IN THE HIGH COURT FOR ZAMBIA **2009/HL/86**
IN THE LIVINGSTONE HIGH COURT
(Civil Jurisdiction)

BETWEEN:

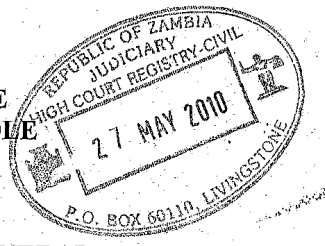
IN THE MATTER OF: An application under Articles 11, 13, 15, 17, 21, 23, 28(1), 110(1), 111 and 112 c), (d), (e), (f) & (j) of the Constitution of Zambia

AND

IN THE MATTER OF: Rule 2 of the Protection of Fundamental Rights Rules and Regulations of 1969

IN THE MATTER OF: A PETITION

BETWEEN:



STANLEY KINGAIPE **1ST PETITIONER**
CHARLES CHOOKOLE **2ND PETITIONER**

AND

THE ATTORNEY-GENERAL **RESPONDENT**

Before the Honourable Mrs. Justice E.N.C. Muyovwe in Open Court on the 27th day of May, 2010 at 0900 hours

For the petitioners: Mr. P. Mulenga, Legal Resources Chambers
For the respondent: Col. M. Phiri, Senior State Advocate, Lt. Col. J. Makanta, Legal Counsel (ZAF) and Mrs. N.M. Mumba, State Advocate

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JUDGMENT

Cases referred to:

1. **Castell vs. De Greef (1994) (4) 5A 408**
2. **Lewanika vs. Frederick Chiluba (1998) Z.R. 79**
3. **Diau vs. Botswana Building Society (2003) 2 BLR 409**
4. **C vs. Minister of Correctional Services (1996) (4) SA292**

5. **Byrne vs. Kanweka (1967) Z.R. 82**
6. **Sata vs. The Post Newspapers (1995) Z.R.**
7. **Airedale NHS Trust vs. Bland (1993) 1 All E R 821**
8. **Chester vs. Afshar (2004) 4 All E R 587**
9. **Auckland Area Health Board vs. A.G (1993) 1 NZLR 235**
10. **Re A (children) (conjoined twins: surgical separation (2000) 4 All E R 961)**
11. **Mary Patricia Soko vs. The Attorney-General (1988/89) Z.R. 58**

Legislation referred to:

1. **The Constitution of Zambia**
2. **The African Charter on Human and People's Rights**
3. **The International Covenant on Civil and Political Rights**
4. **The Universal Declaration of Human Rights**
5. **Regulation 9(3) of the Defence Force (Regular Force) (Enlistment and Service) Regulations Cap 106**

On the 22nd November 2007 the petitioners filed their petition in which they are praying for the following reliefs:

(a) That it may be determined and declared that the Respondent's decision to subject them to mandatory and compulsory medical test and examination including HIV/AIDS without their express and/or informed consent as well as pre and post counseling:

i) Is ultravires Article 11 of the Constitution of Zambia
ii) Is a violation of the Petitioners' right to personal liberty guaranteed to them under Article 13 of the Constitution of Zambia
iii) Violated the Petitioners' right to protection from inhuman and degrading treatment guaranteed under Article 15 of the Constitution of Zambia
iv) Was a violation of the Petitioners' right to privacy guaranteed under Article 17 of the Constitution of Zambia
v) Constituted a violation of their right to adequate medical and health facilities and to equal and adequate educational opportunities in all fields and at all levels as provided for under Article 112 (d) and (e) of the Constitution of Zambia

(b) That it may be determined and declared that the Respondent's

decision to discharge and/or exclude the Petitioners on account of their HIV/AIDS on medical ground premised on Regulation 9 (3) of the Defence Force (Regular Force) (Enlistment and Service Regulations Third Schedule Serial No. (xvi) was and is ultravires the Constitution of Zambia, the Universal Declaration of Human Rights, the African Charter on Human and Peoples' Rights and the International Covenant on Civil and Political Rights in that:-

i) it violates the fundamental rights and freedom guaranteed under Article 11 of the Constitution of Zambia

ii) it is a violation of the Petitioners' right to freely associate guaranteed under Article 21 of the Constitution of Zambia

iii) it is discriminatory and a violation of their rights to protection from discrimination on account of their HIV/AIDS status guaranteed under Article 23 of the Constitution of Zambia

iv) it constituted a violation of their right to secure and adequate means of livelihood and opportunity to obtain employment recognized under Article 112 (c) of the Constitution of Zambia

v) it violated their right as disadvantaged persons to social benefits and amenities as are suitable to their needs and are just and equitable

(c) That the Honourable Court may determine and declare that the decision of the Zambia Air Force Commander was and is contrary to the spirit and intent of the stated Government Policy and Guidelines on HIV/AIDS in so far as it relates to the treatment, attitude and accommodation of servicemen who have been diagnosed with t he virus that causes AIDS

(d) That the Honourable Court may determine and declare that the Petitioners are entitled to and/or ought to be entitled to continue working under the Zambia Air Force in their respective ranks and Sections and/or departments and/or be redeployed to appropriate and alternative, available Sections and Departments in the Military Establishment suitable to their status until such a time they shall become Immuno-suppresed such that they are unable to carry out their usual and/or alternative duties.

(e) That the Petitioners be awarded damages for the lost opportunity to continue working and enjoying their rights and privileges as employees of the Zambia Air Force.

(f) That the Petitioners be awarded damages for the mental anguish, emotional distress and the stigma and discrimination that they were subjected to as a result of the Zambia Air Force Commander's

decision to subject them to compulsory and mandatory HIV testing and the premature termination of their employment.

(g) That the Honourable Court may make such declaration directions and orders as it may deem fit to make for the effective realization and enforcement of the right of Persons Living with HIV/AIDS such as the Petitioners.

(h) That the Respondent may be ordered to pay the costs and incidental to these proceedings.

This case from the commencement of trial was beset with procedural hiccups and both parties had to give in to each other and allow the admission of documents which would otherwise not be admitted. By consent learned counsels for the respondent had to apply to file their answer after realising that the answer filed earlier had been sworn by Lt. Col. Makanta who is in the defence team. The affidavit in support of answer sworn by one David Dean Mulenga was then filed by the respondent. They also filed by consent an affidavit in support of the respondent's supplementary (contemporaneous) documents also sworn by David Dean Mulenga. Before learned counsel for the petitioners could complete the 1st petitioner's evidence-in-chief, he made an application to file further affidavits on behalf of his clients after realising that this was the only way documents could be produced having regard to the procedure required to be followed in matters commenced by petition. The learned counsels for the respondent did not object to this application. As I have stated from the outset, this case was beset with procedural hiccups (for lack of a better term). As I pointed out to the learned counsels for both parties, normally, once the respondent has filed his answer, the petitioner is allowed to reply to the issues raised in the answer, but in this case the petitioners' counsel applied to file further affidavits after the state had filed its answer and there was no objection from the State. The court was mindful

of the fact that both parties wanted to conclude their case without any further delay and since the court was/is interested in substantial justice, I allowed the bending of some of the procedural rules as they did not prejudice each party's case.

The 1st petitioner (PW1) testified that he joined ZAF on 16th June 1989 as a recruit and after passing out in 1990 he was appointed as a Leading Aircraft man Class 3. He underwent a Band Course and in 1991 was sent to ZAF Livingstone as a Bandsman, but holding the rank of Leading Aircraft man Class 3. Within the same year, he was promoted to the rank of Corporal while in 1997 he was promoted to the rank of Sergeant which rank he held until his discharge in October 2002. He explained that in 2000 the band disbanded and he was remastered to the transport section as a Mechanical Transport Fitter while at the same time he was carrying out some military duties such as parade and guard duties. In July 2001, the 1st petitioner went to see Dr. Matipa who was then Resident Doctor at ZAF Livingstone. The 1st petitioner complained of a swollen right leg and Dr. Matipa referred him to Livingstone General Hospital where he was seen by Dr. Kabwe. The 1st petitioner was informed by Dr. Matipa later in the month that he had kaposis sarcoma and he commenced him on cytotoxic drugs administered through the drip. The 1st petitioner was one of the people who was ordered to appear before a Medical Board of Inquiry on 11th October 2001. The Medical Board included Dr. Matipa and Dr. Mulele. At the request of the Medical Board, he explained the history of his illness and how he was feeling at that time. He was given forms to complete and he wrote a statement as to his condition. PW1 said he explained to the Board that his illness started in 1998 and that he could not work properly as he could not stand for a long time. He said he

was specifically referring to the work he was doing in the Mechanical Section and on parades. He was not medically examined by the Board and he did not inform them that he wanted to retire on medical grounds or any other grounds. After the Medical Board of Inquiry, he continued working normally and he was not subjected to any medical examination to determine whether he was fit or not. Between 2001 and 2002 his name appeared on the Notice Board on a Station Routine Order as one of those who was required to submit to compulsory medical check up. He explained that since this document was signed by the Station Commander, it was a punishable offence to ignore the directive. On the date in question, he went to the Clinic and had the medical check up - testing of his blood sample, urine, height, sight and blood pressure. He was not informed the purpose or the nature of the check up before or after the tests. Dr. Matipa carried out the tests and no counselling was offered to warn him that an HIV test would be carried out. Two days after the compulsory check up, Dr. Matipa called him and prescribed new drugs without informing him why he was putting him on those drugs that is Lamivudine, Stavudine and Nevirapin. He did not advise him that he had tested HIV positive or that the drugs were ARVs. Following the prescription by Dr. Matipa, the 1st petitioner felt better and continued working normally. Although he had not run out of the drugs, he stopped taking them after two months due to insufficient information on failure to take the drugs. The 1st petitioner was informed of the outcome of the Medical Board on 17th October 2002 by the Officer Commanding Administration. In January 2005 his wife got very ill and they both went to Kalingalinga Clinic in Lusaka to seek medical assistance. After he explained that his wife had been ill for a long time, they were advised to undergo voluntary counselling and testing (VCT). The tests revealed that they were

both HIV positive and they were put on ARV's. Before being given the ARV's the 1st petitioner said they were advised as to the effects of taking such drugs and the consequences of failure to take the drugs. He was shocked to discover that the medication was the same as that which had been prescribed by Dr. Matipa years back in 2002 after the compulsory medical check-up. He said he suffered mental anguish at this discovery. He explained that he continued taking the drugs but his wife passed away in February 2005. The 1st petitioner has continued to get his supply of drugs from the Zambia Air Force Clinic over the years. He denied that at time of discharge he was unfit for duties because between when he appeared before the Medical Board and the time of publication of the results of the Medical Board, he worked normally. He also did not experience any problems from his colleagues or superiors. He stated that when he was put on ARV's he responded well to treatment although he took the medication for only two months and he did not suffer any serious illness and never went on sick leave. According to the 1st petitioner, this was the time he was appointed in charge of stores in addition to the military duties he was carrying out. The 1st petitioner said even if it was shown that he was unfit to carry out his duties at the time of discharge he stated that he was and is still fit to carry out less strenuous tasks in the military. He testified to the fact that after discharge, he was able to find employment. He stated that he underwent medical examinations and assessment which comprised of various tests at Livingstone General Hospital in 2008. He also went through medical examinations at University Teaching Hospital on 7th May 2009 which he said attested to his fitness and this was confirmed by Dr. Lisulo Walubita (PW5). Dr. Imasiku (PW4) of the University of Zambia carried out a psychological assessment of both petitioners to determine the effects of

being put on ARV's without pre and post counselling. The 1st petitioner also went through psycho-social assessment in Lusaka with Miriam Banda and a second one with the late Mwenya Mukula a Pyscho-social Counsellor.

When the 1st petitioner wanted to produce the documents in his supplementary bundle of documents there was an objection from the state arguing that there was no foundation laid and that some of the documents were government documents and that it was not clear how the witness had come into possession of the documents he wanted to produce. Learned Counsel for the petitioners applied for an adjournment to the following day. However, the following day (7th October 2009) Mr. Mulenga informed the court that he had realised that the petitioners' bundles of supplementary documents were improperly before court and that he needed the petitioners to file further affidavits instead. The State had no objection to this application. This is one of the procedural hiccups that I have referred to earlier. After granting the petitioners an adjournment, they both filed further affidavits in support of their petition. When the hearing resumed, the 1st petitioner informed the court that he was relying on his affidavit in support of answer, his affidavit in reply and his supplementary affidavit. The 1st petitioner stated that he was discharged from ZAF due to his HIV status. He prayed that the prayer contained in the joint petition should be granted.

Under cross-examination he admitted having appeared before the Medical Board in October 2001 and that he wrote a statement stating that his condition which started in 1998 had become permanent and worsened. He said he was told by Dr. Matipa that he had kaposis sarcoma and this was confirmed at Livingstone General Hospital. He admitted that in his statement

he stated that he could not work properly due to severe pain. He said he was put on cytotoxic drugs in July 2001 and that the Medical Board in its findings stated that he was unfit due to kaposis sarcoma. However, he insisted that he stood by paragraph 10 of the petition that he was discharged because of his HIV status although he had no document to prove this. He stated that during his service, he underwent medical examinations but none required blood samples. According to the 1st petitioner, he was on cytotoxic drugs and not ARV's before appearing before the Medical Board. He admitted that he had no document to show that he was given Nevirapan by Dr. Matipa. He confirmed that the Zambia Air Force has continued to give him ARV's even after commencement of this action. He stated, however, that he is discriminated in some way. On being referred to a letter written by a Mr. Bwalya of Livingstone General Hospital dated 7th December 2002 confirming that he was suffering from karposis sarcoma, the 1st petitioner said he obtained the letter as he was seeking treatment for his illness. He admitted that he was paid his terminal benefits.

The 2nd Petitioner (PW2) joined ZAF on 27th July 1989. After graduation he was appointed Leading Aircraft man Class 3 and he rose to the position of Sergeant on 1st January 2002, a rank he held until discharge. He developed problems with his leg while he was an instructor in Kabwe at the ground training school in 1993. He was given antibiotics and pain killers and the problem cleared. He then proceeded to do a course in military policing. He appeared before the first Medical Board in 1995 at ZAF Clinic Kabwe. He continued working normally and in 1996 he underwent re-engagement medical examinations and was found to be fit to continue in full time service. Between January and February 2001 he was selected to attend a

course in Ammunition and Explosive storage at Zambia Army School of Ordinance in Livingstone. After completing the course he was re-mastered to another trade i.e. an armourer and he said this is a person who is physically and mentally fit. He served as an armourer at ZAF Livingstone while at the same time, he was a military policeman maintaining discipline and he was attached to the ZAF Academy where he was an instructor in drill. He was in charge of 200 cadets at the Academy. In 2001 he appeared before the 2nd Medical Board conducted at ZAF Livingstone. He wrote a statement describing his disabilities part of which was the swelling of the leg and fungal infections. He denied that he requested to be discharged on medical grounds. After appearing before the Medical Board, he continued working normally. Between October 2001 and early 2002 he attended a compulsory medical check-up at Zambia Air Force Clinic at Livingstone. At this time, he was stationed at the main gate controlling entry of vehicles and he observed ambulances which were picking up personnel who were bed-ridden being taken to the Clinic for medical examination. He presented himself for medical examinations conducted by Dr. Matipa following the Station Routine Order issued by the Station Commander. He also had his blood sample taken amongst other samples like urine etc. No counselling was done before or after taking blood samples from him. Two or three days later he was called by Dr. Matipa who advised him that he was discontinuing fluconazole and he was putting him on new drugs - Nivarapine, Stavudine and Lamivudine. Dr. Matipa told him that the drugs would help him with the pain in his leg.

In October 2002 he received a letter discharging him from the military. He was surprised because two weeks earlier the Station Commander was

congratulating him on his outstanding performance and he conferred on him the substantive rank of sergeant. The 2nd petitioner stated that he was still fit to work in the military because he had continued working normally after attending the Medical Board; he discharged his duties with diligence without any complaints from his superiors and colleagues; he was assigned more duties and got promoted; he was put on ARV's (though without his knowledge) and responded well to treatment and he had no serious health problems and never went on leave; he was selected to go for a course in Ammunition and Explosive Storage at the Zambia Army School of Ordinance. He stated that even if he was shown that he was unfit for all forms of duties - he was and is still capable of performing alternative duties within the military like clerical duties. He stated that even after discharge he was able to find employment and he went for further studies in Automotive Mechanics for one year. The 2nd petitioner stated that his health status confirmed that with continued treatment and adherence to medication he is still fit to work in his former capacity or in any other alternative capacity in ZAF.

The 2nd petitioner said he came to know about his HIV status in 2003 when he was referred to Sepo Centre by Dr. Matipa. He produced the Referral Note dated 9th May, 2003 headed "Request for consultation" and its dated 9th May 2003. It states "our diagnosis and comments - known patient with immunosuppression on ARVs. Pls assist him as necessary." The 2nd petitioner said when he presented the note from Dr. Matipa to officials at SEPO Centre he was counselled before giving his blood sample and after testing he was advised of his HIV status and that he needed continuous counselling to enable him live positively. The 2nd petitioner stated that he is

relying on the affidavit in support of petition; the affidavit in reply and the further affidavit in support of answer.

In cross-examination the 2nd petitioner admitted having attended his first Medical Board in 1995 and he admitted that he could not put on shoes and was in pain. He admitted that he could not perform his duties and he agreed to the recommendation of the Board at that time which stated amongst other things that he was fit for limited trade duties. The 2nd petitioner said he went on sick leave for 60 days. In 1998 he was admitted to Chikankata Hospital for TB treatment and he was given two months bed rest. In 2000 he was awarded temporal Non-effective Medical Employment Standard of A4G4 and was to appear before the next Medical Board which did not take place. He agreed that at this time he was 'living' on pain killers and he had a problem of blocked nostrils. He explained that his leg was almost amputated at Livingstone General Hospital because of the problem that he had with his 'big toe' and he was only saved from amputation by a doctor at Maina Soko Military Hospital in Lusaka. He admitted being paid his terminal benefits. He stated that he had no documents to show that he was fit at time of discharge.

PW3's evidence was substantially the same as that of the two petitioners. He stated that he worked together with the petitioners. In October 2001 they underwent an annual medical check up. He said a lot of samples were taken including blood samples which was unusual. No reason was given for taking blood samples and there was no pre or post- counselling. A year later together with the petitioners and other deceased personnel, they were declared permanently unfit for all forms of military duties and they were

discharged on 3rd October 2002.

PW4 was Mwiya Liyamunga Imasiku, a Clinical Psychologist who confirmed that the petitioners were his patients whom he examined after they were referred to him by their lawyer in May 2009. An objection was raised in that PW4 examined the petitioners when the matter was already subjudice. Mr. Mulenga referred to various authorities to support his argument but I ruled that PW4 could give evidence as long as his evidence was within the pleadings.

PW4 explained that if someone is subjected to an HIV test unknowingly and put on ARVs unknowingly this can lead to feelings of dejection, humiliation and manipulation. Such a person would have no social responsibility and may not take any precautions to avoid re-infecting himself or others. He said that issues of compliance to the medication or adherence to the medication would be compromised because such a person would take ARVs without taking the necessary precautions like avoidance of alcohol. He stated that counselling is an integral part of healthcare. He stated that pre-test counselling prepares the client by preparing him for the HIV test by supplying him with information relating to the nature of the HIV test, the consequences of having an HIV positive result and the implication of an HIV negative result. He explained that pre-test and post-test counselling prepares the client to acquire adaptive coping mechanisms which would take care of in-depths psychological trauma symptoms such as anxiety, depression, suicide ideation. Therefore, before someone is tested they must go through pre-test counselling which helps the client to give an informed consent. The client is also educated as to the difference between HIV and

AIDS. Post-test counselling will depend on the result of the test. If the person is found to be HIV positive the client is reminded of the coping strategies and if he is negative, the client would be informed of the window period and the need to avoid risky behaviour in order to maintain the HIV negative status. He emphasised that for someone living with HIV/AIDS they have to be advised that it is a life threatening condition which requires counselling and this is a continuous process.

In cross-examination he maintained that an informed consent is a right a client has before they are subjected to HIV testing. As regards combatants, he said that internationally they are tested before they join the service and they are recruited on the basis of the results. But when they join the service an informed consent should be obtained.

PW5 was Lisulo Walubita a medical doctor holding the position of Senior Registrar in the Department of Internal Medicine at the University Teaching Hospital in Lusaka. He is involved in the treatment of people living with HIV/AIDS and they form the bulk of his patients and he has been attending to patients in this category since 2000. He met the petitioners in May 2009 after they were referred to him by a surgeon who thought that their problem, was a medical one and they needed to be assessed. The petitioners informed him that they wanted to have medical examinations to find out if they were fit or not. They informed him that they were HIV positive, stating that they were on ARVs since 2002. The 1st petitioner informed him that in the past he had been treated for kaposis sarcoma. PW5 examined the lesions on his legs and he formed the opinion that he had a fungal infection. He treated him and it got healed. As for the 2nd petitioner, he gave a history of TB on three

occasions and that he also had gangrene but PW5 could not agree with this diagnosis. PW5 wrote to Zambia Air Force requesting for the petitioners' medical records but this was denied. He conducted his examinations and found them both to be fit.

PW5 further stated that as regards the 1st petitioner he could not be sure without past medical records whether he had kaposis sarcoma or not. As for the 2nd petitioner, he said he did not have gangrene as his big toe would have been amputated if that was the case. PW5's definition of disability is loss of normal function of a body part either temporal or permanent. The witness was referred to DDM2 which is titled a 'Medical Board Proceedings On A Member of the Zambia Defence Force". In part 2 of the Form (relating to the 2nd petitioner) which is to be completed by the Medical Officer in charge of the case, paragraph 18 talks of the disability or disabilities in respect of which it is proposed to bring the member before a Medical Board - and in this case it is indicated Arthritis on the leg. PW5 explained the meaning of Arthritis stating that there are different forms of arthritis which is an inflammation of a joint and looking at the entry he could not tell the type of arthritis the 2nd petitioner suffered from in 1995. He stated that he could not understand what was meant by arthritis of the leg. He disputed the way the disability was calculated on the form and he could not tell whether the disability was temporal or permanent going by the entry on the form. He failed to comprehend the entries made on the form and could not understand what the Medical Board meant by 15% disability having regard to the ailments indicated on the form. He could not comment on the final remarks by the Director of Medical Services as he did not agree with most of the information filled in the form which he could not comprehend. He stated that

in his case, he could declare a patient temporarily unfit if what he is suffering from can be treated temporarily and if the disability is permanent then it is for the rest of that patient's life. He stated that a person who is declared unfit, remains unfit. He could not declare the petitioners unfit after examining them as he did not find the petitioners physically unfit to work.

Under cross-examination he said he learnt later that the matter was in court. He admitted he was not familiar with the Manual used by doctors dealing with military personnel. In absence of medical history of the patient, he said his conclusions could be wrong if he is fed with wrong information and this is why he requested for documents. After looking at the Medical Board Forms relating to the 2nd petitioner for 1995 and 2002 he said his (PW2's) problem either persisted or he was malingering. He said there are people who complain of non-existent problems or else it may have been due to inadequate treatment or wrong medication. He agreed that a lot of issues lead to immunosuppression. In his case, he would only use the term 'immunosuppression' if he did not want to be specific but he insisted that this is discouraged.

PW6 Professor Nkandu Luo testified that as an Immunologist and Microbiologist, one of the diseases she has invested her support in is HIV/AIDS. She explained that the HIV virus is a 'slow virus' in that if someone gets HIV it will take many years for them to present with AIDS. According to PW6 HIV has different stages. She said that when someone gets infected it takes six (6) weeks before they can tell that the person has HIV infection and this is detected in the laboratory. She stated that it takes years for a person to present the symptoms though they are curable. Even

when a person gets AIDS which is a collection of diseases like TB and diarrhea, these diseases can be cured. When a person get AIDS he becomes very sick. She emphasized the importance of proper evaluation of the patient before putting him on Antiretroviral Therapy. However, the patient must be evaluated continuously at least every three months. For example their liver function must be checked, blood profile taken, CD4 counts and so on. Antiretroviral treatment is very beneficial and she said this is why in Zambia we no longer see sick people around as it was in the past. PW6 explained that a doctor cannot look at a patient and conclude he is immuno-suppressed. If a person has HIV and they are unable to work, it means that the person has advanced AIDS and is not responding to treatment. She further explained that no one should be tested for HIV without counselling and emphasized the importance of adherence counselling as taking any drugs has a toxic effect on the body. According to Professor Luo anyone on drugs should be evaluated so that if there are any problems the doctor can change the drugs and put him or her on second line drugs. And if the person is put on drugs without counselling, this means the doctor has not given the patient a chance to change. Without proper counselling on how to take drugs, a national problem can be created because another strain is created as people become resistant to the drugs. Professor Luo was not cross-examined by the defence.

The respondent called two witnesses. Dr. Remmy Matipa (RW1) confirmed that he worked as the Station Medical Officer at ZAF Livingstone. He knew the petitioners when he was working at ZAF Livingstone. He admitted that the petitioners were discharged on medical grounds. He explained that being discharged on medical grounds meant that the person has been unable to perform military duties for sometime. For the 1st petitioner he wrote to the

Station Commander on 30th July 2001 to consider him for recategorisation and he therefore had to appear before the Medical Board. At this time, the 1st petitioner was being looked after by doctors from Livingstone General Hospital. The 2nd petitioner was his regular patient who suffered from three ailments. He had been on TB treatment and he also presented with cellulitis of the right foot and the toes were getting gangrenous and he did not respond to treatment with antibiotics. He also had cellulitis of the frontal bone following chronic frontal sinusitis. These were persistent conditions and he referred him to Maina Soko Military Hospital in Lusaka for a consultant surgeon to attend to him. The two petitioners appeared before the Medical Board composed of three doctors, chaired by Dr. Mulela (RW2) while he was a member. Dr. Matipa explained that the 1st petitioner was suffering from kaposis sarcoma of the right leg which made him unable to perform his military duties. He said kaposis sarcoma carries a disability of 20% and this was not due to service. He said that as a Medical Board they gave the 1st petitioner a medical category of A4G5 meaning he was unable to perform his military duties at that time hence the recommendation that he be discharged on medical grounds.

For the 2nd petitioner he said they generalised the disability and termed it immune-suppression taking into account the recurrent attacks of pulmonary tuberculosis, frontal bone osteomyelitis and chronic cellulites of the right big toe. The degree of disability for the 2nd petitioner was put at 15% and he was also given a medical category of A4G5. The Board recommended that he be discharged on medical grounds and according to Dr. Matipa, when he was posted at ZAF Livingstone he noticed that a number of staff were not healthy. This was the time when ARVs were introduced in the country and

ZAF was spearheading this issue and he requested the Director of Medical Services to provide them with ARVs. After the Director of Medical Services agreed, a programme was arranged for all staff that were not doing well health wise to undergo testing and counselling and this was done by the Sister-in-Charge Zimba. Those who were found to be positive went through pre-treatment counselling with him. He said at the time, access to proper measurement of viral load and CD4 count was not available and the decision to start someone on ARVs was the doctor's assessment and clinical assessment and full blood count results. Those who were clinically ill or with opportunistic infections were considered for ARVs. Due to the condition the petitioners were in, they were also eligible for ARVs. Dr. Matipa said he administered the drugs himself as he took personal responsibility as he wanted to maintain confidentiality. In this regard, those who were fit used to go to his office but those who were bedridden he followed them up to their homes to ensure they took their medicines. He left Zambia Air Force in December 2003 but he was in touch with the petitioners even after their discharge. He said that before the introduction of ARVs kaposis sarcoma was a killer disease and he had managed a lot of patients in Ministry of Health and ZAF but with the coming of ARVs the picture changed. He explained that the virus that caused kaposis sarcoma responds well to ARVs and a study done in South America confirmed that ARVs can cure kaposis sarcoma - a combination of ARVs and cytotoxic drugs is good. Later, the cytotoxic drugs can be discontinued and the patient is maintained on ARVs only and the patient does well. In kaposis sarcoma, he explained that the lesions disappear leaving a dark pigmentation of the skin. He confirmed that during that period the ZAF were working together with other organisations like SEPO Centre and the Ministry of Health. SEPO Centre

was issuing food supplements to patients and since ZAF had not started its food supplement programme, he referred his patients to them. He admitted writing a referral letter (SK20) to SEPO Centre on behalf of the 2nd petitioner.

In cross-examination he stated that as a station medical officer he had the right to request that 1st petitioner be recategorised and he recommended that he should only carryout his trade but not guard duties. Explaining the 2nd petitioner's condition he said that he had gangrene on his big toe because the process had started and it was becoming worse and more painful. He was questioned over his reference in CC5 contained in the 2nd petitioner's further affidavit in support of petition where he referred him to Livingstone General Hospital and in the reference he stated 'I feel the only solution is amputation'. He said when he saw gangrene setting in, he decided to refer him to a consultant and that it was up to the consultant to decide whether to amputate or not. He stated that when he recategorised the petitioners they were unable to perform their military duties. He said depending on progression of the disease they could perform their duties. He admitted that the ailments that they were suffering from were not permanent and were treatable. He explained that he indicated immuno-suppression instead of specifying the ailments in respect of the 2nd petitioner. He said it is acceptable to use the words immuno-suppression as long you know the condition of the patient. He stated that as a Medical Board they consider the history of the patient before reaching any conclusion. He stated that in military language disability is an ailment while medically speaking a disability is a loss of function. He agreed that there is no such thing as arthritis of the right leg. He stated that each institution has its own standards

of assessment and that the Medical Board did not give the percentage of disability blindly. He admitted that he was a member of the Medical Board that recommended the discharge of the 2nd petitioner in 2001 and he insisted that the 2nd petitioner requested for the discharge. Dr. Matipa said the situation prevailing at that time was serious to the extent where in Zambia Air Force they were burying people weekly and measures had to be put in place to put a stop to this. The measures which were put in place improved the situation greatly. In most cases, he looked at the patients and recommended counselling taking into account their condition and history. A trained counsellor did the pre-test counselling. He said he was not aware that one of the petitioners had stopped taking the ARVs. Although he agreed that it is better to check the viral load and CD4 count, at that time the equipment was not available. The policy is that where facilities are available they can be used but where it is lacking one can use clinical assessment and CD4 count results. He explained that even in rural areas proper equipment is not available but they still manage. He managed the two petitioners up to 2003 and there was improvement in their general health. He said he was not aware that the petitioners continued working normally but by the time the results of the Medical Board were coming out he had already tested the petitioners for HIV and the issue of their status was between the petitioners and himself. He did not inform his superiors about the HIV status of the petitioners. He emphasized that performing military duties was the determining factor and not the trade of the patient. He stated that his duty was to advise that a patient should not carry out military duties but he would not know if his advice was followed. Since he was not in administration, he would not know the considerations that are taken into account when promoting a serviceman. He stated that someone can be HIV positive and work but

opportunistic infections can cause them to be sick. Some opportunistic infections can be controlled while others can be treated.

RW2 was Dr. Abynoty Peter Mulela presently on secondment to the Zambia National Service where he holds the position of Director of Medical Services. He stated that in ZAF in terms of medical assessments they use a manual called Zambia Air Force Manual Assessment of Medical Fitness which provides guidelines for assessments. He explained that the first medical examination is on recruitment to allot the candidate a specific medical standard of fitness. The second one is the Annual Medical Examination which is mandatory as it is meant to see whether the person has maintained the fitness standard attained at time of recruitment. The third medical examination is the re-engagement which applies to non-commissioned ranks after attaining seven years of service although this has now been abandoned. Then there is the Medical Board Assessment which is conducted when there is an indication that the serving person is encountering medical problems in executing his duties in his trade which is noted by the station. The request for the Medical Board is made through Air Headquarters and it is the Headquarters that convenes the Medical Board. The Board comprises of three doctors though the President of the Medical Board can co-opt another doctor and there are support staff attached to the Board like clerical staff, clinical officers and nurses. The Station at which the Medical Board is to be held will inform the persons who are to appear before it. The Board would have medical documents and other relevant records from any hospital where the person received medical treatment. During the hearing, the Medical Board interviews the person to ascertain his condition. After interacting with the person, the Board makes its decision and its

recommendations are forwarded to Air Headquarters through the Director of Medical Services who may or may not agree with the Medical Board's recommendations. Thereafter, Air Headquarters informs the station of the outcome of the Medical Board and in turn they inform the service man who appeared before the Board of the results. The assessment has what he termed as two components - the capability of an individual to perform his duties in the air designated with the letter 'A' and the capability of an individual to perform ground duties designated with the letter 'G'. Both components are graded from 1 to 5. A1 is the highest grading. A1 to A3 is for Air pilots meaning you give A1 to a pilot who is fit. If he is injured and heals of that injury he is graded A2 and can drop to A3 depending on his condition because of his duties. A4 is grading for everyone who is not a pilot but who can be flown as a passenger. A5 means the person cannot be flown even as a passenger. The G component applies to everyone. Therefore, he explained that, "if you say A4G5 you are saying the person can fly as a passenger or can be evacuated without any problem. G5 means that person cannot perform ground military duties and it entails discharge on medical grounds." Once results reach the station, the person is informed and the station will publish a Station Routine Order.

Under cross-examination he said that arthritis is both a cause and a disability. He explained that the minimum disability percentage is 10% and in the case of the 2nd petitioner they arrived at 15% disability. He explained that A4G4 award is a temporal fitness category which means that either the person is on treatment and will be required to appear before a Medical Board to review his category. In such a case, the person continues to carry out specified duties minus military duties to allow him to heal. According to

RW2 once a Medical Board sits and makes recommendations these are forwarded to the relevant authorities and as a Board they would not know whether their recommendations are followed or not. He admitted that in respect of the 2nd petitioner he did not tender any written request to be retired on medical grounds. He stated that in ZAF they have people who are HIV positive and who are given light duties after being categorised A4G4. He stated that if a person who is HIV positive develops an illness which incapacitates him then it becomes a problem.

Both learned counsels for the petitioners and the State filed written submissions which are on record.

Mr. Mulenga learned counsel for the petitioners in his lengthy submission submitted inter alia that there are five issues for determination that is:

(1) whether or not the petitioners were subjected to mandatory/compulsory HIV tests without their consent.
(2) whether or not the Petitioners underwent proper pre and post test counselling before being tested for HIV and whether or not they were put on ARVs unknowingly.
(3) whether or not the petitioners were permanently medically unfit to perform military duties at the time of the medical board proceedings.
(4) whether or not the petitioners were permanently and medically unfit to perform military duties at the time of their discharge from the military.
(5) whether or not the decision to discharge the petitioners was influenced or based on their HIV status.

On the first issue, Mr. Mulenga submitted inter alia that the Air Force Commander made a decision and issued instructions to subject the petitioners to mandatory and/or compulsory medical tests and examinations including HIV tests. Mr. Mulenga submitted that the petitioners underwent HIV tests without being given an opportunity to give an informed consent

and that this constituted an infringement and violation of the petitioners' fundamental rights and freedoms under Articles 11, 13, 15 and 17 of the Constitution of Zambia. He argued that the decision to make the petitioners undergo mandatory testing was in conflict with and contravened their rights under the Universal Declaration of Human Rights and the African Charter on Human and People's Rights and their rights under Article 112 (d) and (e) of the Constitution of Zambia. He argued that the HIV test was a deliberate and intentional enterprise authorised by the ZAF Commander and was an initiative of Dr. Matipa. Mr. Mulenga argued that the carrying out of HIV testing was an initiative and brain child of Dr. Matipa who designed it after securing sources of ARVs from ZAF Headquarters. He submitted that from the evidence, the petitioners' testing of blood samples by Dr. Matipa was not by choice as this was on orders from superior officers and failure to undergo tests would result in disciplinary measures being effected. He argued that the petitioners' blood samples were taken for HIV testing without their express and/or informed consent or knowledge that they were being tested for HIV. Mr. Mulenga pointed out that Dr. Imasiku's (PW4) evidence emphasized the importance of adhering to international guidelines on HIV as contained in the UNAIDS/WHO Guidelines. Mr. Mulenga took time to examine the application of international guidelines, treaties and foreign decisions and acknowledged that though they may not be binding on this court they are certainly helpful and can provide guidance. He cited several Zambian authorities and **Castell vs. De Greef (1)** a South African case where the Cape High Court set out the requirements of informed consent stating that any person consenting to medical procedure must: (a) Know the nature and the extent of the harm or risk to be undertaken, (b) Understand the nature and extent of the harm or risk to be undertaken (c) Agree to the harm or

risk, (d) Agree to all parts of the harm or risk, including the consequence. Learned counsel submitted that the petitioners did not receive any information regarding the nature, purpose and repercussion of being tested for HIV. They were not informed that they could decline to submit their blood samples or refuse to be tested for HIV. In emphasizing his argument that mandatory testing is a violation of the fundamental rights and freedoms, he cited **Lewanika vs. Frederick Chiluba (2)** where the Supreme Court declined to order the respondent to be subjected to DNA testing without his consent because it would violate his right to liberty and security of the person. He also referred to the case of **Diau vs. Botswana Building Society (3)** and Article 6 of the African Charter for Human and People's Right, Article 3 of the Universal Declaration of Human Rights and the Right to liberty under the International Covenant on Civil and Political Rights which he pointed out it requires the obtaining of consent prior to testing for HIV and that therefore mandatory testing is a violation of the right to liberty.

On the second issue of whether or not the petitioners underwent proper pre and post testing before being tested for HIV and whether they were put on ARVs unknowingly. Mr. Mulenga re-emphasized the need for pre and post test counselling and that this omission was a violation (as in the first issue above) of their rights guaranteed under Articles 11, 13, 15 and 17 of the Constitution of Zambia as well as the Universal Declaration of Human Rights and the African Charter on Human and People's Rights. He argued that Dr. Matipa in his evidence was not sure if pre and post counselling was done as he did not know what it involved and the fact that Mrs. Zimba who allegedly did the pre and post counselling was not called as a witness showed this was an afterthought. He urged the court to treat Dr. Matipa's

evidence on this point as mere speculation and instead believe the petitioners' version of what transpired. He referred to the Zambia Defence Force Policy on HIV/AIDS which came into effect in 2005 and submitted that prior to this there was no policy in place and that HIV and AIDS prevention and care and support interventions were implemented in isolation. He argued that there being no policy in place between 2000 to 2002 Dr. Matipa and his colleagues had no guidelines to follow and the ethical and psychological aspects of mandatory HIV/AIDS testing were not taken into account. In the words of Mr. Mulenga "the policy of the Respondent effectively substituted a blanket of trial official mandate for medical practitioners who had the discretion to make decisions in the light of the circumstances of their individual patients perceived medical conditions without adhering to any ethical or policy guidelines and standards with disastrous medical and psychological results for the people affected such as the petitioners."

He pointed out that the evidence of Dr. Imasiku and Professor Nkandu Luo emphasized the importance of pre-test counselling before one is tested for HIV and as well as post-test counselling which focuses on the psychological and social support to help the person being tested cope with the impact of the result and to facilitate access to care and prevention services and treatment if needed and disclosure to others who may have been exposed. He argued that in the case of the petitioners, it is clear that even minimum standards and requirements for voluntary counselling and testing were not met before putting them on ARVs. He cited the South African case of **C vs. Minister of Correctional Services (4)** where the court held inter alia that informed consent requires proper pre and post test counselling. He submitted

that the fact that the petitioners did not receive the necessary pre and post counselling violated their right to protection of personal liberty and security of the person, the right to protection from inhuman and degrading treatment and their right to privacy as well as their rights under international law and treaties for which they entitled to damages from the State. Further Mr. Mulenga submitted that providing the petitioners with Anti-retroviral treatment without informing them of their HIV status or providing them with adherence counselling violated their Right to Life under Article 11(a) read with Article 12 (1) of the Constitution of Zambia as well Article 6 of the International Covenant on Civil and Political Rights and Article 4 of the African Charter on Human and People's Rights.

On the third issue, whether or not the petitioners were permanently medically unfit to perform military duties at the time of the medical board proceedings, Mr. Mulenga submitted that at the time of appearing before the Medical Board both petitioners were capable of performing both military and trade duties and that both petitioners provided evidence to this effect. He submitted that the 2nd petitioner did not request to be retired on medical grounds before, during or after the Medical Board. He argued that both petitioners were not informed after appearing before the Medical Board that they were recategorised A4G5 and that the recommendation that they were not fit for duties was not put into effect as they continued with their normal duties. He argued that there is no evidence to show that both petitioners in practical terms failed or could not perform their military duties.

The fourth issue is whether or not the petitioners were permanently and medically unfit to perform military duties at the time of their discharge from

the military. Under this head Mr. Mulenga examined the provisions of Regulation 9 (3) of the Defence Force (Regular Force) (Enlistment and Service) Regulations Third Schedule Serial No. (xvi). He argued that even assuming that the petitioners were medically unfit at the time of the Medical Board in October 2001 or at the time of their discharge in October 2002 there is no medical or scientific evidence to show either that they remained medically unfit permanently thereafter or that they were likely to remain so permanently. He conceded that the petitioners had medical complaints prior to the Medical Board proceedings but he argued that the question still remains whether or not at the time of discharge they were rendered permanently medically unfit for all forms of military service based on the available medical evidence. He argued that in light of the medical evidence on record and the physical and medical condition of the petitioners at time of discharge and beyond, the petitioners had no permanent deformity, disability, ailment or medical condition which could render them permanently unfit for all forms of military service. He pointed out that the Medical Board assumed that the petitioners would be permanently unfit to perform military duties not only in 2001 but 2002 and forever. Mr. Mulenga addressed the question of the medical fitness of the petitioners at the time of their discharge and what happened after the Medical Board sittings of October 2001. In this regard, he urged the court to consider both the petitioners' testimony and that of the medical experts. Looking at the evidence on record, he argued that it would not be in order for the respondent to maintain that the petitioners were permanently medically unfit for military service at the time of discharge or that they were likely to remain so permanently as per Regulation 9 (3) of the Defence Force (Regular Force) (Enlistment and Service) Regulations, Third Schedule Serial No. (xvi) of the Defence Act. He submitted that the

respondent cannot therefore invoke the provisions of the said Act and their reliance on the said provisions was misplaced and erroneous. That the declaration that the petitioners be discharged for being permanently medically unfit for all forms of military duties was and is premature, irrational, unjustifiable, unfair and unlawful due to the fact that the conditions for declaring one permanently medically unfit were not met in this case. Mr. Mulenga submitted that the petitioners having demonstrated that they were and are medically fit to work in the military, their rights to security and adequate means of livelihood and opportunity to obtain employment as well as their right to social benefits and amenities suitable to their needs and the right and fair labour practices recognised under Article 112 (c) (f) and (j) of the Constitution of Zambia were violated. Mr. Mulenga concluded by arguing that therefore the petitioners are entitled to damages for the unfair and unlawful discharge as well as the lost opportunity to continue discharging their military duties in the Air Force.

The fifth issue is whether or not the decision to discharge the petitioners was based on their HIV status. The argument put up by learned counsel is that 'bearing in mind the foregoing arguments and the submission that the respondent acted prematurely, irrationally, unfairly and unlawfully when it decided to discharge the petitioners from the military without ascertaining for a fact whether the petitioners were permanently medically unfit to perform all forms of military duties and that they would remain so permanently - the real reason for discharging them especially that there was no permanent medical condition for which they could have been lawfully discharged, the respondent's decision to discharge them was based on or influenced by their HIV status arising from the mandatory HIV tests which

they were subjected." He submitted that this is based on the medical evidence on record coupled with the general attitude of the respondent before and after the petitioners were tested for HIV. Mr. Mulenga submitted that the recommendation by the Medical Board that the petitioners be discharged on medical grounds had to wait until the petitioners tested HIV positive before it was acted upon by the Director of Medical Services on 24th July 2002. Mr. Mulenga argued further that the communication of the approval of the recommendation for discharge was withheld from the petitioners until October 2002. He argued that there was no tangible explanation for the unwarranted delay in informing the petitioners about the major decision being made by the respondent on an issue touching the petitioners lives and directly affecting their rights and interest as bona fide employees of the respondent. Mr. Mulenga submitted that should the court find in favour of the petitioners that they were discharged because of their HIV status then he called upon the court to find that the decision to discharge them from the military on account of their HIV status amounted to discrimination and violates Articles (11a), 21, and 23 (1) and (2) of the Constitution. He also submitted that this court should find Regulation 9(3) of the Defence Force (Regular Force) (Enlistment and Service) Regulations, Third Schedule Serial No. (xvi) of the Defence Act ultra vires the Constitution of Zambia and the provisions of international Law as it can be used as legal authority to discriminate against persons living with HIV/AIDS. Mr. Mulenga argued that HIV/AIDS is a constitutional issue and emphasized that the petitioners have the right to be free from discrimination. Mr. Mulenga cited numerous authorities to support his argument.

In reply, the respondent's advocates responded by following the order of

reliefs sought by the petitioners in their petition. They argued that the allegation that the periodic medical assessment programme was driven by a desire to assess personnel who would be eligible to access ARVs is mischievous and a distortion of facts. They submitted that as per the evidence before court, military personnel are subjected to annual medical assessment to confirm their physical and medical fitness for combat duties. They argued that there is clear evidence that the petitioners had a history of chronic ill health which required them to undergo the medical examinations. They submitted that there is no evidence that the petitioners were subjected to mandatory HIV testing and that Dr. Matipa's evidence supports this. They submitted that Dr. Matipa confirmed that during that period there were limited access points for measurement of CD4 counts and viral load such that the decision to commence a patient on ARVs was mostly based on the doctor's clinical assessment of the patient and blood count. They submitted that Dr. Matipa testified that the petitioners were counselled by the sister-in-charge and later by himself before he personally commenced them on ARVs which he personally administered to ensure compliance. They submitted that the petitioners were fully aware of the medication they were taking and cannot claim that their blood samples were extracted from them without their consent or knowledge. They alluded to the 2nd petitioner's evidence where he admitted in cross-examination that he was alive because of the medication Dr. Matipa prescribed for him and that he only wanted to go back for work since he was now fit. The defence argued that the application of international guidelines, treaties and foreign decisions is misapplied and not relevant to this case as the petitioners were counselled and knew fully well what they were being treated for. They submitted that the fundamental rights and freedoms enshrined under Articles 11, 13, 15, 17, 23, 110 (i) and

111 of the Constitution of Zambia were not violated. They argued that reference to Articles 110, 111 and 112 is misleading in that Article 111 expressly provides that these rights are not actionable by themselves. For these reasons they argued that the first and second issues raised by the petitioners in their submissions should be dismissed.

In arguing the 2nd relief sought as per the petition, the defence team also included their arguments on the fifth issue raised by the petitioners. In arguing this point, the defence referred the court to exhibit DMM1, DMM3 and DMM8 contained in the Affidavit in Support of Answer. They argued that both petitioners have failed to show that they were discharged from the Air force because of their HIV status. They referred to the Employment Standard Codes and that the 2nd petitioner's medical fitness had dropped to A4G5 a standard not fit for military service. Further they argued that the 2nd petitioner requested that he be retired on medical grounds and that this is contained in his own form (DMM3) and supported by Dr. Matipa in his evidence. They argued that the petitioners' suggestion that they were 'targeted' victims whose ultimate destiny was exclusion from the military by certain circles in the military was mischievous. In examining Regulation 9 (3) of the Defence Act (Regular Force) (Enlistment and Service) Regulations of the Defence Act under which the petitioners were discharged, the defence submitted that the term 'permanently medically unfit' is defined in the Zambia Air Force Manual Assessment of Medical Fitness (APZ2701) which defines the employment standards. They argued that the petitioners are misleading the court by suggesting that the term 'permanently unfit' means it is only HIV/AIDS which can be considered incurable and therefore 'permanent'. They submitted that according to the Manual Assessment of

Medical Fitness, a permanent employment standard is one which in the opinion of the Medical Board, is unlikely to require review within a minimum period of 18 months. The defence argued that the petitioners were sick from 1998 and 1993 respectively before they appeared before the Medical Board. They argued that the Medical Board results could have been questioned if the petitioners had stayed more than 18 months without being discharged. They argued that the Manual allows the Director, Medical Services to sit as approving authority for all Medical Board proceedings once every two months to complete part 4 of the Form. They submitted that the Director Medical Services sat to approve the Medical Board's findings after 6 months which cannot be regarded as an unreasonable time to warrant invalidating the Medical Board proceedings. In relation to Regulation 9 (3) of the Defence Force (Regular Force) (Enlistment and Service) Regulations, they submitted that the regulation is good law which should be upheld by the court and that the petitioners have failed to demonstrate how Regulation 9 (3) infringes upon the rights and freedoms of the service personnel in relation to the Constitution of Zambia. They urged the court to dismiss the 2nd relief sought.

On the 3rd relief which relates to the Defence Force HIV and AIDS Policy which they submitted is now being implemented, they submitted that voluntary counselling and testing is provided at all Defence Force health care facilities. They submitted that both petitioners confirmed that they continue to receive health care and support from the Air Force even after retiring from the Air Force in 2002. They submitted that there is no evidence to show that the Air Commander acted contrary to the spirit and intent of the stated government policy and guidelines. They argued that the 3rd relief

should be dismissed more so that the petitioners did not even address it in their submissions.

In relation to the fourth relief sought, the defence argued it together with the 3rd issue raised by the petitioners. They submitted that it is absurd for the petitioners to argue that simply because they appeared in uniform at the Medical Board hearing, this means that they were fit for military duties. They argued that this submission contradicts the petitioners own written statements submitted when they appeared before the Medical Board. They submitted that given the medical condition of the petitioners at the time they appeared before the Medical Board it was not strange that they were recategorised. They further argued that even after medical discharge, the petitioners continued being sick. They pointed out that in DMM16 found in the Affidavit in Support of the Respondent's Supplementary (Contemporaneous) Documents there is a copy of the letter from Livingstone General Hospital dated 7th December 2002 showing that the 1st petitioner needed K30,000,000 to undergo treatment in Zimbabwe or South Africa. They also alluded to SK16 in the 1st petitioner's affidavit in reply dated 27th March 2007 which is a referral from ZAF Clinic to the ART Clinic at Livingstone General Hospital. The Referral shows the 1st petitioner had been on Vincristine Sulphate and Actinomycin 'for kaposis sarcoma of lower extremities' and was being referred for further advice. They pointed out that this was 5 years after being discharged from ZAF. In respect of the 2nd petitioner they pointed out that in his Affidavit in Reply there is a note marked SK20 which was a referral to SEPO Centre requesting for their assistance and that this was on 8th May 2003 which is 8 months after being discharged from the Zambia Air Force. The defence argued that there is

therefore sufficient evidence to show that the petitioners remained medically unfit for a long time after their discharge. They submitted that it is absurd for the 1st petitioner to produce a certificate dated 1st May 2008 from the Zambia Federation of Employers showing that he was a disciplined worker. Again, the 2nd petitioner produced a letter from China GEO Engineering Corporation his former employers dated 10th June 2008. The argument by the defence is that both of these documents are not medical fitness certificates showing that the petitioners are fit for military duty. The defence prayed that the court dismisses the 4th relief sought which they state is related to the 3rd and 4th issue raised in the petitioners' submissions.

The defence argued the 5th and 6th reliefs together. They submitted that damages can only be claimed for civil wrongs both in contract and in tort. They argued that the petitioners have not shown what breach was caused to their contract of employment or what personal injury or pain they are currently suffering. According to the defence, the publicity that this petition has received at the instigation of the petitioners, in the print and electronic media, shows that their motivation for commencing legal proceedings is not based on principle or legal grounds. They submitted that the discharge of the petitioners was done within the confines of the law after they appeared before a duly constituted Medical Board which found them unfit for military service and discharged them accordingly in terms of the provisions of Regulation 9 (3) of the Defence Force (Regular Force) (Enlistment and Service) Regulations of the Defence Act. The defence argued that the claim for lost opportunity to continue working when they were declared unfit for all forms of military duties is misconceived and that the prayer for these reliefs should be dismissed.

The defence concluded by urging the court to dismiss the petition with costs.

I have considered the evidence before me and the submissions by learned counsels for both parties. I am indebted to them for their very helpful submissions and in-depth research.

From the outset, I would like to point out that it is trite law that he who alleges must prove and in this case the burden is on the petitioners to prove their case on a preponderance of probability. The rules of procedure demand that parties be bound by their pleadings. In **Byrne vs. Kanweka (5)** the court said "Fundamentally, of course, parties are bound by their pleadings and evidence outside the pleadings would ordinarily be excluded as inadmissible." In this case, it is in the petition where the Petitioners have specified their claim or prayer. Surprisingly, counsel for the petitioners, in his submissions, departed from the reliefs sought in the petition and urged the court to determine the five issues mentioned herein. He has completely ignored the prayer in the petition. In reply, the defence decided to focus on the prayers in the petition and rightly so, and argued them together with the issues raised in the petitioners' submissions. As the defence observed in their submissions, it is not clear whether the petitioners have abandoned the reliefs sought in the petition as they completely left them out and concentrated on the five issues which they want this court to determine. This kind of departure from the pleadings, at submission stage, cannot be encouraged as it tends to confuse matters. It would have been prudent and orderly for learned counsel for the petitioner to address the five issues within his arguments under any of the reliefs sought in the petition. I cannot ignore the prayers (reliefs sought) in the petition and merely address the five issues

raised by the petitioners in isolation. This would be a misdirection on my part. In my view, this court is obliged to determine the prayers in the petition as pleaded. Of course, the petitioners had the option from the outset of these proceedings to clearly show that these five issues were the issues at the heart of this petition instead of bringing these questions at the stage of submissions. At the same time, I bear in mind that the petitioners addressed these questions partly during their evidence and in cross-examination, however, it was not clear that these were the questions at the heart of the matter. To this end, I must say that the petitioners have been unfair to the respondents who have had to respond to these issues in their submissions as well those pleaded specifically in the petition.

Turning to the main matter, it is not in dispute that the petitioners were discharged from ZAF in October 2002. It is not in dispute that prior to their discharge they attended before a Medical Board which found them to be unfit to perform all forms of military duties and recommended for their discharge on medical grounds pursuant to Regulation 9 (3) of the Defence Force (Regular Force) (Enlistment and Service) Regulations. It is not in dispute that after appearing before the Medical Board the petitioners were among those who were ordered through a Station Routine Order to submit to a medical check up. It is also not in dispute that the medical check up included blood tests. It is also not in dispute that the petitioners are still attending the ZAF Clinic where they are accessing free ARVs. It is also not in dispute that following their discharge in 2001, the petitioners were paid their terminal benefits in full. It is noteworthy that after their discharge, they later found employment in various institutions.

Firstly, **(a)the petitioners pray that it may be determined and declared that the respondent's decision to subject them to mandatory and compulsory medical test and examinations including HIV/AIDS without their express and/or informed consent as well as pre and post test counselling**
i) is ultra vires Article 11 of the Constitution of Zambia
ii) Is a violation of the petitioners' right to personal liberty under Article 13 of the Constitution of Zambia
iii) It violated the petitioners' right to protection from inhuman and degrading treatment guaranteed under Article 15 of the Constitution of Zambia
iv) Was a violation of the petitioners' right to privacy guaranteed under Article 17 of the Constitution of Zambia
v) Constituted a violation of their rights to adequate medical and health facilities and to equal and adequate educational opportunities in all fields and at all levels as provided for under Article 112 (d) and (e) of the Constitution of Zambia.

I will at the same time deal with the 1st and 2nd issues which in my view are related to this question. The petitioners' evidence on this aspect which was supported by PW3 was that there was a Station Routine Order by the Station Commander Livingstone which compelled them to attend medical check up at the Clinic. In the words of Dr. Matipa:

"ZAF approved our recommendation and both of them were discharged on medical grounds. In the intervening period before discharge - when I came to ZAF Livingstone I noticed the number of personnel that were not doing well in terms of health. That was the time when in the country we saw the coming in of ARVs and the ZAF was spearheading this issue and considering my responsibility as Station Medical Officer looking after the health of personnel and their families, I asked the Director of Medical Services to consider supporting us in terms of providing ARVs. He gave us a go ahead and we arranged a programme for all staff that were not doing well to undergo testing and counselling....."

In cross-examination he said:

."We had a situation where ZAF was burying every week and we had to take action to stop this and the measures which were put in place have helped ZAF even up to the time I left. ...In most cases I looked at them and recommended for counselling. I took into account their condition and history. It was necessary to help our personnel and have workers who were healthy."

Dr. Mulele (RW2) explained that there were four types of Medical Assessment or examinations in the Defence Forces and this is not in dispute. However, the petitioners' evidence is that the medical examination which they underwent following the posting of the Station Routine Order was not an annual medical assessment and this is my finding. The medical examination in issue which resulted in their blood being extracted and which according to them was an unusual one, was done after the Medical Board made the recommendation that they be discharged on medical grounds. In any event, Dr. Matipa has not denied that blood samples were taken from the petitioners and that he conducted the medical check up after the petitioners had appeared before the Medical Board and before the final decision to discharge them was communicated. I find, however, that there is no evidence to support the argument that the petitioners were 'targetted' or that this exercise was a 'deliberate and intentional enterprise authorised by the ZAF Commander' as argued by the petitioners. As Station Medical Officer Dr. Matipa was responsible for the well-being of ZAF personnel and their families. At the same time, it cannot be denied that whatever Dr. Matipa did carried the blessing of his superiors with whom he had consulted and this came out clearly in his evidence.

I must say that I was surprised to hear Dr. Matipa state that the petitioners went through pre-test counselling and post-counselling. This is because the defence did not take the petitioners to task on this issue in cross-examination. The defence did not address the question of mandatory testing in their cross-examination of the petitioners, yet this issue was raised by both petitioners in their evidence. The petitioners' evidence on this issue remained unchallenged. Listening to Dr. Matipa, it was clear to me that he

observed that there were some sick looking personnel in ZAF and some were dying and therefore he decided to intervene and take measures, by getting some, like the petitioners, tested based on his own diagnosis. Quite clearly and with good intentions, Dr. Matipa set out to have the ZAF personnel who were unwell tested for HIV to save their lives and as the defence have pointed out - the 2nd Petitioner expressed his gratitude as he acknowledged that his life was preserved through the treatment commenced by Dr. Matipa. Indeed, what is in issue in my view is not that the medical examination itself was compulsory but the fact that it included an HIV test which was taken without the petitioners' informed consent. I am aware, as alluded to by the defence, that in this country, the Employment Act allows applicants for employment to undergo compulsory medical examinations. This is also the same for those who are applying for a drivers licence and so on. As the petitioners stated in their evidence, they found the procedure strange because their blood sample was taken which had not happened before in previous medical examinations. Of course, if any testing is done without someone's consent, it means it is mandatory. And since the petitioners were not cross-examined on this important point of mandatory testing, as I listened to Dr. Matipa I realised that his evidence that the petitioners were counselled before and after being tested was an afterthought. In **Lewanika and Others vs. Chiluba (2)** cited by the petitioners, Lewanika J at Page 135 said:

"The question of consent is of cardinal importance and was considered by the House of Lords in the case of S v S which I have already referred to and I would like to quote from the speech of Lord Reid at page 111: "I must now examine the present legal position with regard to blood tests. There is no doubt that a person of full age and capacity cannot be ordered to undergo a blood test against his will. In my view, the reason is not that he ought not to be required to furnish evidence which may tell against him. By discovery of documents and in other ways the law often does this. The real reason is that English law

goes to great lengths to protect a person of full age and capacity from interference with his personal liberty. We have too often seen freedom disappear in other countries not only by coup d'etat but by gradual erosion; and often it is the first step that counts. So it would be unwise to make even minor concessions. It is true that the matter is regarded differently in the United States. We were referred to a number of state enactments authorising the courts to order adults to submit to blood tests. They may feel that this is safe because of their geographical position, size, power or resources or because they have a written Constitution. But here parliament has clearly endorsed our view by the provision of S.21 (1) of the 1969 Act."

Chirwa J at Page 129 said:

"It was also argued that this is an important constitutional issue touching on the office of the President of the nation, I hold the view that the more important the issue is, the more stringent proof are demanded and the importance of the issue cannot be used to induce the court to exercise a non-existent inherent jurisdiction and which when used may amount to an infringement of an individual right or privileges. For the foregoing reasons, I would refuse the application to direct the respondent to give a blood sample or other body tissue for examination."

Going by the above authority, the Supreme Court recognised that extracting a blood sample from any person without his or her consent infringed individual rights. They refused to grant the application to compel the respondent to go for a DNA test. This case underscores the stand that Zambian courts have taken on issues touching fundamental rights and freedoms enshrined in our Constitution. This court is at large to consider and take into account provisions of international instruments and decided cases in other countries. The Zambian courts are not operating in isolation, and any decision made by other courts on any aspect of the law is worth considering. In **Sata vs. The Post Newspapers (6)** cited by Mr. Mulenga, Ngulube CJ as he then was said:

"I make reference to the international instruments because I am aware of a growing movement towards acceptance of the domestic application of international human rights norms not only to assist to resolve any doubtful issues in the interpretation of domestic law in domestic litigation but also because the opinions of other senior courts in the

various jurisdictions dealing with a similar problem tend to have a persuasive value. At the very least, consideration of such decisions may help us to formulate our own preferred direction which, given the context of our own situation and the state of our own laws may be different to a lesser or greater extent."

In this first issue under discussion the question of informed consent is cardinal. The case of **Airedale NHS Trust vs. Bland (7)** clearly supports the petitioners' case that they were in a position to make their own decision whether or not to have an HIV test. Therefore, the question of what was in the best interest of the petitioners cannot be an issue in this case. In **Airedale NHS Trust vs. Bland** (7) the story was different since Anthony Bland lacked the capacity to give consent to medical treatment. In the case under consideration, there is no evidence to show that the petitioners were unable to give their consent to undergo an HIV test. As I have found, Dr. Matipa formed his own medical opinion because of the condition of the petitioners and decided that they should have an HIV test and he went ahead and arranged for the same and when the results came out he proceeded to put them on ARVs without informing them. Lord Mustill at Page 889 in the **Airedale NHS Trust vs. Bland** (7) case said:

"If the patient is capable of making a decision on whether to permit treatment and decides not to permit it his choice must be obeyed, even if on any objective view it is contrary to his best interests. A doctor has no right to proceed in the face of objection, even if it is plain to all, including the patient that adverse consequences and death will or may ensue."

Indeed, this is how important consent is and in the case of HIV testing, we are referring to not only to consent but informed consent. It is possible that someone can give their consent without knowing and understanding fully what they are consenting to. This was precisely the issue the House of Lords dealt with in **Chester vs. Afshar (8)** where the patient consented to a risky

operation yet she was not warned of the risk involved. It is now an acceptable fact that an informed decision is the best decision that any person can make on any issue touching their lives. In **Diau vs. Botswana Building Society (3)** which involved a woman who refused to undergo an HIV test the court had this to say:

"Informed consent is premised on the view that the person to be tested is the master of his own life and body. In the premises it should follow that the ultimate decision whether or not to test lies with him or her, not the employer, not even the medical doctor. The purpose of informed consent is to honour a person's right to self-determination and freedom of choice."

I cannot agree more. Further in **Auckland Area Health Board vs. A.G (9) at 245** (cited in **Re A (children) (conjoined twins: surgical separation (10)** Thomas J said:

"Human dignity and personal privacy belong to every person whether living or dying"

Turning to The African Charter on Human and Peoples' Rights it provides:

"Article 4: Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.
Article 5: Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation, and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

The International Covenant on Civil and Political Rights adds its own voice to this important subject of fundamental rights and freedoms and the preservation of a person's dignity and integrity. Each one of us has a right to make our own choices. Specifically, our own Constitution provides in Article 15 that:

"A person shall not be subjected to torture, or to ***inhuman or degrading*** punishment or other like ***treatment***" (italics mine)

Article 17 (1) reads:

Except with his own consent, a person shall not be subjected to the search of his person or his property or the entry by others on his premises" (italics mine)

I am convinced that no pre and post counselling was done because if this was the case, the defence would have made this an issue in cross-examination. The defence concentrated mainly on proving that the petitioners were discharged because of their medical condition and not because they were HIV positive. At the same time, I must say that Dr. Matipa's evidence on this aspect was not convincing and it is clear that he decided that the petitioners should have an HIV test because of their medical history and condition at the time. I find that the petitioners were subjected to mandatory testing without their consent and that they were put on ARVs unknowingly. This was a grave error on the part of the doctor. Having regard to the authorities cited herein, I find that the petitioners' right to protection from inhuman and degrading treatment under Article 15, the right to privacy under Article 17 were violated. I must hasten to note that after the petitioners were put on ARVs they responded positively to the treatment and this is going by their own evidence - but this does not take away the fact that their fundamental rights to privacy and protection from inhuman treatment were infringed.

The other issue raised by Mr. Mulenga is that the petitioners were put on ARVs without receiving the necessary adherence counselling thereby violating their rights under the Constitution and other international instruments. The 1st petitioner's evidence was that he stopped taking the medication after two months and the petitioners want to put the blame on the

doctor. On this point, I must find that this is not true. Dr. Matipa was very concerned about the well-being of the petitioners hence his decision to put them on ARVs and I cannot imagine that the very person who decided to save their lives would merely prescribe medication without giving the necessary counsel. Taking into account the circumstances of this case, I believe the evidence of the doctor on this point and I take the view that it is probable that the 1st petitioner after feeling better decided to abandon taking the medicine - if indeed he did. In fact on this point, it was Dr. Matipa's evidence that he managed the petitioners up to 2003 and this was after they were discharged. Basically, the 1st petitioner wants the court to believe that he only resumed taking ARVs in 2005 when the same was prescribed to him at the Kalingalinga Clinic. Yet both petitioners told Dr. Walubita that they were on ARVs since 2002. The submission by the petitioners that they were not given adherence counselling is not tenable under the circumstances.

The petitioners also claim that they suffered a violation of their rights to adequate medical and health facilities and to equal and adequate educational opportunities in all fields and at all levels as provided for under Article 112 (d) of the Constitution. The petitioners testified to how the respondent has assisted them over the years by providing medical treatment. In fact the 2nd petitioner paid tribute to the respondent and he explained that he still prefers to attend treatment at the respondent's clinic, because it is more conducive than other government clinics. With regard to this claim, the Constitution makes it clear in Article 111 that the Directive Principles of State Policy set out in Part IX of the Constitution shall not be justiciable and shall not be legally enforceable by themselves. The petitioners have argued that in this case, the Directives are not relied upon "by themselves" and that this makes

them legally enforceable. I do not agree. The petitioners have shown no evidence to support the argument that their rights under Article 112 were infringed. The court is not in position to make a declaration which is not supported by evidence. This part of the claim has no merit and it must fail.

The second prayer by the petitioners is: That it may be determined and declared that the respondent's decision to discharge and/or exclude the petitioners on account of their HIV/AIDS status on medical grounds premised on Section 9 (3) of the Defence Force(Regular Force) (Enlistment and Service) Regulations, Third Schedule Serial No. (xvi) was and is ultra vires the Constitution of Zambia, the Universal Declaration of Human Rights, the African Charter on Human and People's Rights and the International Covenant on Civil and Political Rights in that:

i) it violates the fundamental rights and freedoms guaranteed under Article 11 of the Constitution of Zambia.
ii) it is a violation of the Petitioners' right to freely associate guaranteed under Article 21 of the Constitution of Zambia.
iii) it is discriminatory and a violation of their right to protection from discrimination on account of their HIV/AIDS status guaranteed under Article 23 of the Constitution of Zambia.
iv) it constituted a violation of their right to secure and adequate means of livelihood and opportunity to obtain employment recognized under Article 112 (c) of the Constitution of Zambia.
v) it violated their right as disadvantaged persons to social benefits and amenities as are suitable to their needs and are just and equitable.

This prayer is obviously connected and is basically the same as the 5th issue raised by the petitioners i.e. whether or not the decision to discharge the petitioners was based on their HIV status. The petitioners base their argument on the medical evidence on record and on the general attitude of the respondent before and after they were tested for HIV.

At the time the petitioners appeared before the Medical Board this is what the 1st petitioner presented in writing:

The problem I have is swelling of the right leg from the knee joining downwards up to

the toes. The other problem is pain in the bones especially in the pelvic joint, knee joints and other bones from the knee going downwards. The pain normally becomes severe if I happen to stand for a long time or if I walk a distance. This started in 1998 when I was a bandsman. I was exposed to standing for a long time and walking. Since 1998 the pain has become permanent and the swelling has now worsened. One side of the leg is now becoming hard that is when the SMO Livingstone referred me to Livingstone General and diagnosed and said it is first impression KS. As at now I cant even work properly because of severe pain and swelling of the leg and I was told that KS normally reoccurs after a certain period. In my opinion the cause of the disease was standing for a long time and marching which resulted in the swelling of the leg and later severe pain"

Clearly, the 1st petitioner's condition had been persistent since 1998 and he had been attended to by doctors but he concedes in his own statement above that his condition was worsening. In the opinion of the doctors, he was found to be unfit for all forms of military duties and hence the recommendation for his discharge.

Turning to the 2nd petitioner this is what he wrote:

I have two disabilities on my body. The first disability is my right leg which continues to swell. This started in 1993 when I was a drill instructor at ground training school in Kabwe. I was taking my students in Drill lessons when one day whilst at the same school(GTS) I started feeling some sharp pain in my leg. This pain continued and eventually my leg started swelling. I was first admitted to the school sick quarters. Then I later went to Ndola Central Hospital. I then went to Chikankata Hospital for the same problem. After undergoing these treatments, I improved and I started wearing shoes. Now currently the problem am facing with my leg is that when it is very cold I experience a lot of pain in my leg until I get some pain killers. Also when it is very hot I experience the same pain. When I walk around for sometime it swells and it reduces the swelling when I taken a long rest, as at now I live on different pain killers for me to operate.

The second disability is on my forehead. This started whilst operating as a provost at the main gate in ZAF Livingstone. It was during this period that I discovered a swelling on my right side of my forehead, stayed with that swelling for sometime and I reported myself to station sick quarters. I received treatment and the swelling couldn't go away. I later travelled to Chikankata Hospital and by this time the swelling burst and puss started coming out on my forehead. Also there was some smelly puss which continued coming out of my nose. I started experiencing brokings in my nostrils until 1999 when I was first referred to MSMH for the same problem. It was also this period that PTB was diagnosed on me. So as at now I experience some persistent blockage in my nostrils and later

followed by headache. The doctor for ENT was supposed to write a letter to this location, but it hasn't come yet...."

Again, it is clear from the narration above that the 2nd petitioner's medical condition was deteriorating from 1993. Evidence from DDM2 which is not in dispute, is that the 2nd petitioner appeared before a Medical Board on 12th April 1995 and this is what he wrote in his statement to the Medical Board:

"It was in August 1993 when I discovered that my right leg had started swelling. At first I took it that it was just something which would go away. I reported the case to school sick quarters where I got admitted since that time, the problem has persisted. It has been on and off hence making me unable to be in shoes and failing to walk properly. And as for the pain, it has failed to go off."

The Medical Board at that time decided that the 2nd petitioner was only fit for limited duties. The Director of Medical Services agreed with the Medical Board's recommendations and advised that the 2nd petitioner should not participate in sports, parades and guard duties and further advised that he should go on leave for 60 days 'to help in the healing process'.

The next Medical Board he attended is the one in issue, which recommended for his discharge from the military. In this case, Dr. Matipa indicated on the form that the 2nd petitioner still had pain in his right leg and the problem of puss discharge from the nostrils was still present. Although the 2nd petitioner in his evidence portrayed that he was enjoying good health at the time he attended the Medical Board, his own statement submitted to the Medical Board shows to the contrary. The State alleged that the 2nd petitioner requested for the discharge on medical grounds. However, the 2nd petitioner denied ever requesting for the discharge and I must say that it would have

been better if the 2nd petitioner was requested to put it in writing. As it is Dr. Matipa and the Medical Board have no proof that he requested for the same since he did not include it in his own written statement. This means that he must be given the benefit of doubt.

On the other hand, there is ample evidence to show that the findings of the Medical Board were not unreasonable having regard to the 2nd petitioner's medical history. He admitted having been unwell since 1993 and his own statement in October 2001 shows that he had not improved but rather was getting worse. In their assessment of the 2nd petitioner in 1995 the Medical Board recategorised the 2nd petitioner and assessed him in category A4G4. However, in 2001 after appearing before the Medical Board, his medical fitness dropped to A4G5 which meant he was not fit for military duties.

It is not in dispute that the petitioners were discharged under Regulation 9 (3) of the Defence Force (Regular Force) (Enlistment and Service) Regulations of the Defence Act. It provides as follows:

> A soldier may be discharged from the Regular Force at any time during his service in such force upon any of the grounds set out in column 1 of the Third Schedule, subject to the special instruction appearing opposite thereto in Column 2 of the said schedule and, for the purposes of section twenty-one of the Act, the person specified opposite thereto in Column 3 of the said schedule shall be competent military authority for the purpose specified in Column 1 thereof.
> Serial (xvi) states:
> Cause of discharge: Permanently medically unfit for military service.
> Special Instructions: A soldier will be discharged under this serial if he is medically unfit for any form of service in the Regular Force and is likely to remain so permanently.
> Competent military authority to authorise discharge
> Commander acting on advice of medical authorities

In my considered view, the key word is '*likely*' - meaning that the soldier is 'likely' *to remain so permanently*. While I agree (and I have alluded to this

above) that the petitioners were only tested for HIV after they appeared before the Medical Board, it is clear that because of their condition which Dr. Matipa felt was deteriorating, he tested them for HIV and put them on ARVs and their own evidence is that they began to improve. From the facts, it is clear that at the time when the petitioners appeared before the Medical Board, the doctors were of the opinion that the medical condition of the petitioners was 'likely to remain permanent' considering their medical history.

Under this head, the defence also referred the court to the Zambia Air Force Manual Assessment of Medical Fitness (APZ2701). They argued that it is not correct to suggest that the term 'permanently unfit' refers only to HIV/AIDS which in the petitioners' submission is the only 'disease' that can be termed incurable and therefore 'permanent.' The ZAF Manual has its own definition of what can be termed 'temporal or permanent'. No doubt, every institution has its own standards of assessment and in this case Zambia Air Force has laid guidelines as to the way assessments are carried out. In fact this explains why Dr. Walubita (PW5) could not understand the assessment done by the Medical Board. In the Foreword of the Manual it is stated in paragraph 5 that:

> " in the interest of efficiency, it is essential that all officers and men should have some knowledge of not only what the medical and executive branches of the Air Force require of them medically but also to know the medical standards they are expected to achieve at whatever level of their employment in the Zambia Air Force. With this in mind it is hoped then that the manual will serve as a guide to all staff at all levels and branches of the Air Force as a book of reference whenever such personnel are in doubt."

For the 2nd petitioner, in 1995 he was graded A4G4 which is 'a temporary employment standard' which is awarded when there are medical indications

that a significant change in the individual's condition is likely to occur within 18 months. Probably, the Station Medical Officer expected some significant positive change in the 2nd petitioner's medical condition but instead his condition had worsened by the time he appeared before the Medical Board in 2001. And going by the condition of the 2nd petitioner, the doctors found him unfit for all forms of military duties. Looking at the provisions of the Third Schedule Serial No. (xvi) of the Defence Force (Regular Force) (Enlistment and Service) Regulations it is important to note that the 'standards' are mentioned therein. Without doubt, the definition of disability is different in the military and this was also explained by Dr. Matipa and Mulela. According to Dr. Walubita (PW5) 'disability' is loss of normal function of a body part either temporal or permanent. He gave an example of a temporal disability that if a person broke his arm - this is temporal. But if it is amputated - this is a permanent disability in medical terms. In this case, it has to be borne in mind that we are talking about physical fitness to perform military duties in the Zambia Air Force. And I should point out that the petitioners were regarded as airmen - this question was brought out by Mr. Mulenga.

With regard to the 1st petitioner in his statement to the Medical Board he stated that he had been suffering from 1998 and that he could not work properly because of severe pain and the swelling of the leg which was now hardening. The doctors indicated that he would require long term treatment for the problem which they identified to be kaposis sarcoma. In the opinion of the doctors and as per the provisions of the Defence Act he was unfit for all forms of duties in the Zambia Air Force.

Going by the definition in the Zambia Air Force Manual of Assessment of

Medical Fitness, the medical team did not expect any positive change in the condition of the petitioners within 18 months. Again, this was due to the petitioners' medical history of poor health for many years and this was evident in their own statements to the Medical Board coupled with that of their doctor (RW1). Having read the Defence Act and the Regulations it is quite clear that discharge from the military is not a simple process hence the laborious procedures as the aim is to keep a serviceman in service once enlisted.

I must say that, listening to the petitioners on this point, they were not convincing though they tried to insist that they were discharged because of their HIV status. Indeed, having regard to the facts of the whole case, I find that there is no evidence to show that the petitioners were discharged because they were HIV positive. The relief sought by the petitioners must fail for lack of merit and evidence.

(c) That the Honourable Court may determine and declare that the decision of the Zambia Air Force Commander was and is contrary to the spirit and intent of the stated Government Policy and Guidelines on HIV/AIDS in so far as it relates to the treatment, attitude and accommodation of servicemen who have been diagnosed with the virus that causes AIDS.

I have already found that the petitioners were not discharged because of their HIV status but because of their medical condition which the doctors believed was likely to remain permanent and therefore they recommended that they be discharged from ZAF. Dr. Mulela (RW2) did explain that in fact the Zambia Air Force does not discharge personnel on account of their HIV status and that there are a number of staff who are still in ZAF who are HIV positive. It is important to note that at the time the petitioners were

discharged, the government policy on HIV/AIDS was not in place. The respondent has exhibited the Zambia Defence Force HIV and AIDS policy dated January 2008 and in the Foreword the then Honourable Minister of Defence Mr. George W. Mpombo MP states in para 1 that:

> "The Zambian Defence Force, through Defence Force Medical Services has been fighting a relentless war against HIV and AIDS epidemic since its advent in the early 1980s. However, the various interventions put in place to mitigate the negative effects of the epidemic among service personnel and their families have been implemented without an HIV and AIDS policy. The national HIV and AIDS policy came into effect in June 2005 and since then, the Defence Force has been involved in consultative processes within and with co-operating partners, to formulate a work place HIV and AIDS policy"

There is no dispute to the fact that the HIV/AIDS Policy only came into effect after the petitioners were discharged. In my view, it has no bearing on this petition. The Policy does not have any retrospective effect. The court is obliged to focus on the situation which was prevailing before and during the discharge of the petitioners from military service. In any case, the petitioners admitted that they have continued, since their discharge to enjoy medical facilities at the ZAF Clinic. Basically, their being discharged has not affected their access to treatment. While I believe that the Government Policy and Guidelines on HIV/AIDS has made a great impact on the fight against HIV/AIDS, this case is dealing with the situation before the policy was implemented and for the petitioners to cite it in support of their case is a misconception. For them to claim that their discharge was premature and that this was against government policy is unacceptable for lack of evidence. I must also point out the petitioners did not even address this claim in their evidence and the same was not addressed in their submissions. This claim fails.

The petitioners also argued that the respondent's decision to discharge and or

exclude them on account of their HIV/AIDS status was ultra vires the Zambian Constitution, the Universal Declaration of Human Rights and The African Charter on Human and People's Rights as well as the International Covenant on Civil and Political Rights. Since their claim that they were discharged on account of their HIV status has failed, this argument has no leg to stand on and must fail as well.

The petitioners have also alleged that Regulation 9 (3) of the Defence Force (Regular Force) (Enlistment and Service) Regulations permits the Air Commander to discharge or exclude military personnel on medical grounds on account of their HIV status and that this law violates Articles 11, 21 and 23 of the Constitution and other international instruments. Having regard to the facts of this case, there is no evidence to this effect. The regulation is very clear and cannot be misused to infringe on the rights of military personnel living with HIV/AIDS or indeed any other military personnel in general. Under the said regulation, it is the fitness of the soldier which determines the course of action and not necessarily the disease. And a good example is the petitioners who were recommended for discharge by the Medical Board before they were tested for HIV.

(d) That this Honourable Court may determine and declare that the Petitioners are entitled to and/or ought to be entitled to continue working under the Zambia Air Force in their respective ranks and Sections and/or departments and/or be redeployed to appropriate and alternative, available Sections and Departments in the Military Establishment suitable to their status until such a time when they shall have become Immuno-suppressed such that they are unable to carry out their usual and/or alternative duties.

In relation to this claim, under Serial (xvi) of the Defence Force (Regular Force) (Enlistment and Service) Regulations there is provision for transfer or redeployment to another department but not in the case of soldiers who are

discharged for being permanently medically unfit for military service. In this case, the doctors advised that the petitioners were unfit for all forms of military duties and it was on this advice that the Commander discharged the petitioners. I will also consider the third issue and fourth issue whether the petitioners were permanently medically unfit to perform their military duties at the time of the Medical Board proceedings and at the time of discharge.

The petitioners argue that because they appeared before the Medical Board in uniform this meant that they were on military duty. And that after appearing before the Medical Board they resumed their duties without any problems. As the defence have stated on this point, wearing a uniform does not indicate medical fitness or indeed that someone is on duty. In his statement to the Medical Board, the 1st petitioner indicated inter alia that the pain he had been experiencing since 1998 had become permanent and the swelling had worsened such that he could not work properly due to severe pain and swelling of the leg. On the other hand, the 2nd petitioner indicated that the problem he had started in 1993 and he explained that he was now living on pain killers due to pain in his right leg and he also experienced blockage in his nostrils and headaches. The statements have been reproduced in full in this judgment. The information was provided to the Medical Board and relying on the petitioners' own statements of their conditions including evidence from Dr. Matipa and having regard to the fact that the two had been ill for some years, the doctors in their wisdom discharged them as in their opinion their medical condition was not likely to change in the next 18 months (as per the provision in the Manual of Medical Assessments). The point is the condition of the petitioners had not changed in spite of the treatment they were receiving and I find the recommendation made by the

doctors cannot be said to be unreasonable. The petitioners argued that after appearing before the Medical Board, they continued working and they did not know that they were recategorised. The role of the Medical Board is to come up with recommendations and the final decision is made by the Commander and the Medical Board cannot be blamed for the delay in communicating the final decision to the petitioners. As Dr. Matipa (RW1) and Dr. Mulela explained they made recommendations but they did not know whether their orders were followed by the supervisors. I find that the correct procedure was followed in this case and the respondent cannot be faulted.

In addition, the 1st petitioner produced a letter of confirmation from the respondents which states that during his service in Zambia Air Force he was hardworking, dedicated to duty and well disciplined. The 2nd petitioner has also produced a reference letter dated January 2003 in which it is stated that he was retired on medical grounds but that he was hardworking, loyal to his superiors and subordinates and was dependable. I must agree with the defence submission that the two letters are not a confirmation of the medical fitness of the petitioners to perform military duties. These are letters of recommendation to would-be employers and are not helpful to the petitioners' case. The way I see it, it is a situation where the petitioners insist they were fit, yet the doctors felt otherwise and under the Defence Act it is the opinion of the doctors that carries the day. In fact the petitioners want the court to ignore their own statements made to the Medical Board in preference to their evidence in which they claim they were fit and should not have been discharged. As far as the third issue is concerned, I find that having regard to the facts, the petitioners were medically unfit at the time

they appeared before the Medical Board and the decision to discharge them cannot be said to have been premature, irrational, unjustifiable, unfair or unlawful as contended by the petitioners. It is definitely not a question of whether they are presently fit to carry out military duties but rather whether at that time, in the opinion of the Medical Board, the petitioners were medically fit to perform their military duties.

Turning to the question whether the petitioners were permanently unfit at time of discharge, it is undisputed that following their appearance before the Medical Board, they continued working in the Zambia Air Force. The defence has raised pertinent issues with regard to this question and that is that there is evidence that the petitioners remained medically unfit after their discharge. In this argument, the defence contend that the petitioners were obviously unfit at time of discharge as their condition did not improve long after discharge. It is not in dispute that on 7th December 2002 Livingstone Hospital wrote on behalf of the 1st petitioner that he needed K30million for medical treatment in South Africa. This letter is marked DDM16 in the Affidavit in Support of Respondent's Supplementary (Contemporaneous) Documents and it confirms that the 1st petitioner was suffering from kaposis sarcoma and now needed specialist treatment either in Zimbabwe or South Africa. That he was on prescription drugs for the same disease is not disputed. Further, as pointed out by the defence, the 1st petitioner was referred by the ZAF Clinic to the Livingstone General Hospital as he was obviously unwell. The 2nd petitioner had to be referred by the ZAF Clinic to SEPO Centre for food supplements. Be that at it may, the question still remains whether they were unfit at time of discharge. The petitioners attended the Medical Board a year earlier and the petitioners' contention is

that even if they had health problems at the time of the Medical Board proceedings, this did not mean that the said health problems would remain with them permanently or that their condition would interfere with their military duties. During the proceedings, I put the question to Dr. Mulela that would it not have been prudent to review the petitioners having regard to the lapse of time that it had taken from the time the Medical Board sat to the time of discharge? He stated that review is not available in such cases. While, I believe that a review of the medical condition of the petitioners would have been a prudent thing for the respondent to do having regard to the lapse of time, am also mindful of the fact that the initial decision to discharge them was because the doctors could not see any hope of improvement and were of the opinion that the petitioners were *likely to remain* in the condition they were in permanently. In my considered view, I do not think this was an unreasonable conclusion having regard to the medical history of the petitioners.

I have to emphasize that the opinion of the doctors was cardinal in this case and the decision was that the petitioners be discharged on medical grounds. It was therefore inconceivable, in such circumstances, at that time to place them in other departments because they were unfit for military service. In fact the petitioners enjoyed a good working environment such that in spite of their medical condition which they described themselves in their statements to the Medical Board - their superiors considered them for promotion and training. The petitioners cannot therefore claim that they were stigmatised, discriminated against or treated unfairly by the respondent before or after discharge. I do not agree that the petitioners should now be considered for re-engagement simply because they have been certified to be of good health

by medical practitioners like Dr. Walubita (PW5) or for the fact that they may have enjoyed good health after discharge contrary to the verdict given by the doctors at the time of discharge. Unless the decision made by the respondent at the time of discharge was made in bad faith, I do not find any reason to interfere with it and order that the petitioners are entitled to continue working in the Air Force or that they should merely have been given light duties. I do not think the claim by the petitioners under this head is practical or realistic and if I allowed it I would certainly be setting a wrong precedent. I do not find any merit in the claim and it also fails.

(e) That the Petitioners be awarded damages for the lost opportunity to continue working and enjoying their rights and privileges as employees of the Zambia Air Force.

The petitioners cannot be awarded damages under this head as they were not wrongly discharged from the Zambia Air Force. They were discharged on medical grounds and as I have said I find the decision to have been justified due to the medical condition of the petitioners at the time. This claim must therefore fail.

(f) That the Petitioners be awarded damages for the mental anguish, emotional distress and the stigma and discrimination that they were subjected to as a result of the Zambia Air Force Commander's decision to subject them to compulsory and mandatory HIV testing and the premature termination of their employment.

Under this head, the first thing to note is that I have already stated and found that the petitioners were not prematurely discharged from the Zambia Air Force. It was purely on medical grounds and within the confines of the law. However, I have found that they were indeed subjected to mandatory HIV testing which was and is a violation of their fundamental rights provided

under the Constitution of Zambia. By this action the respondent, in this case, the Attorney-General was/is in breach of its international obligations found in the various international Covenants and instruments to which Zambia is a signatory like the African Charter on Human and Peoples' Rights. The State has argued that the discharge was done in accordance with the law and that the petitioners were paid their terminal benefits after discharge and are therefore not entitled to damages. The State further argued that damages can only be claimed for civil wrongs in contract and tort and that the petitioners have not shown the breach caused to their contract of employment or what personal injury or pain they are currently suffering. In my considered view, this is a case where the petitioners' right to privacy and protection from inhuman treatment was infringed and petitioners are entitled to damages. Otherwise, why have rights enshrined in the supreme law of the land which can be violated at will without redress? This certainly was not the intention of the framers of our Constitution. According to the evidence of Dr. Mwiiya Imasiku (PW4) if a person is tested for HIV without their knowledge and later they discover that they are HIV positive, this is traumatic as the person feels manipulated and dehumanised among other factors. Both petitioners told the court they suffered mental anguish after discovering they had been tested for HIV without their knowledge or consent. The question is what is the purpose of pre-test and post-test counselling? Dr. Imasiku (PW4) explained that it helps to prepare the client with coping mechanisms to take care of any psychological trauma like anxiety, depression etc. In the words of Dr. Imasiku pre-test counselling is a therapeutic strategy used to prepare the client by giving him information about the test HIV test as well as discuss the consequences of an HIV positive result or negative result. This was not done and for this the petitioners demand compensation from the

State. This is a case where at the time when they were subjected to mandatory testing for HIV, the petitioners were deprived of vital information regarding their personal health and their dignity was lowered, their privacy was invaded without their consent. To an ordinary Zambian or a reasonable serviceman in the class of the petitioners this would be a shocking discovery. Although this is not a case involving damages for personal injuries, the case of **Mary Patricia Soko vs. The Attorney-General (11)** can offer some guidelines on quantum of damages even for mental anguish. In **Mary Patricia Soko vs. The Attorney-General (11)** at page 161 the Supreme Court had this to say:

> "...the task of measuring human suffering of this nature in terms of cash is not an easy one but the court should try to award fair and adequate compensation. No money can ever fully compensate for serious physical injuries and no yardstick exists for measuring in money terms the compensation to be accorded .....for mental suffering because the loss is imponderable in cash"

Therefore, it is not about the amount of money and the bottom line is that there was a conflict between ethical issues and private rights and Dr. Matipa did what he thought was right to help the petitioners at the time and taking this factor into consideration should not be misinterpreted. Looking at it from a different angle, what he did is, in my view, a mitigating factor because the medication did not cause any harm to the petitioners. It made them better. If anything the petitioners have benefited from the treatment and this is why they can now demand to be re-engaged into the military. In **C. vs. Minister of Correctional Services (4)** which was almost similar to this one, the court awarded R1000. In that case, the court observed that had the plaintiff received pre-test counseling "the emotional blow would have been diminished". Taking into account the circumstances of this case, I find that

an award of K10,000,000 to each petitioner is reasonable. The amount is payable with interest at 10% from the date of writ up to today and hereafter at the Bank of Zambia lending rate until full payment.

(g) That the Honourable Court may make such declaration directions and orders as it may deem fit to make for the effective realization and enforcement of the rights of Persons Living with HIV/AIDS such as the Petitioners.

My recommendation is in relation to communication of the results of the sittings of the Medical Board. Although the Medical Board is not the final authority, my view is that it is fair and just that at the end of every sitting, every serviceman who has appeared before it, should be informed of its decision. The final decision from the Air Commander can come later but the recommendation of the Medical Board can be communicated immediately and I do not believe there would be any harm or prejudice in this.

For avoidance of doubt, my judgment is that and I declare that the respondent's decision to carry out mandatory HIV tests on the petitioners without their informed consent was a violation of their right to protection from inhuman and degrading treatment and the right to privacy. The damages are as stated herein.

Costs to the petitioners to be taxed in default of agreement.

E.N.C. MUYOVWE

JUDGE