



## SANDF CHIEFS BRACE FOR HIV POLICY CHALLENGE



After 13 years of political confusion, 'muddled' policy, inconclusive court challenges and fruitless negotiation over its 'unconstitutional' HIV policies, the South African National Defence Force (SANDF) and its political bosses are to be confronted head on.

Several HIV-positive SANDF members and the South African Security Forces Union (SASFU) are launching an assault in the High Court in Pretoria over the SANDF's 'highly discriminatory and outdated' recruitment and deployment policies and practices.

In the most comprehensive legal challenge yet mounted, the AIDS Law Project (ALP for SASFU) has compiled 1 700 exhaustive pages of argument on evidence-based medicine, detailed cases of individual discrimination and a fascinating history of contradictory responses, inaction and denial by the SANDF and its political masters.

The SANDF justifies its HIV testing policy and its implementation by saying that people living with HIV are 'medically unsuitable' and unable to withstand stress, physical exercise and adverse climatic conditions.

It says HIV-positive members 'pose a risk to others', HIV prevalence needs to

be kept low in the military (officially 17 - 25% 2 years ago but estimated at triple this in some press reports at the time), foreign deployment conditions are 'too harsh' for people living with HIV and the military has 'a duty to protect the Republic'.

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From interviews with lawyers preparing the case *Izindaba* has learnt that the Pretoria High Court will, in chambers and before the year is out, form an opinion on the constitutionality of the SANDF's current annual Comprehensive Health Assessment, which includes physical, mental and audiometric tests to determine levels of fitness.

Several cases where potential recruits tested positive for HIV and were turned away, and others where soldiers were excluded from lucrative foreign peacekeeping missions, are cited in

detail in the ALP papers (a foreign deployment can earn a member R13 000 per month extra).

### **Super fit and HIV positive = no deployment**

One of them involves a super-fit physical fitness instructor who trained hundreds of soldiers up to deployment fitness but was prevented from serving alongside them because he was HIV positive. Many of the disillusioned complainants are former MK and APLA cadres integrated into the SANDF in 1994. Their deafening outcry against HIV testing at the time led to the dropping of annual comprehensive health assessments (CHAs) for 6 years.

Judgement may only be handed down early next year as the SANDF and its co-respondents (the surgeon general, ministers of defence and health, chief of the SANDF and President Thabo Mbeki) are opposing the matter.

*Izindaba* sources in the State Attorney's office said that each respondent's legal department pored over the ALP's papers before reporting back to the central State Attorney of Record.

At the time of going to press the SANDF lawyers were still seeking clarity on ALP requests for a record of the development of the HIV/AIDS policy, its implementation and justification. No hearing date has yet been set.

According to ALP papers any HIV-positive test result destroys an SANDF applicant's opportunity for employment and an SANDF member's opportunities for deployment and promotion. It claims that the net result is a blanket exclusion of HIV-positive people from employment, foreign deployments and promotions – regardless of their actual level of fitness, state of health and their job category or mustering.



**Special job categories for HIV-positive members?**

The SANDF and cabinet had over recent years given the ALP repeated assurances that they would come up with ‘categories’ of service in which HIV-positive soldiers, sailors and airmen could be deployed – but had yet to produce such a document.

Attempts to elicit an authoritative response from the SANDF on what United Nations (UN) regulation it relies on to keep HIV-positive people from being deployed on peacekeeping missions had also proved unsuccessful.

UN regulations actively oppose HIV testing among peacekeeping forces for reasons of stigmatisation and discrimination. The UN pays compensation for soldiers who die on peacekeeping duties (about R14 000) but excludes those who die of chronic illnesses – something some senior SANDF sources reportedly cite as a reason for not deploying HIV-positive members. The chances of any healthy HIV-positive SANDF member dying within the usual maximum foreign posting period of 6 months are considered almost negligible.

The evolution of the alleged SANDF discrimination on the basis of HIV status has more twists and turns than an

enemy guerrilla escape route or political spy novel.

**A political dance...**

The Ministers of Health (Manto Tshabalala-Msimang) and Defence (Ronnie Kasrils) denied that any such policy existed. Yet the ALP brought several individual court actions showing the opposite, and these SANDF HIV-positive members were ordered by the courts to be re-instated (1994, 1996 and 1997).

From a ‘cabinet review’ of the policy in 1997, to the defence ministry stating that its exclusionary policy was ‘neither unfair nor discriminatory (given the constitutional role of the SANDF),’ to cabinet suggesting the definition of certain exclusionary categories of employment, the saga unfolded at random.

In August 1999, a nurse who applied to join the SANDF was rejected on the grounds that she suffered from a ‘potentially fatal disease’. The nurse, cited only as ‘CMM’ in court papers, died in 2003, before her legal challenge was heard. Two other ALP legal probes, in 2002 and 2003 and still pending, will now probably mark time until the current comprehensive challenge is decided on.

Attempts by the ALP to have the SANDF policy revised through the South African National AIDS Council (SANAC) bore little fruit besides the establishment of a ‘task team’.

One Department of Defence (DoD) e-mail to this task team admitted that while the DoD did ‘not maintain a body of scientific evidence that informed HIV/AIDS policy’ all relevant scientific research was ‘constantly monitored to detect new evidence’.

Subsequent letters, mostly initiated within SANAC by ALP executive director and SANAC law and human rights sector representative, Mark Heywood, to the health minister, her deputy (Nozizwe Madlala-Routledge) and Defence Minister (Mosiuoa Lekota), went unanswered.

**HIV policy flouts SANDF’s own regulations**

The deputy general secretary of SASFU, John Hlatshwayo, argues in the ALP court motion that SANDF policy fails to even give effect to its own defence regulations.

These required an assessment of whether a particular person was able to perform his or her work functions efficiently, given their particular type of post, mustering, appointment, or job classification. Using HIV-positive status to exclude someone flouted this regulation, making the policy ‘unreasonable and unconstitutional’.

Heywood says the SANDF’s HIV policy has failed abjectly to keep up with advances in the treatment of HIV/AIDS that now enable young people to live for more than 35 years after diagnosis.

Other supporting affidavits from medical experts contend that exercise training enhances the immune system and is beneficial to people living with HIV.

They cite exemplary performances of well-known HIV-positive athletes such as Evelina Tshabalala (Comrades 2005





and 2006, conquered Mount Aconcagua, Argentina in March 2007) and basketball hero and Olympic medallist, Magic Johnson.

## Anglo rebuts SANDF arguments

Dr Brian Brink, Anglo SA's chief health officer, says in an affidavit that harsh and physically demanding conditions in underground mining presented serious risks and dangers to the health of miners, yet being HIV positive created no barrier to the work.

He said 95% of Anglo's staff on ARVs continued with their normal work and lived healthy, productive

lives while fear of infection among their HIV-negative colleagues had subsided dramatically with education and over time. The medium-term costs of providing ARVs were 'significantly outweighed' by the savings in reduced absenteeism and health care costs while productivity and skills retention increased.

The court papers cite a regional conference on HIV in the military estimating the number of working days lost owing to HIV/AIDS in 1 year in the SANDF to be 400 000.

One expert ALP affidavit puts the risk of contracting HIV from a bleeding

soldier in a combat situation at less than 1 in 3 300, way below that of actually being killed in combat.

Hlatshwayo says at one point that 'the assumption by the SANDF that it can contain the effect of HIV by denying HIV-positive individuals employment or deployment is incomprehensible. The very fact of the discrimination and stigmatisation is a barrier to members testing voluntarily for HIV and hence subverts the SANDF's own programmes that are aimed at managing the condition.'

**Chris Bateman**

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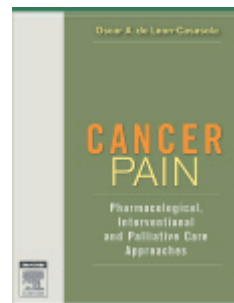
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