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Explanatory Note

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*The following explanation is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.*

This appeal from the Witwatersrand High Court concerns the constitutionality of South African Airways' practice of not employing people living with HIV as cabin attendants.

That happened to Mr Hoffmann and he challenged the constitutionality of the policy in the High Court. SAA defended its policy as promoting the safety and health of its passengers and its own competitive capacity: people living with HIV might not react positively to yellow fever vaccination, they might contract and transmit other diseases to passengers and are a bad training investment because of their limited life expectancy. The High Court upheld SAA's defence.

The Aids Law Project was admitted as an *amicus curiae* in the proceedings before the Constitutional Court. It presented medical and other evidence relevant to the case as a result of which SAA conceded that its employment practice was unjustified.

In a unanimous decision written by Justice Ngcobo, the Constitutional Court held that SAA had infringed Mr Hoffmann's constitutional right not to be unfairly discriminated against. Not every person who is HIV positive poses the risks alleged by SAA, only those who are at the immunosuppressed stage. Mr Hoffmann was not immunosuppressed either at the time he applied for the position or when he brought the matter to the Constitutional Court. The practice of other airlines was not relevant in determining the constitutionality of SAA's actions.

Legitimate commercial requirements are important but they cannot serve to disguise stereotyping and prejudice, which have no place in this era of respect for human dignity, compassion and understanding - ubuntu. People living with HIV have been stigmatised and as one of the most disadvantaged groups in society deserve special protection from our law.

Justice Ngcobo held that the most appropriate remedy to grant a person who has been denied employment as a result of unfair discrimination is instatement but that, in the circumstances, it would not be fair to SAA to backdate the order.

The Constitutional Court upheld the appeal and set aside the decision of the High Court. The Court ordered that SAA make an offer of employment immediately to Mr Hoffmann, and that SAA pay the costs of the application in both the High Court and the Constitutional Court.