DIAU v BOTSWANA BUILDING SOCIETY

INDUSTRIAL COURT, GASORONE

(IC NO 50 OF 2003)

19 December 2003

DINGAKE J

Chilisa for the applicant.
Solomon the respondent.

DINGAKE J:
The parties in this matter dispensed with the need to call evidence and argued their case on the basis of the admitted statement of facts. In terms of the admitted statement of facts, the applicant was employed by the respondent in terms of a letter dated 18 February 2002. She commenced her employment on 25 February 2002. The applicant's employment was conditional on her undergoing and passing a full medical examination in terms of the letter dated 18 February 2002.

It is material to reproduce hereunder the contents of the letter dated 18 February 2002 in its entirety:

BOTSWANA BUILDING SOCIETY

Telephone: 371396 Head Office: B.B.S House Broadhurst Mall P O Box 40029
Telex: 2702 BD GABORONE
Fax: 303029 Botswana

18 February 2002

Ms Sarah Diau
P O Box 1320
GABORONE

Dear Ms Diau

OFFER OF PROBATIONARY EMPLOYMENT - YOURSELF

I am pleased to inform you that you have been successful in your interview for employment held on 15 January 2002. You are accordingly offered probationary employment as Security Assistant BS 11 at a salary of P900.00 per month. Your annual leave entitlement will be 18 days. Your duty station will be Gaborone. Your probationary employment will be subject to a period six months. During this period, your termination of employment will be subject to notice of 48 hours by the party that initiates it.

During your probation, you will perform duties as outlined in the attached job description for Security Assistant. You will however be required to perform any other duties related to your job and deemed to be within your competence to perform.

Your employment will be subject to your passing a medical examination by a doctor chosen and paid by the Society. You are issued with the enclosed medical examination form to be completed by the medical doctor referred to.

You will upon successful completion of your probationary employment, be appointed to the permanent and pensionable service of the Society and be required to join the membership of the Staff Pension Fund.

You should expect to be posted to any duty station at the discretion of the Society. A copy of the booklet of Conditions of Service will be issued to you upon your assumption of duties. This booklet sets out in more detail, the conditions of your employment.

If you accept this offer, please indicate your acceptance in writing to the Chief Executive, before your commencement of duties. You are also required to complete the enclosed application and Declaration of Secrecy forms, before submitting them along with a copy of your National Identity (Omang) card to the Human Resources officer as soon as possible.
We look forward to your response and commencement of employment with the Society and hope that you will contribute significantly to the growth of the organization.

Yours faithfully
Signed
L. Phoi
FOR/CHIEF EXECUTIVE

cc: Finance Manager
Senior Administration Officer

By letter dated 27 August 2002, the respondent wrote the applicant a letter advising her that as part of the employment examination she was to submit a certified document of her HIV status. For completeness, I produce hereunder the aforesaid letter:

BOTSWANA BUILDING SOCIETY

Telephone: 371396 Head Office: B.B.S House Broadhurst Mall P O Box 40029
Telex: 2702 BD GABORONE

Fax: 303029 Botswana

27 August 2002

Ms Sarah Diau
P O Box 40029
GABORONE

u.f.s: Senior Administration Officer

Dear Ms Diau

FURTHER MEDICAL EXAMINATION

This serves to inform you that you are required to submit a certified document of your HIV status

Yours faithfully

Signed
L. Phoi
FOR/CHIEF EXECUTIVE

According to the admitted statement of facts, the applicant did not initially respond to the aforesaid letter. She requested a delay in furnishing such document pending her decision whether she is willing to undergo such a test or not. On or about 7 October 2002, the applicant wrote the respondent, declining to undergo such a test. The letter articulates the reasons for her refusal and deserve being quoted in full.

P O Box 40029

Gaborone

7th October, 2002

Chief Executive
Box 40029
Gaborone

Att. Chief Executive

FURTHER MEDICAL EXAMINATION

Att. Chief Executive

With reference to your letter dated 27th August 2002 concerning submission of my certified document of my HIV status. This serves to inform that I am not going to do that unless it's a requirement under employment Act or any other Act.

As far as I know HIV status it's a personal right, not for public or employment requirement.

Thank you.

Yours faithfully

Sarah Diau
Security Officer

On 19 October 2002, the respondent, in writing, advised the applicant that she would not be confirmed to the permanent and pensionable service of the society. No reason was advanced for the termination of the applicant's employment.

The above constitute the indisputable facts of this case.

On the basis of the above facts Mr Chilisa, the representative of the applicant, raised a number of legal and constitutional issues.

I will attempt to summarise as succinctly and as briefly as possible the arguments advanced by both Mr Chilisa and learned counsel for the respondent, Mr Solomon.

Mr Chilisa's arguments are predicated on s 20(1) and 20(2) of the Employment Act (Cap 47:01) and on ss 3, 7, 9 and 15 of the Constitution of Botswana.
Mr Chilisa has argued before me that the applicant had completed her probationary period. He characterized the applicant as unskilled worker, whose probationary period cannot exceed three months in terms of s 20(1) of the Employment Act. It is his contention that to the extent that the respondent appointed the applicant on a six months probationary period, such period is in violation of s 38 of the Employment Act, in so far as it exceeds three months, and is therefore null and void and of no force and effect. The s 38 that Mr Chilisa was referring to is, in terms of the revised edition of the Laws of Botswana, now s 37, and provides that a contract of employment that provides for less favourable terms than those provided by the Employment Act shall be null and void to the extent that it so provides.

Mr Chilisa went further to argue that the respondent cannot rely on s 20(2) of the Employment Act because it did not give the applicant 30 days notice of termination as required by the aforesaid section as read with ss 18 and 19 of the Employment Act.

According to Mr Chilisa the applicant's contract of employment was terminated because she disobeyed the respondent's instruction to undergo an HIV test. He argued that such an instruction was unreasonable and that the applicant was entitled to disobey it.

At the constitutional level, Mr Chilisa argued that the conduct of the respondent of instructing the applicant to undergo an HIV test and subsequently not confirming her after she refused to oblige was in violation of ss 3, 7(1), 9(1) and 15(2) of the constitution. In particular he sought to persuade the court that the non-confirmation of the applicant, which effectively ended her contract of employment with the respondent for refusing to undergo an HIV test, constitutes degrading treatment as contemplated by s 7(1) of the Constitution of Botswana.

I turn now to summarise the submissions of learned counsel for the respondent, Mr Solomon.

Learned counsel for the respondent, Mr Solomon, started off by stressing that this is not a case in which the constitution is in issue, and that it is not a case which the court needs to consider the vertical or horizontal application of the constitution or to what extent the respondent is an organ of the state.

According to Mr Solomon, this case concerns the right of the employer, in this case, the respondent, not to confirm an employee to permanent employment after the expiration of the probation period. He argued that s 20(2) of the Employment Act deals with the situation where one terminates the contract of employment during the probationary period. He submitted that s 20(2) doesn't deal with a decision not to confirm an employee to permanent status after the expiry of the probationary period.

According to learned counsel for the respondent, the applicant was offered and accepted employment on a probationary basis for a period of six months and that at the expiry of that period, it was up to the respondent to confirm the applicant to the permanent and pensionable service of the society or not to confirm her. He argued that the respondent elected not to confirm her as it was within its rights to

do so. He contended further that the respondent was not obliged to proffer any reasons for its decision.

According to learned counsel for the respondent, the applicant's probation ended on 27 August 2002, and that this is the day the respondent was entitled to have advised the applicant that it is not going to confirm her as a permanent and pensionable employee of the society, but it did not do so because the applicant requested for an opportunity to reflect on whether she wants to undergo the HIV/AIDS test as per the instructions or not. The applicant only advised the respondent that she would not undergo the required test on or about 7 October 2002, and 12 days or so later her employment was terminated by letter dated 19 October 2002.

There is nothing on the admitted facts that suggest that applicant's probation was extended upon her request. There is in any event no formal communication to that effect. Learned counsel for the respondent was emphatic that the applicant was advised that as part of her contract of employment, she was required to submit a certified document of her HIV status, and that she was thus in a position where she knew she could not be confirmed to permanent employment unless she met the requirement.

With respect to the probationary period of the applicant, learned counsel for the respondent argued that there is no evidence that the applicant was an unskilled worker and that the court should hold that her probationary period should have been a period not exceeding three months.

I have considered the facts of this case and the submissions of the parties very carefully. The court accepts that the admitted facts do not mention whether the applicant was unskilled or skilled.

The court has however had regard to the job description of the applicant filed of record that sets out the nature of the applicant job, qualifications and experience.

For completeness, I produce hereunder the applicant's job description:

BOTSWANA BUILDING SOCIETY

JOB DESCRIPTION

JOB TITLE	*Security*
NAME OF JOB HOLDER	*Sarah Diau*
JOB GRADE	*BS 11*
REPORTS TO	*Senior Security Officer*
DEPARTMENT	*Administration*
DIVISION	*Corporate Services*
OBJECTIVES	*To implement security measures as directed by supervisors and management*

DUTY A	*IDENTIFYING POTENTIAL MISDEMEANOURS*

Task A1:	*Prevent suspicious characters from security breaches*
A2:	*Maintain security over Society property*
A3:	*Patrol premises*
A4:	*Monitor CCTV*

DUTY B

Task B1:	*TAKING CARE OF FACILITIES* *Check that fire equipment in working order*
B2:	*Ensure lights are out when offices are not in use*
B3:	*Ensure that electrical appliances are switched off after hours*
B4:	*Keep premises and grounds in clean and orderly state*
B5:	*Ensure that the Water Bottles for the coolers are filled*

DUTY C: PERFORMING RECEPTION DUTIES

Task C1:	*Receive vistors/clients*
C2:	*Keep visitors' log*
C3:	*Respond to telephone calls outside working hours*
C4:	*Take messages*

SUPERVISES:	*No supervisory responsibilities*
INTERACTS WITH:	*Senior Security Officer* *Heads of Department* *Other Staff* *Members of the Public*
MAJOR ACCOUNTABILITY	*To be vigilant at all times against potential security violators. To ensure that visitors are received cordially and helpfully. Undertake routine maintenance of premises and equipment.*
SKILLS/EDUCATION REQUIREMENTS	*Some primary education and basic literacy and numeracy and ability to converse in simple English. Some experience in a security environment.*
PERFORMANCE INDICATORS	*Number of security threats identified and dealt with successfully.*

It is clear from the aforesaid job description that the applicant's job did not require any expertise on her part, as her duties entailed, inter alia, patrolling premises, preventing suspicious characters from security breaches, keeping premises grounds in clean and orderly state, receiving visitors, responding to telephone calls, and generally being vigilant at all times against potential security violators.

The qualifications required are quite low, being primary education and basic literacy and numeracy and ability to converse in English. In terms of experience only ‘some experience’ in a security environment is required.

I am acutely aware that there is no definition of ‘skilled’ or ‘unskilled’ in the Employment Act. However, in the *Concise Oxford Dictionary* (9th ed ‘skilled’ is defined as follows:

‘Having or showing skill, skilful; requiring skill; highly trained or experienced; (of work) requiring skill or special training. “Skilful” is defined as having or showing skill, practiced, expert, adroit, and ingenious.”’
The above dictionary defines ‘skill’ as ‘expertness, practiced ability, facility in an action, dexterity or tact’.

In the case *Gaopotlake v Dulux Botswana (Pty) Ltd* [2000] 1 BLR 458, IC, my brother De Villiers J held that in order to determine whether an employee is skilled or unskilled, in the context of labour law, the court will consider, inter alia, the following:

(a) the nature of the employment of the said employee;
(b) his qualifications, if qualifications are required for such employment;
(c) what training the employee has undergone for such employment
(d) what experience the employee has in such employment.

Having regard to the nature of the job of security assistant which essentially does not require any special training and the very low formal qualifications required, I feel comfortable to conclude, as I hereby do, that the applicant herein was unskilled and that accordingly the requisite probation period in terms of s 20(1) of the Employment Act cannot exceed three months. In the premises, the six months probationary period was unlawful and null and void to the extent that it violated s 37 of the Employment Act.

In any event, even if I am wrong to conclude that the applicant was an unskilled worker, I would still hold that on the admitted facts the applicant had completed her probationary period as indicated in her letter of appointment, and was at the time of her dismissal a permanent and pensionable employee of the respondent. On the admitted facts, I am prepared to find, as I hereby do, that the applicant having commenced her employment on 25 February 2002, completed her probationary period six months later on 24 August 2002. This would seem to be supported by the logic of s 41(2) of the Interpretation Act (Cap 01:04).

In the result, the last day the respondent could have terminated her contract of employment was 24 August 2002.

In the admitted statement of facts, para 5 thereof, it is recorded that the applicant did not initially respond to this (referring to the instruction to undergo an HIV test dated 27 August 2002) and requested a delay in furnishing such document. On the basis of this paragraph, counsel for the respondent sought to argue that the respondent could not have advised the applicant of its intended non-confirmation of her contract because the applicant sought an opportunity to reflect on her position, which position she only advised the respondent of on or about 7 October 2002.

As I have indicated earlier, the last day the respondent could have properly terminated the applicant's contract of employment, in terms of her letter of appointment, is 24 August 2002. Instead the respondent failed to do so. The fact that the applicant did not initially respond to the instruction to undergo an HIV test on 27 August 2002, and her request to reflect on the instruction cannot by any stretch of imagination be taken to have extended the probationary period. The fact of the matter is that the applicant continued to work for the respondent until 19 October 2002, when she was effectively dismissed.

In the premises, even on the assumption that the applicant was to properly serve a probationary period of six months as per her letter of appointment, her probationary period would then have come to an end on 24 August 2002. What is certain is that by the time she was told she cannot be confirmed, she had long finished her probation and was therefore a permanent and pensionable employee of the respondent. If for whatever the reason the respondent considered the applicant still on probation after 24 August 2002, or more precisely on 19 October 2002, when it purported to terminate her contract, then it had grossly misunderstood the law.

It is perhaps appropriate at this juncture to discuss briefly the law governing employees on probationary periods.

Probationary periods are governed by s 20 of the Employment Act, the relevant provisions of which provide:

‘20(1) In the case of a contract of employment for an unspecified period of time (other than a contract of employment for a specified piece of work, without reference to time), such period *not exceeding three months in the case of unskilled employees*, and twelve months in the case of skilled employees, *as the contract may specify immediately* after the commencement of employment under the contract may be a probationary period (hereinafter referred to as a “probationary period”) if the contract so provides.

(2) Where a contract of employment is terminated during a probationary period by either the employer or employee under section 18 or 19 by not less than 14 days’ notice, the contract shall be deemed, for the purposes of this Part, to have been terminated with just cause and neither the employer nor the employee shall be required to give any reasons therefor.

(3) Before entering into a contract of employment which is to provide for a probationary period, the prospective employer shall inform the prospective employee in writing of the length of the probationary period.

(4) …

(My emphasis)

I take it to be self evident that in terms of subs (2) aforesaid a contract of employment during probationary period may be terminated by not less than 14 days notice.

In my understanding, s 20(2) does not however suggests that any employee on probation should be given notice of 14 days. If he or she is a monthly paid employee he or she is entitled to a one month notice. In this case there is nothing to suggest that the applicant was given the one month notice as required. This however is beside the point having regard to my finding that at the time of her dismissal the applicant had long completed her probationary period. Learned counsel for the respondent argues that it was entitled not to confirm the applicant as a permanent and pensionable employee in the manner it did as reflected by the respondent's letter of termination of employment dated 19 October 2002.

Le Roux and Van Niekerk, in the *South African Law of Unfair Dismissal* (1994) at p 73 state that:

'Termination could also take place prior to the expiry of the probationary period if the employee is found to be unsuited for the job *prior to the completion of the probationary period*.' (My emphasis)

The learned authors indicate that the above position reflects the common law position. By the common law the learned authors are referring to the Roman Dutch common law, which is also the common law of Botswana.

In terms of the common law, before the expiry of the probationary period, the employer may elect to confirm the employee as a permanent employee or the employer can extend the probationary period. This choice must be exercised and conveyed to the employee at the latest on the last day of the probationary period. Should an employer fail to exercise any such choice and the employee is allowed to carry on working after the expiration of the probationary period, it will be deemed that the employer had tacitly confirmed the contract of employment.

The employer cannot therefore after the expiration of the probationary period decide to extend such period, nor can he thereafter decide to terminate the contract of employment without giving a valid reason for so doing and or complying with fair procedure. This is what the respondent did in this case.

The respondent allowed the applicant to carry on working, and after close to two months, following the expiration of the ‘six month probationary period’, it writes the applicant a letter, purporting to end her contract of employment, by not confirming her.

The applicant was not subject to any fair procedure before losing her job. Neither was any reason proffered for the decision to terminate her contract of employment. Quite clearly the termination of the contract of employment of the applicant was procedurally and substantively unfair. (See *Phirinyane v Spie Batignolles* [1995] BLR 1, IC. I must stress here that the applicant having completed her probationary period was no longer subject to s 20(2) of the Employment Act. Consequently the respondent could not dismiss her without a valid reason.

Although the respondent did not disclose the reason for terminating the applicant’s contract of employment, from the circumstances and facts of this case, the inference is irresistible that she was dismissed because she refused to undergo an HIV test and I so find. This is so because the applicant was

dismissed soon after advising the respondent that she would not undergo the HIV test. The absence of a reason for terminating the applicant's employment also supports the above conclusion.

I take the view that the instruction to undergo an HIV test was irrational and unreasonable to the extent that such a test could not be said to have been related to the inherent requirements of the job.

The applicant was in my view entitled to disobey the order and or instruction.

As J have suggested earlier, the applicant was by operation of law deemed to be a permanent and pensionable employee following the expiry of her probationary period. It follows in my view that the respondent's instruction to the applicant to undergo an HIV test amounted to compulsory post-employment testing. The question that arises therefore is whether compulsory post-employment testing is legal.

I must say at this juncture, that I know of no specific legislation regulating issues or matters of HIV/AIDS testing at the workplace and or the general issue of HIV/AIDS at the workplace. There is however the National AIDS Policy that addresses issues to do with HIV/AIDS at the workplace.

I am sustained in my belief that there is no specific legislation governing issues of HIV/AIDS at the workplace by similar remarks by my brother Legwaila JP, in a case involving HIV testing, at the workplace, coincidentally involving the same employer as in this case.

This was the case of *Jimson v Botswana Building Society* (IC 35/03), unreported. At the outset it must be stated that the facts of that case are materially different from the present case in that in the case of *Jimson* supra, the requirement for HIV testing was purportedly part of the pre-employment testing. The applicant,

Rapula Jimson, was advised that HIV testing is ‘a condition for employment with the Society’.

The applicant in the above case complied with the instruction to undergo an HIV/AIDS test, ostensibly as part of pre-employment medical examination, but apparently the Doctor chosen by the society declined to conduct the HIV test. The applicant then approached another Doctor and had the test done at his own expense. The applicant tested positive and was subsequently advised that ‘your probationary employment with the Society will be terminated...’ A copy of the results of the test was enclosed.
In the case of *Jimson*, supra, the court at p 2 recorded the questions to be determined by the court as follows:

(a) whether the compulsory post-employment HIV testing was legal;
(b) whether the dismissal on the basis of positive HIV status constituted a just cause in terms of s 20(2) of the Employment Act;
(c) whether the condition of employment that allowed termination of employment by forty eight (48) hours notice was fair;
(d) whether the termination of employment during probationary period by forty eight (48) hours notice was fair;
(e) whether the termination of employment without payment of one month’s remuneration in *lieu* of notice was fair.’

Unlike in the *Jimson* case, in this case, it has not been shown that the applicant was HIV positive. It would also appear from the recorded questions that fell for determination in the *Jimson* case, that no constitutional questions were directly posed for determination as in the present case.

On the facts and circumstances of that case the court found that notwithstanding that the respondent took the position that the requirement to undergo HIV/AIDS test was part of the pre-employment testing it was in fact post employment

testing and that the conduct of the respondent was a breach of the contract of employment entered into between the applicant and the respondent.

The court held therefore that the termination of the applicant's contract of employment was in breach of her contractual rights and was substantively unfair as having been tainted by the unfairness of the test. In the course of his judgment in the *Jimson* case, supra, the Judge President correctly indicated that the Botswana National Policy on HIV/AIDS is not law.
It would appear to me that Botswana National Policy on HIV/AIDS, is consistent with the World Health Organisation, SADC Code of Good Practice on HIV/AIDS and Employment (1997); HIV/AIDS and Human Rights: International Guidelines, United Nations (1998), ILO guidelines on HIV/AIDS in the workplace, to the extent that it encourages voluntary testing and or discourages compulsory pre- and post employment testing as part of the assessment of fitness to work because such an approach is unnecessary, in addition to promoting stigmatization.

In my considered view the National HIV/AIDS Policy augments rather than detracts from the constitution, to the extent that the constitution entrenches the right to equality, human dignity, liberty and the right to privacy. It is not law. It therefore does not impose any direct legal obligations. However, to the extent that its provisions are consistent with the values espoused by the constitution, breach of its provisions may, in an appropriate case, constitute evidence of breach of constitutional provisions. In essence, the National HIV/AIDS Policy is a very progressive document in that it seeks to eliminate HIV/AIDS related unfair discrimination, promote equality and fairness especially at the workplace and more fundamentally, gives effect to Botswana's international obligations.

The elimination of unfair discrimination and the promotion of non-discrimination are the key objectives of the national HIV/AIDS policy. In my view, the National HIV/AIDS Policy is based and or is consistent with the national and international

legal framework for eliminating unfair discrimination and the promotion of equality at the workplace. This framework, in the circumstances of our country, where there is no statutory regulation of matters to do with HIV/AIDS and employment, must of necessity begin with the constitution. It also embraces, relevant international instruments, including United Nations (UN) Human Rights Treaties, International Labour Organisation (ILO) and appropriate regional and sub regional instruments. The constitution as the supreme law is immensely relevant when interrogating issues of HIV/AIDS at the workplace to the extent that it guarantees that every person is entitled to equality before the law, equal protection of the law and human dignity — and also to the extent to which it prohibits unfair discrimination.

Before interrogating the constitutional issues involved in this case, I must make it clear that on the basis of what I have already said, quite apart from the constitutional issues, I take the view that the respondent's termination of the contract of employment of the applicant solely because she refused to undergo an HIV/AIDS test, and or without affording her a hearing at all was unlawful and or wrongful and most unfair.

The decision to terminate the applicant's employment under the guise of exercising the right not to confirm her to a permanent and pensionable status, was so patently harsh, unjust and grossly unreasonable that no court of law and equity can properly, lawfully and fairly put its seal of approval on it.

Ordinarily, having regard to my conclusion that quite apart from the constitutional issues, the termination of contract of employment of the applicant was unlawful and unfair for want of procedural and substantive fairness, it would not be necessary for me to consider the constitutional issues raised. But having regard to the fundamental importance of the issues canvassed, and that some of the issues have never been a subject of judicial scrutiny and pronouncement

previously and or the national importance of the case, it is incumbent upon me to address the constitutional issues raised.

Further, Mr Chilisa, (having regard to his written submissions) appeared to have spent considerable time researching the constitutional implications of this case and it would be unfair not to pronounce on the constitutional issues he raised.

I turn now to address the constitutional issues raised by Mr Chilisa, in the specific context of the facts and circumstances of this case. My discussion of the constitutional arguments is premised on the agreed facts and a list of documents referred to in the admitted facts.

In his final submissions, Mr Chilisa representing the applicant, has alleged breach of a number of the applicant's constitutional rights, which I have referred to earlier in this judgment.

Before I discuss and determine the validity of the said arguments, I must first answer the question whether the constitution also applies to the respondent. I do so with some trepidation and diffidence because of the novelty and or complexity of the issues involved, particularly in the context of our jurispondence and or jurisdiction.

Mr Chilisa has urged me to hold that Botswana Building Society is bound to observe the Bill of Rights given that it operates in a public domain, for the benefit of the public and that government is a shareholder.

From the onset, I must indicate that no evidence was placed before me indicating that government is a shareholder of the respondent.

I am aware that in the *Jimson* case supra my brother Legwaila JP made a finding, on the basis of the evidence led in the said case, that government was a shareholder of the respondent. No such evidence was led before me.

That the government is a shareholder is not in the admitted facts. I can therefore not hold that government is a shareholder of the respondent. It is trite that a judge cannot use a finding of fact made by another judge in a different case.

It would appear to me that the starting point to understand the nature and character of the respondent is to read the Building Societies Act (Cap 42:02). In my view, a reading of the Building Societies Act supports the preposition or the view that the respondent is a private organization.

It is for the above reasons that I find that the respondent is a private organization that certainly operates in the public domain.

I am also clear in my mind that the respondent cannot be held to be a statutory body simply because it is established under the Building Societies Act. Such logic would render all companies or all societies public bodies.

I also do not think that the respondent is a state organ as ordinarily understood in constitutional law. Ordinarily, in constitutional law, organs of the state refers to such institutions such as the executive, the legislature, the judiciary and or departments of governments.

The question of the application of a bill of rights to organs of the state and the substantive issues relating to discrimination with respect to the dismissal of an employee who tested HIV positive were traversed in detail in the South African case of *Hoffman v South African Airways* (2002) 21 *ILJ* 2357 (CC). In the above case, Hoffman applied for a position as a cabin attendant with South African

Airways. He successfully completed a four stage interview process and a medical examination, and was found to be a suitable candidate for the position.

However, when the results of an HIV test came back positive, his medical report was altered to read ‘HIV Positive’ and ‘unsuitable’ and he was denied the position of cabin attendant.

The Constitutional Court held that South African Airways had unfairly discriminated against Hoffman and that this was a violation of the equality clause.

In the aforesaid case Ngcobo J alluding to the rationale of applying the constitution to South African Airways said:

‘Transnet is a statutory body, under the control of the state, which has public powers and performs public functions, in the public interest. It was common cause that SAA is a business unit of Transnet. As such it is an organ of the state and is bound by the Bill of Rights in terms of s 8(1)....
It is therefore expressly prohibited from discriminating unfairly.’

Quite clearly, Ngcobo J as in effect saying that having regard to the provisions of s 8(1), as read with s 239 of the South African Constitution, the Constitution applies vertically, that is, to organs of the state.

It does seem to me that both in the context of the South African Constitution and the Constitution of Botswana, the whole concept of vertical and horizontal application of the constitution needs to be examined more clinically and deeply.

I have read the *Hoffman* case supra and other leading cases on the South African Constitution generally, but more particularly the judgment of Kentridge J in *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC) and the relevant sections of the South African Constitution, and I have come to the

conclusion that one needs to be extremely careful with respect to the extent to which reliance could be placed on the jurisprudence from other countries, as quite often the constitutional provisions being interrogated are materially different from our own.

For example, the South African Constitution can be distinguished from the Botswana Constitution on various grounds, not least that the South African Constitution contains express provisions indicating that the constitution applies to organs of the state and to a limited extent to private relations, whilst the Botswana Constitution has no such provisions and in fact makes no reference to those distinctions whatsoever.

Traditionally, a bill of rights regulates the relationship between the individual and the state. It confers rights on individuals and imposes duties on the state. This was premised on the realization that the state is far more powerful than individuals. For example, it is the state that has a monopoly of the legitimate use of force within its boundaries. Individuals were therefore considered vulnerable and worthy of protection from the state that may violate their rights. Overtime, it was recognized that private entities or individuals may abuse human rights of others, especially the weak and the marginalized.

This is what is often called horizontal application of the bill of rights which essentially means that individuals are conferred rights by the bill of rights, but also, in certain circumstances, have duties imposed on them by the bill of rights to respect the rights of other individuals.

I propose to survey the jurisprudence on the question of the horizontal application of the constitution by exploring the position in a few countries, namely, Canada, India, Namibia Sri Lanka and South Africa. This survey will inform my analysis of the Botswana position.

Canada

The Constitution of Canada contains a Canadian Charter of Rights and Freedoms, being Schedule B to the Constitution Act of 1982. Part 1 thereof relates to the Canadian Charter of Rights and Freedoms.

The application of the Charter is dealt with in s 32(1), which provides as follows:

'32(1) This Charter applies *(a)* to the Parliament and Government of Canada in respect of all matters within the authority of Parliament, including all matters relating to the Yukon Territory and Northwest Territories; and *(b)* to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.'

Clearly, therefore, the Charter of Fundamental Rights applies only to the organs of State, that is the Legislature and the Executive.

In the important case of *Retail, Wholesale and Department Store Union Local 580 v Dolphin Delivery Ltd* (1987) 33 DLR (4th) 174 the Canadian Supreme Court held that the Charter did not apply as the case involved private parties and there was no governmental action.

This decision has been severely criticized, not only in Canada but in other countries as well, as being contrary to the spirit of the Charter. (See David Beatty in an article entitled *Constitutional Conceits: The Coercive Authority of the Courts* in 37 University of Toronto Law Journal (1987) 83 at p 186 and *Private Rights/Public Wrongs: The Liberal Lie of the Charter* by Allan C Hutchinson and Andrew Peter in the (1988)38 University of Toronto Law Journal LJ 297.)

In the latter article the authors make the point that distinctions like those developed in *Dolphin*, cited supra, provide formal paraphernalia behind which

private power thrives relatively unchecked and substantive issues are arbitrarily and unjustly resolved.

The authors argue further that liberal rights talk constrains our choices and makes us look at the world in the absolutist and static terms of a black- and-white photograph.

India

The Constitution of India deals extensively with fundamental human rights in ss 15—30. An important aspect of the Indian Constitution is the Directive Principles of State Policy contained in ss 36—51. These are means of promoting as effectively as may be practicable the welfare of the people.

The Indian experience reveals that the Supreme Court has, as a result of dynamic activity, applied fundamental human rights in a horizontal manner in confronting a number of issues relating to alleged violations of fundamental human rights by private entities.

Namibia

The fundamental human rights and freedoms contained in the Namibian constitution are protected by Art 5, which provides:

‘The Fundamental rights and freedoms enshrined in this chapter shall be respected and (upheld) by the Executive, Legislative and Judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the Courts in the manner hereinafter prescribed.’

The clear effect of the above provisions is that the operation of these fundamental rights and freedoms in this constitution is both vertical and horizontal.

Sri Lanka

The Supreme Court of Sri Lanka in the case of *Gunaratne v Peoples Bank* 1987 CLR 383 (Sri Lanka) held that constitutional guarantees of some fundamental rights not only provide protection against State action but can also be maintained to control the acts of other bodies.

South Africa

The South African Constitution applies to organs of the State, but may also apply to private relations. This becomes crystal clear when one has regard to s 8(1) and (2). The aforesaid sections bear quoting in full.

‘8(1) The Bill of Rights applies to all law, and binds the Legislature, the Executive, the Judiciary and all organs of State.

8(2) A provision of the Bill of Rights binds a natural or juristic person, if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.’

Section 239 of the South African Constitution defines an organ of the State. In terms of s 239, the conduct of organs of the State may be divided into three categories. First, conduct of any department of State, or administration; secondly, conduct of any functionary or institution exercising a power or performing a function in terms of the constitution and thirdly, conduct of any functionary or institution exercising a public power or performing a public function in terms of any legislation.

Having regard to the aforesaid provisions, one can hardly disagree with the conclusion of Ngcobo J that South African Airways is an organ of the State and is bound by the Bill of Rights.

As indicated earlier the Constitution of Botswana does not have similar provisions as those of the South African Constitution. On the contrary, one discerns a number of indicators that suggests that confining the Bill of Rights to organs of the State was never intended by the framers of the constitution for the following reasons.

(i) Unlike the South African Constitution (and to some extent the Canadian Charter of Human Rights) the Botswana Constitution has no clause limiting its application to organs of the state.
(ii) The *ipssima verba* of s 18 simply requires the person to prove that a right has been, is being or is likely to be contravened in relation to him. It does not specify by who, nor is any such limitation to be found anywhere in the Constitution.
(iii) Section 9(1) makes reference to entry by others onto someone's premises. It does not make reference to entry by State organ.

Having regard to what I have said above, and the fact that the scope of the Bill of Rights in our constitution is not restricted to 'organs of the State', I don't think there is any basis to interpret the applicability of our Bill of Rights in a restrictive manner. Such a restriction is not mandated, nor was it intended by the framers of the constitution. It is important to always note that even a constitution is a legal instrument, the language of which must not be unduly restricted. It would be incompetent to read restrictions into it which are not mandated or necessary. Authorities are abundant that stress the point that the language of the constitution must be given a broad and purposeful interpretation, so as to give effect to its spirit, and that this is particularly true of those provisions that are concerned with protection of fundamental human rights.

In today's world there are private organizations that wield so much power, relative to the individuals under them, that to exclude those entities from the scope of the Bill of Rights would in effect amount to a blanket license for them to abuse human rights.

This is particularly so in an employment relationship which more often than not is characterized by unequal bargaining power between the employer and the employee.
In all the circumstances, I have come to the conclusion that the respondent falls within the scope of our Bill of Rights and that it is accordingly bound by the provisions thereof.

I imagine that there may well be dangers in opening up wholesale private relations to constitutional scrutiny. Applying the Bill of Rights to private entities should be done under exceptional circumstances. In this particular case, what has influenced my application of the Bill of Rights to the respondent is that the constitution does not restrict its application to organs of the State as is the case with other constitutions; the fact is that the respondent operates in a public domain and is in terms of the Building Societies Act, open to the public.

In labour law, the workplace is acknowledged as a site of inequality between a person providing service or performing work (employee) and the recipient (the employer). In this relationship the employer is usually the weaker party. Labour law is seen by a number of societies, not least the ILO, as a convenient instrument to address issues arising out of the inherent inequality.

In my view, in an employment setting, employees are in a position comparable to individuals of a powerful 'State' — it being recalled that traditionally a bill of rights was applicable vertically because the State was considered powerful and prone to abuse its power. This is notwithstanding the likelihood, that most private or

juristic persons do not have the capacity to infringe human rights in a manner and on a scale comparable to that of the state. A reasoning that seeks to confine the application of our constitution to organs of the State is not only unauthorised by the constitution itself, but it is also a static approach in that it fails to take into account the realities of the modern distribution of power where in many instances it is not only the state, but the exercise of private power that poses the greatest threat to the exercise of fundamental human rights and freedoms.

It cannot be doubted that in this modern era, private individuals and private business enterprises are for example, quite often not equals in terms of power and influence. It is for this reason that in recent years, the bill of rights has been applied to private entities to curb the exercise of superior social or commercial power outside the traditional domain of the ‘state’.

It was the above understanding that led Friedman JP in the case of *Baloro and Others v University of Bophuthatswana and Others* 1995 (4) SA 197 (B) to lay down the general principle that any activity, operation, undertaking or enterprise operating in the community and open to the public, is subject to the horizontal application of fundamental rights.

Having found that the constitution would apply in the ‘non-state sphere’, Friedman JP held that the horizontal dimension would apply, inter alia, to the following:

(i) Corporations, multinational and local companies that engage in trade, commerce, business that deal with the public, have employees, engage in numerous undertakings.
(ii) Commercial and professional firms which rely on the public for their custom or support.
(iii) Hotels, restaurants, etc.

I agree entirely with the general principle articulated by Friedman JP. I have no doubt that the respondent operates in public and rely on public patronage for its business. It can therefore not escape the application of the constitution dealing with fundamental human rights and freedoms.

In my mind the question of opening up conduct of private entities to constitutional scrutiny cannot be determined in the abstract, and extreme care must always be taken to guard against the over-proliferation of horizontal application of the bill of rights. Whether a private body's conduct is open to constitutional scrutiny should also depend on the nature of the private conduct in question and the circumstances of a particular case. I imagine they may well be rights that are more applicable to the state than private entities.

In my considered view the purpose of a provision or a bill of rights is an important consideration in determining whether it is applicable to private conduct or not. For example, it would appear to me that the purpose of the right to liberty, equality before the law and human dignity does not demand a differentiation between the state or private conduct, for to draw such differentiation may authorize constitutional violations by private persons, that properly ought not be permitted.

Take as an example a hypothetical policy requirement by Botswana Federation of Trade Unions (BFTU) or Botswana Confederation of Commerce Industry and Manpower (BOCCIM) and or a private commercial bank that it can only recruit into its staff, only black people, or even more dramatically, only people of a particular tribe. Both BFTU, BOCCIM and or a private commercial bank are private organizations, in the sense that they are not organs of the State in the classic sense and or in the manner I defined the organs of the State earlier, or are they statutory bodies. Can it be said that this policy requirement is not liable to be struck out on the basis that it is discriminatory, because the three organizations are private? I do not think so.

Having found that the constitution is applicable to the respondent, I must now address the question whether the fact that the applicant was dismissed for refusing to undergo and an HIV test (as I have found) violates any of her constitutional rights.

The applicant contends that the requirement to undergo an HIV test violated the applicant's right to privacy as contemplated by s 9(1) of the Constitution of Botswana and that to terminate a person's contract of employment because the person (applicant) has refused to undergo an HIV/AIDS test constitutes denial of equal protection of the law contrary to s 3 of the constitution.

The applicant also argues that the conduct of the respondent aforesaid constitutes unfair discrimination contrary to s 15(2) of the constitution.

Further, the applicant contends that the conduct of the respondent of requiring the applicant to undergo compulsory HIV testing without offering counseling constitutes inhuman and degrading treatment contrary to s 7(1) of the Constitution.

In my mind, and notwithstanding that the applicant alleged a violation of a number of rights alluded to above, the central issue that the court has to determine, is whether, the conduct of the respondent of dismissing the applicant for refusing to undergo an HIV test is inconsistent and or in violation of any of the provisions of the Bill of Rights.

However, and for convenience, it may be helpful to address specifically the issue of the specific rights alleged to have been violated. Essentially, the applicant alleges violation of the right to privacy, discrimination, the right to liberty and the right not to be subjected to inhuman and degrading treatment. I propose to address the above *seriatim*.

The Right to Privacy

The right to privacy is governed by s 9(1) of the constitution. The aforesaid section provides that:

‘9(1) Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision —

(a) that is reasonably required in the interests of defence, public safety, public order, public morality, public health, town and country planning, the development and utilization of mineral resources, for the purpose of any census or in order to secure the development or utilization of any property for a purpose beneficial to the community;

(b) that is reasonably required for the purpose of protecting the rights or freedoms of other persons;

(c) that authorizes an officer or agent of the Government of Botswana, a local government authority or a body corporate established by law for a public purpose to enter on the premises of any person in order to inspect those premises or anything thereon for the purpose of any tax, rate or duty or in order to carry out work connected with any property that is lawfully on those premises and that belongs to that Government, authority or body corporate, as the case may be; or

(d) that authorizes, for the purpose of enforcing the judgment or order of a court in any civil proceedings, the search of any person or property by order of a court or entry upon any premises by such order’

and except so far as that provision or, as the case may be, anything done under the authority thereof is shown not to be reasonably justifiable in a democratic society.’

The right to privacy in employment has been the subject of litigation in other jurisdictions. In the case of *Jansen van Vuuren and Another NNO Kruger* 1993 (4) SA 842 (A), which concerned the disclosure of a patient's HIV status, the court held that the public disclosure of private facts is an invasion of the right to privacy.

Common law recognizes a right to privacy in two forms. An invasion of privacy may assume either the form of an unlawful intrusion on the personal privacy of another or the unlawful publication of private facts about a person. Examples of breach of the right to privacy, include entering into a private residence without authority; disclosure of an individual's medical facts without authority, listening to private conversations etc. It would seem to me from reading the provision of the constitution relating to privacy (see s 9), that whether or not a right to privacy has been infringed is a two stage enquiry. First, whether the conduct complained of amounts to an infringement. Secondly, if there has been an infringement, it must be determined whether the infringement is reasonably justifiable in a democratic society.

The United States courts have described the right to privacy as 'the right to be let alone'. For instance, the US Supreme Court utilized a right to privacy to declare unconstitutional State law which prohibited the use of contraceptives and the dissemination of medical evidence concerning their use. It did so on the basis of a right to 'marital privacy' (see *Griswold v Connecticut* 381 US 479 (1965)).

In the case at hand the employer says because you refuse to undergo an HIV test, I terminate your employment. Section 9(1) of the constitution prohibits unauthorised search of the person, which is what testing without consent will amount to. I ask myself wouldn't this right be undermined when employees are dismissed because they refuse to be tested? I think the respondent's conduct undermines the applicant's right not to be searched and or the right to privacy.

But this conclusion does not translate into evidence of violation of the right to privacy.

On the facts of this particular case, I do not think the facts establish an invasion of the right to privacy, in that prima facie, no actual invasion or infringement took place. No doubt there was an attempt to forcefully invade her privacy which she rejected. It would be difficult on the facts of this case to conclude that the right to privacy was infringed.

Consequently the answer to the first enquiry being in the negative, it is not necessary to determine whether the infringement is reasonably justifiably in a democratic society. In the premises, the complaint that the conduct of the respondent violated the right to privacy ought to be rejected, for the simple reason that the allegation lacks sufficient factual grounding.

Discrimination

Section 15 of the constitution dealing with discrimination deserves to be quoted in full. It provides that:

‘15(1) Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect.

(2) Subject to the provisions of subsections (6), (7) and (8) of this section, no person shall be treated in a discriminatory manner by any person acting by virtue or any written law or in the performance of the functions of any public office or any public authority.

(3) In this section, the expression “discriminatory” means affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are

not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

(4)-(9) …

In order to put the allegation of discrimination in context it should be recalled that the respondent's offer of probationary employment to the applicant was subject to passing a medical examination. That the applicant was employed suggests that she passed the medical examination.

What then explains the curious turn of events that led the respondent to insist on post-employment testing? Having regard to the fact that in February 2002 the applicant had passed the medical examination, what could have prompted a specific request for an HIV test, in August of the same year?

Quite clearly the conduct of the respondent, which was unexplained, directing the applicant to go for an HIV test was quite strange and on the face of it quite irrational. The possible inference that one can draw for insisting on this test was possibly a lurking suspicion that the applicant feared to take an HIV test because she knew that she was likely to be HIV positive. The inference therefore that the applicant's dismissal or 'non-confirmation' as the respondent would prefer to call it, could have been premised on the suspicion or perceived HIV positive status of the applicant may not be ruled out, but on the evidence, there is nothing to suggest that the applicant was suspected or perceived to be HIV/AIDS positive.

In the circumstances, I find that the conduct of the respondent cannot be said to be discriminatory within the meaning of s 15(2), as read with s 15(3) of the Constitution of Botswana, in that it has not been shown or proved that the applicant was treated differently, ie dismissed, because of the suspicion or perception that she may be HIV positive. If I was so satisfied I would clearly hold that such conduct is discriminatory within the meaning of s 15(2) as read with s 15(3) of the constitution notwithstanding that among the listed grounds upon

which it is not competent to discriminate. HIV or perceived HIV status is not mentioned. (See *Hoffman v South African Airways* supra.)

In my mind the grounds listed in terms of s 15(3) are not exhaustive. A closer interrogation of the said grounds show one common feature - they outlaw discrimination on grounds that are offensive to human dignity and or on grounds that are irrational. To dismiss a person because of perceived positive HIV status would offend against human dignity, in addition to being irrational.

Consequently the ground of HIV status or perceived HIV status must be considered to be one of the unlisted grounds of s 15(3) of the Constitution of Botswana.

The ILO Declaration on Fundamental Principles and Rights at Work, adopted in June 1998, reaffirmed the constitutional principle of the elimination of discrimination at the workplace.

I subscribe fully to the values of the above declaration and believe firmly that elimination of discrimination at work is essential if the values of human dignity and individual freedom are to go beyond mere formal pronouncements. I also believe that the above position is in line with the values of Convention no 111 (Discrimination Employment and Occupation Convention, 1958) that Botswana has ratified. I believe that the fact that Botswana has ratified the convention cannot be regarded as irrelevant. By doing so, Botswana has demonstrated its clear intention to comply with the provisions contained therein and the court should take cognizance of this action as an expression of the recognition which must be accorded to its provisions when interpreting similar fundamental provisions under the constitution.

The protection afforded by the above convention applies to all sectors of employment and occupation, both public and private.

It must be mentioned that the principle of equality does not out law treating people differently to others per se. The principle of equality does not require everyone to be treated the same, but simply that people in the same position should be treated the same. Simply put, discrimination that is irrational and or unjustifiable cannot pass the constitutional test.

The Right not to be subjected to inhuman and degrading treatment

The right to dignity permeates the entire bill of rights in our constitution, it is an intrinsic part of the right to life, broadly construed, for the denial of the right to dignity would denude the right to life of its effective content and meaningfulness. Section 7(1) of the constitution in so far as it prohibits inhuman and degrading treatment, is protective of the right to dignity.

Section 7(1) bears quoting in full:

‘7. (1) No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.’

In liberal moral philosophy human dignity is considered to be what gives a person their intrinsic worth as human beings, consequently every human being must be treated worthy of respect. It is the right to dignity that lays the foundation for the right to equality and all other rights that human being posses.

In my mind the right to dignity requires us to respect that or an individual is the master of his or her own body and or destiny and that he or she is free to resist any potential violation to his or her privacy or bodily integrity.

To punish an individual for refusing to agree to a violation of her privacy or bodily integrity is demeaning, undignified, degrading and disrespectful to the intrinsic worth of being human.

Punishing the applicant for refusing an invasion of her right to privacy and bodily integrity is inconsistent with human dignity. This is particularly so in the context of HIV/AIDS where even the remotest suspicion of being HIV/AIDS can breed intense prejudice, ostracization and stigmatization. This is the context within which one must analyse the right to dignity in this case. The symbolic effect of punishing an employee for refusing to undergo an HIV test is to say that all those who refuse to undergo an HIV/AIDS test are not competent to be employed — they should lose their jobs and by extension be condemned to unemployment — a form of economic death for simply saying, as a human being, I have decided not to test for HIV/AIDS.

Having regard to the supreme importance of the right to dignity, I believe that it is proper that when a decision under challenge is the one that has deprived or threatens to deprive an applicant of his or her livelihood such a decision calls for the most anxious scrutiny. This is so because, as I have said earlier, even the remotest suspicion that someone who has refused to undergo an HIV/AIDS test, may have done so because he/she may be fearful that he/she is HIV positive may give birth to prejudice and vulnerability. Prejudice to that category of people may be no different from those who are HIV positive. The vulnerability of people who are HIV positive has been a subject of judicial comment before. Ngcobo J in the *Hoffman* case supra, articulated the vulnerability of HIV positive persons in the context of the employment setting when he said at pp 2370—71:

‘People who are living with HIV constitute a minority. Society has responded to their plight with intense prejudice. They have been subjected to systematic disadvantage and discrimination. They have been stigmatized and marginalized.

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 AIDS are one of the most vulnerable groups in our society… 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…'
(See also: *X v Y* [1988] 2 All ER 648 (QB); *X v Y Corp and Another* [1999] 1 LRC 688*; X v Commonwealth of Australia and Another* [2000] 4 LRC 240.)

I am happy to associate myself with the views of Ngcobo J quoted above and the decisions of the cases aforementioned that essentially express the sentiments articulated by Ngcobo J. Speaking for myself, I think that it would be offensive to modern thinking and the values espoused by our Constitution, to tolerate any practice whose effect is to undermine, directly or indirectly the values of our Constitution, which values also inform our national vision, and directly contradicts national efforts at tackling stigma and prejudice.

It is incompetent to force people to undergo HIV testing. People must be encouraged to test voluntarily through persuasion and education. After all, common sense dictates that it is prudent for people to know their status so that if positive they can take treatment at the earliest opportunity. Compelling people to undergo HIV test is inhuman and degrading in addition to being counter productive. In this case the applicant paid the highest price for refusing to undergo the HIV test: deprivation of livelihood by loosing her job.

Viewed from this angle the conclusion that the respondent conduct was inhuman and degrading is inescapable.

The choices imposed upon the applicant in this case were most unfair. She had to choose between protecting her employment (by undergoing the test) and in the process lose the fundamental private right of choosing whether or not to test or insist on her right to choose and loose employment.

I take it that human rights matter most during periods of crisis — a period when the weak and marginalized are particularly vulnerable. HIV/AIDS is an epidemic that has brought a crisis of immense proportions. This calls for heightened vigilance to any conduct that infringes the baseline right — the right to dignity. In my mind, the respondent by dismissing the applicant for refusal to undergo an HIV test amounted to an assault on the applicant's *dignitas* as by which I mean that 'valued and serene condition in her social or individual life which is violated when she is, either publicly or privately subjected by another to offensive and degrading treatment, or when she is exposed to ill-will, ridicule disesteem or contempt' (per Gardiner AJA, in *Minister of Posts and Telegraphs v Rasool* 1934 AD 167).

Having regard to the stigma, paranoia, prejudice and ignorance that surrounds HIV/AIDS, the conduct of the respondent in the circumstances of this case qualities as inhuman and degrading treatment as contemplated by s 7(1) of the constitution. What is more, the directive of the respondent instructing the applicant to go for an HIV test, does not appear to be alive to the internationally recognized requirement for counseling before one can go for such a test. My conclusion that the conduct of the respondent amounted to inhuman and degrading treatment derives from the premise that the human body is inviolable and respect for it is a fundamental element of human dignity and freedom. Compromise these rights the society to which we aspire — the one promised by the constitution — of human dignity becomes illusory. Expressed positively, the content of the right to dignity encompasses the freedom of individuals to rebuff attempts at subjecting their bodies to any treatment or test, without being punished for exercising such freedom or right. This explains why the National HIV/AIDS Policy and a number of international legal instruments encourage voluntary testing where the person to be tested, must not just consent, but must give informed G consent, meaning that before the person who is tested may give consent he or she must be made to fully appreciate the consequences and

implications of his or her consent. Informed consent is premised on the view that the person to be tested is the master of his or her 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 employer, not even the medical doctor. The purpose of informed consent is to honour a person's right to selfdetermination and freedom of choice.

I believe it to be my sacred duty to give s 7(1) of the constitution a broad and generous meaning in order to safeguard and secure the fundamental rights and freedoms of the individual. This approach to constitutional interpretation is not new.

In the Gambian case of *Attorney-Genera/ v Momodou Jobe* [1984] AC 689 (PC) at p 700, Lord Diplock, affirming this approach, spoke of the need for a generous and purposive construction when he said:

'A constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the State are to be entitled, is to be given a *generous and purposive* construction.' (My emphasis)

In *R v Big M Drug Mart Ltd* 1985 18 DLR (4th) 321 at p 395-6) Dickson J (as he then was) said, with reference to the Canadian Charter of Human Rights, that:

'The interpretation should be ... a *generous rather than legalistic one, aimed at fulfilling the purpose* of a guarantee and securing for individuals individuals the *full benefit* of the Charter's protection.' (My emphasis)

The Indian Supreme Court has long recognized the importance of a generous purposive construction of the Constitution. In *Sakal Papers v Union of India* AIR 1962 SC 305 at p 311 Mudholkar J said:

‘It must be borne in mind that the Constitution must be interpreted in a broad way and not in a narrow and pedantic sense. Certain rights have been enshrined in our Constitution as fundamental and, therefore, while considering the nature and content of those rights the Court *must not* be too astute to interpret the language of the Constitution in so literal a sense as to *whittle them down*. On the other hand the Court must interpret the Constitution in a manner which would enable the citizen to enjoy the rights guaranteed by it in the *fullest measure* subject, of course, to permissible restrictions.’ (My emphasis)

In the case of *Nyamakazi v President of Bophuthatswana* 1992 (4) SA 540 (B) at p 541 Friedman J held that the constitution must be:

‘…interpreted *in the context of the scene and setting that exists at the time, and not when it was passed* otherwise it will cease to take into account the *growth of the society* which it seeks to regulate’. (My emphasis)

It was further held as long ago as 1936 in the case of *James v Commonwealth of Australia* (1936) AC 578 (PC) at p 614 by Lord Wright that:

‘…a Constitution must not be construed in any narrow and pedantic sense. The words used are necessarily general, and *their full import* and true meaning *can often only be appreciated when considered, as the years go on*, in relation to the vicissitudes or fact which from time to time emerge. It is not that the meaning of the words changes, but the changing circumstances illustrate and illuminate the full import of that meaning (My emphasis)

I agree entirely with the above views. The basic theme in the discourse of human rights which we in the judiciary must address is how we can convert the promise of our constitution into reality. In my mind a proper application of the constitution can serve as a potent source of a sober critique of the existing arrangements and or practices that serve, often unwittingly, to promote stigma and prejudice about

HIV/AIDS at the workplace. It is up to the judiciary to clarify, the content, context and location of any rights and duties that are conferred by the constitution. The Bill of Rights provisions must be safeguarded from possible attempts to narrow their scope unduly or to circumvent altogether the obligation they engender.
The constitutional provisions in our Bill of Rights are couched in elastic terms in order to enable an interpretation that is dynamic. In the context of the reality of HIV/AIDS afflicting our society, rampant ignorance of the syndrome, the consequent problems of stigma and prejudice, it is imperative for the courts to interpret the constitutional provisions purposefully, as far as the language permits, and in a manner consistent with the contemporary norms, aspirations, expectations and the sensitivities of the people of Botswana as expressed in the constitution, and further having regard to the emerging consensus of values in civilised international community which Batswana share.

The provisions of our Bill of Rights are not time-worn adages. We (judiciary) must implement those provisions in a dynamic and purposeful manner that does not lag behind societal developments. If we don't, the words of the constitution will be beholden to the values of the past, not the present. In this context, the remarks of Justice Marshall in the case of *McCulloch v Maryland* 17 US (4 Wheat) 316 (4 L Ed 579 (1819) are most appropriate. He said:

'We must never forget, that it is a constitution we are expounding… intended to endure for ages and consequently to be adapted to the various crises of human affairs....'

In the case of *Gompers v United States* 233 US 604 (1914) at p 610 Wendell Holmes J said:

'The provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions.... Their significance is

vital not formal; it is to be gathered not simply by taking words and a dictionary but by considering their origin and the line of their growth.'

The Right to Liberty

The right to liberty finds protection in s 3 of the constitution. The relevant portion bears quoting in full. It provides:

'3. Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interests to each and all of the following, namely:

(a) Life, liberty, security of the person and the protection of the law;

(b) …

(c) …'

It is my understanding that the right to liberty as captured by s 3*(a)* of the constitution, goes beyond the notion of mere freedom from physical constraint and protects within its scope a narrow sphere of personal autonomy wherein individuals may make inherently private choices free from irrational and unjustified interference by others. In my view the autonomy protected by a 3*(a)*, or the right to liberty, encompasses only those matters that can properly be characterized as inherently personal, such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence. Choosing whether to test or not is a private decision striking at the heart of personal and individual autonomy and no entity, the state or any employer ought to be permitted to interfere, barring any compelling reasons in favour of interference. The above reasoning appears to have found

favour in a similar Canadian case of *Godbout v Longueuil (City)* [1997] 3 SCR 884.

In the case aforementioned, the respondent obtained employment with the appellant municipality. Upon employment she signed a declaration to the effect that she would reside within the boundaries of the appellant for the duration of her employment. She subsequently moved to a house in another municipality. She was directed by the appellant to move back into its boundaries and when she refused to do so her employment was terminated.

She sued for damages and reinstatement founding her claim on the Charter of Human Rights.

The court considered the issue from the point of view of the right to liberty and expressed the view that such right is not only concerned with the right to physical liberty but includes concepts of human dignity, individual autonomy and privacy. These it concluded, include the right to make intensely personal decisions without interference. The court also noted the unfair choice imposed upon the respondent, vis, to protect her employment and in the process lose her right of choosing where to reside; or protect her choice of residence and in the process lose her employment.

There are notable similarities between the above case and the present case, in that in the case of *Godbout*, supra, the dismissed employee invoked the Canadian Charter of Human Rights. *Godbout* sought positive relief to the effect that the conduct of the appellant was a violation of the right to privacy, and the right to liberty. He prayed for reinstatement.

The other striking similarity is that the choices presented to the appellant in the case of *Godbout* are no different from the choices presented to the applicant in this case. In effect the respondent in this case is saying to the applicant ‘Agree to

test for HIV/AIDS and keep your job; or maintain your right to make the inherently personal decision of whether or not to have an HIV test and lose the employment opportunity.' In my view the very fact of this irrational demand, it being wholly unrelated to the inherent requirement of the job, is a veritable assault on the applicant's right to liberty and human dignity.

It is not just a threat to her right to liberty it is an actual violation of that right, for she has already suffered the consequences of her right to liberty, through the respondent's refusal to confirm her, effectively dismissing her. In my view the foregoing analysis and authorities, adequately disposes of the central question earlier posed. For the reasons I have given, the post employment HIV test requirement imposed by the respondent is susceptible to constitutional scrutiny.

I am of the conclusive view that the HlV/AIDS test requirement, coupled with the dismissal, consequent upon exercising the right not to consent to testing infringes the applicant's right to liberty.

Relief Sought

In its statement of case the applicant sought the following relief:

'Reinstatement or payment for unfair dismissal compensation sought is for a period of six (6) months at P900.00 per month totaling P5 400 plus humiliation costing P4 000, all totaling P9 400.00.'

In its written final submissions the applicant sought further relief in the following terms:

1. An order declaring the instruction of the respondent to the applicant to undergo an HIV test as unlawful, because it violates the applicant's constitutional right to privacy as enshrined by s 9(1).
2. An order declaring the respondent's decision to terminate the applicant's contract of employment on the basis that she might have HIV as

discrimination on the basis of disability contrary to s23, of the Employment Act and s 15(2) (of the constitution) and that such discrimination constitutes a denial of equal protection of the law as enshrined by s 3 of the constitution as well as degrading treatment alternatively inhumane and degrading treatment contrary to a 7(1) of the constitution.

3. An order declaring that failure by the respondent to provide pre-test counseling and post test counseling by the respondent constitutes degrading treatment contrary to s 7(1).
4. An order directing the respondent to reinstate the applicant and pay her six months compensation.

I have already found that the termination of the contract of employment of the applicant on 19 October 2002 was unlawful and or wrongful on a number of grounds, namely, for want of procedural and substantive fairness and that her dismissal for refusing to undergo an HIV test as instructed by the respondent violated her right to dignity and liberty.

The remedies this court can give if it has found the dismissal unlawful and or wrongful are provided in s 19(1) of the Trade Disputes Act (Cap 48:02), which provides that:

‘19(1) In any case, where the Court determines that an employee has been wrongfully dismissed or disciplined the Court may, subject to its discretion to make any other order which it considers just —

(a) in the case of wrongful dismissal, order reinstatement of the employee, with or without compensation, or order compensation in lieu of reinstatement; or
(b) in the case of wrongful disciplinary action, order the payment of such compensation as it considers just;

Provided that —

(i) compulsory reinstatement as a remedy for wrongful dismissal should only be considered —

(a) where the termination was found to be unlawful, or motivated on the grounds of sex, trade union membership, trade union activity, the lodging of a complaint or grievance, or religious, tribal or political affiliation; or

(b) where the employment relationship has not irrevocably broken down; and

(ii) in a case where reinstatement is ordered, any compensation ordered shall not exceed the actual pecuniary loss suffered by the employee as a result of wrongful dismissal, and in any other case, any compensation ordered shall not exceed six months' monetary wages.'

Section 19(1) makes it clear that reinstatement is a discretionary remedy. It can only be considered where the termination was found to be unlawful or motivated on the grounds of sex, trade union membership, trade union activity, the lodging of a complaint or a grievance, or religious, tribal or political affiliation, or where the employment relationship has not irrevocably broken down (See *Hirschfeld v Express Cartage Botswana (Pty) Ltd* (IC 67/96), unreported.

The Industrial Court's discretion, though wide, must be exercised within certain limits. The employee's employment opportunities and work security, the unfair disruption of the employer's business and the harmful effect on the employment relationship are some of the considerations within which the discretion is to be exercised. The above limits amount to a system of checks and balances which the court weighs up before making a decision.

The question of the employee's employment opportunities is, in my view, important in that where the applicant has since secured employment, it may not be necessary to order reinstatement. Contrarily, where the applicant's

employment opportunities are slim, the court may take that into account in exercising its discretion.

The extent to which an order of reinstatement would unfairly affect the employer's business has been considered by the South African courts on several occasions, with varying results.
It has also been held to be too disruptive to reinstate employees on the ground that their positions have been filled. (See the case of *Maine v African Cables* (1985) 6 ILJ 234 (IC) at p 245).

It is in my view, extremely important that in considering the remedy of reinstatement the Court must endeavour to balance the interests of the employee and employer. To this extent, this Court associates itself with the sentiments expressed in the case of *Consolidated Frame Cotton Corporation Ltd v The President of the Industrial Court* (1986) 7 ILJ 489 (A) at p 495D where the court held that the power to order reinstatement, which may indeed have far-reaching consequences must not be taken lightly.

In my view such a power must be exercised reasonably and equitably, and with due regard to the interests not only of employees but also of the employers.

Another factor the courts have taken into account as having a possible disruptive effect is whether or not an order of reinstatement would undermine management authority. (See *Fihla and Others v Pest Control Tvl (Pty) Ltd* (1984) 5 ILJ 165 (IC) at p 169.)

It is in my view, part of the delicate balancing act for the court to have regard to the effect of the reinstatement order on the need to maintain discipline at the workplace. That however does not mean that the court should refrain from ordering reinstatement when the facts cry out for one.

Whether or not the relationship between the employee and the employer has irretrievably broken down is also an important factor to take into consideration. The above factor is, of course, the same as that which is often advanced by our ordinary courts when they decide against ordering specific performance of employments contracts. The court generally examines the circumstances of each case in deciding whether or not reinstatement would be appropriate. In doing so, the court considers a number of factors. The degree of acrimony between the parties and the nature of the offence are all relevant considerations to be taken into account.

In this particular case there is no evidence that:

(a) an order of reinstatement would unfairly affect the respondent's business;
(b) that the applicant position has been filled;
(c) that a reinstatement order will undermine management authority; and
(d) that the relationship between the parties hereto has broken down irretrievable or was there even a whisper of an acrimonious relationship between the parties.

I am further mindful, that this was not a case where the applicant had committed any misconduct that could have prejudiced the respondent in anyway.

It must also be noted that in this case, we are not dealing with a contract of employment of strictly personal nature, such as would exist between a maid or helper and his or her master. We are here dealing with a relationship of employer and employee governed by rules previously agreed between themselves, and the rules of natural justice. The respondent is an established institution and cannot be compared with the relationship I have earlier alluded to (see *National Development Bank v Thothe* [1994] BLR 98, CA p 109).

In all the circumstances of this case, this court takes the view that because of the appalling and or disgraceful manner in which the respondent treated the applicant an appropriate order would be one of reinstatement plus an order of compensation.

In awarding compensation the court is required to take into account the factors mentioned in s 19(2) of the Trade Disputes Act.
I have taken into account in favour of the applicant the fact that the circumstances of her dismissal were most unfair, involving an unjustified assault on her dignity and her right to liberty. I have not taken into account factors *(a)*, *(b)*, *(c)* because no evidence was led on same. Factor *(f)* does not seem to be relevant to this case. With respect to factor *(g)* the respondent has not pleaded inability to pay.

The applicant earned P900 per month at the time of her dismissal. In fairness, I think the appropriate award for compensation should be an amount equivalent to her four months salary, namely P3 600.

The court wants to make it clear that the amount to be awarded to the applicant is compensation and not salary and therefore the full amount, without any deductions should be paid to the applicant.

Determination
In the circumstances the court makes the following determination:

1. The termination of the contract of employment of the applicant was unlawful and or wrongful for want of procedural and substantive fairness.
2. That the respondent is not exempted from complying with the Constitution of Botswana, more particularly the provisions of ss 3 to 16, inclusive.
3. That the conduct of the respondent of terminating the applicant's contract of employment for refusing to undergo an HIV test, as instructed, was an

unjustifiable violation of the applicant's right to liberty as contemplated by s 3*(a)* of the Constitution of Botswana, as well as s 7(1) which outlaws inhuman and or degrading treatment.

4. In terms of a 19(1)*(a)* of the Trade Disputes Act, the respondent is hereby directed and or ordered to reinstate the applicant in its employ on terms and conditions no less favourable to her than those that pertained to her employment prior to her contract of employment being terminated.
5. This determination shall be operative as from Monday 12 January 2004.
6. In terms of s 19(1) of the Trade Disputes Act, the respondent is hereby directed and or ordered to pay the applicant the amount of P3 600 (P900 x 4) being compensation.
7. The respondent is directed to pay the applicant the amount referred to in para 6 hereof on or before 5 January 2004.
8. No order as to costs.

I agree on the facts:
P V Moyo (Nominated member (BOCCIM))

Application granted.