REPUBLIC OF SOUTH AFRICA

HIGH COURT, NORTH GAUTENG PROVINCIAL DIVISION (PRETORIA)

(1) REPORTABLE: Electronic reporting.
(2) OF INTEREST TO OTHER JUDGES: No.
(3) REVISED.

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Case No. 40844/2013

In the matter between:

ANDISIWE DWENGA	First Applicant
APPLICANT X	Second Applicant
MOTOAI SHADRACK SEBATANA	Third Applicant
SOUTH AFRICAN SECURITY FORCES UNION	Fourth Applicant
SOUTH AFRICAN NATIONAL DEFENCE UNION	Fifth Applicant

and

SURGEON-GENERAL OF THE SOUTH AFRICAN MILITARY HEALTH SERVICE	First Respondent
CHIEF OF THE SOUTH AFRICAN NAVY	Second Respondent
CHIEF OF THE SOUTH AFRICAN NATIONAL DEFENCE FORCE	Third Respondent
MINISTER OF DEFENCE	Fourth Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Fifth Respondent

Case Summary: The High Court in previous proceedings declared the South African National Defence Force's (SANDF) blanket exclusion of anyone who is living with the human immunodeficiency virus (HIV) from recruitment, external deployment and promotion to be unconstitutional and an unreasonable and unjustifiable infringement of the rights of aspirant and current HIV positive SANDF members inter alia *not to be unfairly discriminated against in terms of s 9(3) of the Constitution and to dignity in terms of s 10 – Whether the SANDF should be permitted to again in these proceedings ventilate the issue of the constitutionality of its employment practice concerning new recruits.*

JUDGMENT

MEYER, J

[1] This matter concerns the continued blanket ban by the South African National Defence Force (SANDF) on the recruitment of anyone and everyone who is living with the human immunodeficiency virus (HIV), despite this court more than six years ago (in the *South African Security Forces Union (SASFU)* case) having found that employment practice of the SANDF unconstitutional.

[2] New recruits first enter the SANDF's 'Military Skills Development System' (MSDS) for a period of two years. The MSDS serves as an introduction to military life for all candidates who intend joining the SANDF. They receive training during the initial two year period and augment the SANDF's deployment capabilities. Following successful completion of the MSDS, they may be recruited to serve in the 'Core Service System' (CSS) or in the Reserve Force for a period of five years with a commitment of thirty days per year. The conclusion of a CSS contract is conditional upon the successful completion of service in the MSDS and the availability of posts in the CSS. A further career stage in the SANDF is the Senior Career System (SCS).

[3] There were three individual applicants in the *SASFU* case. Without having been assessed to determine the actual state of their health, they were excluded from being recruited, deployed externally or promoted within the SANDF in accordance with the SANDF's then blanket exclusion of persons who are HIV positive from recruitment,

external deployment and promotion within the SANDF. The consequences of the SANDF's HIV testing policy were found to be unconstitutional, and reviewed and set aside, and the SANDF was directed to formulate a new health classification policy.[1]

[4] Following the order made in *SASFU*, a *'Department of Defence Directive*' was issued during 2009 (the DoDD). It is recorded therein that-

'[t]his Department of Defence Directive (DODD) is a consequence of the judgment given in the High Court Case (No 18683/07) in the matter between the South African Security Forces Union (SASFU) and the Surgeon General (SG). The health requirements of the South African National Defence Force (SANDF), regarding the recruitment, deployment and promotion of HIV positive people were found to be unconstitutional and were set aside by the Court on that basis. This Directive gives effect to the Court Order.'

The aim of the DoDD is stated to be to-

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[1] The relevant parts of the order made by Claassen J on 16 May 2008 in the matter of *South African Security Forces Union* (and three individuals) *v Surgeon General, Minister of Defence, Chief of the SANDF, President of the RSA and Minister of Health* (case no. 18683/2007) are the following:

'1. . . .

2. THAT the consequences of the HIV testing policy as developed by the first respondent and implemented by the second respondent in terms of which no person who is HIV positive may be recruited, deployed externally or promoted within the SANDF, is hereby reviewed and set aside.

3. THAT the consequences of the HIV testing policy referred to in paragraph 2 is unconstitutional in that it unreasonably and unjustifiably infringes the rights of aspirant and current HIV positive SANDF members:

3.1 not to be unfairly discriminated against in terms of section 9(3) of the Constitution;

3.2 to privacy in terms of section 14 of the Constitution;

3.3 to dignity in terms of section 10 of the Constituion;

3.4 to fair labour practices in terms of section 23(1) of the Constituion; and

3.5 to administrative justice in terms of section 33 of the Constitution.

4. . . .

5. THAT the respondents are directed to:

5.1 formulate a new health classification policy within six months of the date of this order or such time period as the court directs; and

5.2 serve on the applicants and lodge with the registrar of the court an affidavit setting out the new health classification policy adopted;

and that the applicants are granted leave to apply to the court on the same papers, supplemented as necessary, for such further relief flowing from the new policy as they may be advised to seek.'

'… provide a policy and related outcomes for health classification in the SANDF for members presenting with HIV and AIDS and to assign primary responsibility for the implementation thereof.'

[5] A *'Department of Defence Instruction for the Policy on the Health Classification and Deployability of SANDF members with HIV and AIDS'* (the DoDI) was also issued. The DoDI contains similar recordals to those contained in the DoDD and its content is similar but more comprehensive. It inter alia further records that-

'[d]uring health assessments for recruitment, selection, deployment, utilisation and health classification of SANDF members, all applicable governance are applied according to the constitutional imperatives affecting the SANDF and the human rights enshrined in the Bill of Rights.'

[6] The DoDD and the DoDI are clear in their terms that an assessment of each individual's health is required in relation to recruitment, deployment and promotion within the SANDF. The policy sets out 'health classification principles', which principles are post specific. It is inter alia stated that the medical standards 'regulate the medical category allocated for every member to ensure that he/she is utilised in a post in the restrictions of the particular health profile of the post and relevant clinical circumstances'. It is also stated that the classification system 'is governed by different health assessments that are structured to fit specific circumstances that the SANDF member may encounter in the line of duty'. As far as 'health classification for HIV and AIDS' is concerned, it is stated that '[t]he single most important medical criterion for the deployment of an HIV positive member is fitness to perform his/her expected duties for the duration of employment within the medical capability in the mission area and without any additional risk to the health of the member related to his/her HIV positive status'.

[7] It is clear from the policy that new recruits who are HIV positive are not thereby automatically excluded. On the contrary, depending on the clinical profile, a member or new recruit who is HIV positive may be allocated a 'G2K1' classification if, although not yet on ARV treatment, the soldier or new recruit is clinically asymptomatic (clinical stage 1) with a t-lymphocyte CD4 count of more than 500 cells/mm³ and without any other health condition or abnormality that necessitates a lower health classification, or, if already on ARV treatment, the soldier or new recruit is clinically asymptomatic (clinical stage 1) with a t-lymphocyte CD4 count of more than 350 cells/mm³ and without any other health condition or abnormality that necessitates a lower health classification.

[8] But the manner in which the SANDF is implementing the DoDD and DoDI as far as new recruits are concerned is no different from the policy which was declared unconstitutional in *SASFU*. In order to enter the MSDS or to secure a contract in the CSS a 'G1K1' health classification is required. Anyone who has tested HIV positive is automatically excluded from being classified as G1K1 irrespective of that person's health and fitness. The SANDF's implementation of its health classification policy, therefore, constitutes a blanket ban on the recruitment of anyone and everyone who is HIV positive, regardless of their actual state of health and even though the SANDF recognises that a person with HIV may 'remain fit and healthy'. It is thus clear that the SANDF is neither complying with its own policy nor with the court order in *SARFU*.

[9] The first and second individual applicants in this matter have both successfully completed service in the MSDS. The posts in which they sought to be employed in the CSS were available. But for their failure to meet the G1K1 health classification because

they tested positive for HIV, they would have been offered CSS contracts. The third individual applicant has withdrawn his application.[2]

[10] Below the heading 'THE CRUX OF THE RESPONDENTS' CASE', the following is stated in the SANDF's answering affidavit:

'4.1. The respondents accept that in prescribing the G1K1 classification as a prerequisite for admission to the MSDS and the CSS, there is discrimination against all persons who do not qualify for such classification: at present this means all candidates with HIV or other chronic ailments and diseases, as well as persons with debilitating physical and mental handicaps.

4.2 It is also accepted that the respondents bear the *onus* of proving that such discrimination is justified and fair under the circumstances.

4.3 For the past 6 years, the SANDF is oversubscribed, meaning in essence, that there are more applicants for positions than actual posts available.

4.4 The respondents have therefore been in the position, for the past 6 years, of being able to pick and choose from, quite literally, the very best candidates. In order to recruit the very best, and have as members the very best candidates, the respondents therefore have to start eliminating recruits and the starting point is health examination.

5. Conversely, and if the position were to be that there were insufficient candidates with a G1K1 classification for the number of posts available, then candidates with a G2K1 classification would

[2] The other applicants are the trade unions, South African Security Forces Union (fourth applicant) and the South African National Defence Union (fifth applicant), which are stated to represent '… the interest of the group of persons who are no longer employed by the SANDF solely because each member of the group does not possess a G1K1 health classification', '… on behalf of any other similarly placed persons who cannot act in their own name' and '… in the public interest'. The respondents are the Surgeon-General of the South African Military Health Service (first respondent), the Chief of the South African Navy (second respondent), the Chief of the South African National Defence Force (third respondent), the Minister of Defence (fourth respondent) and the President of South Africa (fifth respondent). Section 202(1) of the Constitution provides that '[t]he President as head of the national executive is Commander-in-Chief of the defence force, and must appoint the Military Command of the defence force'.

be considered, provided that they passed any other criteria for entry into the MSDS, and the CSS. Regrettably the decision to settle this matter (in 2008 without leading evidence) has far reaching implications for the South African National Defence Force (SANDF), in terms of both its force preparation and combat readiness.'

[11] The SANDF initially contended that its discrimination is justifiable within the meaning of s 36 of the Constitution of the Republic of South Africa, 1996.[3] It is, however, not open to the SANDF to advance a justification under the limitations provision. A threshold requirement of s 36 for the limitation of any right in the Bill of Rights is that the limitation must be 'in terms of law of general application'. We are not dealing here with a law of general application.[4] This counsel for the SANDF conceded during argument. When the shoe pinched the SANDF adapted its argument by contending that its discrimination is not unfair as contemplated in s 9 of the Constitution.[5]

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[3] Section 36 of the Constitution reads as follows:
'36 Limitation of rights
(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 Constituion, no law may limit any right entrenched in the Bill of Rights.'

[4] See: *Pretoria City Council v Walker* 1998 (3) SA 363 (CC), para 28; *Premier Mpumalanga v Executive Committee, Association of State Aided Schools* 1999 (2) SA 91 (CC), para 42; *August v Electoral Commission* 1999 (3) SA 1 (CC), para 23; *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), para 41; *President of the Republic of South Africa & another v Modderklip Boerdery (Pty) Ltd (AGRI SA & others, amici curiae)* 2005 (5) SA 3 (CC), para 52.

[5] Section 9 of the Constitution reads as follows:
'9 Equality
(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

[12] The first question to be decided is whether the SANDF should be permitted to again in these proceedings ventilate a dispute that has already been decided against it. In *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC* [2013] ZASCA 129, Wallis JA said the following:

[45] The solution lies in a point made by Milne J in [*Cook* and others v Muller 1973 (2) SA 240 (N), at 245H-246B], when he said:

'Even if this does not strictly constitute a defence of *lis alibi pendens*, it is clear that the Court may, in the exercise of its discretion in controlling the proceedings before it, debar a person from ventilating a dispute already decided against him under the guise of an action against another party. See *Burnham v Fakheer*, 1938 N.P.D. 63. Although the previous proceedings had not even been between the same parties, the Court there held that for the respondent to attempt to re-try an issue which had already been decided merely by changing the form of his action was an abuse of the processes of the Court, and was vexatious. See also *Niksch v Van Niekerk and Another*, 1958 (4) SA 453 (E) at p. 456, and the English decision of *Reichel v. Magrath*, (1889) 14 A.C. 665 (H.L.).'

[46] The case of *Burnham*, to which Milne J referred, is illuminating. Burnham was an attorney who had drafted an agreement of sale in respect of two properties on behalf of Mr Fakheer. When the purchaser sought to enforce the contract Mr Fakheer raised the defence that he did not understand the contract, which had not been explained to him, and had never intended to enter into an agreement of sale in respect of the properties. This defence was rejected after a full trial in which Mr Burnham gave evidence concerning

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

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

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

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

Mr Fakheer's grasp of the English language, the fact that the agreement had been read out to the parties before signature and any explanations sought were given and that the agreement had been drawn by him in accordance with his instructions. His evidence was accepted and that of Mr Fakheer rejected. When the latter then sued him for damages for drafting the agreement contrary to his instructions and allowing him to sign it when he knew that he (Fakheer) did not understand or agree with its contents, Burnham successfully applied to have the claim struck out as an abuse of the process of the court.

[47] The importance of *Burnham* for present purposes is that Burnham was not a party to the previous litigation between Fakheer and the purchaser of the properties, but it was held that it would be an abuse of process to permit Fakheer to relitigate the same issues in an action against Burnham. The same situation had arisen in *Reichel v Magrath* which Carlisle J followed in *Burnham*. Reichel, a vicar, had brought an action against his bishop contending that he had not resigned his benefice and that an instrument of resignation he had executed was void. He lost, the court holding that he had resigned with the consent of the bishop. The new incumbent of the benefice was forced to bring an action against Reichel to compel him to give up the vicarage and the glebe lands. Once again Reichel claimed that he had not resigned. That defence was struck out as an abuse even though the new vicar had not been a party to the previous action between Reichel and the bishop. The court held that it was vexatious and frivolous and an abuse of process to seek to relitigate a matter that had already been determined in another action. Similarly in *Niksch v Van Niekerk* it was held to be vexatious for a witness, who had already testified in a motor collision case that the accident that had occurred was occasioned by the negligence of the driver of the vehicle in which he was a passenger, to bring an action against the driver of the other vehicle involved in the collision in which he alleged that the accident had been caused by that driver's negligence'.

[13] It is in my view vexatious and frivolous and an abuse of process for the SANDF to seek to relitigate the same issues that have already been determined in the *SARFU*

application. Questions of equity and fairness[6] do not require that the question of the constitutionality of the SANDF's practice of refusing to employ all people who are living with HIV be relitigated in these proceedings.

[14] The stance adopted by the SANDF is thus reflected in its heads of argument:

'It is trite that court orders, whether correctly or incorrectly granted, must be obeyed until they are set aside. However it is submitted that there is a lack of willfulness and *mala fides*. It is submitted that there are circumstances which justify the departure from the strict *ipsissima verba* of the order and that the respondents were entitled to apply their interpretation of the order, particularly in view of the changed circumstances that have presented themselves and the Constituional mandate set out *supra*.'

[15] This, to borrow the words of Froneman J in *Bezuidenhout v Patensie Sitrus Beherend Beperk* 2001 (2) SA 244 (E),[7] '… is an amazingly brazen attitude to adopt.' As was said by Herbstein J in *Kotze v Kotze* 1953 (2) SA 184 (C):[8]

'The matter is one of public policy which requires that there shall be obedience to orders of Court and that people should not be allowed to take the law into their own hands.'

The SANDF, being an organ of state, is 'obliged to be exemplary in their obedience to court orders'[9] and must lead by example. The Constitutional Court in *Mohamed and another v President of the Republic of South Africa and others (Society for the Abolition*

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[6] Relevant considerations in determining whether a plea of *exception rei iudicata* in the form of issue estoppel should be allowed include questions of equity and fairness. See: *Prinsloo NO & others v Goldex 15 (Pty) Ltd & another* [2012] ZASCA 28, paras 10 and 23-27: *Hyprop Invesments Ltd & others v NSC Carriers and Forwarding CC & others* [2013] ZASCA 169, paras 13-20.

[7] At 228F.

[8] At 187F-G. Also see: *Culverwell v Beira* 1992 (4) SA 499 (W) at 494A-E; *Clipsal Australia(Pty) Ltd and Others v GAP Distributors and Others* 2010 (2) SA 289 (SCA), paras 21 – 22.

[9] Per Kriegler J in *S v Mamabolo (E TV and others intervening)* 2001 (3) SA 409 (CC), para 63.

of the Death Penalty in South Africa and another intervening) 2001 (3) SA 893 (CC) held as follows:[10]

'South Africa is a young democracy still finding its way to full compliance with the values and ideals enshrined in the Constitution. It is therefore important that the State lead by example. This principle cannot be put better than in the celebrated words of Justice Brandeis in *Olmstead et al v United States*:

'In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. . . . Government is the potent, omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy.'

The warning was given in a distant era but remains as cogent as ever. Indeed, for us in this country, it has a particular relevance: we saw in the past what happens when the State bends the law to its own ends and now, in the new era of constitutionality, we may be tempted to use questionable measures in the war against crime. The lesson becomes particularly important when dealing with those who aim to destroy the system of government through law by means of organised violence. The legitimacy of the constitutional order is undermined rather than reinforced when the State acts unlawfully. '

[16] The stance adopted by the SANDF that the *SASFU* case was 'regrettably' settled 'without leading evidence' in support of its attempt at relitigating the matter is without merit. *SASFU* proceeded by way of application. The affidavits constitute the pleadings and the evidence in application proceedings.[11] After counsel for the applicants had argued the merits in *SASFU*, the SANDF agreed to the order which is quoted in footnote 1 supra. Before making an agreement an order of court, the court has to be satisfied

[10] Para 68.

[11] See: *ABSA Bank Ltd v Kernsig 17 (Pty) Ltd* 2011 (4) sa 492 (SCA), para 23; *Louw and Others v Nel* 2011 (2) SA 172 (SCA), para 17 and *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* !99 (2) SA 279 (T), at 323D-324B.

'that it was a competent and proper order to make in the circumstances'.[12] Neither in *SASFU* nor in the present matter did the SANDF request a referral to oral evidence or to trial.

[17] The statement that the SANDF 'is oversubscribed' for the past six years is unsubstantiated and a mere conclusion with the primary facts upon which it depends omitted. No evidence is given as to what the position relating to oversubscription was at the time when the consent order in *SASFU* was made or, as is stated in the replying affidavit, whether the statement of oversubscription '… is a generalisation or instead applies to all musterings in all constituent parts of the SANDF, whether in the MSDS or the CSS or both'. On the contrary, as pointed out in the replying affidavit, '… the record shows that there are particular musterings in particular parts of the SANDF that are undersubscribed – such as technical musterings in the SA Navy'.

[18] Also, no evidence is adduced to prove the SANDF's contention that its requirement of recruiting the best candidates requires a blanket exclusion of all candidates who are HIV positive or why compliance with paragraph 2 of the *SASFU* order would undermine 'force preparation and combat readiness'. It is not in issue that a particular state of health is required for entry into the MSDS or the CSS, but there is no evidence adduced to suggest that the requisite health cannot be achieved by a person who lives with HIV. On the contrary, the SANDF recognises that a person with HIV may 'remain fit and healthy'. There are numerous musterings in the SANDF, each requiring its own level of fitness and health.

[12] See: *Ex parte Venter and Spain NNO: Fordom Factoring Limited and Others Intervening; Venter and Spain v Povey and Others* 1982 (2) SA 94 (D), at 101; *Pierre Cronje (Pty) Limited v Adonis* 2010 (4) SA 294 (WCC), paras 11-13.

[19] The SANDF also raises 'budgetary constraints' and the burden placed upon it by those requiring chronic medication as justification for its refusal to recruit people with HIV. But, as was pointed out by the applicants in reply, the state has accepted its constitutional duty to provide access to such medication in the public health system and thus covers the costs, whether the medication is accessed in the public health system or in the SANDF.

[20] The order made in *SASFU* accords with the definitive pronouncement of the Constitutional Court thirteen years ago in *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), which is a case in point. In that case, like in the present one, SAA had adopted a policy that HIV positive persons were not qualified for employment as airline cabin attendants. The Constitutional Court held that the refusal by SAA to employ the appellant in that case as a cabin attendant because he was HIV positive 'impaired his dignity and constituted unfair discrimination'[13] and 'violated his right to equality guaranteed by s 9 of the Constitution'.[14] Ngcobo J inter alia said the following:

'[28] The appellant is living with HIV. People who are living with HIV constitute a minority. Society has responded to their plight with intense prejudice. They have been subjected to systemic disadvantage and discrimination. They have been stigmatised and marginalised. As the present case demonstrates, they have been denied employment because of their HIV positive status without regard to their ability to perform the duties of the position from which they have been excluded. Society's response to them has forced many of them not to reveal their HIV status for fear of prejudice. This in turn has deprived them of the help they would otherwise have received. People who are living with HIV/AIDS are one of the most vulnerable groups in our society. Notwithstanding the availability of compelling medical evidence as to how this

[13] Para [40].
[14] Para [41].

disease is transmitted, the prejudices and stereotypes against HIV positive people still persist. In view of the prevailing prejudice against HIV positive people, any discrimination against them can, to my mind, be interpreted as a fresh instance of stigmatisation and I consider this to be an assault on their dignity. The impact of discrimination on HIV positive people is devastating. It is even more so when it occurs in the context of employment. It denies them the right to earn a living. For this reason, they enjoy special protection in our law.

[29] There can be no doubt that SAA discriminated against the appellant because of his HIV status. Neither the purpose of the discrimination nor the objective medical evidence justifies such discrimination.

[30] SAA refused to employ the appellant saying that he was unfit for world-wide duty because of his HIV status. But, on its own medical evidence, not all persons living with HIV cannot be vaccinated against yellow fever, or are prone to contracting infectious diseases - it is only those persons whose infection has reached the stage of immunosuppression, and whose CD4+ count has dropped below 350 cells per microlitre of blood. Therefore, the considerations that dictated its practice as advanced in the High Court did not apply to all persons who are living with HIV. Its practice, therefore, judged and treated all persons who are living with HIV on the same basis. It judged all of them to be unfit for employment as cabin attendants on the basis of assumptions that are true only for an identifiable group of people who are living with HIV. On SAA's own evidence, the appellant could have been at the asymptomatic stage of infection. Yet, because the appellant happened to have been HIV positive, he was automatically excluded from employment as a cabin attendant.

[31] A further point must be made here. The conduct of SAA towards cabin attendants who are already in its employ is irreconcilable with the stated purpose of its practice. SAA does not test those already employed as cabin attendants for HIV/AIDS. They may continue to work despite the infection, and regardless of the stage of infection. Yet they may pose the same health, safety and operational hazards as prospective cabin attendants. Apart from this, the practice also pays no attention to the window period. If a

person happens to undergo a blood test during the window period, the person can secure employment. But if the same person undergoes the test outside of this period, he or she will not be employed.

[32] The fact that some people who are HIV positive may, under certain circumstances, be unsuitable for employment as cabin attendants does not justify the exclusion from employment as cabin attendants of all people who are living with HIV. Were this to be the case, people who are HIV positive would never have the opportunity to have their medical condition evaluated in the light of current medical knowledge for a determination to be made as to whether they are suitable for employment as cabin attendants. On the contrary, they would be vulnerable to discrimination on the basis of prejudice and unfounded assumptions - precisely the type of injury our Constitution seeks to prevent.'

[21] It is indisputable that the SANDF denies people who are HIV positive entry into the MSDS or the securing of a contract in the CSS without regard to their health and fitness and ability to perform the duties required of them during MSDS or of the particular position they otherwise would have secured in terms of a CSS contract. I, in the words of Ngcobo J, '… consider this to be an assault on their dignity'.[15] The discrimination has not been shown to be fair and it violates the right to equality guaranteed by s 9 of the Constitution. I nevertheless consider it appropriate to rather decide this matter on the basis that it is vexatious and frivolous and an abuse of process for the SANDF to seek to relitigate the same issues that hav already been determined in *SASFU* and to debar the SANDF from doing so.

[22] Apart from the declaratory and interdictory relief sought by the applicants, which is aimed at enforcing compliance with paragraph 2 of the order made in *SASFU*, I am of

[15] Section 10 of the Constituion provides as follows:
'10 Human dignity
Everyone has inherent dignity and the right to have their dignity respected and protected.'

the view that instatement ('which requires an employer to employee an employee')[16] is the appropriate relief that should also be granted to the individual applicants in this case. Such an order inter alia would redress the wrong the first and second applicants suffered and place them, as far as is possible, in the same position they would have enjoyed but for the unfair discrimination against them. A has not been made out for an order backdating the instatement, expressed by ordering that the first and second applicants be 'appropriately remunerated for the period 1 May 2013 to the date of the order of this Court, such remuneration to include interest at the rate of 15.5%', as prayed for in the notice of motion.

[23] Finally, the matter of costs. The SANDF's non-compliance with the order in *SASFU* and its attempt to retry the same issues that have already been decided, which is vexatious and frivolous and an abuse of process, in my view warrants the granting of a punitive costs order against the respondents. Each side is represented by three counsel, which I consider prudent and not over-cautious or extravagant.

[24] In the result the following order is made:

1. The second applicant is granted leave to be described in these proceedings as applicant X.
2. It is directed that the name of the second applicant is –

2.1 to be provided to the Registrar of this Court and to the respondents, to be retained in a safe place and not to remain in the ordinary court file; and

[16] *Hoffmann* (supra), paras 50-61.

2.2 not to be disclosed or publicised in any manner or form – including in the form of initials – by the Registrar, the respondents or any other person or entity.

3. The use of the health classification G1K1 as a prerequisite for –

3.1 entry into the Military Skills Development System (MSDS) of the South African National Defence Force (SANDF) and/or any of its constituent parts: the South African Army (the SA Army), the South African Navy (the SA Navy), the South African Air Force (the SA Air Force) and the South African Military Health Service (the SAMHS);

3.2 securing a contract in the Core Service System (CSS) of the SANDF, the SA Army, the SA Navy, the SA Air Force and/or the SAMHS; and

3.3 entry into a course or participating in any training opportunity offered by the SANDF, the SA Army, the SA Navy, the SA Air Force and/or the SAMHS;

is declared in breach of paragraph 2 of the order of this Court handed down by his Lordship Mr Justice Claassen on 16 May 2008 under case no. 18683/2007.

4. The decision of one or more of the respondents to set the health classification G1K1 as a prerequisite for –

4.1 entry into the MSDS of the SANDF, the SA Army, the SA Navy, the SA Air Force and/or the SAMHS;

4.2 securing a contract in the CSS of the SANDF, the SA Army, the SA Navy, the SA Air Force and/or the SAMHS; and

4.3 entry into any course or participating in any training opportunity offered by the SANDF, the SA Army, the SA Navy, the SA Air Force and/or the SAMHS;

is hereby reviewed and set aside.

5. The first, second, third and/or fourth respondents are directed to implement the DoDD and DoDI such that –

5.1 a health classification other than G1K1 of a person who is HIV positive is not automatically considered as an exclusionary criterion for entry into the MSDS or securing a contract in the CSS of the SANDF, the SA Army, the SA Navy, the SA Air Force and/or the SAMHS or for entry into any course or participating in any training opportunity offered by them; and

5.2 each person who is HIV positive and has a health classification other than G1K1 is assessed on an individualised basis to determine whether his or her state of health is such that he or she is medically unfit to –

5.2.1 enter the MSDS in respect of which he or she has applied;

5.2.2 secure the CSS contract in question; and/or

5.2.3 enter the course or participate in the training opportunity in question.

6. The decision of one or more of the respondents, or any member of the SANDF acting on their instructions and/or under their authority, not to conclude a CSS contract with each of the first and second applicants is hereby reviewed and set aside.

7. CSS contracts must forthwith be offered to the first and second applicants on the same terms and conditions as the CSS contracts that would have been concluded with each one of them respectively had it not been for their HIV status.

8. The first and/or second applicants may elect not to take up the CSS contract referred to in paragraph 8 above.

9. The costs of this application are to be paid by the respondents, jointly and severally, the one paying the others to be absolved, on the scale as between attorney and client, including the costs of three counsel.

P.A. MEYER
JUDGE OF THE HIGH COURT

26 September 2014

Date of hearing:	29 July 2014
Date of judgment:	26 September 2014
Applicants' counsel:	Adv Gilbert Marcus SC (assisted by Adv Alida Hassim and Adv Jonathan Berger)
Applicants' attorneys:	Section27, Braamfontein, Johannesburg C/o Cilliers & Reynders Inc, Doringkloof, Centurion
Respondents' counsel:	Adv DA Preis SC (assisted by Adv B Neukircher SC and Adv HC Janse van Rensburg)
Respondents' attorneys:	State Attorney, Pretoria