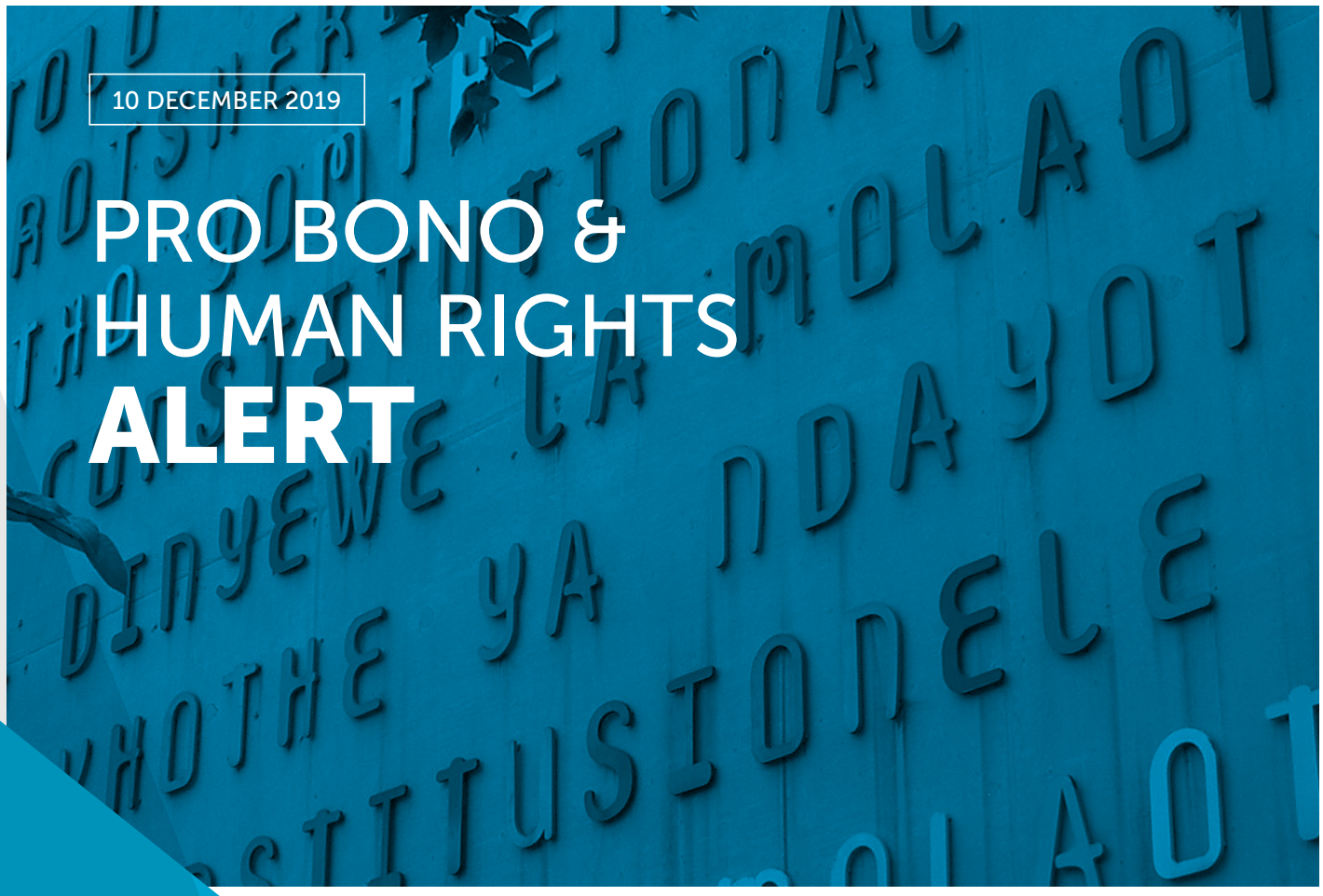

10 DECEMBER 2019

PRO BONO & HUMAN RIGHTS **ALERT**

Victory Against HIV Discrimination

According to Statistics South Africa (Stats SA) 2019 mid-year population estimates for 2019, around 18,7% of South Africans aged 15 to 49 years are HIV positive, with the total number of people living with HIV estimated at approximately 7,97 million. In view of the overwhelming evidence of the importance, impact on society, link to systemic disadvantage and historical discrimination on the grounds of positive HIV status, it is clear that stringent measures need to be taken to ensure that HIV positive people are able to maintain productive lives, remain gainfully and productively employed and that their basic human rights are at all times respected.

CDH
CLIFFE DEKKER HOFMEYR

Victory Against HIV Discrimination

The Cape Town Pro Bono & Human Rights Practice (Practice) recently acted for the applicants in the matter *Mr. X & South African Human Rights Commission v South African National Defence Force & Minister of Defence and Military Veterans*, in the Western Cape Division's Equality Court.

According to Statistics South Africa (Stats SA) 2019 mid-year population estimates for 2019, around 18,7% of South Africans aged 15 to 49 years are HIV positive, with the total number of people living with HIV estimated at approximately 7,97 million. In view of the overwhelming evidence of the importance, impact on society, link to systemic disadvantage and historical discrimination on the grounds of positive HIV status, it is clear that stringent measures need to be taken to ensure that HIV positive people are able to maintain productive lives, remain gainfully and productively employed and that their basic human rights are at all times respected.

The Cape Town Pro Bono & Human Rights Practice (Practice) recently acted for the applicants in the matter *Mr. X & South African Human Rights Commission v South African National Defence Force & Minister of Defence and Military Veterans*, in the Western Cape Division's Equality Court. Mr. X, a reservist in the Naval branch of the SANDF, sought redress under the Promotion of Equality and Prevention of Unfair Discrimination Act 52 of 2002 (PEPUDA) in that he was unfairly and unlawfully discriminated against on the basis of his HIV-positive status.

As a reservist in the Navy, Mr. X had worked himself into a position as a Leading Seaman onboard the *SAS Spioenkop*. In 2008, his lifelong ambition of serving at sea was seemingly realised when he received call-up instructions to serve on a three-month long, international seagoing mission aboard the *SAS Spioenkop* on the basis that he had formed a vital part of the ship's company. However, just two days before departure, he was informed that he would be excluded from the mission for medical reasons. Since then, he has not been deployed aboard a sea going vessel, and relegated to onshore clerical and guard duties, notwithstanding the fact that he remained operationally skilled, physically fit, healthy and asymptomatic of the only reason for his exclusion, his HIV-positive status.

This barring of Mr. X from both the mission and any further seagoing deployments, was due to a medical categorisation of "Red" status, which holds that he is "not externally deployable" with his duty restrictions described as "no duty outside the Republic of South Africa". In terms of the Department of Defence and SANDF policies, the "Red" status entails a "serious health concern or an unstable health condition with a restriction on operational utilisation". Based on the facts, it was clear that Mr. X was given this status for no other reason than his HIV status, without any regard to his physical fitness, ability to perform his job or the fact that he suffers from no known illnesses or diseases which would render him medically unfit for deployment.

This must also be seen in light of the SANDF's historical approach to HIV-positive individuals. Following the *South African Security Forces Union v Surgeon General (SASFU)* judgment, the SANDF was forced to re-evaluate its employment and governance policies

Victory Against HIV Discrimination

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On 27 November 2019, judgment in favour of the applicants was delivered by Ndita J, who found that the Navy's practices and policies imposed an inflexible and absolute rule, which in effect meant that anyone with an HIV-positive status was automatically categorised as "not externally operationally deployable".

(policies) in respect of the right to equal treatment of HIV-positive individuals. Five years after SASFU, the Pretoria High Court again found against the SANDF in *Dwenga and Others v Surgeon-General of the South African Military Health Services and Others (Dwenga)*. In *Dwenga* the court held that the SANDF was implementing these policies in a manner that made it impossible for any HIV-positive service member to be recruited, regardless of health or fitness. It was, in effect, another blanket ban. The court found that the SANDF had been discriminating unfairly and again ordered the SANDF to assess and implement its policies in a manner that considers each person who is HIV-positive on an individualised basis to determine whether or not they are healthy and fit enough to be recruited.

Subsequent to the *Dwenga* matter and pursuant to a complaint it received from Mr X and a prima facie finding by it that the SANDF had violated his rights to equal treatment and to dignity, the South African Human Rights Commission (SAHRC), the second applicant in the matter, sought certain information from the respondents in order to ascertain how the SANDF's policy in respect of HIV-positive individuals has changed since *Dwenga*, how it is implemented and how many HIV-positive service members are actually deployed, with a view to determining whether the SANDF continues to engage in discriminatory practices toward HIV-positive service members and then holding SANDF accountable for such practices.

On 27 November 2019, judgment in favour of the applicants was delivered by Ndita J, who found that the Navy's practices and policies imposed an inflexible and absolute rule, which in effect meant that anyone with an HIV-positive status was automatically categorised as "not externally operationally deployable". The court found that the SANDF's implementation of its policies relating to HIV-positive members is inadequate in that decisions are made based solely on a medical categorisation and without regard to any other factors impacting on the health, functions and physical abilities of the member concerned. Accordingly, the court found that SANDF had unfairly, unlawfully and unjustifiably discriminated against Mr. X.

The court confirmed that there may well be legitimate reasons why, in some cases, people could not be placed in certain positions based on their HIV status, but this does not justify a blanket approach. Ndita J held that the indignity and humiliation suffered by Mr. X is regrettable, more so because it was at the instance of the State. As such, the court directed the respondents to provide the SAHRC with the information it sought within two months from the judgment.

In granting relief, Ndita J agreed that the opposition of the matter by the respondents was unjustified and that the defences raised by the respondents were "spurious and disingenuous" and "downright difficult to fathom".

Victory Against HIV Discrimination

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The court showed its displeasure with the manner in which the respondents conducted their defence by granting a costs order against them.

For all these reasons, notwithstanding the fact that ordinarily an order for costs is not made in cases of this nature, the court showed its displeasure with the manner in which the respondents conducted their defence by granting a costs order against them.

This case, the judgment given and relief granted are significant in that they represent not only a vindication of Mr. X, but a step towards realising a society where HIV is not a barrier to the enjoyment of a meaningful life, where the goals and dreams of those affected by the virus are not restricted by a lack of opportunity or exclusionary policy, but are achievable on an equal footing with the rest of society.

The Practice is proud to have played our part in obtaining justice for Mr. X, in assisting the SAHRC to play their Constitutionally-protected role of holding our government institutions accountable to the Constitutional rights and responsibilities to which we are all bound, and in protecting the human dignity and right to equality of all current and aspirant deployees of the SANDF who are or may be affected by HIV.

Brigitta Mangale and Shaad Vayej

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