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**A conceptual analysis that non - disclosure of HIV/AIDS
status before engaging in sexual conduct is fraud.**

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Declaration

I, hereby declare that this dissertation is my original work, and other work cited or used are clearly acknowledged. This work has never been submitted to any University, College or other institution of learning for academic other award.

Signed.....A. Alongo.....

Date.....22 August 2019.....

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Abbreviations

AIDS – Acquired Immune Deficiency Syndrome.

HIV – Human Immune Virus.

WHO – World Health Organization.

UNAIDS – The Joint United Nations Programme on HIV and AIDS.

OHCHR – Office of the High Commissioner for Human Rights.

Chapter One

Introduction

1.1. Problem statement

The Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS) epidemic remain a genuine general health challenge confronting Sub-Saharan Africa. In 2013, there were an expected 24,7 million individuals living with HIV in Sub-Saharan Africa, speaking to 71 percent of the worldwide aggregate.¹ In 2012, there were 1,2 million death because of AIDS-related ailments in the area.² As of December 2012, an expected 15 million kids in Sub-Saharan Africa had lost one or the two guardians to AIDS.³ Albeit vital advancement has been made in light of HIV in the area – with a decrease in new HIV diseases and a critical increment in access to hostile to retroviral treatment – the pestilence remains a main source of death.⁴ Besides, genuine social, legitimate and arrangement issues, for example, disgrace, segregation, sex imbalance and other antagonistic standards and practices that make individuals powerless against HIV and ruin their entrance to HIV administrations, remain to a great extent unchallenged.⁵ This research seeks to explore legal issues around none disclosure of HIV and AIDS status before engaging in an unprotected sex.

¹ UNAIDS *The gap report* (2014) 26.

² UNAIDS Global Report. *UNAIDS Report on the Global AIDS Epidemic* (2013) A43.

³ UNICEF Towards an AIDS-Free Generation. *Children and AIDS: Sixth Stocktaking Report 2013* (2013).

⁴ See UNAIDS How AIDS changed everything. *MDG 6: 15 years, 15 lessons of hope from the AIDS response* (2015).

⁵ See Global Commission on HIV and the Law HIV and the law: Risks, rights and health (2012); CI Grossman & AL Stangl (eds) 'Global action to reduce HIV stigma and discrimination' (2013) 16 *Journal of the International AIDS Society* 18881.

1.2. Some legislative responses to HIV/AIDS in Africa

The law is viewed as an auxiliary instrument that can shape singular conduct with regards to general health difficulties, for example, HIV and arrange the manner in which states react to these difficulties.⁶ Therefore, most sub-Saharan African nations have embraced administrative, arrangement or different measures to react to HIV. In their lawful reactions, numerous nations in the locale (27 out of 45) have turned to HIV-explicit laws, rather than different types of enactment like applying existing standards of criminal law to HIV cases. Numerous nations in sub-Saharan Africa have depended on HIV explicit laws. This is on the grounds that HIV explicit laws make it conceivable to address a few angles and reactions to HIV through a solitary bit of enactment. This is progressively viable instead of the difficulties and defers intrinsic in the reception of a huge number of administrative alterations managing diverse parts of HIV.

In addition to medical developments and technological advancements in dealing with the issue of HIV/AIDS in South Africa, legislations should be put in place to support these advancements. Thus, it is necessary that legislation should be put in place to facilitate this advancement in South Africa. Before the availability of antiretroviral treatment (ART) most of the case law on non-disclosure of HIV/AIDS status before engaging in a sexual act and non-consensual transmission of HIV considered the act as attempted murder in South African courts.⁷ This was so because, at the time there was no free medication and the available medication was too expensive for poor people. Thus, the exorbitant prices made it impossible for poor people to access

⁶ See, e.g., J Hamblin 'The role of the law in HIV/AIDS policy' (1991) 5 AIDS s239s243; L Gable et al 'A global assessment of the role of law in the HIV/AIDS pandemic' (2009) 123 *Public Health* 260-264 .

⁷ *S v Nyalungu* 2013 (2) SACR 99 (T).

medication. Being infected with HIV meant death and the perpetrator would be charged with murder.⁸ This would be for situations where one intentionally transmitted the virus without a proper disclosure.

The availability of ART brought about a change in that an infected person could still live if they did not neglect taking their medication as prescribed by the medical practitioner. Being infected no longer meant that death was certain but depended on whether the infected person took their medication as prescribed or neglected to do so.

In South Africa, ARTs are now freely available to the general population.⁹ A patient who contracts HIV and adheres to their medical prescription is most likely to live a normal life, and have an improved life expectancy. While there has been a shift in policy in responding to the HIV/AIDS pandemic, the legal response has not changed. As such, South African courts continue to consider most cases around non-disclosure of HIV as attempted murder.¹⁰ The crux of the argument presented in this dissertation, is that given the medical developments outlined above, and a shift in policy considerations in South Africa, there is a need to reconsider the legal response to the HIV/AIDS pandemic.

In South Africa a purposeful transmission of HIV to someone else is a criminal offense.¹¹ The South African Law Commission in a thought report expresses that a deliberate transmission of HIV to someone else or introduction of someone else to HIV would as of now be at risk to indictment under the existing common law crime of

⁸ *S v Tembani* (2006) SCA 151 (RSA).

⁹ *Ibid.*

¹⁰ *S v Phiri* 2014 (1) SACR 211 (GNP). See also *S v Ndlanzi* 2014 (2) SACR 256 (SCA).

¹¹ Criminal Law (Sexual Offenses and Related Matters) Amendment Act 32 of 2007.

murder, assault, assault with intent to do grievous bodily harm.¹² This is one of the significant reasons why most HIV transmission cases in South Africa are considered as endeavoured homicide. Cases are *S v Nyalungu*¹³ and *S v Phiri*.¹⁴ These cases held that the standard of precedent-based law was adequately wide to legitimize a conviction of endeavoured homicide. Therefore, the present condition of the South African case law advocates for divulgence of HIV/AIDS status to sexual accomplices previously captivating in unprotected sex.

This dissertation seeks to argue on the strength of the case of *S v Phiri*¹⁵ that in light of the developments in relation to HIV/AIDS, particularly the availability of ART, there should be a different approach to crimes associated with HIV/AIDS. This is so because, murder is an intentional and unlawful killing of another human being.¹⁶ On the other hand, attempted murder is where the accused intended to kill another human being but is unsuccessful.¹⁷ What is apparent from these definitions is that it would be more appropriate to charge a person who does not disclose their HIV status before engaging in a sexual act with fraud, than it would be with murder. This, is arguably so because fraud is the unlawful and intentional making of a misrepresentation which causes actual prejudice, or which is potentially prejudicial to another.¹⁸ It is also

¹² South African Law Commission., *Criminalisation of HIV Transmission* (2011) (<http://www.tac.org.za/community/node/3204>). (Accessed: 04 May 2018).

¹³ *S v Nyalungu* 2013 (2) SACR 99 (T). see also *S v Ndlanzi* 2014 (2) SACR 256 (SCA).

¹⁴ *S v Phiri* 2014 (1) SACR 211 (GNP).

¹⁵ *S v Ibid.*

¹⁶ *S v Ntuli* 1975 (1) SA 429 (A); Burchell JM *Principle of Criminal Law* 4th Ed (2013) 562; Snyman CR *Criminal Law* 6th Ed (2014) 437.

¹⁷ Kemp G *Criminal Law In South Africa* 2nd Ed (2013) 301.

¹⁸ *S v Myeza* 1985 4 SA 30 (T) 31 – 32; *Ex parte Lebowa Development Corporation Ltd* 1989 3 SA 71 (T) 101; Gardener 2011 (1) SACR 570 (SCA) par 29.

dishonestly making a false (untrue or misleading) representation with a view to gain something from someone.¹⁹ This definition fits more the act of intentionally withholding the information on the HIV status of the sex partner for continual sexual pleasure. In relation to the dissertation, silence can also be considered as fraud when one refuses to speak in a circumstance where speaking is a duty. This means that mere silence can amount to fraud when the person keeping silent is under the duty to speak. This duty can be as a result of the fact that the one party has placed trust, faith and confidence in the other.²⁰ This is related to what is postulated in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, that any person who infects another person with HIV knowingly is guilty of an offence.²¹

Referring to case law, legislation and some ethical considerations, this dissertation seeks to argue that non-disclosure of HIV/AIDS status before engaging in an unprotected sexual intercourse should be considered as fraud.

1.3. The significance of the study

The criminal law (Sexual Offences and Related Matters) Amendment Act²² is silent on which charge should be levelled against a person who infects the other knowingly with HIV. Secondly, courts have not explored the criminal charge of fraud in dealing with HIV cases. Given the medical developments outlined above, this dissertation seeks to explore the charge of fraud in relation to non-disclosure of HIV before one engages in sexual activity.

¹⁹ Law and Martin *A Dictionary of Law* (2009) 239 .

²⁰ Shegal, S. 2018. *3 Important Cases when Silence is Considered to be Fraud* <http://www.shareyouressays.com/knowledge/3-important-cases-when-silence-is-considered-to-fraud-in-india/94785>. (Accessed: 25 May 2018).

²¹ Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 .

²² Ibid.

1.4. Literature Review

1.4.1. HIV/AIDS in Sub-Saharan Africa

Most administrative ways to deal with HIV/AIDS, have been scrutinized on the grounds that they grasp coercive methodologies that disregard human rights and hazard undermining the current reaction to HIV.²³ On 31 July 2014, Uganda, the last among the 27 nations in Sub-Saharan Africa, established HIV-explicit enactment and this was trailed by a consent by the Head of State to the HIV and AIDS Prevention and Control Act.²⁴ This Act was reprimanded in light of the fact that it raised both human rights and general Health concerns like those in the N'Djamena Model Law.²⁵ Over 10 years after the main HIV-explicit laws were embraced in Sub-Saharan Africa, there is merit in leading a complete examination of these laws to look at their key arrangements against human rights and general wellbeing guidelines identifying with HIV. This keeps on being a restricting contention to, and perspective on, laws and enactment on HIV/AIDS revelation and transmission in most Sub-Saharan African nations including South Africa.

²³ D Grace 'Legislative epidemics: The role of model law in the transnational trend to criminalise HIV transmission' (2013) 39 *Medical Humanities* 77-84 .

²⁴ R Ninsiima 'Uganda: HIV law – After assent, Museveni under fire' *The Observer* 22 August 2014 <http://allafrica.com/stories/201408220430.html> (accessed 25 May 2018) .

²⁵ Pearshouse R *Legislation contagion: building resistance. HIV/AIDS Policy & Law Review* 12 (2/3), 2008 .

1.5. Research Questions

1. Do persons living with HIV have a duty to disclose their health status to their sexual partner when they have unprotected sex?
2. What should the legal response be to persons who know that they are HIV positive but fail to disclose their status to their sexual partner?

1.6. Methodology

This is a desktop dissertation based on information that is in the public domain such as legislation, case law, monographs, books and internet sources.

1.7. Research Outline

Chapter one – This chapter presents the introduction and background to the dissertation, the research problem, the research questions, and the methodology adopted in the study.

Chapter two – This chapter presents the duty to disclose where ethical and legal considerations in relation to privacy, and confidentiality is discussed.

Chapter three – This chapter presents fraud and its element and links it to non-disclosure of HIV status.

Chapter four –this chapter presents the argument for the dissertation using some of the available publications, case laws, legislation and ethical principles that are relevant to the dissertation. Finally, it makes recommendations that non-disclosure of HIV/AIDS status before engaging in a sexual conduct should be considered as fraud.

Chapter Two

Duty to Disclose

2.1. Introduction

The previous chapter consisted of an introduction to the study, and presented key arguments that the dissertation will engage with. This chapter focuses on the duty to disclose where ethical and legal considerations in relation to privacy, and confidentiality will be discussed.

HIV/AIDS has guaranteed the middle of everyone's attention in broad daylight and political discussions in the course of the most recent couple of years, and therefore, most South African researchers have connected profoundly in looking at and talking about the directly to protection and its confinements with regards to HIV/AIDS.²⁶ Until the Constitutional Court's decision in *NM and Others v Smith and Others*,²⁷ the absence of writing was joined by a shortage of case law with respect to the significance of the insurance of security of HIV-contaminated individuals. This area of the paper investigates the idea of protection and classification with respect to divulgence of HIV/AIDS status.

2.2. Disclosure

The South African Constitution states categorically that everyone has the right to privacy which includes the right to confidentiality of communication.²⁸ Flowing from the Constitution, it is clear that every human being enjoys the right to privacy and

²⁶ Nienaber, A. 'The international sexual transmission of HIV' (2014) (29) SAPL 522-533.

²⁷ *NM and Others v Smith and Others* 2007 (5) SA 250 (CC). The decision is hereafter referred to as *NM and Others v Smith*.

²⁸ Section 14 of the Constitution of the Republic of South Africa 1996.

confidentiality. Privacy alludes to the right of people to confine access by others to a few parts of their individual, including wellbeing data.²⁹ Privacy claims are established in the moral standards of self-rule and nobility. By correlation, secrecy stretches out security assurances to unique connections, for example, those between medicinal services experts and their patients. Security and classification assurances, just as safety efforts and different laws that control the utilization of health information, every now and again confine the exposure of HIV data and may accommodate punishments for the individuals who uncover HIV data without approval or generally neglect to agree to HIV protection and security prerequisites.³⁰ The extent of constraints on revelation of HIV test data and which is liable to these confinements fluctuates impressively crosswise over nations, with a few nations having extremely vigorous security insurances set up and others not giving noteworthy security assurances in law or practice. A run of the mill approach received by numerous enactments is to set up a default decide that the security and classification of HIV data ought to be ensured and just be uncovered under determined conditions.³¹

Within the context of this dissertation, disclosure of HIV/AIDS demands that one informs one's partner of one's HIV status especially before engaging in a sexual conduct.³² The demand for such disclosure raises both constitutional and ethical issues.

²⁹ Gable, Gamharter, Gostin, Hodge, and Van Puymbroeck *Legal Aspects of HIV/AIDS: A Guide for Policy and Law Reform* (2007) 10.

³⁰ Ibid.

³¹ National Health Act 61 of 2003.

³² Gable, at al (2007) 10.

Despite the fact that people appreciate the directly to protection, there are known special cases where divulgence of data about one's HIV status might be required, for example, for general health observation, for the arrangement of suitable restorative consideration, and for certain non-wellbeing purposes, for example, law authorization or protection.³³ Beyond these predetermined special cases, revelation of HIV data, regardless of whether purposeful or careless, will establish a rupture of security that may result in common obligation, criminal punishments, or different genuine assents, for example, suspension of therapeutic permit. Laws and policies that authorize disclosure of HIV information fall within three broad categories: 1) disclosures requiring informed consent; 2) discretionary disclosures; and 3) mandatory disclosures.³⁴ These three categories fall within the paradigm that this dissertation is arguing for. The need to disclose one's HIV status becomes paramount when it threatens the life of the other person. This is because there should be a mutual and consensual relationship between partners, especially sexual partners. So, if a proper consent process is adopted and respected, all sexual partners are entitled to comprehensive information about the benefits and risks of having sexual intercourse. Consequentially, if this is not respected properly then it is necessary that the act of withholding information, as this dissertation will argue, be considered as fraud.

From the arguments above, it is clear that there is a need to disclose one's HIV/AIDS status before engaging in sexual conduct. What is not clear, though, is how the law should treat cases where such a disclosure was not made. Thus, rooted in South African legal sources and some ethical considerations, this dissertation seeks to argue

³³ Center for Law and the Public's Health, *Model State Public Health Privacy Act*. (2018). <http://www.publichealthlaw.net/Resources>. (Accessed: 25 July 2018).

³⁴ Gable, et al (2007) 10.

that non-disclosure of HIV/AIDS status before engaging in a sexual conduct should be considered as fraud.

Exposure of data about HIV can uncover intimate insights concerning a person's health status and other individual data that an individual may wish to keep private. Divulgences of HIV status can harm the protection of people living with HIV or AIDS and have other adverse results, for example, disgrace, segregation, savagery, and social disengagement. Revelation may likewise prompt genuine monetary damage, including loss of business, protection, or lodging. Then again, divulgence of data about HIV might be required for general wellbeing reconnaissance, for the arrangement of proper medicinal consideration, and for certain non-wellbeing purposes, for example, law implementation or protection.³⁵ Henceforth, nations need to create laws and approaches that balance the requirement for exposure of HIV data with the assurance of the security and self-governance of people as for their HIV status.

For the most part, requiring educated agree preceding exposure advances trust, participation, and straightforwardness in the social insurance and general health frameworks. Informed consent additionally decreases the probability of negative outcomes following the divulgence.³⁶ Consent might be explicit and direct who is to get the data, for what purposes and use, and for to what extent the assent stays legitimate. Secrecy laws may require extra assent for ensuing divulgence to different

³⁵ Jürgens, Ralf, *Confidentiality*, in *HIV Testing and Confidentiality: Final Report* (Canadian HIV/AIDS Legal Network & Canadian AIDS Society 2001). <http://www.aidslaw.ca/publications/publicationsdocEN.php?ref=282>. (Accessed: 25 July 2018).

³⁶ Gostin, Lawrence O. & Zita Lazzarini, *Human Rights and Public Health in the AIDS Pandemic* (Oxford University Press 1997).

gatherings.³⁷ A second classification of arrangements stipends people or organizations prudence to reveal HIV data without assent under explicit conditions sketched out in law or strategy.³⁸ These arrangements may shift incredibly among nations and apply to a scope of exercises such as, in South Africa, accomplice warning, arrangement of medicinal services, court preliminaries, or repayment of protection claims. While such rules are normal, divulgements of HIV data for non-wellbeing reasons for existing are dubious in light of the fact that they may undermine trust in the wellbeing framework, discourage individuals from looking for testing dependent on protection concerns, and may enable access to an individual's HIV status in settings not represented by wellbeing data security laws.³⁹ The third classification of approved revelations includes laws and approaches that order exposure under specific conditions. The quintessential instances of this methodology are HIV detailing laws, which require doctors and research centres to reveal positive HIV test results to the legislature for public health observation.⁴⁰ Different precedents identify with circumstances where there exists an obligation to caution that an individual may have been presented to HIV, for instance in word related exposures or assault cases or on the off chance that they are in a lawful relationship. These arrangements depend on the uncovered individual's "entitlement to know" about the dangers they face and their need to take proper wellbeing assurances. Also, the centre moral thought in connection to exposure is the need to turn away unsafe

³⁷ AIDS Law Project & AIDS Legal Network, *Your Health Rights*, chapter 6 in *HIV/AIDS and the Law: A Resource Manual* (3rd ed., AIDS Law Project & AIDS Legal Network 2003), and App. A2 (South Africa's National Patients' Rights Charter). <http://www.alp.org.za>. (Accessed: 25 July 2018).

³⁸ Ibid.

³⁹ Center for Law and the Public's Health, *Model State Public Health Privacy Act* (Center for Law and the Public's Health). <http://www.publichealthlaw.net/Resources>. (Accessed: 25 July 2018).

⁴⁰ Ibid.

circumstances.⁴¹ This implies it is morally necessitated that an individual's HIV status is imparted to an individual who can be hurt by non-revelation.

2.3. Partner notification of HIV/AIDS

Accomplice warning offers an opportunity to build the quantity of individuals who will look for testing and guiding for HIV, and to get more individuals into treatment. The accomplice notice process energizes (and once in a while commits) an individual to reveal his or her HIV status to sex as well as needle-sharing accomplices or to take endeavours to sensibly shield accomplices from avoidable health dangers.⁴² Accomplice warning has turned into a typical practice far and wide in HIV anticipation endeavours yet has stayed questionable. Public health experts legitimize accomplice notice programs as a strategy for avoidance and access to treatment. By and large there has all the earmarks of being a moral obligation to unveil one's HIV status to accomplices who might be in risk of infection.⁴³ This obligation is grounded in the commitment to do no mischief to other people and the idea of an accomplice's "entitlement to know" about the dangers they may confront. In this admiration, the obligation to disclose is grounded in the need to avert further infection.⁴⁴ Nevertheless, regardless of whether tainted people have the duty to advise their accomplices of their HIV status keeps on inciting banter. A few AIDS advocates contend that if an individual

⁴¹ Ibid.

⁴² Fenton, K. A. & T. A. Peterman, *HIV Partner Notification: Taking a New Look*, 11 *AIDS* 1535–46 (1997).

⁴³ UNAIDS, *Opening Up the HIV/AIDS Epidemic: Guidance on Encouraging Beneficial Disclosure, Ethical Partner Counselling and Appropriate Use of HIV Case-Reporting* (UNAIDS 2000).
http://data.unaids.org/Publications/IRC-pub05/JC488-OpenUp_en.pdf. (Accessed: 25 July 2018)

⁴⁴ Gostin, Lawrence O. & James G. Hodge Jr., *Piercing the Veil of Secrecy in HIV/AIDS and Other Sexually Transmitted Diseases: Theories of Privacy and Disclosure in Partner Notification*, 1 *Duke J. of Gender Law and Policy* 9–88 (1998).

contaminated with HIV reliably utilizes more secure sex works on (utilizing a condom), the person in question may not generally be obliged to inform.⁴⁵

In countries like Canada and South Africa, the HIV-positive file persistent is fundamentally in charge of advising his or her sexual or needle-sharing contacts that they may have been exposed to HIV.⁴⁶ Laws and approaches have executed this obligation as projects that require, or on the other hand empower on an intentional premise, accomplice warning by HIV-tainted people.⁴⁷ By and large, the administration or other open substances will furnish both the patient and accomplices with access to directing, testing, and if important and accessible, treatment. Most nations that approve accomplice notice lean toward wilful accomplice warning to other, increasingly coercive, approaches.⁴⁸ The UNAIDS and OHCHR International Guidelines on HIV/AIDS and Human Rights additionally embrace this methodology. In like manner, UNAIDS and WHO empower intentional exposure among accomplices and the arrangement of expert directing for HIV-infected clients and their partners.⁴⁹ Different methodologies, less normal, force a confirmed obligation on HIV-

⁴⁵ Jürgens, Ralf, *Partner Notification*, in *HIV Testing and Confidentiality: Final Report* (Canadian HIV/AIDS Legal Network & Canadian AIDS Society 2001).
<http://www.aidslaw.ca/publications/publicationsdocEN.php?ref=282>. (Accessed: 25 July 2018).

⁴⁶ UNAIDS, *Opening Up the HIV/AIDS Epidemic: Guidance on Encouraging Beneficial Disclosure, Ethical Partner Counselling and Appropriate Use of HIV Case-Reporting* (UNAIDS 2000).
http://data.unaids.org/Publications/IRC-pub05/JC488-OpenUp_en.pdf. (Accessed: 25 July 2018).

⁴⁷ WHO, *HIV Status Disclosure to Sexual Partners: Rates, Barriers and Outcomes for Women* (World Health Organization 2004). http://www.who.int/gender/documents/en/VCTinformationsheet_%5b92%20KB%5d.pdf. (Accessed: 25 July 2018).

⁴⁸ UNAIDS, *Opening Up the HIV/AIDS Epidemic: Guidance on Encouraging Beneficial Disclosure, Ethical Partner Counselling and Appropriate Use of HIV Case-Reporting* (UNAIDS 2000).
http://data.unaids.org/Publications/IRC-pub05/JC488-OpenUp_en.pdf. (Accessed: 25 July 2018).

⁴⁹ UNAIDS & OHCHR, *International Guidelines on HIV/AIDS and Human Rights*, 2006 Consolidated version (UNAIDS & Office of the United Nations High Commissioner for Human Rights 2006).
http://data.unaids.org/Publications/IRC-pub07/JC1252-InternGuidelines_en.pdf?preview=true. (Accessed: 25 July 2018). ; WHO, *HIV Status Disclosure to Sexual Partners: Rates, Barriers and Outcomes for Women* (World Health Organization 2004).
http://www.who.int/gender/documents/en/VCTinformationsheet_%5b92%20KB%5d.pdf. (Accessed: 25 July 2018).

contaminated people to advise their accomplice of their HIV status based on the accomplice's entitlement to know.⁵⁰ Notwithstanding, there likely will be circumstances where the patient was unable or reluctant to tell his or her accomplices of the hazard they face. In such cases, the social insurance proficient/guide might be allowed to inform and direct distinguished accomplices in the wake of gauging the damages and advantages to all parties.⁵¹ Thus, legislative public health offices are regularly approved to participate in contact following to distinguish and specifically illuminate potential accomplices of the patient that they may have been presented to HIV.

Intentional notice of accomplices can cultivate various constructive results, including the recognizable proof of people conceivably presented to HIV, empowering these people to get advising, testing, and if essential, treatment; enabling accomplices to play it safe to maintain a strategic distance from HIV disease or reinfection; and energize more secure practices later on paying little heed to HIV status, which diminishes further transmission of HIV. Deliberate projects force less on individual protection than criminal punishments or progressively coercive types of accomplice warning; they add to open mindfulness about HIV in the network, and may encourage prior distinguishing proof of extra instances of HIV contamination, chances to interface uncovered or tainted people to general wellbeing administrations, and increasingly exact observing of the HIV plague.

⁵⁰ Gostin, Lawrence O. & James G. Hodge Jr., *Piercing the Veil of Secrecy in HIV/AIDS and Other Sexually Transmitted Diseases: Theories of Privacy and Disclosure in Partner Notification*, 1 Duke J. of Gender Law and Policy 9–88 (1998).

⁵¹ Fenton, K. A. & T. A. Peterman, *HIV Partner Notification: Taking a New Look*, 11 AIDS 1535–46 (1997).

Adversaries of patient-focused accomplice warning methodologies feature the mind-boggling expenses and flawed utility of accomplice notice as an essential system in diminishing HIV transmission. The long hatching time of HIV may muddle the naming and area of past accomplices, and reaching accomplices raises worries about secrecy and shame, especially under accomplice warning laws and arrangements that require (not just empower) patients to tell accomplices. Accomplice notice conveys with it the danger of aggressive behaviour at home by accomplices who find they might be tainted with HIV. In any case, if HIV-contaminated people do not inform their accomplices of their status, they may put their accomplices in danger for disease.

2.4. The physician or counsellor part and intervention in partner notification

In countries like Canada and South Africa approve doctors or instructors to lead partner notification. Partner notification generally is wilful, yet every so often should be possible without the assent of the index patient.⁵² A doctor's obligation to reveal a patient's HIV status to the patient's accomplices who might be in danger of contamination exudes from the lawful idea of "obligation to caution." In request to caution the accomplices of a HIV-tainted patient, the doctor might be approved under law to get the accomplices' names from the patient, privately tell the accomplices they might be contaminated, and give the accomplices HIV advising and access to testing and different administrations when accessible.⁵³ Physicians and other providers must

⁵² Jürgens, Ralf, *Partner Notification*, in *HIV Testing and Confidentiality: Final Report* (Canadian HIV/AIDS Legal Network & Canadian AIDS Society 2001). <http://www.aidslaw.ca/Maincontent/issues/testing/11partnere.html>. (Accessed: 25 July 2018).

⁵³ Gostin, Lawrence O. & James G. Hodge Jr., *Piercing the Veil of Secrecy in HIV/AIDS and Other Sexually Transmitted Diseases: Theories of Privacy and Disclosure in Partner Notification*, 1 Duke J. of Gender Law and Policy 9–88 (1988).

conduct partner notification in a private way to stay away from infringement of their patient's entitlement to security and diminish conceivable disgrace and separation .

In numerous nations, legitimate specialist to direct accomplice warning exists at various dimensions. Most nations, including South Africa, that authorize accomplice notice have supported people who are HIV-tainted to unveil their status to accomplices or forced an obligation to do as such. A considerable lot of these nations have actualized extra components to approve doctors, guides, or other health suppliers to take part in accomplice warning when wilful strategies are lacking, or in participation with patients.⁵⁴ In deciding if to utilize accomplice warning, human services experts must adjust restricting variables. The protection infringement and potential damage, segregation, surrender, or disgrace that the record patient may look because of the revelation to accomplices must be weighed against the hazard that, missing these endeavours, HIV might be transmitted to these partners and beyond.⁵⁵ In practice, many health care professionals avoid an active role in partner notification when patients are willing to notify their partner themselves. Only when the patient refuses or is unwilling to engage in partner notification will the physician proceed without consent. Still, a physician may determine that in light of the circumstances, such as potential abuse or other factors, partner notification may not be appropriate. Health care professionals/counsellors usually retain the discretion to notify and counsel identified partners after weighing the harms and benefits to all parties.

⁵⁴ UNAIDS, *Opening Up the HIV/AIDS Epidemic: Guidance on Encouraging Beneficial Disclosure, Ethical Partner Counselling and Appropriate Use of HIV Case-Reporting* (UNAIDS2000). http://data.unaids.org/Publications/IRC-pub05/JC488-OpenUp_en.pdf. (Accessed: 25 July 2018).

⁵⁵ *Ibid.*

The partner notification procedure may force genuine moral quandaries on doctors or advisors, adequately driving them to choose their expert commitment of classification to their patient and their obligation to caution the patient's accomplices to secure their wellbeing. Enactment that approves accomplice notice regularly perceives this issue and gives an exemption inside classification insurances for HIV data that expressly enables doctors to contact accomplices. Enactment likewise habitually attempts to alleviate potential infringement of secrecy by necessitating that doctors and instructors occupied with accomplice notice do not uncover the list patient's character to hold accomplices. While by and by the accomplice might most likely decide the personality of the record quiet, this procedure takes into account the likelihood of all the while connecting with accomplices and keeping up the file patient's classification. The UNAIDS and OHCHR International Guidelines on HIV/AIDS and Human Rights give essential direction on when medicinal services experts ought to participate in accomplice warning without consent.⁵⁶ This is already an established rule even though it is still in contradiction with the human rights policy and demands of a privacy and confidentiality policy.⁵⁷ This dissertation will not deal much in the area as its aim is to portray that disclosing is necessary. This is because according to the argument this dissertation intends to present, non-disclosure of HIV status before engaging in a sexual conduct should be considered as fraud.

⁵⁶ UNAIDS & OHCHR, *International Guidelines on HIV/AIDS and Human Rights*, 2006 Consolidated version (UNAIDS & Office of the United Nations High Commissioner for Human Rights 2006). http://data.unaids.org/Publications/IRC-pub07/JC1252-InternGuidelines_en.pdf?preview=true. (Accessed: 25 July 2018).

⁵⁷ Gostin, Lawrence O. & Zita Lazzarini, *Human Rights and Public Health in the AIDS Pandemic* (Oxford University Press 1997).

2.5. Conclusion

In this chapter the dissertation dealt with the duty to disclose where ethical and legal considerations in relation to privacy, and confidentiality were discussed. This dissertation touched on the ethical issues around disclosure and thereafter concluded with the necessity to disclose. This is because non-disclosure can be considered as unethical as well, and the aim of this dissertation is to postulate that non-disclosure of HIV/AIDS status before engaging in a sexual conduct should be considered as fraud. This is why the next chapter touches on fraud and its elements, discussing what fraud is, and the elements in fraudulent acts, to see if it applies to what the dissertation is arguing for.

Chapter Three

Fraud and its Elements

3.1. Introduction

The previous chapter dealt with the duty to disclose where ethical and legal considerations in relation to privacy, and confidentiality were discussed. In the above chapter the researcher touched on the ethical issues around disclosure and thereafter concluded with the necessity to disclose. This is because non-disclosure can be considered as unethical as well and the aim of this dissertation is to postulate that non-disclosure of HIV/AIDS status before engaging in a sexual conduct should be considered as fraud. Therefore, it is evident that fraud is central to the argument advanced in this dissertation. This chapter seeks to discuss fraud and its elements.

3.2. Fraud

Fraud is when one unlawfully and intentionally makes a misrepresentation to the other person causing prejudice, harm or potential harm and prejudice to the other person.⁵⁸ It is among the oldest human occupations.⁵⁹

The crime of fraud can be dated back to Roman law which was based on the crimes of *stellionatus*⁶⁰ and various *crimina falsi*.⁶¹ These crimes were later reviewed and merged into a single offence under the legislative authority of the Roman-Dutch law

⁵⁸ Burchell JM *Principle of Criminal Law* 4 ed (2013)721; Snyman CR *Criminal Law* 523.

⁵⁹ Ever since Jacob obtained Isaac's (his father's) blessing by impersonating his brother Esau, the effort to get something for nothing has been a recurring theme in most literature and case law. This oldest story of fraud is told in Genesis 27: 1-35 NKJV. Today, Jacob and his mother, Rebekah, could have been charged with fraud and conspiracy.

⁶⁰ Roman, civil, & Scots law. : a fraud not distinguished by a more special name especially : a sale of the same property to different persons or the sale of something as one's own which belongs to another.

⁶¹ Snyman CR *Criminal Law* 6 ed (2014) 523.

crime of fraud, referred to as *falsitas*.⁶² The unitary concept of fraud as a crime involving proprietary and non-proprietary interests, as well as real or potential prejudice, was accepted by the Appellate Division (AD), now the Supreme Court of Appeal (SCA), early in the 20th century.⁶³

Furthermore, there are early references to fraud in English common law—the legal system on which the American legal system is based defines fraud as cheating or deceit.⁶⁴ A common-law cheat was one who, by false pretences, false tokens, or intentionally false representations, induced someone else to part with his property or personal rights.⁶⁵ Fraud, then, has a historical foothold in English civil law as well as in criminal law.⁶⁶ This dual status is retained in modern American courts. For fraud to occur, criminal and civil actions are both pursued in relation to the same act: prosecutors may file a criminal complaint and the harmed party can file a civil action for recovery of damages or property.

Similarly, it is arguable that a misrepresentation or an intentional withholding of one's HIV status should be treated as a crime of fraud. This is because the intentional move to hide one's HIV status or a false representation of one's status before engaging in an unprotected sexual conduct can lead to infecting the other person with a life threatening disease.

⁶² Ibid.

⁶³ *R v Dyonta and another* 1935 AD 52; *R v Kruse* 1946 AD 524; *R v Heyne and others* 1956 (3) SA 604 (A).

⁶⁴ ACFE. The Fraud Trial. https://www.acfe.com/uploadedFiles/Shared_Content/Products/Self-Study_CPE/Fraud-Trial-2011-Chapter-Excerpt.pdf. (Accessed: 25 July 2018)

⁶⁵ Ibid.

⁶⁶ Ibid.

Viewed as a victimless crime, fraud does not draw community and political reaction like other crimes.⁶⁷ Yet, while it is less dramatic than crimes of violence like murder or rape, many now believe that fraud can be as serious as or even more serious than certain types of street crimes.⁶⁸ Therefore, the need to critically review the underpinning concepts relating to fraud, around non-disclosure of HIV and AIDS status before engaging in sexual conduct, becomes of great importance in this dissertation.

3.3. The Elements of Fraud

In criminal law there are four elements of fraud; these are; misrepresentation, unlawfulness, intent, and prejudice. These elements are necessary to discuss in this dissertation as this dissertation aims to deal with the act of intentionally withholding information about one's HIV and AIDS status to the sexual partner. So, to proceed with the argument in the dissertation it will be necessary to elaborate on these four elements of fraud.

3.3.1. Misrepresentation

This is of relevance in the context of fraud because there has to be a misrepresentation involving the act or an attempt to distort the truth.⁶⁹ This can be in different forms; it can be implied or expressed. A case of a behaviour that constitutes fraudulence or misrepresentation is conspicuous in *S v Mdantile*⁷⁰ where there was proof of the accused bribing a security official to gain entrance to the station platform

⁶⁷ Chapman, A. & Smith, R.G. 2001, 'Controlling financial services fraud', *Trends and Issues in Crime and Criminal Justice*, No. 189, Australian Institute of Criminology, Canberra.

⁶⁸ DJ Rebovich, & JL Kane "An eye for an eye in the electronic age: Gauging public attitude toward white collar crime and punishment" (2002) (1) *Journal of Economic Crime Management* 2.

⁶⁹ *Criminal Law 2nd ed* (2013) 434.

⁷⁰ *S v Mdantile* 2011 (2) SACR 142 (FB).

and thence on to the train. The inability of the accused to produce a ticket to the ticket examiner made it clear that the accused had not purchased a train ticket. The accused was charged with fraud on the basis that the accused's conduct of representing to the world that he/she had a valid ticket, knowing that such representation was false was fraudulent. Thus, the accused's conduct amounted to false representation – and such conduct was intended to induce Transnet to convey the accused at its expense and to its detriment. So, misrepresentation and prejudice was established which is considered by the court as the crime of fraud.

This is similar to instances where people lie about their HIV status to get sexual gratification as pointed out previously in this dissertation. The act of withholding or giving false information about one's HIV and AIDS status so that the partner will agree to engage in unprotected sex with them should be considered as fraud as this dissertation seeks to argue for. This is because such conduct amounts to false representation and it intends to induce the partner to have sex with them without protection, which will bring pleasure but at the health detriment of the HIV free partner. Thus, cases like this should be considered as misrepresentation and prejudice which is fraud as the above case presents.

In addition, if the accused for instance buys goods on credit from the complainant, the accused implicitly represents to the complainant that he, the accused, will pay for the goods at some future time and will be in a position to do so. If at the material time, the accused harboured no such intention or belief, he/she misrepresents his states of mind to the complainant and this can be considered as a crime of fraud.⁷¹

⁷¹ *R v Persotam* 1938 AD 92; *S v Latib* 1973 (3) SA 982 (A).

This can be linked to a clear case of one telling one's partner that one is HIV negative while one is completely aware that one's HIV status is positive. This person equally has misrepresented their state of mind and should be charged with fraud.

Misrepresentation can be seen in two forms and these are the form of a positive act or an omission. An omission arises when the accused is under the legal duty to disclose a fact, the non-disclosure of which may induce the complainant to act to his or her prejudice. The legal duty to disclose may also arise from legislation. For instance, the *Law of South Africa Encyclopaedia*⁷² states that directors are obliged to disclose their interest in every contract concluded between their company and the third party.⁷³ In addition, section 76(2)(b) of the Companies Act⁷⁴ requires directors to disclose information that may affect the interest of the company to the board. In *S v Heller*⁷⁵ Trollip articulated the legal principles with respect to fraud based on non-disclosure⁷⁶ as presented below:

- A duty to disclose the particular fact must exist.
- There must be a wilful breach of this duty under such circumstances as to equate the non-disclosure with a representation of the non-existence of that fact.
- There must be an intention to defraud. This involves knowledge of the particular fact, awareness and appreciation of the existence of the duty to disclose, and

⁷² Skeen A st Q and Hoor S 'Criminal Law' in Joubert WA and Faris JA (eds) *Law of South Africa Encyclopedia (LAWSA)* 2 ed Vol 6; The Companies Act 71 of 2008.

⁷³ Ibid.

⁷⁴ Companies Act 71 of 2008.

⁷⁵ *S v Heller and another* 1964 (1) SA 524 (W).

⁷⁶ *S v Gardener and another* 2011 (1) SACR 570 (SCA).

deliberate refraining from disclosure in order to deceive and induce the representee to act its prejudice or potential prejudice.

- Actual or potential prejudice of the representee must occur.

Alternatively, the accused may be under the duty to correct a misconception of the complainant where in the normal course of events the complainant would be misled if the accused failed to take corrective measures.⁷⁷

S v Yengeni further illustrates the duty to disclose where a member of parliament failed to disclose a gift in breach of the parliamentary code of conduct. However, a breach of the code *per se* did not amount to fraud, the court found that there was a legal obligation on the accused to speak. Consequentially, his failure to speak was intended to mislead Parliament and this amounted to fraud.⁷⁸ This is a clear case that is directly linked to the argument in the dissertation. This is because one has the duty to speak in a circumstance where trust and confidence has been reposed on you. However, if the issues of one's HIV status do not come up one is obliged to speak before the other gets infected.

Conclusively, misrepresentation covers a wide range of issues including the issues that are addressed in this dissertation. The act of misrepresenting one's health information when it will affect the other can be considered as fraudulent.⁷⁹

⁷⁷ *R v Larkins* 1934 AD 91.

⁷⁸ *S v Yengeni* 2006 (1) SACR 405 (T).

⁷⁹ *S v Macdonald* 1982 (3) SA 220 (A).

3.3.2. Unlawfulness

Theoretically, the usual defences, such as coercion considered in the context of the general principles of criminal law, will be available to the accused. However, it is no defence to allege that the complainant was aware of the falsity of the misrepresentation.⁸⁰

3.3.3. Intent

The onus is on the State to prove that the accused intended to defraud. This is discharged directly where it proves that the accused was aware that his misrepresentation was false. It is not necessary for the State to allege and prove that the accused intended to defraud any particular person. It is, however, necessary to allege and prove that a more generic somebody⁸¹ has been prejudiced or potentially prejudiced. Section 103 of the Criminal Procedure Act 51 of 1977 provides as follows ⁸²:

In any charge in which it is necessary to allege that the accused performed an act with an intent to defraud, it shall be sufficient to allege and to prove that the accused performed the act with intent to defraud without alleging and proving that it was the intention of the accused to defraud any particular person, and such a charge need not mention the owner of any property involved or set forth the details of any deceit.⁸³

⁸⁰ LAWSA 6 at para 311; S v Heller supra.

⁸¹ R v Jones and More 1926 AD 350 at 354; Du Toit E et al] *Commentary on the Criminal Procedure Act* (Revision service 54, 2015) 14-44-14-45.

⁸² Criminal Procedure Act 51 of 1977.

⁸³ S v Avion Motor. Enterprises (Pty) Ltd 1978 (4) SA 692 (T) at 694B.

It is open for the State to prove intention in the form of *dolus eventualis*⁸⁴. This type of *dolus* is present where the accused makes a representation foreseeing the possibility that it may be false, but nevertheless goes ahead with it. The accused may be indifferent as to whether it is true or false. The reckless conduct of the accused in this regard satisfies the requirement of *dolus eventualis*.⁸⁵

This is related to instances of ignorance and negligence where someone does not know their HIV status and they are not interested in getting tested, yet they are engaging in an unprotected sexual conduct. This suffices to be fraud under *dolus eventualis*.

An intention to deceive should not be confused with an intention to defraud. Prejudice is the key to the distinction between each form of intent. Deception takes place when one attempts to persuade Y that something is true when it is in fact false. Fraud involves this deception, but goes further. It includes an intention to induce Y to act to his prejudice.⁸⁶

Once an intention to defraud has been proved, the actual motive behind the intent is irrelevant.⁸⁷

⁸⁴ Intent in the form of **dolus eventualis** or legal intention, which is present when the perpetrator objectively foresees the possibility of his act causing death and persists regardless of the consequences, suffices to find someone guilty of murder.

⁸⁵ *Ex parte Lebowa Development Corporation Ltd* 1989 (3) SA 71 (T).

⁸⁶ *S v Isaacs* 196B (2) SA 187 (D).

⁸⁷ *S v Shepard and others* 1967 (4) SA 170 (W).

3.3.4. Prejudice

The prejudice must be actual or potential.⁸⁸ While actual prejudice is clear, potential prejudice requires further explanation. 'The prejudice must not be too remote. There must be a reasonable possibility that the misrepresentation may prejudice another.'⁸⁹ The emphasis falls on the potential nature of prejudice. It is irrelevant whether the complainant acted on the representation or whether the accused's deception was successful.⁹⁰ Nor does it matter whether the complainant was aware at any moment that the misrepresentation was false.⁹¹ On this basis, the accused may be convicted of fraud where he/she is the target of a police trap. The fact that members of the trap were aware that the accused's misrepresentation was false is not a defence to a charge of fraud.⁹²

The prejudice, whether actual or potential, need not be proprietary in nature. Writing an examination in the name of another candidate amounts to fraud in circumstances where the intention is to deceive the examiners as to the true identity of the person who attempted the examination.⁹³ This approach was confirmed in the context of tender fraud where the appellants failed to disclose in a tender application their connection to the entity which had awarded the tender, in this case the Department of Education. It was argued on their behalf that the Department had not suffered prejudice as it had paid moneys for services rendered. However, the Court held that

⁸⁸ *S v Kruger and another* 1961 (4) SA 816 (A); *S v van Niekerk* 2014 JDR 2196 (KZP).

⁸⁹ *S v Myeza* 1985 (4) SA 30 (T).

⁹⁰ *S v Isaacs* 196B (2) SA 187 (D).

⁹¹ *S v Campbell and others* 1991 (I) SACR 435 (Nm).

⁹² *S v Swarts en 'n ander* 1961 (4) SA 589 (GW).

⁹³ *R v Thabeta and another* 1948 (3) SA 218 (T).

the non-disclosure 'is prejudicial to other tenderers, and the community at large, and frustrates the state's efforts to eliminate the favouritism the 'declaration of interest' seeks to combat'.⁹⁴

The failure to allege prejudice in the indictment renders an indictment alleging fraud defective.⁹⁵

3.4. The Relevance of Fraud to the Research

From the above presentation, it is clear that fraud is one of the oldest crimes among human beings and it has been seen in different ways depending on the time and the group of people. In the current South African structure, it is considered a criminal offence with a distinct meaning. The meaning of fraud is consistent with the conception of a wilful perpetration of an act that is a total misrepresentation of the true reality.

Deductively from the above definition and explanation it can be argued that non-disclosure of HIV/AIDS status before engaging in sexual conduct should be considered as fraud. This is because it is a misrepresentation to intentionally engage in unprotected sex with another without making them aware of the fact that one is HIV positive. This will lead to infecting the other person with a life-threatening disease. On the other hand, the South African constitution gives credit to individual privacy and confidentiality. This makes it possible for an HIV/AIDS patient to decide legally who he or she wants to share his or her status with. However, the right to privacy ends where it infringes on another person's right to life and good health.⁹⁶ The act of not disclosing ones HIV status before engaging in an unprotected sex might lead to infecting the

⁹⁴ *S v Tshopo and others* 2013 (1) SACR 127 (FB) at 130B-C.

⁹⁵ *Essop v S and others* [2014] 3 All SA 337 (KZP).

⁹⁶ Section 36 of the Constitution 1996.

other person with HIV virus. Thus there is a legal duty placed on an HIV positive person who knows his or her status to disclose it to any person he or she want to engage with in an unprotected sexual intercourse.⁹⁷ Therefore the other person has a right to consent to unprotected sex with him or her knowing the potential risk of being infected. Therefore there will be no crime committed by the HIV positive person if he or she has disclosed to him or her.

3.5. Conclusion

In this chapter it has been presented that fraud is when one unlawfully and intentionally makes a misrepresentation to the other person causing prejudice and harm, or potential harm and prejudice to the other person.⁹⁸ It is among the oldest human occupations. This chapter also pointed out in detail that in criminal law there are four elements of fraud, these are misrepresentation, unlawfulness, intent, and prejudice. This chapter also showed how these elements are necessary for the dissertation as it aims to deal with the act of intentionally withholding information about one's HIV and AIDS status to the sexual partner. As the above has been presented, the next chapter will deal with the argument in the dissertation using the case of *Phiri v S* for analysis.

⁹⁷ Criminal Law (Sexual Offenses and Related Matters) Amendment Act 32 of 2007.

⁹⁸ Burchell JM *Principle of Criminal Law* 4 ed (2013)721; Snyman CR *Criminal Law* 523.

Chapter Four

Analysis and Conclusion

4.1. Introduction

The previous chapter presented fraud and its elements and linked them to non-disclosure of HIV status. This chapter deals with the analysis, argument and conclusion of the dissertation; this section presents the argument for the dissertation using the case of *Phiri v S* as the central case for the argument. It will also present the conclusive idea of the researcher, as well as recommendations for policy and law amendments.

4.2. Analysis

4.2.1. Analysis using the case of *Phiri v S*

There is a developing agreement that on the off chance that somebody purposely or deliberately transmits HIV to a sexual accomplice, that individual merits legitimate authorization.⁹⁹ South Africa has selected not to set up a different arrangement of criminal offenses to condemn HIV transmission in this setting¹⁰⁰, dissimilar to a few other African nations that have set up independent wrongdoings for the deliberate or careless transmission of HIV:¹⁰¹ for example, Benin, Botswana, Lesotho, Malawi, Mali,

99 Bunnell et al 'Changes in sexual risk 1 behaviour and risk of HIV transmission after antiretroviral therapy and prevention interventions in rural Uganda' (2006) *AIDS* 85-92 and Marks et al 'Meta-analysis of high-risk sexual behaviour in persons aware and unaware they are infected with HIV in the United States: implications for HIV prevention programs' (2005) *Journal of Acquired Immune Deficiency Syndromes* 446-53.

100 South African Law Commission Project 85 Fifth interim report on aspects of the law relating to AIDS: The need for a statutory offence aimed at harmful HIV-related behaviour.

101 Pieterse 'Disentangling illness, crime and morality: Towards a rights-based approach to HIV prevention in Africa' (2011) *African HRLJ* 57; and Canadian HIV/AIDS Legal Network (2007) *A human rights analysis of the N'djamena model legislation on AIDS and HIV specific legislation in Benin, Guinea, Guinea Bissau, Mali, Niger, Sierra Leone and Togo*.

Niger, Sierra Leone, Uganda, Tanzania, Togo, Zambia and Zimbabwe.¹⁰²

Nonetheless, in South Africa, strategy contemplations have provoked the utilization of existing criminal law standards in court cases managing the purposeful or careless transmission of HIV to sexual partners.¹⁰³

As of recently, shockingly couple of common or criminal cases that identify with the unjust or unlawful transmission of HIV amid sex have achieved our courts. This is because of an assortment of variables. In any case, with regards to the transmission of transmittable illnesses, for example, HIV, it is hard to demonstrate the component of causation – explicitly verifiable causation – required for criminal and delictual obligation.¹⁰⁴ The best-known reported case concerning the intentional or negligent transmission of HIV to a sexual partner is a delictual action for damages, namely, *Venter v Nel*.¹⁰⁵ Regrettably, *Venter v Nel* is considered 'bad' law because the claimant's action was unopposed and judgment by default was granted.

Therefore, in light of the dearth of cases concerning the transmission of HIV to sexual partners, this research examines the implications of the recent North Gauteng High Court decision in *Phiri v S* for potential charges or claims regarding the unlawful or wrongful transmission of HIV, and questions the appropriateness of the court's decision in the context of public health efforts to curb the epidemic. Thus, the next

¹⁰² Eba 'Pandora's box: The criminalisation of HIV transmission or exposure in SADC countries' in Viljoen and Precious (eds) *Human rights under threat: Four perspectives on HIV, AIDS, and the law in Southern Africa* (2007) 29-34.

¹⁰³ Van Wyk 'The need for a new statutory offence aimed at harmful HIV related behaviour: The general public interest perspective' (2000) *Codicillus* 2; Viljoen 'Stigmatising HIV/AIDS, stigmatising sex? A reply to Professor Van Wyk' (2000) *Codicillus* 11.

¹⁰⁴ Ibid 163 – 164.

¹⁰⁵ *Venter v Nel* 1997 4 SA 1014 (D).

section will present an outline of the facts and the North Gauteng High Court's decision in *Phiri v S*, after which the wisdom of the court's decision on the facts is questioned.

4.2.2 The criminal law element in relation to HIV transmission

looking at *Phiri v S* case.

South African criminal law recognizes two types of fault: intention and negligence.¹⁰⁶ As a form of fault, negligence is an attitude or conduct by an individual which reflects 'lack of regard, neglectfulness or hastiness in light of the fact that, by giving inadequate consideration regarding his activities he neglected to hold fast to the standard of consideration lawfully expected of him'.¹⁰⁷ As the accused in the case under discussion was charged with attempted murder, for which intention and not negligence is required, I here leave the discussion of negligence and below focus on intention.

The elements of the crime of attempted murder as outlined by our courts are unlawfulness, intention (to kill) and an attempt.¹⁰⁸ Attempted murder, then, may be defined as the unlawful intentional attempted killing or causing the death of another human being.¹⁰⁹ Causality is not an element of attempted murder.¹¹⁰

It is now generally accepted that a conviction for attempt will lie even when the act constituting the attempt is frustrated or rendered impossible by circumstances not within the contemplation of the perpetrator. This view rests on the premise that criminal law has as its aim the protection of public and social interests. Therefore, the question

¹⁰⁶ Burchell *Principles of criminal law* (2006) 545; Snyman *Criminal law* (2008) 159.

¹⁰⁷ Neethling, Potgieter and Visser *Law of delict* (2006) 116.

¹⁰⁸ *S v Ndlovu* 1984 ZASCA 84; 1984 3 SA 23(A).

¹⁰⁹ Burchell JM *Principle of Criminal Law* 4th Ed (2013, Cape Town: Juta and Company (PTY) LTD) 159; Snyman *Criminal law* (2008) 159

¹¹⁰ *S v Ndlovu* (n 12) para 28 A–C.

of the criminality of an attempt will depend in part on the actor's intent and in part on the degree of actual danger to social or public interest arising from such acts.

Fault, in the form of intention, needs to be proved beyond reasonable doubt for an accused to be guilty of attempted murder.¹¹¹ Intention, or *dolus*, is present when a person commits an act 'while his will is directed towards the commission of the act or the causing of the result; in the knowledge of the existence of the circumstances mentioned in the definitional elements of the relevant crime; and in the knowledge of the unlawfulness of the act'.¹¹² Intention consists of two elements: a cognitive (or intellectual) element and a conative (volitional or voluntative) element.¹¹³ Three forms of intention exist: direct intention; indirect intention; and *dolus eventualis*.¹¹⁴ To prove a charge of attempted murder, the state needs to prove the presence of any one of the three forms of intention in the actions of the accused.

In the case of direct intention, or *dolus directus*, the person is directing his will towards achieving a result (the result or act is his or her goal).¹¹⁵ In the context of the transmission of HIV to a sexual partner, *dolus directus* is present in instances where the HIV positive partner has sexual intercourse with someone with the direct intention of transmitting the virus. In other words, his aim is expressly to infect the other person and he is directing his will towards achieving that result; towards infecting his partner.

¹¹¹ Burchell JM *Principle of Criminal Law* 4th Ed (2013, Cape Town: Juta and Company (PTY) LTD); Snyman *Criminal law* (2008) 159.

¹¹² Snyman CR *Criminal Law* 6th Ed (2014, Durban; LexisNexis).

¹¹³ *Ibid* 182.

¹¹⁴ Burchell JM *Principle of Criminal Law* 4th Ed (2013, Cape Town: Juta and Company (PTY) LTD); Snyman CR *Criminal Law* 6th Ed (2014, Durban; LexisNexis).

¹¹⁵ Snyman CR *Criminal Law* 6th Ed (2014, Durban; LexisNexis).

Thankfully, instances of the transmission of HIV in which direct intention is present, are rare if there are any.¹¹⁶

In the case of indirect intention, or *dolus indirectus*, the prohibited act or result is not the person's goal, but he realises, if he wants to achieve his goal, the prohibited act or result will of necessity materialise.¹¹⁷ In the context of HIV transmission, the transmission of the virus is not the HIV positive sexual partner's goal but he realises, if he wants to achieve his goal, the transmission of the virus will of necessity materialise. Put differently, this form of intention requires that the HIV positive sexual partner must foresee, as a certainty, the transmission of the virus to his sexual partner and he must have reconciled himself to that certainty. Indirect intention differs from direct intention with regard to the sexual transmission of HIV in that, in the case of indirect intention, the HIV positive partner does not specifically will the infection of the other partner as his aim, but foresees it (as a certainty) and reconciles himself to it. Of course, indirect intention in the context of the transmission of HIV during sexual intercourse will be almost impossible to establish: it is scientifically impossible to be sure that one will transmit the HIV virus during sexual intercourse. In fact, one's chances of transmitting the virus are as low as 0.04 per cent per sexual encounter.¹¹⁸ The certainty required for indirect intention to be present, then, is unlikely, if ever, to be established in the case of the sexual transmission of HIV.

116 Bunnell et al 'Changes in sexual risk 1 behaviour and risk of HIV transmission after antiretroviral therapy and prevention interventions in rural Uganda' (2006) *AIDS* 85-92 and Marks et al 'Meta-analysis of high-risk sexual behaviour in persons aware and unaware they are infected with HIV in the United States: implications for HIV prevention programs' (2005) *Journal of Acquired Immune Deficiency Syndromes* 446-53.

117Snyman CR *Criminal Law* 6th Ed (2014, Durban; LexisNexis).

118Centres for Disease Control and Prevention (2011) 'HIV/AIDS statistics overview: Transmission risk' from *HIV surveillance report: Diagnoses of HIV infection and AIDS in the United States and dependent areas*, available at: <http://www.cdc.gov/hiv/policies/law/risk.html>.

The third form of intention, *dolus eventualis*, is most relevant to the sexual transmission of HIV in the case under discussion. *Dolus eventualis*, as a form of intention, may be defined as follows: the doer 'actively foresees'¹¹⁹ the possibility that, in striving to attain his main aim, the unlawful act may be committed or the unlawful result may be caused, and reconciles himself to that possibility.¹²⁰ This form of intention requires that the HIV positive sexual partner foresees the possibility of the infection of the other partner and reconciles himself to that possibility.¹²¹ Although not directly willing his sexual partner's infection with HIV, he will have *reconciled* himself to the *possibility* that sexual intercourse may bring about his sexual partner's HIV infection. It is important to distinguish *dolus eventualis* from negligence. In respect of negligence, the HIV positive sexual partner does not foresee the eventuality of infecting the HIV negative sexual partner, though he reasonably should have foreseen it, and, therefore, does not take the steps reasonably required of him to prevent the infection of his sexual partner. In the case of *dolus eventualis*, the HIV positive sexual partner foresees the risk of infection and reconciles himself to that risk.

Regardless of whether the deliberate transmission of HIV to a sexual accomplice amid intercourse establishes a criminal offense was considered by our courts in *S v Nyalungu*.¹²² In *Nyalungu* it was set up that lead by a HIV positive sexual accomplice who does not take measures to forestall transmission amid sex establishes the important mens rea and sums to attempted murder.¹²³ Beneath, the realities of Phiri

¹¹⁹Snyman CR *Criminal Law* 6th Ed (2014, Durban; LexisNexis).

¹²⁰ *Ibid.*

¹²¹ Nienaber, A. 2014. "The Intentional sexual transmission of HIV" *SAPL* (29).

¹²² *S v Nyalungu* 2013 2 SACR 99 (T) 1. The case was reported only in 2013.

¹²³ *Ibid.*

just as the North Gauteng High Court's judgment in the issue are plot, trailed by ends in regards to the potential effect of the Court's judgment upon a charge of the deliberate transmission of HIV amid sex. Note that it is not the point of this discourse to dissect the High Court's treatment of the component of blame in detail, yet rather to analyze the ramifications of the Court's judgment in regard of future prosecution with respect to the sexual transmission of HIV.

4.2.3 The case of *Phiri v S* in the North Gauteng High Court

The case concerns an appeal to the North Gauteng High Court from the Piet Retief Regional Court, in which the appellant, Mphikeleli Lovers Phiri, was convicted of attempted murder and given a six-year prison sentence. The appellant was employed as a HIV counsellor at the complainant's local clinic.¹²⁴ They met when the complainant underwent a HIV test.¹²⁵ The complainant tested HIV negative.¹²⁶ At that stage Phiri had been living with HIV for about three years and he was aware of his HIV positive status.¹²⁷

Subsequently, a relationship developed between the complainant and Phiri during which they had sexual intercourse on two occasions.¹²⁸ On neither occasion did Phiri use a condom, despite being requested to do so by the complainant.¹²⁹ The complainant subsequently tested HIV positive.¹³⁰ As she not had sex with anyone but

¹²⁴ *Phiri V S* para 2.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ *Ibid* para 3.

¹²⁹ *Ibid.*

¹³⁰ Nienaber, A. 2014. "The Intentional sexual transmission of HIV" *SAPL* (29).

Phiri the complainant confronted him, whereupon Phiri apologised and asked for her 'forgiveness'.¹³¹

The only issue in dispute before the trial court was whether Phiri had used a condom during sexual intercourse.¹³² After initially stating that he did not tell the complainant that he was HIV positive, he changed his version during cross examination and then stated that he had told the complainant that he was HIV positive before they had intercourse for the first time and that he had used a condom on both occasions.¹³³ The trial court rejected Phiri's version of events and found him guilty of attempted murder.¹³⁴

Before the North Gauteng High Court, the appellant alleged that the Regional Court had erred in its evaluation of the evidence and its application of the law, as he did not have the necessary *mens rea* to sustain a conviction of attempted murder.¹³⁵ No proof was tendered either in the trial court or the appeal court that the appellant in fact infected the claimant with HIV.

The North Gauteng High Court, per Makgoka J and Baloyi AJ, stressed that they could not interfere with the trial court's finding on the facts (rejecting Phiri's version that he had used a condom on both occasions during sexual intercourse) as lacking in credibility and not being supported by the evidence.¹³⁶ In its judgment, the court did not specify why, in its mind, fault in the form of *dolus eventualis* was present in the

¹³¹ *Ibid* para 2.

¹³² *Ibid* para 4.

¹³³ *Ibid*.

¹³⁴ *Ibid*.

¹³⁵ *Ibid* para 5.

¹³⁶ *Ibid* para 9.

appellant's behaviour. Instead, relying on *S v Nyalungu*, the court found that the appellant acted with intention, and merely stated¹³⁷ that it is to be borne in mind that the appellant was not convicted of having in fact transmitted HIV to the complainant. The State did not have to go that far. It was sufficient for a conviction on the count of attempted murder, to establish that the appellant, knowing that he was HIV positive, engaged in sexual intercourse with the complainant, whom he knew to be HIV negative, without any preventative measures. This entails the presence of *mens rea* in the form of *dolus eventualis*.

The judges equally rejected the appellant's argument that he should have been found guilty not of attempted murder but of assault or assault with the intent to cause grievous bodily harm.¹³⁸ In this regard the court stressed that there is still no cure for AIDS and infection with HIV is likely to result in a reduced lifespan.¹³⁹ The court further stated that it was established in *S v Nyalungu*¹⁴⁰ that conduct of this kind (sexual intercourse without a condom) constitutes attempted murder and not assault, and that the appellant was thus properly convicted of attempted murder in the trial court.¹⁴¹

As respects the intrigue against the appealing party's six-year jail sentence, the court dismissed the litigant's contention that a six-year jail term is 'exasperatingly wrong' for a first guilty party who is HIV positive.¹⁴² It was additionally battled that the preliminary court did not consider that the litigant and the complainant were seeing someone, in

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ Nienaber, A. 2014. "The Intentional sexual transmission of HIV" *SAPL* (29).

¹⁴⁰ *S v Nyalungu* 2013 2 SACR 99 (T) 1. The case was reported only in 2013.

¹⁴¹ *Phiri V S* para 9.

¹⁴² *Ibid* para 14.

this manner, that there was no constrained sex.¹⁴³ The judges dismissed these contentions too. They expressed this could rather be an irritating element, just like the way that the litigant was a HIV and AIDS instructor.¹⁴⁴ The North Gauteng High Court expelled the intrigue, and the appealing party's conviction and sentence were affirmed.¹⁴⁵

4.3 Argument

As said above, the discussion does not concern itself with the soundness of the Gauteng North High Court's finding or, specifically, the soundness of its approach regarding fault as a criminal element in cases concerning the sexual transmission of HIV, but rather with the possible consequences of the court's judgment for public health efforts to combat the spread of HIV and AIDS.

On the face of it, a finding that fault in the form of *dolus eventualis* is present and also is sufficient for a conviction of attempted murder in cases concerning the sexual transmission of HIV if the HIV positive sexual partner fails to wear a condom, sends a necessary warning to sexual partners to take preventive measures and so curb the spread of the HIV epidemic. Such a finding may be seen by many as a laudable attempt to curb the spread of the HIV infection. However, let us consider whether the court's finding really advances public health efforts in the context of the transmission of HIV in South Africa.

As evidence was never presented either in the trial court or in the Gauteng High Court that the appellant actually infected the complainant (it was merely deduced that he

¹⁴³ *Ibid* para 15.

¹⁴⁴ *Ibid*.

¹⁴⁵ *Ibid* paras 10; 18-19.

infected her with HIV on her evidence that he was the only person she had sexual intercourse with) and as, after all, causation is not an element to be proved for a conviction on a charge of attempted murder, the court's finding, in fact, is punishing mere *exposure* to HIV in the form of unprotected sex as attempted murder, rather than unprotected sex resulting in actual transmission. The appellant was found guilty and sentenced because he, on the evidence of the complainant, had unprotected sexual intercourse with her while being HIV positive. In other words, it was not necessary to prove that the appellant had in fact infected the complainant.

From the High Court's judgment, therefore, it is clear that for a conviction on a charge of attempted murder in cases of the alleged sexual transmission of HIV, it must be established beyond reasonable doubt: a) the HIV positive sexual partner knew that he was HIV positive; and b) that he had unprotected sex with the complainant knowing that he put that complainant at risk of infection. Such an approach has several limitations from a public health perspective. These limitations are discussed in the following paragraphs.

To start with, HIV and AIDS are again disparaged¹⁴⁶ and through this social refinements are improved. Disgrace in this way turns out to be a piece of the social battle for power. Distinction is changed into imbalance. Besides, shame is utilized to deliver, legitimize and imitate social imbalances by building up contrast. What's more, distinction in this manner comprised is utilized to discover where gatherings of individuals fit into the structures of intensity' or are treated as having 'remarkable' illnesses:¹⁴⁷ There have been no cases revealed where the deliberate presentation of

146 Nienaber, A. 2014. "The Intentional sexual transmission of HIV" *SAPL* (29).

147 Smith and Whiteside 'The history of AIDS exceptionalism' (2010) *Journal of the International AIDS Society* 47.

someone else to other possibly dangerous irresistible sicknesses, for example, multi-sedate safe tuberculosis, smallpox, cholera or Ebola has brought about fruitful feelings of endeavoured homicide. HIV and AIDS are singled out for unique lawful approval.

Much has been written about the motivations behind the stigmatisation of diseases, most notably the stigmatisation of HIV and AIDS. The stigmatisation of HIV and AIDS is viewed as aiming at conceptually separating those who are ill from the unaffected population, so externalising the threat of the disease and appeasing public fears of contagion.¹⁴⁸ Consequently, society is divided into a healthy 'us' and an infected 'them'.¹⁴⁹ Blame for infection is apportioned to those who are ill; 'healthy members of society can reassure themselves that they are safe against infection and justify their lack of compassion with those who have fallen ill'.¹⁵⁰ By employing criminal sanction, not only is HIV and AIDS stigmatised by the court but those who are ill may be blamed for spreading the disease. I return to this point below.

Second, the North Gauteng High Court's approach is unscientific as it fails to distinguish between different levels of risk per exposure to HIV – the Court found that mere exposure is enough for a conviction and ignored the fact that various factors, not just the use of a condom, can increase or decrease the transmission risk of HIV per exposure. For example, taking antiretroviral therapy can reduce the risk of an HIV-infected person transmitting the infection to another by as much as 96 per cent.¹⁵¹

¹⁴⁸ Pieterse 'Disentangling illness, crime and morality: Towards a rights-based approach to HIV prevention in Africa' (2011) *African HRLJ* 57; and Canadian HIV/AIDS Legal Network (2007) *A human rights analysis of the N'djamena model legislation on AIDS and HIV specific legislation in Benin, Guinea, Guinea Bissau, Mali, Niger, Sierra Leone and Togo*.

¹⁴⁹ *Ibid*.

¹⁵⁰ *Ibid*.

¹⁵¹ Cohen et al 'HPTN 052 Study Team. Prevention of HIV-1 infection with early antiretroviral therapy' (2011) *New England Journal of Medicine* 493 – 505.

Conversely, having a sexually transmitted infection or a high level of HIV in the blood (which happens in early and late stages of HIV infection) may increase the transmission risk.¹⁵² The High Court did not consider whether the appellant, in fact, was on antiretroviral therapy at the time of exposing the complainant to determine the risk of HIV transmission, only whether he wore a condom. In other jurisdictions, the question of whether the accused is on antiretroviral therapy is an important consideration in determining guilt.¹⁵³

Third, as indicated before, the motivation behind the court's judgment may well have been to encourage safe sex practices amongst sexual partners and to encourage HIV positive partners to disclose their status. In South Africa, however, the disclosure of one's HIV status is not a simple matter. In South Africa, it may well be that sexual partners do not disclose their HIV-positive status because of the fear of violence or other serious negative consequences. On occasions, women living with HIV and AIDS are killed when they reveal their status, as in the well-publicised case of Gugu Dlamini who was stoned to death by her neighbours.

South African ladies are more terrible hit than the plague than men, because of financial components, just as natural elements.¹⁵⁴ Subsequently, almost certainly, ladies, instead of men, will be accused of endeavored homicide for uncovering their sexual accomplices to HIV disease. At times it likely could be that they disregard to uncover their status, either in view of monetary reliance on their male accomplice, or

152 Beauchamp T. L. and J. F. Childress. 2013. *Principle of Biomedical Ethics*. Oxford: Oxford University Press.

153 UNAIDS/WHO (2008) *Antiretroviral therapy and sexual transmission of HIV*, available at: http://data.unaids.org/pub/PressStatement/2008/080201_hivtransmission_en.pdf. (Accessed: 15 September 2018).

154 Nienaber, A. 2014. "The Intentional sexual transmission of HIV" *SAPL* (29).

due to their dread of viciousness and derision. Ladies who live with HIV and AIDS are defamed: once in a while they are even accused for spreading HIV.¹⁵⁵

Moreover, HIV-positive women in most communities are stigmatised as being prostitutes, or 'loose women', or as having 'invited' HIV infection to claim access to social grants.

Stigmatisation leads to discrimination and a violation of equality.¹⁵⁶

The rights of people living with HIV/AIDS are often violated because of their presumed or known HIV status, causing them to suffer both the burden of the disease and the burden of discrimination. Stigmatisation and discrimination may affect the uptake of antiretroviral treatment, and may also affect employment, housing and other rights.

Connected to the negative outcomes of uncovering one's status plot above, is the fourth purpose of analysis against the North Gauteng High Court's judgment. So as to abstain from being accused of endeavoured homicide, many will won't be tried for HIV (as it is required for *dolus eventualis* that the HIV positive sexual accomplice anticipates the likelihood of the disease of the other accomplice and accommodates himself to that probability). In the event that one is unconscious of one's status, one can not anticipate the disease of another amid sex. The North Gauteng High Court's judgment may really be counter-profitable and increment the spread of HIV: on account of the dread of being accused of endeavoured homicide many may not get tried for HIV, persevere in risky sexual practices, thus the plague will proceed.

155 Alexander and Mbali 'Beyond "bitches and prostitutes": *Folding the materiality of gender and sexuality into rights-based HIV/AIDS interventions*' in Viljoen (ed) (2005) *Righting stigma: Exploring a rights-based approach to addressing stigma* 51.

156 Zuberi "'If you (be) Come HIV positive, you will lose your human rights" - HIV/AIDS stigma and human rights: A localised investigation of Hammanskraal communities' in Viljoen (ed) *Righting Stigma: Exploring a right based approach to addressing stigma* (Pretoria: PULP, 2005).

Together with the disparagement of HIV, the Court's judgment adds to the defencelessness of others to disease. A dread of the negative results of knowing one's status, criminal approval and HIV-related disgrace and segregation demoralize people tainted with and influenced by HIV from reaching wellbeing and social administrations.¹⁵⁷ It is in this setting we should see the High Court's judgment.

Finally, the North Gauteng High Court's judgment is contrary to public health studies which show that criminal law assumes, incorrectly, that people engage in sexual intercourse as if it were reasoned, rational and informed behaviour; it entirely fails to deter high-risk conduct and, consequently, exposure to HIV.¹⁵⁸ As well, punishing HIV transmission puts the blame for spreading the epidemic once again on HIV positive people, absolving the rest of the population from taking measures to limit their exposure to the virus and, consequently, accelerating the spread of the epidemic.¹⁵⁹

4.4 Policy Recommendation

This research recommends that South African courts in future should take heed of the warning of UNAIDS that urges governments to limit the criminalisation of sexual HIV transmission to cases of intentional transmission, i.e., in which a person knows his or her HIV positive status and acts with the deliberate and calculated intention to transmit the virus.¹⁶⁰ In addition, courts should, instead, find an accused guilty of fraud and not attempted murder only in circumstances where direct intention in the form of

¹⁵⁷ *Ibid.*

¹⁵⁸ UNAIDS (2002) Criminal law, public health and HIV transmission: *A policy options paper* 21; UNAIDS (2008) *Policy brief on criminalisation of HIV transmission* 4; Adam et al 'Effects of the criminalisation of HIV transmission in Currier in men reporting unprotected sex with men' (2008) *Canadian Journal of Law and Society* 157.

¹⁵⁹ Van Wyk 'The need for a new statutory offence aimed at harmful HIV related behaviour: The general public interest perspective' (2000) *Codicillus* 2; Viljoen 'Stigmatising HIV/AIDS, stigmatising sex? A reply to Professor Van Wyk' (2000) *Codicillus* 11.

¹⁶⁰ *Ibid.*

a wilful and calculated intent to transmit the virus – instead of mere *dolus eventualis* – was proved. As well, the South African government should expand programmes which have been demonstrated to reduce HIV transmission and protect the human rights both of people living with HIV and those who are HIV negative.¹⁶¹

4.5 Conclusion

HIV/AIDS remains one of the enduring epidemics faced by South Africa. Nevertheless, although a lot of prevention methods have been proposed by all the necessary bodies like public health and the legislative council, the rate of transmission increases daily. This dissertation argues, using the case of *Phiri v S*, that there should be a different approach to crimes associated with HIV/AIDS. This is because most cases, especially the one under study, are considered as attempted murder and attempted murder is where the accused intended to kill another living human being but was unsuccessful. With this view, it will be more relevant to argue that non-disclosure of HIV status before engaging in a sexual conduct should be considered as fraud for the following reasons. As presented above, fraud is when one unlawfully and intentionally makes a misrepresentation to the other person causing prejudice, harm or potential harm and prejudice to the other person. With this definition, the act of intentionally withholding information that will cause grievous harm to the other living human being is an act that should be considered as fraud. Thus this dissertation agrees with the policy and legislation around disclosure but argues for an alternative approach to the crime of infecting someone with HIV/AIDS.

¹⁶¹ Ibid.

Conclusively, Pieterse postulates that it is probably fair to say that HIV and AIDS have challenged the way in which we think about the relationship between public health, morality and law, more so than any other disease.¹⁶²

This statement is indeed true for the challenges posed by the criminalisation of the transmission of HIV – criminalisation remains a controversial issue. On the one hand it is argued that criminal sanction will prevent or lessen the intentional transmission of HIV; on the other, public health experts warn that the criminalisation of HIV transmission will hamper efforts to mount an effective public health effort to curb the spread of HIV.

There are no information demonstrating that the use of criminal law to HIV transmission, as criminal assault as feelings for endeavoured homicide, will accomplish either criminal equity or avoid HIV transmission.¹⁶³ Rather, as appeared, criminal approval, in numerous examples, really hampers general wellbeing endeavours to check the spread of HIV by provoking individuals to stay away from HIV testing thus abstain from reaching the general wellbeing administration.

It is in this context that the judgment on *Phiri v S* should be seen. Not only does it appear that *Phiri v S* confirms the criminalisation of mere exposure to HIV during unprotected sex, ignoring the fact that by undergoing antiretroviral treatment the risk of HIV-transmission is substantially lowered, but, also, it is likely to prompt a decrease in the voluntary uptake of HIV-testing. Thus, as presented above this dissertation is not arguing that there should be no crime associated with an intentional transmission

¹⁶² Pieterse 'Disentangling illness, crime and morality: Towards a rights-based approach to HIV prevention in Africa' (2011) *African HRLJ* 57; and Canadian HIV/AIDS Legal Network (2007) *A human rights analysis of the N'djamena model legislation on AIDS and HIV specific legislation in Benin, Guinea, Guinea Bissau, Mali, Niger, Sierra Leone and Togo*.

¹⁶³ UNAIDS/WHO (2008) *Antiretroviral therapy and sexual transmission of HIV*, available at: http://data.unaids.org/pub/PressStatement/2008/080201_hivtransmission_en.pdf. (Accessed: 15 September 2018).

of HIV but it is postulating that it should be considered as fraud which is a lesser crime depending in the gravity of the offense.

Bibliography

Articles

- Adam, B. Elliott, R. Husbands, W. Murray, J. Maxwell, J. 2008. Effects of the criminalisation of HIV transmission in Currier in men reporting unprotected sex with men. *Canadian Journal of Law and Society* 157.
- Anderson, J. and Moles, K. 2013. Walking into Coincident Places, *Qualitative Researcher* 9: (2008) 5–8. CI Grossman & AL Stangl (eds) 'Global action to reduce HIV stigma and discrimination' 16 *Journal of the International AIDS Society* 18881.
- Bunnell R, Ekwaru JP, Solberg P, Wamai N, Bikaako-Kajura W, Were W, Coutinho A, Liechty C, Madraa E, Rutherford G, Mermin J. 2006. Changes in sexual risk 1 behaviour and risk of HIV transmission after antiretroviral therapy and prevention interventions in rural Uganda. *AIDS* 85-92.
- Chapman, A. & Smith, R.G. 2001, 'Controlling financial services fraud', *Trends and Issues in Crime and Criminal Justice*, No. 189, Australian Institute of Criminology, Canberra.
- Cohen, M. Chen, Y. McCauley, M. Gamble, T. Hosseinipour, M. Kumarasamy, N. Hakim, J. Kumwenda, J. Grinsztejn, B. Pilotto, J. Godbole, S. Mehendale, S. 2011. HPTN 052 Study Team. Prevention of HIV-1 infection with early antiretroviral therapy. *New England Journal of Medicine* 493 – 505.
- Eba, P. M. 2015. HIV-specific legislation in Sub-Saharan Africa: A comprehensive human rights analysis. 15 *African Human Rights Law Journal* 224-262.

- Eba, P.M. 2007. Pandora's box: The criminalisation of HIV transmission or exposure in SADC countries. in Viljoen and Precious (eds) *Human rights under threat: Four perspectives on HIV, AIDS, and the law in Southern Africa*. 29-34.
- Fenton, K. A. & T. A. Peterman. 1997. *HIV Partner Notification: Taking a New Look*, 11 *AIDS* 1535–46.
- Gable L, Gostin L, Hodge JG. 2009. A global assessment of the role of law in the HIV/AIDS pandemic. 123 *Public Health* 260-264.
- Gostin, Lawrence O. & James G. Hodge Jr. 1998. *Piercing the Veil of Secrecy in HIV/AIDS and Other Sexually Transmitted Diseases: Theories of Privacy and Disclosure in Partner Notification*, 1 *Duke J. of Gender Law and Policy* 9–88.
- Grace, D. 2013. Legislative epidemics: The role of model law in the transnational trend to criminalise HIV transmission. 39 *Medical Humanities* 77-84.
- Hamblin J. 1991. The role of the law in HIV/AIDS policy. 5 *AIDS* s239 - s243;
- Marks G, Crepaz N, Senterfitt JW, Janssen RS. 2005. Meta-analysis of high-risk sexual behaviour in persons aware and unaware they are infected with HIV in the United States: implications for HIV prevention programs'. *Journal of Acquired Immune Deficiency Syndromes* 446-53.
- Nienaber, A. 2014. The Intentional sexual transmission of HIV. (29) *SAPL* 522 – 533.
- Pieterse, M. 2011. Disentangling illness, crime and morality: Towards a rights-based approach to HIV prevention in Africa. *African HRLJ* 57; and Canadian HIV/AIDS Legal Network (2007) *A human rights analysis of the N'djamena model legislation on AIDS and HIV specific legislation in Benin, Guinea, Guinea Bissau, Mali, Niger, Sierra Leone and Togo*.

Rebovich, DJ & Kane JL. 2002, An eye for an eye in the electronic age: Gauging public attitude toward white collar crime and punishment. *Journal of Economic Crime Management*, vol. 1: 1-19.

Smith J. & Whiteside A. 2010. The history of AIDS exceptionalism. *Journal of the International AIDS Society* 47.

Van Wyk, C. 2000. The need for a new statutory offence aimed at harmful HIV related behaviour: The general public interest perspective. *Codicillus* 2.

Viljoen F. 2000 'Stigmatising HIV/AIDS, stigmatising sex? A reply to Professor Van Wyk' (2000) *Codicillus* 11.

Books

Alexander A, and Mbali M., 2005. 'Beyond "bitches and prostitutes": Folding the materiality of gender and sexuality into rights-based HIV/AIDS interventions' in Viljoen (ed). *Righting stigma: Exploring a rights-based approach to addressing stigma*. Pretoria: PULP.

Beauchamp T. L. and J. F. Childress. 2013. *Principle of Biomedical Ethics*. Oxford: Oxford University Press.

Burchell J M. 2013. *Principle of Criminal Law* 4th Ed. Cape Town: Juta and Company

Gable L, Gamharter K, Gostin L, Hodge J, and Van Puymbroeck R. 2007. *Legal Aspects of HIV/AIDS; A Guide for Policy and Law Reform* Washington, D.C.; The World Bank.

Gostin, Lawrence O. & Zita Lazzarini, 1997. *Human Rights and Public Health in the AIDS Pandemic*. Oxford: Oxford University Press.

- Kemp G. 2013. *Criminal Law In South Africa* 2nd Ed. Oxford: Oxford University Press.
- Law and Martin. 2009. *A dictionary of Law*. Oxford: Oxford University Press.
- Neethling, Potgieter and Visser. 2014. *Law of delict* 7th ed. Durban: LexisNexis.
- Pearshouse R. 2008. *Legislation contagion: building resistance. HIV/AIDS Policy & Law Review* 12 (2/3).
- Skeen A st Q and Hoor S. 2010. Criminal Law. in Joubert WA and Faris JA (eds) *Law of South Africa Encyclopedia (LAWSA)* 2 ed Vol 6.
- Snyman CR. 2014. *Criminal Law* 6th Ed. Durban: LexisNexis.
- Zuberi, F. 2005. If you (be) Come HIV positive, you will lose your human rights - HIV/AIDS stigma and human rights: A localised investigation of Hammanskraal communities in Viljoen F. (2005) (ed) *Righting Stigma: Exploring a right based approach to addressing stigma*. Pretoria: PULP.

Cases

- Essop v S and others* [2014] 3 All SA 337 (KZP).
- Ex parte Lebowa Development Corporation Ltd* 1989 (3) SA 71 (T).
- Ex parte lebowa Development Corporation Ltd* 1989 3 SA 71 (T) 101; Gardener 2011 1 SACR 570 (SCA) per 29.
- NM and Others v Smith and Others* 2007 (5) SA 250 (CC).
- R v Dyonta and another* 1935 AD 52.
- R v Heyne and others* 1956 (3) SA 604 (A).
- R v Heyne and others* 1956 (3) SA 604 (A).

R v Jones and More 1926 AD 350 at 354.

R v Kruse 1946 AD 524.

R V Kruse supra at 533-534.

R v Larkins 1934 AD 91.

R v Persotam 1938 AD 92.

R v Thabeta and another 1948 (3) SA 218 (T).

S v Avion Motor. Enterprises (Pty) Ltd 1978 (4) SÄ 692 (T) at 694B.

S v Campbell and others 1991 (I) SACR 435 (Nm).

S v Coetzee and others 1997 (1) SACR 379 (CC).

S v Coetzee supra at 384C-D.

S v Coetzee supra per Langa J at 384B-C. 32.

S V Friedman 1996 (1) SACR 181 (W).

S v Gardener and another 2011 (1) SACR 570 (SCA).

S v Heller and another 1964 (1) SA 524 (W).

S v Isaacs 196B (2) SA 187 (D).

S v Isaacs 196B (2) SA 187 (D).

S v Kruger and another 1961 (4) SA 816 (A); *S v van Niekerk* 2014 JDR 2196 (KZP).

S v Latib 1973 (3) SA 982 (A).

S v Macdonald 1982 (3) SA 220 (A).

S v Mdantile 2011 (2) SACR 142 (FB).

S v Mngqibisa 2008 (1) SACR 92 (SCA).

S v Myeza 1985 (4) SA 30 (T).

S v Myeza 1985 4 SA 30 (T) 31 – 32.

S v Ndlanzi 2014 (2) SACR 256 (SCA).

S v Ndlanzi 2014 (2) SACR 256 (SCA).

S v Ndlovu 1984 ZASCA 84; 1984 3 SA 23(A).

S v Ntuli 1975 (1) SA 429 (A); 562.

S v Nyalungu 2013 (2) SACR 99 (T).

S V Phiri 2013 ZAGPPHC 279 (8 August 2013).

S v Phiri 2014 (1) SACR 211 (GNP).

S v Shaik and others 2007 (1) SACR 247 (SCA).

S v Shepard and others 1967 (4) SA 170 (W).

S v Swarts en 'n ander 1961 (4) SA 589 (GW).

S v Tembani (2006) SCA 151 (RSA).

S v Tshopo and others 2013 (1) SACR 127 (FB) at 130B-C.

S v Yengeni 2006 (1) SACR 405 (T).

Venter v Nel 1997 4 SA 1014 (D).

Constitution

Constitution of the Republic of South Africa Act 200 of 1993.

The Constitution of the Republic of South Africa 1996.

Legislation

Criminal Law (Sexual Offenses and Related Matters) Amendment Act 32 of 2007.

Criminal Procedure Act 51 of 1977.

National Health Act 61 of 2003.

The Companies Act 71 of 2008

Website Article and Report

ACFE. The Fraud Trial.

https://www.acfe.com/uploadedFiles/Shared_Content/Products/Self-Study_CPE/Fraud-Trial-2011-Chapter-Excerpt.pdf (Accessed: 25 July 2018).

AIDS Law Project & AIDS Legal Network, *Your Health Rights*, chapter 6 in *HIV/AIDS and the Law: A Resource Manual* (3rd ed., AIDS Law Project & AIDS Legal Network 2003), and App. A2 (South Africa's National Patients' Rights Charter). <http://www.alp.org.za> (Accessed: 25 July 2018).

AIDS Law Project & AIDS Legal Network, *Your Health Rights*, chapter 6 in *HIV/AIDS and the Law: A Resource Manual* (3rd ed., AIDS Law Project & AIDS Legal Network 2003), and App. A2 (South Africa's National Patients' Rights Charter). <http://www.alp.org.za> (Accessed: 25 July 2018).

AIDS Law Project & AIDS Legal Network, *Your Health Rights*, chapter 6 in *HIV/AIDS and the Law: A Resource Manual* (3rd ed., AIDS Law Project & AIDS Legal Network 2003), and App. A2 (South Africa's National Patients' Rights Charter). <http://www.alp.org.za> (Accessed: 25 July 2018).

Canadian HIV/AIDS Legal Network, *Privacy Protection and the Disclosure of Health Information: Legal Issues for People Living with HIV/AIDS in Canada* (Canadian HIV/AIDS Legal Network 2004). <http://www.aidslaw.ca/publications> (Accessed: 25 July 2018).

Center for Law and the Public's Health, *Model State Public Health Privacy Act* (Center for Law and the Public's Health). <http://www.publichealthlaw.net/Resources> (Accessed: 25 July 2018).

Centres for Disease Control and Prevention (2011) 'HIV/AIDS statistics overview: Transmission risk' from *HIV surveillance report: Diagnoses of HIV infection and AIDS in the United States and dependent areas*, available at: <http://www.cdc.gov/hiv/policies/law/risk.html> (Accessed: 25 July 2018).

Global Commission on HIV and the Law *HIV and the law: Risks, rights and health* (2012); Available at: <https://hivlawcommission.org/wp-content/uploads/2017/06/Executive-Summary-GCHL-EN.pdf> (Accessed: 06 May 2018).

Jürgens, Ralf, *Confidentiality*, in *HIV Testing and Confidentiality: Final Report* (Canadian HIV/AIDS Legal Network & Canadian AIDS Society 2001). <http://www.aidslaw.ca/publications/publicationsdocEN.php?ref=282> (Accessed: 25 July 2018).

Jürgens, Ralf, *Partner Notification*, in *HIV Testing and Confidentiality: Final Report* (Canadian HIV/AIDS Legal Network & Canadian AIDS Society 2001). <http://www.aidslaw.ca/publications/publicationsdocEN.php?ref=282> (Accessed: 25 July 2018).

R Ninsiima 'Uganda: *HIV law – After assent, Museveni under fire*' *The Observer* 22 August 2014. Available at: <http://allafrica.com/stories/201408220430.html> (Accessed: 12 May 2018).

South African Law Commission. 2011, *Criminalisation of HIV Transmission*. Available at: <http://www.tac.org.za/community/node/3204> (Accessed: 4 May 2018).

UNAIDS & OHCHR, *International Guidelines on HIV/AIDS and Human Rights*, 2006 Consolidated version (UNAIDS & Office of the United Nations High Commissioner for Human Rights 2006). http://data.unaids.org/Publications/IRC-pub07/JC1252-InternGuidelines_en.pdf?preview=true. (Accessed: 25 July 2018).

UNAIDS Global Report. *UNAIDS Report on the Global AIDS Epidemic* (2013) A43. Available at: https://heaims.org.za/site/assets/files/1267/unaidsglobalreport2013_en.pdf (Accessed: 04 May 2018).

UNAIDS *How AIDS changed everything. MDG 6: 15 years, 15 lessons of hope from the AIDS response* (2015). Available at: http://www.unaids.org/sites/default/files/media_asset/MDG6_ExecutiveSummary_en.pdf (Accessed: 12 May 2018).

UNAIDS *The gap report* (2014) 26. Available at:

http://files.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2014/UNAIDS_Gap_report_en.pdf (Accessed: 04 May 2018).

UNAIDS, *Opening Up the HIV/AIDS Epidemic: Guidance on Encouraging Beneficial Disclosure, Ethical Partner Counselling and Appropriate Use of HIV Case-Reporting* (UNAIDS 2000). [http://data.unaids.org/Publications/IRC-pub05/JC488-](http://data.unaids.org/Publications/IRC-pub05/JC488-OpenUp_en.pdf)

[OpenUp_en.pdf](http://data.unaids.org/Publications/IRC-pub05/JC488-OpenUp_en.pdf) (Accessed: 25 July 2018).

UNAIDS/WHO (2008) *Antiretroviral therapy and sexual transmission of HIV*, available at: http://data.unaids.org/pub/PressStatement/2008/080201_hivtransmission_en.pdf (Accessed: 25 July 2019).

UNICEF Towards an AIDS-Free Generation. *Children and AIDS: Sixth Stocktaking Report* 2013 (2013). Available at:

[https://www.unicef.org/publications/files/Children and AIDS Sixth Stocktaking Report-Summary.pdf](https://www.unicef.org/publications/files/Children_and_AIDS_Sixth_Stocktaking_Report-Summary.pdf) (Accessed: 25 May 2018).

WHO, *HIV Status Disclosure to Sexual Partners: Rates, Barriers and Outcomes for Women* (World Health Organization 2004).

http://www.who.int/gender/documents/en/VCTinformationsheet_%5b92%20KB%5d.pdf (Accessed: 25 July 2018).

29 November 2018

Mr Sueng Mhlongo (217080369)
School of Law
Howard College Campus

Dear Mr Mhlongo,

Protocol reference number: HSS/2143/018M

Project title: A conceptual analysis that non-disclosure of HIV/AIDS status before engaging in sexual conduct is fraud

In response to your application received on 26 November 2018, the Humanities & Social Sciences Research Ethics Committee has considered the abovementioned application and the protocol has been granted **FULL APPROVAL**.


Full Approval – No Risk / Exempt Application

Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through the amendment/modification prior to its implementation. In case you have further queries, please quote the above reference number. PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.

The ethical clearance certificate is only valid for a period of 3 years from the date of issue. Thereafter Recertification must be applied for on an annual basis.

I take this opportunity of wishing you everything of the best with your study.

Yours faithfully



.....
Professor Shenuka Singh (Chair)

/ms

Cc Supervisor: Dr Freddy Mnyongani
Cc Academic Leader Research: Dr Donrich Thaldar
cc School Administrator: Mr Pradeep Ramsewak

Humanities & Social Sciences Research Ethics Committee

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