



Gender-specific HIV policies and programmes at South African workplaces

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1. INTRODUCTION

The concept of gender is relevant in understanding how HIV/AIDS is spread. This is because of women's social and biological vulnerability to HIV infection. What is meant by gender has reference to roles which males and females respectively are expected to play within a particular society. There are commonly accepted expectations with regards to male and female behaviour, characteristics and roles within a particular society. These expectations also define how males and females are expected to interact with each other.¹ These expectations and respective roles and characteristics are not cast in stone and have the potential to change and be re-invented over time as the social mores of the community change in order to reflect surrounding socio-economic and other circumstances.

¹ Shisana O "Gender and HIV/AIDS: Focus on Southern Africa" paper delivered at the inaugural International Institute on Gender and HIV/AIDS, 7 June 2004, South Africa 2.

These roles are learned. Consequently altered roles related to gender can be adopted and learned by society in general. Since commonly accepted expectations with regards to male and female behaviour are of prime importance in the spread of HIV/AIDS, the relevance of this malleability and potential for the characteristics and expected gender roles to change over time lies in the fact that these potential changes can influence the spread of HIV/AIDS.

It is not only social and cultural influences that render women more vulnerable to being infected with HIV/AIDS, but also women's biological make-up. Although women's subordinate role in society can be changed, a women's biological make-up cannot be changed. Therefore in order to effectively reduce the spread of HIV/AIDS, policies and practices should inter alia focus on changing women's subordinate positions in society. Given the important role that employers and employers' organisations play within a society, they are ideally situated to play a part in influencing commonly held beliefs and practices which result in subordinate roles for women.² The purpose of this paper therefore is to examine employers' duties in designing and implementing gender specific workplace policies and programmes in the fight against HIV/AIDS.

Firstly I will explain why women are more vulnerable to HIV/AIDS because of their biological makeup. Then I will discuss some causes of the subordination of women in society and how this renders them more vulnerable to HIV infection. Thereafter, I will discuss employers' duties in the fight against HIV/AIDS with reference to international law, the South African Constitution, the common law and legislation in general. In conclusion I will suggest that gender specific workplace policies can not only more effectively help reduce and contain the spread of HIV/AIDS³ but also help attain the fundamental rights of equality and dignity.

2 WOMEN'S VULNERABILITY TO HIV INFECTION

2.1 Biological vulnerability

Women are more susceptible to sexually transmitted diseases because women's reproductive tracts have larger exposed areas than those of men. This permits the virus to survive longer making women four times more likely than men to contract HIV and other sexually transmitted diseases.⁴ Furthermore, there is a higher concentration of the virus in semen than in women's reproductive fluid making men more efficient at

² In the words of Sprague C "Women's Health, HIV/AIDS and the Workplace in South Africa" (2008) 7(3) *African Journal of Aids Research* 341 at 349: "This is primarily attributed to their physical location at the epicentre of the epidemic."

³ The ILO Recommendation concerning HIV and AIDS and the world of work, 2010 (No 200) recognises the key role employers can play in this regard and provides in Chapter III entitled "General Principles": "HIV and AIDS should be recognized and treated as a workplace issue, which should be included among the essential elements of the national, regional and international response to the pandemic with full participation of organizations of employers and workers..."

⁴ *Ibid* 6.

transmitting HIV.⁵ Women are twice as likely to be infected with HIV by an HIV infected man as a man by an HIV infected woman.⁶ The fact that women are more susceptible than men to sexually transmitted diseases in general also increases their susceptibility to HIV infection. This is because sexually transmitted infections result in broken skin or torn membranes creating an ideal environment for the virus.⁷

2.2 Social vulnerability

The historical, cultural, social and economic reasons rendering women more susceptible to HIV infection in South Africa have been summarised as follows:⁸

“In South Africa, the history of colonialism and apartheid rule has resulted in a significant overlap of race and poverty. Because poverty and inequality are so strongly gendered, the most disadvantaged and marginalized in our society are black women. A substantial number of black women are further disadvantaged by their exposure to cultural and religious regimes that make the struggle for gender equality even more complex. Specifically, African customary law--which is essentially patriarchal in both character and form and has been interpreted in a way that allocates crucial benefits according to male primogeniture, has had a particularly detrimental effect on the socio-economic power and well-being of rural women. The effect of the HIV/AIDS pandemic on women is a reflection of the complexity created by the interface between poverty and inequality as it impacts women's daily lives. Achieving effective gender equality is, therefore, the key to the eradication of disadvantages faced specifically by women. The eradication of inequality will assist in reducing both poverty and vulnerability of women to HIV infection.”

In short, women in South Africa, specifically black women are less likely to be educated, less likely to be employed and consequently have less access to facilities and services than the rest of the population.

2.3 Customary law⁹

Customary law consists of parliamentary and delegated legislation codifying rules of customary law and decisions of the Supreme Court and of the previous Black Appeals Court. The informal or unofficial customary law consists of unwritten rules and norms rooted in the social and cultural practices of indigenous communities. Rules of customary law create gender inequality and women are economically and socially subordinate to men. For example, men can withdraw their economic support if women refuse to do what they want.¹⁰ This makes it very difficult for women to insist on the use of condoms and safer sex.¹¹ It also makes women dependent upon relationships that

⁵ *Ibid.*

⁶ Sprague C, “Women’s Health, HIV/AIDS and the Workplace in South Africa” (2008) 7(3) *African Journal of AIDS Research* 341 at 343.

⁷ *Ibid.*

⁸ Mokgoro Y “Constitutional Claims for Gender Equality in South Africa: A judicial Response” (2003) *Albany Law Review* 565, 565-566.

⁹ A detailed exposition of South African customary law is beyond the scope of this paper. This discussion merely serves to provide some examples of how customary law and customary beliefs render women subordinate to men and consequently socially and economically dependent on men.

¹⁰ Shisana (n 2 above) 9.

¹¹ Klugman B “Sexual Rights in Southern Africa: A Beijing Discourse or a Strategic Necessity” (2000) 4 (2) *Health and Human Rights* 145 at 146-7 explains: “If a husband initiates sex, his wife may not refuse him; the same applies in relationships outside of marriage. This makes it impossible for women to protect

may, at the same time, put them at risk for HIV. For example, as a result of gender inequality in family relationships, women are denied rights to marital property and in some cases are subject to forced arranged marriages rendering women vulnerable to violent and forced sexual relations within a marriage.¹²

The customary practice of polygamy, for example, places all the wives in a union at risk if one of them or the husband is infected with HIV or any other sexually transmitted disease. Furthermore, certain marital rights (*ukugena, ukuvusa* and *seantlo*) “often involve unprotected sexual intercourse between the widow of a deceased man (usually a relative of the deceased), chosen by the deceased’s family”.¹³ There are also various customary practices that contribute to women’s subordinate role in society and consequently vulnerability to HIV infection:

“The paying of bride price¹⁴ – which used to be modest gifts intended to promote links between families being assimilated into an income – generating opportunity, thus turning young women into commodities; the transfer of assets to the husband’s family on his death which serves to devalue women’s lives and put them in danger of abuse and poverty, which in turn may lead to sexual behaviours based on survival tactics; and arranged marriages of young girls, who are also sometimes given to creditors as a form of payment, which increases the likelihood of their HIV infection through unprotected sexual intercourse with infected older men. It has also been reported that traditional healers consulted by desperate HIV infected men are known to advise them to have sexual intercourse with virgin girls as a cure for HIV. This is leading to rape, and an increased infection rate among very young girls.”¹⁵

These examples of customary laws and cultural beliefs and practices serve to illustrate the inherent ability of social mores and beliefs to disempower women thus impoverishing them and exposing them to HIV/AIDS and other sexually transmitted diseases.

Even though the Constitution protects the right to culture¹⁶ it also protects the right to equality and non-discrimination¹⁷ and the right to human dignity¹⁸. Customary rules which limit other rights contained in the Constitution and are contrary to the spirit of the Constitution can be declared unconstitutional. Section 211(3) of the Constitution states that: “The courts must apply customary law when that law is applicable, *subject to the Constitution* (my emphasis) and any legislation that specifically

themselves from HIV/AIDS by initiating non-penetrative sex...or insisting on fidelity or condom use. Women are...also products of this culture and may themselves have internalized ideas of manhood that make it appropriate for men to have many partners and to manage sexual relations while they accept their partner’s dominance and remain faithful.”

¹² Albertyn C “Using Rights and the Law to Reduce women’s Vulnerability to HIV/AIDS: A Discussion Paper -October 2000 Canadian HIV/AIDS Legal Network Aids Law Project 6.

¹³ Paper No. 12 International Labour Office November 2007 (Social Dialogue, Labour Law and Labour Administration Branch) Jane Hodges (General Editor) “Digest of Good Legislative Practices Relating to HIV/AIDS in Selected African Countries” 125.

¹⁴ This is called *lobola* and has been linked to to “patriarchal attitudes of ‘ownership’ of women and also increased violence.” Albertyn (n 12 above) 7.

¹⁵ *Ibid* 125.

¹⁶ Section 30 protects the right to language and culture. Section 31 protects the right to culture, religious and linguistic communities. However, these rights contain internal limitation clauses to the effect that these rights may not be exercised in a manner that is inconsistent with the Bill of Rights.

¹⁷ Section 9.

¹⁸ Section 10.

deals with customary law.” Unfortunately the fact that discriminatory cultural laws and customs can be declared unconstitutional is insufficient to eradicate discriminatory practices. Despite the fact that customary law is subject to the Bill of Rights in the South African Constitution, specifically the right to equality, discriminatory customary practices endure as they form part of the moral and cultural fabric of indigenous societies. The law cannot guarantee social transformation. What is necessary is a change in the mind-set of the community. Changing sexual behaviour is at the core of reducing the spread of HIV/AIDS. The most effective way of changing sexual behaviour is by altering socio-economic power relations in society. In short, the elimination of gender inequality is key to the implementation of effective policies and practices to address the HIV/AIDS. Employers are strategically placed to play an influential role in this endeavour.

The question as to whether employers have a duty to design and implement gender specific HIV/AIDS policies and practices is discussed hereunder. Thereafter certain employer strategies for the design and implementation of gender specific workplace policies and practices for the management and control of the spread of HIV/AIDS will be identified.

3 FORMAL LEGAL FRAMEWORK

3.1 Fundamental rights

The protection of fundamental freedoms such as gender equality, the right to dignity and the prevention of harassment at the workplace form a cornerstone of South African legislation. Section 9 of the Constitution (the “equality clause”) provides inter alia that no person may unfairly discriminate directly or indirectly against anyone on one or more grounds including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

Section 10 of the Constitution provides that everyone has inherent dignity and the right to have their dignity respected and protected. Section 12 provides for freedom and security of person which inter alia includes the right “to be free from all forms of violence from either public or private sources” and the right to bodily and psychological integrity, which includes “the right to security in and control over their body”. Section 13 prohibits slavery, servitude or forced labour.

Section 6(1) of the Employment Equity Act (EEA)¹⁹ provides:

“(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.”

Section 6 (3) provides: “Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair

¹⁹ 55 of 1998.

discrimination listed in subsection (1).” However, the South African legislation does not specifically provide for active measures for the empowerment of women (aside from chapter 3 of the EEA which only deals with equality at the workplace and not fundamental human rights in general). Despite this, it may be possible to argue that the prohibition of unfair discrimination (including harassment as a form of discrimination) provided for in terms of both the EEA and the Constitution as well as the constitutional right to dignity, may well entail a duty on the part of the employer to take positive steps so as to attain gender equality. This duty can take the form of gender specific workplace policies and practices. This positive duty may emanate from legislation and common law interpreted in the light of “soft law”²⁰ and international instruments.

3.2 International law

Active measures that include gender-specific programmes and policies for the recognition of fundamental rights and the management of HIV/AIDS at the workplace have been recognised in international instruments emanating from the International Labour Organisation and other United Nations agencies such as UNIFEM, UNDP and UNAIDS.²¹ The ILO’s Code of Practice on HIV/AIDS and the World of Work (ILO, 2001) also emphasises gender equality as a fundamental principle. However, it goes further than the South African legislation and provides that workplace policies and programmes should devise strategies to lessen women’s vulnerability to HIV/AIDS. This is relevant for the interpretation of South African legislation because in terms of section 39 (1)(a) and (b) of the Constitution, when interpreting the Bill of Rights, a court, tribunal or forum- “(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law”. Therefore the right to equality may, interpreted in the light of international law, may require employers to take positive steps to eliminate women’s vulnerability to HIV/AIDS.

The ILO Recommendation concerning HIV and AIDS and the world of work, 2010 (No 200) recognises that the empowerment of women is of paramount strategic relevance in the global fight against AIDS and it states inter alia in its preamble:

“Noting that HIV affects both men and women, although women and girls are at greater risk and more vulnerable to HIV infection and are disproportionately affected by the HIV pandemic compared to men as a result of gender inequality, and that women’s empowerment is therefore a key factor in the global response to HIV and AIDS...”

Section 14 which relates to measures that should be taken at the workplace to combat HIV/AIDS states:

“14. Measures should be taken in or through the workplace to reduce the transmission of HIV and alleviate its impact by:

(a) ensuring respect for human rights and fundamental freedoms;

²⁰ Code of Good Practice: Key Aspects of HIV/AIDS and Employment as promulgated in GN R1298 in GG 21815 of 1 December 2000. Another relevant source of ‘soft law’ in this regard is the King Report on Corporate Governance for South Africa 2002.

²¹ Sprague (n 6 above) at 344.

- (b) ensuring gender equality and the empowerment of women;
- (c) ensuring actions to prevent and prohibit violence and harassment in the workplace;
- (d) promoting the active participation of both women and men in the response to HIV and AIDS..."

Chapter 3 of this recommendation "General principles" provides inter alia that "the response to HIV and AIDS should be recognized as contributing to the realization of human rights and fundamental freedoms and gender equality for all, including workers, their families and their dependents..."

3.3 Soft law

Soft law in South Africa, in the form of the Code of Good Practice on HIV/AIDS (hereinafter "the Code") has also called for the recognition of women's vulnerability to HIV/AIDS and consequently gender specific policies and programmes to lessen this vulnerability. Soft law as opposed to legislation is not enforceable in a court of law but may possibly, in an indirect manner, impose legal duties on the employers. Soft law serves primarily as a guide to employers wishing to implement HIV/AIDS policies and programmes. In terms of the Employment Equity Act²² (hereinafter the 'EEA'), the Code must be used as an interpretive tool to give content to its provisions.²³ Consequently employers may find that in the light of the Code, it is necessary to take positive action. The Code provides that in order to manage HIV/AIDS effectively in the workplace an integrated strategy that includes, inter alia, HIV/AIDS programmes that aim to achieve "ongoing sustained prevention of the spread of HIV among employees and their communities".²⁴ In terms of paragraph 3.3 "the protection of human rights and dignity of people living with HIV or AIDS is essential to the prevention of HIV/AIDS." In terms of paragraph 3.4 "HIV/AIDS impacts disproportionately on women and this should be taken into account in the development of workplace policies and programmes."

Workplace policies and programmes need to be gender specific in order to take into account the fact that "HIV/AIDS impacts disproportionately on women". Furthermore, since women are still subservient to men as a result of mostly cultural and economic factors, the protection of fundamental rights such as dignity and equality and the right to bodily and psychological integrity may require employers to take positive measures so as to attain gender equality. Gender equality entails more than equality at the workplace. It comprises equality between the sexes in all areas, including employment, education and social rights.²⁵ In order to prevent harassment at the workplace it is essential to firstly create an environment of gender equality in a broad sense, not just gender equality in relation to work such as equal pay for equal work and

²² 55 of 1998.

²³ S 3 (c) of Employment Equity Act 55 of 1998.

²⁴ Para 13.

²⁵ Gender equality comprises equality between the sexes in all areas, including employment, education and social rights: www.equality-ne.co.uk/resources/glossary.html It is based on the idea that no individual should be less equal in opportunity, access to resources and benefits or in human rights than others. It is based on the notion that "all people are created equal therefore should have equal share of the worlds resources and benefits" (www.dwaf.gov.za/Docs/Other/RISDP/Glossary.doc)

equal access to job opportunities and promotions. Only, once gender equality in all spheres is attained at the workplace, will it be possible to control and reduce the prevalence of harassment of women by men.

3.4 The common law

3.4.1 Employer duty to take reasonable care of employee safety

The breach of the duty of care can also take the form of an omission.²⁶ Brassey states:

“Since [employers] can be held liable for omissions, employers can be liable for failing to prevent people, such as suppliers, customers or employees, from causing their employees harm. They are likely to be held liable if they provided the opportunity or conditions for the injurious act or had the power to prevent it.”²⁷

Breach of this duty occurs if the employer fails to guard against injury or harm in circumstances where a reasonable person would have foreseen the likelihood of injury or harm.²⁸ Given the cultural practices and norms which result in women having no say over sexual relations, possible, even probable harassment by employees of their female co-employees is reasonably foreseeable. Therefore a common law duty on employers to take positive steps to prevent women from being sexually violated at work and thereby being exposed to HIV/AIDS and consequently suffering harm or injury is most likely.

In *Media 24 Ltd & another v Grobler*²⁹ the Supreme Court of Appeal held that it is “well settled” that employers owe their employees a duty to take reasonable care of their safety.³⁰ The court opined that this duty is not confined to protecting employees from physical harm, but includes a duty to protect employees from psychological harm.³¹ This case concerned an appeal by Media 24 to set aside the decision of the High Court in *Grobler v Naspers Bpk & ‘n ander*³². The High Court had held Naspers vicariously liable for acts of sexual harassment committed by a fellow employee of Grobler against her. It ordered Naspers to pay Grobler an amount of R 776 814 in compensation. On appeal the court found it unnecessary to deal with the question of the vicarious liability of the employer because the claim could succeed on the basis of Grobler’s second cause of action, namely, the employer’s common law duty to take reasonable care of the safety of its employees. The court found that the legal convictions of the community required an employer to take reasonable steps to protect its employees against acts of sexual harassment of other employees. Failure to do so would result employers having to pay compensation to the victim of such sexual harassment. It could be argued that these reasonable steps may include gender-specific policies and programmes for the management of HIV/AIDS.

²⁶ See Brassey M, *Employment and Labour Law* (2000) vol 1 E4:29.

²⁷ *Ibid* E4: 30.

²⁸ *Ibid* at at E4: 30-31.

²⁹ (2005) 26 *ILJ* 1007 (SCA).

³⁰ See Brassey (n 26 above) E4:19-49.

³¹ *Media 24 Ltd & another v Grobler* at par 65.

³² (2004) 25 *ILJ* 439 (C).

3.4.2 Vicarious liability

Another possible common law basis for employer liability for failing to take steps to protect women from injury or harm is the vicarious liability of the employer. Unlike the direct liability based on the duty to protect its employees from harm, vicarious liability renders an employer liable for the wrongful acts of its employees. Vicarious liability in the context of the employment relationship is a legal doctrine that assigns liability or responsibility to the employer for the consequences of a negligent and wrongful act or omission of an employee that causes injury or pecuniary loss. If the negligent act is committed by an employee while acting within the general scope of her or his or her employment, the employer will be held liable for damages caused as a result thereof.

In *Grobler v Naspers Bpk & 'n ander* the court found the employer vicariously liable for the acts of sexual harassment of one of its employees. After considering the development of the doctrine of vicarious liability in other common law jurisdictions, the court concluded that policy considerations justified its finding.³³ Gender specific workplace policies and practices to control and avoid the incidence of harassment or sexual violence of its employees may not only help prevent the spread of HIV/AIDS but also serve to protect the employer from being found vicariously liable for acts of its employees.

3.5 Labour legislation

Section 60 of the EEA provides inter alia that if an employer directly encourages or even by its inaction allows or condones conduct which is in breach of the EEA, it will be vicariously liable for damages flowing from such breach. It reads as follows:

“(1) If it is alleged that an employee, while at work, contravened a provision of this Act, or engaged in any conduct that, if engaged in by that employee’s employer, would constitute a contravention of a provision of this Act, the alleged conduct must immediately be brought to the attention of the employer.

(2)The employer must consult all relevant parties and must take the necessary steps to eliminate the alleged conduct and comply with the provisions of this Act.

(3)If the employer fails to take the necessary steps referred to in subsection (2), and it is proved that the employee has contravened the relevant provision, the employer must be deemed also to have contravened that provision.

(4) Despite subsection (3), an employer is not liable for the conduct of an employee if that employer is able to prove that it did all that was reasonably practicable to ensure that the employee would not act in contravention of this Act.”

In order to avoid liability on the basis of the above quoted section an employer would be obliged to put in place policies and practices in order to prevent discrimination and harassment. Furthermore, in situations where employees are guilty of discriminating unfairly against fellow employees the employer is obliged “to take the necessary steps to eliminate the alleged conduct.” Clearly this provision obliges an employer to take positive steps in order to prevent unfair discrimination and harassment. This would

³³ A thorough discussion of the reasoning of the court is beyond the scope of this article.

most likely entail the adoption of workplace policies and practices. In order to be effective such policies and practices would have to be gender specific.

In terms of section 186 of the LRA a constructive dismissal occurs where the employer by its acts or omissions rendered continuation of employment by the employee intolerable.³⁴ This situation can be achieved by an employer's inaction. The lack of a gender specific HIV policy that deals specifically with harassment in the workplace or an employer's inaction with regard to the harassment of women employees by fellow employees can render continued employment intolerable for the employee. Clearly then, in order to prevent liability for unfair dismissals including automatically unfair dismissals employers would be well advised to take measures to eliminate all forms of unfair discrimination including harassment. Section 187(1)(f) of the LRA³⁵ provides that if the reason for a dismissal is the employer's direct or indirect unfair discrimination on the basis inter alia gender such dismissal will constitute an automatically unfair dismissal.³⁶ In the case of other unfair dismissals the maximum compensation that can be awarded to an employee who has been unfairly dismissed is twelve month's salary.³⁷ In the case of an automatically unfair dismissal the maximum awardable compensation is twenty four month's salary.³⁸

4 GENDER-SPECIFIC HIV WORKPLACE POLICIES

Although the HIV policies of most South African employers speak of gender equality and elimination of discrimination, unfortunately most of them do not include gender specific procedures that take into account gender differences regarding vulnerability to HIV/AIDS discussed above. In this sense the policies are generally gender neutral. A sample policy of a prominent public company (that of course cannot be named herein) when dealing with elimination of discrimination at the workplace simply states:

"No person with HIV or AIDS shall be unfairly discriminated against within the employment relationship or within any employment policies or practices, including with regard to: recruitment procedures, advertising and selection criteria; appointments, and the appointment process, including job placement; job classification or grading; remuneration, employment benefits and terms and conditions of employment; employee assistance programmes; job assignments; the workplace and facilities; occupational health and safety; training and development; performance evaluation systems; promotion, transfer and demotion; disciplinary measures short of dismissal; and termination of services."

Trade unions – especially the larger and more influential ones – can work with employers in ensuring that workplace HIV/AIDS policies are gender specific. This can be done for example by: the development of education programmes on prevention with an emphasis on the reasons for vulnerability of women and the elimination of these

³⁴ S 186(1)(e).

³⁵ Labour Relations Act 66 of 1995.

³⁶ It is interesting to note that despite the omission of HIV status as a prohibited ground for discrimination in this section, the Code of Good Practice: Key Aspects of HIV/AIDS and Employment at par. 5.3.4 states: "In accordance with section 187(1)(f) of the Labour Relations Act, 66 of 1995, an employee with HIV/AIDS may not be dismissed simply because he or she is HIV positive."

³⁷ S 194(1).

³⁸ S 194(3).

factors as well as awareness regarding HIV / Aids treatment and care; the development and distribution of information and training of trade union representatives and leaders to enable them to assist workers affected by discrimination with legal advice; the development of counselling and other services to union members and staff and; engagement with bargaining councils and the government regarding funding for these initiatives. Employer workplace policies can be designed so as to include these kinds of initiatives and employers can work hand in hand with unions in the implementation thereof.

5 CONCLUSION

Fundamental rights such as the right to equality and the right to dignity can form the foundation for sexual, cultural and economic transformation. Gender equality cannot be realised without addressing the root causes thereof. Although the law can provide the foundation for such transformation, on its own it is insufficient in addressing social, economic and cultural problems of inequality. What is needed is a profound understanding of the fundamental causes of gender inequality so that pro- active strategies to eliminate them can be devised and implemented. Gender neutrality cannot achieve gender equality. Women's special needs and circumstances need to be taken into account in designing and implementing effective strategies for the transformation of the fundamental rights of equality and dignity into reality. Gender specific workplace policies and programmes can play an important role in achieving these fundamental rights. Unfortunately workplace HIV/AIDS policies and programmes in South Africa are generally gender neutral.³⁹Even though in terms of these policies non-discrimination is the starting point, they do not take into account women's special needs and subservient position in society. Consequently the emphasis on "sameness" in the quest for equality can help to maintain the status quo of inequality. As discussed above, legislation and common law can be creatively interpreted, in the light of the Constitution, soft law and international law so as to create legal duties on the part of employers to implement gender specific policies and practices in the fight against HIV/AIDS thereby helping to achieve equality and dignity.

³⁹ Sprague (n 6 above) at 345.

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