

SECURING THE RIGHTS OF PEOPLE LIVING WITH HIV IN THE WORKPLACE:

The Case of X v Brink and Others



**SOUTHERN AFRICA
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PREFACE

In 2014, the National HIV and AIDS Anti-Discrimination Act (HAD Act) of the Federal Republic of Nigeria was signed into law. The Act makes provision for the protection of the fundamental human rights and dignity of people living with and affected by HIV and AIDS in Nigeria. It was written for and applies to all persons living with and affected by HIV and AIDS in Nigeria as well as the judiciary, employers of labour and employees in the public and private sectors including the Nigerian Armed Forces, Nigeria Police, State Security Services, other paramilitary organizations, schools, hospitals and places of worship.

Unfortunately, HIV and AIDS related stigmatisation and discrimination remain a big challenge, threatening the fight against the HIV epidemic in Nigeria. This was evident in the case of Mr X (whose real identity has been concealed in compliance with the provision of the HAD Act, 2014 and in compliance with the order of the court), whose employment was terminated on the basis of his HIV-positive status.

In 2016, through the National Agency for the Control of AIDS (NACA), Mr X was referred to Lawyers' Alert by the Network of People Living with HIV and AIDS in Nigeria (NEPWHAN). In helping Mr X seek redress, Lawyers' Alert had a series of pre-litigation meetings with representatives from NACA, the Joint United Nations Programme on HIV/AIDS (UNAIDS), Nigeria Country Office, Coalition of Lawyers for Human Rights (COLaHR), the International Labour Organisation, civil society organisations and human rights activists, where it was resolved that an action be brought against Mr X's employers, claiming damages for compelling him to undergo an HIV test without his consent and terminating his employment on the grounds of his HIV-positive status.

On the strength of the resolution, Lawyers' Alert filed a suit against Mr X's employers on the 19th day of December, 2016 at the National Industrial Court of Nigeria sitting in Abuja, titled, *Mr X v Jakobus Brinks & 3 Ors.* (Suit No. NICN/ABJ/37/464/2016). This booklet showcases the process, victory and implementation of the court order in favour of Mr X.

It is important that such legal feats are documented and used as reference for similar cases. NACA recognises the efforts of Lawyers Alert and their partner, the Southern Africa Litigation Centre (SALC) for getting justice for Mr X and others in the court as documented in this booklet. NACA is happy to recommend this booklet to practitioners in the vanguard for rights and welfare of persons living with HIV and AIDS in Nigeria.

NACA is committed to working with all stakeholders to end all forms of HIV/AIDS related stigma and discrimination in order to achieve the global target of ending AIDS by 2030.



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Introduction

Around the world, people living with HIV continue to experience discrimination and stigma on the basis of their HIV status. This includes discrimination in the workplace.

In Nigeria, the government has enacted the HIV and AIDS (Anti-Discrimination) Act of 2014 that aims to protect people living with HIV from discrimination. Amongst other things:

- The Act prohibits all forms of discrimination based on HIV status.
- The Act prohibits employers from forcing their employees or people who are applying for jobs from undergoing HIV tests.
- The Act prohibits employers from discriminating against their employees on the basis of their HIV status.
- The Act prohibits termination of employment on grounds of HIV status.
- The Act prohibits healthcare workers from testing people with HIV without their informed consent.

Despite the law, people living with HIV continue to face discrimination in the workplace. A recent decision of the National Industrial Court of Nigeria, Abuja, affirms that discrimination on the basis of HIV status is unconstitutional and unlawful and has sanctioned employers who violate the law.

The Court's judgment is important for people living with HIV, workers, prospective employees and all employers to understand.



The case of Mr X

The facts

On October 28, 2014, Mr X was employed by Sterling Operation and Kings Guard Nig. Ltd (both security companies) by means of a written contract of employment, and posted to work at an embassy in Abuja, Nigeria. After three months of work, his employers ordered him to undergo a medical test at a designated hospital. Mr X, scared of losing his job should he refuse the test, went to the hospital for the test. Afterwards, he was given a sealed envelope and told to deliver it to his employers. Before submitting it, however, he opened the sealed envelope and found that an HIV test had been carried out on him without his knowledge.

Mr X was shocked and distressed by this information. What was more, the medical report the hospital gave him did not include any form of certification of his fitness

for employment. Despite this, Mr X delivered the report to his employer based on his understanding that the test was mandatory.

Ten days later, Mr X was informed verbally, without any written notice, by his immediate supervisor that his services had been terminated because of his HIV status. Undeterred, Mr X went to the head of the company to confirm the termination of his employment. His employers confirmed and further said that the termination was due to the medical report which showed that he was HIV-positive.

Mr X asked his employers how he could fix the situation and was instructed to obtain cover letters from two doctors. He did this. In the two letters, it was stated that Mr X was fit to work and undertake tasks assigned to him. One of the two letters further warned his employers of the consequence of stigmatising and / or discriminating against Mr X on the grounds of his HIV status. Mr X submitted both letters to his employers and they promised to get back to him. They did not. Constant visits to his place of work to remind them of their promise proved as futile as did all his efforts to get his employers to reinstate him.

Lawyers Alert's intervention

Mr X approached Lawyers Alert for help based on two complaints:

1. He was aggrieved that he had been forced to undergo an HIV test without his informed consent.
2. He was aggrieved that he had been discriminated against and lost his job.

With the assistance of Lawyers Alert, he filed a case in the National Industrial Court of Nigeria, Abuja, against his employer. Mr X asked the Court to declare the conduct of his employer a violation of his rights under the Nigerian Constitution, the HIV and AIDS (Anti-Discrimination) Act, 2014, the Labour Act Cap L 17 LFN 2004, the Universal Declaration of Human Rights, and the African Charter on Human and Peoples' Rights.

Mr X asked further that his employer pay him compensation and damages for breaching his constitutional rights and pay his lost earnings from when he was dismissed.

Anonymity and confidentiality order

Following the instructions of Mr X, who said he did not want his case to be heard in the open court, Lawyers Alert filed, alongside Mr X's suit, an application (Motion on Notice) for leave of court to prosecute Mr X's case under condition of anonymity and confidentiality. The anonymity and confidentiality order were granted by the Court before proceeding to hearing of the case. For this reason, his name is reported as "Mr. X" in court papers and press.

The ruling

On the 26th day of September, 2018, Honourable Justice Agbakoba of the National Industrial Court of Nigeria, Abuja, held in Mr X's favour, rejecting the employer's denial that he was not their employee and their assertion that he was not compelled to undergo an HIV/AIDS test.

The Court held that the HIV and AIDS (Anti-Discrimination) Act 2014 –

*"recognizes and prohibits discrimination to a job applicant as well as in the pre-employment recruitment process and the Act **clearly applies to private sector employment**". (Emphasis added)*

Can an employer compel potential employees to undergo an HIV test?

The Court held that employers cannot force their employees or potential employees to undergo a HIV test.

The Court stated that –

"whereas the employer is expected to direct his employees or prospective employees ... to undergo a medical examination of fitness under the Labour Act, prior to employment or continued employment, conversely, by virtue of the HIV and AIDS (Anti-Discrimination) Act of 2014, such employer is precluded from enquiring or including HIV ... testing as part of that medical examination".

The Court held that employers "are not entitled to demand that employees be examined to the determination of their HIV or AIDS status. ... HIV testing is not a compellable medical enquiry for employment."

The Court held that in Mr X's case, his employers had violated the HIV and AIDS (Anti-Discrimination) Act 2014 by forcing him to undergo an HIV test.

Can an employee be lawfully dismissed on the basis of his HIV status?

The Court held that Mr X's employers had dismissed him on the basis of his HIV status and that this was unlawful and an unfair labour practice.

The Court held that dismissing someone from their employment on the basis of their real or perceived HIV status is workplace discrimination, which violates the HIV and AIDS (Anti-Discrimination) Act, the African Charter on Human and Peoples' Rights, the International Labour Organization Convention on Discrimination and other international and regional human rights laws.

The Court considered that the prohibition on HIV-related employment discrimination is the reason why HIV screening is prohibited in employment processes, why job applicants and workers cannot be forced to disclose their HIV-status, and why dismissal on the basis of HIV status is prohibited.

Court order

In finding in Mr X's favour, the Court considered that to remedy the violation of his rights, it needed to consider "the stigma and opprobrium attached to HIV and AIDS and the cavalier manner" in which Mr X's employers had treated him.

The Court made the following orders:

- It declared that compelling Mr X to undergo an HIV test violated his fundamental rights to dignity and privacy contrary to the Constitution and the HIV and AIDS (Anti-Discrimination) Act.
- It declared that the dismissal of Mr X on grounds of his HIV status was discrimination and a violation of his right to work and his right to confidentiality contrary to the HIV and AIDS (Anti Discrimination) Act.
- It declared that Mr X had been unlawfully dismissed and that his dismissal on the grounds of his HIV status violated his right to inherent dignity, respect for his life, integrity of the person, the right to liberty and to security of the person contrary to the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.
- The Court ordered the employer to pay Mr X damages for the breach of his constitutional rights, and to pay five years' salaries in addition to one month's salary in lieu of notice of termination of his contract.



Implications of the judgment

Workers and people living with HIV

The judgment affirms that people living with HIV have the following workplace rights:

- The right to be free from discrimination in the workplace on the basis of actual or perceived HIV status, including during the process of applying for a job.
- The right to refuse to undergo an HIV test requested by a current or prospective employer.
- The right to keep one's HIV status confidential and not to disclose one's status to an employer or prospective employer.
- The right not to be dismissed on the basis of one's HIV-status.
- Many other important and complimentary rights, including the right to dignity, equality and fair labour practices.

Employers

All employers, whether in the public sector, the private sector or the non-profit sector (including churches) should be aware that the law requires the following conduct from employers, failing which employers risk facing sanctions:

- Employers may not discriminate against existing employees or candidates for employment on the basis of their HIV-status.
- While an employer may require an employee or prospective employee to undergo a **medical fitness assessment**, they may **not** enquire into the individual's HIV status or require that the individual undergoes an HIV test. Employers may not force or coerce or ask an employee to test for HIV.
- Employers must respect the right of all employees and prospective employees to keep their HIV status confidential. To dismiss, refuse to hire, punish or in any other way sanction an individual for refusing to disclose their HIV-status is unlawful discrimination.
- Employers may not dismiss a worker on the grounds of their actual or perceived HIV-positive status.
- Employers must respect the rights of all employees, including those living with HIV, to dignity, equality, and fair labour practices.

Healthcare workers

While the conduct of the hospital and healthcare workers that performed the tests on Mr X were not a part of his case, the facts raise some concerns that healthcare workers and facilities are violating patients' confidentiality and participating in some of the unlawful practices demanded by certain employers:

- Healthcare workers and facilities must respect the right to free and informed consent to all persons accessing healthcare services and HIV testing and should never perform an HIV test without the knowledge and voluntary and informed consent of the individual.

- Healthcare workers and hospitals should not report on a patient's HIV status in employment-related medical fitness tests or otherwise disclose a patient's HIV status to any other person without their explicit consent or based on other exceptions recognised in law.

Conclusion

Mr X's case signals that the National Industrial Court of Nigeria will not tolerate discrimination against people living with HIV in the workplace and will strictly enforce their rights as enshrined in the Constitution and the HIV and AIDS (Anti-Discrimination) Act.





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