



## Hoffman v. South African Airways

(2) SA 628; 2001 (10) BHR 571; (2000) 3 CHRLD 146

**Country:** South Africa

**Region:** Africa

**Year:** 2000

**Court:** Constitutional Court

**Health Topics:** Health care and health services, HIV/AIDS

**Human Rights:** Freedom from discrimination

### Facts

In 1996, the Appellant applied for employment as a cabin attendant with South African Airways (SAA). At the end of the selection process, he was found to be a suitable candidate for employment. He was then subject to a medical examination, which found him clinically fit and thus suitable for employment. However, a blood test revealed that he was HIV-positive. SAA subsequently deemed him unsuitable for the position.

The Appellant challenged the constitutionality of the refusal to employ him based on his HIV status in the Witwatersrand High Court (the High Court). He claimed unfair discrimination in violation of his constitutional right to equality, human dignity and fair labour practices. SAA denied these claims and argued they were justified in their hiring practices on the basis of safety, medical and operational concerns. They contended that they were attempting to mitigate the risk of transmission of HIV to passengers. SAA further asserted: (1) their hiring practice was aimed at detecting all kinds of disability, and did not single out HIV; (2) life expectancy of people living with HIV was too short to invest in their training; and (3) other major airlines had similar hiring practices.

The High Court held in favour of SAA. The Court found SAA's hiring practices to be sufficiently based on considerations of medical, safety and operational concerns. The Appellant filed an appeal of the High Court's decision with the Constitutional Court.

### Decision and Reasoning

The Court declared that people living with HIV "must be treated with compassion and understanding" and they "must not be condemned to economic death" by the denial of equal opportunity in employment. The Court held that "the refusal by SAA to employ the appellant as a cabin attendant because he was HIV-positive violated his right to equality guaranteed by section 9 of the Constitution."

The Court stated that SAA's contention that its hiring practices were justified on the basis of safety, medical and operational concerns was not only incorrect, but also in conflict with the medical evidence proffered in the company's defence. In an affidavit, SAA's medical expert testified to the High Court that only people living with HIV who had reached the stage of immunosuppression and whose CD4 count had dropped below 300 cells per microliter of blood were prone to medical, safety and operational hazards. SAA's assertions were therefore not true of all people living with HIV. In particular, they were not true of the Appellant, as he had not reached the immunosuppressed stage. The Court further held that the practice of other airlines was not relevant in determining the constitutionality of SAA's actions.

The Court upheld the appeal and set aside the decision of the High Court. The Court ordered SAA to make an offer of employment to the Appellant immediately, and to pay the Appellant the cost of employing legal counsel in both the High Court and the Constitutional Court.

### Decision Excerpts

"The appellant is living with HIV. People who are living with HIV constitute a minority. Society has responded to their plight with intense prejudice. 23 They have been subjected to systemic disadvantage and discrimination. 24 They have been stigmatised and marginalised. As the present case demonstrates, they have been denied employment because of their HIV positive status without regard to their ability to perform the duties of the position from which they have been excluded. Society's response to them has forced many of them not to reveal their HIV status for fear of prejudice. This in turn has deprived them of the help they

would otherwise have received. People who are living with HIV/AIDS are one of the most vulnerable groups in our society. Notwithstanding the availability of compelling medical evidence as to how this disease is transmitted, the prejudices and stereotypes against HIV positive people still persist. In view of the prevailing prejudice against HIV positive people, any discrimination against them can, to my mind, be interpreted as a fresh instance of stigmatisation and I consider this to be an assault on their dignity. The impact of discrimination on HIV positive people is devastating. It is even more so when it occurs in the context of employment. It denies them the right to earn a living. For this reason, they enjoy special protection in our law. 25"

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

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