

HIV/AIDS AND WORKPLACE DISCRIMINATION IN NIGERIA: PREJUDICE, STIGMATIZATION AND LEGAL SHENANIGANS*

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I. Introduction

Workplace discrimination in Nigeria on the basis of HIV/AIDS status raises troubling issues that are steeped in prejudice, stigmatization and legal shenanigans. This paper briefly explores these challenges and, drawing insights from South African jurisprudence, charts a course of action consistent with the imperative of bolstering the framework for the prohibition of discrimination, especially in the context of labour relations, against people living with HIV/AIDS.

II. HIV/AIDS and Non-Discrimination under Nigerian Law

Nigeria's constitutional scheme engenders a bifurcated regime of human rights, pursuant to which provision is made, on the one hand, for "Fundamental Rights" (which are predicated on civil and political rights and are expressly made justiciable) and, on the other hand, for "Fundamental Objectives and Directive Principles of State Policy" (which should ordinarily constitute the fulcrum of economic, social and cultural rights but are expressly made non-justiciable). However, the Fundamental Objectives and Directive Principles of State Policy, in the words of Justice Uwaifo of the Nigerian Supreme Court, "need not remain mere or pious declarations".¹ As Justice Bhagwati of the Indian Supreme Court further points out, "[t]he dynamic provisions of Directive Principles fertilise the static provisions of Fundamental Rights."²

In addition to the constitutional framework of human rights, Nigeria has domesticated the African Charter on Human and Peoples' Rights³, whose provisions encapsulate justiciable economic, social and cultural rights, including the right to work.

In the specific context of non-discrimination, section 42(1) of the Nigerian Constitution provides as follows:

A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person –

(a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive and administrative action of the government, to disabilities or

* A brief paper within the framework of the sub theme "Labour and Fundamental Human Rights: Is 'Discrimination Law' Doing the Job it is Supposed to Do?", as part of the general theme of the International Association of Law Schools (IALS) Conference on "Labour Law and Labour Markets in the New World Economy", scheduled for Milan, Italy, from May 20-22, 2010.

¹ *Attorney-General of Ondo State v Attorney-General of the Federation & Ors* (2002) FWLR (Part 111), 1972, at 2144.

² Justice Bhagwati, in *Minerva Mills v Union of India* (1980) AIR SC, 1789 at 1843.

³ African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap. A9, Laws of the Federation of Nigeria, 2004.

- restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions are not made subject; or
- (b) be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions.

This provision generates several critical issues. First, its provisions are restricted to Nigerian citizens. Sections 15, 16 and 17, though expressly made non-justiciable, provide in similar terms.⁴ Second, there is no specific reference to non-discrimination on the basis of HIV or other health status. Third, while the phrase “in the practical application of...any law in force in Nigeria” appears to cover the public and private realms, the phrase “or any executive or administrative action of the government”, literally construed, targets only discrimination in the public realm. Thus, from a human rights prism, the Nigerian Constitution does not meet the minimum core requirements of a general equality clause. However, the African Charter complements the Nigerian constitutional regime on human rights and addresses some of its limitations in the context of non-discrimination. For instance, Article 3 is to the effect that “[e]very individual shall be equal before the law” and that “every individual shall be entitled to equal protection of the law.” Additionally, Article 5 guarantees the right of “every individual” to “respect of the dignity inherent in a human being” and forbids “[a]ll forms of exploitation and degradation of man particularly...cruel, inhuman or degrading punishment and treatment...”, while Article 15 guarantees “the right to work under equitable and satisfactory conditions and...equal pay for equal work.”

Having regard to the foregoing, the ensuing discourse examines, in brief, the bizarre circumstances surrounding the plight of Citizen Ahamefule, the first Nigerian to seek legal redress before a Nigerian court against workplace discrimination on the basis of HIV/AIDS status.

III. Illustration: The Plight of Citizen Ahamefule⁵

In Nigeria, workplace discrimination on the basis of HIV/AIDS status is shrouded in secrecy, primarily because people living with HIV/AIDS are constrained to suffer in

⁴ Section 15(2) prohibits discrimination “on the grounds of place of origin, sex, religion, status, ethnic or linguistic association or ties”; section 16(1)(b) requires the State to ensure “equality of status and opportunity”; under section 17(1), “[t]he State social order is founded on ideals of Freedom, Equality and Justice”; in furtherance of the social order, subsection (2)(a) provides that “every citizen shall have equality of rights, obligations and opportunities before the law”; pursuant to subsection 3(a)(e), the State shall direct its policy towards ensuring that “all citizens, without discrimination on any group whatsoever, have the opportunity for securing adequate means of livelihood as well as adequate opportunity to secure suitable employment” and that “there is equal pay for equal work without discrimination on account of sex, or on any other ground whatsoever.”

⁵ See, for instance, “‘Iam Still Alive’, says Goergiana Ahamefule...A Case of Continued Prejudice Towards People Living with HIV/AIDS”, Serac @ Work, Electronic Newsletter, Vol. 1, Issue 2, January-July, 2009, <http://www.serac.org/.../E-Newsletter%20Volume%201,%20issue%202.pdf> (Site accessed on March 20, 2010).

silence, when their employments are terminated for no other reason than their health status, rather than seek legal redress and risk stigmatization and ostracization. Regrettably, they suffer triple jeopardy – health challenges; loss of their means of livelihood; and stigmatization/ostracization. Tragically, a large segment of the society continues to victimize the victims of HIV/AIDS. It is against the backdrop of this reality that the case of Mrs Georgina Ahamefule stands out.

Mrs Georgina Ahamefule, was, until the year 2000, an auxiliary nurse in the employment of Imperial Medical Centre, Lagos, Nigeria. However, in that year, her employer terminated her five-year old employment on the ground of her HIV-positive status. The termination letter indicated that the hospital management could not compromise the facility or its patients by exposing them to the risks associated with her health status. Mrs Ahamefule suffered additional injuries when, apparently owing to the trauma associated with the treatment meted out to her, she spontaneously had a miscarriage. Yet, the hospital proprietor, Dr Alex Molokwu, is alleged to have refused to carry out the requisite medical operation that he had prescribed as indispensable in order to alleviate her post-abortion plight.

In an unprecedented move, Mrs Ahamefule dared to speak truth to power. On July 14, 2000, with the assistance of Social and Economic Rights Action Centre (SERAC), a Nigerian NGO, she sued the Imperial Medical Centre and its proprietor challenging, *inter alia*, the unlawful termination of her employment. She predicated her claim on relevant provisions of the Nigerian Constitution, the African Charter and other international instruments which are binding on Nigeria.

In a bizarre turn of events, counsel to the defendants, objected to the presence of Mrs Ahamefule in court to give evidence in support of her case, on the ground that her presence could endanger the lives of others. Remarkably, on February 5, 2001, Justice Caroline O. Olufawo of the Lagos High Court upheld the contention of the defendant's counsel, on the ground that life has no duplicate and must be guarded jealously. The judge then ordered for expert opinion on the propriety, from a safety prism, of the plaintiff testifying in court.

A decade later, at the time of writing, the matter is still pending before the trial court, as the defendants continue to deploy all sorts of obstructionist tactics to frustrate the case, including an outrageous false deposition by a staff of the defendant's counsel, Professor ABC Adesanya, SAN, on April 22, 2009, that the plaintiff had died! To their utter consternation, the plaintiff appeared in court, about a month later, on May 27, 2009! Regrettably, the judicial process is being manipulated and the course of justice subverted. For Citizen Ahamefule, justice remains, for now, an illusion.

IV. Looking Ahead: Insights from South African Jurisprudence

The plight of Citizen Ahamefule, and others similarly situated, underscores the imperative of capacity building of all stakeholders in the Nigerian justice system on the HIV/AIDS pandemic. This, in turn, requires a coordinated framework of sustained education and enlightenment, institutional linkages and networking on best practices.

Flowing from the above, the decision of the South African Constitutional Court in *Hoffmann v South African Airways*⁶ is pertinent. It would be recalled that in September

⁶ CCT 17/00, judgment delivered on September 28, 2000.

1996, the appellant, Mr Hoffmann, applied for employment as a cabin attendant with South African Airways (SAA). At the end of the selection process, the appellant, together with eleven others, was found to be a suitable candidate for employment. This decision, however, was subject to a pre-employment medical examination, which included a blood test for HIV/AIDS. The medical examination found him to be clinically fit and thus suitable for employment. However, the blood test showed that he was HIV positive. As a result, the medical report was altered to read that the appellant was “H.I.V. positive” and therefore “unsuitable”. He was subsequently informed that he could not be employed as a cabin attendant in view of his HIV positive status.

The appellant challenged the constitutionality of the refusal to employ him in the High Court, alleging that the refusal constituted unfair discrimination, and violated his constitutional right to equality, human dignity and fair labour practices. Consequently, he sought, *inter alia*, an order directing SAA to employ him as a cabin attendant.

SAA denied the charge, asserting that the exclusion of the appellant from employment had been dictated by its employment practice, which required the exclusion from employment as cabin attendant of all persons who were HIV positive. SAA justified this practice on safety, medical and operational grounds.

It is instructive that on the medical evidence placed before the High Court, it was not established that the appellant posed the risks asserted. None the less, the High Court agreed with SAA, on the grounds that SAA’s practice was based on considerations of medical, safety and operational grounds; did not exclude persons with HIV from employment in all positions within SAA, but only from cabin crew positions; and was aimed at achieving a worthy and important societal goal. The High Court noted that if the employment practices of SAA were not seen to promote the health and safety of its passengers and crew, its commercial operation, and therefore the public perception about it, will be seriously impaired. On SAA’s claim that its competitors apply a similar employment policy, the Court reasoned that if SAA were obliged to employ people with HIV, it would be seriously disadvantaged as against its competitors. The High Court, therefore, concluded that SAA’s practice did not unfairly discriminate against persons who are HIV positive and that even if it did, such discrimination was, in the circumstances, justifiable.

On appeal, the South African Constitutional Court underscored the fact that at the heart of the prohibition of unfair discrimination is the recognition that all human beings, regardless of their position in society, must be accorded equal dignity. That dignity is impaired when a person is unfairly discriminated against. This is particularly so that society has responded to the plight of people living with HIV with intense prejudice. They have been stigmatized, marginalized and subjected to systemic disadvantage and discrimination. As the present case demonstrates, they are 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, deprives them of the help they would otherwise have received. It is, therefore, beyond dispute that people living with HIV/AIDS are one of the most vulnerable groups in our society. Notwithstanding the availability of compelling medical evidence as to how this disease is transmitted, the prejudices and stereotypes against HIV positive people still persist. Undoubtedly, the impact of discrimination on HIV positive people is devastating,

particularly in the context of employment given that it denies them the right to earn a living.

The Court established that neither the purpose of the discrimination nor the objective medical evidence justified such discrimination. In the view of the Court, and rightly so in our respectful view, the fact that some people who are HIV positive may, under certain circumstances, be unsuitable for employment as cabin attendants does not justify the exclusion from employment as cabin attendants of *all* people who are living with HIV. Were this to be the case, people who are HIV positive would never have the opportunity to have their medical condition evaluated in light of current medical knowledge for a determination to be made as to whether they are suitable for employment as cabin attendants. On the contrary, they would be vulnerable to discrimination on the basis of prejudice and unfounded assumptions.

The Court acknowledged that legitimate commercial requirements are, of course, important considerations in determining whether to employ an individual. However, it is important to guard against allowing stereotyping and prejudice to creep in under the guise of commercial interests.

The Court further expressed recognition of the need to promote the health and safety of passengers and crew. However, fear and ignorance can never justify the denial to all people who are HIV positive of the fundamental right to be judged on their merits. Accordingly, the Court rightly reasoned, our treatment of people who are HIV positive must be based on reasoned and medically sound judgments; they must be protected against prejudice and stereotyping; and we must combat erroneous, but nevertheless prevalent, perceptions about HIV.

On the whole, the Court found in favour of the appellant and directed SAA to employ him.

We heartily commend the decision of the South African Constitutional Court and urge all stakeholders in the Nigerian justice system to learn from its constructive, incisive and informed analysis.