

**Jimson v Botswana Building Society
(2005) AHRLR 3 (BwIC 2003)**

This case involves an employee whose probationary employment was terminated as a result of a positive HIV test. The Botswana Industrial Court ruled that the termination of the employee's contract was both substantively and procedurally unfair. Of particular note in this case is the Court's exhortation to the legislature to address the issue of compulsory HIV testing.

Excerpts

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Facts

[1] The applicant, Rapula Jimson, was offered and accepted employment by the respondent, Botswana Building Society. The Botswana Building Society letter of 20 June 2002 which offered the employment made the appointment subject to six months probationary period; 48 hours notice of termination during probation; passing a medical examination by a doctor chosen and paid for by the Society.

[2] On successful completion of probationary period the applicant would be appointed to the permanent and pensionable service of the society and be required to join the membership of the Staff Pension Fund.

[3] For purposes of medical examination the applicant was 'issued with the enclosed medical examination form to be completed by the medical doctor referred to.' Nineteen days later on 9 July 2002 the applicant received another letter from the respondent...

Further pre-employment medical examination

Further to the pre-employment medical examination that has been conducted on you, you are advised that there is still a requirement for you to undergo an HIV test, as a condition for employment with the society.

[4] The applicant complied but apparently the doctor chosen by the Society declined to conduct the HIV test because she was not convinced that the test was voluntary. The applicant then approached another doctor and had the test done at his own expense. The results of the test were sent directly to the respondent showed that the applicant was HIV positive. On 27 August 2002 the respondent wrote a letter to the applicant informing him that 'your probationary employment with the society will be terminated with effect from 31 August 2002.' Copy of the results of the test was enclosed.

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Substantive fairness

[9] The approach taken by this Court in dismissal cases is that notwithstanding the provisions of sections 18 and 19 of the Employment Act (cap 47:01) and taking into account the provisions of section 20(2), a contract of employment for an unspecified period of time should not be terminated unless *just cause* can be shown. This is also consistent with the ILO Convention article 4 which provides:

The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.

[10] For purposes of this part of the judgment the issue boiled down to:

- (a) Whether the letter of June 20 and the attached medical form included HIV test, and,
- (b) Whether the Respondent was entitled to terminate the Applicant's employment because of his HIV status.

[11] Currently there is no legislation governing the employment of HIV positive persons. I shall deal with the procedural aspects of the complaints later under the appropriate heading.

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[15] It was not disputed that the medical form explained above represented what may be termed, a standard form, for purposes of employment. The applicant did not raise any objection to going through the tests as specified in the form. It was also admitted in court by the respondent's representatives that the tests specified in the form were done and there was no negative recommendation.

[16] The medical form does not tell the doctor the minimum state of health required of an applicant for a positive recommendation. I shall assume therefore that the matter is left to the doctor to give an expert opinion on the applicant's state of health and suitability for employment, no doubt taking into account the import of the last two questions on the applicant's general state of health. In view of the absence of objection to the test as specified in the medical test form, I shall assume that the result would still have been accepted even if had been negative. However unfortunately the matter did not end there.

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[18] The Court does not agree that the form provided for HIV test. If until June 2002 no one was tested for HIV on the basis of that form, there is no reason why it could be treated as prescribing HIV testing. It was admitted in Court that a particular doctor who did the medical examination, had been used by the respondent in the past. Not only did the doctor not consider the tests listed to include HIV but she also didn't include it in the tests. The respondent did not, at that time, say to the applicant that the doctor omitted the HIV test. Instead it made it clear that the test was *additional* by stating, that 'further to the pre-employment medical examination that has been conducted on you, you are advised that there is still a requirement for you to undergo an HIV test, as a condition for employment with the Society.' In any case, having supplied the applicant with a detailed questionnaire on his health dealing with many ailments from 'spitting blood' through venereal disease, discharge from the ears, to minor ailments such as sore throat, it must be assumed on the basis of the principle, *inclusio unius est exclusio alterius*, (the inclusion of one is the exclusion of another) that HIV test which was not mentioned was not part of the test ordered. Admittedly the questionnaire included the question 'Any disease or illness not above mentioned'. That was part of the standard form and never resulted in HIV test before. HIV is such a prominent subject that I do not believe it could have been dealt with in that indirect and casual manner. In any case nothing in the conduct of the respondent suggests that the questionnaire was intended to cover subjects such as HIV. There is not even any reference to blood test in the form. The test clearly focused on general physical fitness. That is the purpose of paragraph 9 of the medical form. Being HIV positive does not *per se* imply physical unfitness. It depends on the stage of the virus. (See *Hoffman v SA Airways* (2000) 21 ILJ 891 at 899).

[19] It is a well established National Policy in this country that 'Pre-employment HIV testing as part of the assessment of fitness to work is unnecessary, and should not be carried out.' (P 12, para 6(2) of the Botswana National Policy on HIV/AIDS).

[20] The National Policy is clearly based on the World Health Organisation and ILO guidelines on HIV/AIDS in the workplace of 1990 which provide that pre-employment HIV/AIDS screening as part of the assessment of fitness is unnecessary and should not be required. The SADC code on HIV/AIDS and employment also states that there should be no direct or indirect pre-employment HIV test. (See *Hoffman v SA Airways* (2000) 21 ILJ 891 at 908). With all these policy codes including that of the World Health Organisation, there is no way any doctor would adopt a casual approach to HIV testing without risking accusation of breach of the Hippocratic

oath. The doctor to whom the applicant was sent not only did not test for HIV but even after the respondent wrote a specific letter on HIV test, she still refused on ethical grounds as she was not satisfied as to the applicant's uncoerced consent.

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[22] The applicant accepted the offer of employment on the basis of the letter of 20 June 2002. He complied with the conditions of the offer relating to the passing of a medical examination. He passed the prescribed test and therefore satisfied the conditions set from the medical point of view. Did the applicant's compliance with the demands of the letter of 9 July amount to the applicant's consent to the variation of the contract already concluded? Was the applicant made aware that the requirement for additional medical test was introducing new terms to the contract already concluded?

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[24] On the other hand the respondent cannot be classed as unskilled or even semi-skilled. It had all the skilled manpower to conduct its business. Yet it took advantage of an unskilled employee by making a variation of the conditions of a contract entered into look like a continuation of the original medical examination.

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[28] In view of the foregoing authorities and court decisions on the duties and responsibilities of the Industrial Court, can this court *fairly* enforce the effect what the applicant correctly determined 'the compulsory post-employment HIV testing' which was turned into a precondition for employment contrary to the offer that had already been accepted? Does it matter that the applicant complied? All these questions must be answered in the negative. The respondent's unlawful unilateral alteration of a contract entered into, which alteration unfairly affected the applicant's employment opportunities and work security and jeopardised or prejudiced his social welfare, is not one that this Court can give blessing to. To do so would be to act contrary to the rules of fairness or equity. We would be administering injustice not justice. Compliance with a compulsory instruction by an unskilled and uninformed worker desperate for employment is not the type of consent that can form a proper basis for a defense by the respondent to the applicant's claim. Compulsion and consent are mutually exclusive concepts. It is clear from statutory intervention in the private relations between employers and employees and the introduction of concepts such as *just cause*, *good cause* and *lawful termination* (see sections 20(2), 33(1)(d), 120(1) & (2) and 17 respectively of the Employment Act) in the place of the common law *laissez-faire* policy that it was clearly intended to mitigate the harsh realities of unequal contracting.

[29] The Court finds therefore that the compulsory post-employment HIV testing ordered by the respondent was in breach of the contract of employment entered into between the applicant and the respondent. Therefore the termination of the applicant's contract because of an HIV testing in breach of his contractual rights was substantively unfair as having been tainted by the unfairness of the test.

[30] The conclusion reached also answers the question put to the Court whether the *dismissal* on the basis of positive HIV status constituted a just cause in terms of section 2(2) of the Employment. The answer is that the dismissal of the applicant was substantively unfair. The Applicant having passed the medical examination he was required to go through, the deal was done. He was now in the same position as any other employee serving probation whose admission into the permanent and pensionable service could only be thwarted by poor performance or misconduct. The introduction of the HIV test at that stage amounted to discriminatory treatment, as it was not applied to other employees. Evidence was given by respondent's witness that existing employees who are found to be HIV positive are not dismissed but counseled. The applicant was exactly in that position. He should have been given the same treatment.

Is pre-employment testing of HIV permissible?

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[32] I have already stated that there is no statutory provision regulating the employment of HIV infected applicants. I have also referred to the existing National Policy on HIV/AIDS. This policy simply provides that: 'Pre-employment HIV testing as part of the assessment of fitness to work is unnecessary and should not be carried out.'

[33] In the South African case of *Hoffman v SA Airways* (2000) 21 ILJ (CC) 2357 the Constitutional Court of South Africa ruled that the refusal by SAA to employ the appellant as a cabin attendant because he was HIV positive violated his right to equality guaranteed by the Constitution. Counsel for the respondent relied on the ruling of the Witwatersrand Local Division on the same case which favoured the employer while the applicant's representative relied on the decision of the Constitutional Court on appeal which favoured the employee.

[34] Section 9 of the South African Constitution provides: '(1) The state may not unfairly discriminate directly or indirectly against anyone ...'. Section 15 of the Botswana constitution provides that:

(1) ... No law shall make any provision that is discriminatory either of itself or in its effect.

(2) ... No person shall be treated in a discriminatory manner by any person acting by virtue of any written law of in the performance of the functions of any public office or public authority.

[35] Two points need to be made about these constitutional provisions. First these are matters of public law as opposed to private law.

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The second point is that both provisions forbid discrimination by public authorities including the making and enforcing such laws by such authorities. It is because of the nature of the constitutional provisions of the South African Constitution that Ngcobo J in laying the foundation for ruling that SAA acted unconstitutionally stated:

Transnet is a statutory body, under the control of the state, which has public powers and performs public functions in the public interest. It was common cause that SAA is a business unit of Transnet. As such, it is an organ of state and is bound by the Bill of Rights in terms of s 8(1), read with 239 of the Constitution. It is therefore, expressly prohibited from discriminating unfairly.

[36] The Botswana constitution also forbids the making of discriminatory laws (no doubt by the state) and the discriminatory treatment of persons acting in pursuance of any written law or 'in the performance of the functions of any public office or any public authority.' See also the definition of public office in section 127(1) of the Constitution.

...

[38] It is clear that both the South African and the Indian courts based their decisions on the fact that they were dealing with the state or state organs. This is consistent with the wording of constitutions on bills of rights. The bills of rights protect the individual against the state or state power. This is public law as contradistinguished from private law which regulates dealings between private individuals including private legal persons. The wording of the National Policy on HIV/AIDS is wide and imperative enough to create the impression that it applies to all and sundry. It is binding on the respondent? The respondent is not a statutory body or a parastatal. It is not a state organ but a private commercial entity. The government is merely a shareholder just as it is a shareholder in other private commercial entities.

[39] The Botswana National Policy on HIV/AIDS is a government policy produced and approved by the said government in 1998. It is a binding policy on the government

and state organs. The power to 'make laws for the peace, order an good government of Botswana' is vested only in Parliament. In the absence of specific delegated powers of legislation with respect to particular subjects, the government would not have power to legislate. Nowhere does the policy claim to have statutory authority. In any case, sub-legislation is effected by way of statutory instruments and not by way of policy. Therefore however worded paragraph 6(2) of the policy may be, it remains a policy carrying only persuasive authority. It is not binding on the Botswana Building Society.

[40] In another policy document, Botswana National Strategic Framework for HIV/AIDS 2002 - 2003 of 29 November 2002, one of the national objectives is stated as: 'To develop and implement laws, regulations and measures to eliminate stigma and discrimination against PLWH.'

[41] In an apparent acknowledgement of the fact that so far only persuasion through policies is in place, the preamble, under the heading 'HIV/AIDS and employment', states:

The government as an employer, as well a private sector and parastatal organisations, will have to manage staff affected by HIV/AIDS and *make decisions regarding recruitment*, deployment, training, payment of terminal benefits, retirement due to ill-health et cetera (emphasis added).

[42] The Botswana Building Society made a decision with regard to the recruitment of people living with HIV. In the absence of any legal stipulation forbidding the making of that policy, this Court cannot assume the role of a lawmaker.

[43] However the Court, as a court of equity, would be remiss if it did not comment on the moral force of the applicant's case on the simple issue of mandatory HIV testing for prospective employees with consequent rejection simply because of an applicant's HIV status.

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[45] ... [I]t is time for the government to 'develop and implement laws and regulations ... to eliminate the stigma and discrimination against PLWH' as promised. The applicant lost his employment because of an indiscriminate policy of the employer who took advantage of the absence of restraining legislative instruments. It was not that at that point in time the applicant was found to be incapacitated but simply because he was HIV positive. This is not the type of prejudice that can be left to the courts to tackle. The courts can only fill the gaps, clear doubt or give meaning where there is lack of clarity. But they cannot create a new law outlawing the testing for a particular disease simply because policy would wish it to be so. The Court is not unmindful of the provisions of section 13(5) of the Trade Disputes Act (cap 48:02) which permits the Court to take into consideration 'any terms and conditions of employment that may, from time to time, be issued by the government.' That does not give the Court the power to turn policy into law.

[46] I stated earlier that the respondent's tests included infection of the throat. It is not clear whether the applicant would have been disqualified if he had a sore throat. An infected throat will not necessarily incapacitate a worker just as being HIV positive will not necessarily incapacitate a worker. The only reason a court would outlaw testing for HIV and not for throat infection would be in response to government policy. This is not the way courts of law and even those vested with equity jurisdiction, are supposed to operate. Courts have to apply the *law* not *policy*. The two operate at different levels. It is instructive that the policy maker after categorically stating that there should be no pre-employment HIV testing, four years later in another policy document left it to employers to 'make decisions regarding recruitment' of people living with HIV.

[47] The conclusion the Court arrives at is that it is for the state to decide whether it wants to stop HIV testing in the workplace in which case it would introduce legislation to that effect.

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Remedy

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[59] Although the Court ruled that the National Policy had no force of law, it has been observed also that it has persuasive moral force. The applicant received the most unfair treatment that can be meted out to an HIV sufferer by a commercial entity depending for its survival on the patronage of members of the public. The applicant is a member of that public.

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[66] In consequence of the foregoing the Court makes the following determination: The termination of the contract of employment of the applicant was substantively unfair

The said termination was also procedurally unfair.

The National Policy on HIV/AIDS has no force of law but has a strong moral persuasive force. It is therefore not legally binding on the Respondent which has the right to 'make (its) decisions regarding recruitment.'

The respondent is hereby ordered to pay the applicant compensation for substantive and procedural unfairness in the amount of P 9240 being the equivalent of six months' monetary wages for the applicant at the time of termination. (P 1540 x 6). No other compensation is due for the alleged remainder of the probationary period.

The respondent is also ordered to pay the costs of HIV testing, as conceded, in the amount of P 159.50.

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