Chapter 1

Ending unfair discrimination in the military

By Adila Hassim

> [T]he 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.
>
> Ngcobo J in *Hoffmann v South African Airways*[1]

Eight years after its *amicus curiae* intervention in the *Hoffmann* case, the ALP succeeded in bringing the same reasoning to bear against the HIV testing policy of the South African National Defence Force (SANDF). This argument was at the heart of the complaint that the ALP had been pursuing for close to 14 years in order to bring an end to unfair discrimination against people with HIV in the military.

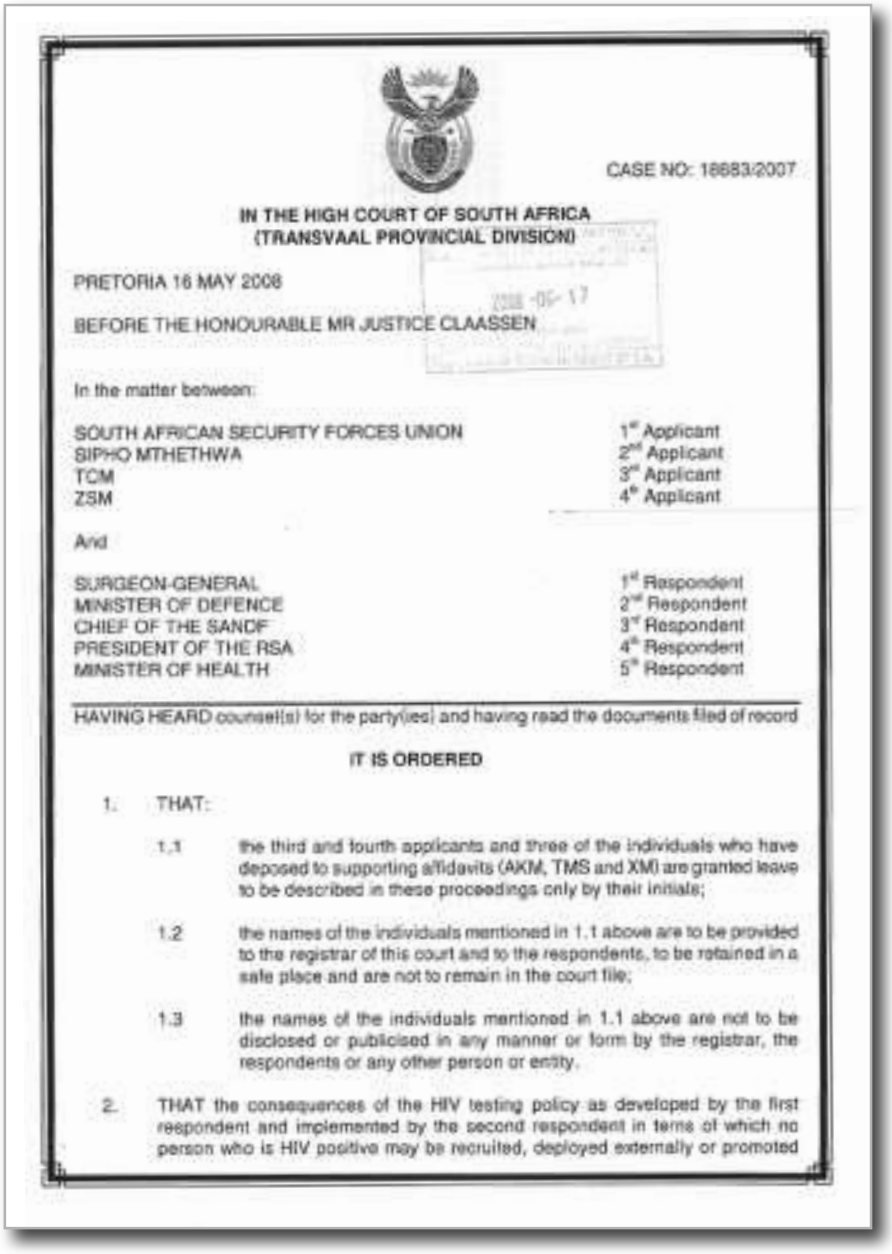
In our last review, we chronicled that the ALP, acting on behalf of South African Security Forces Union (SASFU) – a military union – and several individuals, had just filed papers in the Pretoria High Court in the case of *South African Security Forces Union and Others v Surgeon-General and Others*.[2] At issue was the SANDF's policy that people with HIV are by definition unfit to be employed in the military, regardless of their actual state of health or category of work for which they would be responsible.

Hence TCM, a trumpeter who had passed his auditions admirably and had been offered a job in the airforce band, was later told that he could not be employed due to his HIV status. Similarly Sipho Mthethwa, an ex-Umkhonto we Sizwe (MK) soldier who spent his time in the SANDF training soldiers for external deployment, was himself denied the opportunity of deployment and promotion due to his HIV status.

1. 2001 (1) SA 1 (CC) at 35
2. Case number 18683/07, High Court of South Africa (Transvaal Provincial Division) (settlement made an order of court on 16 May 2008)

The case eventually came before court on 15 May 2008. Despite persisting in their opposition, the respondents initiated settlement talks shortly after the close of the applicants' oral argument on the first day of the hearing. Later that day, they also informed us that the President – the fourth respondent who was cited in his capacity as Commander-in-Chief – had withdrawn his opposition to the case. After further consultation, the parties reached a settlement on largely similar terms to the relief sought in the notice of motion.

In essence, the respondents – the Surgeon-General, the Minister of Defence, the Chief of the SANDF and the President[3] – conceded that the HIV testing policy was unconstitutional on five separate grounds, and that the SANDF bears a duty urgently to remedy the situation. This was made an order of court by Justice Roger Claassen in the following terms:



CASE NO: 18683/2007

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

PRETORIA 16 MAY 2008

BEFORE THE HONOURABLE MR JUSTICE CLAASSEN

In the matter between:

SOUTH AFRICAN SECURITY FORCES UNION	1st Applicant
SIPHO MTHETHWA	2nd Applicant
TCM	3rd Applicant
ZSM	4th Applicant

And

SURGEON-GENERAL	1st Respondent
MINISTER OF DEFENCE	2nd Respondent
CHIEF OF THE SANDF	3rd Respondent
PRESIDENT OF THE RSA	4th Respondent
MINISTER OF HEALTH	5th Respondent

HAVING HEARD counsel(s) for the party(ies) and having read the documents filed of record

IT IS ORDERED

1. THAT:

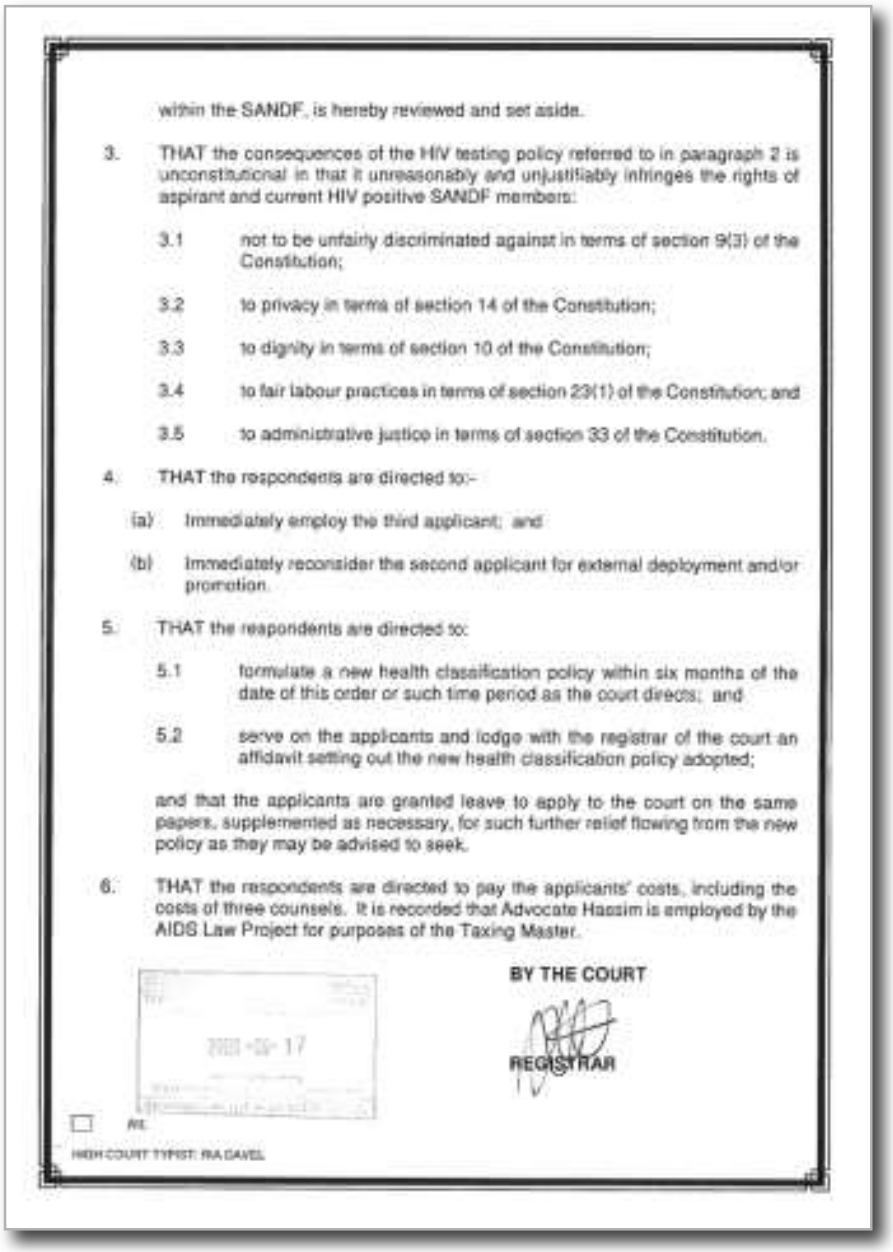
1.1 the third and fourth applicants and three of the individuals who have deposed to supporting affidavits (AKM, TMS and XM) are granted leave to be described in these proceedings only by their initials;

1.2 the names of the individuals mentioned in 1.1 above are to be provided to the registrar of this court and to the respondents, to be retained in a safe place and are not to remain in the court file;

1.3 the names of the individuals mentioned in 1.1 above are not to be disclosed or publicised in any manner or form by the registrar, the respondents or any other person or entity.

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

3. No relief was sought against the Minister of Health, who was the fifth respondent.



within the SANDF, is hereby reviewed and set aside.

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

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

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

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

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

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

4. THAT the respondents are directed to:-

(a) Immediately employ the third applicant; and

(b) Immediately reconsider the second applicant for external deployment and/or promotion.

5. THAT the respondents are directed to:

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

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

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

6. THAT the respondents are directed to pay the applicants' costs, including the costs of three counsels. It is recorded that Advocate Hassim is employed by the AIDS Law Project for purposes of the Taxing Master.

BY THE COURT

REGISTRAR

AR

HIGH COURT TYPIST: RA DAVEL

The arguments

At the outset, the applicants clarified that this case was not about the relevance of testing for HIV in the military context but rather the consequences of the HIV testing policy. In particular, they strongly objected to the denial of employment, external deployment and promotion of people with HIV in the SANDF without an individualised health assessment.

Through expert scientific and medical evidence, the applicants sought to refute the assumption that all people with HIV are unfit for military service, showing that it is based on stereotypes and therefore amounts to unfair discrimination. In addition, they argued that the policy is unconstitutional in that it violates the rights to fair labour practices, just administrative action, privacy and dignity.[4]

4. The full set of papers is available at *http://www.alp.org.za/index.php?option=com_content&task=view&id=43&Itemid=85*.

The applicants led evidence by several experts on the following key issues:[5]

- The nature and disease progression of HIV – the evidence shows that with advances in knowledge about treatment, HIV has become medically manageable.
- The effect of antiretroviral therapy (ART) on disease progression and viral replication – the evidence demonstrates that viral replication can be halted with the use of ART, allowing most people to continue normal, active lives.
- The drug regimen has drastically improved so that the pill burden may be reduced to one pill once a day.
- Neurological impact – the evidence shows that there is no causal relationship between early stage HIV infection and neuropsychological impairment.
- The effect of stressors (such as climate or combat) – the manner in which stress is handled differs from person to person, meaning that there is nothing inherent in HIV that renders people less able to cope with stress.
- Risk to others – statistically, the risk of HIV transmission from an injured soldier to another is extremely low, especially when universal precautions (e.g. surgical gloves) are used. In fact, soldiers face a vastly higher risk of death and injury from combat itself.
- Analogous physically demanding work environments – despite exposure to extremely harsh conditions in the mining sector (such as excavating up to three kilometres underground, noise, falling rocks and extreme heat), miners with HIV remain healthy with appropriate treatment and care

In addition to this evidence, the applicants demonstrated that similar HIV testing policies in foreign militaries (such as Namibia, Australia, Canada and Mexico) were also found to be unlawful. As a result of legal challenges, these countries were forced to adopt individualised health assessments rather than blanket exclusions on the basis of HIV status alone. In the context of the Australian case, Justice Michael Kirby had the following to say:[6]

> In the case of disability (including HIV), knowledge of the causes and approaches to the reasonable adjustments envisaged by the Act progresses over time. ... In the circumstances of the employment to which the Act is addressed, it would be as well, in my respectful opinion, if the courts were to avoid the preconceptions that lie hidden, and not so hidden, in tales of Tuscan soldiers wallowing in blood (however vivid may be the poetic image), or in descriptions of regimental life and soldierly duty in the heyday of the British Empire (however evocative may be the memories). ...
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> [I]n other countries where the military is subject to civil power, constitutional norms or applicable principles of human rights enable and oblige the courts to scrutinise such decisions strictly and, when authorised by law, to decline to give them effect. ...

5. The ALP is very grateful to the generous expert assistance that was provided on a pro bono basis by Prof. Leslie London, Dr. Francois Venter, Dr. Shuaib Manjra, Dr. Brian Brink, Prof. Robert Schooley, Prof. Trefor Jenkins and Mr. Richard Elliot.
6. *X v The Commonwealth* 200 CLR 177 at 230-1 (internal citations omitted)

> Generally speaking, the courts in the United States and Canada have been consistent and principled in recent years in their insistence that the civil norms of non-discrimination reach into the military and must be obeyed by them. This is certainly what happened when challenges were mounted in the courts against unjustifiable and universal exclusions expressed in terms of race, the exclusion of women from military institutions or from combat duties, and the automatic discharge of military personnel on grounds of their sexuality. ...
>
> The universal exclusion of recruits on the grounds of their HIV status is simply the latest in a succession of such grounds.

In addition to the foreign precedents, the UN policy regarding HIV testing in its peacekeeping forces is clear. In December 2000, the Executive Director of the Joint United Nations Programme on HIV/AIDS (UNAIDS) established the UNAIDS Expert Panel on HIV Testing in UN Peacekeeping Operations to analyse and formulate a comprehensive position on the issue of HIV testing. The Panel reached a number of conclusions, including that voluntary counselling and testing should be made available to peacekeeping personnel within a context of non-discrimination and access to care and support; and that eligibility for recruitment to peacekeeping operations should be based on *"fitness to perform the duties of peacekeepers during deployment"*, to be determined by an individualised medical assessment.[7]

The respondents' written argument skirted these legal arguments and evidence. In the main, the SANDF attempted to show that the military context is unique. However, no credible evidence was led to contradict the conclusions of the applicants' experts.

At the heart of the respondents' case was their claim that while the policy did amount to discrimination, such discrimination was fair. Yet at the same time, in their replying affidavit they conceded that the policy did *not* constitute "a fair balance between force health protection, combat-readiness and gainful employment of a soldier in a hostile environment".[8]

The SANDF's case was replete with such anomalies. Consider the following:

- The SANDF implemented a policy that contradicted Cabinet resolutions taken in 1997 that prohibited the exclusion of individuals with HIV from the military.
- The South African Air Force has a policy where pilots, who are required to maintain high levels of physical and mental fitness, are allowed to fly regardless of HIV status on condition that they satisfy certain objective health criteria.
- The Surgeon-General's policy on non-discrimination in respect of members with HIV was not implemented.
- While the SANDF argued that members with HIV are by definition not "combat-ready" and therefore not deployable abroad, they nevertheless deployed members with HIV to remote areas within South Africa's borders.
- For several years, the SANDF itself had been conducting a review of its policy of not deploying members with HIV externally. Indeed, the South African Military Health Service (SAMHS) published a Position Paper in 2005 that proposed external deployment of soldiers with HIV who have a CD4 count above 350.

There was no attempt by the SANDF to explain any of these anomalies. Instead, right up until the day of the hearing, they persisted in the argument that the policy was rational, fair and constitutional.

7. Report of UNAIDS Expert Panel on HIV Testing in UN Peacekeeping Operations at 3528 – 3549
8. Answering Affidavit, volume 23, page 2663, paragraph 269.14

The Zimbabwe Study

By far the most troubling aspect of the SANDF's legal defence was their introduction of and reliance upon a study entitled "The Type, Intensity, Frequency and Duration of Exercise Causes Rapid Deterioration in HIV Seropositives (HIV-SP) Leading to Opportunistic Infections and an Early Onset of Full Blown AIDS (FBA) During Military Training".[9] The study was introduced into evidence by Dr. Martin Rupiya, at the time a Project Manager for the Military Aids Project at the Institute for Security Studies in Pretoria.

According to this study, 120 Zimbabwean soldiers were divided into two groups on the basis of HIV status. They were then observed during a six-month period of intensive training. At the end of the period, it was concluded that the type, intensity, frequency and duration of the training resulted in reduced immune response, opportunistic infections and death amongst those soldiers with HIV.

The applicants' experts trenchantly criticised the study. In his affidavit, Prof. Trefor Jenkins, one of the foremost ethicists in South Africa, compared it to experiments "conducted by Nazi doctors during the Second World War" and stated that it was "akin to thawing people after they have been frozen in order to see what temperatures the human body can withstand."[10] In a similar vein, Prof. Leslie London compared it to the infamous Tuskegee syphilis experiment.[11]

London went further. He explained that the study was not methodologically sound because it exhibited no compliance with standard scientific research methods. It was undated, not peer-reviewed, sought to prove a pre-conceived hypothesis, did not provide vital information (such as the criteria for selecting the participants, their general state of health and whether they were on ART) and the statistical findings in some instances were so implausible as to be impossible.[12]

That the Surgeon-General, who is responsible for military health policy, could place his reliance on such evidence is surprising. Military health policy (as with all medical policies) is meant to keep pace with advances in medical and scientific knowledge. Perhaps more importantly, the Surgeon-General is entrusted with the development of health policy in a manner that accords with the highest ethical standards.

After the order

With this order, the ALP laid to rest the last remaining major HIV-related employment discrimination case. The court order is a precedent that fortifies the legal framework that seeks to protect the equality rights of people living with HIV. However, as we have long understood, a groundbreaking precedent does not automatically change the lives of those who are vindicated.

Knowing this, the ALP continued to engage with the Department of Defence (DoD) in relation to implementation of the court order, including making an offer to assist with the redrafting of the health classification policy. The ALP suggested that the South African National AIDS Council (SANAC) and its expert technical task teams are ideally placed to advise on a new policy because of the wide-ranging expertise resident within such


News

PRETORIA NEWS

HIV+ soldiers fight for their rights in SANDF

Court hears exclusion policy is unconstitutional, offensive, demoralising

9. Unpublished and undated paper authored by SMT Mudambo Kaka, T Marufu and A Tafirenyika
10. Affidavit of Trefor Jenkins, page 3405 of the record
11. Affidavit of Leslie London, pages 3311-3312 of the record
12. Ibid

structures. Indeed, one of the very purposes of SANAC is to advise on policy development in relation to HIV and AIDS.

The ALP's offer was simply ignored. Instead, the SANDF drafted a revised health classification policy that it made available in November 2008. After consultation with experts and its clients, the ALP provided comments on this draft. At the time of writing, the parties had agreed on a process in terms of which the revised policy would be finalised.

In line with the court order, TCM took up his position in the airforce band on 1 August 2008. Regrettably however, Sipho Mthethwa has yet to obtain any relief. The ALP has raised this in correspondence and meetings with the SANDF. The official justification for his non-deployment is that the SANDF deploys force structure elements and not individuals. In addition to being inconsistent with reports that the ALP has received from SANDF members, this position is in any event in violation of the court order insofar as it relates to Mthethwa. The ALP will continue to press for his external deployment.

At the time of writing, the parties had agreed on a process in terms of which the revised policy would be finalised.

The ALP has also received reports of ongoing acts of unfair discrimination against SANDF members with HIV. On 10 September 2008, the ALP obtained 12 affidavits from serving members of the 6 South African Infantry ("SAI") Battalion in Grahamstown. We later obtained a further set of 13 affidavits from members of the 4 SAI Battalion in Middelburg. Collectively, these affidavits confirm that:

- SANDF members with HIV continue to be discriminated against solely on the basis of their HIV status by being excluded from external deployment; and
- The Officers-Commanding of the relevant battalions consistently state that the order of the court will not be implemented unless and until they receive instructions from the DoD to deploy members with HIV.

These affidavits were sent to the SANDF on 12 September 2008 and 3 December 2008 respectively. At the time of writing this review, the SANDF had yet to abide by the court order and discontinue this unconstitutional practice.

Conclusion

This case illustrates the strengths and limitations of litigation. Despite years of attempted engagement and consultation with the DoD, it was not until the ALP seriously pursued legal proceedings that we were able to make any progress in resolving the constitutional concerns regarding the SANDF's HIV testing policy.

Prior to this, apparent advances turned out to be fleeting and disregarded by the DoD – such as a May 1997 letter from then Deputy Minister of Defence Ronnie Kasrils informing the ALP that "Cabinet agreed that being HIV positive should not exclude any candidate from appointment in any section of the Public Service including the Departments of Defence, of Safety and Security and of Correctional Services".[13]

Attempts over the years to get clarity from the DoD regarding the implementation of the HIV testing policy were also unsuccessful. It was only through litigation that the DoD was forced to respond to the ALP in writing. Even then the letters preceding litigation went unanswered by the DoD – the ALP first received a written response in the form of an answering affidavit.

13. This did not apply to certain job categories that were said to require extreme physical fitness.

It was also through litigation that TCM was employed as a trumpeter in the military. The litigation finally resulted in the SANDF and DoD conceding that the policy was unlawful and required urgent revision. This would not have been the case in the absence of litigation.

Yet the full implementation of the court order remains elusive. Why this should be the case, given that the order was an agreement between the parties, is inexplicable. For Sipho Mthethwa and many others, whether chefs, drivers, logisticians or soldiers, unfair discrimination on the basis of HIV status is still felt.

While the ALP is committed to trying to resolve this situation, there is little that can be achieved if we continually meet resistance from the SANDF. For this reason, we are of the view that SANAC should be tasked with the responsibility of ensuring that a fair and lawful HIV testing policy is finally implemented in the military.

End HIV discrimination in the army

Help us to protect workers' rights

The SANDF has, until the end of November, to come up with a policy on health assessments, which does not discriminate against soldiers or employees living with HIV.

The South African Security Forces Union (SASFU) won a court order on 16 May 2008 from the Pretoria High Court, protecting HIV positive workers' rights. This order included provisions that:

- The South African National Defence Force (SANDF) can no longer automatically exclude HIV positive people from recruitment, external deployment and promotion
- The SANDF must amend its policy on health classifications within six months. This new policy should allow for individual health assessments of the actual state of fitness of each SANDF soldier or employee, instead of the SANDF rejecting people on the basis of their HIV status.

This court order was granted against:

- The Surgeon-General of the South African Medical Health Services,
- The Minister of Defence,
- The Chief of the SANDF, and
- The President of the Republic of South Africa.

SASFU took this dispute to court to challenge the unfair consequences of the former SANDF policy. This policy on HIV testing provided that no person who tested HIV positive should have been recruited, deployed outside South Africa's borders or promoted beyond the rank of non-commissioned officer.