to medical treatment without discrimination and shall be entitled to agreed upon sick leave provisions. Section 6.3 provides that an HIV/AIDS positive employee should continue working in their current employment for as long as they are medically fit to do so. If they are unable to perform their current job due to medical constraints, then alternate employment should be offered without prejudicing their current benefits. If their health has disintegrated to such an extent that they can no longer provide the duties required of them, then the standard benefits and procedures for termination should apply.

Section 7 relates to occupational benefits and provides that such should be non-discriminatory. It further provides that Schemes should make efforts to protect the rights and benefits of the dependents of deceased and retired employees. All information should be kept confidential and should not be used by employers to prejudice employees in their current employment contract or relationship. Section 7.3 provides that private and public health financing mechanisms be obliged to provide standard benefits to all employees regardless of their HIV/AIDS status. Employees should be informed of their and benefits through advisory services. Section 8 relates to risk management and provides that appropriate precautionary measures be taken to reduce the exposure to HIV/AIDS. Section 8.2 states that employees who contract HIV infections during the course of their employment be compelled to follow standard compensation procedures and receive standard compensation benefits. Section 9 refers to stigmatisation and discrimination and prohibits it providing that protection be offered. Sections 11 and 12 allow for the collection and analysing of data in an effort to monitor and plan an effective response to the social and economic impact of the HIV/AIDS epidemic.

3.3.3 The report of the executive secretary activity report of the SADC secretariat 2011-2012

The report serves as proof that the SADC is adhering to provisions of the Codes enacted. The findings of the report was that the employment and labour sector In keeping up with the process of regional integration, continued to lay emphasis on adopting common policy approaches towards employment creation, integration of the labour market and improving conditions of employment and labour for poverty reduction and for enhancing social protection and labour productivity. With regards to HIV/AIDS In line with the Maseru Declaration on HIV and AIDS, the Secretariat continued to facilitate harmonisation of policies relating to HIV and AIDS.

3.4 African Union

The African Union was a replacement of the Organisation of African Unity which was established on 25 May 1963 in Addis Ababa. After being disbanded on 9 July 2002 by its last chairperson, South African President Thabo Mbeki, The African Union was formed.

3.4.1 Abuja Declaration and Plan of Action on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases

In this Declaration, the African leaders affirmed their acknowledgement that HIV/AIDS is an emergency in the continent and pledged to place the response to HIV/AIDS at the forefront as the highest priority issue in their respective national development plans. Principally, the leaders committed themselves to mobilise resources from within Africa and beyond, and to enact appropriate legislation and international trade regulations that would ensure availability of drugs at affordable prices to HIV positive persons. If the tone of the Declaration is anything to go by, all signatories are under obligation to guarantee sources of livelihood to HIV positive persons and this can be facilitated by expressly providing for employment rights of HIV positive persons.

3.4.2 Roadmap on shared responsibility and global solidarity for AIDS, TB and malaria response in Africa

The roadmap adopted by the African heads of State provides a major step forward in the response to HIV/AIDS, TB and malaria. The roadmap was structured around health governance, diversified financing and access to medicines. This roadmap defined goals, expected results, roles and responsibilities to hold stakeholders accountable.

3.4.3 Declaration of the special Summit of African Union on HIV/AIDS, Tuberculosis and malaria

The theme of the Au special summit was ownership, accountability and sustainability of HIV/AIDS, Tuberculosis (TB) and Malaria Response in Africa: Past, Present and the future. The purpose of the summit was to review the progress made and the challenges faced in implementing the Abuja Declaration and Plan of Action on Roll Back Malaria (RBM) of 2000; the Abuja Declaration and Plan of Action on HIV and AIDS, Tuberculosis and Other Infectious Diseases (ORID) of 2001; and the Abuja Call for Accelerated Action Towards Universal Access to HIV and AIDS, Tuberculosis and Malaria Services in Africa by 2010. It was satisfactorily noted that Africa has made tremendous progress in the fight against HIV/AIDS, TB and Malaria since 2000 and in strengthening health systems, which has resulted in lives being saved, enhanced productivity and improvement. Concern was expressed that despite the tremendous progress being made in the fight against HIV/AIDS, TB and Malaria, challenges still remain with Africa being one of the regions of the world most affected by HIV and AIDS, TB and Malaria, thereby constituting major threats to national and continental socio-economic development as well as to peace and security. There was also a need to recognise and strengthen the preventive measures required to mitigate exposure to HIV/AIDS by vulnerable groups and populations at risk. It was also undertaken to accelerate the implementation of the earlier “Abuja Commitments”.

3.5 Conclusion

It is evident that global emphasis is placed on better managing HIV/AIDS both socially and within the labour industry. The International Labour Organisation, the United Nations and the South African Development Community have stressed the importance of effectively enacting and enforcing legislation and regulations to eliminate discrimination surrounding HIV/AIDS. The ILO, UN, SADC and AU issue Codes, Recommendations and Conventions in an effort to communicate with all the member states. Although not binding on states, the Codes, Declarations and Recommendations serve as a guideline for all states to enact their own legal framework to create uniformity and conformance to a universal norm of standards.

Some of the key aspects covered in the ILO, UN's and SADC's declarations and Codes are anti-discrimination mandates specifically stating that HIV/AIDS positive people should not be discriminated against. Pre-employment testing is forbidden at both recruitment and continued employment stages. There can be no justification for requesting a job applicant to disclose his/her status. The international standards place the onus on the employer to provide a safe working environment for all employees, free from potential occupational hazards. Employers are requested to endorse procedures to manage the risk of exposure to HIV/AIDS. The declarations and Codes further provide requirements to be complied with post-exposure. Providing counselling, post-exposure prophylaxis and informing the employee of his/her rights, eligibility and procedures to follow to claim from the workman's compensation are a few obligations placed on the employer by the ILO, UN and SADC. The ILO, UN, SADC and AU strongly advocate for the respect of human dignity and human rights and endeavour to ordain policies and principles to conform to these considerations. The following chapter will conduct a critical analysis of South Africa's role in abiding by international standards on the governance of HIV/AIDS.

CHAPTER 4

SOUTH AFRICA AND INTERNATIONAL PRINCIPLES

This chapter will conduct an investigation into the conformance of South Africa's standards with international principles. The core focus of this chapter is to evaluate the protection afforded to HIV/AIDS positive people in South Africa. The protection afforded to HIV/AIDS infected employees will then be assessed.

4.1 General Principles

South Africa has played a pivotal role in the adaptation and implementation of international principles in the enactment of national legislation governing HIV/AIDS in an employment context. Being a member state of the ILO and UN, South Africa has unparalleled obligations to respect all international principles. The Labour Relations Act¹⁶⁴ sets forth its primary objective as giving effect to obligations incurred by the Republic as a member state of the ILO. This understanding is further substantiated in Section 3 of the LRA relating to interpretation and states:

'Any person applying this Act must interpret its provisions- (a) to give effect to its primary objects; (b) in compliance with the Constitution; and (c) in compliance with the public international law obligations of the Republic.'

The Constitution gives effect to international law through Section 39.¹⁶⁵ Further, Section 233, which relates to the application of international law provides that when interpreting legislation, a Court must prefer an interpretation consistent with one found in international law rather than one not consistent with it.¹⁶⁶

¹⁶⁴ The Labour Relations Act 66 of 1995 Section 1(b).

¹⁶⁵ S 39(1) of the Constitution of the Republic of South Africa : *'When interpreting the Bill of Rights, a Court, tribunal or forum - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law.'*

¹⁶⁶ Ibid. s 233: *'When interpreting any legislation, every Court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.'*

4.2 National Framework governing HIV/AIDS

South Africa has one of the most developed legal systems in the world, with ample protection extended to all citizens. This development was not always visible and took years of progression and trial both pre and post-apartheid to formulate.¹⁶⁷

4.2.1 The Constitution of the Republic of South Africa

Over the years Constitutional law in South Africa has undergone progressive transformation. The Interim Constitution came into effect on April 27, 1994 and was deemed a clear break from the previous Constitutions. It was the first democratic Constitution in terms of which all South Africans older than eighteen years were allowed to vote. The main features of the Interim Constitution were: the abolition of parliamentary sovereignty and its replacement by Constitutional supremacy, the creation of a Constitutional Court,¹⁶⁸ the introduction of a proportional voting system consisting of political parties as opposed to specific candidates,¹⁶⁹ the division of the country into nine provinces,¹⁷⁰ and the division of legislative¹⁷¹ and executive¹⁷²

¹⁶⁷ From as early as 1652 the need for labour was a pressing issue. In 1658 it was evident that the Cape colony was a direct participant of slavery in the East African and East Indies slave trade. By the end of the eighteenth century slavery had become a fundamental part of the Cape colony. The 1922 rand rebellion led to urgent attention being paid by Government to labour relations. This led to The Industrial Conciliation Act being passed in March 1924. This system saw the division of employees based on racial requirements; this was partly remedied with the enactment of the Wages Act in 1925, which provided for the unilateral determination of wages and working conditions. During 1981 there was a significant breakthrough for labour laws. There were amendments to the Industrial conciliation, now modified to the Labour Relations Act. There were guidelines that surfaced mainly relating to dismissals and retrenchments but as anticipated there were numerous inconsistencies. The government went on to promulgate the Labour Relations Amendment Act of 1988 which was vigorously resisted by unionists who were of the opinion that: "... It was seen as a serious attempt to curb their powers and rights.' In 1994 the ANC won the elections which brought about major improvements in all spheres of the South African legal system. The new government was said to have transformed the whole legislative framework of labour relations to allow practical enactment of the Constitution and to bring it into line with the international standards of the International Labour Organisation. After much debate and slow progression the new Labour relations Act, the Basic Conditions of Employment Act and the Employment Equity Act finally came into operation.

¹⁶⁸ A new Court called the Constitutional Court was created, the purpose of which was to interpret the Constitution and invalidate legislation and executive conduct in conflict with the Constitution.

¹⁶⁹ In terms of this voting system a party was allocated a number of seats in parliament proportionate to the percentage of support it receives in the nation-wide elections.

¹⁷⁰ The nine provinces were as follows: Eastern Cape, Free State, Gauteng, Kwa-Zulu Natal, Mpumalanga, North-West, Northern Cape, Northern Province and Western Cape.

¹⁷¹ The legislative function was exercised by parliament (the National assembly and senate) at a national level, the provincial legislatures at a provincial level and the municipal Courts at a local level.

competencies into provincial and local levels. The Interim Constitution had limited duration hence the Final Constitution had to be adopted within a stipulated period. The members of the National Assembly and the senate reconstituted themselves as the Constitutional Assembly¹⁷³ and were assigned the task of drafting the Final Constitution within two years. The thirty-four principles that were entrenched in the Interim Constitution needed to be complied with when drafting the Final Constitution. This was successfully drafted after a few modifications. The Constitutional Court adopted an amended draft on October 11, 1996; this version was certified by the Constitutional Court and came into effect on February 4, 1997.

In many respects, the Final Constitution was a continuation of its predecessor, the Interim Constitution. The Final Constitution affirmed three fundamental changes in South Africa that had been initiated by the Interim Constitution. Firstly it brought about an end to the racially-qualified Constitutional order that accompanied three hundred years of colonialism, segregation and apartheid and replaced it with a universal franchise and an electoral system based on proportional representation. Secondly the Doctrine of Parliamentary Sovereignty was replaced by the Doctrine of Constitutional Supremacy and a Bill of Rights was introduced to safeguard human rights,¹⁷⁴ ending centuries of state-sanctioned abuse. Thirdly the strong central government of the past was replaced by a system of government with federal elements.¹⁷⁵ A significant evolution relevant to this study is the Doctrine of Constitutional supremacy. This means that the Constitution is the supreme law of the land and any law or conduct inconsistent

¹⁷² The executive authority functioned as a government of national unity; the president and deputy president were appointed from the majority party on a national level and the second highest supported party had the deputy president appointed from their respective party, a multiparty cabinet was formed and comprised members of all parties with five percent or more of support in the elections.

¹⁷³ According to s 68(1) of the Interim Constitution, the Constitutional assembly consisted of the national assembly and the senate.

¹⁷⁴ See Preamble to Constitution of the Republic of South Africa: which states:

“We, the people of South Africa, recognise the injustices of our past; honour those who suffered for justice and freedom in our land; respect those who have worked to build and develop our country; and believe that South Africa belongs to all who live in it, united in our diversity. We, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to- heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; improve the quality of life of all citizens and free the potential of each person; and build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations... .”

¹⁷⁵ Iain Currie & Johan De Waal *The Bill of Rights Handbook* 5 ed (2005) ch 2.

with it is invalid. The Courts have a testing power over legislation and have the authority to inquire into the validity of any law that is inconsistent with the Constitution. This was in direct contrast to the pre-apartheid principles of parliamentary sovereignty of which the mere majority of parliament could write and rewrite laws, alter the basic structure of the state and invade human rights without constraint. Nor were there any significant judicial constraints on Parliament. A Court could only declare an Act invalid if it had not been passed in accordance with the procedures laid down for the passing of legislation in the Constitution. This meant that the legislation could only be challenged on procedural grounds and not substantive grounds.¹⁷⁶

Constitutional Supremacy is affirmed in Section 2 of the Constitution of the Republic of South Africa which states that: *"This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."* It is re-affirmed in Section 8(1) of the Constitution of the Republic of South Africa which reads as follows: *"The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state..."*¹⁷⁷

Section 7 enshrines the obligation of all levels of government to respect, protect, promote and fulfil the rights.¹⁷⁸ These provisions divest the relevant levels of Government of any authority to formulate any laws or policies that remove the guarantees under the Constitution. Specifically, parliament cannot enact any legislation in conflict with the Constitution or legislation that defeats the provisions of the

¹⁷⁶ Procedural grounds refer to the procedure followed: whether the status quo was met, whether there were irregularities in the drafting procedure, whereas Substantive grounds refers to the substance of the rights, i.e. whether any infringement of fundamental rights has occurred.

¹⁷⁷ S 8 of the Constitution of the Republic of South Africa reads as follows: *'(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right. (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a Court -(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with Section 36(1). (4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.'*

¹⁷⁸ S 7 of the Constitution of the Republic of South Africa reads as follows: *'(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. (2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights. (3) The rights in the Bill of Rights are subject to the limitations contained or referred to in Section 36, or elsewhere in the Bill.'*

Constitution. The human rights enshrined in the Constitution are justiciable, as provided for by Section 38 of the Constitution of the Republic of South Africa which states that:

*“Anyone listed in this Section has the right to approach a competent Court, alleging that a right in the Bill of Rights has been infringed or threatened...”*¹⁷⁹

Section 38 empowers citizens to challenge any laws that infringe on the rights afforded to them by the Bill of Rights; the Courts generally adopt a broad approach in relation to locus standi.¹⁸⁰

The Bill of Rights guarantees civil, political, economic, social and cultural rights. These rights have a direct and occasionally indirect impact on HIV/AIDS in South Africa. The Sections applicable to HIV/AIDS and the labour industries are: Section 9 (the provision for equality), Section 10 (the provision for human dignity), Section 11 (the provision for the right to life), Section 12 (the provision for freedom and security of a person), Section 13 (the provision for the prohibition of forced labour), Section 14 (the provision for the enforcement of privacy), and Section 23 (the right to fair labour practices).

Section 9 provides for equality before the law and the right to equal protection and benefit of the law without any discrimination on the grounds of “...race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”¹⁸¹ The formal idea of equality at its most basic and abstract is that people situated in similar ways should be treated similarly; its logical correlative is the idea that people not similarly situated be

¹⁷⁹ The Constitution of the Republic of South Africa, s 38 states: ‘Anyone listed in this Section has the right to approach a competent Court, alleging that a right in the Bill of Rights has been infringed or threatened, and the Court may grant appropriate relief, including a declaration of rights. The persons who may approach a Court are: (a) Anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of, a group or class of persons; (d) anyone acting in the public interest; and (e) an association acting in the interest of its members.’

¹⁸⁰ Under common law the South African Courts took a restrictive approach to standing, this common law approach contrasted directly with the approach adopted in the bill of rights, Judge Chaskalson P, remarked in the case of *‘Ferreira v Levin NO 1996 (1) SA 984 (CC)’* “It is my view that we should rather adopt a broad approach to standing. This would be consistent with the mandate given to this Court to uphold the Constitution and would serve to ensure that Constitutional rights enjoy the full measure of the protection to which they are entitled....”

¹⁸¹ The Constitution of the Republic of South Africa, s 9(3).

treated differently.¹⁸² Section 9(3) of the Constitution of the Republic of South Africa¹⁸³ expressly prohibits discrimination. Discrimination is defined as differentiation on illegitimate grounds. The list of presumptively illegitimate grounds is listed in Section 9(3) of the Constitution of the Republic of South Africa.¹⁸⁴ Differentiation on grounds not listed in Section 9(3) is deemed as analogous to the listed ground. HIV/AIDS is provided for by forming an analogous ground of disability. Put simply, this means that it has a similar relationship to the listed ground of disability.¹⁸⁵ Therefore it can be understood that any and all laws relating to disability shall be applicable to HIV/AIDS positive persons. This point is further reiterated by the access to disability grants offered by SASSA¹⁸⁶. Despite no express mention of the grants being applicable to HIV/AIDS infected citizens, the grant is available to people with a temporary disability resultant from a chronic disease. The grant varies from periods of six to twelve months depending on the functionality impairment. HIV/AIDS has been categorised as a disabling chronic disease among diabetes and hypertension.

The Constitutional Court held that the grounds listed in Section 9(3) were grounds relating to attributes or characteristics and impacted directly on human dignity.¹⁸⁷

Equality is directly interrelated to human dignity which is provided for by Section 10 of the Constitution of the Republic of South Africa which states that: *“Everyone has inherent dignity and the right to have their dignity respected and protected.”*

Justice O’Regan J remarked in the landmark case of *S v Makwanyane*¹⁸⁸

“Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated and worthy of respect and concern. This

¹⁸² Iain Currie & Johan De Waal (*The Bill of Rights Handbook* 5 ed (2005) ch 2.

¹⁸³ The Constitution of the Republic of South Africa, s 9(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.’*

¹⁸⁴ Ibid. s 9 (3).

¹⁸⁵ The Constitutional Court held in the case of *Harsken v Lane* 1998 (1) SA 300(CC) that an analogous ground is one which has a similar relationship or impact on the listed ground.

¹⁸⁶ Max Du Preez ‘There is a grant for people with HIV – SASSA’ News 24.

¹⁸⁷ Iain Currie & Johan De Waal *The Bill of Rights Handbook* 5 ed (2005) p.257.

¹⁸⁸ *S v Makwanyane* 1995 (3) SA 391 (CC) para 144.

right therefore is the foundation of many of the other rights that are specifically entrenched in the bill of rights..."

Justice Chaskalson P reiterated this point by stating that:

*"The right to life and dignity are the most important of all human rights..."*¹⁸⁹

Although there is no concise definition for dignity, it is synonymous with respect and status.¹⁹⁰ Given the stigma attached to HIV/AIDS and the stereotypes linked with the virus, it is logical to conclude that a HIV/AIDS positive person risks losing their dignity upon members of society acquiring knowledge of their status. Human dignity includes the right not to be subjected to cruel, inhuman or degrading treatment. Thus, if one considers the Constitutionality of pre-employment testing, we can deduce that it is a direct infringement of the right to dignity.

Stemming from Section 9 and 10 is the fundamental right to life provided for by Section 11 of the Constitution affirming that:

*"Everyone has the right to life"*¹⁹¹

The right to life in the South African Constitution can be deemed to be textually unqualified. This means that the right to life may only be limited if the limitation is reasonable and justifiable in accordance with the limitation clause set out in Section 36 of the Constitution.¹⁹²

¹⁸⁹ See *National coalition for gay and lesbian equality v Minister of justice* 1999 (1) SA 6 (CC), *Ferreira v Levin* NO 1996 (1) SA 984 (CC), *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC).

¹⁹⁰ Wikipedia 'Definition of dignity' available at www.wikipedia.org/wiki/Dignity#Section_5, accessed in March 2013.

¹⁹¹ The Constitution of the Republic of South Africa, s 11.

¹⁹² S 36 of the Constitution of the republic of South Africa: '(1) *The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including - (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.* (2) *Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.*' This system contrasts with the Constitutions from other jurisdictions such as United States, Hungary, Canada and India; these Constitutions qualify the right to life usually by providing that the right to life may not be deprived arbitrarily or other than in accordance with a sentence of Court.

There has been much debate regarding the infringement of the right to life when an HIV/AIDS positive person knowingly infects another individual. In most countries knowingly infecting another person with HIV/AIDS can lead to criminal or civil sanctions. Charges may vary depending on the laws of the countries and include, but are not limited to, murder, attempted murder, culpable homicide, assault and reckless endangerment.¹⁹³ A charge of murder is conceivable if intent and unlawfulness is present. Therefore a HIV/AIDS positive person who knowingly infects another person and that subsequent infection results in the latter's death, is deemed guilty of murder. Similarly a HIV/AIDS positive person who intentionally or recklessly exposes another person to HIV/AIDS without infecting them may be guilty of attempted murder. Culpable homicide is resorted to by the Courts when there is negligence present. In this context negligence is defined as a person reasonably foreseeing the likelihood that (s)he would infect another person with HIV/AIDS but did not take any steps to prevent such infection from occurring. This person would be guilty of culpable homicide should the recipient contract the virus and deacease. A person who unlawfully, intentionally or recklessly infects another person or threatens to infect another person with HIV/AIDS would be guilty of assault.

Civil actions can be categorised into two main sections: firstly, civil action for intentional or negligent acts resulting in physical injuries or death commonly known as patrimonial loss;¹⁹⁴ secondly; intentional acts which result in infringement of a person's dignity, privacy or reputation that cause non-patrimonial loss.¹⁹⁵ In the case of patrimonial claims for physical injuries or death, the aggrieved party or his/her dependents must prove intention or negligence by the wrongdoer. The reasonable man test is applied to prove negligence.¹⁹⁶ If the HIV/AIDS survivor causes the death of another person, the dependents may sue for loss of support, and the deceased's estate may also sue for funeral and hospital expenditure. When a person has intentionally infringed on a

¹⁹³ 'Criminal transmission of HIV' available at <http://en.wikipedia.org>, accessed in March 2013.

¹⁹⁴ Joubert Galpin Searle 'definition of patrimonial loss' defined as loss that can be expressed in money. Therefore monetary value can be attached to the claim available at <http://www.jgs.co.za/pages>, accessed in March 2013.

¹⁹⁵ Ibid. non patrimonial loss is a loss that cannot have a monetary value attached to it, however the damages will be awarded in monetary terms.

¹⁹⁶ According to this test a reasonable man, meaning an ordinary, normal, average person with ordinary intelligence foresaw the possibility and failed to take steps to prevent it.

person's Constitutional right to dignity, privacy or their reputation, the aggrieved person may sue for damages.¹⁹⁷ Adjudicating from the facts it is apparent that punitive measures are indeed in existence, but due to inefficient knowledge and understanding, these sanctions are not appropriately invoked.

Much of the lack of implementation can be attributed to conflicting opinions and viewpoints. Many activists and advocacy groups have argued against the criminal prosecution of HIV/AIDS transmission. Profound members of society have gone on record and voiced forthright opinions on the absurdity of the application of criminal liability.

*Justice Edwin Cameron*¹⁹⁸ was affirmative when saying:

*"Applying criminal law to HIV transmission has a heightened role in stigmatising HIV, it is ineffective and public health strategies are better used to advance HIV prevention."*¹⁹⁹

*Christele Diwouta*²⁰⁰ wrote:

*"A blanket application of criminalisation could cause more harm as it has the high potential of further fuelling stigmatisation and discrimination of people living with HIV. Furthermore, there are issues of public health and human rights at stake."*²⁰¹

Other arguments against the criminalisation of HIV/AIDS transmission were based on the deterrent factor. Many believed advocating criminalisation of HIV/AIDS transmission was reducing the number of people readily available to ascertain their HIV/AIDS status. Others believed that although it was merely punitive, it served no progressive purpose in the fight against HIV/AIDS, as the person being prosecuted would be HIV positive upon prosecution, and if the correct treatment were not administered timeously the

¹⁹⁷ The legal dictionary defines damages as: "Monetary compensation that is awarded by a Court in a civil action to an individual who has been injured through the wrongful conduct of another party. Damages attempt to measure in financial terms the extent of harm a plaintiff has suffered because of a defendant's actions. The purpose of damages is to restore an injured party to the position the party was in before being harmed. As a result, damages are generally regarded as remedial rather than preventive or punitive." Available at <http://legal-dictionary.thefreedictionary.com/damages>, accessed in March 2013.

¹⁹⁸ Supreme Court of Appeal in South Africa.

¹⁹⁹ Christele Diwouta 'Criminalisation of wilful transmission of HIV: sitting on the fence?' Wordpress10 November 2010.

²⁰⁰ Ibid.

²⁰¹ Ibid.

individual would already bear the burden of a shortened life expectancy and thus the purpose of a jail sentence would be defeated. Further, it was deduced that a lack of knowledge of HIV/AIDS transmission may result in a culpable homicide charge should infection occur. This seems self-defeating, as most HIV/AIDS positive people would plead ignorance about HIV/AIDS transmission in order to receive a less harsh sentence than that for murder.

South Africa has taken a broad approach to this issue and though it has satisfactory legislation in place for criminalisation, inadequate implementation has been demonstrated. *Justice Michael Kirby* of the High Court of Australia in his response to the criminalisation of HIV/AIDS remarked:

*“Like in the early years of the epidemic when I declared that we have now ‘HIL – Highly Inefficient Laws’, when there were the proposals for testing everyone in society, we now have a new wave of HIL. And it’s a wave that’s coming particularly in Africa, but also in other parts of the world.”*²⁰²

Section 11 of the Constitution²⁰³ guarantees the right to life; therefore no one has the right to endanger others’ lives. It is understood that South Africa has made provision for the intentional and wilful transmission of HIV/AIDS to be punishable under the crime of murder or attempted murder in terms of Section 37 of the Criminal Procedure Act.²⁰⁴ South Africa in an effort to curb intentional transmission of HIV/AIDS has amended the Sexual Offences Act to include a harsher sentence if the perpetrator was HIV positive. Further Section 3(4) (C) of the Draft Offence Act of South Africa deems an HIV/AIDS infected person having sexual intercourse without informing his partner of his sero-status as “rape.”²⁰⁵

However one of the major problems with criminal prosecution for infecting others with HIV/AIDS is the question of causation.²⁰⁶ This obstacle was overcome in a case which surfaced in January 2006 when a South African, Mr. Chad Parenzee, was convicted on

²⁰² Christele Diwouta op cit at 199.

²⁰³ The Constitution of the Republic of South Africa.

²⁰⁴ The Criminal Procedure Act 51 of 1977.

²⁰⁵ Christele Diwouta op cit at 199.

²⁰⁶ Causation means that there is a direct link between the wrongful conduct or failure to act by the wrongdoer and the injury suffered by the person harmed.

three counts of endangering lives.²⁰⁷ The basis for his conviction was that he had unprotected sexual intercourse with three women over a period of several years. He deliberately exposed them to the risk of infection and misled them about his status claiming he was 'HIV sero-negative.' On appeal Parenzee argued that the existence and virulence of HIV had not been proven.²⁰⁸ *Robert Gallo* a prominent researcher testified to the scientific consensus that HIV exists and causes AIDS.²⁰⁹ The appeal was dismissed as the judge remarked that there "was no longer any genuine scientific dispute that HIV exists and causes AIDS." Consequently causation was attested to.

Under Section 14 of the Constitution²¹⁰ the right to privacy is granted. This Section reads:

"Everyone has the right to privacy, which includes the right not to have their person or home searched; their property searched; their possessions seized; or the privacy of their communications infringed."

The importance of privacy was given emphasis in the case of *Bernstein and others v Bester NO and others*²¹¹ where the judge stated:

"A very high level of protection is given to the individual's intimate personal sphere of life and the maintenance of its basic preconditions and there is a final untouchable sphere of human freedom that is beyond interference from any public authority. So much so that, in regard to this most intimate core of privacy, no justifiable limitation thereof can take place..."

All HIV/AIDS positive persons have a legal right to privacy as afforded by Section 14 of the Constitution. Within the labour context, an employee is not legally required to disclose his/her HIV/AIDS status to their employer or to other employees. Should an employee choose to voluntarily disclose his/her HIV/AIDS status to the employer or fellow employees, this information may not be disclosed to others without the employee's written consent. Where written consent is unobtainable reasonable steps

²⁰⁷ 'Biography on Andre Chad Parenzee' available <http://en.wikipedia.org> accessed in May 2013.

²⁰⁸ Ibid.

²⁰⁹ Ibid.

²¹⁰ The Constitution of the Republic of South Africa.

²¹¹ *Bernstein and others v Bester NO and others* 1996 (2) SA 751 (CC).

must be taken to confirm the employee's wish to disclose his/her status. This right compels employers, employees and medical professionals to refrain from disclosing any knowledge of an employee's HIV/AIDS status. Doctors are bound both ethically and legally to maintain confidentiality in this regard. A breach of such confidence may result in actions for invasion of privacy afforded by Section 14 of the Constitution or dignity afforded by Section 10 of the Constitution.

The prominence of confidentiality came under scrutiny in the case of *Jansen van Vuuren v Kruger*.²¹² In this case the plaintiff approached his doctor, Mr. Kruger (the defendant in the case) for an HIV test. After several days he was informed that he had tested positive for HIV antibodies. The doctor proceeded to give his patient an assurance that his confidentiality would be respected and his status would not be disclosed. The next day the doctor joined two medical colleagues for a leisurely game of golf. The two colleagues knew the plaintiff socially and professionally as both had treated him the past. However, neither of the professionals was treating the plaintiff at this relevant period. As the game proceeded the defendant mentioned to his colleagues that the plaintiff had tested positive for HIV. Within days, the entire town was aware of the plaintiff's positive status leaving him feeling victimised, ostracised, embarrassed and stressed. He went on to institute an action against the doctor for invasion of privacy.²¹³ Patients discuss intimate and personal details about themselves with health care workers and have a right to expect that their disclosures will remain in confidence. The ethical rules of the Health Professions Council of South Africa (HPCSA) provide that there is an ethical duty on doctors not to divulge verbally or in writing any information regarding a patient without the latter's consent, unless such disclosure is required by statutory provision, by Court of law or justified in the public interest.²¹⁴

²¹² *Jansen van Vuuren v Kruger* 1993 (4) SA 842 (A).

²¹³ The plaintiff passed away in September 1991 while the trial was in progress forcing the trial judge to reject his claim.

²¹⁴ S 13 of the Constitution of the Health Professions Council of South Africa states: 'A doctor may be ordered by a Court of law to give evidence concerning treatment of a patient. A doctor who discloses such information when ordered to do so by a Court cannot be held liable for breaching the confidentiality rule. If the doctor refuses to comply with a Court order he or she may be prosecuted for contempt of Court.'

The general consensus is that patients who are HIV/AIDS positive are entitled to have their right to confidentiality respected. Only if they are a threat to the health and life of others, may it be necessary to disclose their HIV or AIDS status. The Health Professions Council requires doctors to breach the confidentiality rule in cases where their HIV/AIDS positive patients put other health care practitioners or the patient's spouse or sexual partner at risk. In such cases the doctor should try to persuade the patient to consent to the disclosure being made. If the patient refuses consent the doctor should counsel the patient and explain that he or she is ethically bound to warn the other parties on a confidential basis. Given that HIV/AIDS has been deemed as a non-communicable disease it remains a challenge to discover how HIV/AIDS status disclosure could be smoke screened by 'public interest'.

With regard to minors, the medical ethics guidelines state that the parent or guardian must provide written consent to the disclosure for minors under the age of 14 years. In the case of *South African Human Rights Commission v. SABC & Another*²¹⁵ the revelation of the HIV/AIDS positive minor's identity came under scrutiny. The Human Rights Commission argued that the broadcasting corporation had contravened the minor's right to privacy by failing to mask his identity by either distorting or digitally fragmenting the image. The Court remarked²¹⁶ that the broadcaster had not contravened the Code. This ruling was based largely on the communication of the disease being necessitated by societal interest. Further permission was granted by the minor's parents to expose his identity.

In the *Van Vuuren* case there were no visible threats of the public being at risk. Nor were there any health care practitioners at risk as it was established that the two colleagues' who were privy to the information were no longer treating the plaintiff. Although this may be the legal standpoint, an American writer drew attention to the persuasive argument that Courts may find the temptation "*to throw aside the notion that*

²¹⁵ *South African Human Rights Commission vs. SABC & Another* (2003) SABCT.

²¹⁶ "...Since there was a compelling societal interest that the AIDS pandemic be communicated to the public, and since the parents had granted their permission, the broadcasters had not contravened the Code..."

*the chances of harm to the person with HIV/AIDS matters at all in risk assessment” He stated: “...Freed of the need to consider probability, it is disturbingly easy for a judge to paint a person with HIV as the embodiment of disaster...”*²¹⁷

Similarly, in the case of *N.M and Others v Smith and Others (Freedom of Expression Institution as Amicus Curiae)*,²¹⁸ the Constitutional Court held that the disclosure of the names of three women living with HIV/AIDS published in a biography was a violation of the women’s rights to privacy and dignity. The Court based its judgement on the precedent set by the Bernstein case.²¹⁹ It should be noted that although the plaintiff succeeded with the constitutional claim, the proceeding civil claim for damages was dismissed with costs.

Section 23 of the Constitution of the Republic of South Africa guarantees the right to fair labour practices. Section 23(1) states that: “*Everyone has the right to fair labour practices.*” This right is guaranteed in the Constitution of the Republic of South Africa and may not be infringed unless the infringement is in accordance with Section 36 of the Constitution.²²⁰

4.2.2. The Labour relations Act 66 of 1995

The Labour relations Act (LRA) was assented to on 29 November, 1995 and came into operation on 11 November, 1996. One of the declared purposes of the Act was to ensure that the legislative framework governing labour relations was in accordance with Section 23 of the Bill of Rights, which provided specifically for the regulating of organisational rights of trade unions, providing guidelines for resolution of labour disputes, facilitating collective bargaining at the workplace and encouraging worker

²¹⁷ Scott Burris *Testing, Disclosure and the Right to Privacy” in AIDS Law Today- A New Guide for the Public.* (1993) p.135-37.

²¹⁸ *N. M. and Others vs. Smith and Others (Freedom of Expression Institute as Amicus Curiae)* 2007 (5) SA 250 (CC).

²¹⁹ *Bernstein and others v Bester NO and others* 1996 (2) SA 751 (CC).

²²⁰ ‘(1) *The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including - (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.* (2) *Except as provided in ss (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.*’

participation in decision making through the establishment of workplace forums.²²¹ There was much ambiguity around the meaning of “worker” and who should actually be classified as a worker. The 2002 amendments to the LRA²²² have now added a statutory presumption that a person is a ‘worker’ if any of a list of enumerated factors are present, including: being under the control of an employer, being obliged to provide services personally, working for one employer, and being economically dependent on that employer and receiving a salary or wage.

The LRA²²³ recognises that even though a dismissal may be substantively fair, if the proper procedure is not followed the dismissal is unfair. The Act also states that a dismissal is deemed unfair if it infringes on any fundamental rights or if it is for a reason listed in Section 187(1) (f) of the LRA²²⁴ which provides:

“A dismissal is automatically unfair if the employer, in dismissing the employee, unfairly discriminates against an employee, directly or indirectly on any arbitrary ground including but not limited to race, gender sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.”

The Act recognises three grounds of legitimate termination of employment, namely: the conduct of the employee, the capacity of the employee and the operational requirements of the employer’s business. The onus is on the employer to prove one of these grounds. A failure to do so will result in unfair dismissal.

²²¹ The Labour Relations Act 66 of 1995, s 1 states that: ‘The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are- (a) to give effect to and regulate the fundamental rights conferred by Section 27 of the Constitution ;(b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation; (c) to provide a framework within which employees and their trade unions, employers and employers’ organisations can- (i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and (ii) formulate industrial policy; and (d) to promote- (i) orderly collective bargaining; (ii) collective bargaining at sectoral level; (iii) employee participation in decision-making in the workplace; and (iv) the effective resolution of labour disputes.’

²²² The Labour Relations Act 66 of 1995.

²²³ Ibid, Schedule 8 The Code of Good Practice: Dismissal.

²²⁴ The Labour Relations Act 66 of 1995.

In the case of *Gary Shane Allpass v Mooikloof Estates*²²⁵ the applicant, Mr. Allpass, an award-winning horse rider and instructor who had been living with HIV since 1992 was dismissed. His employer, Mr. Dawie Malan claimed the dismissal was effected due to a breach of trust and dishonesty. Mr. Allpass had not disclosed his HIV positive status during the interviewing process. He had further failed to disclose his allergy to penicillin, the administering of which to the horses formed an imperative part of the job description.

Mr. Allpass however argued that within a day of disclosing his HIV status, he was summarily dismissed on the basis of his failure to reveal his HIV status during his job interview. *Warren Bank*, Mr. Allpass's advocate rubbished the defendant's explanation, telling the Court that this was *"nothing more than an afterthought and smoke-screen to conceal what is clearly nothing less than blatant discrimination based solely on HIV status."* Expert witness, *Professor Francois Venter*²²⁶ testified that he had *"never heard of any specific policy relating to allergies and not being able to administer injections."* Venter also went on to say that, *"there was nothing in the job description that Allpass could not perform,"* in relation to the long, "strenuous" working hours expected of him.²²⁷ Judge Bhoola declared Mr. Allpass's dismissal as automatically unfair in terms of Section 187(1)(f) of the LRA²²⁸ and awarding him twelve months compensation, (remuneration) reflecting both restitution as well as a punitive element for unfair discrimination. The judge also awarded Allpass all legal costs.

In the case of *Gary Shane Allpass v Mooikloof Estates (Pty) Ltd*²²⁹ it is evident that discrimination continues to exist despite legislation prohibiting such actions. Discrimination manifests itself in the workplace with dire subtlety in most instances. The employer tends to create a diversion from the actual discriminatory dismissal. In other

²²⁵ *Gary Shane Allpass v Mooikloof Estates (Pty) Ltd t/a Mooikloof Equestrian Centre* (LC) unreported case no JS178/09 (16 February 2011).

²²⁶ President of the Southern African HIV Clinicians Society and associate professor at the department of medicine at Wits University.

²²⁷ Allpass supra note 218.

²²⁸ Labour Relations Act 66 of 1995.

²²⁹ *Gary Shane Allpass v Mooikloof Estates (Pty) Ltd t/a Mooikloof Equestrian Centre* (LC) unreported case no JS178/09 (16 February 2011).

instances it was noted that the employer tends to demote the employee or create an unsuitable working environment that forces the employee to resign.

4.2.3 Employment Equity Act 55 of 1998

The Employment Equity Act (EEA)²³⁰ was passed primarily to eradicate employment discrimination.²³¹ This Act aims to promote the Constitutional right to equality and true democracy, to eliminate unfair discrimination in the workplace, to redress the effects of discrimination through the implementation of employment equity, to achieve a diverse workforce, to promote economic development and efficiency and to give effect to the Republic of South Africa as a member of the International Labour Organisation. (ILO)

Section 5 of the EEA²³² provides for the prohibition of unfair discrimination and states that:

“Every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.”

The object of the Act is more clearly articulated in Section 6 which states that:

“(1) No person may unfairly discriminate, directly or indirectly, against a worker, in any employment policy or practice, on one or more grounds, including race gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth. (2) it is not unfair discrimination to – (a) Take affirmative action measures consistent with the purpose of this Act; or (b) Distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.”

²³⁰ The Employment Equity Act 55 of 1998: This act does not extend to members of the National Defence Force, the National Intelligence Agency, or the South African Secret Service in accordance with S 4(3).

²³¹ See Preamble to Employment Equity Act 55 of 1998 which states that: *“Recognising that as a result of apartheid and other discriminatory laws and practices, there are disparities in employment, occupation and income within the national labour market; and that those disparities create such pronounced disadvantages for certain categories of people that they cannot be redressed simply by repealing discriminatory laws. Therefore, in order to promote the Constitutional rights of equality and exercise of true democracy; eliminate unfair discrimination in employment; ensure the implementation equity to redress the effects of discrimination; achieve a diverse workforce broadly representative of our people; promote economic development and efficiency in the workforce; and give effect to the obligations of the Republic as a member of the International Labour Organisation.*

²³² The Employment Equity Act 55 of 1998.

An inherent job requirement has no concise definition but the National Disability coordination officer programme based in Sydney Australia defined inherent requirements as:

*“Essential activities of the job: the core duties that must be carried out in order to fulfill the purpose of a position. They do not refer to all of the requirements of a job, but rather contrast with peripheral or non-essential tasks, which may be negotiable and flexible. Inherent requirements relate to results, or what must be accomplished, rather than means, or how it is accomplished.”*²³³

In the landmark case of *Hoffmann v South African Airways*²³⁴ the Constitutional Court considered the issue of non-discrimination of a worker on the basis of HIV/AIDS status. In this case Hoffmann applied to South African Airways (SAA) for employment as a cabin attendant. He went through the vigorous selection process and together with eleven other applicants was found suitable for employment. Part of the pre-employment medical examination included a blood test for HIV/AIDS. His results revealed a HIV/AIDS positive status. Despite the results he was still found to be medically fit as he was still in his asymptomatic stage. He was subsequently regarded as being unsuitable for employment and was not employed.

Hoffman challenged the Constitutionality of the refusal to employ him, alleging that the refusal had amounted to unfair discrimination and violated his right to equality, human dignity and fair labour practices. SAA opposed the application, alleging that its flight crew had to be fit for world-wide duty. They had to be inoculated against yellow fever but persons who were HIV positive could react negatively to this vaccine and were not permitted to take it. They could therefore contract yellow fever and pass it on to passengers. SAA alleged that such persons were liable to contract opportunistic diseases. If they fell ill, they would not be able to perform emergency and safety procedures required of them as cabin attendants. SAA also relied on the perceptions of

²³³ National Disability Coordination officer programme, Sydney Australia available at <http://pubsites.uws.edu.au/ndco/pdf/INFO%20sheet%20-%20Definitions%20of%20Inherent%20Requirements%20-%207%20Nov%2008.pdf> accessed in April 2013.

²³⁴ *Hoffmann vs. South African Airways* (2000) CCT 17/00.

its passengers and the policies of competing airlines. The Court ruled that the determining factor in deciding whether discrimination is unfair is its impact on the people affected. The Courts further ruled that being denied employment because of their HIV/AIDS status without regard to their ability to perform the duties of the position from which they have been excluded is a violation of dignity. The Court noted a prevailing prejudice against HIV/AIDS positive people and stated that any further discrimination against them was ‘a fresh instance of stigmatisation’ and an assault on their dignity. The discrimination could not be justified as fair because it was based on ill-informed prejudice against people with HIV/AIDS. The Court further ruled that the inability of some people with HIV/AIDS to work as cabin attendants did not justify a blanket policy of refusing employment to all people with HIV/AIDS. “...*Prejudice can never justify fair discrimination.*” Hoffman was consequently instated as a cabin attendant, and the Court held that: “*The instatement was a basic element of appropriate relief in the case of a prospective employee who is denied employment for unconstitutional reasons.*”

It was further held that this remedy ‘strikes effectively at the source of unfair discrimination’ and that as a general rule where a wrong has been committed, the aggrieved person should be placed in the same position that (s) he would’ve been but for the wrong suffered. The EEA²³⁵ makes reference to ‘worker. As defined above a worker can be deemed to be someone who receives a salary or wage. Section 6 is also broad in its approach in that it expressly mentions ‘no person.’ This leads to the extrapolation that apart from providing protection against employer-employee discrimination Section 6 also effectively protects employee-employee discrimination. Unequivocally Section 7 prohibits medical testing of an employee or an applicant for employment, to ascertain that employee’s or potential employee’s HIV/AIDS status.

Section 7 however does allow for testing where legislation permits or requires testing or if it is justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of a job.²³⁶ Section 7 (2) permits testing if it is deemed justifiable by a Court and complies with the terms

²³⁵ The Employment Equity Act 55 of 1998.

²³⁶ The Employment Equity Act 55 of 1998 s7(1).

provided in Section 50(4) of the EEA.²³⁷ The conditions of Section 50 (4) include the provision of counseling, confidentiality, categories applicable for testing and the periods of validity.²³⁸

In the case of *Irvin & Johnson Ltd v Trawler & Line Fishing Union and Others*,²³⁹ the Courts were faced with drawing a distinction between compulsory testing and voluntary testing. The Court concluded that compulsory testing meant the imposition by the employer of a requirement that workers or prospective workers submit to the testing or face sanctions or be placed at a disadvantaged position upon the refusal to consent. This is in direct contrast with voluntary testing which places the onus on the employee to decide if (s) he wishes to undergo testing with no disadvantages attached to the decision. The Court further defined anonymous testing as testing which does not enable the employer to know the HIV/AIDS status of a particular worker.

Consequently, because the employer made an application for voluntary and anonymous testing, the Labour Court held that such application did not fall within the ambit of Section 7 of the EEA²⁴⁰ which applied to compulsory testing. The employer based his argument on the required information being imperative to conducting assessments on HIV/AIDS prevalence in the workforce in an effort to minimise the impact of HIV/AIDS mortalities, engage in appropriate manpower development in addition to implementing sufficient support structures and policies to cater to the needs of HIV/AIDS positive workers, thereby reducing the risk of further transmission.

It is evident that the Courts are keen on granting authorisation regarding voluntary testing in the workplace, as seen in the case of *Joy Mining Machinery v National Union of Metal Workers of South Africa and Others*.²⁴¹ Joy Mining applied to conduct voluntary

²³⁷ The Employment Equity Act 55 of 1998 s7(2).

²³⁸ The Employment Equity Act 55 of 1998 s 50(4) states: "If the labour Court declares that the medical testing of an employee as contemplated in Section 7 is justifiable, the Court may make an order that it considers appropriate in the circumstances, including imposing conditions relating to- (a) the provision of counselling; (b) the maintenance of confidentiality (c) the period during which the authorisation for any testing applies; and (d) the category or categories of jobs or employees in respect of which the authorisation for testing applies."

²³⁹ *Irvin & Johnson Ltd v Trawler & Line Fishing Union and Others* (2002) C1126.

²⁴⁰ The Employment Equity Act 55 of 1998.

²⁴¹ *Joy Mining Machinery vs. National Union of Metal Workers of South Africa and Others* (2002) (23) ILJ 391 (SALC 2002).

testing among its staff in order to plan for effective HIV/AIDS prevention and as a strategy to evaluate its training and awareness campaign. The application was made in terms of Section 7(2) of the EEA²⁴² which prohibits HIV/AIDS testing unless authorised by the Labour Court in terms of Section 50 (4) of the EEA.²⁴³

The Court granted the application on the grounds that the proposed testing had no adverse consequences attached if a person declined to participate. Nor were the tests being conducted for discriminatory purposes. It should be noted that HIV/AIDS testing is not deemed unconstitutional if the employees consent to it, as was decided in the case of *PFG Building Glass (Pty) Ltd v Chemical Engineering Pulp Paper Wood and Allied Workers Union & Others*.²⁴⁴ The Court granted an order allowing anonymous and voluntary HIV/AIDS testing in the workplace. It held further that if the employee consented to the testing, then there was no need for the employer to approach the Labour Court for authorisation.

These provisions in effect protect employees and prospective employees, as stated in Section 9 of the EEA.²⁴⁵ “For purposes of Section 6, 7 and 8 “employee” includes an applicant for employment.” Section 11 of the EEA²⁴⁶ provides for the burden of proof vesting with the employer to prove that the alleged dismissal was fair. Discrimination can be fair or unfair. Unfair discrimination occurs when the discrimination has an unfair impact and imposes a burden on people.²⁴⁷ Whereas fair discrimination can be seen as discrimination on the grounds of progressive redress of past inequalities or disadvantages.

²⁴² The Employment Equity Act 55 of 1998.

²⁴³ The Employment Equity Act 55 of 1998, s 7(2): “Testing of a worker to determine that worker’s HIV status is prohibited unless such testing is determined to be justifiable by the Labour Court in terms of Section 50(4) of this Act.”

²⁴⁴ *PFG Building Glass (Pty) Ltd v Chemical Engineering Pulp Paper Wood and Allied Workers Union & Others* (2003) 24 ILJ 974 (LC).

²⁴⁵ The Employment Equity Act 55 of 1998.

²⁴⁶ Ibid.

²⁴⁷ Iain Currie & Johan De Waal *The Bill of Rights Handbook* 5 ed (2005) ch 2.

4.2.4 The Basic Conditions of Employment Act 75 of 1997

The Basic Conditions of Employment Act (BCEA) was assented to on 26 November, 1997. The objective of this Act as stated in the preamble was to give effect to fair labour practices as referred to in Section 23(1) of the Constitution of the Republic of South Africa, in so doing conforming to the ILO's²⁴⁸ standards to which the Republic of South Africa is a signatory.

In accordance with the BCEA²⁴⁹ every employer is obliged to ensure that all employees receive certain basic standards of employment, including a minimum number of day's sick leave. In terms of Section 22 of the BCEA²⁵⁰ an employee is entitled to an amount of paid sick leave equal to the number of days the employee would normally work during a period of six weeks.²⁵¹ The entitlement is calculated on the wage the employee would ordinarily receive on the usual pay day.²⁵² A sick leave cycle is defined in terms of Section 22(1) of the BCEA²⁵³ as a period of thirty-six months employment with the same employer immediately following an employee's commencement of employment, or on completion of that employee's preceding sick leave cycle. It should be noted that an employer is not required to pay an employee sick leave if the employee has been absent from work for more than two consecutive days on more than two occasions during an eight week period, or if the employee fails to produce a medical certificate stating the worker was unable to work for the duration of the employee's absence on account of sickness and injury, on request by the employer.²⁵⁴

²⁴⁸ International Labour Organisation.

²⁴⁹ Basic Conditions of Employment Act 75 of 1997.

²⁵⁰ Ibid.

²⁵¹ Ibid. s 22(2).

²⁵² Ibid. s 22(5).

²⁵³ Ibid.

²⁵⁴ Basic Conditions of Employment Act 75 of 1997. s 23 (1) 'An employer is not required to pay an employee in terms of Section 22 if the employee has been absent from work for more than two consecutive days or on more than two occasions during an eight-week period and, on request by the employer, does not produce a medical certificate stating that the employee was unable to work for the duration of the employee's absence on account of sickness or injury. (2) The medical certificate must be issued and signed by a medical practitioner or any other person who is certified to diagnose and treat patients and who is registered with a professional council~ established by an Act of Parliament.(3) If it is not reasonably practicable for an employee who lives on the employer's premises to obtain a medical certificate, the employer may not withhold payment in terms of subsection (1) unless the employer provides reasonable assistance to the employee to obtain the certificate.'

4.2.5 Occupational Health and Safety Act 85 of 1993

The Occupational Health and Safety Act (OHSA) commenced operation on 1 January, 1994. The purpose of the Act was to set down regulations to assist in the creation of a healthy and safe working environment. Section 8(1) of the OHSA²⁵⁵ states:

“Every employer shall provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of his employees.”

This creates conflicting views, as the onus rests with the employer to provide a safe working environment based on the OHSA.²⁵⁶ However such a situation may be unattainable as the employer is prohibited from pre-employment HIV/AIDS testing. It is arguable that an employer is unable to defend a course of action that is unknown to him/her. Although HIV/AIDS is deemed non-communicable, it can be assumed that nobody can properly allege to have been infected with the HIV/AIDS virus during an ordinary work relationship. A risk of transmission is still present through blood contact. An employer may take general precautions such as protective wear and the appointment of specifically allocated individuals to attend to medical emergencies. Despite such precautions, the risk of HIV/AIDS transmission still places a great burden on the labour industry.

4.2.6 Mine Health and Safety Act 29 of 1996

The Mine Health and Safety Act²⁵⁷ (MHSA) was assented to on 30 May, 1996. The objectives of the Act are to protect the health and safety of persons at mines by requiring employers and employees to identify hazards and eliminate, control and minimise the risks relating to health and safety at mines, thus giving effect to the public international legal obligations of the Republic concerning health and safety in mines. Section 2(1) and Section 5(1) of the MHSA²⁵⁸ provides that an employer is required to

²⁵⁵ The Occupational Health and Safety Act 85 of 1993.

²⁵⁶ The Occupational Health and Safety Act 85 of 1993.

²⁵⁷ The Mine Health and Safety Act 29 of 1996.

²⁵⁸ The Mine Health and Safety Act 29 of 1996.

create as far as reasonably practicable a safe workplace. This may include ensuring that the risk of occupational exposure to HIV/AIDS is minimised.

4.2.7 Compensation for Occupational Injuries and Disease Act 130 of 1993²⁵⁹

Since its inception in 1994, COIDA²⁶⁰ has replaced the former Workmen's Compensation Act (WCA). COIDA²⁶¹ asserts that every company must register its members/ employees even if it only has one member. All employers are obliged to pay a determinable amount into a centralised fund commonly referred to as the compensation fund. The amounts are computed based on the number of employees in the company, the salaries paid and the nature of the industry. COIDA²⁶² was established as a system of no-fault compensation, for accidents arising '*during the course and scope of employment*' and provided for compensation from a central fund being entitled to employees who suffer a temporary disablement, employees who are permanently disabled and to dependents of employees who die as a result of injuries from accidents while at work or as a result of an occupational disease.²⁶³ The Act also provides for the payment of medical aid received by such employees. According to COIDA²⁶⁴ employees have the right to compensation if they are injured or become ill at work. If an employee became infected with HIV because of a workplace accident, that employee could claim for compensation provided that the infection arose during the course of employment.

COIDA provides benefits in terms of Section 22(1) to an employee who has been infected with HIV/AIDS as a result of occupational exposure to infected blood or bodily fluids,²⁶⁵ provided that the accident results in the disablement or death of the employee and the accident arose during the course and scope of employment, and where the

²⁵⁹ The Compensation for Occupational Injuries and Disease Act 130 of 1993 was assented to on 24 September 1993.

²⁶⁰ Ibid.

²⁶¹ Ibid.

²⁶² Ibid.

²⁶³ *Jooste v Score Supermarket* 1999 (2) SA 1 (CC).

²⁶⁴ The Compensation for Occupational Injuries and Disease Act 130 of 1993

²⁶⁵ Ibid. s 22 (1) "*If an employee meets with an accident resulting in his disablement or death such employee or the dependents of such employee shall, subject to the provisions of this Act, be entitled to the benefits provided for and prescribed in this Act.*"

employee did not contravene any laws at the time of the subsequent misfortune and did not act contrary to the orders of the employer.²⁶⁶

Initially Section 65 of COIDA, regulating compensation for occupational diseases, only provided compensation for diseases cited in Schedule 3 of the Act, provided they occurred during the course and scope of employment. Prior to the publication of the Government Gazette,²⁶⁷ clarifying the status of occupational transmission of HIV/AIDS, many aggrieved employees were unable to claim for compensation for occupational exposure. However since the provision of the Gazetted notice in line with Section 69 of COIDA, HIV/AIDS as a mode of occupational exposure is compensable under COIDA. The proceeding chapter will deal extensively with COIDA and the application of it, particularly Section 35(1) and its effects on invoking the Vicarious Liability Doctrine as an alternative mode of claiming for occupational exposure to HIV/AIDS.

4.2.8 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

The Promotion of Equality and Prevention of Unfair Discrimination Act²⁶⁸ was assented to on 2 February, 2000. The purpose of the Act was to give effect to Section 9 read with item 23(1) of Schedule 6 to the Constitution of the Republic of South Africa. The aim was to prevent and prohibit unfair discrimination and harassment by promoting equality and eliminating unfair discrimination.

Section 9 provides for the prevention, prohibition and elimination of unfair discrimination, hate speech and harassment on the grounds of disability and states:

“Subject to Section 6, no person may unfairly discriminate against any person on the ground of disability, including-

²⁶⁶ Ibid, s 22 (4) *“For the purposes of this Act an accident shall be deemed to have arisen out of and in the course of the employment of an employee notwithstanding that the employee was at the time of the accident acting contrary to any law applicable to his employment or to any order by or on behalf of his employer, or that he was acting without any order of his employer, if the employee was, in the opinion of the commissioner, so acting for the purposes of or in the interests of or in connection with the business of his employer.”*

²⁶⁷ Government Gazette Vol 473, No 27003.

²⁶⁸ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

- a) denying or removing from any person who has a disability, any supporting or enabling facility necessary for their functioning in society;*
- b) contravening the Code of practice or regulations of the South African Bureau of Standards that govern environmental accessibility;*
- c) failing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons.”*

Section 34 (1) makes provision for the severity of HIV/AIDS and includes HIV/AIDS in the definition of prohibited grounds:

- “In view of the overwhelming evidence of the importance, impact on society and link to systemic disadvantage and discrimination on the grounds of HIV/AIDS status, socio-economic status, nationality, family responsibility and family status-*
- a) special consideration must be given to the inclusion of these grounds in paragraph (a) of the definition of "prohibited grounds" by the Minister;”*

There has been much uncertainty concerning the status of HIV/AIDS positive persons and medical aid and insurance Schemes. Many people infer that an HIV/AIDS positive person cannot be granted insurance or medical aid cover. This is not entirely correct as legislation compels medical aids and insurance institutions to cover HIV/AIDS positive persons. The Schedule to The Promotion of Equality and Prevention of Unfair Discrimination Act²⁶⁹ which sets out an illustrative list of unfair practices deems it unfair for an insurance service to refuse to provide or make available an insurance policy to a person on one or more of the prohibited grounds. In terms of Section 34(1) HIV/AIDS falls within the scope of this definition. It is also unfair discrimination to limit the provision of benefits and services and is unfair practice to disadvantage a person by refusing to grant a service based solely on their HIV/AIDS status.

²⁶⁹ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

In conjunction with this is the Medical Schemes Act.²⁷⁰ Section 24(2) (e) of the Act provides:

“No medical schemes shall be registered under the Act unless the Council is satisfied that the medical Scheme does not or will not unfairly discriminate directly or indirectly against any person on one or more arbitrary grounds including race, gender, marital status, ethnic or social origin, sexual orientation, pregnancy, disability and state of health.”

This provision is reinforced by Section 29, which states that: *“The Registrar shall not register a medical scheme under the Section, and no medical scheme shall carry on any business, unless provision is made in its rules for certain matters.”* These Acts in essence prohibit an insurance company from unfairly excluding people with HIV/AIDS from health insurance. Therefore if a person is able to pay the premiums, they may not be denied access to health insurance services. One important factor to note is that all Medical Schemes in South Africa are legally obliged to adequately and fully fund treatment for opportunistic infections as part of the mandated basic minimum package of care and treatment.

In an employment context The Code of Practice on aspects of HIV/AIDS and employment specifically refers to workers' benefits. In terms of Section 10, workers who are ill with HIV/AIDS should be treated the same as other workers with comparable life threatening diseases. In respect of access to worker benefits, it provides that where a Medical Aid Scheme is offered as part of a worker benefit package, it is important that the Scheme does not discriminate, directly or indirectly, on the basis of HIV/AIDS.

4.3 Code of Good Practice: Key Aspects of HIV/AIDS and Employment 2000

South Africa being a member state of the ILO and UN deemed it necessary, based on the severity of the HIV/AIDS pandemic and with obligations imposed on an international platform, to draft a National Code governing HIV/AIDS in the labour sector. The Code

²⁷⁰ The Medical Schemes Act No.131 of 1998 came into force on 1 August 1999. The Act was aimed at regulating and reforming private health care providers and insurance providers.

was crucial in ensuring a harmonious labour approach to a global crisis which seemed impossible to ignore with the ever increasing statistics.

Section 54(1) of the Employment Equity Act²⁷¹ states that: “*The Minister may on advice of the Commission issue any Code of good practice and change or replace any Code of good practice.*” It is under this Section that the Minister was mandated to draft the Code of Good Practice: Key Aspects of HIV/AIDS and Employment²⁷² (The Code.) The Code identifies HIV/AIDS as serious public health problems with socio-economic, employment and human rights implications.²⁷³ The primary objective of the Code was to create guidelines for employers and unions to allow for development and implementation of workplace policies to eliminate HIV/AIDS discrimination in the workplace.

The Code held that there shall be no statutory consequences should adherence not be complied with. It serves as a guideline to ensure that employers, employees and unions are better equipped to handle HIV/AIDS in an employment context. The core principle of the Code was to promote equality and non-discrimination between individuals with HIV/AIDS and those without and to create a supportive environment enabling HIV/AIDS infected employees to continue working under normal conditions in their current employment for the duration of their medically fitting stage and to protect the human rights and dignity of people living with HIV/AIDS, leading to the prevention and control of HIV/AIDS. The Code was also designed to accommodate for the disproportionate impact of HIV/AIDS on women and to encourage the full participation of all relevant stakeholders to combat the HIV/AIDS scourge.

The Code’s secondary objective was to provide guidelines for employers, employees and trade unions on how to manage HIV/AIDS within the workplace by:

- (i) creating a safe working environment for all employers and employees;*
- (ii) developing procedures to manage occupational incidents and claims for compensation;*
- (iii)*

²⁷¹ The Employment Equity Act 55 of 1998.

²⁷² Code of Good Practice: Key Aspects of HIV/AIDS and Employment 2000.

²⁷³ Ibid. para 1 of the introduction: “*The Human Immunodeficiency Virus (HIV) and the Acquired Immune Deficiency Syndrome (AIDS) are serious public health problems which, have socio economic, employment and human rights implications.*”

introducing measures to prevent the spread of HIV; (iv) developing strategies to assess and reduce the impact of the epidemic upon the workplace; and (v) supporting those individuals who are infected or affected by HIV/AIDS so that they may continue to work productively for as long as possible.

Paragraph 6 of the Code prohibits unfair discrimination of HIV/AIDS positive persons within the employment relationship or within any employment policies or practices. Paragraph 4.2 emphasises the definition of “workplace” to be more broadly interpreted than the LRA.²⁷⁴ It states that a workplace does not consist of merely an employer-employee relationship but also extends to the informal sector and the self-employed. Paragraph 4.1 outlined the application and scope of the Code as an instrument to develop, implement and refine the current HIV/AIDS policies and programmes to suit the needs of the respective workplaces.

Paragraph 5.3.6 of the Code rehashes the assertion of the duty on the employer under Section 2(1) and Section 5(1) of the Mine Health and Safety Act²⁷⁵ by providing that an employer be required to create, as far as is reasonably practicable, a safe workplace. This may include ensuring that the risk of occupational exposure to HIV is minimised. Paragraph 5.3.7 provides that: *‘an employee who is infected with HIV as a result of an occupational exposure to infected blood or bodily fluids, may apply for benefits in terms of Section 22(1) of the Compensation for Occupational Injuries and Diseases Act, No. 130 of 1993.’* Paragraph 8 is of paramount importance in establishing a duty on the employer to create a safe working environment and provides that an employer is obliged to provide and maintain a safe workplace. Although the risk of transmission is minimal in the workplace, accidents may still occur. The Code proposes that every workplace complies with the Health and Safety provisions stipulated. The Code further requires that a policy be drafted including coverage on identification of hazards, procedures following an incident and compensation procedures. The Code dictates that all workplaces must provide adequate training, education and awareness on universal

²⁷⁴ The Labour Relations Act 66 of 1995.

²⁷⁵ The Mine Health and Safety Act 29 of 1996.

control measures. Adequate monitoring post-accident should be strictly adhered to.²⁷⁶ Pursuant to the provided recommendation imposed on the employer by paragraph 8, an employee may claim for compensation in terms of the Compensation for Occupational Injuries and Diseases Act²⁷⁷ for HIV infections occurring as a result of occupational exposure.

4.4 Conclusion

This chapter has compared South African principles to international standards. It can be deduced that national legislation generally conforms to international principles. The binding authority of the Constitution ensures compliance with the principles of equality, dignity and privacy as recommended by the ILO and UN, notwithstanding the binding and assertive nature of the constitutional principles governing HIV/AIDS in labour practices. The legislature has supplemented these constitutional principles with advancing statutory obligations in an effort to eliminate discrimination surrounding HIV/AIDS.

As recommended by international authority South Africa subscribes to the policy of prohibition on pre-employment testing for HIV/AIDS at both recruitment and continued employment stages, with a Labour Court order being the only means of contesting this prohibition. Dismissals based on a positive HIV/AIDS status are deemed unfair and are governed by several Acts in South Africa. Basic paid sick leave is afforded to an employee provided the leave falls within the prescribed cycle. In keeping with

²⁷⁶ The Code of Good Practice: Key Aspects of HIV/AIDS and Employment 2000: "(8.1) an employer is obliged to provide and maintain, as far as is reasonably practicable, a workplace that is safe and without risk to the health of its employees. (8.2) The risk of HIV transmission in the workplace is minimal. However occupational accidents involving bodily fluids may occur, particularly in the health care professions. Every workplace should ensure that it complies with the provisions of the Occupational Health and Safety Act, including the Regulations on Hazardous Biological Agents, and the Mine Health and Safety Act, and that its policy deals with, amongst others: (i) the risk, if any, of occupational transmission within the particular workplace; (ii) appropriate training, awareness, education on the use of universal infection control measures so as to identify, deal with and reduce the risk of HIV transmission in the workplace; (iii) providing appropriate equipment and materials to protect employees from the risk of exposure to HIV; (iv) the steps that must be taken following an occupational accident including the appropriate management of occupational exposure to HIV and other blood borne pathogens, including access to post-exposure prophylaxis; (v) the procedures to be followed in applying for compensation for occupational infection; (vi) the reporting of all occupational accidents; and (vii) adequate monitoring of occupational exposure to HIV to ensure that the requirements of possible compensation claims are being met."

²⁷⁷ Compensation for Occupational Injuries and Disease Act 130 of 1993.

international principles, the Occupational Health and Safety Act and the Mine Health and Safety Act place the burden on the employer to create a safe working environment for the employee. However, no sanctions are offered for a failure to discharge the burden. Evidently national legislation conforms to international standards. South African legislation provides for a system of governance on how to halt the scourge of the HIV/AIDS virus and reduce the stigma and discrimination surrounding the virus; however these are merely suggestions with no repercussions for failure to abide by them.

Express requirements on reporting occupational incidents are absent. Allocation of labour inspectors to monitor adherence is not statutorily provided for. A shortage of implementation based committees further contributes to the slow progression of implementation. An employee could claim damages for occupational exposure through a no-fault compensation system for temporary and permanent disablement, and it can be argued that the COIDA provides a ready source of compensation for employees who suffer employment related injuries, and provides compensation without the necessity of having to prove negligence thus eliminating timeous, expensive and unpredictable litigation processes to recover compensation for injuries sustained. It can be argued on the contrary that the restrictions placed on the employees limits the compensation available to them significantly, as they are only limited to claiming pecuniary loss in terms of COIDA. Therefore, their rights to claiming general damages for past and future pain and suffering, loss of amenities of life and future loss of earnings and medical expenses are limited.

The possibility of an optional vicarious liability approach as opposed to the strict statutory COIDA approach could see a worker facing the prospect of a proportional reduction of damages based on contributory negligence and could subject the worker to expensive and time-consuming litigation to pursue a claim, with no guarantee that an award would be recoverable, because, there would be no certainty that the employer would be able to pay large amounts in damages. If successful, an employee could be awarded high payouts as compared to COIDA. The next chapter will critically analyse

the application of COIDA and its express exclusion of civil or vicarious liability claims. In an effort to understand the operation and application of COIDA, the researcher will also explore possible avenues of challenging the immunity presently enjoyed by employers as a result of this statute.

CHAPTER 5

A GENERAL PERSPECTIVE ON THE COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT 130 OF 1993.

Given the specific preclusion by section 35(1) of the Compensation for Occupational Injuries and Disease Act 130 of 1993 (COIDA)²⁷⁸ in disbarring employees from claiming from an employer through any civil avenues, this chapter will attempt to analyse the Act in its entirety with relevant case law applicable in favor and against the relevant arguments of application.

Throughout this dissertation it has become evident that ample legislation works in favour of protecting an HIV/AIDS positive employee. However it can be argued that Section 35(1) of COIDA²⁷⁹ severely limits this privilege burdening and disadvantaging the employees. The ambits of Section 35(1) read

“No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational injury or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death.”

The above stipulated clause has the effect of highlighting its exclusivity²⁸⁰ thereby eliminating any other claims pursuable for occupational injuries. Many labour institutions and representatives have publically voiced their concerns on the lack of adequate accountability by employers due to the immunity afforded by Section 35(1) of COIDA.²⁸¹

Numsa²⁸² argued that the law provides “*hopelessly inadequate payouts*” to those injured at work; it prevents workers from taking employers to Court for negligence and only allows for minimum fines being imposed on the employers. Numsa is of the opinion that

²⁷⁸ The Compensation for Occupational Injuries and Disease Act 130 of 1993 was assented to on 24 September 1993.

²⁷⁹ The Compensation for Occupational Injuries and Disease Act 130 of 1993.

²⁸⁰ Ibid.

²⁸¹ Ibid.

²⁸² The National Union of Metal Workers of South Africa (NUMSA) is the biggest metal workers trade union. See <http://www.numsa.org.za/> accessed in September 2016.

it makes it cheaper for the employer to pay a fine and have the accident happen repeatedly, than to invoke preventative and corrective measures in place to halt the occurrence. Numsa²⁸³ further argued that the employers are highly subsidised, as at present an employer pays a modest levy which bears little or no relation to the harm that his/her unsatisfactory health practices cause. Therefore “*a company is granted immunity against any claim that an injury may attract.*”²⁸⁴

Richard Spoor²⁸⁵ a specialist health and safety lawyer believes that the full ambit of the legal Constitution and social arguments against immunity of employers, were not placed before Courts. “*We have not heard the end of this issue*”²⁸⁶ he remarked, adding that it would be a mistake for employers to become complacent.²⁸⁷ Concerning is cross-subsidisation of “bad” employers by “good” employers with the latter only taking health and safety seriously. He believes that good employers contribute more than their fair share to the fund, whilst bad employers attributable to substantial claims due to their bad safety standards constitute and unfair drain on the fund’s resources.²⁸⁸

Richard Spoor asserted that policing employers is not enough and employers tend to escape liability, as, good or bad they are all entitled to pay the same amount. Spoor²⁸⁹ remarked that the best and simplest incentive is to hold employers liable for the full extent of the harm they inflict on their employees whether intentional or negligent. The starting point towards this reform would be to challenge the immunity that employers presently enjoy.²⁹⁰

Currently as the legal position stands many Courts and labour mediation firms lack the authority to preside over, make judgments in contradiction of, or declare invalidity over

²⁸³ The National Union of Metal Workers of South Africa (NUMSA) See <http://www.numsa.org.za/>

²⁸⁴ Ibid.

²⁸⁵ Richard Spoor is a South African activist and human rights attorney based in White River Mpumalanga who has more than 25 years of experience in complex litigation. A pioneer throughout the past 20 years in the fight for workers’ rights and safety. Richard Spoor represented Mr Mankanyi in the landmark case of *Mankayi v Anglogold Ashanti Ltd* 2011 32 ILJ 545 (CC).

²⁸⁶ Ibid.

²⁸⁷ Ibid.

²⁸⁸ Ibid.

²⁸⁹ Ibid.

²⁹⁰ Ibid.

Section 35(1) of COIDA.²⁹¹ At most employers attain what can be referred to as “a slap on the wrist” for negligent failure or mismanagement of their workplace. In the case of *Rodney Allan v New Line Piping*²⁹² it was noted that the Commissioner of the CCMA could only conceivably arbitrate on the failure of an employer to submit a compensation claim for an injury on duty of which at most the Commissioner only bore jurisdiction to direct an employer to fulfill their obligations in this regard and nothing more.

This was further reiterated in the case of *Jooste v Score Supermarket*²⁹³ where the Court remarked on whether an employee ought to have retained the common law right to claim damages, either over and above or as an alternative to the advantages conferred by the Compensation Act, represents ‘*a highly debatable, controversial and complex matter of policy. It involves a policy choice which the legislature and not a Court must make. The contention represents an invitation to this Court to make a policy choice under the guise of rationality review; an invitation which is firmly declined.*’

In the case of *Newu v CCMA*²⁹⁴ the Court commented the following regarding an employer’s power “*In my view the employer remains very economically strong compared to an individual worker...*”

It can be noted that an employer bears a statutory and a common law duty to provide a safe working environment for his/her workers. Consequences for a failure to fulfill this statutory duty surfaces in the provisions and penalties enshrined by the OSHA²⁹⁵, MHSA²⁹⁶, ODMWA²⁹⁷ and COIDA.²⁹⁸ However a failure to fulfill his/her common law duty bears no legal repercussions as it is limited by the exclusivity of the operation of COIDA.²⁹⁹ In an effort to understand the statutory duty of care assured to every employee, it is crucial to analyse the legislation governing it.

²⁹¹ The Compensation for Occupational Injuries and Disease Act 130 of 1993.

²⁹² *Rodney Allan v New Line Piping* cc (KN34803).

²⁹³ *Jooste v Score Supermarket* 1999 (2) SA 1 (CC).

²⁹⁴ *Newu v CCMA* 2007 (16) CLL(111).

²⁹⁵ Occupational Health and Safety Act 85 of 1993.

²⁹⁶ Mine Health and Safety act 29 of 1996.

²⁹⁷ Occupational Diseases and Mine and Works Act 1973.

²⁹⁸ The Compensation for Occupational Injuries and Disease Act 130 of 1993.

²⁹⁹ Ibid.

5.1 Compensation for Occupational Injuries and Diseases Act³⁰⁰

Since its inception in 1994, COIDA³⁰¹ has replaced the former Workmen's Compensation Act (WCA). COIDA³⁰² asserts that every company must register its members/ employees for COIDA, even if it only has one member. All employers are obliged to pay a determinable amount into a centralised fund commonly referred to as the compensation fund. The amounts are computed based on the number of employees in the company, the salaries paid and the nature of the industry.

COIDA³⁰³ was established as a system of no-fault compensation, for accidents arising '*during the course and scope of employment*' and provided for compensation from a central fund being entitled to employees who suffer a temporary disablement, employees who are permanently disabled and to dependents of employees who die as a result of injuries from accidents while at work or as a result of an occupational disease.³⁰⁴ The Act also provides for the payment of medical aid received by such employees. In terms of COIDA³⁰⁵ employees have the right to compensation if they are injured or become ill at work. If you get infected with HIV because of a workplace accident, you can claim for compensation provided that the infection arose during the course of employment.

At common law an employee has a right to institute a delictual action against his/her employer for compensation based on a common law right to a safe working environment. Any breach of these duties should result in a delictual claim either in isolation or through vicarious liability. However, Section 35 (1) has removed the common law right of an injured employee to claim benefits through delictual avenues and instead enforces the notion that all claims for occupational injuries need to be addressed to the Compensation Commissioner.

³⁰⁰ The Compensation for Occupational Injuries and Disease Act 130 of 1993.

³⁰¹ Ibid.

³⁰² Ibid.

³⁰³ Ibid.

³⁰⁴ *Jooste v Score Supermarket* 1999 (2) SA 1 (CC).

³⁰⁵ The Compensation for Occupational Injuries and Disease Act 130 of 1993.

The benefits of COIDA³⁰⁶ are only applicable to employees. An employee as defined by the Act is

“a person who has entered into or works under a contract of service or of apprenticeship or learnership, with an employer, whether the contract is express or implied, oral or in writing, and whether the remuneration is calculated by time or by work done, or is in cash or in kind.”

Thus certain exclusions present itself in the definition of an employee specifically;

- i) The South African National Defence Force;
- ii) The South African Police Services;
- iii) An independent contractor, who is regarded as an employer in his/her own right.

The prohibition of employees and dependents instituting an action against an employer covers both vicarious liability claims for acts of employees and claims occasioned by the employers own negligence. This can be regarded as the Exclusivity Doctrine which prohibits more than one claim being instituted against a defendant³⁰⁷ as expressly provided for by Section 35(1) of COIDA.³⁰⁸

An employer as defined by the Act, means any person, including the State, who employs an employee, and includes--

- a) Any person controlling the business of an employer;
- b) if the services of an employee are lent or let or temporarily made available to some other person by his employer, such employer for such period as the employee works for that other person;
- c) a labour broker who against payment provides a person to a client for the rendering of a service or the performance of work, and for which service or work such person is paid by the labour broker

³⁰⁶ The Compensation for Occupational Injuries and Disease Act 130 of 1993.

³⁰⁷ Deborah A Ballam “The Workers’ Compensation Exclusivity Doctrine: Threat to workers’ rights under state employment discrimination Statutes.” American Business Law Journal. Vol 27 Issue 1.

³⁰⁸ The Compensation for Occupational Injuries and Disease Act 130 of 1993.

When an employee is remunerated by the labour broker, (s)he for the purposes of COIDA³⁰⁹ is regarded as an employee of the labour broker. Hence, should an accident occur during the course and scope of employment resulting in an injury, the employee will not be prohibited from claiming against the employer for damages in terms of common law. However, where the client of the labour broker remunerates the employee, then for purposes of COIDA, the client is the employee's employer and in this instance the ambits of Section 35(1) become applicable.

The status of sub-contractors operates the same as employees and is subject to the same provisions. They may however claim via civil avenues against parties other than their employers where the negligent actions of the third parties result in damages being sustained.

5.2 Clarification on the meaning of "State"

In the case of *Minister of Defense and Military Veterans v Liesl-Lenore Thomas*³¹⁰ the Constitutional Court had the opportunity on shedding clarity on the meaning of 'State' for the purposes of COIDA.³¹¹ In this particular case the respondent fell down a stairwell and injured herself as a result of alleged negligence on behalf of the hospitals employees. Owing to her injuries sustained during her course of employment, the respondent lodged a claim for benefits against the Western Cape Provincial Government under COIDA,³¹² which went uncontested. However she also lodged a separate claim for damages against the Minister in his capacity as such for alleged negligence of the hospital staff.

The Minister defended this action relying on the provisions of Section 35(1) indemnifying an employer against a delictual claim for occupational injuries. The issue before the Constitutional Court became a matter of distinguishing who the employer of the respondent was at the time the injuries were sustained. The central concept to be understood was whether the State was a single unified entity operating at three different

³⁰⁹ The Compensation for Occupational Injuries and Disease Act 130 of 1993.

³¹⁰ *Minister of Defense and Military Veterans v Liesl-Lenore Thomas* (168/4) [2015] ZACC 26.

³¹¹ The Compensation for Occupational Injuries and Disease Act 130 of 1993.

³¹² *Ibid.*

levels or whether the Western Cape Provincial Government was an individual component.

The Minister contended that the respondent, whether employed by the Western Cape Provincial Government or Minister, was not an issue as in essence she was employed by the State which constituted a single entity. His contention was largely based on Section 40(1) of the Constitution which states that *“In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.”*

After consideration of all the arguments put forward and the definition of the word State’ in various other statutes, the Constitutional Court held that there is no legislative or Constitutional framework that suggests that the state must be considered as a single employer of all employee’s working in different spheres of Government.³¹³ The Court went further to say that weighing the potential risks associated with interpreting that all spheres of Government constitute a single employer, the respondent’s common law right to bodily integrity and security would be unduly restricted.³¹⁴

It was held that the respondent’s employer was Western Cape Provincial Government and not the Minister. Therefore the Minister could not rely on the protection afforded by Section 35(1) of COIDA, limiting its vicarious liability for injuries sustained by negligence of employees of the hospital. The respondent’s common law claim for damages was thus preserved and she was entitled to claim from the Minister as a third party.

The findings of this case has significant importance as it has displayed two important points. Firstly, where the identity of the employer is unclear due to interpretational uncertainty, the Constitutional Court has favoured an interpretation that is least restrictive on the employee. Secondly, for the purposes of COIDA³¹⁵ the ‘State’ is not considered to be a single entity inclusive of all of its spheres.

³¹³ *Minister of Defense and Military Veterans v Liesl-Lenore Thomas* (168/4) [2015] ZACC 26.

³¹⁴ *Ibid.*

³¹⁵ The Compensation for Occupational Injuries and Disease Act 130 of 1993.

5.3 Extension of the definition of employer

The provisions of Section 35(2) read with Section 56 of COIDA³¹⁶ extends the definition of an employer to include; an employee in management positions who is authorised to manage, control the business of any branch or department, an employee who has the right to engage or discharge employees on behalf of the employer, an engineer appointed to be generally in charge of machinery, or a duly appointed assistant to the engineer, an appointed representative in charge of machinery in terms of regulations made under the OHSA. Based on the widened definition, it can be understood that it mainly encompasses managerial positions, thus falling under the immunity of Section 35(1) of COIDA. It follows that there is nothing preventing a claim by an employee against a fellow employee who is not in a management position.

5.4 COIDA and permanent disability

Notwithstanding the severe burdens already placed on employees by the exclusions of Section 35(1), there exists more disadvantages prompted by COIDA. This was demonstrated in the case of *Free State Consolidated Gold Mines BPK t/a Western Holdings Goudmyn v Labuschagne*³¹⁷ in which the Court held that in the case of total permanent disability of an employee, there is no obligation on the employer to retain the services of the said employee nor are they obliged to find alternative employment for the employee. In the above case, the claim for compensation for injuries resulting from the employer's insistence to perform certain work tasks was not justiciable by the Industrial Court under its unfair labour practice jurisdiction.³¹⁸ The employee has contended that the employer committed unfair labour practices by forcing him to perform tasks which he knew he was unable to perform due to his back problem, and due to the employers gross negligence and disregard, he was entitled to compensation. The Court ruled that the employee had no claim against the employer occasioned by unfair labour practice as despite the employer's negligence the injuries sustained still amounted to occupational injuries and were governed strictly by section 35(1) of COIDA

³¹⁶ Ibid.

³¹⁷ *Free State Consolidated Gold Mines BPK t/a Western Holdings Goudmyn v Labuschagne* (1999) 4 LLD 766 (LAC).

³¹⁸ Ibid.

preventing any other causes of action.³¹⁹ The Courts further stated that the employee could not escape the provisions of COIDA by trying to categorise a regrettable injury as unfair labour practice and claim in terms of the LRA.³²⁰

5.5 Other modes of protection afforded to employers

Employers are further protected by the general indemnity extended to them by employer's liability policies. This in essence affords employers and other categories of persons such as partners, directors, members or employees of the insured, the same protection that Section 35(1) of COIDA offers. Due to its similarity in operational nature to COIDA, it is seldom that an employer's relies on the public liability policy to rebut claims against them by employees. However this could also prove significantly impactful on employees who wish to claim from a fellow employee for injuries, as the employee may also be indemnified under the policy against any claim from a fellow employee.

Evidently, employers' bear significant protection as compared to their employees. It can be argued that the Act provides a ready source of compensation for employees who suffer employment related injuries, and provides compensation without the necessity of having to prove negligence thus eliminating timeous, expensive and unpredictable litigation processes to recover compensation for injuries sustained. On the contrary it can be argued that the restrictions placed on the employees limits the compensation available to them significantly as they are only limited to claiming pecuniary loss in terms of COIDA. Their rights to claiming general damages for past and future pain and suffering, loss of amenities of life and future loss of earnings and medical expenses are extinguished.

The argumentative opinions of employers and employees came under scrutiny in the case of *Jooste v Score Supermarket*.³²¹ This case concerned the appeal of the special plea, which was occasioned by an employee instituting an action for general damages in the High Court. She purported that the injuries was a direct result of one or more

³¹⁹ *Free State Consolidated Gold Mines BPK t/a Western Holdings Goudmyn v Labuschagne* (1999) 4 LLD 766 (LAC).

³²⁰ *Ibid.*

³²¹ *Jooste v Score Supermarket* 1999 (2) SA 1 (CC).

employee's negligence during their course and scope of employment. The defendant in the High Court matter raised a special plea citing the express preclusion of claiming for delictual damages by Section 35(1) of COIDA for occupational injuries. The special plea prompted a consequential replication from the High Court that the provisions of Section 35(1) was inconsistent with the Interim Constitution, in that the provisions were a violation of the right to equality before the law³²², to equal protection of the law and the right to not be unfairly discriminated against³²³, the right of access to Courts³²⁴ and the right to fair labour practices.³²⁵ The matter was referred to the Constitutional Court for a confirmation of the declaration of invalidity as required by Section 172(2) (a) of the Final Constitution.³²⁶

The initial ruling by the High Court of the infringement of Section 9(1) and 9 (3) of the 1996 Constitution was based on the contention that the employees, by being deprived of the common law right to claim damages against their employers, are placed at a disadvantage in relation to people who are not employees and who retain that right.

In dealing with these contentions, Zietsman JP said *"The question . . . is whether section 35 of the Act, which denies to employees the right to claim compensation from their employers, has a rational connection to the purpose of the Act. If not it constitutes unfair discrimination against employees."*

In oral argument before the Court, counsel for the applicant rightly accepted that there was no evidence in support of the proposition that the differentiation in issue amounted to unfair discrimination and advanced no contention in this regard. In the absence of

³²² Section 8 (1) of the Constitution of the Republic of South Africa Act 200 of 1993. Which provides:

"Every person shall have the right to equality before the law and to equal protection of the law."

³²³ Section 8 (2) of the Constitution of the Republic of South Africa Act 200 of 1993. Which provides: *"No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language."*

³²⁴ Section 22 of the Constitution of the Republic of South Africa Act 200 of 1993. Which provides: *"Every person shall have the right to have justiciable disputes settled by a Court of law or, where appropriate, another independent and impartial forum."*

³²⁵ Section 27 (1) of the Constitution of the Republic of South Africa Act 200 of 1993 which provides: *"Every person shall have the right to fair labour practices."*

³²⁶ Section 172(2) (a) *"The Supreme Court of Appeal, a High Court or a Court of similar status may make an order concerning the Constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of Constitutional invalidity has no force unless it is confirmed by the Constitutional Court."*

any legislation, an employee could claim damages only if it could be established that the employer was negligent. The worker would also face the prospect of a proportional reduction of damages based on contributory negligence and would have to resort to expensive and time-consuming litigation to pursue a claim. In addition, there would be no guarantee that an award would be recoverable because there would be no certainty that the employer would be able to pay large amounts in damages. It must also be borne in mind that the employee would incur the risk of having to pay the costs of the employer if the case were lost. On the other hand, an employee could, if successful, be awarded general damages, including damages for past and future pain and suffering, loss of amenities of life and estimated “lump sum” awards for future loss of earnings and future medical expenses, apart from special damages including loss of earnings and past medical expenses.³²⁷

An employee who is disabled in the course of employment has the right to claim pecuniary loss only through an administrative process which requires a Compensation Commissioner to adjudicate upon the claim and to determine the precise amount to which that employee is entitled.³²⁸ The procedure provides for speedy adjudication and for payment of the amount due out of a fund established by the Compensation Act to which the employer is obliged to contribute. Payment of compensation is not dependent on the employer’s negligence or ability to pay, nor is the amount susceptible to reduction by reason of the employee’s contributory negligence. The amount of compensation may be increased if the employer or co-employee were negligent but not beyond the extent of the claimant’s actual pecuniary loss. An employee who is dissatisfied with an award of the Commissioner has recourse to a Court of law which is, however, bound by the provisions of the Compensation Act. That then is the context in which section 35(1) deprives the employee of the right to a common law claim for damages.

It was stated that the Compensation Act supplants the essentially individualistic common law position, typically represented by civil claims of a plaintiff employee against

³²⁷ *Jooste v Score Supermarket* 1999 (2) SA 1 (CC).

³²⁸ Chapter VII of The Compensation for Occupational Injuries and Disease Act 130 of 1993.

a negligent defendant employer, by a system which is intended to and does enable employees to obtain limited compensation from a fund to which employers are obliged to contribute.³²⁹ Compensation is payable even if the employer was not negligent. Though the institution of the regime contemplates a differentiation between employees and others, it is very much an open question whether the Scheme is to the disadvantage of employees.

Counsel for the applicant submitted that section 35(1) had to be viewed independently of the rest of the Compensation Act because it did not have to be an integral part of the Scheme, that there was no reason why a negligent employer should not be obliged to pay both the assessed contributions to the fund and common law damages, and that there was accordingly no rational basis for the inclusion of section 35(1) as part of the Scheme. He said that the assumption that it was unduly onerous for the employer to be obliged to pay both contributions to the fund and common law damages if negligent was ill founded.³³⁰

In essence, the contention amounted to this: the nature of the balance achieved by the legislature through the Compensation Act tilts somewhat in favour of the employer while requirements of policy and the nature of the relationship between the employee and the employer indicate that a different balance is appropriate. It was contended that the object of the Act is to provide compensation for workers, not to benefit employers. Section 35(1) of COIDA benefits only employers. It is therefore not rationally related to the purpose of the legislation.

The legislature clearly considered that it was appropriate to grant to employees certain benefits not available at common law. The Scheme is financed through contributions from employers. No doubt for these reasons the employee's common law right against an employer is excluded. Section 35(1) of the Compensation Act is therefore logically and rationally connected to the legitimate purpose of the Compensation Act, namely, a comprehensive regulation of compensation for disablement caused by occupational

³²⁹ *Jooste v Score Supermarket* 1999 (2) SA 1 (CC).

³³⁰ *Ibid.*

injuries or diseases sustained or contracted by employees in the course of their employment.³³¹

In so far as section 8(2) was concerned, there was no evidence of unfair discrimination, no contention in this regard and no apparent basis upon which unfair discrimination could be said to exist.³³² The other basis on which the applicant sought to impugn the section, namely the alleged inconsistency with sections 22 and 27(1) of the Interim Constitution, were not pursued in argument before this Court.

The appeal succeeded, and the order of Constitutional invalidity of section 35(1) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 was not confirmed.

Negligence plays a key role as an employee is entitled to additional compensation if it can be established that the injury was caused by negligence of the employer, certain categories of management or fellow employee's. All claims for damages are excluded including pain and suffering and loss of amenities of life.³³³

The implication of the Jooste³³⁴ decision was that the computation of compensation to dependents be limited in terms of Section 54 and Schedule 4 of COIDA. Regardless of the negligence of the employer, the same formula is used in the calculation of the pension and lump sum payouts as set out in the Schedule. Although Section 56 provides for increased compensation where the employer was negligent, the only penalty the employer may suffer is in terms of Section 85(2), which allows the compensation commissioner to assess the contribution rates. COIDA in essence insulates the negligent employer from the full delictual consequences of his negligence.

Therefore, although negligence may result in a greater claim, it should be borne in mind that the object of the Act is to benefit employees and that their common law remedies were restricted to enable easy access to compensation. This did not mean that compensation for every harm initiated in the workplace had to be channeled to through

³³¹ *Jooste v Score Supermarket* 1999 (2) SA 1 (CC).

³³² *Ibid.*

³³³ *Ibid.*

³³⁴ *Ibid.*

this statutory mode. However if the injury was caused by an accident that arose out of an employee's employment than the latter is restricted to a claim under the Act, and this is ordinarily referred to as the Exclusivity Doctrine .

5.6 The Exclusivity Doctrine

Commonly referred to by the Americans as '*the exclusive remedy rule*' many writers believe this theory is neither exclusive nor a remedy.³³⁵ What began as a cornerstone of workers compensation has now been riddled with leaks.³³⁶ Referred to in South Africa has the Exclusivity Doctrine, though dissimilar in titles, the definition and objectives remain the same, offering protection to employers from common law suits by employees to recover for work-related injuries.³³⁷

All states have incorporated an exclusive remedy provision into their workers' compensation statute. Workers' compensation laws apply only to work-related injuries. Workers' compensation statutes in most states limit a worker's remedies for work-related injuries to a workers' compensation claim against the employer. This statutory Scheme results from a compromise whereby both employers and employees give up certain advantages in return for others. Employer's trade liability, regardless of fault, for protection from large tort awards, and employees surrender a cause of action in return for swift but limited financial benefits. These limited benefits are the exclusive remedy for injured workers against their employers.³³⁸

South Africa's provisions of the Exclusivity Doctrine surfaces in the form of Section 35(1) of COIDA, barring employees from claiming from employers for delictual damages arising during the course of employment. However with any theory,

Doctrine or precedent their remains room for interpretation, investigation and the discovery of loopholes.

³³⁵ See US Legal Definitions available at <http://definitions.uslegal.com/e/exclusive-remedy-rule/> last accessed on 10 October 2016.

³³⁶ Gary L Wickert *The exceptions to the rule: Understanding the dual capacity Doctrine* (2016) Matthiesen, Wickert and Lehrer, S.C.

³³⁷ Ibid.

³³⁸ Ibid.

Internationally, several Courts have carved out exceptions to the exclusive remedy rule that have allowed employees to recover more from employers than merely the statutorily prescribed benefits. One such exception, the dual capacity Doctrine , releases an employee from the exclusive remedy rule by allowing an employee to sue the employer acting in a third party capacity, such as a manufacturer, a lessor of workplace products or provider of medical services.

The dual Capacity Doctrine was originally adopted in the case of *Duprey v Shane*,³³⁹ in the Californian Supreme Court in 1952. An injured nurse who was negligently treated by a co-employee, a chiropractor sued both the chiropractor and her employer. The Court ruled that

“An employee injured in an industrial accident may sue the attending physician for malpractice if the original injury is aggravated as a result of the doctor’s negligence, and that such right exists whether the attending doctor is the insurance doctor or the employer.

Accordingly, an employer normally shielded from tort liability under the exclusive remedy rule may become liable in tort to his/her employee if, in addition to his/her capacity as an employer, s(he) occupies a second capacity conferring on them obligations that are independent of their obligations as an employer.

In the case of *Guy v Arthur H. Thomas Co*³⁴⁰ the Court enounced that for an employer to be held liable under the dual capacity Doctrine, the employer must act in a capacity other than that of the employer. It was further stated that *‘the decisive dual capacity test is not concerned with how separate or different the second function of the employer is from the first but with whether the second function generates obligations unrelated to those flowing from the first, that of employer.*³⁴¹

The underlying public policy rationale for the Doctrine as set out in the case of *Perry v heavenly Valley*³⁴² is that when an employee’s injury is caused concurrently by the

³³⁹ *Duprey v Shane*, 241 P.2d 78, aff’d, 249 P.2d 8 (cal 1952).

³⁴⁰ *Guy v Arthur H. Thomas Co.*, 378 N.E 2d 488 (Ohio 1978).

³⁴¹ *Duprey v Shane*, 241 P.2d 78, aff’d, 249 P.2d 8 (cal 1952).

³⁴² *Perry v Heavenly Valley*, 163 Cal. App.3d 495 (Cal. App. 1985).

employers breach of a duty owed to all members of the public, denying that person a common law cause of action would strip the employee of a cause of action available to non-employees simply because s (he) is an employee.

Over the years there are seven distinct other capacities which surfaced prompting exposure to tort liability to an employer despite protection of the Exclusivity remedy rule. Although highly argumentative and debatable till date these capacities form a major contribution to liability of an employer.

5.6.1 Vendor/ vendee relationship

Perhaps the most protuberant among the legal capacities is the employers a capacity as a vendor. Where a vendor/vendee relationship exists it has been argued extensively that the dual capacity theory should apply but only if the employer is in the business of supplying the injury causing goods or services. Two Michigan decisions helped explain this limitation further. In *Panagos v North Detroit General Hospital*³⁴³ the dual capacity Doctrine was applied, this case concerned a hospital employee cutting his mouth on food purchased in the hospital cafeteria. The Court said that this allowance was based on the vendor-vendee relationship and the cause of action had nothing to do with the fact that the plaintiff happened to be employed by the defendant. A conflicting view arose in *Neal v Roura Iron Works, Inc.*³⁴⁴ where an employee brought a breach of warranty suit against an employer, who sold the employee a glove which became caught in a drill press. The Court distinguished this case from *Panagos* and did not allow a suit, because the accident could not possibly have happened but for the fact that he was employed by the defendant as a drill press operator. Moreover, the gloves sold to the plaintiff were to be used by him in his capacity as an employee of the defendant, and it was while the plaintiff was performing in this capacity that the accident occurred.

5.6.2 Manufacturer/ Distributor of a Defective Product

When the employer manufacturers, modifies, distributes or installs a product that causes an employee workplace injuries, Courts have considered whether the employee

³⁴³ *Panagos v North Detroit Gen. Hospital.*, 192 N.W.2d 542 (Mich. Ct. App. 1971).

³⁴⁴ *Neal v Roura Iron Works, Inc.*, 238 N.W.2d 837 (Mich. Ct.App. 1975).

may bring a product liability action against the employer.³⁴⁵ A minority of states³⁴⁶ have applied the dual capacity Doctrine in this context, requiring the second persona of the employer to be completely independent from his obligations as an employer. On the other hand a majority of states reject the dual capacity Doctrine in cases involving products made by the employer.³⁴⁷ The case of *Weber v Armco, Inc.*³⁴⁸ the Court of Oklahoma stated:

“The majority of jurisdictions have refused to apply the dual-capacity Doctrine under a products liability theory, when the employer manufactures, modifies, distributes or installs a product used in the employee’s work. Application of the dual-capacity Doctrine requires that the second persona of the employer be completely independent from his obligations as an employer. If the employer is also the manufacturer of the product which caused the employee’s injury, the two personas of manufacturer and employer are interrelated. An employer has a duty to provide a safe workplace for his employees. If an employer provides an employee with a defective machine or tool to use in his work, he has breached his duty as a manufacturer to make safe machinery, and his duty as an employer to provide a safe working environment. Yet, the two duties are so inextricably wound that they cannot be logically separated into two distinct legal personas.”

5.6.3 Provider of Medical Services

Another scenario where an employer may be liable in tort under the dual capacity Doctrine involves an employer that provides medical services to his/her own employee. The first case to adopt the dual capacity theory³⁴⁹ was attributable to the fact that the co-employee performed medical services on a fellow employee resultant in aggravated injuries. This sanctioned the application of the dual capacity Doctrine holding the

³⁴⁵ See *Douglas v. E. & J. Gallo Winery*, 69 Ca. App.3d 103 (Cal. Ct. App. 1977) (employee injured when scaffolding manufactured by employer and on which employee was working collapsed). See *Mercer v. Uniroyal, Inc.*, 361 N.E.2d 492 (Ohio Ct. App. 1976) (employee injured by defective tires that were manufactured by employer and coincidentally on truck leased by employer from another company). See *Smith v. Metropolitan Sanitary District*, 396 N.E.2d 524 (Ill. 1979) (employee injured by employer’s leased truck with a defective emergency brake). See *Lewis v. Gardner Engineering Corp.*, 491 S.W.2d 778 (Ark. 1973) (defective pile driver). See *Needham v. Fred’s Frozen Foods*, 359 N.E.2d 544 (Ind. App. 1977) (defective pressure cooker). See *Schlenk v. Aerial Contractors, Inc.*, 268 N.W.2d 466 (N.D. 1978) (defective wire winder).

³⁴⁶ These states include California, Ohio and Illinois among other states.

³⁴⁷ These states include Arkansas, Indiana, North Dakota and Oklahoma.

³⁴⁸ *Weber v. Armco, Inc.*, 663 P.2d 1221, 1226 (Okla. 1983).

³⁴⁹ *Duprey v Shane*, 241 P.2d 78, aff’d, 249 P.2d 8 (Cal 1952).

employer liability under tort. Further, in the case of *Guy v Arthur H. Thomas Co*³⁵⁰ the Court accepted the liability of the employer where due to the negligence of an employee of the hospital he failed to diagnose mercury poisoning.

However since then many countries have rejected the Doctrine's application³⁵¹ in a medical service context, stating that an employer cannot cause physical injury by writing a cheque to the medical service provider. The most common approach in adopting the Doctrine is that the Doctrine will expose the employer to liability only if the employer personally performs medical services.³⁵² The rationale is that there is a crucial difference between paying for services and physically performing them. The Court remarked in the case of *McAlister v Methodist Hosp.*³⁵³ that "*The employer is the employer, not some person other than the employer, it is that simple.*"

5.6.4 Owner of real estate

There is no support for the application of the dual capacity Doctrine when the employer is sued as the premises owner. In the case of *Sharp v Gallagher*³⁵⁴ the Supreme Court reasoned why. This case concerned an employee who was injured while working at a residential construction site and the premises was owned by the contractor/employer through a land trust. The Court held that an employer cannot be sued as the owner or occupier of land, whether the cause of action is based on common-law obligations of landowners or on a law such as a safe place statute or structural work Act. Apart from the basic argument that mere ownership of land does not endow a person with a second legal persona or entity, there is an obvious practical reason requiring this result.

The Court said *'that an employer, as part of his business, will almost always own or occupy premises, and maintain them as an integral part of conducting his business. If*

³⁵⁰ *Guy v Arthur H. Thomas Co.*, 378 N.E.2d 488 (Ohio 1978).

³⁵¹ Illinois, Tennessee, Mississippi and Florida.

³⁵² See *McCormick v. Caterpillar Tractor Co.*, 85 Ill.2d 352 (Ill. 1981) (malpractice of physician hired by employer). See *Trotter v. Litton Systems, Inc.*, 370 So.2d 244 (Miss. 1979) (infection caused by negligence of personnel at employer's first aid station). *Warwick v. Hudson Pulp & Paper Co.*, 303 So.2d 701 (Fla. Dist. Ct. App. 1974) (aggravation of back injury at in-house clinic).

³⁵³ *McAlister v Methodist Hosp.*, 550 S.W.2d 240 (Tenn. 1977) an hospital employee was injured by the negligent treatment of a back injury.

³⁵⁴ *Sharp v. Gallagher*, 447 N.E.2d 786 (Ill. 1983).

*every action and function connected with maintaining the premises could ground a tort suit, the concept of exclusiveness of remedy would be reduced to a shambles.*³⁵⁵

5.6.5 Employer is self- insured

It has been argued that a self-insured employer actually bears two titles. One as an employer and the other as an insurance company, however there has been very little support in application of the Exclusivity remedy rule. The rationale is two-part; (i) self-insurance is within the scope of employer activity ; and (ii) taking on the role of an insurer does not give rise to an independent duty in terms of providing safe work premises, which is the employers duty. Generally Courts have rejected the dual-capacity Doctrine within the context of a self-insured employer.³⁵⁶ As clearly set out in the case of *Swain v J.L Hudson Co.*,³⁵⁷

“We fail to see why the assumption of an employer’s own insurance risk should alter the clear meaning of this [worker’s compensation] statute. A self-insured employer cannot be a ‘third party’ against whom an employee may institute suit.”

5.6.6 Corporate Subsidiaries or related entities

The uniform rule is that the operation of different division within a corporation does not create separate capacities within the meaning of the dual capacity Doctrine. Even states which have generously applied the Doctrine to other contexts have been reluctant in this regard. In permission of the application of the Doctrine, the argument for imposition of

³⁵⁵ *Sharp v. Gallagher*, 447 N.E.2d 786 (Ill. 1983).

³⁵⁶ See *Adair v. Moretti-Harrah Marble Co.*, 381 So.2d 181 (Ala. 1980) “...Here, we begin with the premise that the employer is not a third party. Just as the carrier cannot be the employer, the employer cannot be a party ‘other than the employer.’ We do not believe that the totality of the Workmen’s Compensation Act contemplates the transformation from employer to third party by its performance, or lack of performance, of work-related activities such as safety inspections.” Also see *Denman v. Duval Sierrita Corp.*, 558 P.2d 712 (Ariz. Ct. App. 1976) (action based on negligent inspection by the employer/self-insurer) In Arizona, the Court considered but rejected the Doctrine, saying, “Appellant theorizes that appellee is acting in a dual capacity and as an insurance carrier is a third party liable in common law negligence. This theory is without support in the case law or logic. It defeats the public policy of the State of Arizona as set forth in the Workmen’s Compensation statutes. It would work to penalize the self-insurer and is without merit.”

³⁵⁷ *Swain v. J.L. Hudson Co.*, 230 N.W.2d 433 (Mich. Ct. App. 1975).

suits against a corporate sub-division or related corporation is that it is a separate division/ entity of the employers business causing injury to the employee.³⁵⁸

5.6.7 Government divisions

The general rule is that an employee of one governmental division cannot sue the government when another governmental division causes the employer to suffer injuries. Nonetheless, an argument can be made for applying the dual capacity Doctrine, as governments often have many employees and separate departments acting independently.³⁵⁹

5.6.8 Statutory Duty not imposed by the Workers' Compensation Act

The application of the dual capacity Doctrine has not been considered widely in this regard. The question is whether the statutory duty arises independent of the employer-employee relationship.

In the case of *Mazurek*³⁶⁰, an employee was a national guardsman injured as a result of the negligence of another guardsman and sought to recover under a Wisconsin statute requiring the state to pay a judgment entered against a guardsman acting in good faith. This suit was allowed because, according to the Court, the state is wearing two hats, that of employer and that required of it under the guardsman statute. In a conflicting view the case of *Naso v Lafata* saw the Court of Appeals in New York, adjudicating a case in which an employee injured in an accident while being driven home in car owned by employer sought to recover under New York's vicarious liability statute which imposes liability on a vehicle owner for negligence of any person operating vehicle with owner's permission. The Suit was not allowed '*...because to allow the suit was to thwart the legislative purpose of the exclusive remedy provision. It seems that the essential*

³⁵⁸ See *Mercer v. Uniroyal*, 361 N.E.2d 492 (Ohio App. 1976) "*In recent years, corporations and employers have entered a variety of fields and economic factors have promoted diversification rather than specialization. Conglomerates have become the rule. A corporation's economic structure should not dictate the right of the injured to recover or that each new corporate merger erases a like number of causes of action.*"

³⁵⁹ See *Minister of Defense and Military Veterans v Liesl-Lenore Thomas* (168/4) [2015] ZACC 26 for South African stance.

³⁶⁰ *Mazurek v. Skarr*, 210 N.W.2d 691 (Wis. 1973).

question is whether the statutory duty arises independent of the employer-employee relationship.'

According to the dual capacity Doctrine an employer who is generally immune from tort liability to an employee injured in a work-related incident may become liable to his employee as a third party if he occupies in addition to his capacity as an employer, a second capacity that confers obligations independent of those imposed upon him as an employer. This proves to have significant impact on the application of the Exclusivity Doctrine enshrined by Section 35(1) of COIDA as internationally proving a dual capacity relationship between the employer and employee could result in a common law claim being conceivable. This could prove to have severe advantages for an employee thereby removing the suppressive nature of the exclusivity of COIDA currently governing the South African workplace. It has been accepted that the negligent actions of an employer will not attract more liability than is provided for by Schedule 4 of COIDA, however it is crucial to explore the situation where an employer's deliberate wrongdoings or omissions resulted in an occupational injury of dire nature.

5.7 Negligent and deliberate wrongdoings

Through this study it has become evident that where an employer's negligent actions may have caused injury to an employee, s (he) may not pursue a claim against the employer for common law damages as they are restricted only to claiming from the Compensation Commissioner in terms of COIDA. While this is the preferred understanding a monumental case in South Africa proved contrary to this accepted theory.

The case of MEC for Department of Health, Free State Province v Dr E³⁶¹ proved to be one of very few cases in which the Supreme Court of Appeal delivered a judgment which provided for an employee to sue her employer for damages sustained outside of the boundaries of COIDA. In this case the application of the provisions of Section 35(1) of COIDA was considered in a claim for damages by a doctor against the hospital where she was employed based on her being raped whilst on duty.

³⁶¹ MEC for Department of Health, Free State Province v Dr E (924/2013) [2014] ZASCA 167.

The employer was of the opinion that this claim fell within the scope of COIDA which inevitably limits the employee's common law right to sue the employer. It was common cause that the employee elected not to submit a claim for compensation under COIDA but rather to pursue a delictual claim.

The Supreme Court of Appeal asserted that each case must be dealt with based on its own facts. A general rule was that an employee should as far as possible claim compensation that is due and payable under the provisions of COIDA. However when considering the facts of this case, the parameter fencing was under repair, the elevator was non-functional and the lights were not working thus creating an environment dangerous to the employees.

COIDA was described in the case of *Jooste v Score Supermarket Trading (Pty) Ltd*³⁶² as "important social legislation which has a significant impact on the sensitive and intricate relationship amongst employers, employees and society at large."³⁶³

*"The purpose of the Compensation Act, as it appears from its long title, is to provide compensation for disability caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment."*³⁶⁴

The Constitutional Court went further to analyse the distinction between compensation in terms of COIDA and at common law. In a nutshell, it was determined that the two modes of compensation differed substantially. On the one hand compensation in terms of COIDA offers a system of no-fault compensation with guaranteed payouts; on the other hand the common-law position allows a claim for compensation in the absence of other legislation if the employer was negligent. Though the common law route favours a more time-consuming, expensive and no guarantee stance, if successful, the employee would be awarded general damages, including damages for past and future pain, suffering, loss of amenities of life and estimated lump sum awards for future loss of earning and future medical expenses, apart from the special damages compensable under special damages. COIDA further provides benefits to be paid to employees who

³⁶² *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 (2) SA 1 (CC).

³⁶³ *Ibid.* at para 9.

³⁶⁴ *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 (2) SA 1 (CC) at para 13.

suffer temporary disablement, employees who are permanently disabled and the dependents of employees who die as a result of injuries sustained in accidents at work or as a result of occupational disease.³⁶⁵

In arriving at its conclusion the Court considered *Davis v Workmen's Compensation Commissioner*³⁶⁶ where it appeared that '*The policy of the Act is to assist workmen as far as possible.*' Further in the case of *Williams v Workmen's Compensation Commissioner*³⁶⁷ it was noted that the Act should not be interpreted restrictively so as to prejudice a workman if it is capable of being interpreted in a manner more favourable to him.

The Court also considered other international jurisdictional approaches in arriving at a conclusion. Among the many considered were New Zealand, Germany, England and America. It should be noted that in New Zealand the compensation Scheme which came into effect in 1974 contains an extensive definition of 'accident' which outlines both circumstance that are encompassed as well as certain exclusions. "*It has always been the case.... that intentional acts like battery and rape are covered as being an "accident" to the victim.*"³⁶⁸ In Germany a distinctive stance is taken and the 'gesetzliche Unfallversicherung' (statutory accident insurance) has a basic assumption that intentional acts which include sexual harassment and rape would not constitute an accident for the purposes of German Workmen's compensation law, and thus such claims arising from such acts are pursuable under tort law.³⁶⁹ In England a system of non-tort compensation is separated by various statutes. The Industrial Injuries Scheme provides for compensation for injuries and certain prescribed diseases conditioned on occurrence during the course of employment. Secondly, the Criminal Injuries Compensation Scheme provides for compensation for personal injury caused by a crime of violence broadly in line with common law damages for tort and does not govern

³⁶⁵ *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 (2) SA 1 (CC).

³⁶⁶ *Davis v Workmen's Compensation Commissioner* 1995 (3) SA 689 (C) at 694 F.

³⁶⁷ *Williams v Workmen's Compensation Commissioner* 1952 (3) SA 105 (C) at 109c.

³⁶⁸ K Oliphant *Private and Social Insurance* Fleming's Law of Torts 10 ed (2011) at 481- 482. See also *G V Auckland Hospital Board* [1976] 1 NZLR 638 (SC).

³⁶⁹ *MEC for Department of Health, Free State Province v Dr E* (924/2013) [2014] ZASCZ 167.

accidents.³⁷⁰ The absence of rape and sexual harassment cases being pursued under the Industrial Injuries Scheme is evident of the effectiveness of separation thus far.

The American Courts have largely held that claims arising from rape and sexual assault fall within the definition of an accident in the governing Workmen's Compensation Scheme and are thus barred at common law by way of application of the Exclusivity Doctrine.³⁷¹ In the case of *Nisbet v Rayne & Burn* [1910] 2 KBD 689, the Court considered whether the murder of a cashier while travelling in a railway with a large sum of money intended for the payment of the employers workforce was an accident. In establishing the same the Courts have leaned more towards a theory referred to as ' *the necessary risk of employment*' or ' *risk incidental to employment*' by employing this concept the Courts have been able to determine whether the cause of injuries sustained by employees were related to the employees employment or not.

It was ruled in the MEC³⁷² case that:

"...As a matter of policy among, an action based on rape should not, except in circumstances in which risk is inherent and I have difficulty conceiving of such circumstances, be excluded and compensation then be restricted to a claim for compensation in terms of COIDA."

The Court further remarked, *"I am unable to see how rape perpetrated by an outsider on a doctor- a pediatrician in training- on duty at a hospital arises out of a doctor's employment. I cannot conceive of the risk of rape being incidental to such employment. There is no more egregious invasion of woman's physical integrity and indeed of her mental well-being than rape..."*

Based on this the Court allowed the complainant to sue her employer for damages occasioned by common law. Despite, a clear understanding that any form of negligence on the part of an employer can result in no more than a claim within the ambit of COIDA, there are cases which have allowed for the contrary. As stated in the

³⁷⁰ See Winfield Rogers *Tort* 17 ed (2002) at 37.

³⁷¹ See *Ford v Revlon inc.* 153 Ariz. 38 (1987) 734 P.2nd 580. Where Revlon was held liable in tort for employees emotional distress due to negligence in dealing with the ongoing matter appropriately.

³⁷² *MEC for Department of Health, Free State Province v Dr E* (924/2013) [2014] ZASCZ.

*Williams v Workmen's Compensation Commissioner*³⁷³ case, the Act should not be interpreted restrictively so as to prejudice a workman, if it is capable of being interpreted in a manner more favourable to him. This in essence provides that each case must be analysed on its own set of facts which may or may not always coincide with the provisions and restrictions of COIDA. The case of Dr E proved that South Africa is advancing in its legally accepted norms and Courts are gradually progressing to deviate from the express provisions of COIDA and its exclusivity.

5.7.1 Deliberate wrongdoing

Notwithstanding the isolated case of Dr E it is common cause that an employee is precluded by Section 35(1) of COIDA from claiming in terms of common law for damages sustained through occupational injuries occasioned by an employer's negligence. However an employee is not prevented from claiming common law damages from the employer where the accident is a result of the deliberate wrong doing of the employer. This was considered in the case of *Kau v Fourie*³⁷⁴

In this subsequent case the Court considered whether an employer could be held vicariously liable for assaulting his employee with an iron rod after the employee, in the course of his employment duties, damaged the employer's motor vehicle. Despite receiving compensation from the Workman's Compensation Commissioner the employee pursued a civil claim against his employer for damages. The employer argued that the employee was precluded from instituting a claim against him as per the ambit of Section 7(a) of the WCA (currently equivalent to Section 35(1) of COIDA). The Court held that in order for this section to be applicable to the facts; the accident/injury must have arisen out of the employee's employment. The emphasis is therefore placed on a causal connection/link between the accident and the employee's employment. In light of the facts of this case, the assault with the iron rod had nothing to do with the employee's employment but was rather an instance of deliberate intent on the employer's part. The Court had little difficulty in finding that the employee was indeed entitled to instituting a damages claim against the employer.

³⁷³ *Williams v Workmen's Compensation Commissioner* 1952 (3) SA 105 (C) at 109c.

³⁷⁴ *Kau v Fourie* 1971 (3) SA 623.

Further to that, the 2009 case of Twalo³⁷⁵ changed the law regarding claims for occupational injuries. Despite going unnoticed for several years, this judgment is slowly re-surfacing to change the way aggrieved employees/ dependents of deceased employees handle occupational claims. In the case of Twalo v The Minister of Safety and Security and Another³⁷⁶ Ebrahim J, ruled that there are exceptions to the general rule of employees being barred from instituting civil claims as a result of Section 35(1). In particular, the Judge noted that that criminal and/or intentional acts fall outside COIDA, thereby entitling an employee to claim directly from an employer.

In the case of Twalo, the second defendant, an employee of the Minister shot Twalo, a colleague. This shooting occurred with a firearm at Twalo's place of work. Twalo's widow claimed damages in her personal capacity and behalf of her three minor children from the first and second defendant, for the loss of support due to her husband's death, which she alleged was an intentional shooting. The first defendant confirmed employment of the second defendant at the time of the incident but relied largely on Section 35(1) of COIDA in his special plea to argue his acquittal from liability.

The Court had two main issues to consider in arriving at a suitable judgment. The first issue was whether the intentional acts fell within the definition of an 'accident'. Secondly, whether the shooting arose out of and in the course of the employee's employment. *'The most difficult question which arises... is whether facts as stated by the magistrate can be said to constitute an "accident" within the meaning of the law.'*³⁷⁷ An accident in a legislative context was not an accident in the ordinary acceptance of the word which in general terms is *'an effect which was not intended.'*

5.7.1.1 First issue: whether the intentional acts fell within the definition of an 'accident'

COIDA defines accident as *'arising out of and in the course of an employee's employment and resulting in a personal injury, illness or the death of the employee.'* The rather vague definition of accident led the defendant to urge the Courts to broaden its

³⁷⁵ Twalo v The Minister of Safety and Security and Another (2009) 2 All SA 491 (E).

³⁷⁶ Twalo v The Minister of Safety and Security and Another (2009) 2 All SA 491 (E).

³⁷⁷ In mcQueen v Village Deep G.M Co Ltd (1914) (TPD) 344. Devilliers Jp at 347.

interpretation to include both negligent and intentional acts. The Court rejected this argument and stated that it could not find any justification for the broadening of the definition of accident to include not only a negligent act but also an intentional killing by one employee of another, despite the absence of any causal connection with their respective duties.

The Court further stated that the intentional shooting of the deceased and subsequent pleading guilty to a charge of murder was not in dispute. Relying on the definition of 'accident' as set out in the case of *Nicosia v workmen's Compensation Commissioner*³⁷⁸ the Court concluded that based on the facts presented the shooting was patently not an accident as defined in COIDA, and although the shooting was an 'unexpected occurrence' it was not 'unintended'. The second defendant's actions were premeditated and carried with the intention to kill him.

5.7.1.2 Second Issue: whether the shooting arose out of and in the course of the employee's employment

The plaintiff argued that the test was *'not whether or not the "wrongdoer" was acting within the course and scope of his employment but rather whether the "victim" was acting within the course and scope of his employment at the time when he sustained or contracted the occupational injury.'*

The Court applied the test of vicarious liability adopted by Zulman AJ in *ABSA Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd* 2001 (1) SA 372 (SCA) and concluded that the action was not *'about the affairs, or business, or doing the work of, the employer,'* A private dispute generated the sole reason for the shooting of the deceased. The fact that it took place while both were on duty and at their workplace was entirely coincidental. This could have occurred at any other place entirely unrelated to their work environment, as the motive for the shooting bore no causal relationship with their work.

³⁷⁸ 1954 (3) SA 897 (TPD) at 901G where the Court referred to *Briesch v Geduld Proprietary Mines, Ltd.*, in which Smith J quoted what Lord Linley had said in *Fenton v Thorley*, namely:
' "Speaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produces hurt or loss. But it is often used to denote any unintended and unexpected loss or hurt apart from its cause; and if the cause is not known the loss or hurt itself would certainly be called an accident." '

The Court rejected both arguments put forth by the defendant on the premise that it created the impression that the right to claim compensation would be unqualified. Since this would mean that as long as Twalo was acting in the course and scope of his employment at the time of the incident it would not be necessary to show the causal relationship existed between the nature of the injury and the duties carried out by the employee as set out in the case of *Minister of Justice v Khoza*.³⁷⁹

Based on these facts, the intentional shooting was not an accident and did not constitute an occupational injury resultant in his death, thus the provisions of Section 35(1) of COIDA were not accordingly applicable and the deceased's widow was permitted to claim from the Minister and perpetrator.

Save for the case of *Dr E*³⁸⁰, the South African legal system tends to favour employers with relation to negligent occupational injury causing actions. Although the case of *Dr E* set a precedent regarding the consideration of the facts of each case objectively and independently, the acceptable norm is that negligent acts do not permit a claim outside COIDA. The situation somewhat tilts in favor of an employee regarding intentional injury causing acts, which promotes liability of an employer for deliberate actions unrelated to the employees course of employment. The case of *twalo* further strengthened the argument against holding an employer liable for intentional acts either in him/herself or through vicarious liability.

In order to explore and analyse the full extent of protection afforded to employees, careful consideration should also be given to the Occupational Diseases and Mine Works Act which governs controlled mines and its effect on COIDA.

³⁷⁹ 1966 (1) SA 410 (AD) Rumpff JA, stated that what was required in the broad sense was a causal connection between employment and the accident. He went on to state that, in general, the causal connection between the accident and employment is met when the accident occurs at a place where the employee works. A causal connection would be extinguished if the accident was of such a kind that the employee would have sustained the injuries even if he had been at a place other than that where he was executing his duties as an employee or when, through his own act, he caused the causal connection to be extinguished. A causal connection will be severed when the employee was intentionally injured by a stranger and the motive for the assault bore no connection to the injured person's employment.

³⁸⁰ *MEC for Department of Health, Free State Province v Dr E* (924/2013) [2014] ZASCZ.

5.8 Occupational Diseases and Mine and Works Act 1973

Occupational Diseases and Mine and Works Act 1973 (ODMWA) provides for payment of compensation for cardio-respiratory diseases contracted by persons employed in controlled mined and related works. Most mines in the mining industry are 'controlled' and subject to the provisions of ODMWA.

Section 100 of ODMWA delivers for the prohibition of being unduly enriched by more than one source of compensation and provides that:

“(1) No person shall be entitled to benefits under this Act in respect of any disease for which he or she has received or is still receiving full benefits under the Workmen's Compensation Act...”

“(2) Notwithstanding anything in any other law contained, no person who has a claim to benefits under this Act in respect of a compensatable disease as defined in this Act, on the ground that such person is or was employed at a controlled mine or a controlled works, shall be entitled, in respect of such disease, to benefits under the Workmen's Compensation Act, 1941 (Act No. 30 of 1941), or any other law.”

The definition of the word law becomes significant in order to give effect to this provision. The interpretation of statutes Act 1957 defines law as "any law, proclamation, ordinance, Act of Parliament or other enactment having the force of law." Based on historical advances it is unlikely that a Court will find Section 100(2) restrictive in its ability to promote an employee's right to proceed with a common law claim for damages against an employer.

5.9 Analysis of the Mankayi v AngloGold Ashanti Ltd³⁸¹ case and its repercussions for COIDA

Mr Mankayi instituted a claim against AngloGold Ashanti limited for damages suffered consequent to the occupational lung diseases he contracted as a result of working on the gold mines. The claim was based on the argument that AngloGold negligently

³⁸¹ 2011 32 ILJ 545 (CC).

exposed him to harmful levels of dust and gases resulting in him developing a lung disease rendering him unfit to work underground.

The claim was based both on common law and a statutory duty borne by AngloGold to provide a safe and healthy working environment, and, in breach of this duty, AngloGold failed to apply appropriate and effective control measures in its mine to reduce the risk of exposure to harmful dust and gases.

Prior to launching the action, the plaintiff was certified to be suffering from a compensable disease in terms of ODMWA and was accordingly paid out compensation in terms of the Act. The plaintiff sought to claim further damages for the debilitating lung disease that he contracted, and did so on the basis that, despite being entitled to and obtaining compensation in terms of ODMWA. There was no provision in ODMWA precluding him from suing his employer for damages at common law. Further to the argument, Section 100(2) expressly prohibits him from claiming compensation in terms of COIDA thus the provisions of COIDA specifically section 35(1) were not applicable to him. Both the High Court and the Supreme Court of Appeal agreed with the defendant that the plaintiff had no right to sue the defendant for damages occasioned by his occupational lung disease he contracted whilst working for the defendant.

The Constitutional Court upheld the plaintiff's plea and overturned the decisions held by the Supreme Court of Appeal and the High Court. The Constitutional Court found that while Section 35(1) of COIDA excluded the common law right of employees to sue their employer for damages in respect of occupational injury or disease, mineworkers excluded in terms of ODMWA from claiming against their employer under COIDA for compensatable diseases in a controlled mine were not covered by Section 35(1). In justification of this conclusion, the Court premised its argument on Section 39(2) of the Constitution.³⁸² Froneman J reasoned that the interpretation given to section 35(1) of the COIDA in the High Court and Supreme Court of Appeal has the effect of abolishing a common-law right which protected and provided an appropriate remedy to the

³⁸² Which provides that a Court must, when interpreting any legislation, promote the spirit, purport and objectives of the Bill of Rights.

fundamental right to freedom and security of the person in terms of section 12(1) of the Constitution.

One of the crucial issues examined by the Court was the question of whether COIDA applied to employees covered by section 100(2) of ODMWA, and whether the exclusionary and extinguishing effect of section 35(1) applies only to employees who have a claim for compensation under COIDA in respect of the occupational disease suffered by Mankayi.

The Constitutional Court remarked that the meaning of the word "employee" in section 1 of COIDA covers employees such as the Applicant, who are entitled to claim for occupational diseases under COIDA and who may become entitled to claim benefits for compensatable diseases under ODMWA. The Court also acknowledged that various provisions indicated that COIDA also applies to employees in controlled mines and works. The definition of the words "employee" and "employer" respectively do not expressly exclude employees who could have a claim for compensation under ODMWA.

Apart from providing compensation for occupational injuries, COIDA also provides for statutory compensation in respect of a number of listed occupational diseases³⁸³ contracted by employees in the course of their employment and resulting in disablement or death. The diseases that constitute "compensatable diseases" under ODMWA overlap with the diseases that constitute occupational diseases under COIDA. In the case of the Applicant, the disease which he had contracted could fall within both COIDA and ODMWA, but section 100(2) of ODMWA precludes him from claiming under COIDA.

³⁸³ Section 1 COIDA defines "occupational diseases" as any disease contemplated in s 65(1)(a) or (b). S 65(1)(a) refers to Schedule 3. Schedule 3 lists occupational diseases to include, inter alia, the following respiratory diseases:

- (i) Pneumoconiosis-fibrosis of the parenchyma of the lung caused by fibrogenic dust;
- (ii) Pleural thickening caused by asbestos dust exposure;
- (iii) Silicotuberculosis;
- (iv) Bronchopulmonary diseases caused by hard-metal dust;
- (v) Bronchopulmonary diseases caused by cotton, flax, hemp or sisal dusts (byssinosis); and
- (vi) Chronic obstructive pulmonary diseases.

The Court also considered the impact of section 100(2) of ODMWA on the definition of "employee" and the use of that word in section 35(1) of COIDA which provides:

... substitution of compensation for other legal remedies ... No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational injury or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death.

What is striking in this provision is that there is no reference at all to ODMWA, notwithstanding the fact that COIDA was enacted more than twenty years after ODMWA. It can be argued that had the legislature intended for ODMWA to entitle employees to be covered under COIDA, it would have been easy for it to have included references to ODMWA, but it has not done so.

According to the Court, the compensation provisions of ODMWA and COIDA are separate but contiguous. While section 100(1) of ODMWA precludes "double-dipping" on the part of employees who qualify for compensation because of having contracted a disease that is listed under both ODMWA and COIDA, section 100(2) of ODMWA goes further and specifically precludes employees with claims in respect of compensable diseases under ODMWA from claiming any COIDA benefits in respect of the same disease. It is difficult to see how section 100(2), while removing employees from COIDA compensation, could at the same time render section 35(1) applicable to them.

The purpose of workers' compensation legislation was pointed out by Price J in *R v Canquan*³⁸⁴ when he remarked:

"[Such legislation] is designed to protect the interests of employees and to safeguard their rights, and its effect is to limit the common-law rights of the employers and to enlarge the common-law rights of employees. The history of social legislation discloses that for a considerable number of years there has been progressive encroachment on the rights of employers in the interests of workmen and all employees. So much has this

³⁸⁴ *R V Canquan* 1956 3 SA 355 E.

*been the purpose of social legislation that employees have been prevented from contracting to their detriment. They have been prohibited from consenting to accept conditions of employment which the legislature has considered are too onerous and burdensome from their point of view.*³⁸⁵

In addition, COIDA is wider in scope than the Workmen's Compensation Act, which it replaced in 1993. Compensation is payable only if the accident which caused the injury, illness or death occurred within the scope of the employee's employment and was not predictable. No payments are made in respect of temporary disabilities of three days or less.

The Constitutional Court's decision in the Mankayi case deemed to be relevant to the system of occupational health and safety based on the following reasons. Firstly, the Constitutional Court has developed a precedent to determine the content and meaning of the employer's duty of care. Phrased differently, there are yardsticks or standards of conduct against which the employer's conduct can be measured and judged. This judgment will instill some sense of accountability in employers who have exploited workers working under horrendous conditions for many years. Secondly, the judgment indicates that it is time the mines are taken to task about their responsibilities for the health and safety of employees in the workplaces. Lastly, the Mankayi case illustrates the difference in compensation that is being paid to employees suffering from the same occupational diseases.³⁸⁶

The Court noted that compensation under ODMWA is far less generous and comprehensive than that afforded under COIDA and concluded that the exclusion of common-law liability in section 35(1) is limited to those employees entitled to compensation under COIDA. According to the Court, to hold otherwise would strain the plain meaning of the language in section 35(1). In its judgment the Court unanimously held that mineworkers who have contracted compensatable diseases under ODMWA retain their common-law right to claim against their employers.

³⁸⁵ Ibid.

³⁸⁶ *Mankayi v AngloGold Ashanti Ltd* 2011 32 ILJ 545 (CC).

The judgment has attracted various criticisms. Some critics argue that it is responsible for "opening the flood gates" to cases against employers. However, this judgment, is submitted as groundbreaking in that it has paved the way for mineworkers to seek justice outside of the failed compensation system. The decision of the Constitutional Court provides us with an opportunity to fight the legacy of asbestos and silicosis that has left a trail of health and death threats in our communities. The Mankayi case also highlights the disproportionate nature of the workers' compensation laws in South Africa, which lean towards compensation and place little focus on human rights.³⁸⁷ On a positive note, the Mankayi judgment places a duty on the employer to implement numerous good practice solutions which will enhance safety in the workplace.

Mineworkers who suffer from compensable occupational lung diseases in terms of ODMWA are entitled to institute civil claims against their former employers for additional compensation.³⁸⁸ This was based on the finding that COIDA and ODMWA made provision for very different Schemes of compensation. It was founded that COIDA Schemes made provision for much higher and far more comprehensive compensation than that provided for by ODMWA. The Court noted that while both COIDA and ODMWA require employer contributions to be made on behalf of employees, the contributions made in terms of the latter allow mining companies to make significant savings on their contributions.

The Court found that in light of the historical role of mining in South Africa and the dangers of risks faced by mineworkers, there is nothing irrational about preserving their common law right to claim against employers for compensable diseases.

5.10 Difference between COIDA and ODMWA

When analysed in totality, COIDA has been deemed to be more generous in terms of compensation payouts. This is based on the a lump sum benefit of thirty percent compensation for permanent disability and further pension payouts if the disability is proved to be more than thirty percent, the leniency of COIDA far surpasses the

³⁸⁷ *Mankayi v AngloGold Ashanti Ltd* 2011 32 ILJ 545 (CC).

³⁸⁸ *Ibid.*

ODMWA which only allows for a lump sum benefit based on the level of impairment with no further supplementation for pensions. The scope of the two Acts also differ based on application as COIDA covers occupational injuries in all industries including the mining sector that is not covered by ODMWA. However ODMWA only covers occupational lung disease in miners and ex-miners. One advantage of ODMWA is that it makes allowance for post-mortem benefits whilst COIDA does not expressly make provision for such benefits but can still be considered based on facts.

5.11 Conclusion

There are various sources which regulate occupational injuries and diseases. The International Labour Organisation has a number of conventions concerning employment injuries and diseases. In South Africa a Constitutional imperative regarding occupational health and safety exists. Section 24 of the Constitution states that everyone has the right to a safe working environment that promotes personal health and well-being. To put this in perspective, employers must identify workplace hazards, assess the potential risks stemming from these hazards and take appropriate action, which includes informing employees of the safety measures and risks associated with their workplace. Collective agreements can also contain arrangements relevant to social security and health and safety at the workplace.

The primary legislation in South Africa which provides for preventative measures are Occupational Health and Safety Act, and the Mine Health and Safety Act, while the most important legislation that regulates compensation for employees' injuries and diseases (and even death) suffered and contracted at work is COIDA. The Road Accident Fund Act is applicable where an employee is injured while being conveyed by a motor vehicle in the course of his employment. In cases of commuting injuries, COIDA and the RAF Act must be read together.

OHSA and the MHSA are aimed at ensuring the health and safety of employees at the workplace. In essence, these statutes serve a truly preventative purpose in the sense that they strive to prevent the contraction of diseases or injuries by employees.

Similarly, COIDA and ODMWA deal with the aftermath of injury or disease, i.e. the payment of compensation to the injured employee.

This chapter attempted to clarify the application of COIDA by exploring the relevant parties necessary to its enforcement. It was found that employers bear no common law repercussions through vicarious liability for their negligent injury causing actions. It was further deduced that certain employees in management positions also enjoyed the immunity presently enjoyed by employers for negligent occupational exposure to injuries. It was further noted that there were no restrictions on holding a fellow employee responsible for any injuries sustained through occupational exposure. However this could prove to be problematic as the employee could be indemnified under the employers public liability policies.

The exclusivity of the provisions of Section 35(1) of COIDA was explored and analysed and an adequate rebuttable to the Exclusivity Doctrine surfaced in the form of the dual capacity theory. This theory allowed for conferment of delictual liability to an employer if (s)he occupied a second capacity, deliberating obligations on them independent of their obligations as an employer. The cornerstone for the application of this theory was that the employer should act in a capacity other than that of an employer and that the obligations should be unrelated from the first capacity. The rationale was that when an employee's injury is caused concurrently by the employer's breach of a duty owed to all members of the public, denying that person a common law cause of action would strip the employee of a cause of action available to non-employees simply because s (he) is an employee.³⁸⁹

This proved to be generously applied internationally and seven distinct capacities were discovered. Although still highly debatable and controversial to some extent, there are several cases that have succeeded based on the dual capacity theory. It was evident that where an employer was also a vendor, (s)he was liable for any injuries caused to employees provided there were not related to their duties as an employee and they were not performing in an employee capacity when the incident occurred. A products

³⁸⁹ Gary L Wickert *The exceptions to the rule: Understanding the dual capacity Doctrine* (2016) Matthiesen, Wickert and Lehrer, S.C.

liability claim could succeed if the two personas were not related. It was also revealed that an employer who conducts medical procedures on an employee could be held liable under the dual capacity theory. Self-insured employers and employers who owned the premises where they conducted business could escape liability based on international precedents however, there is still room for interpretation on this matter. The Courts have been reluctant to apply the theory to corporate subsidiaries and with Governmental divisions it was a general rule that an employee of one governmental division cannot sue the government when another governmental division causes the employer to suffer injuries. Although this has been the internationally accepted general rule, the South African case of *Minister of Defense and Military Veterans v Liesl-Lenore Thomas*³⁹⁰ held that there is no legislative or Constitutional framework that suggests that the state must be considered as a single employer of all employees working in different spheres of Government, and ruled that for the purposes of COIDA and vicarious liability the 'State' is not considered to be a single entity inclusive of all of its spheres.

This chapter further explored the application of COIDA in negligent and deliberate wrongdoings of employers and fellow employees, and was it was accepted that the norm is that the negligence acts of employers or employees attract no more than an increase in the monthly assessed contributions and could increase an aggrieved employees amount claimed in terms of COIDA. However the case of *Dr E*³⁹¹ proved to contradict the general standard as *Dr E*³⁹² succeeded in her claim through vicarious liability against her employer for their negligence in omitting to provide a safe working environment. In contrast to negligent actions, deliberate actions were researched and proved to attract delictual liability outside of COIDA for an employer provided certain requirements could be met as demonstrated in the case of *Kau*³⁹³ and *Twalo*.³⁹⁴

The Occupational Diseases and Mine and Works Act was analysed together with the *Mankayi* case and it was discovered that the provisions of ODMWA and COIDA are

³⁹⁰ *Minister of Defense and Military Veterans v Liesl-Lenore Thomas* (168/4) [2015] ZACC 26.

³⁹¹ *MEC for Department of Health, Free State Province v Dr E* (924/2013) [2014] ZASCZ 167.

³⁹² *Ibid.*

³⁹³ *Kau v Fourie* 1971 (3) SA 623.

³⁹⁴ *Twalo v The Minister of Safety and Security and Another* [2009] 2 All SA 491 (E).

separate but contiguous. Section 100(2) of ODMWA specifically precluded employees with claims in respect of compensable diseases under ODMWA from claiming any COIDA benefits in respect of the same disease. Thus there could be no logical explanation for rendering Section 35(1) of COIDA applicable to them. The Mankayi case proved to be a significant step towards reform in the labour industry. The decision of the Constitutional Court had the potential to achieve legislative change, in particular with regard to the protection of miners and ex-miners against occupational injuries and diseases. This resonates well with the Constitutional provision which affords everyone the right to a healthy environment.

The next chapter will compare USA and Australia to the South African standards governing HIV/AIDS in the workplace, and civil modes of claiming damages both solely and jointly and the practical prospects of success internationally will also be looked at.

CHAPTER 6

JURISDICTIONAL ANALYSIS OF HIV/AIDS LEGISLATION

In an effort to understand any shortcomings within the South African framework, it becomes necessary to compare and analyse the best practice methods of other countries which give due recognition to the dominance of HIV positive employees' rights. The study focuses on the approach to HIV/AIDS taken by the United States of America and Australia. The choice of these jurisdictions was based largely on population density. The United States of America is the third most densely populated country in the world.³⁹⁵ By contrast, Australia is one of the least densely populated countries.³⁹⁶ This chapter focuses largely on pre-employment and continued employment structures and conducts a critical analysis of the three countries. The core focus of the comparative analysis is the notion of discrimination as well as duties imposed on employers and employees internationally.

6.1 United States of America

Recent statistics revealed that one million one hundred thousand people are currently living with HIV/AIDS in the United States of America³⁹⁷ (USA). Sixteen percent are unaware of their status.³⁹⁸ Although mandatory testing of immigrants ceased in January 2010,³⁹⁹ USA still requires all migrants and prisoner inmates in certain states to undergo mandatory HIV/AIDS testing by law.⁴⁰⁰

It is a civil right to live free from discrimination based on HIV/AIDS status.⁴⁰¹ There are many laws protecting the rights of people living with HIV/AIDS in the United States. These laws are aimed *inter alia* at assisting people living with HIV/AIDS in finding, keeping and advancing in employment in a discrimination free environment. In USA

³⁹⁵ Worldometers 'Countries in the world (ranked by 2014 population)' available <http://www.worldometers.info/world-population/population-by-country/> accessed in June 2014.

³⁹⁶ Ibid.

³⁹⁷ Avert 'Statement issued by AIDS data collection organisation' available at <http://www.avert.org/hiv-aids-usa.htm> accessed in June 2014.

³⁹⁸ Ibid.

³⁹⁹ Ibid.

⁴⁰⁰ Ibid.

⁴⁰¹ Section 12112 of The Americans with Disabilities Act of 1990.

HIV/AIDS is considered a disability in relation to statutory wording and interpretation. The statutes governing HIV/AIDS aim to prohibit and eradicate discrimination and provide protection based on disability status in the workplace.

6.1.2 The Americans with Disabilities Act of 1990

The Americans with Disabilities Act⁴⁰² (ADA) was signed into law as Public law (PL) 101-336 on July 26, 1990. The ADA is a comprehensive federal anti-discrimination law designed to remove barriers to employment and increase access to public accommodations and services for individuals with disabilities. Although similar to the Civil Rights Act of 1991, which prohibits employers from making employment decisions based on characteristics such as race or sex. The ADA⁴⁰³ goes further by requiring employers to determine whether reasonable accommodation can be made for people with disabilities.

In terms of Chapter 1, Section 12102 (2) of the ADA, to qualify as an individual with a disability, a person must have a substantial physically or mentally limiting impairment and be regarded as an impaired person by the employer.⁴⁰⁴ HIV/AIDS is considered a physical and mental impairment. Section 12112 of the ADA provides for prohibition of discrimination against qualified individuals in respect of job application procedures, hiring, advancing or discharging employees. It further prohibits discrimination on the basis of compensation, job training and any other terms, conditions and privileges.⁴⁰⁵

⁴⁰² The Americans with Disability Act of 1990 arose from Title VII of the Civil Rights Act of 1964 and the Rehabilitation Act of 1973. A large number of disability access statutes and Executive Orders preceded the ADA and provided for anti-discrimination against people with disabilities. These acts include: Urban Mass Transportation Act of 1964, Architectural Barriers Act of 1968, Rehabilitation Act of 1973, Federal Highway Act of 1973, Education for all Handicapped Children Act of 1975, Developmental Disabilities Act of 1975, Executive Order 11830, Voting Accessibility Act of 1984, Air Carriers Act of 1986, Executive order 12640, Technology-Related Assistance for individuals with Disabilities Act of 1988, Fair Housing Amendments Act of 1989 and Civil Rights Act of 1991.

⁴⁰³ The Americans with Disabilities Act of 1990.

⁴⁰⁴ Chapter (i) Section 12102 (2) of the Americans with Disabilities Act of 1990 to qualify as an individual with a disability, a person must meet the following criteria: *(a) Have a physical or mental impairment that substantially limits one or major live activities (b) Have a record of such impairment or (c) Be regarded by the employer as having an impairment.*

⁴⁰⁵ Chapter (i) Section 12102 (2) of the Americans with Disabilities Act of 1990: 'No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.'

Chapter 1, Section 12112 (b) of the ADA goes further by providing grounds which constitute discrimination. Discrimination is said to occur if an employer *inter alia* limits, segregates, or classifies a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee and fails to provide reasonable accommodation⁴⁰⁶ for the said employee.⁴⁰⁷ Chapter 2, Section 12132, governing discrimination in the public service sector prohibits discrimination and provides the following:

'...No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.'

6.1.3 Employment testing

Section 12111 (6) of the ADA considers employment testing or other selection criteria to screen out an individual with a disability discrimination, but only if other employees or prospective employees are not subjected to the same necessities.

Section 12111 (d) (3) of the ADA governing employment entrance examinations states:

'A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination if: (A) all entering employees are subjected to such an examination regardless of disability...'

⁴⁰⁶ The Americans with Disability Act of 1990, s 12111 (9): The term "reasonable accommodation" may include (a) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (b) job restructuring, part-time or modified work Schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

⁴⁰⁷ The Americans with Disability Act of 1990, s 12112 (5)(a) *'not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or (b) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;'*

This section therefore provides that prior to extending a job offer to a prospective employee, no medical questions may be asked nor may any medical exams be conducted. However the situation is significantly altered the moment a job offer is extended. The law then allows for any medical questions to be put forth and any medical testing to be conducted, with the option to refuse hiring based on the results of the testing. It should be noted that HIV/AIDS testing is also permitted under pre-employment medical testing. Refusal to employ a specific candidate based on their status is not considered discrimination provided the same tests were used as a consistent screening process for all prospective candidates.

6.1.4 Occupational Safety and Health Act of 1970

The Occupational Safety and Health Act (OSH) was enacted by congress in 1970 and was signed by President Richard Nixon on December 29, 1970. The main goal of the Act was to ensure that employers provide employees with an environment free from recognized hazards. Prior to the enactment of the Safety and Health Act of 1970 there had been several attempts by previous congressman to govern safety in the workplace.⁴⁰⁸

Section 5 of the OSH Act⁴⁰⁹ contains the general duty clause and requires each employer furnish his/her employees with a workplace free from recognized hazards which are likely to cause death or serious physical harm to the employee.⁴¹⁰ Section 8 of the OSH Act⁴¹¹ covers reporting requirements and makes provision for the appointment of inspectors forming part of the administrative body established under the Safety and Health Act. The purpose is to inspect and investigate any workplace covered by the Act. Section 11(c) of the OSH Act⁴¹² prohibits any employer from discharging,

⁴⁰⁸ On January 23, 1968, President Lyndon B Johnson submitted a comprehensive occupational health and safety bill to congress which was widely opposed by businesses. The legislation died in committee.

⁴⁰⁹ Occupational Safety and Health Act of 1970.

⁴¹⁰ S 5 Duties (a) Each employer -- (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees; (2) shall comply with occupational safety and health standards promulgated under this Act. (b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct.

⁴¹¹ Occupational Safety and Health Act of 1970.

⁴¹² Ibid.

retaliating or discriminating against an employee because the worker has exercised a right under the Act. These covered rights include: the rights to complain to the administrative body, seek an inspection, participate in an inspection or participate in testifying in any OSH proceedings.

Section 12 of the OSH Act⁴¹³ makes allowance for the establishment of an Occupational Safety and Health Review committee. This committee should comprise three knowledgeable members responsible for carrying out the functions of the Commission under the Act. Section 22 of the OSH Act⁴¹⁴ provides for the establishment of a National Institute in order to carry out the policy. It is further authorised to develop and establish recommended occupational safety and health standards and conduct research and experimental programmes for the development of criteria for new and improved safety standards.

Section 17 of the OSH Act⁴¹⁵ stipulates penalties for contravention and violation of the OSH Act. These penalties are imposed for wilfully or repeatedly violating the requirements of Section 5 of the OSH Act.⁴¹⁶ They are further imposed for any citations received by the inspectors mandated in terms of Section 8 of the OSH Act⁴¹⁷ which are issued due to either standard or serious violations. Penalties can further be imposed for a failure to remedy a situation for which a citation was received. The most prominent clause of this section is (e) which provides for the death of an employee due to the employer's negligence. Upon proving the guilt of the employer in failing to adhere to the provisions of the OSH Act,⁴¹⁸ the said employer may be liable to a fine, of up to the equivalent of anything from one to two hundred thousand South African rand or face six to twelve months of imprisonment.

⁴¹³ Occupational Safety and Health Act of 1970.

⁴¹⁴ Ibid.

⁴¹⁵ Ibid.

⁴¹⁶ Occupational Safety and Health Act of 1970.

⁴¹⁷ Ibid.

⁴¹⁸ Occupational Safety and Health Act of 1970.

Section 23 of the OSH⁴¹⁹ provides for grants to be made available to the agencies. These grants should be utilised to assist in identifying the needs and responsibilities in the area of occupational safety. This could typically be achieved through developing plans and establishing systems to compute the nature and frequency of transmission of occupational injuries and diseases. This could consequently increase the enforcement capabilities of personnel and generally improve administration and enforcement of laws and standards.

6.1.5 Other legislation protecting HIV/AIDS positive individuals

Section 501 of the Rehabilitation Act of 1973 makes it illegal for a federal agency to discriminate on the basis of disability. This Act requires affirmative action to hire, retain and promote qualified people with disabilities. Section 503 of the Rehabilitation Act makes it illegal for covered federal contractors and subcontractors to discriminate on the basis of disability, requiring them to take affirmative action to hire, retain or promote qualified people with disabilities. Section 504 of the Rehabilitation Act makes it illegal to discriminate on the basis of disability in programmes and activities that receive federal financial assistance.

The Workforce Investments Act of 1988 makes it illegal to discriminate on the basis of disability in employment or in provision of services by organisations or entities that receive federal assistance under the Workforce Investment Act. The Family and Medical Leave Act of 1993 provides eligibility for employees for up to twelve weeks of unpaid, job-protected leave for a range of health reasons, HIV/AIDS included, with continuation of health care coverage under the same conditions afforded had the employee not taken leave.

⁴¹⁹S 23 of the Occupational Safety and Health Act of 1970 (a) The Secretary is authorized, during the fiscal year ending June 30, 1971, and the two succeeding fiscal years, to make grants to the States which have designated a State agency under section 18 to assist them --(1) in identifying their needs and responsibilities in the area of occupational safety and health. (3) in developing plans for --(A) establishing systems for the collection of information concerning the nature and frequency of occupational injuries and diseases; (B) increasing the expertise and enforcement capabilities of their personnel engaged in occupational safety and health programs; or (C) otherwise improving the administration and enforcement of State occupational safety and health laws, including standards thereunder, consistent with the objectives of this Act.

6.1.6 HIV/AIDS and Insurance in the United States of America

Initially governed by the Health Insurance Portability and Accountability Act of 1996, this Act provided limited protection to people living with HIV/AIDS. The Act was limited and failed to eliminate the ability of insurance companies to exclude HIV/AIDS positive persons from coverage for pre-existing conditions. The Patient Protection and Affordable Care Act of 2010 changed the new health care law, even though it has not yet been fully enacted. The provisions of the said Act should gradually come into force in 2018 and aims to establish more protection for people with health conditions. From 2014 adults may not be denied insurance based on pre-existing conditions, HIV/AIDS included. This provision has been effective for children since 2010.⁴²⁰

6.2 Australia

The history of HIV/AIDS in Australia is distinctive. Australian government bodies recognised and responded to the HIV/AIDS pandemic relatively swiftly with the implementation of successful disease prevention and public health programmes. The Australian health policy response to HIV/AIDS has been characterised as emerging from the grassroots rather than top-down. It is further characterized as involving a high degree of partnership between government and non-government stakeholders.⁴²¹ Non-Governmental⁴²² institutions have been proactive in addressing the issue of HIV/AIDS in Australia. The Australian Federation of AIDS Organisations⁴²³ revealed that as at 31 December 2013, thirty-five thousand two hundred and eighty seven cases of HIV had been diagnosed in Australia since the first diagnoses in 1982.⁴²⁴ These statistics reveal that HIV/AIDS is becoming an area of concern as new infection rates are still increasing despite medical and knowledgeable interventions. 'Australia' is a comprehensive term used to encompass several countries within the continent. Australia comprises of: New

⁴²⁰ See USA.gov available at <https://www.usa.gov/health-insurance> accessed in July 2014.

⁴²¹ Wikipedia 'HIV/AIDS in Australia' available at http://en.wikipedia.org/wiki/HIV/AIDS_in_Australia accessed in July 2014.

⁴²² The most notable include the AIDS Trust of Australia, formed in 1987, The Victorian AIDS Council (VAC), formed in July 1983, and the Bobby Goldsmith Foundation, founded in mid-1984. The Bobby Goldsmith Foundation is one of Australia's oldest HIV/AIDS charities.

⁴²³ Australian Federation of AIDS Organisations 'HIV Statistics In Australia' available at <http://www.afao.org.au/about-hiv/the-hiv-epidemic/hiv-statistics-australia#.VBrZuBQaLIU>, accessed in July 2014.

⁴²⁴ Ibid.

South Wales, the Australian Capital Territory, the Northern Territory, Queensland, South Australia, Tasmania, Victoria and Western Australia.

6.2.1 Discrimination

Australian legislation prohibits discrimination based on HIV/AIDS.⁴²⁵ This prohibition is provided for under the term disability or impairment.⁴²⁶ Although similar in nature the latter only extends to the more developed stages of HIV commonly known as AIDS. This is applicable in South Australia where discrimination is prohibited on the basis of 'impairment', which is defined as a condition which impairs a function. As a result South Australia only covers AIDS and symptomatic HIV but does not include HIV prior to the display of any symptoms.

6.2.1.1 The Disability Discrimination Act 1992

Section 4 (1) of the Disability discrimination Act (DDA)⁴²⁷ defines disability as:

(c) the presence in the body of organisms causing disease or illness; or (d) the presence in the body of organisms capable of causing disease or illness;

Sections 5 and 6 govern direct and indirect disability respectively and provide the common classification of treating or proposing to treat a disabled person less favourably than a normal person would be treated.⁴²⁸ Despite anti-discrimination laws in place, HIV/AIDS positive individuals are still discriminated against. While some of these laws have been repealed due to unfairness, others remain influential and dictate the management of HIV/AIDS in Australia.

⁴²⁵ The Disability Discrimination Act, 1992.

⁴²⁶ See s 7(h) of the Anti-Discrimination Act 1991.

⁴²⁷ The Disability Discrimination Act, 1992.

⁴²⁸ Ibid. s 5(1) 'For the purposes of this Act, a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of a disability of the aggrieved person if, because of the disability, the discriminator treats, or proposes to treat, the aggrieved person less favourably than the discriminator would treat a person without the disability in circumstances that are not materially different.' s 6 (1) 'For the purposes of this Act, a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of a disability of the aggrieved person if: (a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; an (b) because of the disability, the aggrieved person does not or would not comply, or is not able or would not be able to comply, with the requirement or condition; and (c) the requirement or condition has, or is likely to have, the effect of disadvantaging persons with the disability.'

In an occupational setting, Part VI regulation 13 of the Australian Capital Territory regulation 1952⁴²⁹ states that:

‘A barber suffering from a contagious disease or a contagious skin rash or eruption shall not attend to a customer.’

Regulation 12 of the Road Transport (Taxi Services) Regulations 2000 provides that a taxi driver may refuse to pick up a person who is apparently suffering from an infectious disease. Regulation 45 (1) of the Motor Omnibus Regulations 1953 states:

‘A conductor of an omnibus shall not knowingly cause or permit to be carried in the omnibus- (a) any person suffering from an infectious or contagious disease or illness’

Section 176 of the Health Regulations Act, 1996 relates to manufacturers of therapeutic goods. This section provides that a person suffering from a contagious or infectious disease cannot be employed for the purpose of making therapeutic goods. Additionally, Section 246 X of the Health Act of 1911 regulating food handling provides that a person with an infectious disease is deemed as having committed an offence if he or she is engaged or employed in the handling or packaging of food. Section 279 further provides that an owner or occupier of a factory, workshop or place from which work is given commits an offence if he or she allows a person with an infectious disease to make wearing apparel on the premises, unless he or she could not reasonably be aware that the person had an infectious disease.

6.2.2 Advancing anti-discrimination

Notable advancements in eradicating discriminatory laws have been made in Australia. In 1993, the Commonwealth Employment Service issued guidelines affirming anti-discriminatory standards. The original laws compelling the disclosure of prospective applicant's HIV/AIDS statuses to employers were repealed and replaced by anti-discriminatory policies. Prior to the 1994 repeal, any prospective applicants in the hospital cleaning and laundry sectors, policing and prison officering, beauty therapists performing electrolysis and tattooing, sanitation workers and fire fighters were denied

⁴²⁹ Australian Capital Territory regulation 1952 no. 13 Regulations under the public Health Ordinance 1928-1951.

employment. This was largely based on a refusal to disclose their HIV status to the prospective employer. The guidelines were eventually reviewed after reservations from the Minister of Employment following a complaint from the Human Rights and Equal Opportunity Commission lodged by a job seeking complainant.

In an incarceration context, initially the Disability Discrimination Act of 1994 provided for the desegregation of HIV/AIDS positive prisoners in the Western Australian prison system. Based on the Director General's rules, all male prisoners with HIV were to be held in Casuarina, a maximum security prison. This was attributable to their need for increased individual supervision by guards and restricted contact with other prisoners. HIV/AIDS positive prisoners were also denied educational classes and access to the resident library and chapel.

The Department of Corrective Services later amended its rules, releasing HIV/AIDS prisoners from being held in the maximum security prison. Despite the exclusion of a maximum security facility, prisoners are still liable by virtue of Section 73 of the Crimes (administration of Sentences) Act, 1999, Section 21 of the Correctional Services Act, 2006 and Section 29 of the Corrections Act, 1986 to undergo medical procedures including HIV testing, deemed necessary by Justice Health for the preservation of the prisoner's life or to prevent serious injury to other prisoners. These tests can be ordered by a doctor, medical officer or the prison director.

Restricted procedures in accordance with the Funeral Industry Union saw a mother of a deceased man being discriminated against by being denied access to viewing and dressing her son's body after his death. Subsequent to the complaint, these policies were amended, permitting dressing and viewing of HIV positive bodies. Despite several advances in other arenas, the armed forces sector in Australia is still subject to discrimination within the selection process in spite of several attempts to eliminate the issue. The Australian Defence Forces policy on HIV requires all recruits to the Australian Regular Army to be tested for HIV/AIDS. Positive results lead to a discharge. The Australian High Court recently heard a case from a man known as 'x' (pseudonym). The basis of his application was the Defence Force policy contravening the Disability Discrimination Act. The Defence Force argued that the discrimination was not prohibited

as it was conditioned by the inability to fulfil the inherent job requirements. The case was abandoned, leaving the matter of alleged discrimination unresolved.

Australia has made significant progression towards the curtailment of discrimination against HIV/AIDS. While policies initially enacted specifically precluded HIV/AIDS positive individuals from enjoying the same benefits as other HIV/AIDS negative individuals, the situation was remedied by repealing laws inconsistent with the Disability Discrimination Act and replacing them with more suitable laws consistent with human rights.

6.2.3 Testing

Australia conforms to the principle of voluntary testing, placing the onus on the individual to submit to testing with no disadvantages attached to a failure to comply. However, there are instances where Australia subscribes to mandatory testing which is permitted under separate legislation. The following instances require mandatory testing:

- i) As a condition of blood, tissue and organ donation
- ii) Application for visas
- iii) As a pre-requisite for certain insurances
- iv) In the context of legal, forensic or coronial instructions
- v) In rare circumstances when a person's behaviour is considered a public health risk

There is generally no statutory or any other obligation on an applicant to disclose their HIV/AIDS status, nor is routine screening of employees warranted. Work safe Australia agency advised that HIV/AIDS screening of current or prospective employees as part of a fitness assessment is unnecessary and not required.⁴³⁰

6.2.4 Health and Safety Act

The Health and Safety Act⁴³¹ creates an onus on the employer to provide as far as “reasonably practicable”, a safe working environment. The guide to the Work Health

⁴³⁰ Michael Costa, Julie Hamblin, Mark Duffy, David Patterson ‘Australian HIV/AIDS Legal Guide’ Federation Press 1993.

⁴³¹ Work Health and Safety Act 137 of 2011.

and Safety Act explains the definition of “reasonable practicable” as reasonable action taken at a particular time to ensure health and safety measures are implemented. In determining reasonable practicability several factors are considered and weighed in totality. The likelihood of the hazard occurring, the degree of harm caused by the hazard, knowledge regarding elimination or minimisation of the hazard, availability of suitable ways to eliminate the hazard and costs of eliminating the hazard.⁴³²

Although cost implication is the last criterion referred to for the assessment of reasonable practicability, it still forms an imperative influential factor. If it can be shown that the requirements for a safe working environment are grossly disproportionate to the risk, a demonstration of alternative less costly measures which could effectively eliminate or minimise the risk is permissible.

The burdens on the employers in Australia are more relaxed in comparison to South African standards. The Health and Safety Act greatly decreases the probability of vicarious liability claims for occupational exposure, as the duty of care is not as forceful as in South Africa. Therefore if an employer can show (s) he created a safe environment, although deviating from the standard requirements, then (s) he is exonerated from any claims pertaining to vicarious liability for occupational exposure.

6.2.5 HIV and Insurances in Australia

Section 49 Q the Superannuation Insurance Clause states:

‘Nothing in this Part renders unlawful discrimination against a person on the ground of disability in the terms or conditions appertaining to a superannuation or provident fund or Scheme or with respect to the terms on which an annuity, a life assurance policy, an accident or insurance policy or other policy of insurance is offered or may be obtained’

⁴³² ‘The term ‘reasonably practicable’ means what could reasonably be done at a particular time to ensure health and safety measures are in place. In determining what is reasonably practicable, there is a requirement to weigh up all relevant matters including: (i) the likelihood of a hazard or risk occurring (in essence the probability of a person being exposed to harm) (ii) the degree of harm that might result if the hazard or risk occurred (in essence the potential seriousness of injury or harm) (iii) what the person concerned knows, or ought to reasonably know, about the hazard or risk and ways of eliminating or minimising it (iv) the availability of suitable ways to eliminate or minimise the hazard or risk, and (v) the cost of eliminating or minimising the hazard or risk.’

This in essence provides that medical Schemes and policy administrators may refuse to insure an HIV/AIDS positive person based on actuarial calculations revealing a high risk. Though this matter was challenged in 1996 by the Life, Investment and Superannuation Association necessitated by the numerous complaints received regarding the disability discrimination. The challenge went unheeded and no advancements were made to eradicate the discrimination present in obtaining life insurance.

6.3 Conclusion

Abundant intervention has necessitated a less discriminatory approach to HIV/AIDS internationally. Discrimination as recognised universally bears the same standard definition as in South Africa, extending it to place a civil burden on employers to ensure compliance. In USA and Australia, many laws have been enacted to guarantee advancement of the civil principles of anti-discrimination. The American with the Disabilities Act operates similarly to the Labour Relations Act and Employment Equity Act of South Africa which were designed to remove barriers to employment.

Despite several similarities between the American with Disabilities Act, The Labour Relations Act and the Employment Equity Act, one distinct difference surfaces with reference to pre- employment testing. In the USA it is not considered discriminatory to subject a prospective job applicant to HIV/AIDS testing provided an offer of employment has been extended. The employer may further reserve the right to refuse employment based on an applicant's HIV/AIDS positive status. This contrasts with the Australian approach which subscribes to voluntary testing with no adverse consequences for a refusal to adhere to the routine HIV screening of employees. However in Australia, mandatory testing is permitted in instances of blood donations, visa applications and certain insurance pre-requisites. Both these jurisdictions are in complete contrast to South Africa which specifically precludes pre-employment testing for HIV/AIDS and offers no justification for mandatory testing besides a labour Court order.

The voluntary testing approach was not always operational in Australia. Prior to 1994 all employees were required to disclose their status and applicants in certain sectors of

employment were often denied employment. Despite advancements in remedying the situation in Australia there are certain instances where it is deemed Constitutional to deviate from standards in public interest.

The Health and Safety regulations in USA and Australia generally provide the same obligations on employers to create a safe working environment as in South Africa. However in USA there is much emphasis placed on implementation of the policies. In USA the Occupational Health and Safety Act provides for immunity from discrimination or victimisation of employees for participating in any investigative processes. USA has also created a Health and Safety review committee to carry out the functions of the policy. Allowance has been made for the establishment of a National Institute responsible for carrying out policies and for further developing standards through continued research and experimental programmes.

In USA, the penalties for contravention of the statute by the employer extend to continued contravention, violations and a failure to rectify situations despite warnings. An important point to consider is the imprisonment sanction on an employer for the death of an employee attributable to the employer's negligence. As a result of the harsh penalty on the employer, it can be understood that given the Constitutionality of pre-employment HIV/AIDS testing, an employer is exonerated from ignorance or unawareness of status as a defence for occupational exposure and transmission.

In Australia the Health and Safety Act creates an onus on the employer to provide a safe working environment, but deems "reasonable practicability" as conditioned on economic feasibility. This provides for a relaxation of standards, as deviation from standard protocol can be justified for vicarious liability claims.

Insurance regulations in USA and Australia operate in complete contrast. Whereas USA, through progressive transformation, now includes coverage for HIV/AIDS positive people and condemns denial of coverage for pre-existing conditions, Australia deems it lawful to discriminate against an HIV/AIDS positive person for purposes of superannuation, provident funds, life assurance, insurance policies and health

coverage. Further it is deemed mandatory to test for HIV/AIDS prior to the granting of insurance policies.

It can be concluded that in comparison to USA and Australia, South Africa has a more stringent legal system governing protection of HIV/AIDS and discrimination. Whereas USA and Australia have sufficient laws governing HIV/AIDS, they are not as rigorous as South African laws. South Africa generates much stricter standards and intolerance towards discrimination than that displayed by Australia and USA. Notable consideration should be given to the system of implementation of the Health and Safety policy in USA. Although South Africa has a more advanced policy than USA, it lacks adequate implementation procedures and sanctions for contravention. Attention should also be drawn to the provision of grants available in USA for the purposes of identifying needs and establishing programmes for effective monitoring of the nature and frequency of incidents. This is an approach that South Africa could adopt as a way of effectively implementing policies.

Section 14 of the Occupational Health and Safety Administration Act of the USA provides *locus standi* for civil litigation for occupational disputes, which South Africa lacks due to the preclusions presented by COIDA. The lack of recognition of civil routes forces aggrieved employees to rely on compensation in terms of COIDA. The monetary proportion of COIDA claims as opposed to civil claims makes the latter a preferential avenue. Problems could surface at pre-trial and trial stages as the costs involved could exceed a simple compensation claim. Nevertheless given the free legal services offered in South Africa a civil claim is still a likely route when the benefits are considered.

It should be noted that any civil claim, either delictual or contractual can prompt the joinder of an employer through the Doctrine of Vicarious Liability. In relation to an employee's conduct causing occupational harm to a fellow employee, the possibility of joining an employer in an action seems plausible as the onus rests with an employer to ensure that no harm comes to any employees in his/her workplace. The institution of a civil claim raises the question of defendants. In all likelihood the offender will be cited in the action as the main defendant, but given the same economic scale as the aggrieved employee, this may not be reasonable as the costs involved in instituting the claim could

far outweigh the ends obtained. The lack of financial capabilities in respect of the offending employee makes it reasonable to join another party who is able to provide sufficient relief to the aggrieved party. This shifts the focus to someone who is financially better off and can provide the relief sought instantly. In several jurisdictions the common law Doctrine of Vicarious Liability provides the rationalisation for the joinder. However, as with any legally binding sanction, requirements need to be adhered to.

The next chapter will analyse the practical application of the Doctrine of Vicarious Liability if the dual capacity theory were to be applied in the South African legal system in future.

CHAPTER 7

VICARIOUS LIABILITY

The preceding chapters have critically analysed the South African legal system in comparison to USA and Australia and the application of COIDA and all the legalities surrounding it. In this chapter we will look at the theoretical background and the practical application of the Doctrine on the basis that a dual capacity, negligent or deliberate act on the part of the employer can be established. Occupational exposure to HIV/AIDS remains a progressive threat to the labour industry and current legislation does not specifically set out the parameters available to an aggrieved employee for a successful claim.⁴³³ This is largely due to the preclusion by COIDA. Currently relief in terms of COIDA is the preferred and legally recognized option available to aggrieved employees in South Africa. This chapter explores the probability of success in pursuing civil claims and claims based on vicarious liability for occupational exposure to HIV/AIDS, provided, it can be proved that the employer bears a second capacity other than that of an employer. The chapter will focus on different groups of employment, including the professional sporting industry as a focus group.

7.1 Background

In South Africa it is trite law that the employer bears the responsibility for unlawful acts committed by employees during the scope of their employment.⁴³⁴ An aggrieved third party may claim damages from the employer despite the employer not being at fault in any way. The unlawful conduct of the employee can be imputed to the employer.⁴³⁵ Vicarious liability is an exception to the basic premise of the law of delict that fault is a prerequisite for liability.⁴³⁶ Accordingly, it can be construed that a master is held 'absolutely liable' as opposed to 'strictly liable' for arising acts of delict. The latter form of liability requires the plaintiff to prove a wrongful act on the defendant's part which results in harm or damage. The concept of absolute liability considers the defendant liable

⁴³³ See chapter 4 and 5.

⁴³⁴ *Lessons to be learned Vicarious liability* January (2004).

⁴³⁵ Stella Vettori Gender-specific HIV policies and programmes at South African workplace Law, *Democracy and Development* Vol 16 (2012).

⁴³⁶ *Ibid.*

without any proof of wrongfulness on his/her part.⁴³⁷ Initially foreign to South African law, vicarious liability had been borrowed from English law.⁴³⁸ The origin of vicarious liability lies in the need to provide the victim of delict with recourse against a defendant of substance who is able to pay damages.⁴³⁹ This need becomes imperative in cases where an employee or third party has been wronged and requires a financially secure defendant to sustain the claim jointly with the injuring party. Occupational exposure to HIV/AIDS forms the focal point of this study and the requisites investigated to hold an employer liable.

7.1.2 Occupational exposure to HIV/AIDS

NAM,⁴⁴⁰ the certified producer of HIV and AIDS related information published in an article that four cases of HIV transmission from health care workers to patients have occurred worldwide.⁴⁴¹ The Canadian Centre of Occupational Health and Safety

⁴³⁷ Professor Willem Scott 'The theory of risk liability and its application to vicarious liability' (2009).

⁴³⁸ Monray Marsellus Botha and Daleen Millard 'The past, present and future of vicarious liability in South Africa' (2012) 45 DeJure 225.

⁴³⁹ *Lessons to be learned: Vicarious liability* January (2004).

⁴⁴⁰ NAM official website 'Four cases of transmission' available at <http://www.aidsmap.com/Four-cases-of-transmission/page/1324553/> accessed in August 2014.

⁴⁴¹ In Spain, a female patient was infected by an obstetrician when he performed an emergency caesarean on her in 2004. Two weeks after the caesar, the woman showed signs of an immune- system disturbance and tested positive for HIV eight weeks later. Based on the absence of the HIV virus to the baby and husband, the probability of transmission was likely due to the obstetrician. The surgeon, who was unaware of his positive status, recalled pricking his finger on a needle during the operation. Upon testing for HIV/AIDS he was found to be positive. Dr. David Acer, a dentist practising in Florida was identified as the source of transmission to six dental patients that he attended to between 1988 and 1989. The report confirmed that five patients had invasive dental work done by Dr. Acer after his positive diagnosis of HIV/AIDS. Lewis Cross explained that many opportunities were present for a dentist to injure himself during invasive procedures such as tooth extractions. Suggestions for possible infection included injuries during the injecting of anesthetics, or a needle prick causing the dentist's blood to make direct contact with patients inflamed or damaged oral tissues during procedures. Despite routine practices of glove wearing being initiated in 1987, it was found that gloves do not prevent most injuries caused by sharp instruments. Other possible suggestions for transmission were cross infection, poor sanitary conditions by failure to sterilize the equipment, or episodes of self-treatment which was testified to by the practice nurse. The CDC went a step further to attach intent and premeditation in an attempt to clarify the motive behind the transmissions. In 1997, the French health authorities reported that an orthopedic surgeon who had been HIV positive for three years was the source of infection to a patient, during a hip-replacement and bone graft operation. Although the only positive diagnosis among nine hundred and eighty three former patients, the likelihood of the transmission via the surgeon was high, due to his incorrect habitual practices such as palpating the needle tip when sewing up operation incisions and twisting sharp suture wires with his fingers. A sixty-one year old patient who was admitted for surgery in May 1996 developed primary HIV infection post-surgery. No surgeons were found to be HIV positive but two nurses treating the patient tested positive. Based on the viral strains and loads, the one nurse was ruled out, leaving the other nurse as the primary source of infection. It is evident that the frequency of

reported that only a few cases of probable occupational HIV infections have been reported,⁴⁴² although the majority of occupational injuries are likely to occur in a medical setting, resulting in surgeons, nurses, dental workers and physicians as being the primary risk group vulnerable to occupational exposure.⁴⁴³ Consideration must be given to the same risk groups possibly transmitting blood borne viruses to a patient. Secondary risk groups include laboratory workers, based on their continuous handling of infectious samples, and ambulance workers, based on their need to provide medical care in emergencies without any medical information. Embalmers are also susceptible to occupational exposure to viruses. Other risk groups, despite being a lower risk group of exposure are not entirely ruled out. These include police, firefighters, mental health institution workers, correctional service workers, cleaners, laundry workers, incinerator attendants and post-mortem attendants.⁴⁴⁴ George D Pozgar⁴⁴⁵ wrote that the injuries affecting employees often go unnoticed. He went further to include blood borne pathogens as a health and safety issue associated with healthcare facilities.⁴⁴⁶ Pozgar supported his standpoint by quoting from a press release by Linda Chaff⁴⁴⁷ which read:

'Many hospitals are focusing on patient safety while employee safety slips off the radar. But improving employee safety and health boosts patient safety as well as the bottom line.'

exposure to HIV/AIDS in a medical setting is fast becoming an area of concern. In the aforementioned international cases the aggrieved patients succeeded with civil claims against the medical professionals for failure to adhere to the standard duty of care applicable to all medically registered and certified professionals. However, if the practitioners were contracted to hospitals or principal employers the prospect of the principal being joined in the claim through the Doctrine of vicarious liability would have been high based on both common law and statutory obligations.

⁴⁴² See report compiled by Canadian Centre for Occupational Health and Safety available at www.ccohs.ca accessed in February 2014.

⁴⁴³ Ibid.

⁴⁴⁴ Ibid.

⁴⁴⁵ George D Pozgar *Patient Care case law, ethics, regulation and compliance* (2013).

⁴⁴⁶ Ibid.

⁴⁴⁷ Ibid.

7.2 The legal position in South Africa

7.2.1 Common law Duty

South African common law does place a duty on an employer to provide safe working conditions for his/her employees.⁴⁴⁸ In establishing whether the employer has fulfilled this duty, the question to be asked is whether a reasonable person in the same circumstances would only have provided adequate facilities or would have done more to improve the safety of the workplace to protect employees against physical and psychological harm.⁴⁴⁹ This duty was explained in the case of *Van Deventer v Workmen's Compensation Commissioner*.⁴⁵⁰ The Court held that an employer owes a common law duty to a workman to take reasonable care for his safety.⁴⁵¹ The question of reasonable care arises in each case which may differ depending on the facts and circumstances.⁴⁵²

It is generally accepted that a master is in the first place under a duty to see that their servants do not suffer, either through his/her personal negligence or by reason of failure to provide a proper and safe working system and suitable operational plant.⁴⁵³ If a servant is employed to do work of a dangerous nature, the employer is bound to take all reasonable precautions for the workman's safety.⁴⁵⁴ Employers can be held liable for their omissions, if they fail to prevent people from causing harm to their employees and any reasonable employer should have foreseen the potential for such harm and can be held liable for failure to prevent such harm.⁴⁵⁵ Flowing from this expectation, there is a common law duty on an employer to take necessary precautionary measures to prevent HIV positive employees from suffering any form of discrimination.⁴⁵⁶ This common law duty can also be seen to extend to the employer's duty to protect their employees from

⁴⁴⁸ Robert Venter, Andrew Levy, Marinda Conradie and Maggie Holtzhausen *Labour Relations in South Africa* (2009) 177.

⁴⁴⁹ Professor Fanie Van Jaarsveld *Principles and Practices of Labour Law* (2011) 201.

⁴⁵⁰ *Van Deventer v Workmen's Compensation Commissioner* 1962 4 All SA 64 (T).

⁴⁵¹ *Ibid.*

⁴⁵² *Van Deventer v Workmen's Compensation Commissioner* 1962 4 All SA 64 (T).

⁴⁵³ *Ibid.*

⁴⁵⁴ *Ibid.*

⁴⁵⁵ Martin Brassey *Employment and labour law* Vol 1 (2011) E4.

⁴⁵⁶ *Media 24 Ltd and another v Grobler* 2005 3 All SA 297 (SCA).

other employees.⁴⁵⁷ In this sense the employer can be held liable for the acts of their employees which were performed during the course and scope of the employment relationship.⁴⁵⁸

In the case of *Media 24 Ltd and another v Grobler*⁴⁵⁹ relating to a breach of an employer's common law duty, the Court remarked as follows:

'This duty cannot in my view be confined to an obligation to take reasonable steps to protect them from physical harm caused by what may be called physical hazards. It must also in appropriate circumstances include a duty to protect them from psychological harm caused.'

7.2.2 Statutory Duty of care

An employer further bears a statutory duty of care to provide a safe working environment for his/her workers. A failure to fulfill such a statutory duty, results in penalties espoused in the Occupational Health and Safety Act⁴⁶⁰, Mine Health and Safety Act⁴⁶¹, Occupational Diseases and Mine Works Act⁴⁶² as well as the Compensation for Occupational Injuries and Diseases Act.⁴⁶³ It must be noted that a failure to fulfill his/her common law duty bears very little legal impact on the employer as COIDA is deemed to provide adequate relief for occupational diseases. Several Constitutional provisions exist for the safeguarding of workers' rights such as the right to equality, the right to privacy and the right to fair labour practices.⁴⁶⁴ Resonating from these rights are ample labour legislation that reaffirms an employer's statutory duty towards his or her employees, such as Section 8 (1) of The Occupational Health and Safety Act,⁴⁶⁵ which necessitates that every employer provide and maintain a safe

⁴⁵⁷ Ibid.

⁴⁵⁸ Martin Brassey *Employment and labour law* Vol 1 (2011) E4.

⁴⁵⁹ *Media 24 Ltd and another v Grobler* 2005 3 All SA 297 (SCA) This case concerned the sexual harassment of one employee towards another. The employer was vicariously liable based on a breach of his common law duty of care. He was ordered to pay the employee R 800 000.00.

⁴⁶⁰ Occupational Health and Safety Act 85 of 1993.

⁴⁶¹ Mine Health and Safety act 29 of 1996.

⁴⁶² Occupational Diseases and Mine and Works Act 1973.

⁴⁶³ 130 of 1993 (hereinafter referred to as COIDA).

⁴⁶⁴ The Constitution of the Republic of South Africa, Act 108 of 1996.

⁴⁶⁵ 85 of 1993.

working environment without risk to their employees.⁴⁶⁶ Section 2(1) and section 5(1) of the Mine Health and Safety Act⁴⁶⁷ places an obligation on the employer to provide a safe working environment which entails minimising the risk to exposure of HIV infection.

COIDA⁴⁶⁸ seeks to compensate an employee who has been infected with HIV/AIDS as a result of occupational exposure to infected blood or bodily fluids,⁴⁶⁹ provided that the accident resulted in the disablement or death of the employee, the accident arose during the course and scope of employment, the employee did not contravene any laws at the time of the subsequent misfortune and did not act contrary to the orders of the employer.⁴⁷⁰

7.2.3 Contractual Duty of care

Notwithstanding the common law and statutory duty imposed on employers, they are further bound by the standard duty of care⁴⁷¹ which is more relevant to third party claims. The principle of the duty of care was established in the case of *Donoghue v Stevenson* 1932. Lord Atkin identified that ‘*there was a general duty to take reasonable care to avoid foreseeable injury to a neighbour.*’ A breach in respect of the duty of care would result in liability for negligence. Medical negligence forms a substantial part of this study, and is said to occur when the aggrieved party suffers any ‘hurt’. In order to prove negligence a three-stage test must be satisfied.

i) A person is owed a duty of care

⁴⁶⁶ Section 8 (1) states “Every employer shall provide and maintain, as far as reasonably practicable, a working environment that is safe and without risk to the health of his employees.”

⁴⁶⁷ 29 of 1996.

⁴⁶⁸ Section 22(1).

⁴⁶⁹ Compensation for Occupational Injuries and Disease Act 130 of 1993. s 22 (1) “If an employee meets with an accident resulting in his disablement or death such employee or the dependents of such employee shall, subject to the provisions of this Act, be entitled to the benefits provided for and prescribed in this Act.”

⁴⁷⁰ Compensation for Occupational Injuries and Disease Act 130 of 1993 s 22 (4) “For the purposes of this Act an accident shall be deemed to have arisen out of and in the course of the employment of an employee notwithstanding that the employee was at the time of the accident acting contrary to any law applicable to his employment or to any order by or on behalf of his employer, or that he was acting without any order of his employer, if the employee was, in the opinion of the commissioner, so acting for the purposes of or in the interests of or in connection with the business of his employer.”

⁴⁷¹ Daniele Bryden and Ian Storey. ‘Duty of care and medical negligence’ (2011) 4 Vol 11 Oxford Journals p.124-127.

- ii) A breach of the duty of care is established
- iii) As a direct result of that breach, legally recognisable harm has been caused.

Procedurally, for a claim to succeed the establishment of fault must be present. Negligence is proven on the balance of probabilities. Thus the burden is much more lower in comparison to the burden in criminal sanctions.⁴⁷² The medical duty of care emerges out of the 'special relationship' between a doctor and patient.⁴⁷³ This relationship is based largely on the respect for a medical professional accruing a certain degree of expertise in the field and being able to apply the acquired knowledge to provide the most suitable and efficient treatment to the patient. When a patient is admitted to a hospital or consulted by a doctor, a duty of care is created. A breach of the duty of medical care is established when a doctor's practice has failed to meet the appropriate standard.⁴⁷⁴ A level of care is determined by measurement of comparable professional practices.⁴⁷⁵

Therefore, it can be noted that in an occupational setting, an employer has a common law duty to provide a safe working environment. Further, the employer has a statutory duty to provide a safe working environment and a standard duty of care which can be labeled as a contractual duty.⁴⁷⁶ Hence, any breach of these duties can result in an occupational exposure claim.

7.3 Theories and rationale for the application of the Vicarious Liability Doctrine

There have been many different theories attempting to explain the dynamics of the Vicarious Liability Doctrine.⁴⁷⁷ Many believed that vicarious liability was aimed at faulting the employer's discretion in selecting the employee whilst other explanations emanated

⁴⁷² Stephen Pete, David Hulme, Max du Plessis and Robin Palmer, *Civil Procedure a practical guide 2 ed (2006)*.

⁴⁷³ Daniele Bryden and Ian Storey op cit note 471.

⁴⁷⁴ Ibid.

⁴⁷⁵ Ibid.

⁴⁷⁶ The Occupational Health and Safety Act 85 of 1993 defines a safe working environment as "an environment free from any hazards".

⁴⁷⁷ Jason Neyers 'A theory of vicarious liability' (2005).

from the interest and profit theory,⁴⁷⁸ the solvency theory and the risk and danger theory.⁴⁷⁹ Anglo-American writers have attributed justification of the Vicarious Liability Doctrine to the implication of the loss-distribution principle.⁴⁸⁰ This principle is commonly linked with the concept of enterprise liability, which dictates “that a person, who for his own purposes creates a substantial risk of damage to other people, can justifiably be saddled by law with responsibility for the materialisation of the risk without having to prove fault on his part.”⁴⁸¹ The loss-distribution principle was introduced to clarify the introduction of the employer’s liability and workmen’s compensation statutes. The initial attempt of liability with fault proved to be problematic as modern advancements in technological, social, economic and industrial fields posed a threat to the sustenance of the fault Doctrine. Plaintiffs found it difficult to accrue blame to a specific person as the products and activities increased in the industrialised world.⁴⁸² The sociological approach demanded that the party undertaking the dangerous activity, be burdened with the responsibility for any harm caused, thereby holding the employer liable as they gained economic benefits from the activities. Many academics dispute the rationale and basis for holding the employer liable and have rendered several arguments in substantiation of their opinions. Van der Walt⁴⁸³ has proposed that the ‘risk liability theory’ replace the “fault theory” as a probable basis for holding the employer liable through vicarious liability.⁴⁸⁴

The argumentative risk liability theory as occasioned by the control aspect can also form a crucial underlying principle of the Doctrine. According to this theory, one person having to perform services or a duty on behalf of another person upon the latter’s instructions or with their knowledge enhances the possibility of damage done to a third party.⁴⁸⁵ By engaging in a relationship with the person, the instructing party is thus

⁴⁷⁸ The profit theory is not widely held among writers. Its failure was based on the criticism that economic advantage could not serve as a satisfactory criterion for liability in law.

⁴⁷⁹ Monray Marsellus Botha and Daleen Millard ‘The past, present and future of vicarious liability in South Africa’ (2012) *DeJure* 225.

⁴⁷⁹ Ibid.

⁴⁸⁰ Scott ‘The theory of risk liability and its application to vicarious liability’ (2009).

⁴⁸¹ James Flemming ‘An Evaluation of the fault concept’ 32 *Tennessee LR* 394.

⁴⁸² Scott op cit note 480.

⁴⁸³ JC Van der Walt ‘Strict liability in the South African law of delict’ (1968) Juta.

⁴⁸⁴ Scott op cit note 482.

⁴⁸⁵ Ibid.

assuming the risk as affected by association. Most international Courts are now of the strong opinion that the employer should bear the liability for any faults arising out of their negligent employees' conduct. In the case of *Imperial Cold Storage v Yeo*⁴⁸⁶ it was held that "it is for public advantage that the loss should fall on that one or two who could most easily have prevented the happening or the recurrence of mischief." Overlooking certain visible attributes will not form a clear justification to exonerate an employer from liability. The case of *Victor v Logie*⁴⁸⁷ reiterated the absolute liability placed on an employer despite fault being absent. Graham JP categorically declared that it would be regarded as a dangerous precedent if he allowed the owner of the vehicle to escape liability for the damage, where such damage was occasioned by the negligent driving of a vehicle by an employee whilst under the influence. He believed that as soon as the drunken status of the driver was established, very little evidence would be required to establish the 'master's' liability.⁴⁸⁸

This ruling was based on the employer's negligence in being inattentive to the driver's intoxication problem. Searle JP took up a parallel view two years later in the case of *Penrith v Stuttford*,⁴⁸⁹ where he stated that it is unreasonable to allow the owner of a vehicle to escape liability for damages arising from his chauffeur's negligent driving, despite the owner transferring the vehicle to another for purposes of a trip. The considerable risk liability principle became an influential factor in assisting the Court in arriving at its decision. The fact that the owner was unaware that his chauffeur was a dangerous driver was irrelevant. Evidently on an international level, the risk liability Doctrine is fully operational and offers no justification for negligence and ignorance on the part of the employer.

The extent to which the Doctrine of fault still dominates legal theory is clearly reflective in South African law. This was narrated in the case of *Country Cloud Trading CC v MEC, Department of Infrastructure -Development*,⁴⁹⁰ where it was stated that,

⁴⁸⁶ *Imperial Cold Storage v Yeo* 1928 CPD 432.

⁴⁸⁷ *Victor v Logie* 1923 EDL 233.

⁴⁸⁸ *Victor v Logie* 1923 EDL 233.

⁴⁸⁹ *Penrith v Stuttford* 1925 CPD 154.

⁴⁹⁰ *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* (CCT 185/13) [2014] ZACC 28.

‘intentionally causing harm to others will not always be wrongful’ and that ‘intent does not necessarily indicate wrongfulness’. The Court concluded that, in the end, the nature of the fault and the degree of blameworthiness are considerations to be weighed up with all other factors in determining whether delictual liability should be imposed.⁴⁹¹ The Court further concluded that, since foreseeability of harm is a prerequisite for delictual liability in all cases, that feature could not render the appellant’s claim deserving of special treatment.⁴⁹² At the same time South African law poses a strong opposition to the recognition of the risk principle as an independent new ground of delictual liability. Nevertheless vicarious liability has formed an essential part of delictual law, proving the risk theory operational and employable.

7.4 An analysis of the Vicarious Liability Doctrine: USA and South Africa

A close look at the Doctrine of vicarious liability governing USA reveals similar scope and application as that of the Doctrine of Vicarious Liability in South Africa. This is based on the original derivatives from common law. In America, a delictual action is classified as a tortious act (tort.)⁴⁹³ Parallel to the Doctrine of Vicarious Liability runs a similar Doctrine known as *respondeat superior* ‘let the master answer’.⁴⁹⁴ This legal Doctrine which is recognised by common and civil law, states that in many circumstances an employer is responsible for the actions of employees performed within the course of their employment. The distinct difference between the Doctrine of Vicarious Liability and *respondeat superior* is that the latter extends to principle-agent relationships.⁴⁹⁵ USA recognises two main requirements to succeed with a claim based on vicarious liability. First and most importantly, the wrongdoer must be acting as a ‘servant’ or employee of the employer; and secondly the tortious act must be committed

⁴⁹¹ *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* (CCT 185/13) [2014] ZACC 28.

⁴⁹² Max Loubser and Rob Midgley “The Law of Delict in South Africa” 2012 Cape Town: Oxford University Press at 14.

⁴⁹³ See definition of vicarious liability “as a strict secondary liability that arises under the common law Doctrine, namely: “the responsibility of the superior for the acts of their subordinate, or in a broader sense, the responsibility of any third party that had the “right, ability or duty to control” the activities of a violator.” At http://en.wikipedia.org/wiki/vicarious_liability (22-07-2015).

⁴⁹⁴ *Ibid.*

⁴⁹⁵ *Ibid.*

during the course of employment.⁴⁹⁶ In South Africa, strict emphasis is placed on the element of fault being complied with. In USA the position is more relaxed and liability is imposed though the risk liability theory on an employer for intentional and incidental actions of the employee causing injury to a third party, employee or stranger.⁴⁹⁷ In the USA, an employer is held to be vicariously liable for an employee's breach of a statutory duty.

This differs from the common law duty imposed on employers as provided for in South Africa. Consequently the employer can be held liable for the breach of a statutory duty even though the duty is owed by the employee personally and individually. This duty has implications in the workplace with regard to harassment.⁴⁹⁸ The case of *Lister v Hesley Hall Ltd*⁴⁹⁹ was monumental in establishing that an employer cannot avoid liability by showing that an employee engaged in intentional and unauthorised wrongdoing. Since the *Lister* case,⁵⁰⁰ the approach taken by the Courts has expanded in determining the circumstances for the applicability of vicarious liability and the criteria has been broadened.

In South Africa, statutory labour recognition has ensured that vicarious liability claims do not indemnify the employee from third party claims against him or her. Section 36 of The Basic Conditions of Employment Act⁵⁰¹ affords authority to an employer to deduct monies from the employee's remuneration as a mode of compensation for the employer's loss or damages suffered. However, before this can be executed, certain requirements need to be met. The employee should be given reasonable opportunity to show why the deductions should not be made. The total amount deducted should not exceed the actual amount of the loss or damage and the total deductions from the

⁴⁹⁶ The one exception permitted under the Doctrine of vicarious liability is the 'coming and going rule' which states that the daily commute is generally considered to be outside the scope of employment, however in contrast if an errand is run for an employer which takes them away from their regular workplace, the employer may be held for injuries occurring during the commute. See *Moradi v Marsh USA, Inc*- Cal.Rptr.3d-2013 WL 5203485.

⁴⁹⁷ Law teacher 'Vicarious liability:Free tort law study guide' <http://www.lawteacher.net/tort-law/vicarious-liability.php>.accessed in July 2016.

⁴⁹⁸ See *Majrowski v Guy's and St Thomas's NHS Trust* [2006] UKHL 34.

⁴⁹⁹ *Lister v Hesley Hall Ltd* [2001] UKHL 22.

⁵⁰⁰ *Ibid*.

⁵⁰¹ S 36 of the Basic Conditions of Employment Act 75 of 1997.

employee's remuneration should not exceed one-quarter of their remuneration.⁵⁰² In countries such as the USA, delictual actions are a more prevalent mode of claiming compensation and employers face huge damages claims where they have failed to take the necessary precautions or measures to prevent HIV positive employees from suffering any form of discrimination or exposure during the course and scope of employment. Despite the restrictions placed by COIDA in respect of delictual claims at the current time, it is important to look ahead to determine whether vicarious liability claims can succeed in the future.

7.5 The test for Vicarious Liability

In order to successfully impose legal liability on an employer through vicarious liability, certain pre-requisites need to be considered. The under-mentioned requirements form the basis of a vicarious liability claim and each must be met in its entirety. The absence of one or more of the three fundamental requirements would see the withdrawal of vicarious liability claims against employers. There are three fundamental requirements which need to be met before one arrives at apportioning such strict liability on the part of another.

7.5.1 It must be established that the person who committed the delict was in fact in the employ of the employer at the time the delict was committed

Innes JA stated in the historic case of *Mkize v Martens*⁵⁰³ that:

“A plaintiff who seeks to make a master liable for the negligent act of a servant must prove the servant was acting in the course of employment. That onus may conceivably be discharged by inference from established facts”

In terms of the Labour Relations Act⁵⁰⁴ an employee is defined as

“(a)any person excluding an independent contractor, who works for any person or for the State and who receives, or is entitled to receive any remuneration (b)

⁵⁰² Ibid.

⁵⁰³ *Mkize v Martens* 1914 AD 382 at 319.

⁵⁰⁴ S 23 of the Labour Relations Act 66 of 1995.

any other person who in any manner assists in carrying on or conducting the business of the employer.”

Whilst the majority of matters involving vicarious liability deal with the relationship between employer and employee, the relationship is deemed to be a contractual relationship where one party exercises authority over the other. The definition specifically precludes an independent contractor from facing the repercussions of the Doctrine of Vicarious Liability.⁵⁰⁵ The dividing line between the contract of employment and the contract for services in particular is not always easy to draw, as demonstrated in the case of *Lordining & Stevenson, and Jordan & Harrison v Macdonald and Evans*⁵⁰⁶ in which the Court remarked: “It is often easy to recognize a contract of service when you see it, but difficult to say wherein the difference [between it and the independent contractor] lies.” In an attempt to assist the Courts in distinguishing between an independent contractor and an employee, the legislature has enacted two sections.⁵⁰⁷

Section 200A (1) of the Labour Relations Act⁵⁰⁸ contains a number of presumptions indicating that a person is an employee. The clause reads: “subject to the presence of factors of manner and hours worked affiliation to organisations, economic dependence and provision of own tools, a worker is deemed an employee until the contrary can be proven”.⁵⁰⁹ In the case of *Stein v Rising Tide Productions CC*⁵¹⁰ the Court stated that the general rule is that an employer is not liable for the negligent wrongdoing of an independent contractor. Liability may be imputed only if the employer was personally at

⁵⁰⁵ See *Langley Fox Building Partnership (Pty) Ltd v De Valance* 1991 1 SA 1 (AD) and *Smit v Workmen’s Compensation Commissioner* 1979 1 SA 51 (A).

⁵⁰⁶ *Lordining & Stevenson, Jordan & Harrison v Macdonald and Evans* 1952 1 TLR 101.

⁵⁰⁷ S 83 (A) of The Basic Conditions of Employment Act 75 of 1997 and S 200 (A) of the Labour Relations Act 66 of 1995.

⁵⁰⁸ The Labour Relations Act 66 of 1995, s 200 (A)(1).

⁵⁰⁹ See s 200 of the Labour Relation Act which reads :“Until the contrary is proved, a person, who works for or renders services to any other person, is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present:(a)the manner in which the person works is subject to the control or direction of another person;(b)the person’s hours of work are subject to the control or direction of another person (c)in the case of a person who works for an organisation, the person forms part of that organisation;(d)the person has worked for that other person for an average of at least 40 hours per month over the last three months;(e)the person is economically dependent on the other person for whom he or she works or renders services; (f)the person is provided with tools of trade or work equipment by the other person; or (g)the person only works for or renders services to one person.”

⁵¹⁰ *Stein v Rising Tide Productions CC* (2002) 23 ILJ 2017 (C).

fault, leading to the negligent injuring of a third party. It was decided that should an employer be responsible for ensuring that the execution of work not be performed according to regulated safety standards, then the employer is indeed liable.⁵¹¹

7.5.2 The conduct or act must amount to a delict occasioned by a third party suffering a loss or placed under prejudice

A delict is defined as a civil wrong or more concisely as wrongful and blameworthy conduct which causes harm to a person. The civil wrong must be an actionable one, resulting in liability on the part of the wrongdoer.⁵¹² An employer is deemed vicariously liable for their employees actions when both parties are joined as defendants in the action. Full payment of the plaintiff's claim by either party absolves the other from having to make payment. In order for an employee to succeed with a claim in delict, certain pre-requisites need to be met. It must be established that a wrongful act was committed.⁵¹³ This constitutes an unlawful act which causes prejudice to another. Fault in the form of negligence or intent needs to be shown.⁵¹⁴ The element of causation needs to be met compelling the plaintiff to show a connection or causal link between each element of the cause of action.⁵¹⁵ Lastly damages need to be substantiated.⁵¹⁶ Given the purpose of the action being based on patrimonial loss, it is necessary for the plaintiff to show the actual loss suffered.⁵¹⁷

⁵¹¹ The general rule is that an employer is not liable for the negligence or the wrongdoing of an independent contractor employed by him or her, except where the employer has in some way been personally at fault in regard to the conduct of the independent contractor which has caused harm to a third party. An employer will therefore not be able to shelter behind the fact that the wrongdoer was an independent contractor or that the wrongdoer was hired from a temporary employment service, if the employer itself is responsible to ensure that the work executed by an independent contractor or temporary employee is performed safely and adequately.

⁵¹² See "South African Law of Delict" at <http://en.wikipedia.org> accessed in July 2015.

⁵¹³ Stephen Pete, David Hulme, Max Du Plessis and Robin Palmer *Civil Procedure A Practical Guide* 2 ed (2006).

⁵¹⁴ Ibid.

⁵¹⁵ Ibid.

⁵¹⁶ Ibid.

⁵¹⁷ Ibid.

7.5.3 It must be established that the employee committed the delict during the course and scope of his or her employment

The core requirement to be met in succeeding with a claim of vicarious liability which could be deemed the most substantial and controversial requirement, is proving that the delict was committed during the course and scope of employment. The test is whether the employee at the time of the alleged wrongful conduct was conducting the affairs of the business or doing the work of the employer.⁵¹⁸ There is no general rule determining whether the employee acted within the course and scope of employment as it is largely dependent on the facts of each case.

The Courts, in an attempt to clarify the ambiguity, have developed certain sub-rules. In the case of *Feldman (Pty) Ltd v Mall*⁵¹⁹ the Court defined core requirement in a deviation case as “a question of degree with regard to space and time when determining if the act of an employee falls within the scope of employment or not.” Difficulties surface in what is regarded as deviation cases. It should be noted that not every act of an employee committed during the time of employment which is an advancement of their personal interest or for the achievement of their own goals necessarily falls outside the scope of their employment.

The Court held in the case of *Minister of Safety & Security v Jordaan t/a Andre Jordaan Transport*⁵²⁰ that the determination of liability of the employer must depend on the nature and extent of the deviation. Should the deviation be so excessive that it cannot be reasonably said that the employee is exercising the functions for which they were appointed, nor can it be said that they were carrying out some instruction for their employer, then the employer ceases to be liable for any delicts committed. The Court further added that consideration of the facts will be taken into account on a case to case basis.⁵²¹

⁵¹⁸ See *Minister of Law and Order V Ngobo* 1992 (4) SA 822 (A) and *Minister of Police v Rabie* 1986 (1) SA 117(A).

⁵¹⁹ *Feldman v Mall* 1945 AD 732.

⁵²⁰ *Minister of Safety & Security v Jordaan t/a Andre Jordaan Transport* 2000 ILJ 2585-2588 D-F.

⁵²¹ See *African Guarantee and Indemnity Co Ltd v Minister of Justice* 1959 2 SA 437 (A) with regard to this matter.

The Court reiterated⁵²² that the test for activities within the course and scope of employment is a subjective-objective one. The Court in *Minister of Police v Rabie*⁵²³ explained the dynamics of the standard subject-objective test as follows:

*"It seems clear that an act done by a servant solely for his own interests and purposes, although occasioned by his employment, may fall outside the course and scope of employment, and that in deciding whether an act by the servant does fall, some reference is to be made to the servant's intention[...] The test is in this regard subjective. On the other hand, if there is nevertheless a sufficiently close link between the servant's acts for his own interests and purposes and the business of his master, the master may yet be liable. This is an objective test."*⁵²⁴

Although the subjective-objective test has been less frequently applied in recent years, the Courts still tend to utilise the principles in deciding on vicarious liability matters.⁵²⁵ Vicarious liability can be inferred in cases where a servant acted for his/her own benefit contrary to the prohibition of his/her master. In such cases, the liability of the master depends solely on the nature of the prohibition. If the prohibition is aimed at restricting certain modes or manners of performance of authorised work, the master may still be held liable. If the prohibition limits the sphere of employment the master may not be held liable for negligent performance of prohibited acts.

The case of *Bezuidenhout NO v Eskom*⁵²⁶ better explains the distinction between prohibition of manner and prohibition of employment scope. In this case, the father of a hitchhiker claimed two and a half million rand from Eskom. Based on a claim for vicarious liability, it was argued that one of their employees injured his son due to the negligent driving occasioned by him falling asleep and losing control of the vehicle. The defence based its argument on the express prohibition of the employee's superiors to provide lifts to passengers in the absence of acquired permission. *Van Der Merwe J* found that the employee had been using a company vehicle when he extended an

⁵²² In the *Minister of Police v Rabie* 1986 1 SA 117 (A).

⁵²³ Ibid.

⁵²⁴ In the *Minister of Police v Rabie* 1986 1 SA 117 (A).

⁵²⁵ See *Minister van Veiligheid en Sekuriteit v Japmoca Bk* 2002 (5) SA 649 (SCA): The Court expressed the view that the standard test has been less prominently applied in recent years than was the case previously.

⁵²⁶ *Bezuidenhout NO v Eskom* 2003 24 ILJ 1084 (SCA).

invitation to the hitchhiker. Based on the visible company signage, the hitchhiker could in no way be under the false impression that the vehicle was a private vehicle. The Court held that in the absence of authority and lack of relation to employed duties, the employee had not been acting during the course and scope of employment and thus exonerated Eskom from any vicariously liable claim.⁵²⁷

It is clearly evident that the requirement relating to unauthorised passengers created a limitation on the scope of employment. It was not merely an instruction or recommendation as to the manner of performing the employers business. If the subjective-objective test is applied, it can be viewed that the employee was perfectly aware he was prohibited from offering lifts to unauthorised passengers. He had no intention of furthering Eskom's affairs by doing so, and the subjective test was not satisfied. Further, the hitchhiker's presence had made no contribution in any way to the furthering of Eskom's business and consequently the close connection required by the objective test was demonstrably absent.

Whether the employer is to be liable or not, must be dependent on the nature and the extent of the deviation. Once the deviation is such that it cannot be reasonably held that the employee is still exercising the functions to which he was appointed or carrying out some instruction of his employer, the latter will cease to be liable.⁵²⁸ The other way in which the employer may be held vicariously liable is when the employee, viewed subjectively has not only exclusively promoted his own interest, but, viewed objectively, has completely disengaged himself or herself from the duties of his contract of employment. Correspondingly a master may still be held vicariously liable if there is a close link between the servant's acts for his own interest and the purpose of the business of his master. It should be noted that an intentional deviation from duty does not mean that an employer will escape liability.⁵²⁹

⁵²⁷ Ibid.

⁵²⁸ *Wait v Minister of Defence* [2002] 3 All SA 414 (E) it was found that a military policeman who shot a person with his personal firearm, while in uniform, had abandoned his duties completely and was thus not acting within the course and scope of his duties at the time.

⁵²⁹ See *ABSA Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd* 2001 (1) SA 372 (SCA) at para 5; *Rieck v Crown Chickens (Pty) Ltd t/a Rocklands Poultry* (2005) 26 ILJ 1240 (SE) at para 44.

7.6 The impact of *K v MINISTER OF SAFETY AND SECURITY* 2005 (6) SA 419 (CC) on vicarious liability

The Court reformulated the test for determining vicarious liability for the wrongful, negligent or intentional wrongs committed by public officers, including police officers so as to bring the concept of policy within the framework of the spirit, purport and object of the Bill of Rights. In the case of *K v Minister of Safety and Security*⁵³⁰, the earlier Supreme Court of Appeal (SCA) judgment was reversed by the Constitutional Court, resulting in the Minister being held vicariously liable for the actions of three policemen who, while on duty, raped a member of the public.

The SCA held that on the existing principles of vicarious liability, the respondent was not liable for the damages suffered by the appellant.⁵³¹ It further held that based on the application of the standard test for vicarious liability of employers in deviation cases, it could not be said that the policemen were, while raping the appellant, still exercising the functions for which they were appointed for nor where the carrying out an instruction of their employer.⁵³² The SCA concluded that the three policemen had deviated from their functions and duties as policemen to a degree that it could not be said that in committing the crime of rape, they were exercising those functions or performing those duties.⁵³³ The SCA also rejected that the notion that the development of the common law standards of vicarious liability and the consequent deviation cases should be developed in light of the spirit, purport and objectives of the Constitution.⁵³⁴ The SCA rejected the liability of the Minister of Safety and Security on the basis that at the time of the rape, the policemen were also failing to perform their duty to protect the appellant.⁵³⁵ The Constitutional Court however founded differently. O'Regan J was of the view that the common law test for vicarious liability in cases where employees deviated from their

⁵³⁰ *K v Minister of Safety and Security* 2005 (6) SA 419 (CC).

⁵³¹ *K v Minister of Safety and Security* 2005 (6) SA 419 (CC).

⁵³² *Ibid.*

⁵³³ *K v Minister of Safety and Security* 2005 (6) SA 419 (CC).

⁵³⁴ *Ibid.*

⁵³⁵ *Ibid.*

authorised functions required further development in light of the spirit, purport and objects of the Constitution.⁵³⁶

The Court explained what constituted the “development” of the common law for the purpose of section 39(2) as follows:

‘In considering this, we need to bear in mind that the common law develops incrementally through the rules of precedent. The rules of precedent enshrine a fundamental principle of justice: that like cases should be determined alike. From time to time, a common law rule is changed altogether or a new rule is introduced, and this clearly constitutes the development of common law.’

The Court indicated that the question of the protection of the applicant’s rights to security of the person, dignity, privacy and substantive equality were of profound constitutional importance.⁵³⁷ It was further held that the fact that the Court was concerned with the aspect pertaining to vicarious liability did not mean that the questions of constitutional rights cannot arise.⁵³⁸ The Court reasoned that the normative influence of the Constitution had to be considered when considering whether the law should be developed or not.⁵³⁹ The applicant’s counsel argued that in order to determine whether the respondent was vicariously liable for the harm the applicant suffered, it was necessary to bear in mind that the conduct of the policemen comprised both a commission which was wrongful (the rape of the applicant) and an omission which was also wrongful (the failure to protect the applicant from crime).⁵⁴⁰

The Court held that despite the possibility of an employee’s act being committed solely for his or her own purposes, if there was a ‘sufficiently close link between the employee’s act and purpose and business of the employer, the Courts must give effect to the spirit and object of the Bill of Rights.’⁵⁴¹ Applying these norms to the facts of the case, the Court found that there was a close connection between the policemen’s

⁵³⁶ Ibid.

⁵³⁷ K v Minister of Safety and Security 2005 (6) SA 419 (CC).

⁵³⁸ Ibid.

⁵³⁹ Ibid.

⁵⁴⁰ Ibid.

⁵⁴¹ K v Minister of Safety and Security 2005 (6) SA 419 (CC).

actions and their duties as employees of the Minister.⁵⁴² The policemen failed in their duty to protect her from harm and to prevent crime, and for this the Minister was held to be vicariously liable.⁵⁴³ Having decided the matter on the issue of vicarious liability the Court did not consider it necessary to decide whether there was any direct liability on the part of the Minister.⁵⁴⁴

Despite the policy-laden character of vicarious liability, our Courts have often asserted, though not without exception,⁵⁴⁵ that the common-law principles of vicarious liability are not to be confused with the reasons for them,⁵⁴⁶ and that their application remains a matter of fact.⁵⁴⁷ Therefore, two key questions need to be asked. The first is whether the wrongful acts were done solely for the purposes of the employee. This question requires a subjective consideration of the employee's state of mind and is a purely factual question. Even if it is answered in the affirmative, however, the employer may nevertheless be held to be vicariously liable if the second question, an objective one, is answered affirmatively. The second question is whether there is a sufficiently close link between the employee's acts for his own interests and the purposes and the business of the employer. This question does not raise purely factual questions, but mixed questions of fact and law. The questions of law that it raises relate to what is "sufficiently close" to give rise to vicarious liability.⁵⁴⁸ It is in answering this question that a Court should consider the need to give effect to the spirit, purport and objects of the Bill of Rights.⁵⁴⁹

⁵⁴² Ibid.

⁵⁴³ Ibid.

⁵⁴⁴ Ibid.

⁵⁴⁵ See *Feldman (Pty) Ltd v Mall* 1945 AD 733 per Watermeyer CJ at 741, per Davis AJA at 784-5; *Grobler v Naspers Bpk en 'n Ander* 2004 (4) SA 220 (C) at 296F-297C (with reference to recent Court decisions in the USA, UK, Canada, Australia and New Zealand).

⁵⁴⁶ See *Ess Kay Electronics Pte Ltd and Another v First National Bank of Southern Africa Ltd* 2001 (1) SA 1214 (SCA) at paras 9-10; *Carter & Co (Pty) Ltd v McDonald* 1955 (1) SA 202 (A) at 211H.

⁵⁴⁷ See *Minister van Veiligheid en Sekuriteit v Japmoco BK h/a Status Motors* 2002 (5) SA 649 (SCA) at para 1; *ABSA Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd* 2001 (1) SA 372 (SCA) per Zulman JA at para 5.

⁵⁴⁸ *S v Basson* 2005 (1) SA 171 (CC) at paras 50-53 as to the distinction between purely factual and mixed fact and law questions.

⁵⁴⁹ *K v Minister of Safety and Security* 2005 (6) SA 419 (CC).

7.7 Occupational impact of fault through omission

A negligent or intentional failure to implement designated practices by an employer or staff to prevent acquired infections may result in legal liability being imputed to the firm through omission.⁵⁵⁰ A negligent failure to implement infection control measures may result in the firm being directly liable. This is based on the premise of the reasonable man test. The test for negligent conduct is objective and measured against the behaviour of a reasonable person being in the position of the wrongdoer, foreseeing the likelihood of harm from a failure to implement measures and steps to guard against said failure.⁵⁵¹

Needle stick injuries form the common mode of exposure to HIV/AIDS and are often consequential to incorrect, unsafe disposal of needles either through negligence or deliberate disregard for protocol and policies. Failure to recap needles can lead to the presentation of needle stick injuries, commonly defined as '*an accident where a person's skin is accidentally punctured by a hypodermic needle or sharp medical device such as a scalpel*'.⁵⁵² The mental effects of a needle stick injury can be as devastating as a physical injury. Most needle stick injuries are caused by careless discarding or disposing of needles without recapping.⁵⁵³

Several cases have occurred in the United Kingdom involving needle stick injuries. In an unreported case,⁵⁵⁴ a train worker succeeded with a claim against his employer - this after incurring an injury by a needle in his knee while attempting to fix the lights on a train carriage.⁵⁵⁵ The fitter who sustained the injury got down on the floor to access an electrical panel in the carriage and knelt on the needle. Although he was cleared of any blood borne diseases, the long wait he endured meant an adjustment of his personal life which led to compensation of eight thousand five hundred pounds.⁵⁵⁶ The award was

⁵⁵⁰ Ibid.

⁵⁵¹ Ibid.

⁵⁵² Thompson law Solicitors 'What are needle stick injuries' <http://www.thompsons.law.co.uk/workplace-accidents/needlestick-injury-personal-injury-claims.htm>, accessed in July 2014.

⁵⁵³ Ibid.

⁵⁵⁴ Thompson law Solicitors <http://www.thompsons.law.co.uk/>. Accessed in July 2014.

⁵⁵⁵ Thompson law Solicitors 'Train worker's agonising wait after needles injury' <http://www.thompsons.law.co.uk/text/compensation-fitter-needlestick-injury.htm>, accessed in July 2014.

⁵⁵⁶ Ibid.

based largely on the fact that the employer, First Green Western, should have provided its employees with knee pads and other protective equipment in order to fulfil its duty to provide a safe working environment. A failure to adhere to the standard health and safety legislation rendered the employer directly liable for injuries sustained from their failure.⁵⁵⁷

In another similar incident a care assistant based at the Kettering General Hospital who wished to remain anonymous (thus referred to as Mrs. Y),⁵⁵⁸ was stuck with a needle while putting rubbish in a bin. A plastic bag containing eight needles had been discarded on the floor next to it, instead of in the sharps bin provided for by the hospital. The clear and definite fault on the hospital's part prompted them to settle out of Court and they agreed to a payment of six thousand five hundred pounds. Lilian Greenwood, UNISON regional organiser for West Midlands, in a statement released pertaining to Mrs. Y's case remarked that an estimated one hundred thousand injuries occur yearly, leading to cost implications for testing, time off work, compensation claims and mental and physical trauma.⁵⁵⁹ In the above unreported cases, it is evident that occupational exposure of HIV/AIDS does occur frequently. Although in the majority of instances, the affected workers' test negative for the virus, possible claims due to the employer's failure to provide a safe working environment are successful and implemented internationally.

Intentional failure can be categorised into two main scenarios; actual intention and eventual intention. Both attract the same penalty of direct liability accrued for any harm caused to patients but the rationales differ. Actual intention is a deliberate act by the wrongdoers, who are aware of the wrongfulness of their failure to implement control measures and proceed to ignore it. Explanations for omissions could be attributed to cost minimisation. When eventual intention is applied, a subjective outlook is taken, imposing reasonable foreseeability of the likelihood of harm being caused to patients and not caring if said harm occurs. This is deemed to be acting in reckless disregard for the consequences of such failure to implement and attracts direct liability for any claims.

⁵⁵⁷ Thompson law Solicitors <http://www.thompsons.law.co.uk/> accessed in July 2014.

⁵⁵⁸ Ibid.

⁵⁵⁹ Thompson law Solicitors <http://www.thompsons.law.co.uk/> accessed in July 2014.

Employers are considered vicariously liable for unlawful acts of their employees either through direct wrongfulness or omission, provided it occurred during their course and scope of employment. Liability is further imputed through vicarious liability even if the staff negligently disobeyed protocols and procedures which amount to a wrongdoing. The involvement of hospitals in negligently acquired infections came under scrutiny in the case of Amichand Rajbansi, a prominent politician who passed away in October 11, 2011, after suffering an alleged hospital acquired infection.⁵⁶⁰ Rajbansi's wife, Shameen Thakur, maintained that her husband was admitted for a respiratory condition and believed that the hospital incorrectly diagnosed his condition as cardiac related. This resulted in a pace-maker being fitted and an acquired infection being contracted due to complications with the procedure, which resulted in his death. Shameen intended suing the hospital for damages and employed the services of attorney Sundeep Singh. Singh was firmly of the belief that *'this device (Biventricular pacemaker) which was foreign to his body was a catalyst for the acute onset of early left ventricular failure as a foreign object could attract infection.'*⁵⁶¹

The Netcare Umhlanga Hospital fought back against these allegations and released a press statement.⁵⁶² The statement assured the public of their commitment to maintenance of international practices on infection control measures, including regular monitoring by the Department of Health. Netcare's hospital manager Shaun Ryan went further to place on record that the hospital did not employ the doctors that attended to patients and reiterated the hospital's infection prevention measures being in line with international practices and complying with the Centre for Disease Control recommendations.

In analysing the facts of this case it is important to note the prominence being placed on the employment status of the doctors in this matter. Legally, this bears significant

⁵⁶⁰ Lee Rondganger 'Raj doctors fight back' *The Independent online*, 2 March 2012 available at <http://www.iol.co.za/dailynews/news/raj-doctors-fight-back-1.1247254?ot=inmsa>, accessed in September 2014.

⁵⁶¹ Lee Rondganger 'Raj doctors fight back' *The Independent online*, 2 March 2012 available at <http://www.iol.co.za/dailynews/news/raj-doctors-fight-back-1.1247254?ot=inmsa>, accessed in September 2014.

⁵⁶² Lyse Comins 'Netcare rejects blame for Raj's death' *The Independent online*, 14 January 2012 available at <http://www.iol.co.za/news/south-africa/kwazulu-natal/netcare-rejects-blamefor-raj-s-death-1.1212769?source=safindit>, accessed in September 2014.

importance as the hospital has successfully managed to escape liability for any future claims of vicarious liability, based on the premise that the doctors who treated Rajbansi were independent contractors subject to their own statutory consequences and implications for negligence. As denoted in the case of *Stein v Rising Tide*⁵⁶³ the employer may not be held liable for the negligent wrongdoing of an independent contractor. Although this is the understanding, Coulter Boeschen in the Nolo legal encyclopedia⁵⁶⁴ lists exceptions where a hospital can be held liable for non-employee doctors' actions, namely:

1.) In circumstances where the hospital appeared to be the doctor's employer.

This would typically occur in a situation where a hospital does not make it clear to a patient that the doctor is indeed not an employee. The patient is then permitted to sue the hospital for the doctor's malpractice. Hospitals attempt to avoid this situation by informing patients in the admission forms that the doctor is not a hospital employee. However, liability is shifted to the hospitals in medical emergencies, where a patient is injured during a procedure in the emergency room, in which case the patient may sue the hospital for damages. This is based on medical malpractice, which is prompted by the fact that hospitals are unable to inform patients in an emergency situation that the doctor is not an employee of the hospital.

2.) In circumstances where hospitals keep incompetent doctors on their staff.

A Hospital can be held responsible if it gives staff privileges to an incompetent or dangerous doctor who is an independent contractor. The hospital is also responsible through vicarious liability if it was aware that a previously safe doctor had become incompetent or dangerous. An example would be if a doctor became addicted to drug related substances and the management at the hospital was aware of it due to knowledge or visible signs. A patient subsequently injured by that doctor can sue the hospital.

⁵⁶³ *Stein v Rising tide productions cc* (2002) 23 ILJ 2017 (C)

⁵⁶⁴ Coulter Boeschen 'Medical Malpractice: When can patients sue a hospital for negligence?' NOLO legal encyclopedia available at <http://www.nolo.com> accessed in January 2014.

The common understanding is that apart from hospitals being held vicariously liable for negligent actions of employees they are also deemed liable vicariously for circumstances where patients were of the mistaken belief that the hospitals are indeed employers of the doctor. They are further held liable if they are aware that the medical professional although an independent contractor is unfit to perform his/her job satisfactorily due to external causes and take no precautions to remove the unfit doctor from the hospitals' engagement.

7.8 Duty of Care to Third Parties

It is deemed common cause that third parties are entitled to a safe environment free of any hazards. This is based largely on a statutory and common law duty by employers/premises owners. Daniele Bryden and Ian Storey⁵⁶⁵ have firmly asserted their understanding of the duty of care extending to any doctor coming into contact with the patient and not just the admitting team. Their argument was supplemented by medical law academics who maintained that any patient whom medical staff comes across in a professional environment is owed a duty of care. Apart from the doctors, patients coming into contact with any person employed by the Trust to deliver patient care owed a duty of care to that patient.⁵⁶⁶ This duty can be seen to extend to daily site visitors or to mutual acquaintances present in any occupational context. Examined in this study is the probability of a day visitor being injured whilst at a specific site. This could extend to anyone from a delivery man to a potential business investor. Minimal literature exists on the legal avenues available to a third party obtaining an injury and possibly contracting the HIV/AIDS virus pursuant to the injury.

A civil claim is actionable and currently there exists no prohibitions to the contrary. If an employee discarded an HIV/AIDS infected needle which caused the injury to the third party the said employee is identifiable. If an employee is not readily identifiable then the employer can be the defendant in the matter for failure to provide a safe environment as

⁵⁶⁵ Coulter Boeschen 'Medical Malpractice: When can patients sue a hospital for negligence?' NOLO legal encyclopedia available at <http://www.nolo.com> accessed in January 2014.

⁵⁶⁶ Coulter Boeschen 'Medical Malpractice: When can patients sue a hospital for negligence?' NOLO legal encyclopedia available at <http://www.nolo.com> accessed in January 2014.

constitutionally obliged so to do. However in some instances, although an employee maybe identifiable, a third party may choose to pursue a more economical source for compensation, thereby joining the employer in the action. This mode of acquiring relief is recognised and operationalised through the Doctrine of Vicarious Liability. The Doctrine can be fully relied upon provided the requirements are met. Since there is no specific mention of precluding third party claims in COIDA, this remains a readily and more economically mode of claiming for damages by a third party for injuries sustained.

Evident in the above analysed case of *K v Minister of Safety and Security*⁵⁶⁷ fault occasioned by omission when a duty of care is owed attracts ramifications under the guise of vicarious liability. In the international case of *PD v Dr. Nicholas Harvey and 1 Ors*,⁵⁶⁸ the plaintiff PD (pseudonym) claimed damages from the general practitioner Dr. Nicholas Harvey and his employer Dr. King Weng Chen through vicarious liability occasioned by negligence as a result of an omission. This claim was based on their subsequent breach of their duty of care as medical professionals. The case focused on the negligence of the medical practitioners to correctly inform PD of her partner FH's HIV/AIDS results, following a joint consultation with Dr. Harvey. The purpose of the consultation was to undergo testing with the intent of procreation.

Dr. Harvey's failure to notify PD of FH's HIV/AIDS positive status resulted in her conceiving a child, due the fraudulent and forged information supplied to PD by FH of his negative status. PD was awarded damages in the sum of seven hundred and twenty seven thousand, four hundred and thirty seven dollars to which the medical practitioner Dr. Harvey and the medical director Dr. Chen were equally liable through direct and vicarious liability respectively. Both respondents argued that a notification of FH's results to PD would constitute a statutory breach of confidentiality, further arguing doctor patient confidentiality as a secondary defence. The Courts rejected this view and maintained that the initial consultation was a joint consultation with the purpose of the testing being fully disclosed to the practitioner. A failure by the practitioner to advise the

⁵⁶⁷ Ibid.

⁵⁶⁸ *PD v Dr Nicholas Harvey & 1 Ors* [2003] NSWSC 48.

patient of their obligation to inform their partners of their status and a failure to jointly reveal the results were negligent and a breach of the duty of care.

Similarly, in the unreported Australian case of Bondi Medical Centre, which was settled in 2009, an aggrieved patient succeeded with a claim based on vicarious liability against the Director of a Medical Centre and the treating doctor.⁵⁶⁹ The basis of this claim was negligence and a breach of the duty of care subscribed to by all professionals premised upon omission. This case involved a woman who attended the Bondi Medical Centre requesting HIV and other tests. Her HIV tests were deemed inconclusive, which suggested that she could possibly have been infected with HIV. Instead of contacting the woman to inform her that further tests were required, the Medical Centre sent a recall letter which attached no urgency to the matter and was also erroneously sent to her old address. Three weeks later, upon returning to the Centre of her own accord and being attended to by a different doctor, that doctor failed to inform the woman of the possibility of being HIV positive. The doctor failed to properly check the patient's file. As a result, the woman's partner contracted HIV and initiated legal action against the Director of the Medical Centre and the second treating doctor. Based on a lack of justification, the parties admitted liability and agreed to pay the plaintiff seven hundred and forty five thousand dollars and the costs of litigation which amounted to one hundred and ninety seven thousand five hundred dollars. Based on the above jurisdictionally precedents it can be noted that conduct through omission attracts unequivocal liability either directly or through vicarious liability as conduct through commission.

Exposure and possible transmission of HIV/AIDS can occur from a medical professional to a patient during a procedure. The avenues available to an aggrieved patient are not always understood or acknowledged. An aggrieved patient may claim damages from the medical professional through a civil claim and his/her employer through vicarious liability if (s) he is contracted to a hospital.

⁵⁶⁹ The Australian Society for HIV Medicine 'Guide to Australian HIV Laws and policies for healthcare professionals' <http://www.ashm.org.au/HIVLegal/Default.asp?publicationID=2&SectionID=340> accessed in February 2014.

In the South African context David McQuoid – Mason, in a Medical Journal article⁵⁷⁰ wrote that hospitals may be held vicariously liable when patients have been harmed due to negligent hospital staff or the intentional failure by the staff to comply with infection control measures that have been implemented during the course and scope of employment.⁵⁷¹ He added that the conditions considered when imputing liability to hospitals will depend on whether the hospital administrators have introduced the best measures to minimise infections. This would largely depend on whether they negligently or intentionally failed to implement designated infection control measures in their hospital, or hospital staff who negligently or intentionally fail to comply with infection control measures implemented by the hospital while acting in the course and scope of their employment which then resulted in harm caused to the patients.⁵⁷² The common law position on acquired infections provides for eligibility and success of claim for damages against health care providers by the aggrieved patients.⁵⁷³

Negligence or intentional breach may also be a violation of the constitutional right to an environment not harmful to one's health and well-being.⁵⁷⁴ It may further be a violation of the National Health Act which states that health establishments must implement measures to minimise disease transmission.⁵⁷⁵ Although a breach of a statute is not considered negligence per se, it may constitute evidence of actionable negligence.⁵⁷⁶

A common law action based on negligence should regard the acquisition of an infection from the hospital as *prima facie* evidence of negligence by the hospital and the principle of *res ipsa loquitur* should apply.⁵⁷⁷ This means that the Courts should infer negligence unless a plausible explanation is presented regarding the mode of acquired infection not

⁵⁷⁰ David McQuoid – Mason 'Hospital- acquired infections- when are hospitals legally liable?' (2012) 102 (6) South African Medical Journal.

⁵⁷¹ Ibid.

⁵⁷² Ibid.

⁵⁷³ McQuoid op cit note 570.

⁵⁷⁴ S 24 (a) of the Constitution of the Republic of South Africa, 1996 states: "Everyone has the right - (a) to an environment that is not harmful to their health or well."

⁵⁷⁵ S 20(3)(b) of the National Health Act No. 61 of 2003.

⁵⁷⁶ David McQuoid – Mason op cit note 570.

⁵⁷⁷ Ibid.

being the fault of the hospital or its employees. Although reluctantly applied by South African Courts the principle is still widely accepted and utilised.⁵⁷⁸

7.9 Duty of care to third parties in sport and the probability of vicarious liability

Another common forum for possible exposure to HIV/AIDS is in a sporting context. Minimal literature exists on the laws governing the sporting industry. This is generally attributable to the fact that professional sports are considered employment and the labour laws governing employment are applicable to a sporting context. Nevertheless HIV/AIDS presents a distressing risk of exposure in sports and few are aware of the laws governing this arena.⁵⁷⁹

The World Health Organisation released the following statement in 1989:⁵⁸⁰

‘...There is a possible very low risk of HIV transmission when one athlete who is infected has a bleeding wound or a skin lesion and another athlete has a skin lesion or exposed mucous membrane that could possible serve as a portal of entry for the virus.’

It has been established that HIV/AIDS cannot be spread through casual contact. Further, the virus has never been identified in sweat and has only rarely been detected in minute concentrations of saliva. Therefore, in order for HIV transmission in a sporting context to occur the blood from an HIV/AIDS infected person would have to enter the blood stream of an uninfected person. Entrance could occur through a cut, lesion, open wound or mucous membrane, specifically the eye or mouth. This may occur in various scenarios as explained by Caryl Verrier and Stephen Tuson.⁵⁸¹ A common scenario would be in a martial arts setting. Two fighters X and Y may be fighting although unbeknown to Y, fighter X is HIV/AIDS positive and failed to disclose his status. During

⁵⁷⁸ Ibid.

⁵⁷⁹ Health 24 divided sports into two main categories; non-contact and contact sports. Non- contact sports are referred to where there is no direct physical contact or minimal contact between participants. Such sports include tennis, golf, cycling, netball, hockey, cricket and volleyball. Contact sports are further divided into low contact and high contact sports; boxing, karate, tae-kwan-do, wrestling, rugby and judo all qualify as high contact sports. The risks of HIV transmission in these sports are relatively high, in comparison to low contact or non-contact sports. Low contact sports include soccer, where direct contact is not supposed to take place but frequently does.

⁵⁸⁰ Health 24 ‘HIV and sport’ available at <http://m.news24.com/health24/Medical/HIV-AIDS/Living-with-HIV/HIV-and-sport-2012072>, accessed in July 2014.

⁵⁸¹ Caryl Verrier and Stephen Tuson, *The transmission of HIV in martial arts* (May 2009) DeRebus, The South African Attorney’s journal. p.18-21.

the bout both fighters X and Y may sustain open wounds thereby leading to X infecting Y.

Although infrequently utilised, the avenues of criminal and civil action are available to fighter y. Attempted murder or assault with intent to do grievous bodily harm would provide a strong basis for criminal liability. The intent in both aspects could be in the form of *dolus directus* or *dolus eventualis*.⁵⁸² A claim for delictual liability is plausible provided the elements of causation,⁵⁸³ negligence,⁵⁸⁴ wrongfulness⁵⁸⁵ and actual loss⁵⁸⁶ occurred.⁵⁸⁷ However, a delictual based claim also presents the option of joining a club, association or organisation in the action through the Doctrine of Vicarious Liability.

Simon Gardiner wrote:⁵⁸⁸

'In most situations where a participant is caused injury whilst playing sport, the cause of the harm and most obvious defendant will be the player who caused the injury. However, in certain circumstances there may be other, more appropriate, defendants. An injured sports professional can join the defendant's employer to claim on the basis of vicarious liability.'

The Doctrine of Vicarious Liability is applicable to any professional sporting context, reliant on the nature and terms of the contract of employment. Any club or organisation that employs a professional player to play a sport explicitly endures the chance of being joined in an action through vicarious liability for any delicts committed by the player. The justification for the liability is based on the sports player working for the benefit of the employer, thus satisfying the loss-distribution principle. This provides for inclusion of the

⁵⁸² Ibid.

⁵⁸³ Proof on balance of probability would be required that fighter x's non-disclosure coupled with his engaging in the bout with fighter y caused fighter y to be infected. Based on the difficulty to prove the exact mode of transmission from a medical standpoint, the Courts would have to decide as a matter of inference from the facts based on probability of fighter x causing fighter y to be infected with HIV.

⁵⁸⁴ Fighter x's non-disclosure would be negligent if the reasonable man test is employed. According to this test a reasonable man, meaning an ordinary, normal, average person with ordinary intelligence, foresaw the possibility that his non-disclosure would cause the HIV/AIDS transmission to fighter y and failed to take steps to prevent it.

⁵⁸⁵ This element takes into account the Constitutional norms, values and principles, the 'legal convictions of the community and considerations of policy to determine if the non-disclosure was wrongful.

⁵⁸⁶ Actual loss is based on the expenses justified including but not limited to medical expenses, loss of earning capacity and general damages.

⁵⁸⁷ Ibid.

⁵⁸⁸ Simon Gardiner, Mark James, John O'Leary and Roger Welch with Ian Blackshaw, Simon Boyes and Andrew Caiger; *Sports Law* 3 ed (2005) p.643.

employer as a joint wrongdoer for any wrongdoing that occurs in the production of that benefit even though the employer did not directly commit any wrong action.

The elements denoted above to prove a claim for vicarious liability need to be complied with in their entirety for a claim to succeed. Important to note is that a sportsperson who is paid to play for a club is an employee of that club. This is evidenced by the contract of employment between the club and player. In professional team sports, the employing club should generally be joined to an action following an injury-causing act of foul play. The foul play forms the basis of the successful negligent actions. Recent international precedents in the United Kingdom have seen the employing clubs as the sole defendant to the action. This is based on the clear indication of vicarious liability hence citing a single defendant to keep legal costs to a minimal.

In the USA and Australia, many clubs have been found vicariously liable for the conduct of their players. This is based on their awareness of certain circumstances relating to the employee and still electing to retain them in their employ. The case of *Tomjanovich v California Sports Inc*⁵⁸⁹ was a clear indication of holding an employer liable for faulting the selection process. In this case a claimant was punched in the face by his opponent, Kermit Washington during a National Basketball Association match. The claimant sued Washington and his employer, the Los Angeles Lakers, owned by the defendant's company. The claimant succeeded in his claim of three million, two hundred thousand dollars against the club through vicarious liability, on the premise that they were aware of the violent disposition and playing style of Washington. They did nothing to discourage it, and continually selected him for matches despite this knowledge. This case demonstrates the ambits of the risk-liability theory, thereby faulting the employer and offering no justification through negligence or ignorance.

The legal understanding of the Vicarious Liability Doctrine as explained in the above case is to hold an employer responsible for awareness of certain facts pertaining to an employee and not taking action leading to further injury of a competitor. While this is a

⁵⁸⁹ *Tomjanovich v California Sports Inc* [No H-78-243 (SD Tx 1979)].

generally acceptable theory, the focus then shifts to the ability of employers to safeguard themselves through unawareness of a particular situation.

Generally club owners are not able to safeguard themselves. Several constitutional issues arise negating any possibility of invoking pre-selection procedures to advocate protection against vicarious liability claims. Compulsory HIV testing of participants is controversial as their democratic rights and employment rights in professional sports are impacted on. Testing can only be done if informed consent is given. Section 18 of the Constitution provides the right to freedom of association to all citizens. Included in this definition are club members, so an intentional denial to participate in an activity can be classified as unconstitutional. Although this may be the standpoint, USA is stricter, with justifiable limiting a HIV/AIDS positive participants rights. This was demonstrated in the case of *Montalvo v Radcliffe* (1999.) The USA Supreme Court confirmed the karate club's decision to bar Motalvo from participating in kumite (a term used for a fighting match in karate) as he had tested positive for HIV. The ruling was handed down despite the USA Disabilities Act which prohibits discrimination based on disability, including medical conditions. The Court ruled that they were 'reasonable grounds' for restricting Montalvo's rights in this regard.

Club owners, organisations and professional bodies have a common law duty of care to provide a safe environment for their athletes or sporting personnel. A failure to adhere to this duty could result in a claim for vicarious liability succeeding. This duty was explained in the case of *Nowak v Waverley Municipal Council & Ors*.⁵⁹⁰ In this case it was held that the owner of a sports field (the Council) had failed to ensure that a football field was as fit and safe as far as reasonable care and skill could make it. The Rugby League and the Club were also held liable. The basis for this liability was that the League and the Club had taken it upon themselves to organise and present football games to be conducted on the field. The Court held that where a person takes it upon himself to do such things, he may be liable in negligence in respect of the dangers which arise from what he does.

⁵⁹⁰ *Nowak v Waverley Municipal Council & Ors* (1984) Aust. Torts Reports 80-200.

Notwithstanding this common law duty, in South Africa these bodies are further bound by abundant labour legislation to protect their sportsmen/women against HIV/AIDS testing. Although internationally, several sporting associations have taken a proactive stance in an attempt to limit any transmission of HIV/AIDS and other blood borne viruses by providing statements, guidelines and recommendations to better manage HIV/AIDS transmission in a sporting context. Some athletic organisations, such as the International Federation of Associated Wrestling Styles and the International Boxing Federation, have now ordained that HIV/AIDS detection tests be compulsory for all participants in their sports. In addition, the International Amateur Boxing Association has recently recommended that an HIV test should be carried out in pre-participation physical examinations.⁵⁹¹

These international standards are governed by the principle used in the USA. An employer may choose to refuse employment based on a HIV/AIDS pre-employment test revealing positivity of a potential employee. In South Africa there exists watertight legislation against pre-employment testing and a refusal to employ based on a positive status. This situation proves to be problematic and places South Africa in weaker position than international jurisdictions. Organisations and club owners can be held vicariously liable for any potential hazards arising from their players' conduct. They have no way of safeguarding themselves or devising stringent pre-participant examinations to fault HIV/AIDS positive individuals from the selection process.

One can argue that an employee is placed at a weaker position by the implemented legislation prohibiting pre-employment testing, this based on the fact that an employer can rely on the defence of *volenti non fit injuria* as a justification for exonerating him/herself from possible civil claims either solely or through vicarious liability. According to the *volenti non fit injuria* defence, a willing person is not wronged. Thus it can be seen to be a defence that functions by negating wrongfulness. This principle is commonly known as the voluntary assumption of risk principle, and has the effect of cancelling fault. Although the voluntary assumption of risk principle can be seen to be a credible defence, Courts are reluctant to accept this as an absolute ground of

⁵⁹¹ Len Els: Yondan Thesis, Martial Arts, self-defence and sexually transmitted diseases, 2009.

justification. In the case of *Lampert v Hefer*,⁵⁹² the plaintiff was a passenger in the side car of the intoxicated defendant's motorcycle, and wished to claim damages from the defendant's estate for injuries sustained resultant of an accident caused by the defendant. During the trial it was found that a good defence had been established by the defendant's executrix based on the establishment of the *volenti non fit injuria* principle. Having argued that the plaintiff knew, realised and appreciated the risk she was exposing herself to, and nevertheless voluntarily undertook the said risk, the presiding officer ruled in favor of the defendant.

On the contrary, the case of *Bongani Seti v South African Commuter Corporation Limited (SACC)*⁵⁹³, in which the plaintiff alleged that he was injured when he fell whilst attempting to board a SACC train, which had left the station with the carriage doors open. The Courts were faced with deciding whether the defendant's defence of *volenti non fit injuria* could be regarded as a full justification. Samela J held that the plaintiff had knowledge of the danger but no appreciation of its nature. The plaintiff also did not understand the extent of harm and risk involved in jumping into a moving train, as the train was travelling at a jogging pace and the plaintiff was confident in his ability to board the train, he did not foresee the injury, hence it would be incorrect to say that the plaintiff consented to be injured. In this case Samela J listed requirements for establishing consent or the voluntary assumption of risk as a ground for justification. Samela J noted that *"it is a defence only in respect of injuries and harm caused by the materialisation of a risk which is subjectively foreseen, appreciated and assumed by the plaintiff. If one exposes oneself to dangerous or negligent conduct, one does not necessarily assume all the risks attached to it."* Based on this it can be denoted that an injured party could only consent to reasonably foreseeable harm caused to him/her. Although participating in full contact sports could pose the risk of injuries, to use the *volenti non fit injuria* defence to negate HIV/AIDS exposure claims would be challenging, due to the difficulty in proving reasonable foreseeability of exposure to the virus as testing is strictly prohibited.

⁵⁹² *Lampert v Hefer* N.O 1995 (2) SA (AD).

⁵⁹³ *Seti v South African Rail Commuter Corporation Ltd* (10026/2009) [2013] ZAWCHC.

In an effort to repudiate the impossibility of the *volenti non fit injuria* defence Len Els⁵⁹⁴ suggested that clubs adopt a rule to require members engaging in bouts of fighting to undergo a sexually transmitted disease test and disclose the results to relevant senior members.⁵⁹⁵ This in essence would offer sufficient knowledge to a participant's status thereby allowing an injured party the possibility of claiming through vicarious liability without the element of an unbeknown status being raised by the employer and indirect *volenti non fit injuria* defenses being raised. It was further suggested that an owner makes provisions in his/her membership application form for the disclosure of any medical condition suffered by the applicant, including the disclosure of any bodily-fluid transmissible disease.⁵⁹⁶ However these recommendations are challenging due to a possibility of constitutional violations.

Thus it can be seen that from an employee's perspective, that the South African sporting industry makes allowance for HIV/AIDS legislation protecting positive participants. USA has prompted a pro-active approach by minimising participation by positive individuals. South Africa remains powerless due to legislative constraints. This in essence increases the probability of vicarious liability claims against club owners and organisations for any exposure to HIV/AIDS.

7.10 Onus on the employer to provide a safe working environment

Based on the above theoretical understanding an employer is constitutionally, statutorily, contractually and through common law obliged to provide a safe working environment to the employees. Modes of providing a safe workplace are achievable through the compilation of a strict and influential workplace policy and efficient implementation of the policy. The Canadian Centre for Occupational Health and Safety in a statement regarding the importance of occupational health and safety policies defined a policy as:⁵⁹⁷

⁵⁹⁴ *Seti v South African Rail Commuter Corporation Ltd* (10026/2009) [2013] ZAWCHC.

⁵⁹⁵ *Ibid.*

⁵⁹⁶ Len Els: Yondan Thesis, Martial Arts, self-defence and sexually transmitted diseases, 2009.

⁵⁹⁷ Canadian Centre for Occupational Health and Safety 'Why should I have an occupational health and safety (OHS) policy statement' available at: www.ccohs.ca accessed in August 2014.

“A plan of action: a course or method of action that has been deliberately chosen and that guides or influences future decisions.”

They went further to recapitulate the issues that should be covered in a policy which included: the company’s objectives and plans for occupational health and safety, senior management’s commitment to establishing a safe workplace policy, the integration of the policy into all workplace activities, a commitment to regular reviewing and monitoring, and the provision of funds for implementation.⁵⁹⁸

Standard precautions are recommended to prevent the spread of HIV in the workplace based on the principle that all blood, body fluids, secretions and excretions may contain transmissible infectious agents. Standard precautions involve using protective clothing i.e. gloves, gowns, aprons, masks and protective eye wear. These can also be referred to as routine practices.⁵⁹⁹ However, as Dora Mbonya⁶⁰⁰ noted, safety measures are not always employed either due to financial constraints with regard to providing protective equipment or inadequate training and logistical obstacles. A study in Nigeria⁶⁰¹ noted that only fifteen point four percent of health care professionals used gloves regularly, while a similar study conducted in Ngoma⁶⁰² found only seventy one point four two percent recapped needles after use despite mandatory requirements invoked by the hospital.

Analysing the situation at a company level, it is distressing to see that although a number of large companies have workplace policies in place, the small to medium enterprises (SMMEs) still lack these interventions. Tamar Kahn reported that of the thousand respondents surveyed, only a quarter of the firms had a formal HIV/AIDS policy implemented and fewer than a fifth had voluntary counseling and testing

⁵⁹⁸ Ibid.

⁵⁹⁹ Canadian Centre for Occupational Health and Safety ‘Why should I have an occupational health and safety (OHS) policy statement’ available at: www.ccohs.ca accessed in August 2014.

⁶⁰⁰ Dora Mbonya, Jerome Ateudjieu, Claude Tayau Tagny and others ‘Risk factors for transmission of HIV in a hospital of Yaounde’ Cameroon’ (2010) 7(5) International Journal of Environmental Research and Public Health p.2085-2100.

⁶⁰¹ Dora Mbonya, Jerome Ateudjieu, Claude Tayau Tagny and others ‘Risk factors for transmission of HIV in a hospital of Yaounde’ Cameroon’ (2010) 7(5) International Journal of Environmental Research and Public Health p.2085-2100.

⁶⁰² Ibid.

programmes or treatment plans to support HIV/AIDS infected workers.⁶⁰³ Looking closely at the SMME sector it has to be noted that thus far, SMMEs have not shown sufficient understanding of business's role and responsibility to prevent HIV/AIDS and to mitigate the impact of the disease.⁶⁰⁴ Jocelyn Vass and Sizwe Phakathi in a survey conducted on effective SMME's workplace policies found that only twenty six percent of organisations had workplace policies in place.

While invoking a policy is mandatory in ensuring a safe working environment, implementation of the policy is equally important. An employer can have an incontrovertible policy but, may still be held liable for any acts committed by an employee during the course and scope of employment. The implementation of policy is an important but often ignored component of managing effective workplace operations.

7.11 Conclusion

The duty of care afforded to employees by employers is warranted under common law, statutory law and general contractual relationships, while common law provides for the relationship between a master and servant and the compulsion to provide a safe working environment. Statutory law further invokes obligations on an employer through The Labour Relations Act, The Employment Equity Act, the Occupational Health and Safety Act and the Mine Health and Safety Act. These duties extend not only to employer-employee relationships but also to employee-employee relationships and employee and third party relationships. An employer is required to take safety measures in order to safeguard any possible harm occurring in his/her place of business. A failure to comply with these obligations will render an employer liable for negligence occasioned by his omission. The reasonable man test remains the source for liability of an employer and is viewed on both a subjective and objective level. It can be established that on both a negligent and deliberate approach, actual and eventual intention is applicable and operational and has the effect of the same outcome, holding an employer liable. It has become apparent through this study that fault can be imputed

⁶⁰³ Talha Khan Burki 'Discrimination against people with HIV persists in China' *The Lancet*, Volume 377, 22 January 2011 Issue 9762 at 286 – 87.

⁶⁰⁴ FK Fraser, WJ Grant, P Mwanza, V Naidoo 'The impact of HIV/AIDS on small and medium enterprises in South Africa' (2002) 70:7 *The South African Journal of Economics*.

to an employer through commission of a wrongful act or through omission, by failing to commit an act as obliged to do so.

This study was focused more predominantly on liability imputed through omission, particularly the failure to provide a safe working environment through the deliberate or negligent invocation of a comprehensive workplace policy. This omission can form the argumentative basis of faulting an employer by breaching not only his/her common law duties but also his/her statutory duties. While section 35(1) provides immunity to an employer by unequivocally affording COIDA exclusivity for occupational claims, the application of the Vicarious Liability Doctrine was proposed to be introduced as part of the dual capacity theory for future legislative reform.

It is evident that the medical profession is the most vulnerable and susceptible risk group for occupational transmission of HIV/AIDS. Although standard precautionary measures could be established, a failure to effectively implement or execute the measures leads to faulting of the employer. Several claims have succeeded in the UK for occupational exposure to HIV/AIDS resulting from the failure of an employer to provide sufficient protective equipment and training. While invoking or introducing a workplace policy could offer a solution to HIV/AIDS exposure, effectively implementing this policy is not always possible as reflected in this chapter.

Progressively, the time has come to consider the application of the Vicarious Liability Doctrine in South Africa provided a dual capacity can be established and the requirements pertinent to vicarious liability are met in relation to occupational exposure claims. It is recommended that there should be strict application of the Doctrine, thereby faulting the employer for an omission to provide guidelines and policies on effective management. A stringent workplace policy being deliberately neglected or disobeyed should not serve as a premise to further hold the employer liable.

Further as demonstrated in the case of *Kau v Fourie*, the deliberate intentional harm resonating from an employer's actions can be grounds to hold him/her vicariously liable. The deliberate disregard for the implementation of workplace policies, procedures and protocols should serve as further grounds to hold an employer liable.

In conclusion, it must be noted that South Africa does have legislation in place protecting HIV/AIDS infected employees from occupational injuries in the workplace. However, the recognition and application of the Doctrine of Vicarious Liability can only enhance the framework safeguarding HIV positive employees. Vicarious liability claims for occupational exposure is an avenue not sufficiently explored in South Africa. Theoretically, vicarious liability claims are understood and deemed actionable for negligence or failure to implement safety control measures, but from a practical perspective it is hardly ever pursued in cases pertaining to occupational injuries or diseases, due to a lack of understanding around the Doctrine. By providing an in-depth analysis of the Doctrine, and dealing with the elements that need to be complied with in order to include an employer in a joint action, a guideline has been provided to deal with the occupational exposure of HIV/AIDS in the workplace environment and allow for better understanding of the pre-requisites and requirements in order to consider a claim via this avenue.

CHAPTER 8

CONCLUSION AND RECOMMENDATIONS

HIV/AIDS is now classified as a global epidemic with far reaching consequences if mismanaged. Africa has been identified as the source of the emergence of the HIV/AIDS virus.⁶⁰⁵ South Africa bears the highest HIV/AIDS rates in comparison to all other African countries. The vastly increasing mortality rates have dictated a more practical approach by South Africa.

South Africa has made huge progress in the labour sector from the early Roman law⁶⁰⁶ standards governing the country. Roman law did not offer protection to an employee. Through the years, South Africa has adopted a democratically representative Constitution.⁶⁰⁷ South Africa has ample legislation and encompasses many anti-discriminatory laws in protection of employees. South Africa through several advances has a more stringent legal system compared to other jurisdictions examined in this study. Intolerance towards discrimination of HIV/AIDS positive people forms the imperative foundation of all enacted laws in South Africa. Despite legal prohibitions on anti-discrimination, discrimination still occurs daily both nationally and internationally. South Africa has sanctioned discrimination, but enforcing these sanctions is problematic due to the aggrieved party's reluctance, based either on a lack of knowledge or awareness and the stigma attached to the virus.

Stigma and discrimination play significant roles in the development and expansion of the HIV/AIDS epidemic. It is clearly documented that this fight against the epidemic is on-going. The impact goes beyond individuals infected with HIV/AIDS, permeating into societies and disrupting the functioning of communities and the workforce. South Africa is rigorously progressive in its fight against the alleviation of HIV/AIDS discrimination as compared to some of our neighbouring countries. This study has examined the

⁶⁰⁵ See random facts and interesting trivia available at <http://facts.randomhistory.com/hiv-facts.html> last accessed on October 2014.

⁶⁰⁶ Roman law is the legal system that was developed by Roman civilisation over a period of approximately 1300 years ago. Today, the principles of Roman law still form part of the legal systems of many countries in the world, In South Africa it is the basis of our common law.

⁶⁰⁷ The Constitution of the Republic of South Africa, 1996.

legislation governing HIV/AIDS on a national and international level and found the standards afforded to South African citizens are rather exacting and inflexible. International intervention, necessitated by the growing concerns over the epidemic, has forced several countries to review and realign their policies. Despite international recommendations, countries such as USA and Australia are perceived to still actively discriminate and limit opportunities available to HIV/AIDS positive individuals. South Africa through progressive transformation has managed to adapt and conform to international standards. The Constitution in itself provides for comprehensive coverage and protection against HIV/AIDS. The Constitution is further supplemented by the Labour Relations Act, Employment Equity Act, Basic Conditions of Employment Act, Occupational Health and Safety Act, Mine Health and Safety Act, Compensation for Occupational Injuries and Diseases Act and the Occupational Diseases and Mine Works Act which guarantee protection to HIV/AIDS sufferers.

The OHSA and MHSA serve a truly preventative purpose and endeavors to prevent the contraction of diseases or injuries by employees. COIDA and ODMWA deal with the aftermath of injury or disease, i.e. the payment of compensation to the injured employee. COIDA provides a ready source of no-fault compensation for employees who suffer employment related injuries, and provides compensation without the necessity of having to prove negligence thus eliminating timeous, expensive and unpredictable litigation processes to recover compensation for injuries sustained. However, this limits the compensation available to employees significantly, as they are only permitted to claim pecuniary loss in terms of COIDA. Controversially, their rights to claiming general damages for past and future pain and suffering, loss of amenities of life and future loss of earnings and medical expenses are limited.

This study analysed the prospects of pursuing claims through civil modes and joining employers in the action to formulate a vicarious liability claim, in an effort to offer an employee a benefit that is currently not available in South Africa. A progressive country demands progressive legislation that is crucial to protect HIV/AIDS positive employees from all forms of discrimination, stigmatisation and harsh working environments.

The study also explored the possibility of the application of the Vicarious Liability Doctrine in negligent and deliberate wrongdoings of employers who fail to provide a safe working environment as statutorily obliged to do so. In general it appears to be accepted that negligent actions bear no more than an increase in monthly assessed contributions. The case of Dr E⁶⁰⁸ proved to contradict the general standard as Dr E⁶⁰⁹ succeeded in her claim through vicarious liability against her employer for their negligence in omitting to provide a safe working environment. This monumental case leaves great room for optimism and assurance that South Africa is advancing towards recognition of the Vicarious Liability Doctrine and a case of this nature will definitely allow for formidable arguments in favor of full recognition and application of the Doctrine.

It became apparent that the targeted risk group for occupational exposure remains mainly in the medical industry but occurrences can manifest themselves in other sectors. The sporting industry was identified as another target risk group for HIV/AIDS. International trends and cases have highlighted the prospect of success in respect of civil and vicarious liability claims for exposure to HIV/AIDS in the workplace and there are lessons to be learnt for South Africa with regards to the approach of HIV/AIDS testing in contact, high risk sports.

In summary, it should be noted that the introduction of the Vicarious Liability Doctrine for occupational exposure to HIV/AIDS, although controversial and debatable could form a proverbial advancement in the protection of HIV positive employees at the workplace. Commendable protection and benefits are afforded to existing sufferers of HIV/AIDS, it is now time to extend this welfare to newly acquired HIV/AIDS infections by allowing them the freedom to choose the mode in which they wish to claim compensation, ultimately aligning these entitlements to the democratically represented Constitution governing this country.

⁶⁰⁸ MEC for Department of Health, Free State Province v Dr E (924/2013) [2014] ZASCZ 167.

⁶⁰⁹ Ibid.

8.1 Primary recommendation derived from this study

South African law, in the form of Section 35 of COIDA, makes it clear that employers are excluded from delictual liability for all damages arising out of occupational injuries and diseases. The primary recommendation to be considered should be the removal of the immunity presently afforded to employers under the guise of Section 35 (1) of COIDA. While compensation in terms of COIDA should still be operational in South Africa, it is recommended that employees be given the possibility of a civil avenue being present thus allowing them the freedom to choose which mode of compensation they wish to claim as with the case of Dr E. This is not an entirely new concept to South African law as the Constitutional Court in *Jooste v Score Supermarket Trading (Pty) Ltd*, confirmed that an employee's decision to retain the common law right to claim damages above or as an alternative to COIDA remains "a controversial and complex matter of policy" for the legislature and not the Courts, to examine. This ruling in itself presents the possibility of transformation towards the retention of common law rights in the practice of the Vicarious Liability Doctrine being applied. It is clear that South Africa does have legislation in place protecting HIV/AIDS infected employees from occupational injuries in the workplace. However, the recognition and application of the Doctrine of Vicarious Liability can only enhance the framework safeguarding HIV positive employees.

There should be some regulation precluding allowance of claiming in terms of both modes as such will be considered double enrichment and is not the aim of this study. Although this study advocates for the application of the Doctrine, it should be applied in strict liability cases, whereby an employer is exonerated from liability only when safety measures have been instituted. A failure to regulate safety measures should see an employer being directly liable for any harm arising out of the negligent failure to implement measures.

By providing an in-depth analysis of the Doctrine, and dealing with the elements that need to be complied with in order to include an employer in a joint action, a guideline has been provided to deal with the occupational exposure of HIV/AIDS in the workplace environment and allow for better understanding of the pre-requisites and requirements

in order to consider a claim via this avenue. The time has come, like in the cases of other countries for legislature to address this hugely controversial matter of policy and possibly make a change.

8.2 Secondary recommendations derived from this study

8.2.1 Lack of awareness

Richard Howard⁶¹⁰ emphasised that: *“People living with HIV/AIDS don’t have any sense of the legislation. They don’t know when their rights are being violated.”* Employers, employees and the public typically have limited knowledge about employment related legislative frameworks and the regulations and rules surrounding HIV/AIDS. This resonates with authorities being unaware of the unconscious harm inflicted on the rights of people living with HIV/AIDS when policy decisions are being made. Although there are numerous laws and regulations designed to protect the basic rights and interests of people living with HIV/AIDS in South Africa as compared to other jurisdictions, in many instances such laws are either unenforceable or unknown. Lack of leadership and funds correspond with a lack of action. Surveys have shown that SMMEs are not prepared to dedicate time to HIV mitigation activities unless they start to see tangible effects of the pandemic within their business environment. Most mitigation activities tend to be once-off.⁶¹¹

The USA has created a programme known as “Business Responds to AIDS/Labour Responds to AIDS” (BRTA/LRTA) which is a public and private partnership that promotes the involvement of businesses, trade associations and labour organisations in HIV/AIDS awareness, prevention, education and mobilisation. South Africa should incorporate this ideology in an effort to promote awareness of all labour sectors. Incentives should be offered to employers for their participation in HIV/AIDS awareness campaigns and safety workshops. Further, employers should appoint in-house representatives, who should be tasked with creating awareness among lay employees through investigative means. Regular articles and notices should be pinned to a central

⁶¹⁰ Richard Howard representative from the International Labour organisation.

⁶¹¹ Irin ‘South Africa: Laws and policies have minimal impact on PWA’s’ *Health systems trust bulletin* 23 September 2002.

notice board which is then visible to all employees informing them of their rights to recourse if injured on duty.

8.2.2 Discrimination

HIV/AIDS related employment discrimination is a complex social problem that has a direct bearing on multiple disciplines. To address this issue we need to improve the implementation of the legal system and raise awareness of the law. Eliminating prejudice is fundamental in eradicating discrimination. However the reality is that it takes time to alter prejudicial attitudes towards HIV/AIDS positive persons. To combat this, increased efforts are required to mobilise government, mass media and society. Correspondingly, public education initiatives are required to inform officials, employers, PLWA and the public about the rights and interests of PLWA. The Department of Labour should be more practical in their fight against discrimination and the realisation and preservation of a harmonious working environment. Educational initiatives need to be enforced in line with those of the USA. Section 21 of the Occupational Safety and Health Act⁶¹² provides the platform for the Secretary to initiate and develop educational and informational programmes to raise awareness.

Alleviating misconceptions surrounding HIV/AIDS is fundamental in combating discrimination. Stigma and discrimination will continue to exist as long as societies as a whole have a poor understanding of HIV/AIDS. The need for more educational workshops being conducted is vital to the eradication of stigma and misconceptions relating to HIV/AIDS.

8.2.2.1 Socio-cultural

Due to the stigmatisation and discrimination attached to the HIV/AIDS virus, people are reluctant to take a pro-active approach by accessing treatment or undergoing voluntary testing. This leads to individuals being unaware of their status and thus not taking standard precautionary measures that could be an effective barrier to the transmission

⁶¹² The Occupational Safety and Health Act of 1970.

of the virus between individuals. Health 24 identified a lack of knowledge as one of the main sociocultural factors responsible for the rapid spread of the disease.⁶¹³

8.2.2.2 Contact tracing

In Australia people infected with HIV/AIDS are required by law to give authorised people the names and addresses of anyone they may have been in contact with and information about how and in what circumstance the virus was contracted. This practice is known as Contact tracing and is defined as:⁶¹⁴

*“A practice whereby a medical professional or the relevant governmental agency traces all the contacts of a person who has, or is suspected of having an infectious disease. Public health officials use contact tracing to identify people at risk of infection and people or places contributing to the spread of the disease.”*⁶¹⁵

A similar initiative was launched in South Africa in the form of the tuberculosis contact tracing action campaign.⁶¹⁶ This was a Government initiative necessitated by the alarmingly high TB infection rates. The contact tracing programme only related to TB, but with derivatives from the Australian legal system it would be beneficial to adapt the contact tracing system to HIV/AIDS infected individuals in an effort to curb the virus. Adapting this system would greatly assist South Africa in reducing new transmissions of the virus. HIV/AIDS positive individuals would then be aware of their status and be able to take preventative measures. Constitutional violations of privacy could be argued. However, if the elected body subscribes to anonymity and provides more of an assistive methodology rather than condemnation, individuals would be keen on participating.

⁶¹³ Health 24 ‘Sociocultural aspects of HIV/AIDS’ available at <http://www.health24.com/Medical/HIV-AIDS/The-South-African-culture/Sociocultural-aspects-of-HIVAIDS-20120721>, accessed in September 2014.

⁶¹⁴ Bebe Loff and Bradley Crammond ‘Legal responsibilities in relation to HIV and viral hepatitis’ available at http://www.ashm.org.au/images/publications/monographs/HIV_viral_hepatitis_and_STIs_a_guide_for_primary_care/hiv_viral_hep_chapter_14.pdf, accessed in September 2014.

⁶¹⁵ Ibid.

⁶¹⁶ See South African Government Notice on Provincial launch of tuberculosis (TB) contact tracing campaign available at <http://govza.gcis.gov.za/node/609247>, accessed in September 2014.

8.2.3 Insufficient penalisation of employers for failing to discharge burdens

Through observations and analysis of comparative legislation, it was found that South Africa makes little provision for penalising employers who fail to discharge their burdens under the Health and Safety Act. While section 38 of the Occupational Health and Safety Act provides for penalties applicable to employers for contravention of the said terms, the section is seldom applied. The acceptable norm in South Africa is to claim compensation in terms of the Compensation for Occupational Injuries and Diseases Act. Provided the employer has registered his employees with the Workman's Compensation Commission and the monthly subscriptions regulated by the Act are paid, the employer has no financial burden imposed on him/her for occupational injuries. Pursuant to this, section 56 of the Compensation for Occupational Injuries and Diseases Act only grants authority to the Director General through section 85(2) to increase tariffs for accidents attributed to the employer's negligence. This allows employers to escape financial strain and incur a slight increase in monthly subscriptions which in principle does not perturb the employer.

Employers, as per the Occupational Health and Safety Act and the Compensation for Occupational injuries and Diseases Act presently enjoy an immunity that is disproportionate to other countries. Employers in South Africa are highly subsidised, as at present they are obliged to pay a modest levy which bears little or no relation to the harm that their unsatisfactory health practices cause

In the USA strict emphasis is placed on penalties imposed on employers for failure to execute their duties. An organisation similar to the Workman's Compensation Commission is absent, thereby placing full financial strain and consequences on employers for insufficient execution of their duties. It is recommended that South Africa recognises a civil mode of claiming for occupational injuries thereby enacting accountability on an employer for their failure to discharge the burdens imposed on them. It should be a matter of preference on which mode an employee wishes to claim as each mode as positives and negatives attached to it.

8.2.4 Workplace policies

Workplace policies are the epitome of regulating safe workplaces in compliance with Health and Safety Acts. Workplace policies should be a mandatory requirement for all businesses. This in essence would benefit both employers and employees. Employers could possibly escape vicarious liability claims if strict guidelines and parameters are provided. This could also be beneficial to employees as this would serve as a source of information creating awareness of their rights and recourses for the contravention of the afforded rights.

Workplace policies should be compiled after adequate risk assessments have been performed. The core objectives of the policy should be to eliminate the risks. This could be achieved through controlling the risks by providing information and training to employees in order to allow them to better manage incidents at work. Emergency plans should be included together with safe work procedures and daily safe tasks delegated to employees.

An independent non-governmental Health and Safety board should be formed with the object of creating standard modes of safe workplace policies and guidelines for each profession. Safety officers should monitor adherence. Labour inspectors, as part of their minimum job requirements should be compelled to visit and monitor all newly established businesses. A failure on the part of an employer to adhere to this requirement should render him/her liable to the imposition of penalties.

8.2.5 Inadequate implementation

Bongani Bingwa⁶¹⁷ stated that *‘the best policies mean nothing without proper implementation.’* This statement is entirely appropriate for the current situation concerning HIV/AIDS and labour laws. South Africa has abundant legislation governing the protection of HIV/AIDS infected people against discrimination and dismissals; however these policies are not implemented adequately. By contrast the USA has a more relaxed approach to HIV/AIDS, permitting certain forms of discrimination. In direct contrast with South Africa, they have focused more on implementing the policies.

⁶¹⁷ Bongani Bingwa, Carte Blanche documentary on ecological wildlife laws, televised on 24 August 2014.

Several bodies have been set up in USA to ensure strict implementation of the laws governing HIV/AIDS in the workplace. In South Africa much of the onus is placed on the employer to implement the policies, with minimal monitoring. As per section 17 of the Occupational Health and Safety Act, the onus rests on the employer to apply in writing for a Health and Safety representative and in terms of section 19, the establishment of a committee could only commence once a representative has been requested.

This could be problematic as generally employers would be reluctant to develop and promote workplace safety initiatives as it places them in a vulnerable position. As revealed in this study, most employers, commonly SMME's have opted for a restricted approach to initiating workplace policies and procedures to place them in a stronger position. It is recommended that the Companies and Intellectual Property Registration Office (CIPRO) upon registering a new corporation liaise with the Department of Labour and allocate a Health and Safety representative to ensure that monitoring and maintenance of safety policies are complied with.

8.2.6 Bridging the gap between the workforce and the legislature

USA has established several functionally differing committees to better promote and maintain health and safety standards. The system adopted by USA involves the national advisory committee, consisting of 12 members, mandated under Section 7 (a) (1), and the supplementary advisory committee consisting of 15 members, mandated under Section 7(4) (b) to present the viewpoint of the employers to the federal heads who then report it to the secretary. The secretary, as per section 26, then prepares and submits reports to the president in an effort to progressively achieve the purpose of the Act, by foreclosing on the miscommunication between the legislature and the general public.

Labour inspectors are responsible for monitoring the legality of workplace activities. They essentially act as a bridge between the government and enterprises and typically have an in- depth understanding of the legislative framework governing HIV/AIDS and employment discrimination. This places them in an advantageous position and they are principally able to advise enterprises on adequate ways to resolve any discrimination-related disputes. They may similarly offer professional assistance to HIV/AIDS positive

employees if violations of their rights have occurred. Although labour inspection is a recognised occupation in South Africa, the labour inspectors struggle to perform their duties as per their job requirements; this is evident in the daily unreported cases and mismanagement of workplace policies. Through enhancement of this form of employment inspection, we can ensure better implementation and enforcement of the laws governing HIV/AIDS and employment discrimination and endeavour to bridge the communication gap between the legislature and the workforce.

The Construction Industry Development Board (CIDB) in South Africa has adopted a mutually communicative approach by sending out regular surveys and notices relating to legislative requirements and developments. This is commendable, because apart from being informative it allows for adjustments and modifications to be sanctioned to better suit the industry. By initiating this approach the Board is aware of all obstacles surrounding the construction industry and thus bear consideration when implementing new policies and procedures.

If all major labour industries formed Boards which could better manage the regulatory informative approaches adopted by the CIDB, it would not only bridge the gap between the legislature and the people, but also provide abundant knowledge to all members of the labour workforce. Regular articles should be circulated to all registered corporations within South Africa.

8.2.7 Administrative efforts

All organisations should train workers in infection control procedures and the importance of reporting occupational exposures. Organisations should develop and distribute written policies for the management of occupational exposures. Personal protective equipment should be compulsory in any workplace, with the severity of the risk being weighed against equipment required. Thus a health care worker would require more comprehensive protective gear than an ordinary domestic worker or food outlet attendant.

Prior to any business being granted a certificate of incorporation, a comprehensive risk assessment and workplace policy should be effected as a pre-requisite to granting

incorporation. This assessment should be compiled by a designated officer who is qualified to assess the probability of risk exposure and provide modes of prevention. The assessment should then form the basis of a workplace policy which would include all the recommendations offered by the risk assessment officer as a mandatory practice for the company.

8.2.8 Legislative considerations

8.2.8.1 The Labour Relations Act

The South African legislature should take steps to enhance the implementation and enforcement of relevant laws and regulations. This could be partially achieved by being more concise and clear particularly with regards to Section 50 (4) of the Labour Relations Act. The definition of inherent job requirements relating to dismissals should be more detailed, allowing for better analysis of applicability in dismissal cases.

8.2.8.2 Compensation for Occupational Injuries and Diseases Act

Currently the Compensation for Occupational Injuries and Diseases Act does not include occupational exposure to HIV/AIDS on the list of compensable diseases provided under Schedule 3. Although the legislature did attempt to clarify the application of HIV/AIDS to Schedule 3 through a Government Gazetted Article (Gov. Gaz. 183) the legislature excluded HIV/AIDS from Schedule 3 when drafting the Amended Act. The reasons remain unknown but this omission could deter many aggrieved employees from claiming for HIV/AIDS occupational exposure. Therefore it is recommended that Schedule 3 be amended to include HIV/AIDS as a compensable disease under the Act. It is further recommended that Section 35 be removed or altered to remove the disbarment of claiming through any civil avenues.

8.2.8.3 Occupational Health and Safety Act

The Occupational Health and Safety Act should be amended to provide *locus standi* to aggrieved employees who wish to pursue civil action against his/her wrongdoer for occupational exposure to HIV/AIDS. Further the Act should create a burden on the

employer to inform employees of their rights to claim via the civil route in conjunction with applying to the Workman's Compensation.

8.2.9 Sporting recommendations

HIV/AIDS transmission remains a threat in the sporting industry with very little protection afforded to employers, clubs and organisations. Furthermore, employees remain unaware of the recourses available to them, as the "assumption of risk Doctrine" is tacitly implied to all participants. As observed in the preceding chapters of this study, internationally, civil claims are an effective and preferred mode of pursuing a claim and having high success rates, proving them to be the more viable option.

It is recommended that mandatory prevention guidelines be invoked. Among these prevention strategies, it is recommended that HIV/AIDS positive participants disclose their status to the medical personnel responsible for the care of the team under the strictest confidence. It is further recommended that all full contact sports make use of barrier methods as displayed in international jurisdictions. In American football, a sport commonly known to South Africa as rugby, require all sportsmen to use helmets. This should be a compulsory requisite in South African rugby as the proportion of contact in rugby as opposed to American football is much higher. Similarly, in the mixed martial arts sport commonly known as cage fighting, prior to entering the ring, all players undergo a smearing of petroleum jelly (Vaseline) in order to prevent any blood from open wounds entering any lesions on the fighters' bodies.

Therefore it is recommended that employers invoke mandatory utilisation of personal protective equipment in order to protect themselves against vicarious liability claims for exposure to HIV/AIDS. Further, the sporting bodies need to provide adequate information via the channels currently used to enlighten sportsmen/women of the recourses available to them for any exposure to HIV/AIDS.

The South African sporting bodies should invoke pre-participant testing which is similar to that applied in the USA. The ambit of the limitations clause effected by Section 36 of the Constitution of the Republic of South Africa should be relied upon. The results of the tests should be disclosed only to the relevant authorities, who will be subject to legal

consequences should the results be divulged to irrelevant parties. This in essence would offer protection to the employers, as well as decreased HIV/AIDS exposure incidents.

8.3 Summary

In summary, it can therefore be concluded that although HIV/AIDS remains a threat to the labour industry, more effective management would curb new infection rates and manage the pre-existing rates. If the above recommendations are considered and implemented, the possibility of stemming the tide of HIV/AIDS in the workplace can become a reality.

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ETHICAL CLEARANCE CERTIFICATE

Certificate Number	UZREC 171110-030 PGM 2012/3									
Project Title	Employer and employee rights in terms of HIV/AIDS									
Principal Researcher/ Investigator	S Gounden									
Supervisor and Co- supervisor	A B Leslie					L Ndlovu, I Kaseeram				
Department	Law									
Nature of Project	Honours/4 th Year			Master's		x	Doctoral			Departmental

The University of Zululand's Research Ethics Committee (UZREC) hereby gives ethical approval in respect of the undertakings contained in the above-mentioned project proposal and the documents listed on page 2 of this Certificate. Special conditions, if any, are also listed on page 2.

The Researcher may therefore commence with the research as from the date of this Certificate, using the reference number indicated above, but may not conduct any data collection using research instruments that are yet to be approved.

Please note that the UZREC must be informed immediately of

- Any material change in the conditions or undertakings mentioned in the documents that were presented to the UZREC
- Any material breaches of ethical undertakings or events that impact upon the ethical conduct of the research

The Principal Researcher must report to the UZREC in the prescribe format, where applicable, annually and at the end of the project, in respect of ethical compliance.

The table below indicates which documents the UZREC considered in granting this Certificate and which documents, if any, still require ethical clearance. (Please note that this is not a closed list and should new instruments be developed, these may also require approval.)

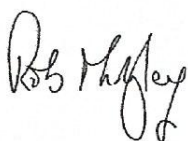
Documents	Considered	To be submitted	Not required
Ethical clearance application form	X		
Project proposal	X		
Informed consent from participants	X		
Informed consent from parent/guardian			X
Permission for access to sites/information/participants			X
Permission to use documents/copyright clearance			X
Data collection/survey instrument/questionnaire	X		
Data collection instrument in appropriate language			X
Other data collection instruments		Only if used	

Special conditions: Documents marked "To be submitted" must be presented for ethical clearance before any data collection can commence.

The UZREC retains the right to

- Withdraw or amend this Certificate if
 - Any unethical principles or practices are revealed or suspected
 - Relevant information has been withheld or misrepresented
 - Regulatory changes of whatsoever nature so require
 - The conditions contained in this Certificate have not been adhered to
- Request access to any information or data at any time during the course or after completion of the project


The UZREC wishes the researcher well in conducting the research.



Professor Rob Midgley
Deputy Vice-Chancellor, Research and Innovation
Chairperson: University Research Ethics Committee
 5 June 2012

Turnitin Originality Report

Protecting employees living with HIV/AIDS in the workplace: A comparative study
Subashnee Gounden

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paper text:

CHAPTER 1 TOPICAL ISSUES 1.1 Introduction Since the beginning of the HIV epidemic, more than sixty million people have contracted HIV1 and nearly thirty million deaths have been attributed to HIV-related causes.² Currently there are thirty-four million people now living with HIV/AIDS,³ of whom twenty-three million five hundred thousand reside in sub-Saharan Africa. The macro-economic effect of HIV in the workplace is substantial. HIV-related absenteeism, loss of productivity and the cost of replacing workers lost to the AIDS pandemic threaten the survival of businesses and industrial sectors in the ever increasing competitive global market.⁴ HIV/AIDS does not only affect impoverished families, communities and a large portion of the urban population, it also affects the workforce base of businesses.⁵ A crucial issue for