CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 17/00

JACQUES CHARL HOFFMANN Appellant

versus

SOUTH AFRICAN AIRWAYS Respondent

Heard on : 18 August 2000

Decided on : 28 September 2000

JUDGMENT

NGCOBO J:

Introduction

[1] This appeal concerns the constitutionality of South African Airways' (SAA) practice of refusing to employ as cabin attendants people who are living with the Human Immunodeficiency Virus (HIV). Two questions fall to be answered: first, is such a practice inconsistent with any provision of the Bill of Rights; and second, if so, what is the appropriate relief in this case?

[2] Mr Hoffmann, the appellant, is living with HIV. He was refused employment as a cabin attendant by SAA because of his HIV positive status. He unsuccessfully challenged the constitutionality of the refusal to employ him in the Witwatersrand High Court (the High Court) on various constitutional

grounds. The High Court issued a positive certificate and this Court granted him leave to appeal directly to it.[1]

[3] The AIDS Law Project (ALP)[2] sought, and was granted, leave to be admitted as an *amicus curiae* in support of the appeal. In addition, the ALP sought leave to introduce factual and expert material that had been placed before the Labour Court in a case that also involved the refusal by SAA to employ as a cabin attendant someone who was living with HIV.[3] The additional material included opinions by various medical experts on the transmission, progression and treatment of HIV, as well as the ability of people with HIV to be vaccinated against yellow fever. In particular, it included minutes reflecting the unanimous view of these medical experts. Leave to introduce the additional material was granted subject to any written argument on its admissibility. Neither party objected to the admission of the additional material.

[4] The ALP submitted written argument and was represented by Mr Tip, together with Mr Boda. We are indebted to the ALP and counsel for their assistance in this matter.

The factual background

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1 In terms of rule 18 of the Constitutional Court Rules.

2 The ALP is a project of the Centre for Applied Legal Studies at the University of the Witwatersrand. One of the objects of the ALP is to prevent discrimination against people living with HIV/AIDS.

3 The additional material was introduced in terms of rule 30 of the Constitutional Court Rules. The Labour Court case was *A v South African Airways (Pty) Ltd*, Case J1916/99. The case was settled on the basis of payment of damages by SAA to the claimant.

[5] In September 1996 the appellant applied for employment as a cabin attendant with SAA. He went through a four-stage selection process comprising a pre-screening interview, psychometric tests, a formal interview and a final screening process involving role-play. At the end of the selection process, the appellant, together with eleven others, was found to be a suitable candidate for employment. This decision, however, was subject to a pre-employment medical examination, which included a blood test for HIV/AIDS. The medical examination found him to be clinically fit and thus suitable for employment. However, the blood test showed that he was HIV positive. As a result, the medical report was altered to read that the appellant was "H.I.V. positive" and therefore "unsuitable". He was subsequently informed that he could not be employed as a cabin attendant in view of his HIV positive status. All this was common cause. In the course of his argument, Mr Cohen, who, together with Mr Sibeko, appeared for SAA, raised an issue as to whether HIV positive status was the sole reason for refusing to employ the appellant. Mr Trengove, who, together with Mr Katz and Ms Camroodien, appeared on behalf of the appellant, submitted that it was. I deal with this issue later in the judgment.[4]

[6] The appellant challenged the constitutionality of the refusal to employ him in the High Court, alleging that the refusal constituted unfair discrimination, and violated his constitutional right to equality, human dignity and fair labour practices. He sought an order, in motion proceedings, amongst other things, directing SAA to employ him as a cabin attendant.

[7] SAA denied the charge. It asserted that the exclusion of the appellant from employment had

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4 See below paras 47-9.

been dictated by its employment practice, which required the exclusion from employment as cabin attendant of all persons who were HIV positive. SAA justified this practice on safety, medical and operational grounds. In particular, SAA said that its flight crew had to be fit for world-wide duty. In the course of their duties they are required to fly to yellow fever endemic countries. To fly to these countries they must be vaccinated against yellow fever, in accordance with guidelines issued by the National Department of Health. Persons who are HIV positive may react negatively to this vaccine and may, therefore, not take it. If they do not take it, however, they run the risk not only of contracting yellow fever, but also of transmitting it to others, including passengers. It added that people who are HIV positive are also prone to contracting opportunistic diseases.[5] There is a risk, therefore, that they may contract these diseases and transmit them to others. If they are ill with these opportunistic diseases, they will not be able to perform the emergency and safety procedures that they are required to perform in the course of their duties as cabin attendants. SAA emphasised that its practice was directed at detecting all kinds of disability that make an individual unsuitable for employment as flight crew. In this regard, it pointed out that it had a similar practice that excluded from employment as cabin crew individuals with other disabilities, such as epilepsy, impaired vision and deafness. SAA added that the life expectancy of people who are HIV positive was too short to warrant the costs of training them. It also pointed out that other major airlines utilised similar practices.

[8] It must be pointed out immediately that the assertions by SAA were inconsistent with the medical evidence that was proffered in their support. SAA's medical expert, Professor Barry David

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5 Such as chronic diarrhoea and pulmonary tuberculosis.

Schoub, in an affidavit, told the High Court that only those persons whose HIV infection had reached the immunosuppression stage and whose CD4+ count had dropped below 300 cells per microlitre of blood were prone to the medical, safety and operational hazards asserted.[6] The assertions made by SAA, therefore, were not only not true of all persons who are HIV positive, but they were not true of the appellant. According to SAA's medical expert, at the time of medical examination there was nothing "to indicate that the infection has reached either the asymptomatic immunosuppressed state or the AIDS stage." On the medical evidence placed before the High Court, therefore, it was not established that the appellant posed the risks asserted. Yet he was excluded from employment.

[9] The High Court, however, agreed with SAA.[7] It found that the practice: was "based on considerations of medical, safety and operational grounds";[8] did not exclude persons with HIV from employment in all positions within SAA, but only from cabin crew positions; and was "aimed at achieving a worthy and important societal goal."[9] The High Court noted that if the employment practices of SAA were not seen to promote the health and safety of its passengers and crew, its "commercial operation, and therefore the public perception about it, will be seriously impaired".[10] A further factor that it took into consideration was the allegation by SAA that its competitors apply a similar employment policy. The court reasoned that if SAA were obliged to employ people with HIV,

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6 The immunosuppressed stage is one of the stages in the progression of the HIV infection. The progress of HIV is discussed in more detail below at para 11.

7 The judgment of the High Court is reported as *Hoffmann v South African Airways* 2000 (2) SA 628 (W).

8 At para 26 of the judgment.

9 At para 28.

10 At para 28.

it "would be seriously disadvantaged as against its competitors".[11] It concluded that "it is an inherent requirement for a flight attendant, at least for the moment, to be HIV-negative" and that the practice did not unfairly discriminate against persons who are HIV positive.[12] If it did, the court found, such discrimination was "justifiable within the meaning of s36 of the Constitution."[13] In the result, it dismissed the application. The present appeal is the sequel.

[10] To put the issues on appeal in context, it is necessary to refer to the medical evidence placed before this Court by the *amicus*, for it is this medical evidence that altered the course of argument on appeal. This evidence, however, told SAA nothing new. Indeed, it said nothing that SAA's expert did not already know.

Medical evidence on appeal

[11] The medical opinion in this case tells us the following about HIV/AIDS: it is a progressive disease of the immune system that is caused by the Human Immunodeficiency Virus, or HIV. HIV is a human retrovirus that affects essential white blood cells, called CD4+ lymphocytes. These cells play an essential part in the proper functioning of the human immune system. When all the interdependent parts of the immune system are functioning properly, a human being is able to fight off a variety of viruses and bacteria that are commonly present in our daily environment. When the body's immune

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11 At paras 26-8.

12 At para 29.

13 At para 28. It does not appear from the judgment of the High Court on what basis the practice was found to be justifiable under section 36 of the Constitution, as that section is only applicable to a law of general application. This is dealt with at para 41 below.

system becomes suppressed or debilitated, these organisms are able to flourish unimpeded. Professor Schoub identifies four stages in the progression of untreated HIV infection:

(a) **Acute stage** - this stage begins shortly after infection. During this stage the infected individual experiences flu-like symptoms which last for some weeks. The immune system during this stage is depressed. However, this is a temporary phase and the immune system will revert to normal activity once the individual recovers clinically. This is called the window period. During this window period, individuals may test negative for HIV when in fact they are already infected with the virus.

(b) **Asymptomatic immunocompetent stage** - this follows the acute stage. During this stage the individual functions completely normally, and is unaware of any symptoms of the infection. The infection is clinically silent and the immune system is not yet materially affected.

(c) **Asymptomatic immunosuppressed stage** - this occurs when there is a progressive increase in the amount of virus in the body which has materially eroded the immune system. At this stage the body is unable to replenish the vast number of CD4+ lymphocytes that are destroyed by the actively replicating virus. The beginning of this stage is marked by a drop in the CD4+ count to below 500 cells per microlitre of blood. However, it is only when the count drops below 350 cells per microlitre of blood that an individual cannot be effectively vaccinated against yellow fever. Below 300 cells per microlitre of blood, the individual becomes vulnerable to secondary infections and needs to take prophylactic antibiotics and anti-

microbials. Although the individual's immune system is now significantly depressed, the individual may still be completely free of symptoms and be unaware of the progress of the disease in the body.

(d) **AIDS (Acquired Immune Deficiency Syndrome) stage** - this is the end stage of the gradual deterioration of the immune system. The immune system is so profoundly depleted that the individual becomes prone to opportunistic infections that may prove fatal because of the inability of the body to fight them.

[12] HIV is transmitted through intimate contact involving the exchange of body fluid. Thus, sexual intercourse, receipt of or exposure to the blood, blood products, semen, tissues or organs of the infected person or transmission from an infected mother to her foetus or suckling child are known methods by which it can be transmitted. HIV has never been shown to be transmitted through intact skin or casual contact.

[13] It will be convenient at this stage to refer to the medical evidence which was placed before us on appeal by the *amicus*. The relevant evidence is contained in the minutes of the meetings of the medical experts of the parties in the Labour Court case, held on 28 April and 8 May 2000.[14] The minute of the first meeting reflects the unanimous view of these experts on the nature of the HIV disease, its progression, treatment and transmission, as well as the ability of people living with HIV to be vaccinated against yellow fever. The sole subject of the second meeting was the exact point at which

[14] At these meetings SAA was represented by its expert Professor Schoub, who, as mentioned in para 8 above, also deposed to an affidavit in these proceedings in the High Court.

HIV positive persons can no longer be effectively vaccinated against yellow fever, and the effectiveness of Highly Active Antiretroviral Therapy, which is a combination of drugs, referred to as HAART treatment. This minute concluded that a person with a CD4+ count below 350 cells per microlitre could not be vaccinated against yellow fever. The minute of the first meeting records that:

> "1. HIV is a progressive illness characterised by decreasing immunocompetence over time.
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> 2. HIV is an infectious disease that requires intimate contact for transmission. By far the predominant mode of transmission is via sexual contact. A small number of medical work-related injuries from needlestick or sharp instruments have accounted for some cases of HIV transmission. Transmission also occurs through mother-to-child routes, through transfusion of blood products, and through needle sharing by intravenous drug users.
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> 3. HIV has never been demonstrated to be transmissible through intact skin or through casual contact. It is not a highly transmissible infection.
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> 4. The standard test to diagnose HIV is a screening ELISA test followed by confirmatory tests. There is a window period of between two to twelve weeks depending on the tests used, within which an HIV-positive individual will test negative.
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> 5. Predicting an individual's risk of developing AIDS can be done accurately by assessing the immune function and the level of HIV burden.
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> 6. Immune function is determined by measuring a particular immune cell count in the blood, which is accepted as a marker. This is the CD4+ lymphocyte cell, which is attacked and destroyed by HIV. The CD4+ count is used to assess the risk of various opportunistic diseases.
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> 7. The level of HIV replication is assessed by quantifying the amount of HIV genetic material in the blood (HIV-1 RNA). This measurement is usually

referred to as the individual's viral load.

8. The viral load and the CD4+ lymphocyte count are now routinely used in patient management.

9. During the asymptomatic phase, HIV infected individuals are able to maintain productive lives and can remain gainfully and productively employed, particularly if they are properly treated with antiretrovirals and prophylactic antibiotics appropriate to their condition.

10. The natural progression of HIV has been dramatically altered in consequence of recent advances in the available medication. There are now combinations of drugs that are capable of completely suppressing the replication of the virus within an HIV+ individual. This combination of drugs has been described as Highly Active Antiretroviral Therapy or HAART. They are available in South Africa and are increasingly accessible.

11. With successful HAART treatment, the individual's immune system recovers, together with a very marked improvement in the CD4+ lymphocyte count. A significant improvement in survival rates and life expectancy results."

[14] In regard to the ability of people with HIV to perform employment duties, and in particular the work of a cabin attendant, the minute records that:

"12. With the advent of [HAART] treatment, individuals are capable of living normal lives and they can perform any employment tasks for which they are otherwise qualified.

13. The reasons for testing employees and potential employees for any medical condition are in general:

- to see whether they are fit for the inherent requirements of the job;

- to protect them from hazards inherent in the job;
- to protect others (clients, third parties etc) from hazards;
- to promote and maintain the health of employees.

14. Within this framework, as applied to the circumstances of a cabin crew member:

- the inherent requirements of a cabin crew attendant's position are such that an asymptomatic HIV-positive person could perform the work competently;
- the hazards to the immunocompetent employee inherent in the job of cabin crew attendant can be reasonably managed by counselling, monitoring, vaccination and the administration of appropriate antibiotic prophylaxis if required;
- the hazards to the clients and third parties arising from a cabin crew attendant being an asymptomatic HIV-positive individual are inconsequential and, insofar as it may ever be necessary, well-established universal precautions can be utilised.

15. There is no well-founded medical support for a policy that **ALL** persons who are HIV positive are unable to be vaccinated for yellow fever. Whether or not a particular individual should receive such vaccination should be assessed on the basis of a proper clinical examination of that individual, having regard to *inter alia* the individual's CD4 count.

16. Thus, where an HIV-positive individual is asymptomatic and immunocompetent, he or she will in the absence of any other impediment be able both:

- to meet the performance requirements of the job; and
- to receive appropriate vaccination as required for the job.

17. On medical grounds **alone**, exclusion of an HIV-positive individual from employment **solely** on the basis of HIV positivity cannot be justified." (Emphasis in the original)

[15] On the medical evidence, an asymptomatic HIV positive person can perform the work of a cabin attendant competently. Any hazards to which an immunocompetent cabin attendant may be exposed can be managed by counselling, monitoring, vaccination and the administration of the appropriate antibiotic prophylaxis if necessary. Similarly, the risks to passengers and other third parties arising from an asymptomatic HIV positive cabin crew member are therefore inconsequential and, if necessary, well-established universal precautions can be utilised. In terms of Professor Schoub's affidavit, even immunosuppressed persons are not prone to opportunistic infections and may be vaccinated against yellow fever as long as their CD4+ count remains above a certain level.

The issues on appeal

[16] Confronted by the consensus among medical experts, including its own expert, on the nature of the HIV disease, its transmission, progression, tracking its progression and treatment, as well as the ability of HIV positive persons to be vaccinated against yellow fever, SAA now concedes that: (a) its employment practice of refusing to employ people as cabin attendants because they are living with HIV cannot be justified on medical grounds and (b) therefore, its refusal to consider employing the appellant because he was living with HIV was unfair.

[17] Despite these concessions, it is the duty of this Court to determine whether any constitutional

rights of the appellant were violated by SAA, and if so, the appropriate relief to which the appellant is entitled.

[18] Before turning to these questions, it is necessary to dispose at once of one matter. We were invited to express an opinion on SAA's policy of testing applicants for employment for HIV/AIDS status, and thereafter of refusing employment if the infection has progressed to such a stage that the person has become unsuitable for employment as a cabin attendant. This policy, we were told, represents SAA's true policy, but in the case of the appellant was incorrectly applied. It was desirable for this Court to express such opinion, we were further told, in order to give guidance to the Labour Court, a court that has a statutory duty to address issues relating to testing to determine suitability for employment.[15]

[19] This invitation must be declined because the policy that is now being urged on appeal was not in issue in the High Court. That policy, therefore, cannot be in issue on appeal.

[20] There is a further consideration that militates against this Court making any decision on the policy put forward by SAA. The question of testing in order to determine suitability for employment is a matter that is now governed by section 7(2), read with section 50(4), of the Employment Equity

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15 In terms of section 7(2), read with section 50(4), of the Employment Equity Act, 55 of 1998.

Act.[16] In my view, there is much to be said for the view that where a matter is required by statute to be dealt with by a specialist tribunal, it is that tribunal that must deal with such a matter in the first instance. The Labour Court is a specialist tribunal that has a statutory duty to deal with labour and employment issues. Because of this expertise, the legislature has considered it appropriate to give it jurisdiction to deal with testing in order to determine suitability for employment. It is therefore that court which, in the first instance, should deal with issues relating to testing in the context of employment.

[21] I now turn to consider whether any constitutional rights have been violated by the refusal to employ the appellant as a cabin attendant. The appellant alleges that his rights to equality, human dignity and fair labour practices have been violated.

The right to equality

[22] The relevant provisions of the equality clause, contained in section 9 of the Constitution, provide:

> "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
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> . . .

[16] Act 55 of 1998. Section 7 came into effect on 9 August 1999.

> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
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> . . .
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> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

[23] Transnet is a statutory body, under the control of the state, which has public powers and performs public functions in the public interest.[17] It was common cause that SAA is a business unit of Transnet. As such, it is an organ of state and is bound by the provisions of the Bill of Rights in terms of section 8(1), read with section 239, of the Constitution. It is, therefore, expressly prohibited from discriminating unfairly.[18]

[24] This Court has previously dealt with challenges to statutory provisions and government conduct

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17 Transnet Limited has its origin in the South African Railways and Harbours Administration, which was administered by the state under the Railway Board Act, 73 of 1962. In terms of section 2(1) of the South African Transport Services Act, 65 of 1981 the South African Railways and Harbours Administration was renamed the South African Transport Services. In terms of section 3(1), it was not a separate legal person, but a commercial enterprise of the state. It was empowered, in terms of section 2(2)(a), amongst other things, to "control, manage, maintain and exploit . . . air services (under the title 'South African Airways' or any title in the Minister's discretion)". Pursuant to sections 2(1) and 3(2) of the Legal Succession to the South African Transport Services Act, 9 of 1989 Transnet was incorporated as a public company, and took transfer of the whole of the commercial enterprise of the South African Transport Services. SAA is a business unit within Transnet, established in terms of section 32(1)(b) of that Act. In terms of section 2(2), the state is the only member and shareholder of Transnet. Section 15 requires it to provide certain services in the public interest. Its services must be performed in accordance with the provisions of schedule 1 to the Act.

18 In terms of section 9(3) of the Constitution.

alleged to infringe the right to equality. Its approach to such matters involves three basic enquiries: first, whether the provision under attack makes a differentiation that bears a rational connection to a legitimate government purpose.[19] If the differentiation bears no such rational connection, there is a violation of section 9(1). If it bears such a rational connection, the second enquiry arises. That enquiry is whether the differentiation amounts to unfair discrimination. If the differentiation does not amount to unfair discrimination, the enquiry ends there and there is no violation of section 9(3). If the discrimination is found to be unfair, this will trigger the third enquiry, namely, whether it can be justified under the limitations provision. Whether the third stage, however, arises will further be dependent on whether the measure complained of is contained in a law of general application.

[25] Mr Trengove sought to apply this analysis to SAA's employment practice in the present case. He contended that the practice was irrational because: first, it disqualified from employment as cabin attendants all people who are HIV positive, yet objective medical evidence shows that not all such people are unsuitable for employment as cabin attendants; second, the policy excludes prospective cabin attendants who are HIV positive but does not exclude existing cabin attendants who are likewise HIV positive, yet the existing cabin attendants who are HIV positive would pose the same health, safety

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19 The three stages were was set out concisely in *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) at para 53. In *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)* 1999 (2) SA 1 (CC); 1999 (2) BCLR 139 (CC) at para 17, the Court noted that the only purpose of the first stage of the test was "an inquiry into whether the differentiation is arbitrary or irrational, or manifests naked preference . . .". In *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) at para 18, the Court held that the rationality test does not inevitably precede the unfair discrimination test, and that the "rational connection inquiry would be clearly unnecessary in a case in which a court holds that the discrimination is unfair and unjustifiable."

and operational hazards asserted by SAA as the basis on which it was justifiable to discriminate against applicants for employment who are HIV positive.

[26] In the view I take of the unfairness of the discrimination involved here, it is not necessary to embark upon the rationality enquiry or to reach any firm conclusion on whether it applies to the conduct of all organs of state, or whether the practice in issue in this case was irrational.

[27] At the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings, regardless of their position in society, must be accorded equal dignity.[20] That dignity is impaired when a person is unfairly discriminated against. The determining factor regarding the unfairness of the discrimination is its impact on the person discriminated against.[21] Relevant considerations in this regard include the position of the victim of the discrimination in society, the purpose sought to be achieved by the discrimination, the extent to which the rights or interests of the victim of the discrimination have been affected, and whether the discrimination has impaired the human dignity of the victim.[22]

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20 *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at para 41.

21 *Harksen v Lane*, above n 19, at para 50.

22 Ibid, para 51.

[28] The appellant is living with HIV. People who are living with HIV constitute a minority. Society has responded to their plight with intense prejudice.[23] They have been subjected to systemic disadvantage and discrimination.[24] They have been stigmatised and marginalised. As the present case demonstrates, they have been denied employment because of their HIV positive status without regard to their ability to perform the duties of the position from which they have been excluded. Society's response to them has forced many of them not to reveal their HIV status for fear of prejudice. This in turn has deprived them of the help they would otherwise have received. People who are living with HIV/AIDS are one of the most vulnerable groups in our society. Notwithstanding the availability of compelling medical evidence as to how this disease is transmitted, the prejudices and stereotypes against HIV positive people still persist. In view of the prevailing prejudice against HIV positive people, any discrimination against them can, to my mind, be interpreted as a fresh instance of stigmatisation and I consider this to be an assault on their dignity. The impact of discrimination on HIV positive people is devastating. It is even more so when it occurs in the context of employment. It denies them the right to earn a living. For this reason, they enjoy special protection in our law.[25]

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23 Ngwena "HIV In the Workplace: Protecting Rights to Equality and Privacy" (1999) 15 *SA Journal of Human Rights* 513 at 514.

24 See section 34 of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, 4 of 2000.

25 Section 6(1) of the Employment Equity Act, which section came into effect on 9 August 1999, specifically mentions HIV status as a prohibited ground of unfair discrimination; section 7(2) prohibits the testing of an employee for HIV status unless the Labour Court, acting under section 50(4), determines that such testing is justifiable. Section 34(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, 4 of 2000, which section came into effect on 1 September 2000, requires the Minister of Justice and Constitutional Development to give special consideration to the inclusion of, amongst other things, HIV/AIDS as a prohibited ground of discrimination; the schedule to that Act lists, as part of an illustrative list of unfair practices in the insurance services, "unfairly disadvantaging a person or persons, including unfairly and unreasonably refusing to grant services, to persons solely on the basis of HIV/AIDS status". The National Department of Education has, in terms of section 3(4) of the National Education Policy Act, 27 of 1996, issued a national policy on HIV/AIDS which, amongst other things, prohibits unfair discrimination against learners, students and educators with HIV/AIDS. The National Department of Health

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

[30] SAA refused to employ the appellant saying that he was unfit for world-wide duty because of his HIV status. But, on its own medical evidence, not all persons living with HIV cannot be vaccinated against yellow fever, or are prone to contracting infectious diseases - it is only those persons whose infection has reached the stage of immunosuppression, and whose CD4+ count has dropped below 350 cells per microlitre of blood.[26] Therefore, the considerations that dictated its practice as advanced in the High Court did not apply to all persons who are living with HIV. Its practice, therefore, judged and treated all persons who are living with HIV on the same basis. It judged all of them to be unfit for employment as cabin attendants on the basis of assumptions that are true only for an identifiable group of people who are living with HIV. On SAA's own evidence, the appellant could have been at the asymptomatic stage of infection. Yet, because the appellant happened to have been HIV positive, he was automatically excluded from employment as a cabin attendant.

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has, in terms of the National Policy for Health Act, 116 of 1990, issued a national policy on testing for HIV. The Medical Schemes Act, 131 of 1998 obliges all medical schemes to provide at least a minimum cover for HIV positive persons. Finally, a draft code of good practice on key aspects of HIV/AIDS and employment issued under the Employment Equity Act has been published for public comment. This draft code has, as one of its goals, the elimination of unfair discrimination in the workplace based on HIV status.

[26] See above para 11(c).

[31] A further point must be made here. The conduct of SAA towards cabin attendants who are already in its employ is irreconcilable with the stated purpose of its practice.[27] SAA does not test those already employed as cabin attendants for HIV/AIDS. They may continue to work despite the infection, and regardless of the stage of infection. Yet they may pose the same health, safety and operational hazards as prospective cabin attendants. Apart from this, the practice also pays no attention to the window period. If a person happens to undergo a blood test during the window period, the person can secure employment. But if the same person undergoes the test outside of this period, he or she will not be employed.

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

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[27] I accept, of course, that the obligations of an employer towards existing employees may be greater than its obligations towards prospective employees.

[33] The High Court found that the commercial operation of SAA, and therefore the public perception about it, would be undermined if the employment practices of SAA did not promote the health and safety of the crew and passengers. In addition, the High Court took into account that the ability of SAA to compete in the airline industry would be undermined "if it were obliged to appoint HIV-infected individuals as flight-deck crew members."[28] This was apparently based on the allegation by SAA that other airlines have a similar policy. It is these considerations that led the High Court to conclude that HIV negative status was, at least for the moment, an inherent requirement for the job of cabin attendant and that therefore the appellant had not been unfairly discriminated against.

[34] Legitimate commercial requirements are, of course, an important consideration in determining whether to employ an individual. However, we must guard against allowing stereotyping and prejudice to creep in under the guise of commercial interests. The greater interests of society require the recognition of the inherent dignity of every human being, and the elimination of all forms of discrimination. Our Constitution protects the weak, the marginalised, the socially outcast, and the victims of prejudice and stereotyping. It is only when these groups are protected that we can be secure that our own rights are protected.[29]

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28 Above n 7, at para 28.

29 *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 88.

[35] The need to promote the health and safety of passengers and crew is important. So is the fact that if SAA is not perceived to be promoting the health and safety of its passengers and crew this may undermine the public perception of it. Yet the devastating effects of HIV infection and the widespread lack of knowledge about it have produced a deep anxiety and considerable hysteria. Fear and ignorance can never justify the denial to all people who are HIV positive of the fundamental right to be judged on their merits. Our treatment of people who are HIV positive must be based on reasoned and medically sound judgments. They must be protected against prejudice and stereotyping. We must combat erroneous, but nevertheless prevalent, perceptions about HIV. The fact that some people who are HIV positive may, under certain circumstances, be unsuitable for employment as cabin attendants does not justify a blanket exclusion from the position of cabin attendant of all people who are HIV positive.

[36] The constitutional right of the appellant not to be unfairly discriminated against cannot be determined by ill-informed public perception of persons with HIV. Nor can it be dictated by the policies of other airlines not subject to our Constitution.

[37] Prejudice can never justify unfair discrimination. This country has recently emerged from institutionalised prejudice. Our law reports are replete with cases in which prejudice was taken into

consideration in denying the rights that we now take for granted.[30] Our constitutional democracy has ushered in a new era - it is an era characterised by respect for human dignity for all human beings. In this era, prejudice and stereotyping have no place. Indeed, if as a nation we are to achieve the goal of equality that we have fashioned in our Constitution we must never tolerate prejudice, either directly or indirectly. SAA, as a state organ that has a constitutional duty to uphold the Constitution, may not avoid its constitutional duty by bowing to prejudice and stereotyping.

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30 For example, in *Moller v Keimoes School Committee* 1911 AD 635, a case involving a challenge to segregation in public schools following an objection by a group of white parents to their children having to attend the same school as black children, de Villiers CJ, at 643-4, declined to ignore colour "prepossessions, or . . . prejudices" in construing a statute. Relying on such prejudice, he found that a white parent would not have been "a consenting party to an Act by which European parents could be compelled to send their children to a school which children of mixed origin can also be compelled to attend". In *Minister of Posts and Telegraphs v Rasool* 1934 AD 167, a case involving a challenge to segregation of counters at a post office following an objection by a group of whites to being served at the same counter as Indians, Stratford ACJ, at 175, held that "a division of the community on differences of race or language for the purpose of postal service seems, *prima facie*, to be sensible and make for the convenience and comfort of the public as a whole, since appropriate officials conversant with the customs, requirements and language of each section will conceivably serve the respective sections". In *Williams & Adendorff v Johannesburg Municipality* 1915 TPD 106, a case involving a challenge to segregation in the use of tramcars, while the majority found that segregation was unlawful because it was unauthorised by the empowering statute, Bristowe J held, at 122, that regard might "be properly paid to the feelings and the sensitiveness, even to the prejudices and foibles of the general body of reasonable citizens" in determining whether segregation was lawful. Bristowe J held further that, having regard to "the existing state of public feeling the segregation of natives, even though not coming within bye-law 12, may be essential to an efficient tramway system." Curlewis J, also dissenting, held, at 128, that "apart from dress and behaviour it is possible that it may be established that the use, for instance, by natives of the ordinary tramcars would be so distasteful and revolting to the rest of the community that the council as a common carrier would be justified in refusing to carry them as passengers in the same cars as Europeans". *The State v Xhego and Others* 83 Prentice Hall H76 concerned the admissibility of confessions. Some ten African accused challenged confessions made by them on the grounds that they had been induced by threats or force on the part of the police. Rejecting the evidence of the accused, van der Riet AJP observed, at 197, that "[h]ad the evidence been given by Europeans, it might well have prevailed against the single evidence of warrant officer de Beer" because there were many other policemen who were allegedly involved in the assault but who gave no evidence to contradict the accused. The evidence of the accused was rejected, however, because "the native, in giving evidence, is so prone to exaggeration that it is often impossible to distinguish the truth from fiction." The Court also noted that there were other factors which "militated strongly against the acceptance of the allegations of the accused, again resulting largely from the inherent foolishness of the Bantu character". In *Incorporated Law Society v Wookey* 1912 AD 623, a case involving an application by a woman to be admitted as an attorney, even though the statute in question did not expressly exclude women from practising as attorneys, relying upon the history of the profession, namely that it is a profession which has always been practised by men, the Court found that the word "person" should be construed to refer to men only, to the exclusion of women.

[38] People who are living with HIV must be treated with compassion and understanding. We must show *ubuntu* towards them.[31] They must not be condemned to "economic death" by the denial of equal opportunity in employment. This is particularly true in our country, where the incidence of HIV infection is said to be disturbingly high. The remarks made by Tipnis J in *MX of Bombay Indian Inhabitant v M/s ZY and another*[32] are apposite in this context:

> "In our opinion, the State and public Corporations like respondent No. 1 cannot take a ruthless and inhuman stand that they will not employ a person unless they are satisfied that the person will serve during the entire span of service from the employment till superannuation. As is evident from the material to which we have made a detailed reference in the earlier part of this judgment, the most important thing in respect of persons infected with HIV is the requirement of community support, economic support and non-discrimination of such person. This is also necessary for prevention and control of this terrible disease. Taking into consideration the widespread and present threat of this disease in the world in general and this country in particular, the State cannot be permitted to condemn the victims of HIV infection, many of whom may be truly unfortunate, to certain economic death. It is not in the general public interest and is impermissible under the Constitution. The interests of the HIV positive persons, the interests of the employer and the interests of the society will have to be balanced in such a case."

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31 *Ubuntu* is the recognition of human worth and respect for the dignity of every person. See also the comments of Langa J, Mahomed J and Mokgoro J in *S v Makwanyane*, above n 29, at paras 224, 263 and 308 respectively.

32 AIR 1997 (Bombay) 406 at 431.

[39] As pointed out earlier, on the medical evidence not all people who are living with HIV are unsuitable for employment as cabin attendants.[33] It is only those people whose CD4+ count has dropped below a certain level who may become unsuitable for employment. It follows that the finding of the High Court that HIV negative status is an inherent requirement "at least for the moment" for a cabin attendant is not borne out by the medical evidence on record.

[40] Having regard to all these considerations, the denial of employment to the appellant because he was living with HIV impaired his dignity and constituted unfair discrimination. This conclusion makes it unnecessary to consider whether the appellant was discriminated against on a listed ground of disability, as set out in section 9(3) of the Constitution, as Mr Trengove contended or whether people who are living with HIV ought not to be regarded as having a disability, as contended by the *amicus*.

[41] I conclude, therefore, that the refusal by SAA to employ the appellant as a cabin attendant because he was HIV positive violated his right to equality guaranteed by section 9 of the Constitution. The third enquiry, namely whether this violation was justified, does not arise. We are not dealing here with a law of general application.[34] This conclusion makes it unnecessary to consider the other constitutional attacks based on human dignity and fair labour practices. It now remains to consider the

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33 Above para 15.

34 See *August and Another v Electoral Commission and Others* 1999 (3) SA 1 (CC); 1999 (4) BCLR 363 (CC) at para 23.

remedy to which the appellant is entitled.

Remedy

[42] Section 38 of the Constitution provides that where a right contained in the Bill of Rights has been infringed, "the court may grant appropriate relief". In the context of our Constitution, "appropriate relief" must be construed purposively, and in the light of section 172(1)(b), which empowers the Court, in constitutional matters, to make "any order that is just and equitable."[35] Thus construed, appropriate relief must be fair and just in the circumstances of the particular case. Indeed, it can hardly be said that relief that is unfair or unjust is appropriate.[36] As Ackermann J remarked, in the context of a comparable provision in the interim Constitution, "[i]t can hardly be argued, in my view, that relief which was unjust to others could, where other available relief meeting the complainant's needs did not suffer from this defect, be classified as appropriate."[37] Appropriateness, therefore, in the context of our Constitution, imports the elements of justice and fairness.

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35 *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 65. In terms of section 7(4) of the interim Constitution, where the rights contained in Chapter 3 were infringed, persons referred to in paragraph (b) of section 7(4) were entitled to apply to Court "for appropriate relief."

36 In *Re Kodellas et al and Saskatchewan Human Rights Commission et al; Attorney-General of Saskatchewan, Intervenor* (1989) 60 DLR (4th) 143, 187, Vancise JA said: "A just remedy must of necessity be appropriate, but an appropriate remedy may not be fair or equitable in the circumstances." This statement must be understood in the context of section 24(1) of the Canadian Charter, which provides that anyone whose rights, guaranteed in the Charter, have been infringed may apply to court "to obtain such remedy as the court considers appropriate and just in the circumstances." The Canadian Constitution, therefore, makes a distinction between "appropriateness" and "justness". Our Constitution does not.

37 *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) at para 38.

[43] Fairness requires a consideration of the interests of all those who might be affected by the order. In the context of employment, this will require a consideration not only of the interests of the prospective employee but also the interests of the employer. In other cases, the interests of the community may have to be taken into consideration.[38] In the context of unfair discrimination, the interests of the community lie in the recognition of the inherent dignity of every human being and the elimination of all forms of discrimination. This aspect of the interests of the community can be gathered from the preamble to the Constitution in which the people of this country declared:

> "We, the people of South Africa,
>
> Recognise the injustices of our past;
>
> . . .
>
> We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to —
>
> > Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights . . ."

[44] This proclamation finds expression in the founding provisions of the Constitution, which include "human dignity, the achievement of equality and the advancement of human rights and freedoms."[39]

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38 Id.

39 In *Fose*, above n 37, Ackermann J said, at para 38, that in determining the appropriate relief under section 7(4) of the interim Constitution, "the interests of both the complainant and society as a whole ought, as far

[45] The determination of appropriate relief, therefore, calls for the balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first, to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third, to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case. Therefore, in determining appropriate relief, "we must carefully analyse the nature of [the] constitutional infringement, and strike effectively at its source."[40]

[46] With these considerations in mind, I now turn to consider the appropriate relief in this case. The infringement involved here consists of the refusal to employ the appellant because he was HIV positive. The relief to which the appellant is entitled depends, in the first place, on whether he would have been employed as a cabin attendant but for his HIV positive status. It is to that question that I now turn.

(a) Would the appellant have been employed but for the unfair discrimination?

[47] It is common cause that the appellant was refused employment because of his HIV positive

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as possible, to be served."

40 *Fose*, above n 37, at para 96 per Kriegler J.

status. This much was conceded both in the written argument of SAA and in the course of oral argument by Mr Cohen. Mr Cohen nevertheless contended that it had not been shown that the appellant would necessarily have been employed but for his HIV positive status. The contention being advanced here is that it has not been shown that the appellant has been denied employment solely because of his HIV status. This contention rests on the assumption that there were fewer than twelve posts for which the twelve individuals, including the appellant, had been identified as suitable. It was submitted that there was, therefore, no guarantee that the appellant would have been one of the individuals to fill the available posts.

[48] The fallacy of this contention lies in its premise. It has never been SAA's case that there were fewer than twelve vacant posts at the time the twelve individuals were selected for employment, nor was there any suggestion that the individuals who were selected still had to go through some further selection process to determine who amongst them were to fill the available posts. Had this been its case, it would have been an easy matter for SAA to have said so. Far from saying so, SAA admitted the allegation that the appellant was selected "as one of twelve flight attendants to be employed out of one hundred and seventy three applicants", and that his selection was subject to a pre-employment medical examination, which included a test for HIV. SAA knew that the case it had to meet in the event that it was unsuccessful on the merits was why the appellant should not be employed. This was the main relief sought by the appellant. The contention must, therefore, fail.

[49] It is common cause that the appellant successfully completed the final screening stage, having been found suitable for employment throughout the selection process. As already mentioned,[41] when the blood test of the appellant indicated that he was infected with the HIV virus, the medical report was altered to indicate that he was unsuitable for employment as a cabin attendant. It follows that what stood between the appellant and employment as a cabin attendant was his HIV positive status. I am therefore satisfied that the appellant was denied employment as a cabin attendant solely because of his HIV positive status. It follows that the infringement involved here consists in the refusal to employ the appellant solely because he was HIV positive. It now remains to consider how to redress this wrong. Mr Trengove contended that instatement was the appropriate relief.

(b) Is instatement the appropriate relief?

[50] An order of instatement, which requires an employer to employ an employee, is a basic element of the appropriate relief in the case of a prospective employee who is denied employment for reasons declared impermissible by the Constitution. It strikes effectively at the source of unfair discrimination. It is an expression of the general rule that where a wrong has been committed, the aggrieved person should, as a general matter, and as far as is possible, be placed in the same position the person would have been but for the wrong suffered. In proscribing unfair discrimination, the Constitution not only seeks to prevent unfair discrimination, but also to eliminate the effects thereof. In the context of employment, the attainment of that objective rests not only upon the elimination of the discriminatory

41 Above para 5.

employment practice, but also requires that the person who has suffered a wrong as a result of unlawful discrimination be, as far as possible, restored to the position in which he or she would have been but for the unfair discrimination.

[51] The need to eliminate unfair discrimination does not arise only from Chapter 2 of our Constitution. It also arises out of international obligation.[42] South Africa has ratified a range of anti-discrimination Conventions, including the African Charter on Human and Peoples' Rights.[43] In the preamble to the African Charter, member states undertake, amongst other things, to dismantle all forms of discrimination. Article 2 prohibits discrimination of any kind. In terms of Article 1, member states have an obligation to give effect to the rights and freedoms enshrined in the Charter. In the context of employment, the ILO Convention 111, Discrimination (Employment and Occupation) Convention, 1958 proscribes discrimination that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. In terms of Article 2, member states have an obligation to pursue national policies that are designed to promote equality of opportunity and treatment in the field of employment, with a view to eliminating any discrimination. Apart from these Conventions, it is

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42 In terms of section 231(2) of the Constitution, an international agreement is binding on the Republic of South Africa once it has been ratified.

43 South Africa has ratified the following Conventions dealing with discrimination: The African Charter on Human and Peoples' Rights, 1981; the Convention on the Elimination of All Forms of Discrimination Against Women, 1979; the International Covenant on Civil and Political Rights, 1966; the International Convention on the Elimination of All Forms of Racial Discrimination, 1966; and ILO Convention 111, Discrimination (Employment and Occupation) Convention, 1958.

South Africa has signed, but not ratified, the Convention on the Political Rights of Women, 1953 and the International Covenant on Economic, Social and Cultural Rights, 1966.

noteworthy that item 4 of the SADC Code of Conduct on HIV/AIDS and Employment,[44] formally adopted by the SADC Council of Ministers in September 1997, lays down that HIV status "should not be a factor in job status, promotion or transfer." It also discourages pre-employment testing for HIV and requires that there should be no compulsory workplace testing for HIV.

[52] Where a person has been wrongfully denied employment, the fullest redress obtainable is instatement.[45] Instatement serves an important constitutional objective. It redresses the wrong suffered, and thus eliminates the effect of the unfair discrimination. It sends a message that under our Constitution discrimination will not be tolerated and thus ensures future compliance. In the end, it vindicates the Constitution and enhances our faith in it. It restores the human dignity of the person who has been discriminated against, achieves equality of employment opportunities and removes the barriers that have operated in the past in favour of certain groups, and in the process advances human rights and freedoms for all. All these are founding values in our Constitution.

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44 In terms of the Code of Conduct on HIV/AIDS and Employment in the Southern African Development Community (SADC), 1997.

45 In the context of an employee who is unfairly dismissed, Nicholas AJA expressed the rule as follows:

> "Where an employee is unfairly dismissed he suffers a wrong. Fairness and justice require that such wrong should be redressed. The [Labour Relations Act, 28 of 1956] provides that the redress may consist of reinstatement, compensation or otherwise. The fullest redress obtainable is provided by the restoration of the *status quo ante*. It follows that it is incumbent on the Court when deciding what remedy is appropriate to consider whether, in the light of all the proved circumstances, there is reason to refuse reinstatement."

National Union of Metalworkers of South Africa and Others v Henred Fruehauf Trailers (Pty) Ltd 1995 (4) SA 456 (A) at 462I-463A. In terms of section 193(2) of the 1995 Labour Relations Act (Act 66 of 1995), reinstatement is the primary remedy for a dismissal that is substantively unfair.

[53] In these circumstances, instatement should be denied only in circumstances where considerations of fairness and justice, for example, dictate otherwise. There may well be other considerations too that make instatement inappropriate, such as where it would not be practical to give effect to it.

[54] Here, there was no suggestion that it would either be unfair or unjust were SAA to be ordered to employ the appellant as a cabin attendant. Nor was it suggested that it would not be practical to do so. On the contrary, Mr Cohen assured us that it would not be impractical to employ the appellant as a cabin attendant. Nor does the medical condition of the appellant render him unsuitable for employment as a cabin attendant.[46] The appellant is currently receiving combination therapy, which should result in the complete suppression of the replication of the virus and lead to a marked improvement in his CD4+ count.[47] On 19 June 2000 he was medically examined and his blood sample was taken. He was found to be asymptomatic, and his CD4+ count was 469 cells per microlitre of blood. He describes his prognosis as excellent. He is able to be vaccinated against yellow fever, and is not prone to opportunistic infections.[48]

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46 When the appeal was called, Mr Trengove asked for leave to hand in an affidavit deposed to by the appellant, setting out his present HIV status, medical condition and the treatment he is receiving. Mr Cohen did not object and it was admitted.

47 See items 10 and 11 of the expert minute at para 13 above.

48 A person may not be effectively vaccinated against yellow fever when his or her CD4+ count drops below 350 cells per microlitre of blood, and only becomes prone to opportunistic infections when his or her CD4+ count drops to below 300 cells per microlitre of blood. See above para 11.

[55] It was contended that an order of instatement would open the floodgates for other people who are living with HIV and who were previously denied employment by SAA. However, what the appropriate relief would be in this case cannot be made to depend on other cases that may or may not be instituted. What constitutes appropriate relief depends on the facts of each case. The relief to be granted in those other cases will have to be determined in the light of their facts.

[56] In the light of the aforegoing, the appropriate order is one of instatement.

[57] Mr Trengove submitted that the order for the employment of the appellant should be effective from the date of the judgment of the High Court. Whether it is appropriate to make such an order in this case is a matter to which I now turn.

(c) The effective date of the order

[58] As a general matter, the question whether instatement is the appropriate relief must be determined as at the time when the matter came before the High Court. The denial of instatement by the High Court should not be allowed to prejudice the appellant. Indeed, it would be unfair to a litigant to fail to provide him or her with the full relief that the trial court should have given, where the trial court has wrongly refused such relief. Albeit in a different context, Goldstone JA expressed the principle as

follows:

> "Whether or not reinstatement is the appropriate relief, in my opinion, must be judged as at the time the matter came before the industrial court. If at that time it was appropriate, it would be unjust and illogical to allow delays caused by unsuccessful appeals to the Labour Appeal Court and to this Court to render reinstatement inappropriate. Where an order for reinstatement has been granted by the industrial court, an employer who appeals from such an order knowingly runs the risk of any prejudice which may be the consequence of delaying the implementation of the order."[49]

However, the ultimate consideration is whether it would be appropriate to backdate the order of instatement to the date of the judgment of the trial court.

[59] In this case there is, in my view, an insuperable difficulty besetting the appellant's path to that relief. Where, as here, the employee seeks an order backdating the order of instatement to the date of the High Court order, it is, in my view, incumbent upon that employee both to warn the employer that he or she intends to request such an order on appeal and to place before the court such information as may be relevant to the consideration of such relief. This is necessary so as to inform the employer of the case it will be required to meet on appeal in the event that it fails on the merits. Here the appellant did not seek such relief in his notice and grounds of appeal. As a result, SAA came to this Court unprepared to meet a claim for the backdating of the order of instatement to the date of the High Court

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[49] *Performing Arts Council of the Transvaal v Paper Printing Wood and Allied Workers Union and Others* 1994 (2) SA 204 (A) at 219H-I.

judgment.

[60] There is a further consideration that militates against granting such relief. The backdating of an order for instatement raises a number of difficult legal questions relating to the form such relief should take. These questions were not argued. It is not possible physically to instate the appellant retrospectively to the date of the judgment of the High Court. Whether retrospectivity of instatement can be expressed by the ordering of back pay and the provision of benefits or some other relief such as damages are matters that were not debated in this Court. Although Mr Trengove informed us from the bar that the appellant has been in employment since the date of the judgment of the High Court, this is not enough. We do not have any information as to what he has earned. Nor do we have any information as to what he would have earned as a cabin attendant. More importantly, SAA has not had the opportunity of investigating these facts. In these circumstances it would be unfair to SAA to make an order backdating the instatement to the date of judgment in the High Court.

[61] I conclude, therefore, that the appropriate relief in the circumstances of this case is an order directing SAA to employ the appellant as a cabin attendant with effect from the date of the order of this Court. It now remains to consider the question of costs.

Costs

[62] The litigation resulting in this appeal was unnecessary, SAA effectively told us on appeal. It is a result, it also told us, of its true policy having been applied incorrectly to the appellant. There was, therefore, nothing for SAA to defend either in the High Court or in this Court. It must, therefore, bear the costs of the appellant in both courts. In the High Court, the appellant sought the costs of two counsel, and he is entitled to such costs. In this Court, Mr Trengove sought the costs of two counsel, but limited the costs of the out-of-town counsel to reimbursements and actual costs incurred.[50]

[63] The *amicus* also asked for an order that SAA pay its costs. An *amicus curiae* assists the court by furnishing information or argument regarding questions of law or fact. An *amicus* is not a party to litigation, but believes that the court's decision may affect its interest. The *amicus* differs from an intervening party, who has a direct interest in the outcome of the litigation and is therefore permitted to participate as a party to the matter. An *amicus* joins proceedings, as its name suggests, as a friend of the court. It is unlike a party to litigation who is forced into the litigation and thus compelled to incur costs. It joins in the proceedings to assist the court because of its expertise on or interest in the matter before the court. It chooses the side it wishes to join, unless requested by the court to urge a particular position. An *amicus*, regardless of the side it joins, is neither a loser nor a winner and is generally not entitled to be awarded costs. Whether there may be circumstances calling for departure from this rule is not necessary to decide in this case. Suffice it to say that in the present case no such departure is warranted.

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50 *Komani NO v Bantu Affairs Administration Board, Peninsula Area* 1980 (4) SA 448 (A) at 473B-C.

Order

[64] In the result, the following order is made:

(a) The appeal is upheld.

(b) The order of the High Court is set aside.

(c) The decision of SAA not to employ Mr Jacques Charl Hoffmann as a cabin attendant is set aside.

(d) SAA is ordered forthwith to offer to employ Mr Jacques Charl Hoffmann as a cabin attendant; provided that should Mr Hoffmann fail to accept the offer within thirty days of the date of the offer, this order shall lapse.

(e) SAA is ordered to pay the appellant's costs as follows:

(i) in the High Court, costs consequent upon the employment of two counsel; and

(ii) in this Court, costs consequent upon the employment of two counsel, the costs of the second counsel to be limited to the out of pocket expenses actually incurred.

Chaskalson P, Langa DP, Ackermann J, Goldstone J, Kriegler J, Mokgoro J, O'Regan J, Sachs J, Yacoob J and Madlanga AJ concur in the judgment of Ngcobo J.

For the appellant:	WM Trengove SC, A Katz and Z Camroodien instructed by the Legal Resources Centre, Cape Town.
For the respondent:	CZ Cohen SC and LT Sibeko instructed by Nalane Manaka Attorneys.
For the *amicus curiae*:	KS Tip SC and FA Boda instructed by the Centre for Applied Legal Studies.