

DISCRIMINATION IN EMPLOYMENT

Dwenga and Others v. Surgeon-General of the South African Military Health Services and Others
[2014] ZAGPPHC 727, Case No. 40844/2013
South Africa, High Court

COURT HOLDING

It was vexatious, frivolous, and an abuse of process for the South African National Defence Force (“SANDF”) to attempt to litigate the same issues that it had already determined in the *South African Security Forces Union* (“SASFU”) case six years previous – namely, whether or not the SANDF’s practice of prohibiting the recruitment of individuals infected with HIV was constitutional.

Summary of Facts

Six years earlier, in the decision reached in the case of *South African Security Forces Union (and three individuals) v Surgeon General, Minister of Defence, Chief of the SANDF, President of the RSA and Minister of Health* (case no. 18683/2007), the High Court of South Africa held the SANDF’s blanket ban on recruitment of persons infected with HIV to be unconstitutional. Following the order made in SASFU, the SANDF introduced new recruitment policies to comply with the Court’s orders. However, SANDF’s implementation of the new policies continued to automatically exclude new recruits who were living with HIV from entering into certain contracts.

The applicants in this matter were automatically excluded from entering into contracts because they were living with HIV. SANDF initially raised the argument that its policy was justifiable pursuant to Section 36 of the Constitution of the Republic of South Africa, 1996 (the “Constitution”). It abandoned this line of argument and argued instead that its recruitment practice was justifiable under Section 9 of the Constitution.

Issue

Whether the SANDF may be permitted to bring before the courts a dispute which has already been decided against it.

Court’s Analysis

The Court cited *Cook and others v. Muller* 1973 (2) SA 240 (N), at 245H-246B for the proposition that a Court may prohibit a person from relitigating a dispute that was already decided against him, under the guise of an action against another party. Under a long line of cases cited by the Court (*Burnham v. Fakheer*, 1939 N.P.D. 63; *Reichel v. Magrath*; *Niksch v. Van Niekerk*), the Court noted that it had previously prevented litigants and defendants from relitigating issues that had already been decided against them. It made no difference that the issue had been raised against a new party.

Here too, the Court noted that the SANDF’s practice of prohibiting the recruitment of applicants with HIV had already been decided in *SASFU*. Although this case was decided on the grounds that the

SANDF's arguments were "vexatious and frivolous and an abuse of process," the Court stated that the SANDF had been unable to provide any evidence to suggest that the requisite health required for the positions sought by the Applicants could not be achieved by a person infected with HIV.

Conclusion

The applicants were successful. The Court made various orders including reinstatement, but also granted punitive costs because of the respondents' non-compliance with the earlier court orders and its attempt to relitigate an issue that was already settled.

Significance

Discriminatory attitudes and practices against persons with HIV are still prevalent in our societies, despite the progress that many countries have made in terms of putting in place public policies to curb these forms of discrimination. Having legislation in place or even a court decision is sometimes not enough incentive, even for public institutions, to end discriminatory practices. The Court commented that public institutions should be exemplary in complying with constitutional norms and standards, such as respect and protection of the rights of persons living with HIV.

Gary Shane Allpass v. Mooikloof Estates (Pty) Ltd.

[2011] ZALCJHB 7, Case No. JS178/09

South Africa, Labour Court

COURT HOLDING

The applicant's dismissal from employment for HIV-positivity was automatically unfair in terms of Section 187(1)(f) of the Labour Relations Act, 66 of 1995, because the reason for dismissal was his HIV status, and was not justifiable on any other ground.

Summary of Facts

The applicant sought relief for dismissal from employment on the grounds of his HIV status, which was unfair according to Section 187(1)(f) of the Labour Relations Act, 66 of 1995 (the "LRA"). In the alternative, the applicant pleaded that his dismissal was substantively and procedurally unfair according to Section 188 of the LRA. He also sought relief arising from unfair discrimination on the grounds of his HIV status, as proscribed by Section 6(1) read with Section 50(2)(b) of the Employment Equity Act, 55 of 1998 (the "EEA").

The applicant was employed by the respondent as a manager of a stable and a horse riding instructor at the Mooikloof Equestrian Centre (the "Centre"), owned by the respondent. In the pre-employment interviews, the applicant was asked about his health, and he stated that he was in good health.

The applicant had been living with HIV for 18 years and was on a treatment regime. Otherwise, according to his medical expert, he was in excellent health.

A week later, he and other colleagues were asked to complete a Personal Particulars Form (“PPF”), and amongst others, it required information about allergies and medication taken for these allergies as well as medication for chronic conditions. The applicant listed chronic conditions including HIV, and indicated the anti-retroviral medication he was taking.

A few days after he had submitted the PPF, a confrontation ensued between the applicant and his employer, which resulted in his being dismissed. He was ordered to vacate the premises. The dismissal note referred to the pre-employment interview and the fact that the applicant had said he was in good health. The note said that he had been dishonest in the interview for not stating the truth about his health. The final notice of his dismissal indicated “fraudulent misrepresentations” as the reason for his dismissal.

The applicant argued two claims. In the first claim, he submitted that the circumstances of his dismissal constituted automatic unfair dismissal under Section 187(1)(f) of the LRA. He claimed that the dismissal was discrimination against him due to his HIV status, and therefore violated his constitutional rights to dignity and privacy. The applicant submitted in the alternative that, should the Court not find unfair dismissal, then it should find that the dismissal was invalid, and the procedure of dismissal was not in accordance with Section 188 of the LRA.

In the second claim, the applicant submitted that the conduct of the respondent amounted to unfair dismissal in terms of the EEA. He claimed that he was dismissed without notice, and removed from the employer’s property in a manner calculated to humiliate him because of his HIV status.

The respondent replied to the first claim with the argument that the reason for dismissal was dishonesty of the applicant, as during pre-employment interviews he stated that he was in good health. The respondent said he only realised the dishonesty when the applicant volunteered information about his medical conditions after completing the PPF. The respondent claimed that this had created a breakdown of trust. The respondent argued that if the Court did not accept this explanation, then it should accept the argument that the respondent was dismissed because he was not suitable for the requirements of the job.

On the applicant’s second claim, the respondent denied the claim, and referred to its reasoning in the argument against the first claim.

Issues

The issues before the Court were:

- (a) Whether the automatic dismissal of the applicant was unfair, or alternatively procedurally and/or substantively unfair, and if so, the appropriate measure of compensation to which the applicant was entitled.
- (b) Whether the applicant was unfairly discriminated against on the basis of his HIV status and if so, the appropriate relief to which he was entitled.

Court's Analysis

The Court reviewed the relevant employment law in relation to unfair dismissal. The Court said that the basis for protection against unfair discrimination in employment is the right to equality under Section 9 of the Constitution of the Republic of South Africa, 1996. It then referred to the LRA, which provides that dismissal for a discriminatory reason is automatically unfair unless it can be justified on the grounds of inherent job requirements. Section 187(1) says that dismissal is automatically unfair if:

... the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.

The Court referenced *Bootes v. Eagle Inc System KZ Natal (Pty) Ltd* (2008) 29 ILJ 139 (Labour Court) in which Pillay J. had held that HIV status was an arbitrary ground as envisaged in Section 187(1) of the LRA.

The Court considered the EEA, which prohibits unfair discrimination on grounds including HIV status (Section 6(1)). The Court reminded itself that Section 50 of the EEA empowers it to grant appropriate relief for unfair dismissal, and this includes payment of compensation, payment of damages, and other orders. The EEA also enjoins the courts to take into account relevant codes of practice and international conventions. The Court therefore referenced the Code of Good Practice on the Key Aspects of HIV and AIDS in Employment (Code) issued under the EEA. Amongst others, the Code has guidelines relating to confidentiality, privacy, and disclosure of one's HIV status in the workplace. The Code states that an employee has the right to privacy and is not required to disclose HIV status to an employer or other employees.

The Court noted that South Africa's anti-discrimination laws are based on the International Labour Organisation Conventions, including C111 Discrimination (Employment and Occupation) Convention of 1958. It also referenced the ILO Recommendation concerning HIV and AIDS and the World of Work 200 of 2010 that recognised the impact of discrimination based on HIV status in the workplace.

The Court also took into account the decision in *Hoffmann v. South African Airways* (2000) 21 ILJ 2357 (Constitutional Court) in which it was held that denial of employment to the Appellant because he was living with HIV impaired his dignity and constituted unfair discrimination, and that this was unconstitutional.

In evaluating the evidence before it, the Court found that the main reason for the respondent's action to dismiss the applicant from employment was because of the applicant's disclosure of his HIV status. The Court therefore was persuaded that the applicant had proven, in accordance with Section 187, that he was dismissed unfairly because of his HIV status. The Court went on to determine whether the respondent had a valid defence. The Court referred to the decision in *Leonard Dingler Employee Representative Council and Others v. Leonard Dingler (Pty) Ltd and Others* (1997) 11 BLLR 1438 (Labour Court) at 148H, which held that an inherent job requirement would constitute an absolute defence against unfairness. In the Court's opinion, the respondent's defence that non-allergy to penicillin was an inherent job requirement was just a thin veil to mask the real reason for the dismissal. It therefore dismissed the respondent's defence to the claim of unfair dismissal.

The Court also reviewed the respondent's reasoning that failure by the applicant to disclose his HIV status had led to the breakdown of trust. The Court however reminded the respondent that an employee is not required to disclose HIV status to the employer. The expectation that he should have disclosed his status violated his right to privacy and dignity.

The Court dismissed the applicant's second claim. The Court was of the view that this concerned a claim for damages for humiliating treatment after the fact of the dismissal, and this was not within the competence of the Court to address.

The Court therefore held that the applicant's dismissal was automatically unfair under Section 187(1)(f) of the LRA, because it was discriminatory as it was based on his HIV status.

Conclusion

The respondent was ordered to pay damages in the sum of twelve months' remuneration.

Significance

Discrimination against persons living with HIV is still a challenge in many countries and there is need for vigilance for states to promote a culture of respect for human rights to address discrimination in the workplace. Many countries are parties to international treaties that recognise various human rights that are infringed when a person is discriminated against on the basis of HIV. These include the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The rights recognised and protected in these treaties include the rights to equality and non-discrimination, dignity and health.

In Africa, the important human rights treaties include the African Charter on Human and Peoples' Rights and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

Apart from these treaties, there are various authoritative documents issued by human rights monitoring bodies or other bodies that explain, interpret, or apply provisions on human rights to employment in relation to HIV. Further, various bodies have developed codes or policy documents to address discrimination against persons living with HIV in the workplace. The Southern African Litigation Centre has brought all these resources together in the publication entitled *Equal rights for all: Litigating cases of HIV-related discrimination*.¹⁰⁶

Many countries in Africa recognise human rights in their constitutional and legal frameworks and integrate human rights protections. An important aspect of promoting respect for human rights is enforcement of rights in the national justice system, such as the courts, as was the circumstance in this decision. Unless rights can be enforced, they remain unrealisable for many people who experience discrimination due to their HIV status in the workplace but cannot access justice in the courts or other tribunals.

Georgina Ahamefule v. Imperial Medical Centre & Dr. Alex Molokwu
[2012] Suit No. ID/1627/2000
Nigeria, High Court

COURT HOLDING

The dismissal of the Applicant from her job was unlawful and constituted a wrongful termination because the 2nd Defendant acted out of malice and extreme bad faith. The Court further held that the 2nd Defendant's performance of a HIV test on the Claimant without obtaining informed consent amounted to battery; the failure to provide pre-and post-test counseling constituted negligence of a professional duty that was owed to the Applicant; and denying medical care to the Applicant based on her status was a violation of her right to health.

Summary of Facts

The Applicant, Georgina Ahamefule, started working as an auxiliary nurse at Imperial Medical Centre, the 1st Defendant, in 1989, when it was established by the 2nd Defendant, Dr. Alex Molokwu. In 1995, while pregnant, the Applicant developed some boils and sought treatment from the 2nd Defendant who conducted diagnostic tests without informing her about the nature of the tests, their outcome, or providing any counseling before and after the tests were conducted. Thereafter, the 2nd Defendant required that the Applicant take a two-week medical leave and also referred her to a physician at Lagos State University Teaching Hospital with a sealed note which she hand-delivered. The physician requested that she return with her husband and took blood samples from both without providing any information about what tests the samples would be used for or any counseling. Subsequently, the physician informed the Applicant and her husband that the HIV test he had conducted on them showed that the Applicant's HIV status was positive while her husband's was negative. No post-testing counselling was provided following these results. The Applicant returned to the 1st Defendant hospital to meet with the 2nd Defendant who directed her to collect a letter of termination of employment. The Applicant, soon after, had a miscarriage and, at the 1st Defendant hospital where she sought medical care, she was denied a medically-necessary surgical procedure due to her HIV status. She filed this case against the Defendants in 2000.

Issues

1. Whether conducting a HIV test on the Applicant without obtaining informed consent and providing pre-and post-testing counseling constituted battery and professional negligence.
2. Whether terminating the Applicant's employment based on her HIV-positive status violated her right to non-discrimination under Articles 2, 18(3) and 28 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act and the Laws of the Federation of Nigeria (African Charter) and were thereby unlawful.
3. Whether refusing to provide the required medical care following a miscarriage to the Applicant due to her HIV-positive status violated her right to health under Article 6 of the African Charter and Article 12 of the International Covenant on Economic, Social and Cultural Rights.

Court's Analysis

The Court first considered whether it had jurisdiction over this matter in response to the Defendants' assertion that Section 254c (1) (third alteration) Act 2010 of the Constitution had conferred exclusive jurisdiction over employment-related cases to the National Industrial Court. The Court determined that jurisdiction is governed by the law in effect at the time a suit is filed and trial begins and that the laws that were in effect in 2000, when the case was filed, provided it with jurisdiction over this matter. It then considered whether the Applicant's employment was wrongfully terminated and determined that the applicable law in this instance was the Common law, which provides that an employer can hire and fire an employee at will and without giving a reason, but where one is given it must be justified. The Court determined that the Applicant, who worked as an auxiliary nurse, ran errands for healthcare providers and did not participate in the provision of medical services, nor did she handle blood or any sharp objects. Consequently, it decided that the reason the Defendants gave for terminating the Applicant's employment, which was that the Applicant posed a risk to patients and other staff, was not justifiable.

Conclusion

The Court found that the termination of the Applicant's employment was based on malice and extreme bad faith and was unlawful. It further determined that the performance of an HIV test without the Applicant's informed consent constituted battery while the failure to provide pre- and post-test counselling amounted to professional negligence. It issued a declaration that the Defendant's refusal to provide required medical care to the Applicant following her miscarriage amounted to a violation of the right to health. The Applicant was awarded 5 million Naira (approximately 25,000 USD) as general damages for the termination of her employment and two million Naira (approximately 10,000 USD) for the testing which was done without consent and for the resulting professional negligence.

Significance

In 2000, when this case was filed, it was the first to address rights violations against a person living with HIV in Nigeria and one of the earliest cases in the region. The issues it raised exposed the continuum of human rights violations experienced by people living with HIV and AIDS and its consequences. These violations include lack of pre- and post-HIV test counselling at healthcare facilities; HIV testing and disclosure of results without informed consent; termination of employment due to an employee's HIV status; and denial of access to healthcare services, including emergency obstetric care, due to an individual's HIV status. The Applicant combined human rights and tort claims to increase the likelihood of obtaining a remedy because of the absence of precedents on the human rights claims at the time of filing. However, during the twelve-year period that the case was litigated, robust human rights standards were established on these issues by international and regional human rights instruments and the treaty monitoring bodies charged with their interpretation.

Yet, some challenges remain at the national level. HIV testing without informed consent continues to occur in Nigeria and other countries and is typically a pre-condition for employment. The emergence of HIV laws that contain provisions which place those living with HIV at increased risk of human rights violations remains a concern in some countries, such as Kenya and Uganda. These laws contain

provisions that provide for testing and disclosure of results without consent, with potentially negative consequences for women, who are more likely to experience violence and stigma once their status is made known. Its negative implications are increased for certain groups such as pregnant women who are typically subjected to routine HIV tests while receiving maternity care. The provisions in these HIV laws, which criminalise HIV exposure and transmission in language that is so broad it could be interpreted to apply to transmission in-utero, during delivery, or while breastfeeding, also hold serious implications for people living with HIV. African courts have a seminal role to play in addressing such violations and this decision can be persuasive in many other jurisdictions.

Stanley Kingaipe & Another v. The Attorney General
[2010] 2009/HL/86
Zambia, High Court

COURT HOLDING

The petitioners were subjected to mandatory HIV testing without their consent and put on antiretroviral (ARV) drugs unknowingly. This was a violation of their right to protection from inhuman and degrading treatment under Article 15 of the Constitution of Zambia, 1991 (the “Constitution”) and their right to privacy under Article 17.

The Court held that petitioners’ rights to adequate medical and health facilities and to equal and adequate educational opportunities in all fields and at all levels under Article 112(d) was not violated.

The Court found that petitioners were not discharged from the Zambia Air Force (the “ZAF”) because they were HIV positive, and therefore held that the petitioners’ discharge did not violate Articles 11, 21, 23, or 112(c) of the Constitution, the Universal Declaration of Human Rights, the African Charter on Human and Peoples’ Rights, the International Covenant on Civil and Political Rights, or the Government Policy and Guidelines on HIV/AIDS.

Summary of Facts

The two petitioners had formerly served in the ZAF. While in service, they were asked to appear before a Medical Board of Inquiry to assess their illnesses and determine their fitness to serve. They were later required to undergo compulsory medical checkups where blood samples were taken. Neither petitioner was informed that an HIV test would be conducted. They were later prescribed drugs, but were not informed that they were being treated for HIV. Each petitioner was subsequently discharged from the ZAF as unfit for service but was never informed that they had HIV. They only discovered that they had HIV after receiving counseling and blood tests from other health centers following their discharge.

The petitioners alleged that they were subjected to mandatory and compulsory HIV tests without their express or informed consent and that they were discharged as a result of these tests. They therefore claimed violations of Articles 11, 13, 15, 17, 21, 23, and 112(c)-(e) of the Constitution and of the Government Policy and Guidelines on HIV/AIDS.

Issues

1. Whether the petitioners were subjected to mandatory and compulsory HIV tests, and if so whether it violated their right to personal liberty under Article 13 of the Constitution, their right to protection from inhuman and degrading treatment under Article 15, their right to privacy under Article 17, or their right to adequate medical and health facilities and to equal and adequate educational opportunities in all fields at all levels under Article 112(d) and (e).
2. Whether the petitioners were discharged on account of their HIV status and, if so, whether it violated their fundamental rights and freedom under Article 11, rights to freely associate under Article 21, rights to protection from discrimination under Article 23, or rights to secure an adequate means of livelihood and opportunity to obtain employment under Article 112(c).

Court's Analysis

The Court found that the petitioners were subjected to mandatory and compulsory HIV tests. The Court noted that if any testing is done without someone's consent then the testing is by definition mandatory. To support this, the Court cited *Lewanika v. Frederick Chiluba* (1998) Z.R. 79, where the Supreme Court of Zambia held that extracting a blood sample from any person without his or her consent infringed individual rights. Citing *Airedale NHS Trust v. Bland* (1993) 1 All E R 821, the Court further noted that the petitioners did not lack the capacity to give consent, and that they were in the best position to make their own decision whether or not to have an HIV test.

In the Court's opinion, the absence of informed consent by the petitioners was an affront to their fundamental rights and freedoms and the preservation of their dignity and integrity, which are rights contemplated in both the African Charter on Human and Peoples' Rights and the International Covenant on Civil and Political Rights. Therefore, the Court held that the compulsory HIV tests similarly violated Articles 15 and 17 of the Constitution, which state, respectively, that "a person shall not be subjected to torture, or to inhuman or degrading punishment or other like treatment" and that "except with his own consent, a person shall not be subjected to the search of his person or his property or the entry by others on his premises."

The Court was not persuaded by the evidence before it that the petitioners were discharged on account of their HIV. The Court noted extensive evidence in the record of the petitioners' deteriorating health prior to their Medical Board Inquiries and HIV tests. Based on this history, which included severe infections that restricted mobility, doctors recommended to the Medical Board that both petitioners be found unfit for all forms of military duty. The Court found that the HIV tests were performed *after* the Medical Board had already accepted the doctors' recommendations, and that their decision was therefore based only on the petitioners' prior medical history and not their HIV diagnoses. The Court explained that under Regulation 9 of the Defence Force Regulations of the Defence Act, a soldier may be discharged if he is medically unfit for any form of service and is likely to remain so permanently. The Court accepted the defendant's argument that the doctors reasonably believed that the petitioners' health problems were likely to remain permanent based on their medical history.

The Court found that the petitioners were not discharged on account of their HIV, and therefore held that the petitioners' discharges were not in violation of their rights.

Conclusion

The petition succeeded in part, and the Court awarded the petitioners K10,000,000 each as compensation for having been subjected to mandatory HIV testing without their consent.

Significance

Doctors in the army realised that army personnel were becoming ill and some were becoming unfit for duties. They suspected HIV. They took the initiative to get sick personnel tested for HIV and put those who tested positive on a treatment. For some, this was life-transforming. They got better, and were able to maintain good health following this intervention. It was a good initiative by the doctors because they saved lives; however, the manner in which they intervened was paternalistic and misaligned with human rights principles.

Human rights demand that persons make decisions for themselves on all health interventions. The doctor only facilitates the process of identifying the medical issue and enables the client to make their decisions based on the available options for addressing the issue.

One of the special challenges with sexual and reproductive health services in Africa is this paternalistic attitude of health providers. Paternalism may be subtly manifested by the health provider's failure to provide all the information that is necessary for the client to understand their situation. Paternalism in health services is sometimes so entrenched that clients have come to believe, mistakenly, that their fate rests in the hands of the health provider. Yet, in human rights terms, no one should decide for another person. Every competent person has the "right" to decide for themselves.