

LABOUR LAW INTERVENTIONS TO HIV AND AIDS AT THE WORKPLACE IN ZIMBABWE: UNPACKING SOME ZIMBABWEAN MEDICO-LABOUR LAW CONTAINED IN THE LABOUR RELATIONS (HIV AND AIDS) REGULATIONS, 1998

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INTRODUCTION

Zimbabwean labour law responded to the HIV and AIDS scourge by the enactment of legislation that specifically deals with this particular area at the workplace by the legislature. The aforesaid legislation is in the form of a statutory instrument known as Labour Relations (HIV and AIDS) Regulations, 1998² ("hereinafter referred to as the HIV and AIDS Regulations"). The HIV and AIDS regulations are designed to provide a legal guideline to both an employer and an employee concerning the subject matter contained therein. Suffice to mention that the concerned regulations are divided and arranged into eleven parts which will be addressed in this paper for the legal benefit of the entire spectrum of the Zimbabwean society, be it employer or employee or some other stakeholder or interested party who may be either infected or affected by HIV and AIDS in one way or the other.

TITLE OF THE HIV AND AIDS REGULATIONS

The title appears in part one of the regulations. This is the legal title which provides a name for the regulations. It is worded as follows:

"These regulations may be cited as the Labour Relations (HIV and AIDS) Regulations, 1998³."

The title of a legislation is inserted for the convenience of the reader or user. These regulations have an overriding and tailor made superseding legal status in any employment relationship by virtue of the fact that they are made in terms of section 17 of the Labour Act which gives the relevant Minister of Labour broad legal powers to make far reaching regulations that create minimum conditions of employment in Zimbabwe⁴. The fact that the HIV and AIDS Regulations are made terms

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² S.I 202/1998

³ See section 1 of SI 202/1998

⁴ Section 17(1) & (2) of the Labour Act [Chapter 28:01] provides that, (1) Subject to this Act, the Minister, after consultation with the appropriate advisory council, if any, appointed in terms of section nineteen, may make regulations for the development, improvement, protection, regulation and control of employment and

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of section 17 of the Labour Act is *res ipsa loquitur* from ex-facie reading of the clear and bold print within such regulations worded as follows:

“IT is hereby notified that the Minister of Public Service, Labour and Social Welfare, in terms of section 17 of the Labour Relations Act [Chapter 28:01], has made the following regulations-”

LEGAL INTERPRETATION OF THE HIV AND AIDS REGULATIONS

The regulations contain an interpretation of some words, terms and phrases used therein. The meaning ascribed to the words, terms and phrases in the regulations is a legally binding meaning which must be used in construing or interpreting the HIV and AIDS Regulations. Testing of HIV and AIDS can be done either directly or indirectly the interpretation part of the regulations is carefully and elaborately worded as follows:

“In these regulations-

“AIDS” means acquired immune-deficiency syndrome and includes the AIDS-related complex;

“HIV” means human-immuno-deficiency virus;

“testing” in relation to HIV includes-

- (a) any direct analysis of the blood or other body fluid of a person to determine the presence of HIV or antibodies to HIV; or*
- (b) any indirect method, other than testing of blood or other body fluid, through which an inference is made as to the presence of HIV;*

“Related communicable disease” means any communicable disease whose transmission may be linked with HIV due to its transmission through body fluids or whose risk of clinical disease may be increased due to the presence of HIV;

“Medical practitioner” means a person registered as a medical practitioner in terms of the Medical, Dental and Allied Professions Act [Chapter 27:08].

LEGALLY COMPULSORY EDUCATION OF EMPLOYEES ON HIV AND AIDS BY AN EMPLOYER

Part three of the HIV and AIDS regulations contain some very important legal provisions for the dissemination of information by an employer to his/her/its employees regarding HIV and AIDS. The sharing of sound, relevant and important information on HIV and AIDS at the workplace through the active participation of an employer may help prevent and cure HIV and AIDS as well as combating stigmatisation of those infected by HIV and AIDS at the workplace. There is need for a government controlled or supervised monitoring and evaluation of practical enforcement of compliance by every employer in Zimbabwe, be it in the private or public sector (even though the HIV and AIDS Regulations under legal scrutiny do not specifically apply to public¹ sector employees), with this noble legal provision for

¹ The reason for the concerned HIV and AIDS Regulations not applying to public sector employees or civil servants is that they were enacted in terms of section 17 of the Labour Act and the same Labour Act does not

education of employees on HIV and AIDS as part of the wider efforts to fight the challenge of this disease in the country so that the nation's workforce is protected from destruction. The law makes it compulsory or mandatory for every Zimbabwean employer to educate every person employed by that particular employer during normal working hours regarding HIV and AIDS in terms of **section 3** of the Labour Relations (HIV and AIDS) Regulations which provides as follows;

“Every employer shall cause to be provided for the benefit of every person employed by him, and at such place and time during normal working hours as he may appoint, education and information relating to-

- (a) the promotion of safe sex and risk-reducing measures in relation to sexually transmitted diseases; and*
- (b) the acquiring and transmission of HIV; and*
- (c) the prevention of the spread of HIV and AIDS; and*
- (d) counselling facilities for HIV and AIDS patients. (Emphasis added by underlining)*

It is noteworthy that the HIV and AIDS Regulations jealously guards against the use of unqualified or bogus persons by an employer in the education of employees on HIV and AIDS at the workplace. The law clearly stipulates that the credentials of a person whom the employer must use or hire to furnish employees with education on HIV and AIDS must be that the person must possess sound knowledge or expertise in matters relating to HIV and AIDS meaning that such a person to offer that education must not be a novice or self-proclaimed expert but a genuine expert with empirical evidence to prove such sound knowledge and expertise which may be in the form of possession of relevant qualifications in the medical field earned from a recognised college or learning institution. The law does not countenance fake experts for providing employees with education on HIV and AIDS at the behest of the employer meaning that it is not every proverbial “Tom”, “Jack” and “Hary” who must purport to provide employees with education on HIV and AIDS at the workplace. Some unscrupulous persons have been on the loose leash or prowl trying to cash in and wrongfully, unlawfully and improperly milking money or resources from unsuspecting members of the public under the guise of providing education and information on HIV and AIDS but their education and information remains fake and toxic. It is submitted that if an employer uses an unqualified person without sound knowledge and expertise in HIV and AIDS purporting to provide his/her/its employees with education on HIV and AIDS, that employer, apart from other criminal legal sanctions, the concerned employer may be found liable for huge sums of money and damages under the law of delict for wrongful, unlawful and harmful conduct against the affected employees. Also, an employer who hires an unqualified person to pretending to “offer” education to his/her/its employees about HIV and AIDS runs the risk of damaging the professional reputation of such employer. The law therefore contains very stringent legal provisions to guard against the sharing of education on HIV and AIDS at the workplace by employers through using unqualified persons by setting the legal bar for persons who are eligible to offer such education as follows:

apply to public sector employees by virtue of section 3(1) and (2) thereof which says, (1) This Act shall apply to all employers and employees except those whose conditions of employment are otherwise provided for in the Constitution and (2) For the avoidance of doubt, the conditions of employment of members of the Public Service shall be governed by the Public Service Act [Chapter 16:04].

“Education and information shall be provided in terms of subsection (1) by persons who have proven sound knowledge and expertise in matters relating to HIV and AIDS, who are able to communicate information with accuracy and consistency.” (Emphasis added by underlining).

Ever since the HIV and AIDS scourge reared its ugly head in the Zimbabwean society, several co-artists have masqueraded as providing information, education, knowledge or cure about HIV and AIDS only for them to turn into merchants of darkness, folly and purveyors of falsehoods but in some cases after fleecing their innocent and pliable victims of fortunes in money and resources. One such case in mind is the sad story of the famous late former Zimbabwean heavyweight boxer by the name **Proud Chinembiri** (also known as **Kilimanjaro** for his remarkable boxing prowess) who in the late 1990s was allegedly reported in the local press known as Parade magazine and later by the Bulawayo based Chronicle³ newspaper, to have been cheated of his lots of money by someone who alleged that he was able to cure HIV and AIDS.

Proven sound knowledge and expertise in matters relating to HIV and AIDS as stipulated by the law in terms of section 3(2) of the HIV and AIDS Regulations is not mere say so by the person professing to possess such knowledge and expertise but it is demonstrable knowledge and expertise in HIV and AIDS with depth confirmed by tangible results and not just empty rhetoric or talk. This is a necessary legal provision because matters of HIV and AIDS are matters of life and death such that if there are no strict legal provisions about the qualifications or prior requirements for one to provide education and information, there can be a gold rush by unqualified persons which may open a Pandora's box or can of worms as some innocent or desperate persons can fall victim and pay a heavy price at the hands of these impostors or fraudsters who will pretend to avail genuine education and information relating to HIV and AIDS. Zimbabwe is a deeply religious society which is gripped and dominated by both the African traditional religion as well as Christian and quasi-Christian religions, some of whose opportunist adherents cross the line pretending to offer solutions to every human problem or ailment including but not limited to HIV and AIDS and hence these legal restrictions imposed by

² See section 3 (2) of S.I 202/1998.

³ See Chronicle article of 15 May 2011 which reported as follows, “founding fathers of Zimbabwe will almost always trace the inspiration of their heroic efforts to one giant, Benjamin Burombo. But there was to be another Benjamin Burombo in post-independent Zimbabwe who made headlines for different reasons altogether. At the height of the HIV and AIDS pandemic, when anti-retroviral drugs were not freely available and the virus was taking its toll on the nation, the self-styled “Doctor” Benjamin Burombo rose to fame with claims that he could cure diseases associated with the virus. He drew many to him and in the process enriched himself. But many doubted that he was genuine and wondered how long he would last. The then Minister of Health and Child Welfare, Dr Timothy Stamps dismissed Burombo’s claim that he could cure Aids-related illnesses. But Burombo was adamant. Among his patients was the late Zimbabwean heavyweight boxing champion Proud “Kilimanjaro” Chinembiri. Burombo’s stakes rose quite high when it was reported that he was “treating” the famed boxing champion. Unfortunately, Kilimanjaro died. It was not long before Burombo’s world started collapsing and he soon disappeared from the limelight. Two decades later, the former vibrant and talkative herbalist is a shadow of his former self. The man, who claimed to possess magical healing powers and herbs, is now broke. His dream of finding a cure for Aids had died. The BMWs and Mercedes Benz have also disappeared and have been replaced by a modest Renault 12. His Kuwadzana house that used to play host to hundreds of Zimbabweans and foreigners seeking help, now tells a different and sad tale. Some sheep could be heard bleating in his backyard when The Herald visited him on Wednesday. Now 51-years-old, the man who used to claim that his wonder herbs were from deed-down Kariba Dam, has lost the bling. At his gate there is an inscription; “Tresspassers will be prosecuted”.

section 3(2) of the HIV and AIDS regulations are absolutely necessary to rein in and fetter some loose canons who may want to prejudice members of the public falsely claiming to offer education and information on HIV and AIDS just for their selfish benefit and to line up their pockets.

Due to the terminal nature of HIV and AIDS, had it not been for the protection afforded in terms of the legal provisions of section 3 (2) of the HIV and AIDS Regulations, some victims may easily fall prey to the foul play by predators who pretend to offer education and information on HIV and AIDS. In addition to proven sound knowledge and expertise in HIV and AIDS, section 3(2) of the HIV and AIDS Regulations goes further to draw a line in the sand for any person who intends to assume the role of providing education and information about HIV and AIDS to employees at the employer workplace that such a candidate must be able to communicate information and education about HIV and AIDS with consistency and accuracy. One of the common features and striking similarity of imposters or con artists who spread deceitful falsehoods is that they are inaccurate and inconsistent, sometimes because they are opportunists who just go by the wind or because they are ignorant of what they profess to know and hence section 3(2) of the HIV and AIDS Regulations is legally ironclad to ensure that only eligible persons with proven sound knowledge and expertise as well as ability to communicate with accuracy and consistency, are eligible to offer education and knowledge to employees at the workplace. These are essential protective legal provisions to ward off, confine, eliminate or maroon fake providers of education and information on HIV and AIDS.

It is legally imperative and mandatory for employer and employee organisations at the workplace e.g works council, workers committees, trade unions, employers' associations, employment councils, to engage and jointly approve any guidelines on education and information about HIV and AIDS at the workplace in consultation with the specialised Ministry of Health and Child Welfare or any other organisation with expertise in HIV and AIDS-related matters as per the following instructive legal provisions of the HIV and AIDS Regulations:

“The design of the education programmes shall be in accordance with guidelines approved by the relevant employer and employee organizations, in consultation with the Ministry of Health and Child Welfare and any other organization with expertise in HIV and AIDS-related matters⁴.” (Emphasis added by underlining)

The legal import of section 3(3) of the HIV and AIDS Regulations is that neither an employer nor an employee can impose an HIV and AIDS education programme for employees at the workplace but any such programme must be a product of consensus *ad idem* between the relevant employer and employee organisation. The legal meaning of the phrase, “in **consultation with the Ministry of Health and Child Welfare and any other organization with expertise in HIV and AIDS-related matters**”, is that there is no legal requirement for the employer and employee to first get approval of the HIV and AIDS guidelines from such stakeholders. Employer and employee organisations may come up with written and agreed HIV and AIDS education policies and manuals for use at the workplace. To the extent that section 3(3) of the HIV and AIDS Regulations require the prior approval by both the employer and employee organization of any HIV and AIDS education guideline

⁴ Section 3(3) Of S.I 202/1998.

at the workplace, it is submitted that this provision entail and entrench democracy and social justice at the workplace by enhancing employee participation in sync with one of the chief purposes of the Labour Act which explicitly provides as follows:

“The purpose of this Act is to advance social justice and democracy in the workplace by-

(a).....

(b)....

(c)...

(d) the promotion of participation of employees in decisions affecting their interests in the work place.

The letter and spirit of consensus building between employer and employee organizations in matters relating to education on HIV and AIDS is a ubiquitous thread that is also encapsulated in terms of section 3(4) of the HIV and AIDS Regulations as follows:

“The provision of education referred to in subsection (1) shall be at such intervals as relevant employer and employee organizations may agree.” (Emphasis added by underlining)

The legal framework under section 3(4) of the HIV and AIDS Regulations is that the relevant employer and employee organizations are free to agree on the time for carrying out any HIV and AIDS education programme as they wish and at their discretion owing to the use of the permissive word, “**may**” in the second part of that provision but the need to provide time for such education at the work place is legally compulsory as underscored by the use of the word, “**shall**” in the first part of that provision.

LEGAL BAN ON COMPULSORY REQUIREMENT FOR A PROSPECTIVE EMPLOYEE TO UNDERGO MEDICAL TESTING FOR HIV AND AIDS ON RECRUITMENT LEGAL APPROVAL OF MEDICAL TESTING OF PERSONS FOR FITNESS FOR WORK AS A PRECONDITION TO THE OFFER OF EMPLOYMENT.

Part four of the HIV and AIDS Regulations is very illuminating and scintillating as it operates like a double-edged sword. The law expressly imposes a blanket mandatory legal ban for any employer to require any prospective employee to go through any form of testing for HIV as pre-requisite for getting a job and that peremptory provision can be gleaned from the use of the word, “**shall**” in the relevant legislation which aptly says;

“No employer shall require, whether directly or indirectly, any person to undergo any form of testing for HIV as a precondition to any offer of employment.” This legal provision nips in the bud any discrimination of persons living with HIV and AIDS from recruitment for employment. The always is crystal clear that an employer is legally barred from either expressly or impliedly requiring any employment seeker or job seeker to undergo HIV testing as a basis for considering that person for employment. It is submitted that this provision deals with both covert and overt antics by any employer to try and discriminate any prospective employee from employment on the basis of his/her HIV and AIDS status. This is particularly important in a conservative society like Zimbabwe where some people living with or infected by HIV and AIDS have been discriminated against and

prejudiced in various spheres of life. It is important to note that the Constitution of Zimbabwe⁵ provides and guarantees every person with a fundamental human right to privacy which also covers legal prohibitions against mandatory medical testing for HIV and AIDS at the workplace or anywhere else in the following words:

“Every person has the right to privacy, which includes the right not to have-

(a)....

(b).....

(c).....

(d).....

(e) their health condition disclosed.

The same Constitution of Zimbabwe contains a general legal provision on equality before the law⁶ and a legal prohibition of any form of unfair discrimination⁷ which equality also applies to those infected with HIV and AIDS as well as proscribing unfair discrimination on the basis of HIV and AIDS status. The Labour Act⁸ contains wide, express and specific legal provisions proscribing the discrimination of any employee on the grounds of his/her HIV status and read together with the general anti-discrimination provisions of section 56 of the Constitution of Zimbabwe, the two standalone legal provisions constitute a formidable hybrid legal force to thwart unfair discrimination on the basis of HIV status on the part of any employee or prospective employee.

The law however allows an employer to require a prospective employee to undergo medical testing to determine fitness to work as a precondition to the offer of employment as can be seen from this legal provision:

“Subsection (1) shall not prevent the medical testing of persons for fitness for work as a precondition to the offer of employment. It is submitted that some employers who may be bent on unfairly

⁵ Section 57 (e) of the Constitution of Zimbabwe Amendment (No.20) Act, 2013.

⁶ Section 56(2) of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013, “All persons are equal before the law and have the right to equal protection and benefit of the law.”

⁷ Section 56(2) of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013 which says, “Every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race, colour, tribe, place of birth, ethnic or social origin, language, class, religious belief, political affiliation, opinion, custom, culture, sex, gender, marital status, age, pregnancy, disability or economic or social status, or whether they were born in or out of wedlock.”

⁸ Section 5(1) of the Labour Act provides that, “No employer shall discriminate against any employee or prospective employee on grounds of race, tribe, place of origin, political opinion, colour, creed, gender, pregnancy, HIV/AIDS status or, subject to the Disabled Persons Act [Chapter 17:01], any disability referred to in the definition of “disabled person” in that Act, in relation to –

- (a) the advertisement of employment; or
- (b) the recruitment of persons; or
- (c) the introduction of prospective employees for jobs or posts; or
- (d) any other matter related to employment.

discriminating against persons with HIV and AIDS may selfishly exploit section 4(2) of the HIV and AIDS Regulations by requiring any prospective employee to undergo a general medical testing of persons for fitness to work and use any results that any ensuing results of such a blanket medical test that show someone as HIV and AIDS positive to sniff out or eliminate that particular person from eligibility for an offer of employment in a very subtle manner. Under such circumstances where an employer relies on section 4(2) of the HIV and AIDS Regulations to unfairly and unlawfully discriminate against a person with HIV and AIDS, in the absence of compelling medical evidence by recognised medical experts to the effect that for the nature of that job, a prospective employee's HIV and AIDS positive status renders him/her medically unfit for that job, if an employer fails to give such an employee a job under medical unfitness which is not supported by credible medical evidence, that decision of the employer may be successfully challenged before a competent court of law as wrongful, unlawful and unconstitutional.

The legal upshot of section 4 (2) of the HIV and AIDS Regulations is a clear recognition by the law that the workplace is a place for production and an employer is legally allowed to use medical evidence in the form of medical testing to sift through any prospective employees to determine those who are medically fit for production at a given workplace. There are certain jobs which by their very nature require any employee who want to join or work in such jobs to be always medically fit to avoid the employer getting prejudiced or suffering losses due to employing a medically unfit employee who becomes a liability and not an asset to the employer. The constitutional right to fair labour practices and standards as well as safe labour standards provided for in terms of section 65 (1) of the Constitution of Zimbabwe⁹ protects every person who could be an employer or employee and hence sections 4(1) and (2) of the HIV and AIDS Regulations are couched in balanced manner which seeks to reconcile the competing interests of both an employer and an employee. A prospective employer has the onus to prove that he/she/it did not decline to give a prospective employee who is HIV and AIDS positive on the basis of his/he health status in the event that any affected or concerned employee or party challenges a decision by such employer to decline that prospective employee a job relying on the results emanating from the general provisions of section 4(2) of the HIV and AIDS Regulations allowing for medical testing for fitness for work as a precondition for employment which would have revealed that a particular person vying for a job is HIV and AIDS positive.

It is worth noting that fundamental constitutional rights provided for in terms of the Constitution of Zimbabwe do not operate *ad in finitum* but they are subject to legal limitations contained in terms of section 86 of the very same Constitution of Zimbabwe which is legally meant to strike a legal balance between fundamental legal rights on one hand and societal legal obligations of persons for mutual co-existence on the other hand. For an employer to rule out hiring a prospective employee on the legal basis of the medical results flowing from a medical test done in terms of section 4(2) of the HIV and AIDS Regulations that employer must prove that such medical results show that the prospective employee is medically unfit for the specific job or employment whether or not such medical unfitness is due to HIV and AIDS or any other medically diagnosed sickness, disease or ailment. What

⁹ "Every person has the right to fair and safe labour practices and standards and to be paid a fair and reasonable wage."

a prospective employer can legally not to, which accounts amounts to riding or treading roughshod on a legal minefield, is to make prospective employee undergo a medical fitness for work test under section 4(2) of the HIV and AIDS Regulations and then if such medical results show that a prospective employee is HIV and AIDS positive, the employer bluntly proceeds to write to such a person saying that he/she will not be given an employment offer because of being HIV and AIDS positive. Such an approach will be patently wrongful, unlawful, unfairly discriminatory and unconstitutional such that the affected prospective employee may successfully institute a lawsuit against the prospective employer. After all is said and done, there is no one size fits all approach as each case will depend on its own facts and merits. Due to the crafty manner by which some employers may seek to unfairly discriminate against persons with HIV and AIDS in recruitment for employment, the law must take a robust approach and avoid an armchair or relaxed approach when dealing with cases involving the legal abuse of section 4(2) of the HIV and AIDS Regulations by some employers to unfairly discriminate or disadvantage any person with HIV and AIDS regarding recruitment for employment offers. The law must peep behind the veil and see if a prospective employer handled a prospective employee with HIV and AIDS in a fair, lawful, just and dignified manner.

OUTLAWING OF COMPULSORY TESTING OF EMPLOYEES FOR HIV AND BREACH OF CONFIDENTIALITY IN RELATION TO HIV AND AIDS

The law in part five of the HIV and AIDS Regulations unequivocally and expressly provides in mandatory terms that compulsory testing of any employee for HIV directly or indirectly is unlawful¹⁰, whether done at the instance of an employer, an employer's agent or some other person. However, voluntary testing of an employee for HIV is lawful and permissible because it is not prohibited in terms of any law. In the same vein an employer is legally barred from requiring any employee to disclose his/her HIV status in relation to anything to do with employment of that particular employee and every employee is legally excused from any compulsory duty to disclose his/her HIV status at the workplace¹¹ but voluntary disclosure of one's HIV status even at the workplace or anywhere by an employee is not outlawed under any law implying that it is permissible. Legislation puts a tight lid on disclosure of information concerning an employee's HIV status by any person whether natural or juristic/artificial, by expressly banning it except with the written consent of the affected employee or as required by law meaning that it is illegal for any person to parade or divulge any employee's HIV status with first getting the prior written approval or permission of that concerned employee¹².

¹⁰ Section 5(2) of S.I 202/1998 says, "It shall not be compulsory for any employee to undergo, directly or indirectly, any testing for HIV."

¹¹ Section 5(2) of S.I 202/1998 says, "No employer shall require any employee, and it shall not be compulsory for any employee, to disclose, in respect of any matter whatsoever in connection with his employment, his HIV status."

¹² Section 5(3) says, "No person shall, except with the written consent of the employee to whom the information relates, disclose any information relating to the HIV status of any employee acquired by that person in the course of his duties unless the information is required to be disclosed in terms of the law."

LEGAL BAN ON TERMINATION OF AN EMPLOYEE'S CONTRACT OF EMPLOYMENT ON THE GROUNDS OF AN EMPLOYEE'S HIV STATUS AND ELIMINATION OF PREJUDICES AGAINST AN HIV POSITIVE EMPLOYEE IN RELATION TO JOB STATUS AND TRAINING

Part six of the HIV and AIDS Regulations provides job security and immunity from unfair and unlawful termination of employment of an employee on the basis of his HIV status alone¹³ meaning that in the eyes of the law, an employee's HIV status does not constitute a valid legal basis or ground for terminating that employee's contract of employment. It is submitted that section 6(1) of the HIV and AIDS Regulations may be viewed as vaguely drafted and open to abuse by some unscrupulous employers because from a literal ordinary grammatical meaning of the words used, it seems to suggest that an employer may use an employee's HIV status as a co-ground for terminating that employee's employment as what appears to be legally prohibited is the termination of an employee's employment on the ground of his HIV status alone. The word "**alone**" as it appears in section 6(1) of the HIV and AIDS Regulations appears to be legally misplaced as it may give some employers legal ammunition to lump together an employee's HIV status with some other ground or grounds to justify termination of an employee's contract of employment in reality on the basis of that employee's HIV status but under a smokescreen of some other grounds to give such termination a cloak of legality. It is strongly argued that section 6(1) of the HIV and AIDS Regulations may require to be amended by removing the last word, "**alone**" which is contained in that legislative provision as it seems to water down the legal protection of an employee from dismissal or termination from employment on the basis of his/her HIV status. Give the conservative nature of the Zimbabwean society concerning HIV and AIDS, there is need for protective legal provisions for the vulnerable members of the society like this one to be watertight because any slightest legal excuse or pretext can be exploited by some daring employers to unfairly terminate an employee's contract of employment on the basis of his/her HIV status together with some other ground or grounds and get scot free. The law adequately protects an employee from being disadvantaged in relation to job status and training at the workplace in peremptory terms as follows;

"No employee shall be prejudiced in relation to-

- (a) promotion; or*
 - (b) transfer; or*
 - (c) subject to any other law to the contrary, any training or other employee development programme; or*
 - (d) status;*
- or in any other way be discriminated against on the grounds of his HIV status alone¹⁴."*

LEGAL ELIGIBILITY FOR EMPLOYEE BENEFITS REGARDLESS OF HIV STATUS AND LEGALLY PERMISSIBLE LIMITATIONS

¹³ Section 6(1) No employer shall terminate the employment of an employee on the grounds of that employee's HIV status alone.

¹⁴ Section 6(2) of S.I 202/1998.

To insulate mainly HIV positive employees from unfair discrimination in some quarters, the law expressly provides in compulsory terms that an employee's HIV status, whether negative or positive shall not be used as a criterion for deciding his or her eligibility for any occupational or other benefit schemes for employees¹⁵. Part seven of the HIV and AIDS Regulations explicitly cover both an HIV positive and negative employee in the same manner without any distinction or bias except as stipulated in terms of the law and some tight legal safeguards on confidentiality and non-disclosure of an employee's HIV status and against the stigmatisation of any employee on the basis of his/her HIV status as follows;

“(1) Subject to any other law to the contrary, the HIV status of an employee shall not affect his eligibility for any occupational or other benefit schemes provided for employees.

(2) Where in terms of any law the eligibility of a person for any occupational or other benefit scheme is conditioned upon an HIV or AIDS test, the conditions attaching to HIV and AIDS shall be the same as those applicable in respect of comparable life-threatening illnesses.

(3) Where any HIV testing is necessary in terms of subsection (2), the employer shall ensure that the employee undergoes appropriate pre- and post-HIV counselling.

(4) Where an employee who opts not to undergo an HIV testing for the purpose of subsection (2), no inferences concerning the HIV status of the employee may be drawn from such exercise by the employee of the option not to undergo the testing.

(5) Where an employee undergoes an HIV testing for purposes of subsection (2), the employer shall not, unless the occupational or other benefit scheme concerned is operated by the employer, be entitled to information concerning the HIV status of the employee concerned.

LEGAL ENTITLEMENT OF AN EMPLOYEE SUFFERING FROM HIV AND AIDS TO SICK AND COMPASSIONATE LEAVE IN TERMS OF THE LABOUR ACT JUST LIKE ANY OTHER EMPLOYEE

The status of an employee as HIV positive does not legally debar or deprive that concerned employee from enjoying an equal or similar legal right to sick leave and compassionate leave in terms of the Labour Act in much the same manner as any other employee, as can be evident from the following peremptory legal provisions under part eight of the HIV and AIDS Regulations:

“Any employee suffering from HIV or AIDS shall be subject to the same conditions relating to sick leave as those applicable to any other employee in terms of the Act¹⁶.” (Emphasis added by underlining)

LEGAL PREVENTIVE MEASURES AND HIV RISK MANGEMENT AT THE WORKPLACE BY THE EMPLOYER AS REQUIRED BY LAW

¹⁵ Section 7 (1) of S.I 202/1998.

¹⁶ Section 8 of S.I 202/1998

The law in part eight of the HIV and AIDS Regulations provides an array of legal preventive measures as well as HIV risk management or mitigation measures which an employer is legally obliged to put in place where necessary for the protection of employees as follows:

“9. HIV risk management

- (1) Where a person is employed in an occupation or is required to provide services where there may be a risk of transmitting or acquiring HIV or AIDS, the employer shall provide appropriate training, together with clear and accurate information and guidelines on minimising the hazards of the spread of HIV or AIDS and related communicable diseases.*
- (2) The working conditions and procedures in relation to occupations I referred to in subsection (1) shall be designed to ensure optimal hygienic precautions to prevent the spread of HIV or AIDS and related communicable diseases to employees and members of the public.*
- (3) Personal protective devices shall be issued, free of charge, by the employer to persons employed in occupations referred to in subsection (1).*
- (4) The employer shall cause to be reviewed, for safety and efficacy, the use of any equipment, devices, procedures, including first-aid procedures used, or guidelines followed, in any occupation referred to in subsection (1).*

LEGAL OBLIGATION AND DUTY OF THE EMPLOYER TO FURNISH EVERY EMPLOYEE WITH A COPY OF THE HIV and AIDS REGULATIONS

The law imposes a legal obligation and duty upon every employer to give each employee a copy of the HIV and AIDS Regulations so that every employee gets to know the information contained therein first hand. The law is silent on whether the employer must provide a copy of the concerned regulations to each employee free of charge or at an applicable or nominal cost but what is abundantly clear is that the law thrusts a duty upon the employer to furnish every rank-and-file employee employed by that given employer from the top to the bottom without any exception, with a copy of the regulations. The adage knowledge is power or information is power is epitomised by this tenth part of the HIV and AIDS Regulations which provides in compulsory terms as follows:

*“10. Copy of regulations for each employee
An employer shall provide every employee with a copy of these regulations.”*

CRIMINAL SANCTIONS AND PENALTY OF IMPRISONMENT OR FINE FOR ANY PERSON FOR VIOLATING THE HIV AND AIDS REGULATIONS

The seriousness which the law attaches to compliance with the HIV and AIDS Regulations is self-evident from the mandatory stern punishment in the form of either imprisonment (custodial sentence) or a hefty monetary fine (non-custodial sentence) or

both forms of punishment that are imposed by legislation for any violation or contravention of such regulations as follows;

“11. Offence and penalty

Any person who contravenes any provision of these regulations shall be guilty of an offence and liable to a fine not exceeding two thousand dollars or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment.”
(Emphasis added by underlining)

CONCLUSION

The legal existence of the HIV and AIDS Regulations must be complemented by an active and concerted effort towards the promotion, enforcement and implementation of such regulations by employers, employees and all other stakeholders for such regulations to bear positive fruit and achieve their intended objective of progressively dealing with the challenge of HIV and AIDS at the workplace in Zimbabwe. There is need for proactive practical steps to be taken by all the role players to ensure that the HIV and AIDS Regulations deliver tangible results at the workplace in the country for the betterment of the local society and beyond.