

# The dearth of the rights of HIV-positive employees in Zambia: A case comment on *Stanley Kangaibe and Another v Attorney-General*

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## Summary

*Recent years have seen increased human rights litigation in Southern Africa in the areas of HIV and AIDS. Unfortunately, there has been virtually no litigation around the many human rights issues involving HIV and AIDS in Zambia. This has resulted in a virtual absence of relevant domestic jurisprudence around issues involving human rights and HIV and AIDS. The contribution comments on the first-ever successfully-litigated case in this area in Zambia. The case of Kangaibe v Attorney-General necessitates commentary because for the first time a Zambian court added its voice to the chorus of recent obiter dicta from several jurisdictions in the African region which declared that HIV testing without consent is a violation of human rights as set out in international human rights treaties and other normative instruments. The article argues that the Kangaibe case has contributed to the expanding frontiers of human rights litigation in Zambia, particularly as far as HIV and AIDS are concerned, and that it was the perfect opportunity for the Zambian courts to develop and refine problems related to the applicability of local and foreign authorities. Regrettably, the court failed to exploit fully these opportunities. The article shows that, while some aspects of the approach by the court in Kangaibe are encouraging in principle, on balance the protection of the rights of people living with HIV and AIDS in an employment setting remains contingent on an innovative and activist approach by a trial court. Obstacles faced by practitioners in such cases remain considerable.*

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## 1 Introduction

On 27 May 2010, the High Court of Zambia passed what is, by all accounts, a landmark judgment on an issue that has dominated the discourse on employees' human rights and the HIV question in Zambia, a country where HIV and AIDS are stigmatised. For the first time, the High Court had occasion in the case of *Stanley Kangaibe and Charles Chookole v Attorney-General*<sup>1</sup> to address the important question of whether the mandatory testing of an employee for HIV without his or her prior consent violated that employee's human rights. Also requested of the Court in that case was to determine and declare that the termination of an employee's contract of employment on account of his or her HIV status was a violation of the employee's human rights guaranteed by the Constitution of Zambia and international human rights instruments. The Court held that a decision by the Zambian Air Force to subject the two petitioners, who were then serving officers in the Zambian Air Force, to mandatory HIV testing without their informed consent, was a blatant violation of their rights to privacy and to protection from inhuman and degrading treatment.

Much as it is regrettable that the decision of the High Court in that case was not appealed against so as to afford the highest court in the land – the Supreme Court – that rare opportunity to pronounce itself on the all too important issue of HIV testing, the judgment nonetheless represents a giant step in the promotion and protection of the rights of people living with HIV and AIDS. Though an appeal would, beyond question, have enhanced the precedential value of that decision on a matter which has hitherto been timidly litigated in Zambia, the judgment is, nevertheless, remarkable for its pioneering role in the judicial treatment of the right to privacy in the context of HIV and AIDS.

This case is also significant because it raised many other important issues which are not often accorded a place in human rights litigation in the country. Apart from the question of the application of international human rights instruments and standards in Zambia, the Court pronounced itself on the efficacy of the Directive Principles of State Policy which lists economic, social and cultural rights as non-justiciable.<sup>2</sup>

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1 (2009) HL/86 (unreported) decided by Justice Elizabeth Muyovwe of the Livingstone High Court. At the time of writing this comment, the judge had been elevated to the Supreme Court of Zambia.

2 The Constitution of Zambia, ch 1 of the Laws of Zambia sets out the Directive Principles of State Policy in part IX. According to art 110, these principles shall guide the executive, the legislature and the judiciary in the development of national policies, the implementation of those policies, the enactment of laws and the application of the Constitution and other laws. According to art 111, these Principles are not justiciable.

This article argues that the decision of the High Court of Zambia in the case of *Stanley Kangaïpe and Charles Chookole v Attorney-General* demonstrates that the rights of HIV-positive persons to privacy and against degrading treatment through mandatory testing are not vague or incapable of judicial enforcement. In this regard, the decision charts new pathways in conceptualising arguments around human rights litigation, particularly those of HIV-positive persons. It also illustrates how the Constitution, local and foreign precedents, as well as international conventions and other local and international standards of a soft law status, could in fact prove useful if interpreted generously in ensuring the effective protection of the rights of persons living with HIV and AIDS.

Novel and commendable as the decision is, it is not without shortcomings. It raises somewhat disquieting issues in the way it was rationalised. The biggest weakness of this decision lies in its general failure to state clearly the rights of HIV-positive employees whose employment is terminated on account of unsatisfactory performance brought about by prolonged ill health. The Court failed to make a clear link between the termination of employment of an HIV-positive employee based on poor performance and the HIV status of the employee. A further omission lies in the judgment's silence on the weight to be placed on non-traditional legal authorities, such as Directive Principles of State Policy, employment manuals, guidelines and policy documents.

This contribution is not a negative criticism of the decision which was, by and large, laudable, but is rather a commentary on the somewhat conservative approach adopted by the Court in that matter and points out gaps that could have been sealed in favour of HIV-positive employees.

## 2 Facts and arguments

To appreciate the issues that fell to be determined in the case, one inevitably has to understand the salient facts which gave rise to the petition. The two petitioners were former employees of the Zambian Air Force. They were both discharged on medical grounds following their testing HIV positive (the test was administered without their knowledge and consent). The circumstances leading up to the first petitioner's discharge from the Air Force started when, in 2001, he saw the Air Force resident doctor complaining of a swollen right leg. He was referred to a general hospital where he was examined and given medication. A month later the resident doctor informed him that he had *kaposis sarcoma*. Treatment for this disease was commenced. Later the same year, he was ordered to appear before a medical board constituted by the Zambian Air Force. Later the following year, the first petitioner's name appeared on a routine station order, signed by the

station commander, as an officer required to submit to a compulsory medical check-up. It was a punishable infraction to ignore the station commander's directives. He attended the clinic for the check-up. Specimens of, among other things, his blood, were taken, although he was not informed of the nature of the tests to be conducted before or after the samples were taken. In particular, no warning or intimation was made that an HIV test would be conducted. Two days later, the resident doctor called him and prescribed new drugs, namely, Lamivudine, Stavudine and Nevirapine, without informing him why he was giving him this new medication. He was not advised that he had tested positive for HIV, nor was he informed that the medication he was given was in fact for the treatment for HIV. He felt much better with the new medication. Two months later, he discontinued the medication even though he had not run out of it. He claimed that this was due to insufficiency of information on a failure to take these drugs. In October 2002 he was informed of the recommendation of the medical board that he was to be discharged on medical grounds.

In 2005 the first petitioner's wife fell ill and remained so for a long time. He went to a different medical facility with her. They were advised to undergo voluntary counselling and HIV testing (VCT). The results showed that both were HIV positive and they were put on anti-retroviral (ARV) therapy. This, however, was not before they were advised on the need to stick to treatment and the consequences of failing to adhere to the treatment regime. It was after this that the first petitioner discovered, much to his shock and annoyance, that the medication prescribed after VCT was the same as that which the resident doctor had prescribed for him some three years previously.

Like the first petitioner, the second petitioner developed problems with his right leg and was treated with pain killers and antibiotics. He had serious medical challenges which saw him admitted to a hospital for pulmonary tuberculosis. He had blocked nostrils and nearly had his right leg amputated. He later worked normally and underwent re-engagement medical examinations in 1996 and was found fit to continue in full-time service. He undertook further training and served in diverse capacities and places. In 2001 he appeared before a medical board, during which he had to give a written statement of his medical history regarding the swelling of his leg and the fungal infections he had. After this, he continued to work normally. In 2002 he had to attend a compulsory medical check-up at the instance of the station commander of the Zambian Air Force through a routine station order that was issued. His blood samples, among others, were taken and, without his knowledge or consent, tested. No counselling before or after the testing of the blood samples was done. Later, he was called and told that they were changing the medication which he had been receiving for his leg and was being put on a new drug – Nevirapine, Stavudine and Lamivudine. Though he did not know that he had been

put on ARV therapy, the second petitioner responded very well to the treatment and his condition of health improved considerably.

In October 2002 he received a letter discharging him from the Air Force on medical grounds. This was barely two weeks after the station commander congratulated him for outstanding performance and conferred on him the substantive rank of sergeant. He subsequently trained as an automotive mechanic and was able to find employment. He continued to attend the Zambian Air Force facilities for medical attention. He came to know of his HIV status in 2003 when the resident doctor referred him to the Sepo Centre, a facility which assisted patients on ARV therapy with food supplements. The referral note to the Centre read, *inter alia*, 'Our diagnosis – known patient with immunosuppression on ARVs. Pls assist him as necessary'. Upon presenting the referral note, the second petitioner was counselled before he gave his blood sample and after testing he was advised of his HIV status and the consequences of failing to adhere to the ARV regime.

On the basis of the foregoing facts, the two petitioners brought the action against their employer, the Zambian Air Force, sued through the respondent.<sup>3</sup> They asked the High Court to determine and declare that the decision to subject them to a mandatory medical test and examination, including HIV testing, without their express or informed consent and without pre-testing counselling:

- (i) was *ultra vires* article 11 of the Zambian Constitution which guarantees the right to life, liberty and security of the person;
- (ii) violated the petitioners' right to protection from inhuman and degrading treatment guaranteed under article 15 of the Constitution;
- (iii) violated the petitioners' right to privacy guaranteed under article 17 of the Constitution; and
- (iv) violated the petitioners' right to equal and adequate educational opportunities in all levels as provided for under articles 112(d) and (e) of the Constitution.

It should be noted that article 112 of the Constitution of Zambia is part of the Directive Principles of State Policy. The petitioners' claim under paragraph (iv) was, therefore, as novel as it was brave. The petitioners went further to ask the Court to also find that the decision to discharge them on medical grounds and/or exclude them on account of their HIV status, premised as it was on Regulation 9(3) of the Defence Force (Regular Force) (Enlistment and Service) Regulations, Third Schedule Serial (vxi), was *ultra vires* the Constitution of Zambia, and international human rights instruments to which Zambia was party. It was argued in specific terms that, apart from violating the identified

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<sup>3</sup> Pursuant to sec 12 of the of the State Proceedings Act, ch 71 Laws of Zambia.

provisions of the Zambian Constitution, the decision to subject the petitioners to mandatory HIV testing was contrary to article 3 of the Universal Declaration of Human Rights (Universal Declaration) relating to the right to life, liberty and security of person; article 6 of the African Charter on Human and Peoples' Rights (African Charter) guaranteeing the right to liberty and security of person; and article 6 of the International Covenant on Civil and Political Rights (ICCPR). It was contended that the discharge of the two petitioners, on a proper construction of the facts, was on the basis of their HIV status and that this decision violated articles 11(a), 21(1) and (2) of the Constitution, and further that Regulation 9(3) of the Defence Force (Regular Force) (Enlistment and Service) Regulations, Third Schedule Serial (xvi) of the Defence Act was *ultra vires* the Constitution of Zambia and the provisions of international law.

In arguing in support of the petitioners' case, an attempt was made to persuade the court to apply essentially five kinds of principles and legal authorities, namely (i) domestic legislation and case law; (ii) judicial decisions by foreign courts and tribunals; (iii) provisions of local standards contained in documents such as policy statements, employment standards and guidelines; (iv) international treaty standards and conventions to which Zambia is a party; and (v) non-treaty standards making up soft law in the form of declarations and guidelines.

Of these sources of law, domestic legislation and case law present no difficulty of applicability since their value as legal authority and precedent is well acknowledged. It is the treatment of the other sources of law that raises some concern, especially in as far as the weight to be placed on each of them is concerned. In the English common law tradition such as Zambia inherited, the manner in which aspects of relevant legal standards apply in determining an issue before a court of law is significant. In particular, the distinction between primary and secondary sources, what is binding authority and what is merely persuasive, is critical. In this particular case, counsel on both sides did not appear to have made a deliberate effort to place the authorities cited in support of the arguments in any particular hierarchical order. The presiding judge did not appear to be unduly concerned with the approach adopted by counsel either. In fact, the Court proceeded as if equal weight could be placed on the different sources of law applicable to the issues before it. In my view, this was unfortunate as it does nothing to enhance the concept of judicial precedent.

As far as domestic legislation and case law are concerned, the petitioners claimed that a number of their constitutional rights had been violated by subjecting them to a mandatory medical examination, including an HIV test. These rights are:

- (a) those set out in article 11(a), namely, the right to liberty, security of the person and to protection of the law;

- (b) that set out in article 13, namely, the right to personal liberty;
- (c) that set out in set out in article 15, namely, the right to protection from inhuman and degrading treatment; and
- (d) that set out in article 17, namely, the right to privacy.

In support of their position, the case of *Akashambatwa Mbikusita-Lewanika v Frederick Chiluba*<sup>4</sup> was cited. In that case the Zambian High Court declined to order the respondent to be subjected to a DNA test without his consent to determine his disputed paternity. The reason for this refusal was basically that the respondent's rights to liberty and security of the person would be violated. The High Court in that case, as quoted by the High Court in *Kangaïpe*, stated:

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'état* but by gradual erosion, and often 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 provisions of s 21(1) of the 1969 Act.'

As far as mandatory testing is concerned, therefore, the petitioners' advocates were spot-on. What are primary sources of applicable law were applied by the Court in accepting that mandatory testing violated the right to privacy as guaranteed in the Constitution. The Court accepted the reasoning in the *Chiluba case* as well as article 17 of the Constitution guaranteeing privacy.

The petitioners further argued that mandatory testing without consent violated article 6 of the African Charter, article 3 of the Universal Declaration and articles 6 and 9 of ICCPR, all of which dealt with the right to life, liberty and security of the person. Counsel then cited the Botswana case of *Diau v Botswana Building Society*,<sup>5</sup> which involved a woman who declined to undergo an HIV test. The Court in that case was equally emphatic on the need for consent to medical examination when it held:

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

<sup>4</sup> (1998) ZR 79.

<sup>5</sup> (2003) 2 BLR 409.

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.

It is the manner in which the High Court treated the latter additional arguments anchored on non-Zambian authorities that should perhaps attract academic and judicial interest. The Court accepted all these authorities stating in the process:

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 law is worth considering.

It is unclear whether the Court in that case meant that foreign decisions were applicable and carried the same force as local case law. What is clear from the Court's statement, though, is that the foreign decisions and international instruments were to be used, considered and taken into account since 'Zambian courts are not operating in isolation'. In my view, this was no doubt an overbroad statement by the High Court if the words 'consider and take into account' are understood, as they suggest, to have been used as synonymous with 'apply'. It was overbroad in at least four senses. Firstly, the High Court is not at large to take into account provisions of international instruments and decided cases in other countries. The Court will most definitely not come anywhere close to applying an international instrument to which Zambia is not a party unless, of course, it can be demonstrated that it is *jus cogens*. Secondly, in applying any international instrument, the Court will, or at least should, have regard to the relative weight to be attached to the instrument in question. The Universal Declaration, which is non-binding and was meant merely to be a common standard of achievement,<sup>6</sup> will not be given the same weight as authority as a ratified treaty which, in the order of things, is legally binding on a ratifying state. Thirdly, any consideration of an international instrument in the domestic setting should take into account the fact that Zambia is a dualist and not a monist state,<sup>7</sup> so that no consideration of an international instrument will imply direct application of the instrument bypassing the domestication step. Fourthly, the Court will not be at liberty to apply an international instrument on an issue adequately covered by domestic legislation.

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6 The Universal Declaration, adopted in December 1948, is considered to be an 'authoritative interpretation of the Charter of the United Nations' and 'the common standard to which the legislation of all the member states of the United Nations should aspire'; LB Sohn 'The new international law: Protection of the rights of individuals rather than states' (1982) 32 *American University Law Review* 10 15 (citing Prof Cassin, one of the principal authors of the Universal Declaration).

7 Monism in international law denotes those states in whose systems international law by domestication or otherwise transforms into national law. The act of ratifying an international treaty immediately incorporates that international law into national law. In dualist states, national implementing legislation is necessary.

As regards decisions of non-Zambian courts, the High Court's statement should likewise have been punctuated by caveats. Firstly, the Zambian courts follow a clearly-defined hierarchy in terms of binding precedents. Foreign judgments will at best be of persuasive value only and the Court in that case should have clearly stated so. Secondly, the extent of the persuasive force of these judgments will invariably depend on the level of the court that decided the particular case and, thirdly, such cases will probably not be considered if they conflict with local decisions made by a court of equal or comparable jurisdiction. The High Court in the *Kangaipe* case quite appropriately quoted an instructive passage on this issue from the Zambian Supreme Court judgment in *Michael Sata v The Post Newspapers Limited*,<sup>8</sup> where it was stated:

I make reference to 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 legislation but also because the opinions of other senior courts in various jurisdictions dealing with similar problems tend to have a persuasive value. At the very least, consideration of such decisions may help us 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.

Having accepted both international treaty law as set out in ICCPR as well as the African Charter, and the standards in the Universal Declaration without distinction as to the weight attached to each, and having also accepted to apply foreign case law, the Court proceeded to refer to a number of foreign cases, including *Airedale NHS Trust v Bland*<sup>9</sup> and *Chester v Afshar*.<sup>10</sup> The Court also relied on the New Zealand case of *Auckland Area Health Board v AG*,<sup>11</sup> in which the court quoted from the English decision of *Re A (Children) (Conjoined twins: surgical separation)*<sup>12</sup> regarding the significance of the right to privacy as a human right. The judge then reproduced article 4 of the African Charter dealing with the right to respect for life and integrity, and article 5 dealing with the right to respect of the dignity inherent in human beings and the right against inhuman and degrading treatment and punishment. It then referred to ICCPR which prohibits inhuman and degrading treatment, and article 17 of the Zambian Constitution which protects one against the search of a person of his person or property without his consent. On the basis of all these authorities, the Court concluded as follows:

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8 [1995] ZMHC 1.

9 (1993) 1 All ER 821.

10 (2004) 4 All ER 587.

11 (1993) 1 NZLR 235.

12 (2000) 4 All ER 961.

I find that the petitioners' right to the protection from inhuman and degrading treatment under article 15 and 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.

As observed earlier, the Court applied horizontally both local and international authorities and did not appear concerned about the question of the weight to be attached to each of these categories of law. Given that the authorities cited appeared unanimous on the point, the judge's approach could largely be regarded as harmless as the overall picture would not change in any case.

On the issue whether the putting of the petitioners on ARV treatment without receiving the necessary adherence counselling violated their human rights, the petitioners argued that this, again, was a violation of their rights under the Constitution and international human rights instruments. They argued that the minimum standards and requirements for voluntary counselling and testing had not been met before they were placed on ARVs. In this respect, they cited the South African case of *C v Minister of Correctional Services*,<sup>13</sup> where the Court held that informed consent demanded pre- and post-testing counselling. Failure to provide such counselling, they submitted, violated their rights to protection against liberty and security of the person and the right to protection from inhuman and degrading treatment. Providing the petitioners with ARVs 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 as article 6 of ICCPR.

The petitioners also claimed that they had 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.<sup>14</sup>

The Court dismissed all the arguments premised on this ground. Firstly, on a technical construction of the evidence before it, as is explained below, the Court found that pre-testing counselling had been given to the petitioners:

On this point, I find that this is not true ... and I cannot imagine that the very person who decided to save their lives would merely prescribe medication without giving the necessary counselling ... The submission

13 1996 4 SA 292 (T).

14 Art 112(d) of the Constitution reads: 'The following Directives shall be the Principles of State Policy for the purpose of this part: ... (d) The state shall endeavour to provide clean and safe water, adequate medical and health facilities and decent shelter for all persons and take measures to constantly improve such facilities and amenities.'

by the petitioners that they were not given adherence counselling is not tenable under the circumstances.

It is obvious from this statement that the Court did not make a finding of fact on the evidence before it. Rather, it made a deduction that if medication was prescribed and given to the petitioners, then it followed that counselling was equally offered. If indeed there was evidence to justify the finding, the Court would have said so. The only evidence available to the Court was that of the petitioners which the Court clearly disbelieved.

Having found as it did that pre-testing counselling had been given, the important question whether providing a patient with ARVs without prior information did or did not violate the right of the patient was rendered irrelevant and was not considered by the Court at all. Any finding by the Court on this issue would doubtlessly have been most useful, albeit such finding would be only *obiter*. What the Court did, nonetheless, was to selectively and gratuitously deal with the one limb of the contention premised on the same argument, namely, whether a failure to inform the petitioners that they were being placed on ARVs was a violation of article 112(d) of the Zambian Constitution; namely, that it violated the petitioners' right to adequate medical and health facilities and equal and adequate educational opportunities in all fields and at all levels.

The petitioners' arguments around this issue were not disingenuous. They conceded that article 111 of the Constitution made the Directive Principles of State Policy, including article 112, not legally enforceable by themselves, but that they were not relied upon 'by themselves' but in conjunction with other provisions, namely, provisions in international human rights instruments, and that this made them enforceable. Without much hesitation, the Court dismissed the argument merely because

[t]he petitioners have shown no evidence to support the argument that their rights under article 112 were infringed. The Court is not in a position to make a declaration which is not supported by evidence. This part of the claim has no merit and it is must fail.

Having assumed or found as it did that pre-testing counselling had been given to the petitioners before they were placed on ARVs, the Court had the choice of not addressing the issue whether article 112 had been violated at all as it already determined that the petitioners were counselled before they were put on ARVs. Rather than leave this issue altogether, the Court proceeded to consider, rather redundantly, the part of the same argument premised on article 112 of the Constitution. The moment the Court chose to deal with that limb of the argument, it should have given appropriate guidance as to whether the Directive Principles of State Policy could be enforced at all and, if so, under what circumstances. As it is, a less than clear insinuation was made through the judgment that if evidence were available the Directive Principles of

State Policy would be infringed, and the Court would then have been inclined to hold that the petitioners' rights had been violated.

The petitioners also asked the Court to determine and declare that the respondent's decision to discharge and/or exclude the petitioners on account of their HIV status on medical grounds premised on section 9(3) of the Defence Force (Regular Force) (Establishment and Service) Regulations, Third Schedule Serial (xvi) was *ultra vires* the Constitution of Zambia, in particular article 11 and article 21, which guarantee the right to freely associate, and article 23, which guarantees the right against discrimination on account of social and other status including HIV status. Furthermore, it was argued that article 112(c) of the Constitution had been violated and that this infringed their right as disadvantaged persons to social benefits and amenities as are suitable to their needs. The argument was that, because the Regulations sanctioned the taking of action which violated constitutional provisions and provisions of the Universal Declaration, the African Charter and ICCPR, the Regulations were *ultra vires* these protective provisions and therefore null and void, and accordingly that action taken pursuant to those Regulations was equally null and void.

Again the Court found on the facts of the case that the discharge of the petitioners was not on the basis of their HIV status; rather it was on the basis of their prolonged ill health which stretched back to the time before they were tested for HIV. Furthermore, the Medical Board which recommended their discharge was held before they were tested for HIV. According to the Court, the discharge of the petitioners from the Air Force was due to their being 'medically unfit and likely to remain so permanently' in accordance with the Regulations made pursuant to the Defence Act.

By making this finding, the Court technically justified its avoidance altogether of the question whether discharging an HIV-positive employee on medical grounds amounts to a violation of article 11 (the right to life, liberty and protection of the law), article 21 (freedom of association) and article 23 (the right against discrimination). Perhaps more curiously, the Court opted to use a standard of unfitness employed for limited and specific purposes in the Zambian Air Force Manual for Assessment of Medical Fitness in which 'permanently unfit', according to the respondent, did not only refer to HIV-induced inability. The Court rejected the suggestion by the petitioners and the opinion evidence of the petitioners' witness that disability should be assessed objectively to mean the loss of a normal function of a body part either temporarily or permanently. The Court preferred instead to take the definition of disability as used in the Manual and the Regulations applicable to the Zambian Air Force only and stated:

The ZAF Manual has its own definition of what can be termed 'temporary or permanent'. No doubt every institution has its own standard of assessment and in this case Zambia Air Force has its laid-down guidelines as to the way assessments are carried ... 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.

The consequences of the Court's decision to adopt a subjective standard as set out in the *Zambian Air Force Manual* and the *Regulations*, rather than an objective one which the petitioners advocated for, struck a fatal blow in the protection of the rights of HIV-positive employees against discharge on medical grounds of physical unfitness, where reference to their HIV status is not made in discharging them. Using the reasoning of the Court in this case, it is conceivable that an employer who discharges an HIV-positive employee on account of physical unfitness to perform his duties would be justified to do so if he avoids reference to the employee's HIV status. This contrasts sharply with the finding of the Industrial Court of Botswana in respect of a similarly-circumstanced employee in *Lemo v Northern Air Maintenance (Pty) Limited*,<sup>15</sup> which is considered in some detail below. Of course, no suggestion is made here that the Court in *Kangaipe* should have followed the decision of the Botswana Industrial Court. The point is one of judicial activism, or rather the lack of it. The circumstances here presented a propitious opportunity for judicial activism in favour of the rights of HIV-positive employees. That opportunity went begging. Perhaps more importantly, the provisions of the *Zambian Air Force Manual* and the *Regulations* appeared to have been unduly heavily weighted by the Court as applicable law to the situation before it.

The Court concluded that the *Defence Force (Regular Force) (Enlistment and Service) Regulations*, which permit the air commander to discharge or exclude military personnel on medical grounds, was not unconstitutional nor did it violate international instruments. The reasoning of the Court in this regard was not entirely lucid and appeared to have been mired in semantics and rhetoric. In dismissing the argument that the regulations were *ultra vires* the Constitution and international instruments, the Court stated:

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 the action and not necessarily the disease.

It is unclear what evidence the Court expected the petitioners to submit on a matter hinging purely on construction. Paradoxically, in the case of the petitioners who went to great lengths to show that, although they were HIV positive, they were fit for some forms of work within the Air Force, they had their discharge justified by the reasoning of the Court which should in fact have helped them retain their jobs.

Another argument preferred by the petitioners was premised on purely non-legally-binding documents. It was contended that the

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<sup>15</sup> IC 166 of 2004, Botswana (Industrial Court).

decision of the Air Force in this case was contrary to the spirit and intent of the stated Government Policy and Guidelines on HIV/AIDS in so far as it related to treatment, attitude, and accommodation of servicemen who have been diagnosed with the virus that causes AIDS. In addressing this argument, the Court reiterated the point that the petitioners had not been discharged on the basis of their HIV status. Rather than leave it there, the Court went on to hold that the *Zambian Defence Force HIV/AIDS Policy of January 2008* was inapplicable because it only came into effect after the petitioners had been discharged:

In my view it has no bearing on this petition. The policy does not have 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.

Whether the Court meant that, but for the non-retrospective effect of the policy, it would have been applied to determine the issues before it, is not clear. Assuming, as one is inclined to do, that the natural inference to be drawn from the Court's statement just quoted is that if the policy were passed before the events giving rise to this grievance, then it would apply, one would then be justified to ask whether this policy document would occupy a higher status in terms of applicability than provisions of the *Directive Principles of State Policy* as set out in the Constitution, which the Court found, *obiter*, were not applicable.

### 3 Whither judicial activism?

The petitioners advanced the argument that they were entitled to continue working in the *Zambian Air Force* in their respective ranks and sections or departments. Alternatively they suggested that they could be redeployed to appropriate or alternative available sections or departments in the military establishment suitable to their status until such time as they would have become unable to work due to immune-suppression. In response, while acknowledging that there was provision in the *Regulations for the transfer or redeployment of officers from one department to another*, the Court maintained that this provision did not apply to soldiers who were discharged for being permanently medically unfit for military service.

Here, no doubt, the judge saw her role as limited merely to the application unreservedly of laws applicable to Zambia as she understood them, including, in this case, manuals and guidelines. This is judicial restraint typical of conservative judges. Going by the manner in which the Court approached the arguments, the judge in this particular case may well have been conservative. A conservationist

approach to judicial decision making is nowhere better illustrated than in *S v Adams*,<sup>16</sup> where the judge remarked:<sup>17</sup>

An Act of Parliament creates law but not necessarily equity. As a judge in a court of law I am obliged to give effect to the provisions of an Act of Parliament. Speaking for myself and if I were sitting as a court of equity, I would have come to the assistance of the appellant. Unfortunately, and on an intellectual honest approach, I am compelled to conclude that the appeal must fail.

Referring to judges who take the approach of judicial restraint, Dugard laconically observed:<sup>18</sup>

[T]he sole task of the court in interpreting a statute is to discover the legislature's intention through rules of interpretation. Its function is merely seen as mechanical ... The intention of the legislature is always discoverable, provided the right rules of interpretation are used in the right manner. The judge is denied any creative power in his mechanical search for the legislature's intention, and desirable policy considerations, based on traditional legal values, are viewed as irrelevant. The approach accords with the Blackstonian theory that judges are authorised to 'find' the law only, not to 'make' it.

Lawyers oriented in human rights protection and promotion, like liberal judges are, of course, opposed to judicial restraint and conservatism which they view as retrogressive. The judicial officer should not be tied to the strict letter of a legislative provision where matters canvassed before him concern important questions of human rights.<sup>19</sup> This is particularly so where the law is manifestly unjust. The judge is urged to approach the provision purposively to place it in comport with the recognised human rights norms and standards.<sup>20</sup> It is only then that the law can remain relevant to new challenges. This appears to be the modern trend in dealing with issues such as HIV and AIDS.

A number of cases from different jurisdictions in the African region illustrate the general approach courts are taking in clarifying HIV legislation and legal standards affecting this subject. The approach ensures that legislative gaps do not further harm vulnerable groups afflicted by HIV/AIDS and reflects judicial activism *par excellence*. In

16 1979 4 SA 793 (T).

17 *Adams* (n 16 above) 801.

18 J Dugard 'The judicial process, positivism and civil liberty' (1971) 88 *South African Law Journal* 181, as quoted in D Kley & F Viljoen (eds) *Beginners' guide for law students* (1995) 44.

19 Kley & Viljoen (n 18 above).

20 See eg the dissenting judgment of Lord Akin in *Liversidge v Anderson* 1942 AC 206 HL, when he said: 'I view with great apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive-minded than the executive', quoted in PJJ Olivier 'Executive-mindedness and independence' in B Ajibola & D van Zyl (eds) *The judiciary in Africa* (1998) 172.

the South African case of *Memory Mushando Magaida v The State*,<sup>21</sup> where the HIV-positive appellant was sentenced by the lower court to 16 years and three months' imprisonment for 99 counts of fraud, the Supreme Court of Appeal held that the High Court erred by failing to consider on appeal the HIV status of the appellant and the fact that while in prison she would be unable to receive treatment comparable to what she could receive in a hospital. While holding that no illness will by itself entitle a convicted person to escape imprisonment if it is the appropriate punishment, the court should consider the totality of the convicted person's circumstances when rendering a sentence. This consideration should include whether a sentence may be relatively more burdensome as a result of the convicted person's health. The Court in this regard referred to the need for 'individualisation of sentence'.<sup>22</sup>

The Kenyan High Court judgment in the case of *JAO v Home Park Caterers Limited and 2 Others*<sup>23</sup> perhaps typifies the activist approach that judges have been commended for in ensuring that the rights of HIV-positive employees are protected. The facts of that case and the arguments have some striking similarities with those in *Kangaipe*. The respondent filed an originating summons arguing that the first applicant, Home Park Caterers and two others – a doctor and a hospital – had violated her rights. She argued that the doctor had violated her right to privacy and confidentiality when he tested her for HIV without her consent and disclosing her HIV status to her employer without her consent. She also contended that the doctor had not acted in accordance with his professional and statutory duty to counsel and to disclose her HIV test results to her. Her further argument was that Home Park Caterers had violated her right to non-discrimination by terminating her employment based on her HIV status. The applicants raised a technical objection. They sought to have the matter struck off for being scandalous, frivolous and vexatious and for not disclosing any cause of action. In respect of the last ground they argued that, while the respondent asserted that her employment had been terminated on 30 April 2002, the medical report, the contents of which formed the basis of her discharge, was dated 2 May 2002. This discrepancy, plus the fact that Home Park Caterers neither participated in her medical examination nor the issuance of the report and merely terminated her employment owing to 'prolonged absenteeism on medical grounds', meant that she did not in truth have a cause of action.

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21 Case 515/2004 [2005] ZASA 68 26 August 2005, Supreme Court of Appeal, South Africa.

22 This contrasts very sharply with the Zimbabwean case of *S v JM* (HC 2845/07) [2007] ZWBHC 86; HB 86/07 9 August 2007, Zimbabwe High Court, where the Court held that the defendant's HIV-positive status and likelihood that she would be a burden to the prison authorities are not a proper basis for reconsideration of her prison sentence, as these are administrative issues.

23 Civil Case 38 of 2003 (decided in 2004) Kenya High Court.

Although the chronology of events was such as would have persuaded the Court to summarily dismiss the case, the Court concluded that because of 'the nature of the case, the universality of the HIV and AIDS pandemic and the development of human rights jurisprudence together with the ongoing attempts at the harmonisation of the relevant conventions with domestic law', the originating summons should be considered reasonable.<sup>24</sup>

An activist approach to HIV and AIDS and the workplace, in complete contradistinction with the approach adopted by the High Court in the *Kangaïpe* case, was also taken in the Botswana case of *Lemo v Northern Air Maintenance (Pty) Limited*.<sup>25</sup> In that case, Lemo was employed by Northern Air Maintenance (NAM) as a trainee aircraft engineer. In the first four years of employment, his health deteriorated remarkably. As a consequence, he exhausted all his annual leave days and paid sick leave days. He applied for and was given unpaid sick leave on various occasions. In January 2004, NAM suggested to Lemo that he should see a named private medical practitioner for purposes of assessing his fitness for employment. Lemo declined, saying that he thought that medical practitioners at a public medical facility were better suited to attend to him since they were familiar with his medical history. NAM insisted that Lemo should see a private medical practitioner. The following day, Lemo informed NAM that he was HIV positive. The next day NAM terminated Lemo's employment owing to 'his continual poor attendance over the last three years'. Lemo then filed a complaint with the district labour office claiming that he had been unfairly dismissed due to his HIV status. The labour office agreed with him and granted him compensation. Lemo then appealed to the Industrial Court seeking reinstatement and an increase in the amount of compensation. The issue before the Industrial Court was whether an employer could, and if so, in what circumstances, terminate the employment of an HIV-positive employee with a history of absenteeism. With the substitution of the word 'absenteeism' in that case for 'permanently unfit', the *Lemo case* is very similar to the situation that presented itself before the High Court in *Kangaïpe*. Could the Zambian Air Force terminate the petitioners' employment bearing in mind that they had a history of ill health, and were HIV positive?

The Court's decision in the *Lemo* case was fairly interesting. It held that the termination of an employee's employment solely on the basis of HIV status violated the constitutional right to dignity. The Court also reviewed international standards on workplace discrimination

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24 The Court also considered the prevalence of stigma and discrimination on the basis of one's HIV status and protected JAO's identity by allowing the use of her initials as a pseudonym. This matter was eventually settled out of court with court approval. Home Park Caterers and the doctor ended up paying JAO compensation in the order of KAS 2 250 000.

25 IC 166 Of 2004, Botswana (Industrial Court).

and cautioned that employers should desist from discriminatory and unfair practices towards HIV-positive employees and advised that such employees deserved to be treated in the same way as employees suffering from any life-threatening illness. The Court also noted that an HIV-positive employee may 'for years, even decades' experience no interference in the performance of his job duties, especially given the treatment currently available. It went further to hold that an employee may only be terminated if he is incapable of performing his duties (for example, is absent for prolonged periods of time) and has been given a fair hearing. The determination about whether an employee's absences are reasonable should include a consideration of the nature of the employee's job, the extent to which the employer's business is suffering and the prospects of the employee's recovery. A fair hearing should include a discussion of relevant factors, including the nature and causes of the employee's incapacity, the likelihood of recovery, improvement, or recurrence, the period of absence, the effect of absence on the employer's business, and any other relevant factors.<sup>26</sup> The Court determined that NAM had used Lemo's absences as a pretext to terminate his employment when the real reason for the termination was his HIV status alone.

The Constitutional Court of South Africa's judgment in *Hoffman v South African Airways*<sup>27</sup> is yet another of the many case authorities that have demonstrated an activist approach to the issue of HIV and AIDS. In that case it was held that a denial of employment because of a person's HIV status violated the constitutional prohibition against unfair discrimination. The Court stressed that, although the employer's commercial interests were legitimate concerns, they could not constitute a valid justification of prejudicial or stereotypical treatment.

A plethora of judicial precedents with trappings of judicial activism around the issue of termination of employment or denial of employment opportunities on the basis of one's HIV status exist outside the African region too. If examples were required, one would look no further than the Indian cases of *Bombay Indian Inhabitant v M/S ZY and Another*<sup>28</sup> and *MX v ZY*,<sup>29</sup> and the Colombian case of *XX v Gun Club Corporation and Others*.<sup>30</sup>

The Court in the *Bombay Indian Inhabitant* case warned that a failure to address employment discrimination against HIV-positive people would essentially condemn them to 'economic death'. Perhaps it was in the Colombian case of *XX v Gun Club Corporation* where the

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26 See Centre for Reproductive Rights, Toronto, Canada *Legal grounds, reproductive and sexual rights in commonwealth courts* (2010) 92.

27 2000 2 SA 628 (CC).

28 High Court, AIR (1997) 406.

29 AIR 1997 Bom 406 (High Court of Judicature, 1997).

30 Constitutional Court of Colombia, Judgment SU-256/96 (1996).

strongest proactive position yet in favour HIV-positive employees was advocated. There, the Court held that the termination of XX's employment on the basis of his HIV status violated his right to equality, employment, privacy, health and social security. The Court ordered compensation and an illness pension. Among other things, the Court said that

[t]he extent of a society's civilisation is measured, among other things, by the manner in which it assists the weak, the sick and in general the more needy, and not, to the contrary, by the manner in which it permits discrimination against them or their elimination.

## 4 Conclusion

The case of *Kangaipe* has no doubt contributed to the expanding frontiers of human rights litigation in Zambia as far as HIV/AIDS is concerned. While the case presented the opportunity for both developing and refining problems of the applicability of local and foreign authorities, that opportunity does not appear to have been fully exploited.

One important point we learn from the case is that submissions by counsel on both sides should reflect some deliberate attempt to categorise authorities according to the value attached to each. The court too, should always be alive to this necessity. This is the only way to obviate the recourse to policy statements, doctrinal writings, administrative rhetoric, political opinions and other inapplicable standards on a scale incompatible with the practical needs of rational judicial reasoning.

What is readily apparent is the difficulty posed by the insistence on the part of the court on an HIV-positive employee, proving that the employer terminated his or her employment on the basis of his or her HIV status rather than absenteeism or unfitness or some other reason caused principally by his or her health. Issues tend to be so closely linked that it becomes unintelligible to attempt to treat them as if they were not mutually exclusive. A formidable obstacle for petitioners in these cases is the issue of precise proof of the reason – the motivation for the employer's termination of their employment. This is a particularly daunting prospect and a vexed one at that. Much as the court is routinely obliged to insist on the adversarial system aphorism of 'he who alleges must prove', it is arguably unsuited to addressing arguments in HIV-related litigation given the difficulties of adducing solid evidence demanded in cases such as *Kangaipe*. If such an approach is habitually taken, given not only the inequality of arms but also the magnitude of what is at stake for either party, it would surely be more appropriate to proceed on the basis of an assumption that the dismissal of an HIV-positive employee is on the basis of that status unless proven otherwise. Clear reasons should be provided as

a matter of fairness. It is perhaps time the courts started shaking their entrenched foundation of judicial restraint and lethargy.

New human rights-based approaches in dealing with HIV in the workplace, despite limitations, some of which have been unveiled in the *Kangaibe* case, have certainly opened up new opportunities for litigating HIV issues in Zambia. They have, for example, recontextualised and reinvigorated discussion on the place of international jurisprudence in the domestic setting. This type of litigation has also wrought more diffuse impacts. The enhanced profile that they offer to human rights issues has proven significant in forging greater publicity for HIV cases than they have enjoyed previously.

In summary, then, some aspects of the approach adopted by the Court in *Kangaibe* to human rights claims premised on HIV issues in Zambia are encouraging in principle, as such claims are being given sufficient credence to warrant close judicial scrutiny. On balance, however, the protection of the rights in the employment setting of persons living with HIV remains contingent on innovative and activist approaches being adopted by the courts. Obstacles that petitioners face remain considerable. Ignoring this fact requires at least some explanation to human rights advocates and HIV or AIDS activists.