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

CASE NO: 18683 / 07

In the matter between:

SOUTH AFRICAN SECURITY FORCES UNION	First Applicant
SIPHO MTHETHWA	Second Applicant
TCM	Third Applicant
ZSM	Fourth Applicant

and

SURGEON-GENERAL	First Respondent
MINISTER OF DEFENCE	Second Respondent
CHIEF OF THE SANDF	Third Respondent
PRESIDENT OF THE RSA	Fourth Respondent
MINISTER OF HEALTH	Fifth Respondent

FIRST TO FOURTH RESPONDENTS' HEADS OF ARGUMENT

INTRODUCTION

1. In this application the applicants seek to review the formulation and implementation of the HIV testing policy of the SANDF as reflected in various policy documents dealing with recruitment, promotion and deployment.

2. The applicants also seek an order declaring the “HIV testing policy” of the SANDF to be unconstitutional in that it infringes on a spectrum of rights protected in Chapter 2 of the Constitution.

3. The applicants also seek consequential relief in the form of:

   3.1. an order directing the respondents to immediately employ the third applicant and to immediately reconsider the second and fourth applicants for deployment or promotion;

   3.2. an interdict preventing the respondents from denying employment, promotion or deployment to persons solely on the basis of their HIV status;

   3.3. an order that the respondents issue a directive to all military bases to cease denying employment, promotion or deployment to persons solely on the basis of their HIV status; and

3.4. an order directing the respondents to formulate a new HIV testing policy within six months from the date of the order.

4. The applicants seek to ground their attack in the provisions of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") alternatively the principle of legality underpinning the Constitution.

5. The first to fourth respondents ("the respondents") oppose the application on a number of bases:

5.1. neither the HIV testing policy, nor the consequences thereof, is conduct of an administrative nature and therefore does not fall within the purview of section 33 of the Constitution. PAJA is therefore not applicable in the present matter[1];

5.2. in any event, the policy relating to HIV testing does not constitute administrative action as defined in PAJA. The applicants do not identify any other 'administrative action' for review under PAJA.

5.3. even if it is found that PAJA is applicable, the policy of testing for HIV is not unreasonable, unfairly discriminatory or irrational (under PAJA

[1] Sidumo & Another v Rustenberg Platinum Mines Ltd and Others (CCT 85/06) 2007 ZACC 22 (5 October 2007)

as well as under the principle of legality). Furthermore the exclusion of persons living with HIV is not unconstitutional. In summary, the arguments underlying this contention are the following:

5.3.1. given the unique characteristics of the military environment, the SANDF is under a legal obligation to ensure that it is able to meet the needs of candidates recruited to the Defence Force as well as members deployed to active service.

5.3.2. in order to discharge this obligation the SANDF must be able to conduct vigorous medical testing which will enable the SANDF to:

5.3.2.1. conduct the physical and psychological selection of personnel for service and employment in the SANDF[2];

5.3.2.2. determine whether a candidate will be able to withstand vigorous Basic Military Training and the rigours of service in the military;

5.3.2.3. classify personnel according to a physical/medical profile code system to facilitate effective mustering[3] and

[2] Medical Standards Manual Supplementary Bundle p82

5.3.2.4. assess the medical needs of the candidate

5.3.3. Once medical testing (referred to as the “Comprehensive Health Assessment”) is done, the SANDF excludes from recruitment candidates who do not meet the predetermined medical standards.

5.3.4. At present these standards exclude persons who have chronic illnesses which includes HIV.

5.3.5. There are a number of reasons underlying the need to adopt medical standards within the military:

5.3.5.1. the nature of service in the military is such that it tests human endurance to the limit. Peak physical health is therefore a logical requirement of being recruited to the military;

5.3.5.2. in the post-Apartheid South Africa, the SANDF is under a constitutional and statutory obligation to ensure that the Force is a core-force which is streamlined and effective. This implies keeping

[3] Medical Standards Manual Supplementary Bundle p82

personnel to a minimum and therefore only recruiting those who are of optimal health.

5.3.6. thus, the policies of the SANDF, far from being directed solely at people living with HIV, exclude people who suffer from a range of chronic illnesses which, at present, includes HIV.

6. The SANDF's position in relation to HIV is not static. It has over the years been reviewed to accommodate members of the SANDF living with HIV. In fact, the policy in relation to the external deployment of existing members is currently under review. Due to the complexity of the issues involved, no decision on this aspect has been reached as yet.

7. The current policy of the SANDF is that, at present, the SANDF is not satisfied that science has advanced to the stage that it can be guaranteed that people living with HIV can withstand the extremely stressful conditions associated with deployment. The expert evidence of Professor Viljoen, Doctor Reynolds and Doctor Baker describe how the HI Virus does not remain static but, in the presence of stressors, replication may accelerate causing a deterioration in the person's immune function.

8. Furthermore, antiretroviral treatment (ART) is such that it does not completely arrest the progression of the disease.

9. In expanding on the above contentions to be advanced on behalf of the respondents, the scheme of these submissions is as follows:

9.1. we analyse the relief sought by the applicants;

9.2. we examine the legal landscape within which the SANDF operates and highlight the implications of this landscape for SANDF policy on recruitment, deployment and promotion.

9.3. we describe the special characteristics of the SANDF as the protector of national security and employer of members of the SANDF. These characteristics have a direct bearing on the respondents' policies in relation to recruitment, promotion and deployment;

9.4. we deal with the SANDF's policy on HIV in general and specifically in relation to recruitment, promotion and deployment;

9.5. we deal with the expert evidence in relation to the nature of the disease and, the key issues of:

9.5.1. the effect of stressors on the progression of the disease;

9.5.2. the neuropathy.

9.6. we set out why the policy is not inconsistent with the Constitution;

The relief sought by the applicants

10. In the amended notice of motion, the applicants seek the review and setting aside of the "HIV testing policy as developed by the First Respondent and implemented by the Second Respondent" [4] and contained in various policy documents listed in the notice of motion.

11. The applicants however do not set out the basis on which they contend that the HIV testing policy of the SANDF constitutes administrative action.

12. In the replying affidavit, the applicants seek to shift the emphasis of their case. The replying affidavit is littered with the concession that the SANDF may conduct HIV tests as part of the Comprehensive Health Assessment. This is reflected in the following portions of the replying affidavit:

12.1. at paragraph 74 of the replying affidavit, Mmagare states that: "The applicants accept that an HIV test may form part of the Comprehensive Health Assessment (CHA)";

[4] Supplementary Bundle P2, prayer 2

12.2. at paragraph 146 of the replying affidavit Mmagare states that: “The applicants do not take issue with the need to conduct HIV testing in the military”;

12.3. at paragraph 274 the applicants state that: “I have already stated that the applicants do not take issue with the relevance of HIV testing in the military.”

13. According to the replying affidavit, the applicants’ challenge, as currently framed, is directed against “the consequences of a positive HIV test”.[5]

14. The notice of motion does not identify those consequences or seek the review and setting aside of those consequences. This Court is therefore unable to determine whether “the consequences” constitute administrative action.

15. Therefore “the consequences” of the SANDF’s testing policy is not the subject of review in this application.

16. While the applicants seek consequential relief which appears to be premised on the assumption that the medical standards in terms of which HIV disqualifies a candidate from being categorised as G1K1, the

[5] See Replying Affidavit paragraphs 74 and 274

applicants do not seek the review and setting aside of the administrative act relating to the setting of medical standards.

17. This application must therefore be determined on the assumption that those standards are unchallenged and are therefore valid. In light hereof, the relief sought in prayers 4, 5, 6 and 7 of the applicants amended notice of motion is incompetent.

18. In their heads of argument, the applicants' case has developed even further than what is provided in the replying affidavit. The applicants state in their heads of argument[6] that "the applicants seek to have the blanket exclusion of HIV positive personnel from recruitment, promotion and deployment reviewed and set aside". This is however not what the notice of motion provides. It is not the case that the respondents were called to meet.

19. The relief sought in the notice of motion is therefore ill-conceived. On this basis alone, the application must be dismissed.

20. In relation to the consequential relief sought, the applicants contend in the replying affidavit that they seek the respondents to adopt a more "nuanced approach" to the recruitment, deployment and promotion of people living with HIV.

[6] Paragraph 1.23

21. The relief sought does not however permit a nuanced approach which would enable the SANDF to factor in the various circumstances which render decisions relating to promotion, recruitment and deployment very complex.

22. The weaknesses in the relief sought are best illustrated by interrogating the policy documents challenged by the applicants in the notice of motion. None of these policy documents provide for compulsory HIV testing. Most of the documents merely incorporate a reference to a G1K1 classification which is determined in the Medical Standards Manual as supplemented by the periodic Joint Defence Publications.

23. The only documents currently in force which provide that a colour code of 'red' is attached to an incomplete CHA test (usually where there is a failure or a refusal to undergo an HIV test) is the Medical Standards Manual as supplemented by the periodic Joint Defence Publications.

24. The applicants' contention in their heads of argument[7] that all the policy documents are reviewable to the extent that they enforce the HIV testing policy is misconceived. Further it loses sight of the distinction between an administrative act and the implementation thereof.[8] In essence, the this

[7] Paragraph 2.7

[8] Minister of Public Works v Kyalami Ridge Environmental Association 2001 (3) SA 1151 (CC);

contention seeks to impermissibly review the implementation of the setting of medical standards while leaving the administrative action associated with the setting of medical standards unassailed.

25. The policy documents challenged by the applicants are dealt with in summary below.

The SAMS Order 7/3/88

26. This order (JNH6 Main Bundle p127) is no longer in force and has been replaced by the 1996 SAMS order.[9]

The Surgeon General Instruction No 01/99

27. SG Instruction No 01 / 99 (SA 8 Supplementary Bundle p49) is titled: "The Management of Immune Deficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (Aids) in DOD".

28. This Instruction records that there may be no compulsory testing of employees for HIV and entrenches the workplace rights of people living with HIV.[10]

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[9] Answering affidavit
[10] Supplementary Bundle p66

29. It is unclear what consequences of HIV testing policy the applicants seek to set aside in relation to this document.

SANDF Manual of Medical Standards

30. The Medical Standards for the South African Defence Force[11] set out the general principles concerning the application of medical standards and classification codes.[12]

31. The Medical Standards refer to the conditions which are acceptable and those which are not in relation to:

31.1. enlistment;[13]

31.2. promotion to commissioned rank[14];

31.3. specialized mustering.[15]

[11] "SA9" Supplementary Bundle p77

[12] Supplementary Bundle p82

[13] Medical Standards Manual Supplementary Bundle p90

[14] Medical Standards Manual Supplementary Bundle p111

[15] Medical Standards Manual Supplementary Bundle p131

Joint Defence Publication 2003

32. This document was replaced by a number of successive JDPs the most recent one being the 2007 version.[16]

33. The 2007 JDP indicates that it supercedes and replaces the Manual for the SAMS. [17]

34. This document incorporates the classifications and codes used by the military:

34.1. The G Code which refers to the Ground Duty Factor:

34.1.1. G1 indicates total fitness for ground duties;[18]

34.1.2. G3 Physical activities are limited and these are clearly defined by relevant restriction codes;[19]

34.1.3. G4 Member is only fit for administrative duties;[20]

[16] Supplementary Bundle P168
[17] Supplementary Bundle P168
[18] Supplementary Bundle P170
[19] Supplementary Bundle P170
[20] Supplementary Bundle P170

34.1.4. GP Permanent unfitness for military service;[21]

34.1.5. G5 Unfit for utilisation in the Permanent and Reserve Forces[22]

34.2. The K Code which refers to geographic/environmental factors:

34.2.1. K1 Member is suitable for duty in all geographic areas; [23]

34.2.2. K2 unfit for active operations in the field and unfit for foreign deployment; May render service in temporary unit base areas and may do routine border patrols; [24]

34.2.3. K3 unfit for active operations in the field and unfit for foreign deployment. May only render service in units permanent base areas; [25]

34.2.4. K4 member is only fit for restricted service in base areas where specialised and general medical services are always readily available; [26]

[21] Supplementary Bundle P170
[22] Supplementary Bundle P170
[23] Supplementary Bundle P170
[24] Supplementary Bundle P170
[25] Supplementary Bundle P170
[26] Supplementary Bundle P170

Civil Aviation Authority HIV/AIDS Guideline

35. These guidelines[27] provide that persons who are HIV positive will be grounded and that asymptomatic HIV positive persons may be reconsidered for certification if certain criteria are met.

Guidelines for Military Service Medical Classification

36. These guidelines[28] incorporate the G1K1 classification but do not determine what constitutes a G1K1 classification.

Revised Protocol Applicable to HIV positive licensed aviation personnel – June 2003

37. This document[29] provides that licensed personnel who are HIV positive will be grounded. It also provides that asymptomatic HIV positive persons may be reconsidered for certification if he or she meets certain criteria. [30]

Department of Defence Instruction Personnel 21/2000

38. This document[31] does not in any way deal with HIV testing.

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[27] Main Bundle P351
[28] Supplementary Bundle P178
[29] Supplementary Bundle P194
[30] Supplementary Bundle P194
[31] Supplementary Bundle P203

Revised Implementation Instruction

39. This document[32] merely provides that Military Skill Development members must be G1K1 compliant.[33]

Instruction: Implementation Core Service System

40. This document[34] merely provide that members must comply with the criteria applicable to their position/mustering. [35]

Selection and reporting instruction for the officers' selection process 2006

41. This document[36] incorporates the requirement that a member be G1K1 compliant. [37]

Comprehensive Health Assessments for Deployment and Peace Support Operations

42. This document[38] predates the JDP 2007 and states that for external deployment members have to be categorized as G1K1 or G3K1[39].

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[32] Supplementary Bundle P268
[33] See p271
[34] Supplementary Bundle P312
[35] Supplementary Bundle P315
[36] Supplementary Bundle P389
[37] Supplementary Bundle P395
[38] Supplementary Bundle P400
[39] Supplementary Bundle P401

The Personnel Management Code DOD Military Musicians SANDF

43. This PMC[40] provides that in relation to recruitment[41] and promotions[42] the general policies of the SANDF apply.

PMC DOD Military Practitioners SANDF

44. This Code[43] similarly requires that applicants for recruitment[44] and promotion[45] are subject to general SANDF policies.

THE LEGAL LANDSCAPE

45. SANDF policy relating to recruitment, promotion and deployment is to a large extent determined by the legal landscape within which the SANDF operates.

46. While legal instruments like the Constitution and the Defence Act provide the legal framework which regulates the creation, existence and operation of the SANDF, other documents like the White Paper on Defence and the

[40] Supplementary Bundle P445
[41] Supplementary Bundle P446
[42] Supplementary Bundle P468
[43] Supplementary Bundle P507
[44] Supplementary Bundle P511
[45] Supplementary Bundle P519

Defence Review significantly encapsulate the vision and policy orientation of the SANDF.

47. SANDF policy directive in relation to recruitment, promotion and deployment are shaped by the constitutional and legislative obligations of the SANDF as well as the broader political vision for the SANDF. The key features of this legal landscape are described below.

The Constitution

48. According to the Constitution, the pursuit of national security is central to the establishment of a democratic nation based on the principles of equality, human dignity and freedom.

49. Section 198(a) of the Constitution provides that: “National security must reflect the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life”.

50. The Constitution also articulates the primary objective of the defence force: namely to defend and protect the Republic, its territorial integrity and its people in accordance with the Constitution and international law principles regulating the use of force[46].

[46] Section 200(2) of the Constitution

The White Paper on National Defence for the Republic of South Africa

51. The White Paper on National Defence for The Republic of South Africa ("the White Paper") was published in May 1996. The White Paper reflects the government's vision of the structure and role of the SANDF.

52. It recognised as its point of departure the profound political and strategic consequences which flowed from the ending of apartheid, the most significant of which is South Africa's re-entry into the international community and its imminent participation in regional and international bodies.

53. Another significant aspect of post-Apartheid South Africa recognised by the White Paper is the commitment of the new government to the socio-economic upliftment of the poor through the implementation of the Reconstruction and Development Programme.

54. The change of priorities was followed by a reallocation of state funding from defence to the funding of the RDP.

55. The net effect of this was a need to rationalise the SANDF and to contain military spending without undermining the country's core defence capability in the short and long term.

56. The White Paper thus ushered in a new approach to national security and a curtailment of military spending.

The South African Defence Review

57. While the White Paper provided the framework of state policy in relation to national security, it provided for the release of a Defence Review, the aim of which was to elaborate on the policy framework through comprehensive long-range planning on matters such as posture, doctrine, force design, force levels, logistic support, armaments, equipment, human resources and funding.

58. Significantly, the Defence Review records that the primary function of the SANDF is the defence of South Africa against external aggression. The other functions are secondary.

59. This implies that the SANDF must at all times be ready to protect the country from external aggressors of any form. It requires a state – of – readiness which is anticipatory rather than reactionary.

60. While the Defence Review[47] entrenches the commitment of the SANDF to a primarily defensive orientation and posture, this posture does not detract

[47] Paragraph 36

from the primary responsibility to be ready to defend against aggression. It does however have clear implications for SANDF doctrine, training and force design.

61. At its core, a defensive posture means that the SANDF is required to maintain an affordable peace-time force. The Defence Review envisages that the SANDF will comprise of a relatively small regular component backed by a sufficiently large part-time component.

62. Despite the fact that the Defence Review entrenches the defensive posture of the SANDF, it records the need to maintain defence capability which is sufficiently credible to deter potential aggressors. According to paragraph 10 of Chapter 2, the maintenance of this capability has to take into account the following:

62.1. A potential aggressor must believe South Africa has the capacity to apply sufficient force to thwart an act of aggression; and

62.2. A potential aggressor should believe that South Africa has the political will to apply such force if it is compelled to do so.

63. In the context of the SANDF, deterrence requires the following:

63.1. South Africa will pursue military co-operation with other states in such a way that potential aggressors run the risk of encountering collective military capabilities in response;

63.2. The capabilities to neutralise possible threats should be at a level of readiness commensurate with the lead time for such threats to develop. This should be clearly visible. Care must be taken not to open strategic gaps in the capability of the SANDF when reducing force levels;

63.3. Deterrence will not only be pursued against potential short-term aggression through immediate force readiness. Potential aggression in the long-term will also be deterred by maintaining the capability for expansion;

63.4. Even if South Africa is not strong enough to ensure dominance in defensive actions, the risk to any potential aggressor should be unacceptably high;

63.5. Deterrence should not be counter-productive in that it triggers an arms race. This has implications for doctrine, force design and force levels.

64. It is therefore vital that the SANDF maintain a high standard of combat readiness. This is reflected in the following requirements in relation to force design contained in the Defence Review requirements[48]:

64.1. SANDF must be comprised of a small but efficient and sustainable core force;

64.2. force levels will be limited to what is needed to maintain essential capabilities and expertise. These will serve as a basis for expansion if necessary;

64.3. Great reliance will be based on the part-time corps. This ensures that mobilisation will be more visible and thus less threatening than a large standing force;

64.4. training and force preparation should be consistent with defence policy, posture and doctrine;

64.5. the Defence Review also expands on the Core-Force Approach first introduced in the White Paper.

65. According to the Defence Review (at paragraph 9 of Chapter 3), the implications of the “core-force approach” is the following:

[48] In paragraph 20 of Chapter 2

65.1. the SANDF must have an affordable and sustainable force structure appropriate to its peace time role and capable of expanding timeously to meet future defence contingencies;

65.2. the SANDF must maintain the necessary systems and expertise to ensure flexible and responsive defence for high risk defence contingencies which may arise in the short term;

65.3. the SANDF must maintain effective intelligence and early warning capabilities to enable it to respond timeously to changes in the strategic environment;

65.4. the SANDF must provide a conventional military deterrence which demonstrates the capability and political will of the state to defend South Africa against aggression;

65.5. the SANDF must maintain and develop the capabilities and skills required to contribute to regional security;

65.6. the SANDF must comprise a small but regular component, backed up by a significantly larger part-time component. This structure is cost-effective and will promote regional confidence;

65.7. the SANDF must perform its secondary functions mainly with its core defence capabilities. Additional force structure elements may be added and funded for specific functions;

65.8. the SANDF must rely on its core defence capabilities if employed against internal threats to the constitutional order.

66. The Defence Review provides in paragraph 51 of Chapter 3 that the SANDF should be cost-effective; capable of appropriate expansion; technologically appropriate; balanced and flexible; and highly motivated and prepared.

The Defence Act 42 of 2002

67. The principles set out in the White Paper are reflected in the Defence Act 42 of 2002 ("the Defence Act"). In particular the Defence Act entrenches the defensive posture of the Defence Force.

68. According to section 2 of the Defence Act, the primary object of the Defence Force is to defend and protect the Republic, its people and its territorial integrity.

69. According to section 11 of the Defence Act, the SANDF is comprised of:

69.1. the Regular Force, the members of which serve full-time until-

69.1.1. reaching their age of retirement;

69.1.2. expiry of their contracted term of service; or

69.1.3. otherwise discharged from the Defence Force in accordance with the law; and

69.2. the Reserve Force, the members of which serve on a part-time basis for such periods as they have been contracted for, unless their service is terminated in accordance with the law.

70. In terms of section 12(1) of the Defence Act, the structural components of the SANDF are:

70.1. the South African Army;

70.2. the South African Air Force;

70.3. the South African Navy; and

70.4. the South African Military Health Service.

71. Under section 58(1) of the Act, every member of the Defence Force is statutorily obliged to serve, and to remain in service, during time of war, a state of national defence or a state of emergency.

72. This in effect means that every member, be it a trumpeter, a chaplain or an air pilot is statutorily obliged to serve. The member is expected to be at all times fit and healthy both physically and psychologically in order to be deployed.

73. Section 81(1)(i) of the Defence Act empowers the Minister to create regulations governing the establishment of medical, physical and psychological standards.

74. The Act therefore specifically mandates the adoption of medical standards.

The General Regulations of the SANDF

75. On 31 May 2004 the General Regulations for the South African Defence Force were amended[49]. Under the amended regulations, the Minister of Defence authorised the Surgeon General to, from time to time, determine

[49] See Supplementary Bundle p217

the standard of physical and mental fitness required in peace or war time for the efficient work performance of members of the SANDF.[50]

76. These standards are determined through the G and K codes and classifications.

IMPLICATIONS OF THE LEGAL LANDSCAPE

77. In light of the provisions of the Constitution, and the Defence Act (read together with the White Paper and the Defence Review) the principles which drive the SANDF include the following:

77.1. It is required to maintain a down-sized core force which is able to respond with immediacy to threats to national security;

77.2. The core force must be both efficient and effective;

78. These principles have direct implications for SANDF policy on recruitment, promotions and deployment in that it means that new recruits have to be able to perform at optimal levels.

[50] Regulation 2(1); Supplementary Bundle p224

79. A further reason for this is that the Defence Act states that members remain members until they die, their contracts of service expire or they are lawfully discharged.

80. This means that even if a member, for one reason or another, ceases to be deployable, such a member remains part of the Force component. Therefore, when recruiting, the SANDF is aware that new recruits must compensate for members who are not deployable. It therefore does not make sense to swell the ranks of members who are not deployable.

81. It is also significant that the Defence Act itself requires that every member of the SANDF be deployable.

82. The Defence Act also expressly empowers the Minister to adopt medical standards. In so doing, it implicitly recognises that these standards may serve as a basis for exclusion.

SPECIAL CHARACTERISTICS OF THE MILITARY

83. The defining characteristic of the military which distinguishes it from all other state organs, entities and employers is its special constitutionally allocated role to protect and preserve national security.

84. This crucial role essentially means that the military bear the responsibility to protect the integrity and autonomy of the country from aggressors, known and unknown.

85. This role also means in making policy decisions in relation to Force design and composition, there is absolutely no room for trial and error. Decisions need to be prudent and cautious because of the interest of national security.

86. The other key defining feature of the military is the overwhelming responsibility it assumes in relation to members of the Force.

87. The military is different from other employers insofar as the military recruits members on the understanding that, once a member joins the force, he or she will be exposed to the ever-present risk of harm.

88. Not only does the military owe members a duty of care, but once a member joins the military and is deployed, the military becomes entirely responsible for every element of that member's existence. This includes the provision of:

88.1. food;

88.2. shelter;

88.3. clothing; and

88.4. medical supplies.

89. Apart from not being in control over their lives, members who are deployed are subject to harsh living conditions in the deployed areas. These conditions include:

89.1. direct exposure to risk of harm;

89.2. being away from friends, family and loved ones;

89.3. worry about leaving loved ones behind;

89.4. uncertainty in a foreign country and in unfamiliar surroundings;

89.5. exposure to a foreign language and culture;

89.6. extreme climates, usually heat and high humidity;

89.7. physical exertion as a result of foot patrols;

89.8. food restrictions and, at times, surviving on dry rations;

89.9. hostility from locals; and

89.10. foreign infections for which they do not have immunity.

90. These conditions are also characteristic of peacekeeping missions. The Medical Support Manual for United Nations Peacekeeping Operations (2nd Ed) (at section 6.07) records that peacekeepers are subject to intense, traumatic and even life-threatening situations. These expose peacekeepers to severe and prolonged levels of stress. The factors identified in the Manual as contributing to stress include:

90.1. difficult or unclear mission giving rise to frustration, and/or feeling of helplessness in carrying it out, as well as loss of confidence in leadership;

90.2. not being professionally trained for the task at hand;

90.3. need to show impartiality to different parties in a conflict despite personal beliefs;

90.4. lack of appreciation by the victims and sometimes hostility and lack of co-operation from the local authorities;

90.5. lack of security and concern about personal safety;

90.6. stress related to use of weapons;

90.7. need to suppress emotions;

90.8. uncomfortable living conditions;

90.9. separation from home, family and friends;

90.10. cultural differences, language difficulties and dietary changes;

90.11. lack of recreation;

90.12. traumatic stress as a result of witnessing violence or death or experiencing intimidation).

91. The duty of the SANDF in relation to its members is crystallised in the Defence Act as well as the Occupational Health and Safety Act.

92. Apart from its common law duties as an employer to take reasonable care of its employees, the SANDF is subject to the Occupational Health and Safety Act:

92.1. section 8(1) of the OHSA provides that: “Every employer shall provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of his employees”;

92.2. OHSA also places an obligation on the SANDF to establish, as far as is reasonably practicable, what hazards to the health or safety of persons are attached to any work which is performed;

92.3. the employer is further required to, as far as is reasonably practicable, further establish what precautionary measures should be taken with respect to such work in order to protect the health and safety of persons, and he shall provide the necessary means to apply such precautionary measures.

93. In addition, section 56 of the Defence Act provides for the protection of members who are deployed on active service.

94. Section 56(4) of the Defence Act provides that a member who, through no misconduct on his or her part, sustains a wound or injury or contracts an illness while on military service or undergoing training is, under such conditions and for such period as may be prescribed, entitled to be provided with medical, dental and psychological or other necessary

treatment for such wound, injury or illness, notwithstanding that the duration of such treatment may extend beyond that member's service contract.

95. Therefore, where a member becomes ill while on service or undergoing training, he or she is entitled, at the expense of the SANDF, to the requisite medical, dental, psychological or other treatment.

96. The only time that the SANDF is not required to provide such treatment is where the illness or injury is as a result of the member’s misconduct.

97. The Defence Act further provides, in section 56(4)(b) that a member receiving the treatment referred to in paragraph (a) must receive his or her pay and entitlements on their becoming due and such period of treatment must for all purposes be regarded as duty.

98. Thus, it is the duty of the SANDF to ensure that the risk of death or injury to members is minimised. This duty intensifies when a member is deployed and the exposure to harm is compounded.

99. In addition, under section 58(1) of the Defence Act, every member of the Force is deemed to be deployable.

100. Put differently, every member of the Force, irrespective of rank, status or station, has to be combat ready.

101. For this reason, while it is inevitable that over time, members may due to age or ill-health, cease to be deployable, it is imperative that new recruits are combat ready. The optimal health of new recruits serves to cushion the effect on the SANDF of having in its ranks members who are not of optimal health and who are thus not deployable. This issue is dealt with in detail hereunder.

102. Policy decisions are therefore taken with a view to balancing the various and varied factors which have a direct bearing thereon.

103. The SANDF, in dealing with force design and composition, has taken a policy decision that it will only recruit candidates who are of optimum health. The reasons for this include:

103.1. down-sizing of the Force is an on-going process resultant in part from our unique history in terms of which the member numbers of the Force were inflated pursuant to the integration process;

103.2. the Department of Defence has an ageing human resource component, the majority of whom are in the ranks of private up to sergeant in the Army and their equivalents in other services;

103.3. The composition of the SANDF includes members whose levels of health have deteriorated over time and who are, as a result, not of optimal health and thus not deployable. They however remain members of the Force.

104. As a result the Department has placed emphasis on the rejuvenation and right-sizing of the Force. This commitment was outlined in the Department of Defence's HR Strategy 2010. The strategic goals of the HR Strategy 2010 include the following:

104.1. to rejuvenate the SANDF's composition with young, fit and healthy members who meet the requirements for operational utilisation;

104.2. to achieve an affordable Human Resources composition;

104.3. to adequately resource and utilise the Regular Force and the Reserves;

104.4. to replace the current SANDF service system with a new service system that will reduce personnel expenditure and optimise force level flexibility;

104.5. to attain a broad level of representivity at all levels and in all occupational classes;

104.6. to improve Human Resources service delivery;

104.7. to obtain equity in the management and administration of uniformed and civilian personnel;

104.8. to retain the required operational and functional expertise.

RECRUITMENT TO THE SANDF

105. The respondents state that the recruitment process for entry into the SANDF is unapologetically vigorous and challenging. It serves to establish that new recruits are physically and mentally fit for active service.

106. The respondents further have an operational concern relating to the members of the force who still form part of the force establishment but who, by virtue of age or illness, are not deployable. For this reason the respondents have identified the need for new recruits to be young, fit and healthy.

107. For this purpose the recruitment process includes a Comprehensive Health Assessment (CHA) the purpose of which, according to Chapter 3 of

the 2007 Joint Defence Publication, is to ensure the operational readiness and health of new recruits to the SANDF.

108. According to this document, the aim of CHA is to achieve the following:

108.1. to ensure the immediate availability of SANDF members who are fit and healthy and ready at short notice for operational deployments.

108.2. to enable SAMHS to do strategic human resource planning and utilisation;

108.3. to provide SAMHS with the opportunity of early identification of health problems and early intervention, treatment and rehabilitation to maintain optimal health levels;

108.4. to analyse the health profiles of members to facilitate preventative programmes and strategic health management planning;

108.5. the process allows the SAMHS to approach the health of uniformed members in a comprehensive and multidisciplinary way, thereby ensuring that the SANDF maintains the required levels of operational readiness.

108.6. comprehensive Health Assessments include a medical examination, an oral health assessment, psychological and social work assessments, as well as a declaration of immunisation status.

Medical standards

109. The role of the First Respondent is to determine the standard of physical and mental fitness of military personnel for efficient work performance in every Service or Division in each branch, corps or unit thereof and in each mustering, appointment, post or job classification in the SANDF.

110. Section 3 of Part 1 of the General Regulations for the SANDF No. 26365 of May 2004 empowers the First Respondent to, amongst others, determine the required standard of physical and mental fitness of any person who applies for appointment and serving in any part of *the SANDF*.

111. The Medical Standards for Employment, Appointment and Deployment are contained in the Guidelines for Medical Standards in the SADF (1974) and is supplemented by the JDP to include all parameters of health collectively known as the CHA.

112. The CHA embodies certain medical standards which provide a minimum standard of health necessary before one can be considered healthy enough to form part of military service.

113. The general medical standards on which the medical tests are based are not static and can be amended to suit the prevailing circumstances at the time. The factors which influence medical standards include:

113.1. the scientific and other information available on a medical condition;

113.2. information available on treatment and cures;

113.3. the known physiological effects of the disease on a person and his or her ability to perform in the extremely challenging military environment;

113.4. the known psychological effects of the disease on a person and his or her ability to perform in the extremely challenging military environment; and

113.5. the requirements of the military.

Deployment

114. Currently, HIV positive persons may be deployed internally. However, the standard required for external deployments is G1K1 green.

115. The requirement of G1K1 is due to primarily the harsh deployment situations described in the affidavits of Lieutenant Colonel Hallat and Corporal Goboza and the unpredictability of deployment situations.

116. However, there is currently a review pending before the Council on Defence in relation the G2 categorisation being re-evaluated to include certain chronic ailments including people who are asymptomatic HIV positive. If in fact the G2 categorisation were to be included, the First Respondent has indicated that the foreign deployment of HIV positive people, if it were to be allowed, it would have to be conditional on the fulfilment of certain criteria which may include:

116.1. the health condition of the member must be stable enough to consider deployment;

116.2. conditions in the deployed area must be accommodative to persons living with HIV in light of the hazards of the condition described above;

116.3. there must be appropriate medical services available in the deployed country;

116.4. there must be limited numbers of HIV positive people deployed within one troop;

117. The consideration of this proposal to re-consider the G2 classification at the highest decision making level demonstrates that the SANDF is consistently considering avenues to accommodate the involvement of people living with HIV in the military where it is appropriate to do so.

Promotion

118. Promotion to the rank of commissioned officer may only happen if a member is G1K1.

119. This is largely due to the fact that it is imperative that all commissioned officers be deployable in order to lead troops during deployment.

THE SANDF AND HIV

120. The South African military is a microcosm of the broader South African society. The military is therefore also faced with the challenge of the HIV and AIDS pandemic that is ravaging the South African society.

121. The SANDF currently has a high rate of approximately 23% of HIV prevalence amongst its members. It has consciously taken care to address the specific needs of members living with HIV. SG Instruction No 01 / 99 (SA 8 Supplementary Bundle p49) deals with the management of HIV and Aids in the Department of Defence.

122. The SANDF also has initiated the PHIDISA Project which is a cooperative HIV/Aids treatment research initiative established in 2003. The Project is a collaborative effort between the South African Military Health Service of the SANDF and the US Department of Defence and the National Institute of Health of the United States.

123. The primary object of the Project is to curtail the transmission of HIV and Aids among South African military and civilian employees and their families and to provide for the treatment and management of HIV and Aids in the military.

124. In relation to recruitment, deployment and promotion, HIV is currently characterised as a chronic illness which excludes a classification of G1K1.

125. It is common cause that the rate of progression of the disease varies from person to person. This introduces an element of unpredictability when dealing with HIV and its effects on an individual. To compound the

problem of unpredictability, research has indicated that the progression of disease can be exacerbated if the person is exposed to certain environmental stressors.

126. This means that, in the military context where individuals are faced with the most severe stressors, there is a real danger that deployment may result in the progression of the disease.

127. Furthermore, someone may be asymptomatic but neurocognitively compromised. The nature of neurocognitive impairment resulting from HIV is such that it compromises that patient's ability to function under novel or unstructured conditions. In effect, the compromised patient becomes increasingly structure dependent. This structure cannot be provided in deployment situations.

128. Like so many chronic conditions, the prognosis of a person living with HIV depends on :

128.1. access to health care facilities;

128.2. monitoring of progression;

128.3. adequate treatment;

129. In addition, there must be no unnecessary exposure to exacerbating factors which characterise deployment situations like:

129.1. opportunistic infections;

129.2. sanitation;

129.3. physical exertion;

129.4. adverse climate;

129.5. undue stress;

129.6. insufficient and erratic nutrition; and

129.7. lack of water.

130. The above is difficult to guarantee in deployment situations.[51]

The evidence underlying the stance of the SANDF on HIV

[51] See affidavits of Hallatt and Goboza

131. The current position of the SANDF is an attempt to discharge its duty to protect employees with chronic illnesses by not exposing them to conditions which may result in a deterioration of their conditions.

132. The SANDF further seeks to refrain from deploying members who are dependant on medication for the well-being (and survival) if it cannot guarantee supply of that medication to the member once that member is deployed.

133. The stance of the SANDF is based on current research:

134. Professor Viljoen indicates in her affidavit that:

134.1. while antiretroviral treatment slows down the rate of replication of the HI virus, it does not completely arrest such replication. Instead the nature of the virus is such that replication continuously occurs in the lymph nodes, spleen and thymus.

134.2. people living with HIV are susceptible to stressors which can cause a deterioration in their condition. This applies equally to those who are asymptomatic. Stressors include environmental stressors, societal stressors and medical stressors.

135. the evidence of Professor Viljoen is borne out by the Zimbabwean study discussed in the supporting affidavits of Doctors Rupiya and Dhlomo.

136. this study, not commissioned or undertaken by the SANDF, was done by Zimbabwean researchers with the concurrence of the Zimbabwean Defence Force. It demonstrates that the various stressors to which members are exposed during military training may worsen the condition of people living with HIV.

137. The applicants contend that the study is unethical insofar as the researchers deliberately exposed the subjects of the study to harm. This is however not a complete picture of the basis of the study since:

137.1. all the subjects fully consented in the study;

137.2. subjects were assured that they could withdraw at any time from the study.

138. In any event, the SANDF did not commission or conduct the study. It merely has been presented with the results of the study. Given the intensity of the SANDF's obligations in relation to members, the SANDF cannot disregard the findings of the study particularly since these findings

dove-tail with the evidence that stressors may cause a deterioration in the condition of persons living with HIV.

139. In relation to the efficacy of ART's, the affidavit of Dr Dhlomo indicates that:

139.1. people who are on antiretroviral treatment may suffer side effects from the treatment which may hamper their ability to function at optimal levels.

139.2. in order for the treatment regime to be effective, there must be strict adherence to routinely taking ART's daily and at the same time each day. Such strict adherence is not easy in a military context where members do not follow daily routines.

139.3. treatment on ART's requires constant monitoring and testing in order to assess tolerance of the treatment regime.

The response of the applicants to the respondents' expert evidence

Professor Viljoen

140. The applicants dispute Professor Viljoen's expertise and credibility because one of the articles published by her is a 'letter' to the editor of a journal setting out her hypothesis.

141. Apart from being factually incorrect, the proposition is astounding that the expertise of Professor Viljoen (who has two Phd's and has published 90 publications in peer-reviewed journals) is challenged on the basis proposed by the applicants.

142. The applicants also contend that the knowledge of Professor Viljoen is theoretical. It is unclear what practical studies the applicants are proposing in relation to the study of psychoimmunology which will qualify Professor Viljoen to articulate her expert views.

143. We accordingly submit that the challenge to the evidence of Professor Viljoen is unwarranted and at best for the applicants raise a material dispute of fact which ought to be referred to trial.[52]

Dr Rupiya

143.1. Dr. Rupiya has done extensive research on the formulation of Defence Policies, military expenditure and civil military relations. His research also includes the complex relationship between HIV/AIDS in the security sector, in particular, the defence sector;

[52] Plascon- Evans Pants Ltd v Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)

143.2. he further works with the United Nations, Department for Peace Keeping Operations (“DPKO”), managing research in various countries in Africa, which research focuses on HIV/AIDS and troop contingents that are deployed on peace missions in Africa.

143.3. Dr. Rupiya also examines the national policies of these countries in light of continental guidelines and international policy frameworks;

144. The applicants challenge the independence of Dr Rupiya without setting out a factual foundation to doubt his expertise in the study of militaries and their policies.

145. It is therefore submitted that, no basis exists to challenge the expertise of Dr. Rupiya.

Drs Baker and Reynolds

146. The applicants challenge the expertise of Drs Baker and Reynolds on the basis that they lack expertise in the particular field of HIV.

147. The respondents do not accept this attack to the expertise of Drs Baker and Reynolds.

148. Dr Baker is a neurologist employed by the South African National Defence Force and is the Head of the Neurology Department at No1 Military Hospital.

149. He also holds a post graduate degree in neurology. He is further a Professor in neurology at the Medical University of South Africa (MEDUNSA).

150. Dr Baker is thus an expert and is qualified therefore to give an expert opinion on the effects of HIV on the nervous system of HIV positive individuals.

151. Furthermore Dr Reynolds is a clinic psychologist specialising in neuro – psychology. He has two masters degrees in psychology.

152. He is accordingly qualified to give an expert opinion on the impact of HIV on the neurological functions of HIV positive individuals.

Dr Dhlomo

153. The applicants challenge Dr Dhlomo's expertise on the basis that he has cited no publications in his CV in the field of ART and HIV.

154. This challenge is entirely misdirected. Dr Dhlomo is the head of PHIDISA and, as demonstrated in his CV, has many years of experience dealing with HIV in a military context.

155. In contrast the expert evidence proffered by the applicants is entirely lacking.

156. None of the experts have any expertise relevant to a military setting. None of the experts make their opinions relevant to a military setting which, as described above, is a highly unique environment. In particular, the evidence of Professor London ought to be disregarded because his evidence is not relevant to a military setting.

157. Most importantly, the applicants do not rely on an expert of sufficient expertise to counter the crucial evidence of Professor Viljoen. In this regard, Venter does not set out any research or experiential expertise which is comparable to that of Professor Viljoen.

HIV TESTING UNDER INTERNATIONAL LAW

The United Nations

158. Under the HIV Testing Policy for Uniformed Peacekeepers, the UN indicates that an HIV test is not required by the UN. However, the UN recognizes in paragraph 5 thereof that certain contributing countries may

have mandatory testing policies. The document records that the Department of Peacekeeping Operations respects this national requirement.

159. The UN clearly requires that individual testing be determined through pre-deployment medical testing (see paragraph 7).

160. At paragraph 9, the policy states that the UN does not exclude HIV positive personnel from serving in a mission because of their HIV status.

161. The Medical Support Manual for United Nations Peace-keeping Operations was first published and distributed in 1995. This policy is currently applicable insofar as it does not differ with the HIV Testing Policy for Uniformed Peacekeepers (annexure JNH 18 to the founding affidavit).

162. This document aimed to outline operational and medical support in the field during UN peace-keeping operations.

163. The Medical Support Manual places emphasis on the Medical Support Plan. In order to arrive at an adequate Medical Support Plan, the Manual identifies the following Planning Considerations:

163.1. Troop Strength and Deployment;

163.2. Type of Peacekeeping operation;

163.3. Standard of Local Medical Infrastructure;

163.4. Geographical factors;

163.5. Medical Threat Assessment.

164. In order to conduct a medical threat assessment, the Manual requires that an assessment be done of the disease and non-combat injury rate. According to the Manual this rate is calculated as a daily percentage rate and is an indicator of the daily workload for a deployed medical unit.

165. It is self evident that, in order to conduct a medical threat assessment, the SANDF would need comprehensive health assessments done on all members who are to be deployed.

166. The UN Policies and Procedure provide in section 5.02 that the following medical conditions "*preclude service in a peacekeeping mission and must be assessed on an individual basis, considering the severity of the condition and the assignment for which he or she is being selected:*

166.1. *Ischemic heart disease;*

166.2. *Hypertension requiring medication;*

166.3. *Diabetes mellitus;*

166.4. *Malignancy;*

166.5. *History of gastro-duodenal ulcers;*

166.6. *ulcerative colitis;*

166.7. *Asthma, chronic bronchitis and emphysema;*

166.8. *Chronic nephritis and urothiasis;*

166.9. *Chronic low back condition;*

166.10. *Skin disease like extensive eczema, custic recurrent acne and skin cancer;*

166.11. *Allergies requiring sustained supportive treatment;*

166.12. *Conditions requiring special continuing medication such as steroids, anti-tuberculosis drugs, chemotherapy, anti-depressant and anti-psychotic drugs;*

166.13. *Endocrine disturbance e.g. hyperthyroidism;*

166.14. *Known allergies to anti-malarial medication;*

166.15. *Immune compromise including Aids"*.

167. In relation to the deployment of HIV positive people on peacekeeping missions, the Manual states (in section 5.02D) that:

167.1. National policies regarding the enlisting and employment of HIV positive people in the military vary;

167.2. HIV positive people who do not show clinical manifestations of AIDS are not precluded from UN peacekeeping service;

167.3. It is however recommended that such individuals not be selected as treatment available within the Mission area may not be adequate to meet their special requirements.

167.4. Exposure to endemic infections and exhaustive immunization requirements may also be detrimental to their health. In addition to the individuals health concerns there is also the risk of his or

her transmitting HIV to medical personnel, fellow peacekeepers and sex workers in the Mission area.

168. The Manual also places primary responsibility for the provision of medical services with the medical unit supporting their respective sector or locality.

169. Where an individual is treated at a local clinic or medical facility, reimbursement of medical expenses will be an individual or national responsibility.

CONCLUSION

170. The applicants have failed to establish a basis to review the “HIV testing policy” of the respondents. Instead the applicants have, in their replying affidavit properly conceded the need for the SANDF to conduct HIV tests for the purposes of the Comprehensive Health Assessment.

171. Insofar as the applicants purport to challenge “the consequences” of the HIV testing, this is not borne out by the relief sought in the notice of motion.

172. In relation to the medical standards which determine that HIV does not render a candidate G1K1 compliant, the SANDF takes the view that in

light of current research, exposure to the extremely stressful conditions of deployment may result in a deterioration of the condition of a person living with HIV.

173. To the extent that the applicants rely on the experiences of individuals to sustain a contention that deployment is neither hazardous nor stressful, the applicants must accept that the nature of deployment is such that the situation is unpredictable. The SANDF is statutorily obliged to take all steps necessary to protect its members and therefore may not formulate policy based on best case scenario. Deployment is characterised by a constant threat to harm. This is the reality which the military must deal with.

Adv K.D. Moroka SC

Adv P.L. Nobanda

Adv K. Pillay