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SASFU/COSATU/ALP Press Statement on the SASFU and Others v Surgeon-General and Other (SANDF)

14 May 2007

Ending HIV discrimination in the SANDF!

The AIDS Law Project, acting on behalf of the South African Security Forces Union (SASFU) and individual members of the SANDF, filed papers at the Transvaal Provincial Division today 14 May 2007. This is the culmination of a long process of attempts to engage the South African National Defence Force, for over 13 years on matters relating to their policies on HIV testing in so far as employment, deployment, promotions and transfers within the SANDF is concerned.

Five separate policies and their implementation are being challenged in this case.

The HIV testing policy is mainly implemented through the Comprehensive Health Assessment (CHA), an annual medical examination, which includes physical, mental and audiometric tests to determine levels of fitness. An HIV positive result, in itself, adversely affects a potential recruit's opportunity for employment, and a member's opportunities for deployment and promotion. The 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.

Over the years the SANDF has justified its HIV testing policy and its implementation on such grounds as the following:

- the military has a duty to protect the Republic,

- there is a need to keep HIV prevalence low in the military,

- people living with HIV are medically unsuitable and unable to withstand stress, physical exercise, adverse climatic conditions, etc,

- foreign deployment conditions are too harsh for people living with HIV,
- HIV positive members pose a risk to others
- the need to comply with the United Nations Regulations with regards to deployment of peacekeepers,

The ALP has provided expert evidence in this case which clearly demonstrates that the 'justifications' are not supported by scientific and medical evidence. There is no basis for the assumption that HIV infection in itself renders a person physically unfit or mentally unstable. To the contrary, the evidence shows that HIV positive people, who are asymptomatic, are able to undertake difficult physical activity with no adverse effects on their health ï¿½ in fact regular exercise is beneficial to their health. One practical example is that of Evelina Tshabalala who is living with HIV who successfully ran the Comrades Marathon in 2005 and again I n 2006 and climbed Mount Aconcagua in Argentina in March 2007. The preparation involved in training and running the Comrades Marathon is clearly far more stressful than the exercise regime imposed by the SANDF. Moreover, mountain climbing at alpine heights is a particularly strenuous form of exercise. These policies are also not in line with United Nations policy nor with the South African governments' strategy to respond to HIV/AIDS as outlined in the Operational Plan for Comprehensive HIV/AIDS Care, Management and Treatment for South Africa, and the most recently cabinet approved National Strategic Plan for HIV & AIDS and STIs 2007 -2011.

SASFU argues that is unreasonable to use HIV testing and exclusion as a measure to reduce HIV in the SANDF. The effect of the testing policy is to stigmatize people and therefore undermines HIV prevention, treatment, care and support within the SANDF. It is also contrary to the South African government's commitment to protecting human rights in response to HIV/AIDS epidemic.

This case seeks to demonstrate that the abovementioned policies, through the implementation of CHA, are unconstitutional in that they violate rights to:

- fair labor practices
- privacy
- dignity
- administrative justice, and
- they unfairly discriminate against people living with HIV

The relief being sought by SASFU in this case is that:

- the policies are reviewed and set aside on the grounds that they are unconstitutional,
- the court grants specific relief for the individual applicants with regards to employment, deployment and/or promotion,
- the court interdicts the SANDF from denying employment, deployment and/or promotion opportunities to candidates for employment or current members of the SANDF based solely on their HIV status,
- the SANDF immediately issues a directive to all military bases and relevant personnel to stop denying employment, deployment and/or promotion opportunities to candidates based on HIV status only

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[END OF SANDF CASE]

Constitutional Court Expands Definition of Rape

End Gender-Based Violence:
Masiya v the Director of Public Prosecutions (Pretoria) and Another

On 16 March 2004 Masiya sexually assaulted a nine-year old girl through anal penetration. The Regional Magistrate's Court did not want to limit the charge against Masiya to one of indecent assault and argued:

"Why must the unconsensual sexual penetration of a girl (or a boy) *per anum* be regarded as less injurious, less humiliating and less serious than the unconsensual sexual penetration of a girl *per vaginam* ? The distinction appears on face value to be irrational and totally senseless, because the anal orifice is no less private, no less subject to injury and abuse, and its sexual penetration no less humiliating than the vaginal orifice. (para 9)

Today (10 May 2007) our Constitutional Court took a step more than a decade overdue to develop the common law definition of rape.

The definition limited the crime of rape to the vaginal penetration of a woman by a man. No case had gone before the Court until the case of *Masiya v the Director of Public Prosecutions (Pretoria) and Another*.

The Court unanimously held that the old definition was unconstitutional. But split 9-2 limiting the definition of rape to include only women and the majority held that either the legislature or a future court case would determine whether men should be included.

Justice Bess Nkabinde writing on behalf of the majority of the Constitutional Court cogently demonstrates why the definition should have been expanded long ago. She paid tribute to womens' activism in the judgment.

Judge Nkabinde traces the history of the law on rape in South African law from its Roman-Dutch, indigenous and English legal sources. And then gives reasons for developing the common law in line with the Constituion and the rights to dignity, equality, privacy, autonomy and the right to be free of violence. She also outlines the reasons for including anal penetration in the definition of rape and the justification for limiting the definition to women.

The judges who agreed with the majority are Moseneke DCJ, Kondile AJ, Madala J, Mokgoro J, O'Regan J, Van der Westhuizen J, van Heerden AJ and Yacoob.

Chief Justice Pius Langa wrote a dissent that goes further and correctly includes anal rape of men in the definition of rape. He gives a clear set of reasons on why the definition should be non-gender specific and why a definition that

includes women only may continue to reinforce male domination. Judge Albie Sachs concurred with the Chief Justice.

Two legal organisations (CALS and Tswaranang) acted as amicus curiae. They made very valuable submissions to the Court (see para 36 of judgment cited below). However, a powerful and instructive lesson could have been drawn if a very broad coalition of women, human rights organisations, trade unions and religious bodies had joined this case. This would have assisted in the popularisation and education of the constitutional rights of women. Civil society organisations have to use the Constitution it is not only the domain of lawyers and the powerful. From the *Jordan* (sex work) case we should have learnt the need for broad coalitions.

Below are excerpts from the judgments ï¿½ first the majority judgment and then and then the dissent. Both judgments can be used to promote equality and dignity for all and to end gender-based violence.

Thanks

Zackie Achmat

***Masiya v the Director of Public Prosecutions (Pretoria) and Another*.**

Excerpts from judgment ï¿½ original paragraph number are kept but footnotes are renumbered.

Judge Nkabinde -- Majority Judgment

It is useful to examine the historical perspective of the criminalisation of rape so as to determine its developmental direction. The word rape originates from the Latin words*raptus* , *rapio*, and *rapina* ï¿½ respectively meaning "tearing off, rending away, carrying off, abduction, rape, plundering"; "to seize, snatch, tear way, to plunder a place, to hurry along a person or thing"; and "robbery, pillage, booty plunder". [1] As such, *raptus*[2] in Roman law was generally understood as an offence consisting of the violent "carrying away" of women and is better translated as "abduction".[3] The crime of rape in Roman law was based on a prohibition of unchaste behaviour. Punishment of non-consensual sexual intercourse protected the interests of the society in penalising unchaste behaviour, rather than the interests of the survivor. (Para 20)

In this period, patriarchal societies criminalised rape to protect property rights of men over women.[4] The patriarchal structure of families subjected women entirely to the guardianship of their husbands and gave men a civil right not only over their spouses' property, but also over their persons. [5] Roman-Dutch law placed force at the centre of the definition with the concomitant requirement of "hue and cry" to indicate a woman's lack of consent. [6] Submission to intercourse through fear, duress, fraud or deceit as well as intercourse with an unconscious or mentally impaired woman did not constitute rape but a lesser offence of *stuprum*.[7] (para 21)

In English law the focus originally was on the use of force to overcome a woman's resistance. By the mid-eighteenth century force was no longer required for the conduct to constitute rape and the scope of the definition was increased to include cases of fraud or deception. This latter definition was adopted in South Africa. [8] (para 22)

In indigenous law[9] rape was restrictively defined. Generally, the law stresses the responsibility of a group rather than of the individual. For instance in Pedi law, in rape cases women must be assisted by their fathers or husbands and

compensation accrues not to the survivor but to her household under the guardianship of the husband or the father. [10] The law excluded cases of sodomy and marital rape. In some communities intercourse with a prepubescent girl-child was also excluded from the definition. These acts often merely constituted assault or "unnatural sexuality". [11] (Para 23)

It is evident from the history of the law of rape that the object of the criminalisation of rape was to protect the economic interests of the father, husband or guardian of the female survivor of rape, to perpetuate stereotypes, male dominance and power and to refer to females as objects. (Para 24)

...

Judge Nkabinde continued:

Moreover the current law of rape has been affected by statutory developments in recent decades. In 1993 the rule that a husband could not rape his wife, the so-called marital rape exemption, was abolished; [12] and the presumption that a boy is incapable of committing rape was abolished in 1987.[13] There have also been changes to the law of evidence relating to sexual offences.[14] These changes reflect our society's changing understanding of rape. Due in no small part of the work of women's rights activists, there is wider acceptance that rape is criminal because it affects the dignity and personal integrity of women. The evolution of our understanding of rape has gone hand in hand with women's agitation for the recognition of their legal personhood and right to equal protection. To this end, women in South Africa and the rest of the world have mobilised against the patriarchal assumption that underlay the traditional definition of rape. They have focused attention on the unique violence visited upon women. Much of this activism focused on creating support systems for women, such as rape crisis centres and abuse shelters; and also on the process whereby rape is investigated and prosecuted. It is now widely accepted that sexual violence and rape not only offends the privacy and dignity of women but also reflects the unequal power relations between men and women in our society. (Para 28)

The facts of the present case deal with penetration of the anus of a young girl. The issue before us then is whether the current definition of rape needs to be developed to include anal penetration within its scope. The facts do not require us to consider whether or not the definition should be extended to include non-consensual penetration of the male anus by a penis. Strong arguments were presented to us to the effect that gender-specificity in relation to rape reflected patriarchal stereotypes inconsistent with the Constitution. This Court [15] has stressed that it is not desirable that a case should be dealt with on the basis of what the facts might be rather than what they are. (Para 29)

It can hardly be said that non-consensual anal penetration of males is less degrading, humiliating and traumatic and, to borrow the phrase by Brownmiller, "a lesser violation of the personal private inner space, a lesser injury to mind, spirit and sense of self." [16] That this is so does not mean that it is unconstitutional to have a definition of rape which is gender-specific. Focusing on anal penetration of females should not be seen as being disrespectful to male bodily integrity or insensitive to the trauma suffered by male victims of anal violation, especially boys of the age of the complainant in this case. Extending the definition to include non-consensual penetration of the anus of the male by a penis may need to be done in a case where the facts require such a development. It needs to be said that it is not constitutionally impermissible to develop the common law of rape in this incremental way. This Court has stated that in a constitutional democracy such as ours the Legislature and not the courts has the major responsibility for law reform and the delicate balance between courts' functions and powers on one hand and those of the Legislature on the other should be recognised and respected. [17] The terrains of the courts and Legislature, Chaskalson P said in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*,[18] should be kept separate even though they

may overlap. The issue of male rape is therefore a matter that will no doubt be dealt with in an appropriate fashion either by the Legislature or the courts when the circumstances make it appropriate and necessary to do so. (Para 30)

The amici, likewise, contended that apart from the gendered nature of the origins of the definition, the elements of the crime of rape perpetuate gender stereotypes and discrimination because they are suggestive of the fact that only males can commit the crime and only females can be raped. They argued that once it is recognised that the primary motive for rape is not sexual lust but the desire to gain power or control over another person, with sex being the violent means by which the power is exercised, the rationale for maintaining the gender distinction falls away. That might be so. However, for the reasons given above, it would not be appropriate for this Court to engage with these questions. In this respect there are three important considerations that favour restraint on the part of this Court. The first is that what is at issue is extending the definition of crime, something a Court should do only in exceptional circumstances. [19] The second is that the development would entail statutory amendments and necessitate law reform. The third is that, historically, rape has been and continues to be a crime of which females are its systematic target. It is the most reprehensible form of sexual assault constituting as it does a humiliating, degrading and brutal invasion of the dignity and the person of the survivor. [20] It is not simply an act of sexual gratification, but one of physical domination. It is an extreme and flagrant form of manifesting male supremacy over females. (Para 36)

The prevalence of sexual violence in our society is deeply troubling. The extension of the definition of rape to include anal penetration will not only yield advantages to the survivor but will also express the abhorrence with which our society regards these pervasive but outrageous acts. This Court, while not unmindful of the fact that the 2003 Bill is before Parliament, cannot delay, defer or refuse to deal with an extension of the definition when the facts before it demand such an extension and when it is clearly in the public interest to do so. Any further delay in or suspension of the extension of the current definition will constitute an injustice upon survivors of non-consensual anal penetration such as the nine-year-old complainant in this case. That result cannot and should not be countenanced. The fact that the 2003 Bill is before Parliament, as the Minister contended, should not thwart the extension of the current definition of rape in these exceptional circumstances and when the interests of justice so demand. (Para 44)

I conclude therefore that the extension of the common law definition of rape to include non-consensual anal penetration of females will be in the interests of justice and will have, as its aim, the proper realisation by the public of the principles, ideals and values underlying the Constitution. Accepting that the element of unlawfulness is based essentially on the absence of consent, [21] the definition should therefore be extended to include intentional penetration of the female anus by a penis without consent. (Para 45)

The question of extending the definition so as to include acts of non-consensual anal penetration of a penis into the anus of a male person is left open for future consideration where the facts might call for its resolution. (Para 46)

Chief Justice Langa partly concurring and partly dissenting

I have had the opportunity of reading and reflecting on the judgment of Nkabinde J. I agree with her that the definition falls short of the spirit, purport and objects enshrined in the Bill of Rights. I associate myself particularly with her eloquent exposition of the patriarchal origin of the definition as well as for placing it in the particular context of South Africa today. I also agree with her findings on legality and the role of the Magistrates' Courts. However, I believe that the development she proposes must be taken further so that it includes the anal rape of men. (Para 75)

Women have always been and remain the primary target of rape. That is not a fact that this Court can or should ignore. Nor can we deny that male domination of women is an underlying cause of rape. But to my mind that does not mean that men must be excluded from the definition. Firstly, as was noted above, this case goes to the very reason for the existence of rape as a crime. To the extent that Nkabinde J concludes that the "object of the criminalisation of [rape] is to protect the dignity, sexual autonomy and privacy of *women and young girls as being generally the most vulnerable group*",[22] I part ways. To my mind the criminalisation of rape is about protecting the "dignity, sexual autonomy and privacy" of all people, irrespective of their sex or gender. When considering the boundaries of the definition of rape, the ICTY held that "[t]he essence of the whole corpus of . . . human rights law lies in the protection of the human dignity of

every person, whatever his or her gender." [23] I agree. (Para 84)

Secondly, there is no reason to believe that including men in the definition will in any way decrease the protection afforded to women. Indeed, limiting the definition to female survivors might well entrench the vulnerable position of women in society by perpetuating the stereotype that women are vulnerable, which in turn enforces the dangerous cycle of abuse and degradation that has historically led to placing women in this intolerable position. The unintended effect is to enforce the subordinate social position of women which informed the very patriarchy we are committed to uproot. The social reality of women cannot be ignored, but we should be wary not to worsen it. (Para 85)

Thirdly, the groups of men who are most often the survivors of rape, young boys, prisoners and homosexuals, are, like women, also vulnerable groups in our society. Moreover, they, and most other male victims, are raped precisely because of the gendered nature of the crime. They are dominated in the same manner and for the same reason that women are dominated; because of a need for male gender-supremacy. That they lack a vagina does not make the crime of male rape any less gender-based. The gendered basis of rape, rightly identified by Nkabinde J, requires that male victims are given equal rather than lesser protection. (Para 86)

Finally, the extension to male survivors is in line with both recent foreign experience, as Nkabinde J notes,[24] and international criminal and humanitarian law. The International Criminal Tribunal for Rwanda [25] (ICTR) and the International Criminal Tribunal for the Former Yugoslavia[26] (ICTY) have both defined rape as including male anal penetration. The Elements of Crimes of the International Criminal Court (ICC) [27] also include male anal penetration under the definition of rape.$[28] Indeed, these international bodies have extended the definition of rape far beyond what is suggested in this judgment.[29] (Para 87)

For all these reasons I do not believe that limiting the extension of rape to the anal penetration of women is in line with the spirit, purport and objects of the Bill of Rights. (Para 88) Excerpt ends.

[1] See *Simpson Cassell's New Compact Latin-English English-Latin Dictionary* (Cassel & Company Ltd, London 1963) 189-190.

[2] *S v Ncanywa* 1992 (2) SA (Ck) at 185E-G citing De Wet and Swanepoel *Strafreg* 3 ed (Butterworths, Durban 1975) 242 and Voet *Commentarius ad Pandectas* 48.6.4, Van der Keessel *Praelectiones ad Jus Criminale* (1809) 46.6.7 (Beinart and Van Warmelo's translation (1972) 883). Voet and Van der Keessel treated rape as a species of public violence (*vis publicae*).

[3] See Hiemstra and Conin *Trilingual Legal Dictionary* 2 ed (Juta, Cape Town 1986).

[4] Kaganas and Murray "Rape in Marriage ï¿½ Conjugal Rights or Criminal Wrong?" 1983 *Acta Juridica*125 at 126.

[5] Id.

[6] In terms of South African law, violence is not an element of the crime of rape.

[7] *Ncanywa* above n 38 at 185G-I. *Stuprum violentum,* translated as meaning "rape" by Hiemstra and Conin above n 39, was distinguished as a form of seduction against the will of a woman. It was regarded as closely related to violent *raptus* and punished as such. It would seem that the Roman-Dutch authorities treated the *actus reus* of rape as a form of *stuprum* being one of a whole group of offences based on illicit sexual intercourse. *Stuprum* was regarded as seduction or coition with women of certain classes but married women and prostitutes were excluded. See also Burchell and Milton *Principles of Criminal Law* 3 ed (Juta, Cape Town 2000) 702.

[8] Burchell and Milton above n 43 at 703.

[9] The Constitution recognises customary law and enjoins the courts, in section 211(3) to ". . . apply customary law

when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law."

[10] Mï¿½nnig *The Pedi* (JL van Schaik Limited, Pretoria 1967) 320 suggests that a woman would have an action for rape if assisted by her husband. Even though one cannot assume that all the systems of indigenous law in South Africa are uniform, seduction, according to Seymour, is the primary offence dealing with sexual violence. Seymour *Native Law in South Africa* (Juta and Co. Limited, Cape Town and Johannesburg 1960) 228.

[11] Myburgh and Prinsloo *Indigenous Public Law in KwaNdebele* (JL van Schaik (Pty) Ltd, Pretoria 1985) 101ï¿½102.

[12] Section 5 of the Prevention of Family Violence Act 133 of 1993.

[13] Section 1 of the Law of Evidence and the Criminal Procedure Act Amendment Act 103 of 1987.

[14] Abolition of the cautionary rule. See *S v Jackson* 1998 (1) SACR 470 (SCA) at para 476E-F.

[15] *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 81.

[16] Albertyn et al "Women's Freedom and Security of the Person" in Albertyn and Bonthuys *Gender, Justice and Equality* (Juta, Cape Town 1996) Chapter 9 at 26 quoting Brownmiller *Against Our Will: Men, Women and Rape* (1975) at 378.

[17] *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC) at para 61.

[18] 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 183.

[19] See in this regard *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as* Amici Curiae*)* 2002 (6) SA 642 (CC); 2002 (11) BCLR 1117 (CC) at para 45. The remarks are echoed by Snyman above n 55 at 48: "[a] court is not free to extend the definition or field of application of a common-law crime by means of a wide interpretation of the requirements for the crime."

[20] See *S v Chapman* 1997 (3) SA 341 (A) at 344I-345B. This Court has said in *S v Baloyi (Minister of Justice and Another Intervening)* 2000 (2) SA 425 (CC); 2000 (1) BCLR 86 (CC) at para 12 that rape, like domestic violence, is "systemic, pervasive and overwhelmingly gender-specific . . . [and] reflects and reinforces patriarchal domination, and does so in a particularly brutal form.".

[21] *Ncanywa* above n 38 at 186A.

[22] At para 37. (Emphasis added.)

[23] *Prosecutor v Anto Furundzija* Case No IT-95-17/1-T (10 December 1998); (1999) 38 ILM 317 at para 183.

[24] Nkabinde J above at n 71.

[25] *Akayesu* above n 2 at para 598; *Musema* above n 1 at paras 225-226; *The Prosecutor v Laurent Semanza* Case No ICTR-97-20-T (15 May 2003) at paras 344-345.

[26] *Prosecutor v Dragoljub Kunarac Radomir Kovac and Zoran Vukovic* Case Nos IT-96-23 and IT-96-23/1-A (12 June 2002) at paras 127-128.

[27] Adopted by the Assembly of States Parties, 1st session New York (3-10 September 2002) ICC-ASP/1/3. The Elements of Crimes were adopted by the state parties to the ICC Statute and will assist the ICC in interpreting the crimes created by statute.

[28] The elements both of the crime against humanity of rape (art 7(1)(g)) and the war crime of rape in both

international (art 8(2)(b)(xxii)) and non-international (art 8(2)(e)(vi)) armed conflicts include:

"The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body." (Footnote omitted.)

[29] The ICTY, ICTR and ICC include oral penetration by a sexual organ and vaginal or anal penetration by any object in their understandings of rape. See nn 10,11 and 13 above.

[END OF COMMENTARY ON CONSTITUTIONAL COURT JUDGMENT ON RAPE]

Two commentaries on the De Lille/Smith case and the right to medical privacy

- **Power, AIDS, stigma and the law**: Response by Mark Heywood to Jonny Steinberg's article in Business Day
- **Generous judgment instils stigma**: Jonny Steinberg's article in Business Day

Response by Mark Heywood to Jonny Steinberg

Power, AIDS stigma and the law

By Mark Heywood, Executive Director, AIDS Law Project

Jonny Steinberg is an insightful writer. His article ("Generous judgment instills stigma", *Business Day*, 24th April) was thought provoking. But something went wrong when he read the judgment of the Constitutional Court in the case of *NM and others versus Smith and others*.

It is important that we all understand that this case is primarily about the privacy of medical information ï¿½ until recently a very uncontroversial right. It is also the first case the Constitutional Court heard which was brought by very poor people who had tried, in vain, to protect their privacy against invasion by very powerful people. These powerful people took deeply private information, the women's HIV status, and put it in a very public book.

As a result the women suffered.

Steinberg asserts that Smith and De Lille "could not reasonably have known that the women required their names to be concealed." But, in fact, there were three separate occasions before the book's publication (two are reflected in the court record) when De Lille was made aware, or should have discerned, that the women desired privacy. Ms Smith admitted that she had access to these requests for privacy when she researched the biography.

Then, on one further occasion, soon after the book's publication, when much of the damage could still have been avoided, Smith and De Lille dismissed a direct request by the women that their names be removed. Only thereafter did the women sue for, amongst other things, damages. In response Smith and de Lille chose to defend the publication of the names for a further three years ï¿½ knowing that with every sale and every passing day the women felt further anguish and violation. Is this not intent?

On this difficult question it is worth noting that in an early affidavit dismissing the women, Smith responded by saying that they could not expect confidentiality as they were being treated at public hospitals where "there is no way of preserving confidentiality of identity."

However, Smith did not persist in this argument. Instead an apparently more plausible one became the main line of

defence: that the University of Pretoria "had already published the names."

But what does this mean? The University of Pretoria issued their report on the investigation into the clinical trial ('the Strauss report') to hardly more than 10 people: including De Lille, who had an obvious interest in it, and a journalist who had participated in the inquiry under false pretenses and used the information she gathered in an expose on Carte Blanche, and in another AIDS denialist article for*Noseweek*, impugning the doctor who led the clinical trail and alleging that ARVs are poisonous. Incidentally, Carte Blanche later apologized for its 'report'.

But ten people, one journalist and one politician does not "the public" make.

Steinberg asserts the judgment is bad for stigma. But it would be very bad for heath care generally if any journalist, upon coming across a medical report, could publish its detail, unless it was explicitly marked "confidential" ï¿½ a point made by Professor Anton Harber in his testimony in the High Court.

This is why transmogrifying this into a freedom of expression issue is so mistaken, and in fact a blow to the ethics and integrity of journalism. All that was required was that the writer and publisher abide by accepted ethical rules, and show a little bit of care. They did not. Which is why, at the end of the day, the case is about bad journalism - not bad law. Indeed, a fact not noticed by the court (or at least not commented on), was the way in which the biographer plundered the Strauss report for the names and gory allegations of abuse in the trial, but largely overlooked its finding ï¿½ lest her champion of the poor be revealed - in this instance - to have gotten it wrong.

Finally, Steinberg raises very important issues about HIV-related stigma, claiming that is more internalized than external ï¿½ more about "self-loathing" than intolerance and prejudice. Would that this were true! In reality it can be a combination of all three - but rarely is it not about the latter two.

I know these women. They are not the self-loathing sort. Coming from very poor backgrounds, badly educated, and managing the day to day indignities of disadvantage leaves little room for introspective self-loathing. But the whip of a violent boyfriend, full of his own blame and suspicions about HIV, or fear of the consequences of disclosure for a loving husband, were very, very real. Without bringing the people that the women were afraid of, or for, before the court - something the respondents at one point cruelly threatened to do - to establish Steinberg's "empirical causal connection" between the disclosure and its consequences, the court had to trust what they said. But courts do this, anyway, every day that a person takes an oath.

This case is a sad one. It created much chatter in legal corridors, much of which emanated from the idea that two good people could not have done wrong. Faced with this difficulty people with power decided to side with each other and to cast aspersions on the motives of people who are poor.

The judgments in *NM v Smith and De Lille* may have many problems (on that we agree), but nine out of ten judges didn't fail on the crucial issue ï¿½ that the law should not excuse unethical journalism that causes avoidable harm to people whose needs and disadvantage are at the heart of our Constitution.

Generous judgment instils stigma

Jonny Steinberg

Tuesday, 15 May 2007

(Reprinted for fair use from Business Day)

http://www.businessday.co.za/articles/topstories.aspx?ID=BD4A445289

SOMETHING disturbing happened in the Constitutional Court earlier this month. Something went wrong in the case of NM and others versus Charlene Smith, Patricia de Lille and another. That two judges dissented from the majority

opinion is unremarkable in itself; disagreement about constitutional interpretation is what the court's work is about. But the dispute here was not about the interpretation of the law. In her dissent, Kate O'Regan argued that the ruling her colleagues handed down was inconsistent with the facts of the case. That was utterly unprecedented. For the first time, the court dragged itself beyond the boundaries of its specialist role and fought over matters that are rightly settled in the lower courts. What happened?

In 1999, several HIV-positive people were recruited to participate in an antiretroviral drug trial at the University of Pretoria.

Soon after its start, some of the volunteers voiced serious concern about the trial. Parliamentarian De Lille became involved in their plight. The university appointed an independent commission of inquiry. At the inquiry, the complainants withdrew their allegations and the subsequent Strauss Report concluded in 2001 that the university had done no wrong.

Later that year, De Lille commissioned Smith to write her biography. Smith read De Lille's copy of the Strauss Report. It named three of the HIV-positive women who had complained about the trial. What Smith did not know is that the women had consented to testify at the inquiry on condition that their names were not made public. That information was contained in an annexure of the Strauss Report, but the report had been distributed without its annexure.

When Smith's biography of De Lille appeared, the names of the three HIV-positive women were in it. The doctor who ran the drug trial read the book and informed the three women. They sued for violation of privacy, dignity and psychological integrity. They said word of their HIV status had got out in the shack settlement in which they lived and they had suffered horrific prejudice.

Here is where the court split on matters of fact. O'Regan argued that Smith and De Lille could not reasonably have known that the women required their names to be concealed. If anyone was negligent, she argued, it was those who distributed the Strauss report without its annexure.

The university, a reputable source, had already published the women's names. To insist that a journalist re-investigate the veracity of information published by reputable sources, O'Regan argued, "would result in unacceptable burdens being imposed on the dissemination of information and have a significantly deleterious effect on freedom of speech".

The majority found the facts to be different. They argued that Smith and De Lille knew the three women wanted their names concealed and deliberately violated their privacy. Alternatively, they knew it was likely the women had not given their consent and published their names in reckless disregard of that likelihood.

The majority's finding is bracing. Not even the three women's counsel argued that Smith and De Lille intended to violate their clients' privacy. Why was the court the only one to see intent?

One can only speculate. The fact that the applicants were among the most vulnerable South Africans imaginable probably played its part. They were poor women, lived in shacks and were HIV-positive. And they had been badly hurt. At a raw emotional level, the court must have struggled with the prospect of ruling against them.

The majority could have stuck to O'Regan's version of the facts if it had argued that Smith had violated the applicants' privacy because of negligence rather than intent.

But there was a problem here. Under the common law, violation of privacy because of negligence is not liable. To award damages on the grounds of negligence, the court would have had to develop the common law. For whatever reason, it did not want to go there. It was thus faced with an uncomfortable choice: either find against the three women or cajole the facts into singing the right tune. I think the court chose the latter.

That it did so is unfortunate and not only for the law. In its haste to side with the meek, I believe the court has inadvertently entrenched AIDS stigma.

One of the issues at the core of AIDS stigma is a feeling of self-loathing in those who suffer from it. To have internalised stigma is to persecute yourself incessantly. And you scan the world looking for signs that the persecution you feel within is mirrored from without, that everyone who looks at you sees inside your body and soul and feels disgust.

I am not suggesting that stigma exists only in the imaginations of the stigmatised. That is absurd. But the persecution felt by those in the depths of stigmatisation has a special occult quality to it. That is why across SA, thousands of people with AIDS believe they have been bewitched. AIDS and witchcraft are natural bedfellows: the coupling of sickness and a sense of persecution has always fuelled feelings of bewitchment.

The urgent task of SA's leaders is to break the cycle of mythology and fear.

The Constitutional Court has done the opposite. Read the majority's judgment and you will find that both its tone and its strange logic carry something of the spirit of bewitchment. What was at worst a negligent act of omission on the part of a journalist and a politician, the court transforms into menacing intent to do ill. And the power of Smith's and De Lille's intent also takes on an almost occult power.

The court tells that the three women suffered terrible prejudice as a result of their names being published: one attempted suicide, another withdrew into herself, the third lived in fear that her family would discover her status.

Perhaps it is true that all of this pain was caused by the publication of the names, but the court did not deem it necessary to show empirical, causal connections. Given the sense of the occult that shrouds AIDS, it should have. The tone of the judgment suggests that there is no need to show causal connections; that having your name revealed will, as a matter of fate, cause an orgy of loathing and violence to come down on your head.

If I arrived in SA for the first time and read the court's judgment, I would not test for HIV. I would feel safer not knowing my status.

Something went wrong on Constitution Hill.

Steinberg is a freelance journalist.

[END OF HEYWOOD AND STEINBERG ARTICLES]

- Violence Against Women

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