

THE AMBIT OF PROHIBITED GROUNDS OF DISCRIMINATION IN BOTSWANA'S EMPLOYMENT ACT¹

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"We cannot solve our problems with the same thinking we used when we created them."³

"I do not think that I would be losing sight to my functions or exceeding them sitting as a Judge in the High Court, if I say that the time that women were treated as chattels or were there to obey the whims and wishes of males is long past and it would be offensive to modern thinking and the spirit of the Constitution to find that the Constitution was framed deliberately to permit discrimination on the grounds of sex."⁴

Introduction

Section 23(d) of the Botswana Employment Act⁵ lists many prohibited grounds for workplace discrimination. When this subsection was amended in 2010, additional grounds were added, including gender, sexual orientation, health status and disability.

Gender, health status, sexual orientation and disability are crucial indicators of the effectiveness and success of the law and courts in eliminating discrimination against women in the workplace.

This paper considers:

- Whether the existing national laws are adequate and effective enough to protect employees against discrimination on the basis of health status and gender; and
- Whether the courts have been effective and successful in addressing workplace discrimination based on health status and gender?

Discrimination

Definition and scope

When considering the scope of the concept of discrimination, the starting point must be the Constitution. Section 3 of the Constitution provides that "every person in Botswana is entitled to the fundamental rights and freedoms of the individual". The framers of the Constitution decided that it was not necessary to list each of the rights and freedoms that normally constitute the Bill of Rights. Even the definition of the word discrimination was not accorded the definitions that are

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3 Albert Einstein, Physicist, 1879-1955.

4 *Dow v Attorney General* (1991) BLR 233, 244-245 (Horwitz J).

5 Cap. 47:01.

current in the International Conventions. The wisdom of this gesture on the part of the framers of the Constitution, of an open ended list in the Bill of Rights, is that the courts have been granted a golden opportunity, on a continuous basis, to expound and elaborate on it. The courts have indeed done so by utilising international conventions, modern jurisprudence and legal scholars.⁶ This is a judicial licence through which the courts in Botswana should modernise the Bill of Rights and its ever evolving concepts, such as the meaning and scope of “discrimination”. Modernising the Bill of Rights simply means that the courts must adapt it to the changing times. It does not mean that the courts must make or promulgate any law, for that is the exclusive province of the legislature.⁷

Definitions of discrimination are found in international human rights instruments. Article 2 of the African Charter on Human and Peoples’ Rights defines discrimination as follows:

“every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present charter without distinction of any kind such as the race, ethnic group, colour, sex, language, religion, political or any other opinion, national or social origin, fortune, birth or other status.”

The words “*other status*” makes it possible for new and evolving grounds to be added. This terminology was first seen in the Universal Declaration of Human Rights. The United Nations Human Rights Committee has widened the scope of discrimination by defining it as:

“... any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”⁸

These are the definitions that the courts in Botswana must adopt and modify to suit the local circumstances. The definition of discrimination in section 15 of the Constitution contains an exhaustive list of the prohibited grounds of discrimination. With such a closed list it has become difficult to add to it new grounds, which are internationally accepted, such as birth, sexual orientation, health status, or disability. It must be pointed out that these new grounds are no longer alien to Botswana, its culture or its values. For instance in 2010 the legislature amended section 23(d) of the Employment Act by including sexual orientation, gender, health status and disability as additional grounds for discrimination. Courts in this country would be doing a disservice to the nation if, when defining discrimination, they ignore these newly added grounds. The courts should never lose sight of the ultimate cause of the law, which is the welfare of the society. Cardozo J, a famous American jurist has authoritatively articulated the role of judicial officers as well as the fundamental purpose of the law. In his treatise, *The Nature of the Judicial Process*, he lectured as follows:

“The final cause of the law is the welfare of Society. The rule that misses its aim cannot permanently justify its existence. ‘Ethical considerations can no more be excluded from the administration of justice which is the end and purpose of all civil laws than one can exclude the vital air from his room and live.’ Logic and history and custom have their place. We will shape the law to conform to them when they may; but only within bounds. The end which the law serves will dominate them all.”⁹

6 See *Attorney General v Dow* 1992 BLR (CA) 154.

7 Constitution of Botswana, 1966, section 86.

8 Human Rights Committee “General Comment 18, Non-discrimination” (1989) para. 7.

9 B.N. Cardozo “Lecture II: The methods of History, Tradition and Sociology” *The Nature of the Judicial Process* (1921).

The welfare of the Botswana society will be best served by factoring these newly added grounds in the definition of discrimination. In any case even if other courts choose to stick to the old and limiting constitutional definition of discrimination, the Industrial Court must comply with section 23(d) of the Employment Act by widening the scope of the definition. In the context of labour law, the Industrial Court would be contravening section 23(d) if its definition of workplace discrimination excluded the grounds of marital status, gender, sexual orientation, health status and disability. In the workplace context, discrimination means any form of distinction, exclusion, restriction or preference which is based on race, sex, religion, colour, language, political or any other opinion, national or social origin, marital status, gender, sexual orientation, creed, health status, disability or any other status or ground which has the purpose or effect of nullifying or impairing (wholly or partially) the enjoyment or exercise by any person, on an equal footing of all or any of the workplace rights and freedoms.

Forms of workplace discrimination

Discrimination comes in all forms, shapes and disguises. It would not hesitate to assume an attractive shape or ideal which may bamboozle its unsuspecting victims. It may appear with so attractive a dressing that its intended and unsuspecting victims may be the first to stand up and embrace it. In the workplace context it would rear its head at the three stages of the employment contract. Workplace discrimination generally takes two forms. The first would be any breach of any contractual term, employment rules or policies between the stages of employment and termination. The second, and more drastic form of discrimination, would be the termination of employment (dismissal). In simple terms an employee's workplace rights would be violated, or he or she would be dismissed on the ground that he or she is HIV-positive or she would be dismissed simply because of her gender.

HIV Status as a Prohibited Ground of Discrimination

According to the World Health Organisation, by the end of 2015 there were about 36.7 million people (women, men and children) on earth living with HIV.¹⁰ Of these 36.7 million people about 19 million live in Eastern and Southern Africa, making this region the home of the epidemic, with women comprising more than half of all persons living with HIV.¹¹

The HIV epidemic became a reality to the whole world in the 1980s. Since then many people who have been infected have suffered discrimination and stigma in the workplace. This stigma and discrimination have been manifested in ostracism, oppression, discrimination, demotion and dismissal (direct or constructive) of those living with the HIV.¹²

Many countries have taken proactive measures to address this stigma and discrimination. Botswana has in place a Bill of Rights in its Constitution and workplace legislation in the form of the Employment Act, which if effectively utilised by courts and relevant institutions must afford

10 UNAIDS Fact Sheet November 2016, 1, available at http://www.unaids.org/sites/default/files/media_asset/UNAIDS_FactSheet_en.pdf (last accessed: 12 December 2016).

11 *Id* 3.

12 See "HIV/AIDS and Human Rights in Southern and East Africa" *AIDS and Rights Alliance for Southern African* (ARASA) (2009) available at http://www.arasa.info/files/6714/0498/7909/ARASA_report2014_web_full.pdf (last accessed: 11 December 2016).

those living with HIV redress. It is often said that a tool is as effective as the person who uses it. The effectiveness of the available legal tools largely depends on how they are used by the courts and the relevant institutions and stakeholders.

Constitutional protection

The Bill of Rights included in the Constitution of Botswana clearly outlaws discrimination, provided it does not fall under any of the exceptions listed therein. At section 15, the Constitution makes this prohibition against discrimination explicit. As per the meaning of discrimination adopted herein an employer who discriminates against an employee on the basis of his or her HIV status violates the constitutional rights of such an employee. An employee so aggrieved is entitled to approach the High Court whereupon he or she should be reinstated, be granted constitutional damages or any appropriate remedy. At the Industrial Court he or she should be reinstated and granted compensation, and not constitutional damages. However the court that is competent to adjudicate on the violation of constitutional rights is the High Court, and not the Industrial Court.¹³

It is submitted that the Constitution of Botswana, through its Bill of Rights, fully and adequately protects the constitutional rights of employees at the workplace. Such rights would include the right not to be unfairly treated at the workplace, and the right not to be wrongfully or unfairly dismissed from work. Of course the ideal constitutional set up would be where the Constitution explicitly incorporates the fundamental workers' rights in the Bill of Rights. However, the absence of the ideal constitutional set up should not in any way distract from the legal reality that the Bill of Rights in the Botswana Constitution incorporates fundamental workers' rights, which are enforceable in courts of law. A generous and purposive interpretation of the Bill of Rights contained in the Constitution must include relatively new grounds including gender, health status, sexual orientation and disability.¹⁴

Statutory protection

Section 23 of the Employment Act lists the prohibited grounds or reasons for dismissal. If any of the prohibited grounds is the basis of the dismissal, then the dismissal is automatically wrongful or unfair. Generally it would not avail the employer to show or argue that he or she had the most convincing reasons to justify the termination of employment.

In 2010, the legislature expanded the list of the grounds that would render a dismissal automatically wrongful and unfair. Such a welcome gesture had the effect of widening the scope of statutory protection against unfair dismissals.¹⁵ For present purposes the relevant subsections under section 23 are (d) and (e), which were added in the 2010 amendment. They read as follows:

13 The jurisdiction of the High Court is unlimited, as stipulated in section 95 of the Constitution. But that of the Industrial Court is limited to trade disputes.

14 *Ramantele v Mmusi and Others* CACGB-104-12 (unreported) para. 69, Lesetedi J. A. was in support of this generous approach.

15 Note that the South African Labour Relations Act uses the term "automatically unfair". This term has been borrowed from the English Unfair Dismissal Law. See Perrins (ed) *Harvey on the Industrial Relations and Employment Law*, Vol 1 at 1101. In Botswana it may be more appropriate to use the term "automatically wrongful" dismissal in consonance with the terminology of section 24 of the Trade Disputes Act of 2003.

“23. Notwithstanding anything contained in a contract of employment an employer shall not terminate the contract of employment on the ground of ...

(d) the employee’s race, tribe, place of origin, social origin, marital status, gender, sexual orientation, colour, creed, health status or disability, or

(e) any other reason, which does not affect the employee’s ability to perform that employee’s duties under the contract of employment.”¹⁶

If an employee is dismissed on the ground of his or her HIV status then such a dismissal is automatically wrongful or unfair. An employee who suffers this fate at the hands of the employer must approach the courts for redress. If he or she approaches the High Court it would order a reinstatement, payment of damages, or both. Such would entirely be within its judicial discretion. If he or she approaches the Industrial Court it would order a reinstatement, payment of compensation or both.¹⁷ The court order would of course depend on the circumstances of the case before it. Section 23(d) therefore fully and adequately protects an employee who is HIV-positive. It is automatically wrongful or unfair, and a violation of section 24 of the Trade Disputes Act, to dismiss an employee simply because he or she is HIV-positive. A dismissal would be rightful or fair in terms of section 23(e) only if the illness has affected the employee’s ability to perform his or her duties under the employment contract. It must clearly be established that the employee is unable to work at any part of the employer’s business or workplace and that there is no scope for reasonable accommodation of the employee.

If discrimination takes place in the workplace but does not amount to dismissal and it is committed on the basis of any of the grounds listed in section 23(d) then it is automatically wrongful or unfair. The automatic wrongfulness or unfairness is not restricted to the discrimination that manifests in a dismissal. It is submitted that any other form of discrimination would be automatically unfair if it is based on any of the prohibited grounds listed under section 23(d) of the Employment Act. It therefore follows that any discrimination short of a dismissal, which is visited upon an employee on the ground of his or her HIV status is wrongful or unfair, and the courts must grant him or her the remedies of reinstatement, damages or compensation.

Case law on HIV discrimination

As expounded above, discrimination of an employee by an employer on the basis of his or her HIV status is both unconstitutional and statutorily unlawful. The law, which is the tool to be used by the judiciary to protect employees against workplace discrimination, is in place. The task is for the courts to ensure that the protective provisions in the Constitution and legislation are given effect to.

In the case of *Diau v Botswana Building Society*¹⁸ the Industrial Court addressed the issue of workplace discrimination which had been visited upon an employee on the basis of her HIV status.

In February 2002 the employer offered the applicant probationary employment. The full employment was conditional on her passing a full medical examination. On this understanding the employee commenced employment towards the end of February 2002. Six months later, the

¹⁶ Underlining added for emphasis.

¹⁷ Trade Disputes Act, 2003, amended in 2016, section 24.

¹⁸ IC 50/2003.

employer instructed the employee to undergo an HIV test. It was explained to her that it was part of the pre-employment medical examination. She refused to undergo the test. For her refusal she was not offered permanent employment. She approached the Industrial Court for redress. The Court invoked the Bill of Rights in the Constitution when determining the legality or fairness of the employer's conduct. It held that the employee's right not to be subjected to inhuman and degrading treatment had been violated because "to punish an individual for refusing to agree to a violation of her privacy or bodily integrity is demeaning, undignified, degrading and disrespectful to the intrinsic worth of being human."¹⁹ With this reasoning the Court ordered the employer to reinstate the employee and pay her compensation.

In another Industrial Court case of *Jimson v Botswana Building Society*,²⁰ Jimson, the employee, was employed subject to a probation of six months, a 48 hour notice of termination during the probation period and a successful passing of a medical examination conducted by a doctor to be paid by the employer. He went through the medical examination and passed it to the satisfaction of the employer. However, a week later the employer instructed the employee to undergo what it termed "further pre-employment medical examination" in the form of an HIV test. He did and tested positive. Soon thereafter the employer informed him, through a letter, that his probationary employment was being terminated. Aggrieved by the employer's conduct he approached the Court for a remedy. In particular he wanted the Court to decide if compulsory post-employment HIV testing was legal. The Court held that this HIV testing, which was introduced after the employee had passed a medical examination, and the employment contract was in place, was unfair and unlawful. This was because the HIV testing was a breach of an employment contract, which was already in operation and did not provide for such a test. This case also clarified the status of the National Policy on HIV/AIDS, which was in operation then had no legal effect against the Botswana Building Society. It advised that, for effectiveness, clarity and efficiency the government should promulgate the necessary legislation. The employer was unhappy with the decision of the Industrial Court. It appealed to the Court of Appeal. The Court of Appeal reversed the decision of the Industrial Court on the ground that the HIV testing was part of the pre-employment medical examination. It is submitted that the outcome of an HIV test result as part of a medical examination ought not lead to a failure to employ in the context where antiretroviral medication has made HIV a chronic disease which can be managed without impacting negatively on performance in the workplace.

In the case of *Lemo v Northern Air Maintenance (Pty) Ltd*,²¹ the applicant, Lemo, was employed by the respondent as a trainee aircraft engineer in 1998. Between 1999 and 2004 the health of the applicant deteriorated so badly that he was regularly on sick leave. As the health of the applicant deteriorated further the respondent reacted by insisting that he must undergo a medical examination. There was stalemate when the applicant refused to be examined by a doctor chosen by the respondent. The stalemate came to an end when the applicant informed the respondent (his employer) that he was HIV-positive. On the day following the date of the disclosure the applicant was dismissed from employment. The respondent argued that the reason for dismissal was that

19 *Id.*

20 IC 35/2003.

21 IC 166/2004.

the applicant was regularly absent from work, which absence adversely affected the productivity of the company. The applicant was dismissed at the time he was away on leave. He approached the Industrial Court for redress alleging an unfair termination of his employment contract. Upon analysis of the evidence before it the Court concluded that the real reason for the dismissal was applicant's HIV positive status, and not his absence because such was always authorised. Most crucially the Court found that there was no evidence showing that applicant's illness had incapacitated him to the extent that he could no longer perform his contractual obligations.²² The dismissal was held to be unfair.

As alluded to above, the courts have generally not hesitated to hold that dismissals based on an employee's HIV status are unfair or wrongful. Living with the HIV virus should not affect an employee's workplace performance, especially not in the context of the availability of antiretroviral medication.

In the case of *Monare v Botswana Ash (Pty) Ltd*²³ the employee had fallen sick due to HIV. The employer had known of the employee's HIV status since 1993, but had taken no adverse action against him. However from July 1997 the employee's health deteriorated rapidly. The consequences of this failing health was that he clocked sick leave of 66 days. As his health deteriorated further he was dismissed in February 1998. He challenged his dismissal at the Industrial Court. The Court held that the dismissal was substantively fair because the employee was no longer able to do his work due to incapacity occasioned by HIV, and there appeared to be no chance of recovery. Owing to this incapacity the operational requirements of the employer warranted a termination of the applicant's employment contract. However with respect to the procedure leading to the dismissal the Court held that it was unfair. This was because the employer had failed to engage in sufficient consultation in the process leading to the dismissal. The applicant was awarded compensation equal to two months of his wages.

In the more recent case of *Latiwa v Komatsu Botswana*²⁴ the Industrial Court held, *inter alia*, that an employer can fairly dismiss an employee based on ill-health only if he or she is permanently incapacitated from carrying out his contractual duties. The Court held further that the dismissal will be fair only if there was no possibility of accommodating the incapacitated employee by way of adapting his work to his new status or securing an alternative job.

The rule that the courts have formulated with respect to sickness due to health status is that an employee can be dismissed only if:

1. His or her sickness has incapacitated him or her from continuing with the employment;
2. He or she cannot be accommodated by the employer by way of adaptation or alternative work;
3. There is no likelihood of recovery and;
4. He or she was adequately and sufficiently consulted in the stage by stage process leading to the termination of the employment contract.²⁵

22 See section 23(e) of the Employment Act (the 2010 amendment).

23 No IC 112/98.

24 No ICF 438/14.

25 See *Botswana National Industrial Relations Code of Good Practice* "Termination of Employment" (2002) para. 9 available at <https://www.hsph.harvard.edu/population/aids/botswana.aids.02.pdf> (last accessed: 11 December 2016).

On the basis of the foregoing it could be argued that the courts have, to some extent, been effective in protecting employees who are HIV-positive at the workplace. The courts should strengthen protection for workers by utilising sections 23(d) and (e) of the newly amended Employment Act to stem out discrimination based on health status in the workplace.

Gender as a Prohibited Ground of Discrimination

Gender-based discrimination remains a challenge in Sub-Saharan Africa. Various social tools, such as culture and economic poverty, have been eagerly employed to perpetuate gender-based discrimination. Gender-based discrimination is present in many forms, including violence and sexual harassment. It is also present in many areas, such as the home, the village and the workplace.

There are two legal tools that have been devised to help eliminate gender-based discrimination at the workplace. The first tool is the Constitution of Botswana, whose provisions apply to all areas of social life, including the workplace. The second is the Employment Act.

Constitutional protection

According to section 3 of the Constitution all persons have the right to equal protection of the law. More recently the Botswana Court of Appeal has held that section 3 applies to every person irrespective of their gender, sexual orientation or gender identity.²⁶ A person who has fallen victim to discrimination is entitled to approach a competent court of law for remedies such as constitutional damages. The civil courts, in particular the High Court, would be competent to rule on such actions.

Statutory protection

According to section 23(d) of the Employment Act, any discrimination based on gender, sex, sexual orientation or marital status is automatically unfair. In Botswana, culture is sometimes used to oppose gender equality. Section 23(d) of the Employment Act is very clear that no amount of cultural or moral justification will make an automatically unlawful discrimination meted out in the form of a dismissal, lawful.

The termination of a woman's contract of employment solely on the basis of her gender or sex is automatically unlawful. Furthermore any wrongful labour practice during the life of an employment contract which is visited on a woman solely on the basis of her gender or sex is automatically unlawful. For example paying a woman less wages than a man for work of equal value is automatically unfair.

Case law on gender discrimination

The following cases are illustrative of how the courts, in particular the Industrial Court, has reacted to gender-based workplace discrimination.

Even prior to the amendment of the Employment Act to include gender as a prohibited ground

²⁶ *Attorney General v Rammoge and 19 Others*, Court of Appeal of the Republic of Botswana, Civil Appeal No. CACGB-128-14 (2016) paras. 58-60.

of discrimination, the Industrial Court in the case of *Moatswi and Another v Fencing Centre (Pty) Ltd*²⁷ held that dismissal of two women applicants on the grounds that women were unable to load or work late night shift was tantamount to discrimination on the basis of their gender. In that case the court followed international conventions to which Botswana was a signatory to come to its conclusion.

In the case of case of *Kenaope and Kebotshabe v Bic Botswana (Pty) Ltd*²⁸ the employees were employed as Bic pen assemblers. For each employee the respondent had set a target of 4 500 Bic pens per day. Initially the applicants met their targets. At times they exceeded their targets. It so happened that the applicants fell pregnant and gradually lost that initial energy to work as fast as they used to. Eventually they could not meet their production targets. They were afraid to tell their supervisors or production manager the reason why they were failing to meet their targets. They feared that if they discussed their pregnancies they would be dismissed from work. The applicants testified in the Industrial Court that the respondent was notorious for dismissing pregnant employees. Upon noticing the pregnancy of the applicants the respondent dismissed them. The applicants sued for unfair dismissal and payment of maternity benefits.

The respondent's reason for the dismissal was that the applicants had failed to reach set targets. The evidence led before and evaluated by the Court pointed otherwise. The Court observed as follows:

“from the above it is clear that the applicants were not guilty of misconduct. They were also not incompetent to do the work. The only reason that the court can infer is that they were temporarily unable to reach the target set by the management because of the pregnancy”²⁹

The Court found that the dismissal was unlawful. It would be noted that the stated reason for the dismissal was failure to reach the targets, but that the real reason was the pregnancy of the applicants.

In the case of *Motsuokwane v Golden Wing (Pty) Limited t/a Cell City*,³⁰ the underlying reason for the dismissal was gender. The court was prepared to order a reinstatement in terms of section 24(2) of the Trade Disputes Act. However, the applicant was not seeking a reinstatement, but compensation. Compensation was granted accordingly. In this case the Court found that the real reason for the dismissal was the gender of the applicant.

It should be noted that discrimination based on gender does not typically rear its head in the blatant and obvious form of dismissing or ill-treating an employee because she is a woman. That form of gender-based discrimination would be too obvious and instead discrimination is often indirect.

The existing constitutional and statutory law go a long way in protecting women against gender-based workplace discrimination. It must be pointed out that the constitutional law protection extends to the workplace. In other words an employee can approach civil courts for the violation of her constitutional rights that happened at the workplace.

27 2002 (1) BLR 262 (IC).

28 Case No. IC 125/2003.

29 *Id* 5 (cyclostyled judgment).

30 I.C 609/2004 (J1493).

Conclusion

Target 16b of the Sustainable Development Goals emphasises the need to promote and enforce non-discriminatory laws and policies to ensure sustainable development. To achieve this, national laws (both constitutional and legislative law) must put in place explicit and clear provisions that protect employees against workplace discrimination based on health status or gender. The law in this regard must not be deciphered from a combination of provisions from different pieces of legislation. A person on the street must be able to right away point at a provision protecting her against discrimination without having to engage in some form of deductive reasoning. Deductive reasoning, interpretation of laws and extrapolations are the daily bread of lawyers and judges. But an ordinary person has neither the skill nor the time to engage in such an intellectual process. The law protecting against discrimination must also be couched in simple terms.

The courts still have a long way to go in protecting persons against discrimination. Of course they are moving in the right direction, but certainly more must be done. The general paucity of case law on discrimination in Botswana attests to this observation. Public campaigns on discrimination must also be intensified so that more cases flood the courts. It is only then that the effectiveness of the courts will be fully put to the test.