



Collaboration Space / UCT Equality Law Database / 2011

ALLPASS v MOOIKLOOF ESTATE (PTY) LTD t/a MOOIKLOOF EQUESTRIAN CENTRE

Created by Jenny Erasmus [Administrator], last modified on Jul 24, 2013

YEAR: 2011PLAINTIFF / APPLICANT / APPELLANT: APPLICANT: GARY SHANE ALLPASSDEFENDANT / RESPONDENT: RESPONDENT: MOOIKLOOF ESTATE (PTY) LTD t/a MOOIKLOOF EQUESTRIAN CENTRECOURT: LABOUR COURTCITATION: (2011) 32 ILJ 1637 (LC)POST / PRIOR ACTION: CCMAJUDGE(S): BHOOLAGROUND(S) OF DISCRIMINATION: HIV STATUSSTATEMENT OF FACTS:

The applicant was employed on a three-month contract as a stable manager by the respondent. He was granted accommodation on the premises. At his interview he was asked inter alia about his health, financial situation and marital status. He declared that he was in good health and he was in a same sex union. The respondent's representatives advised the applicant that they have no problem with same sex marriages, and that they presently employed a same sex couple. Shortly after commencing work the applicant and the only two other employees in a same sex union were required to fill out Personal Particulars Form ("form") which included amongst things information about their health. Notably they were the only employees requested to fill out this form at such time. In completing the form the applicant added in the phrase illness and listed his HIV status, asthma and deep vein thrombosis. In addition he listed his allergies which included penicillin, and his chronic medication. He had not disclosed such information in the interview. In terms of the applicable law he was under no legal obligation to disclose his status. Two days later the owner of the respondent called the applicant to the parking lot of the premises and accused the applicant of being dishonest with respect to his health status in his interview. A confrontation ensued and the owner of the respondent dismissed the applicant with immediate effect. He was instructed to vacate the premises. He did not. The following day the applicant received a dismissal notice from the respondent. The letter referred to the applicant's declaration in the interview that he was in good health. It referred to the Personal Particulars Form filled out by the applicant which it regarded as evidence that the applicant was "severely ill". It alleged that the applicant was unable to perform the tasks of the job as was evident "in a few incidents" that had previously occurred. The previous incidents referred firstly to when the applicant had soiled his pants during a training lesson - the reason for which was not established in evidence - and secondly when the applicant had requested that a colleague administer an injection to a horse - which the evidence reflected was not necessary linked to his listed allergy of penicillin. A few days following the notice of dismissal the applicant was removed with force from the premises of the respondent. The security manager of the respondent called him derogatory names with respect to, inter alia, his sexual orientation. At such stage his attorneys intervened. The following day the applicant's dismissal was confirmed in another letter. It declared the reason for his dismissal as "fraudulent misrepresentations."

The applicant was aggrieved by his dismissal. He referred a dispute to the CCMA. A certificate of outcome was issued referring the matter to the Labour Court.

The applicant alleges that he had been automatically unfairly dismissed on the grounds of his HIV status in terms of s 187(1) of the LRA 1995. Alternatively he pleaded that his dismissal was substantively and procedurally unfair in terms of s 188 of the LRA. In a second claim the applicant alleged he had been unfairly discriminated against on the grounds of his HIV status in terms of s

6(1) read with s 50(2)(b) of the Employment Equity Act; and he had been dismissed in a manner which violated his constitutional rights, including his rights to privacy and dignity. He sought the maximum compensation in terms of s 194(3) of the LRA in the sum equivalent to 24 months' remuneration. In the alternative claim he sought the maximum compensation in terms of s 194(1) of the LRA, equivalent to 12 months' remuneration.

ISSUE OF LAW:

- 1) Whether the dismissal was automatically unfair, alternatively procedurally and substantively unfair, and if so the appropriate compensation.
- 2) Whether the employee was discriminated against on the basis of his HIV status, and if so the appropriate relief.

DECISION, RATIO AND OUTCOME (including minority judgment):

The court inter alia held that the dismissal of the applicant was automatically unfair in terms of s 187(1)(f) of the LRA. The respondent was ordered to pay compensation equivalent to 12 months remuneration, "reflecting both restitution as well as a punitive element for unfair discrimination on the grounds of HIV status." The applicant's second claim was dismissed.

With reference to s 187 (1)(f) of the LRA the court referred to case law declaring that discrimination based on HIV status is considered discrimination on an arbitrary ground. It cited and approved case law confirming that dismissal based on HIV status "was widely acknowledged as discrimination unless the employer could show that being free of HIV was an inherent requirement of the job." In contrast to the text of the LRA, the court referred to the specific prohibition of discrimination based on HIV status in the EEA, and the Code of Good Practice on Key Aspects of HIV and Aids in Employment therein. It referred to an earlier Constitutional Court judgment confirming that discrimination based on HIV status is unconstitutional.

The court held that on a balance of probabilities the respondent required the applicant to fill out the Personal Particulars Form in an attempt to extract information as to the applicant's HIV status. The court considered that the content of the form differed from similar forms issued to other employees, that the applicant's career success and HIV status had previously received attention in the media, and that only 3 employees, of which all were homosexual, were requested to complete the form. The respondent was found to be attempting to extract the HIV status of the applicant, which constituted unfair discrimination based on HIV.

The court examined the conduct of the owner of the respondent in dismissing the applicant in the parking lot. The evidence reflected that at the parking lot confrontation and dismissal, the owner had placed considerable attention on the applicant's HIV status. The immediate dismissal following the disclosure of the applicant's status in the form indicated to the court that the owner of the respondent was concerned with the HIV status of the applicant, and not the other listed illnesses. The court found that there was no medical or physical impediment preventing the applicant from performing his job. The evidence reflected that the respondent was not "seriously ill" as alleged by the respondent, and that its concerns over the other listed illnesses were masking the respondent's primary concern over the applicant's HIV status. The court was satisfied that the dominant reason for the dismissal of the applicant was his HIV status. This amounted to discrimination on an arbitrary ground prohibited by s 187 (1)(f) of the LRA.

The court found that the discriminatory dismissal was not justified by an inherent requirement of the job. On the facts the applicant's had an allergy to penicillin. The respondent argued that the applicant's allergy to penicillin made it impossible to perform his duties as a stable manager as he would not be able to administer injections of depocillin to the horses. The court rejected the respondent's argument as masking the true reason for the dismissal. The evidence failed to establish that a non-allergy to penicillin was an inherent requirement of the job. It was noted that even if it was an inherent requirement of the job, the respondent had admitted that the allergy did not affect the applicant's ability to perform the job.

The court dismissed the second claim of the applicant, namely the he had been unfairly discriminated against on the grounds of his HIV status in terms of s 6(1) read with s 50(2)(b) of the Employment Equity Act and was entitled to damages in the amount of R150, 000.00.

The court found that the relief requested in the second claim amounted to damages for "the applicant's humiliating treatment based on his sexual orientation and his homeless status following his dismissal as well as the unfair discrimination and loss of dignity arising from the expectation that he should have disclosed his HIV status at the interview." With respect to the actions of the security manager at the time of the applicant's initial eviction, the court found that the owner of the respondent could not be held liable for the actions of the security estate when the applicant was forcibly removed. The facts presented was merely circumstantial in establishing that the owner of the respondent had leaked personal details of the applicant to the security manager. Irrespective of a possible causal connection between the respondent and the humiliating actions of the estate security, the court held it lacked jurisdiction as the actions of the security manager occurred after the dismissal of the applicant, and the applicant did not rely on the vicarious liability of the employer. The appropriate cause of action was a civil claim in delict.

With respect to relief for an automatically unfair dismissal the court awarded the applicant 12 months remuneration. The court considered that the applicant had volunteered his HIV status in the form, even though he was not legally obliged to. The applicant did not deliberately withhold information nor was his actions motivated by dishonest or deceit. It was noted that the evidence reflected that the applicant did not know that the form would be seen by the owners of the respondent. The court was satisfied that the applicant had proven his entitlement to relief for damages of loss of dignity and privacy in that he was expected to disclose his HIV status. Had the applicant been a permanent employee of the respondent he would have been entitled to 24 months remuneration as compensation.

The court cited case law confirming that dual claims under the LRA and EEA arising from the same set of facts is permissible.

LINK TO FULL DECISION: <http://www.saflii.org.za/za/ecases/ZALCJHB/2011/7.html>

LABELS: