

Victory against the SANDF in HIV Discrimination Case

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Statement by the AIDS Law Project

The AIDS Law Project (ALP) is pleased to announce the successful conclusion of its litigation against the SANDF's policy of excluding HIV positive people from recruitment, external deployment and promotion. It is a vindication of the Constitution and should be seen as having significance not only for the military in South Africa, but internationally.

The order means that:

- The SANDF can no longer automatically exclude HIV positive people from recruitment, external deployment and promotion;
- That the individual applicants are entitled to immediate relief. In particular T.C.M. is to be employed as a trumpeter and Sipho Mthethwa is to be immediately reconsidered for external deployment; and
- The SANDF must amend its health classification policy within six months to allow for individualised health assessments of recruits and current members of the armed forces.
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The ALP is deeply indebted to the following people who lent their assistance to this litigation: Dr Francois Venter, Prof Leslie London, Prof Trefor Jenkins, Johannes Greef, Richard Elliott, Prof Robert Schooley, Shuaib Manjra, Dr Brian Brink, A.K.M., William Kerfoot, and Philip Moshokoa. Special thanks go to our clients, the South African Security Forces Union (SASFU), Sipho Mthethwa, T.C.M. and Z.S.M. for their fortitude. We would like to thank Gilbert Marcus SC and Isabel Goodman for their expert legal counsel.

Today the Pretoria High Court ordered as follows:

1. That:
 - a. 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;
 - b. the names of the individuals mentioned in (a) 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;
 - c. the names of the individuals mentioned in (a) 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 within the South African National Defence Force, 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:
 - a. not to be unfairly discriminated against in terms of section 9(3) of the Constitution;
 - b. to privacy in terms of section 14 of the Constitution;
 - c. to dignity in terms of section 10 of the Constitution;

- d. to fair labour practices in terms of section 23(1) of the Constitution; and
- e. 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:

- a. formulate a new health classification policy within six months of the date of this order or such time period as the Court directs; and
- b. 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 counsel. It is recorded that Advocate Hassim is employed by the AIDS Law Project for purposes of the Taxing Master.

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