

Challenge to defence force bigotry

The South African Security Forces Union (Sasfu) and three people living with HIV/AIDS won an important Pretoria High Court ruling in May this year. The ruling in effect bans discrimination based on HIV status.

These people were applicants to the South African National Defence Force (SANDF). They were a combat readiness trainer, a trumpeter who applied for a job in the Air Force Band, and a personnel clerk doing administrative work. These people and others in a similar position were excluded from jobs in the SANDF simply because of their HIV status, not because of any assessment of their fitness for the job. They approached the High Court to stop this unfair policy. The AIDS Law Project took their case.

The case was brought against the President, the Surgeon-General, the Chief of the SANDF and the Ministers of Defence and Health. The matter was opposed by all, except for the Minister of Health.

The court ruled that the SANDF's policy of testing for HIV unfairly discriminated against HIV positive people and must be set aside. It declared this policy unconstitutional and ordered the SANDF to reconsider the applicants for employment, deployment and promotion. The court reached this decision because the policy automatically excluded people on the basis of their HIV status.

The court ordered the SANDF to prepare a new health classification policy within six months. The applicants were further given permission to return to court if the

The South African National Defence Force has long discriminated against people living with HIV/AIDS until the South African Security Forces Union took up a case against it. **S'khumbuzo Mapumulo** describes the case that took 13 years to come to fruition and examines its important outcomes.



new policy remained unsatisfactory. The SANDF was ordered to pay the applicants' costs.

OLD SANDF POLICY

The SANDF tested job applicants and members for physical and psychological fitness annually, using their Comprehensive Health Assessment (CHA) system. The test applied to all parts of the SANDF

including the army, the reserve forces, the navy and the air force and it covered all positions, ranging from cooks, cleaners and lawyers to doctors.

These tests included an HIV test. If anyone tested positive for HIV, they were rejected from employment, deployment outside our borders, or promotion.

The SANDF explained this using a

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discredited academic study from Zimbabwe saying that people living with HIV were unable to withstand stress, strenuous physical exercise or harsh weather conditions. This study was defective, for instance, it was undated, based on a limited number of people and never published. Experts discredited the study and likened it to Nazi experimentation.

On the SANDF's admission, one in five members of the SANDF (23%) are HIV positive. Given this fact, the obligation of the SANDF is to develop and implement a comprehensive HIV prevention and treatment policy that does not exclude HIV positive people from job opportunities

SASFU'S WINNING ARGUMENTS

The union said the SANDF fitness policy needed to be more specific. The policy should take into account the positions held by SANDF members and the requirements of each position. Active combat and the threat of harm is not part of all military activities. For instance, it is not likely that the trumpeter would

engage in active combat.

The union further said the SANDF policy was not consistent, as it allowed individual assessments of pilots in terms of a separate Aviation Protocol. This meant that fighter pilots could continue to perform duties even if they were HIV positive, but a trumpeter could not.

In addition, Sasfu told the court that the SANDF allowed soldiers living with HIV to be deployed within the borders of the country, but refused to deploy them into foreign countries. The union emphasised that internal conditions are at times harsher than conditions outside and that HIV positive people are able to withstand such harsh conditions.

Sasfu highlighted that the SANDF's annual tests did not allow for the 'window period' during which an HIV infection may not show up. This meant an HIV positive person could be deployed outside the country because they were lucky as the test had not picked up the HIV in the early stage. The SANDF could not explain this inconsistency.

Sasfu also argued that the annual test meant that those who tested positive, or who refused to test and were assumed to be HIV positive, were stigmatised.

Another factor was that the policy was not in line with the government's constitutional duty to protect human rights and its commitment to reducing HIV transmission, or the Defence Act and regulations. It was also in conflict with the United Nation's policy and policies of countries like

Namibia, Mexico and Australia.

A key argument was that the old SANDF policy disregarded medical evidence. HIV positive people who are not showing symptoms of infection are physically fit. The course of an HIV infection is predictable, and manageable, because of antiretroviral therapy. A major shortcoming of the policy was that it excluded fit and healthy people from recruitment, promotion and deployment.

The SANDF policy was rejected by the court as irrational, unfair and discriminatory against people living with HIV. The court declared that the policy was in conflict with the following rights in the Constitution:

- fair labour practices (section 23(1)), because it allowed for unreasonable exclusions from promotion and employment
- equality (section 9(3)) because it excluded HIV positive people on the basis of their HIV status only, without regard to a person's ability to perform their duties
- privacy (section 14)
- dignity (section 10)
- administrative justice (section 33).

This means that the SANDF can no longer discriminate on the basis of a person's HIV status. At the moment the SANDF does not have a legally enforceable health classification policy as the old policy is now unconstitutional. LB

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