Reportable

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case no.: JS178/09

In the matter between:

GARY SHANE ALLPASS Applicant

and

MOOIKLOOF ESTATES (PTY) LTD t/a

MOOILKLOOF EQUESTRIAN CENTRE Respondent

JUDGMENT

BHOOLA J:

Introduction

[1] In claim A the applicant seeks relief arising from his alleged automatically unfair dismissal on the grounds of his HIV status in terms of section 187(1)(f) of the Labour Relations Act, 66 of 1995 ("the LRA"). In the alternative, the applicant pleads that his dismissal was substantively and procedurally unfair in terms of section 188 of the LRA. In claim B he seeks 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").

Common cause material facts

[2] On 28 October 2008 the applicant was appointed by the respondent as Stable Yard Manager and horse riding instructor for the Mooikloof Equestrian Centre ("the Centre"). The respondent is the developer of Mooikloof Estates, a residential estate on which the Centre is based. It owned and managed the Centre (which has since been sold), which consisted of a horse riding school and stables at which horses owned both by the respondent and private clients were kept.

[3] The applicant's letter of appointment confirms his appointment commencing on 1 November 2008 *"on a temporary basis for a period of three months, where after the position will (sic) reviewed".* The terms of his employment included remuneration at R12000.00 per month as well as accommodation on the respondent's premises. A detailed job description accompanied the appointment letter and defined his duties as *inter alia*:

- managing and overseeing the Mooikloof Equestrian Centre in close cooperation with Aletta Herbst ("Herbst") ;
- horse grooming, care and supervision (24 Hours);
- crisis management of horses and clients;
- assisting the veterinarian; and
- reporting to Dawie Malan ("Malan") on all aspects.

[4] The respondent announced his appointment in a notice dated 3 November 2008 to all stablers, pupils and riders, listing the applicant's 27 years' experience in horse riding, instructing, stable yard management and judging of dressage

competitions. The notice referred to his impressive curriculum vitae and achievements, which included, *inter alia,* representing South Africa in dressage championships as well as being a qualified South African National Defence Force ("SANDF") riding instructor. Prior to taking up the appointment the applicant was self-employed and resided in the Western Cape but travelled to Gauteng occasionally on behalf of private clients. He but relocated when he was notified of his appointment unofficially by Herbst.

[5] In his pre-employment interviews the applicant was asked about *inter alia* his health, whether he had any significant debt and his marital status. He stated that he was in good health, that he had a bond over an immovable property and that he was married. In reply to a question about his religious affiliation he stated that he was agnostic. A question concerning his sexual orientation arose to which he replied that he was homosexual and was in a same - sex civil union. Malan did not regard his responses in an unfavourable light and indicated that the respondent had no problem with this and already employed a same sex couple, Aletta and Magda Herbst.

[6] The applicant has been living with HIV for some 18 years. He commenced a regime of medication and treatment since his diagnosis when he was informed he had only a few months to live. His evidence and that of his medical expert was that he has consistently adhered to a proper treatment regime and has at material times been and remains in good health. According to his medical expert, and which evidence was unchallenged, his CD4 count at the material time was exceptionally low and his viral load was at such a low level as to be undetectable. He was said to be in excellent health and able to perform the duties required of him at all material times.

[7] On 10 November 2008 the applicant, Herbst, and her spouse (who had been employees of the respondent for a number of years), were requested to complete a Personal Particulars Form ("the PPF"). The PPF required information *inter alia* concerning allergies as well as medication taken for these allergies, as well as

chronic medication taken by the employee. The applicant struck out the words *"medikasie wat daarvoor geneem word"* and wrote in the word *"illnesses*" which he listed as asthma, DVT ("deep vein thrombosis") and HIV. He listed six allergies including penicillin and listed his chronic medication as Warfarin, a blood thinning medication for DVT and Kaletra and Truvada, which are antiretroviral drugs.

[8] On or about 12 November 2008, Malan collected the applicant's PPF. The following day a confrontation ensued between Malan and the applicant during which the applicant was dismissed and instructed to vacate the premises. The applicant did not leave immediately as he had not received formal notice of dismissal nor his salary, and his personal belongings (including medication) were on the premises. He also had no alternative accommodation.

[9] In a dismissal notice dated 14 November he was advised as follows:

DISMISSAL : GARY ALLPASS

I refer to our conversation yesterday the 13th of November 2008 and place the following on record :

1. *In the job interview held with you in October 2008 you were told that the job at Mooikloof Equestrian Centre demands long hours, working nights and weekends. You were subsequently asked whether your health is good whereupon you replied that, apart from your ankle injury sustained during horse riding, your health was excellent and that nothing will prevent you from doing your job thoroughly.*

2. *From the questionnaire handed to me on the 12th of November, regarding your personal details, it became clear that you were not telling the truth in the interview. It became clear that you are severely ill and that you will not be able to complete your duties as this became evident in a few incidents that occurred in the few days that you were working at the equestrian centre.*

3. *When you were confronted by me on the 13th of November, you confirmed*

that you made a mistake by not telling the truth in the interview.

4. *The basis on which you are being dismissed from your temporary appointment at the Mooikloof Equestrian Centre is because you were dishonest in the interview.*

Your salary will be paid up to the end of today after you have vacated the house and the premises".

[10] A further incident occurred on 18 November 2008 when the applicant was forcibly removed from the respondent's premises and verbally abused by a security manager at the estate. Following the intervention of his attorneys of record he was given until 12:00 the next day to vacate the premises.

[11] The applicant's dismissal was confirmed in a final notice dated 19 November 2008 and which accompanied his salary payment. The notice declared the reason for his dismissal as *"fraudulent misrepresentations*". It recorded that he did not qualify for one weeks' notice on account of the reason for his dismissal, but offered him the equivalent amount as a *"gesture of humanity*". The applicant refused to sign the acknowledgement of receipt accompanying the notice.

[12] The applicant referred a dispute arising from his dismissal to the Commission for Conciliation, Mediation and Arbitration ("CCMA") on 17 November 2008. The dispute was conciliated on 17 December 2008 under case number GATW 12276-08 and a certificate of outcome was issued referring the matter to this court.

Issues to be determined

[13] Although the pre-trial minute conflates issues of lawfulness and fairness the legal issues can be determined to be the following :

(a) Whether the dismissal of the applicant was automatically unfair, or alternatively procedurally and/or substantively unfair, and if so, the appropriate measure of compensation to which he is 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 is entitled.

The evidence led

[14] The respondent assumed the duty to begin and called Malan, followed by Herbst as its expert witness.

Dawie Malan

[15] Malan managed the Centre under the authority of his father, Hendrik Malan ("Malan senior"). He testified that only one interview was held with the applicant at which both he and his father were present. The applicant relied in his statement of case on two interviews, the first being on his birthday (22 October) when Malan senior congratulated him and the second with Malan alone on 27 October 2008. However, it became common cause during the trial that an interview took place on 27 October 2008 at which both Malans were present. At the interview the applicant was asked about his state of health and confirmed that he was in good health.

[16] He confirmed that the decision to appoint the applicant had been taken immediately after the interview, and that he had been impressed by the applicant's considerable experience with horses and the management of stables. At the

interview the requirements of the job description were canvassed with him, including aspects of the job involving the general care, supervision, grooming and management of horses on a round-the-clock basis at the Centre. Malan emphasised that this required the applicant to reside on the premises, and that he was expected to attend to sick horses until the vet arrived, and this included administering antibiotic injections to the horses should this become necessary. His evidence was that the applicant's job was *"very hard and unforgiving"* since a horse could fall ill during the night and that the horses were very valuable to the respondent particularly those stabled on behalf of private clients.

[17] Malan confirmed that even though the Herbsts had been in the employ of the respondent for several years they were only asked to complete the PPF simultaneously with the applicant. The reason for this was that according to the respondent's bookkeeper, Rina van Zyl ("Van Zyl"), their forms were missing from their files. Malan testified that the applicant's completed PPF had been brought to him by Van Zyl and that she had pointed out the allergies and illnesses recorded therein. Malan stated that his reaction upon noticing the illnesses disclosed by the applicant was to inform Malan senior, and they formed the view that the applicant had been dishonest in not disclosing this information in his interview, and had therefore breached their trust. The decision was made to dismiss him "there and then".

[18] The conclusion that the applicant was seriously ill and unable to perform his duties was bolstered by two incidents which occurred between the interview and the disclosures in the PPF. The first incident related to information he had received from Herbst that the applicant had soiled his pants while giving a riding lesson and had asked her to take over the lesson. There was a dispute of fact about the exact period of time that he was unavailable as a result. Malan suggested that he had not been able to teach for the rest of the day while the applicant testified that he was only away for about 15 minutes, which was half of a normal lesson. The first incident occurred a few days after the applicant had commenced employment. Herbst also informed him of a second incident where the applicant refused to inject a horse

because of his allergy to penicillin. Malan had no direct knowledge of the incidents and relied on the information from Herbst, who had conceded that she had no knowledge of what caused the first incident.

[19] Malan testified that the respondent was not the kind of employer that discriminated against employees and had for many years employed the Herbsts knowing they were a lesbian couple. He had appointed the applicant despite his sexual orientation and had conveyed to him that he despised discrimination. He acknowledged that discrimination based on sexual orientation existed in certain areas but remained adamant that the reason for the applicant's dismissal was his dishonest non-disclosure of his many illnesses. His evidence was that the applicant had lied in the interview because *" when you look at it from an employer's point of view, he was ill and he did not declare it".* He conceded that the applicant had not been asked specific questions about medical conditions or allergies and had simply been responding to a general question about his health. When he was asked whether he believed the applicant had a duty to disclose his HIV condition to his prospective employer he replied : *"I don't think he was under duty but he should have disclosed his HIV status".* His evidence was that when one considered all the illnesses combined it meant that the applicant was *" not in good health*". He testified that if the applicant had only HIV and had failed to disclose this it would have been understandable, but in the context of three illnesses it meant he was not well and it was unfair not to disclose this to a prospective employer. His view was that it would be dishonest for someone with HIV to claim good health, not because it implies that he is unhealthy but because it is a realistic factor impacting on his health. He said that the applicant should have known why the question was being asked of him and he should have answered differently. Malan conceded that if the applicant suffered only from asthma and this was under control it would not have been a work - related issue. Likewise he did not understand the impact of DVT on employment since he was not a medical expert, but was clear that HIV was "*more serious*". Malan was asked in cross examination to consider the hypothetical situation in which the applicant had only one condition namely that he was HIV positive but failed to disclose it and whether he would have considered that to be dishonest. His reply was "*yes, it would be dishonest to say that his health was fine and not say that he was*

HIV positive". He said *"this is not only my view but the view of a lot of employers that this person is not healthy"*, although conceding that this assessment would best be left to a medical expert.

[20] Malan's evidence was that upon receipt of the PPF he telephoned the applicant and arranged a formal meeting with him. As a result of a lack of privacy occasioned by the presence of clients in the office at the Centre, they met in the parking area about 30 to 40 metres away from the office. It became common cause that the meeting took place in the afternoon, not in the morning as the applicant had originally recalled. Malan showed the applicant his PPF and asked him about the various illnesses he had disclosed. The applicant admitted that he had been living with HIV for 17 years and had suffered from asthma and DVT. Malan pointed out the discrepancy with the undertaking he gave in the interview that he was in good health and the applicant admitted that he had made a mistake. Malan then told him that the respondent could not work with someone who had lied, at which point the applicant asked whether he was being fired. Malan replied that this would have to be done formally. The applicant then got angry and ended the meeting by running down the stairs of the parking area, threatening to tell everyone that he was being fired because of his HIV condition. Malan then informed Herbst and asked her to have him vacate the Centre. The applicant sent Malan an SMS message stating that he would only leave upon receipt of a formal notice of dismissal, following which Malan prepared the notice of 14 November.

[21] Malan denied that the applicant had not been afforded a reasonable opportunity to state his case as he had ended the meeting abruptly. Although he conceded that the meeting lasted no longer than five minutes and he could have subsequently convened a formal hearing or a meeting under less heated circumstances, he saw no reason to do so where the applicant subsequently resorted to victimising the respondent and "sabotaging" clients.

[22] Malan disputed that HIV was the reason for the applicant's dismissal and

insisted that the respondent was aggrieved by his failure to disclose his illnesses. He said that had the applicant disclosed his HIV status at the time, he would have engaged with him about properly managing the condition in the context of his work. The respondent had good reason to expect him to declare his illnesses, and what was more important was his inability to meet inherent job requirements as a result of his allergy to penicillin. It was common cause that penicillin is administered to horses as the antibiotic depocillin, and in cross examination Malan conceded that the latter could only be administered when prescribed by a veterinarian. He was however unable to point to any crisis occasioned by the allergy during the applicant's short period of employment, and he could not rule out the concerns raised by the applicant (*inter alia* that Herbst understood the temperament of the horse; she had commenced the course of treatment prior to the applicant's employment; and the injection would have had to be administered on the flank opposite to the one which she had previously injected) as legitimate reasons for refusing to administer the injection himself. He had simply accepted what Herbst had communicated to him about the applicant's refusal being due to his penicillin allergy. He was unable to comment on applicant's evidence that he had administered intravenous medication to horses on numerous occasions, particularly during his national service in the equestrian division of the SANDF.

[23] Malan could not confirm in cross examination that the intravenous administration of penicillin had been stipulated in the applicant's job description or canvassed with him at the interview or subsequent thereto . His evidence was that it did not require specific mention as it was part of the "wider perspective" of managing horses. He was unable to confirm that an allergy to penicillin was contra-indicated for its administration to a horse and had simply assumed this as a result of the communication from Herbst. He conceded that his major concern was the breakdown of trust and that when he saw the applicant's PPF he decided to dismiss him immediately.

[24] Malan denied that the respondent was involved in the applicant's eviction from the premises or that he had issued the instruction to Hattingh, who he said was not

employed by the respondent but was head of security appointed by the homeowners' association on the Mooikloof residential estate. The Malans resided on the estate and he was required to notify them of the applicant's dismissal but he was uncertain whether he or Herbst did so.

Aletta Herbst

[25] Herbst confirmed that the meeting at which the applicant was dismissed lasted only about five minutes and that applicant stormed down the steps saying that Malan had just fired him because of his HIV.

[26] She confirmed that it was the first time she had been asked to provide the medical information sought on the PPF, and that although her spouse also had an allergy to penicillin she did not work directly with the horses.

[27] In regard to the penicillin incident she testified that it occurred during the first weekend of the applicant being on duty. It was her weekend off and the applicant asked her to help him out with injecting a horse because he had an allergy to penicillin. She conceded that she had commenced the treatment of the horse the previous Friday and (although she initially disagreed) conceded that it was a requirement that injections were administered on alternative flanks to avoid internal bleeding. She agreed with the precautions advocated by the applicant in regard to the risks involved in administering intravenous medication to horses and conceded that she was not aware of any guideline that would prevent someone who was allergic to penicillin from injecting a horse with depocillin. She also conceded that she was not aware of any riding school that stipulated as an inherent job requirement the non-allergy to penicillin and she was also not aware of any person having been disqualified from working with horses on this basis. She insisted that the applicant's reason for seeking her assistance was because he had an allergy although she could not dispute that he had administered intravenous medication to horses on

numerous occasions despite this. She conceded that he was justified in taking precautions given the risks of working with horses. Although she had numerous scars from injuries she had sustained in her work, the applicant did not have any.

The Applicant's evidence

[28] The applicant testified that he had openly declared his HIV status and it was a matter of public record. It was known in Western Cape equestrian circles and reports about his effective management of this condition had appeared in various press reports, including the Rapport, a national Afrikaans Sunday newspaper. It is common cause that the Malans are Afrikaans speaking and the main office of the respondent is in Pretoria, which is still associated with conservatism. He had also disclosed his status to his various private clients, many of whom were based in Gauteng, so that they were aware of the risks and could exercise an informed choice as to whether to use his services as a riding instructor. He had never had a client refuse to employ him on this basis. He had developed a public reputation as a motivational speaker and an inspirational figure supporting people living with HIV and promoting non-discrimination. He had been warned by the Herbsts that the Malans were "conservative and difficult people" and this was the reason why he was guarded in the interview when he was asked questions about his sexual orientation, marriage and religious affiliation. He was aware of his constitutional right not to disclose his HIV status to his prospective employers and had not done so at the interview because of the warning as well as his fear of the implications of doing so.

[29] When he completed the PPF he was under the impression that it was for use in the Centre only and was not aware that it would come to the attention of the Malans. He inserted the term "illnesses", which should more correctly have referred to medical problems or conditions since he was in good health despite being diagnosed with HIV. He had only listed asthma as an illness because on two earlier occasions when he commenced treatment for HIV, he had suffered an asthma attack as a reaction to AZT, an HIV drug. Although it was not a chronic condition he felt it

necessary to make his employer aware of his full medical history. DVT was likewise related to one incident which occurred in 2006 and had since then been controlled by regular medication. His penicillin allergy had manifested in the form of a skin rash which lasted about ten days when he had at been given a penicillin injection in error. These conditions had never affected his work as a rider, instructor or stable manager and accordingly he had been honest when he said in the interview that he was in good health. He attributed his excellent state of health to his commitment to a proper treatment regime involving health assessments, taking HIV medication regularly and working hard in an outdoor environment. He was often up from about 5:00 checking on the horses and worked long days managing the grooms, the stable yard and attending to clients.

[30] On 13 November 2008 Malan was angry when he arrived at the stables and asked to speak to him. He denied that Malan had called to pre-arrange the meeting and said that had this been the case he would have ensured that an appropriate venue was available. They went to the parking area where Malan accused him of lying because he had not disclosed in the interview that he had HIV, dismissed him and ordered him to leave the premises immediately. Malan did not mention asthma, DVT or the penicillin allergy, and appeared to be mainly concerned about his HIV. He became angry and upset, and stormed off threatening to tell everyone he had been dismissed for HIV. He denied having admitted to Malan that his failure to disclose during the interview was a mistake. His dismissal notice was issued to him by Herbst, who reported to him, and his humiliation was compounded by the fact that no steps were taken to ensure that at least this communication was given to him in private or at his residence instead of the office, or was placed in a sealed envelope to ensure confidentiality.

[31] On 18 November 2008, following his dismissal, he was confronted by Phillip Hattingh, who said he was acting on instructions to throw him off the property. He was not allowed to contact his attorney and Hattingh summoned a member of Coin Security (known as Wepenaar) to assist with his removal, referring to him in the most derogatory terms as a “moffie” and “vagrant”. He ordered the latter to place him in

the “dog cage” of the vehicle and remove him from the respondent’s premises. Wepenaar then drove him off the property and he remained outside for over two hours until he was able to arrange for his attorney to contact the respondent. He believed that Hattingh could not have obtained information of his being homosexual and his homeless status (which is implied by the derogatory use of the terms “moffie” and “vagrant”) from anyone other than the Malans.

[32] He confirmed that he was able to and could have administered the depocillin injection but asked Herbst as she was available and had commenced the course of treatment of the horse. It was his first weekend on duty and he knew that injections had to be administered on alternate flanks to avoid an adverse reaction from the horse. He worked long hours and was comfortably able to perform the duties listed on his job description, which were the standard duties of a stable yard manager.

Prof. Francois Venter

[33] Prof. Venter was the expert witness for the applicant. He confirmed that none of the applicant’s allergies or medical conditions affected his ability to discharge his employment responsibilities and that his state of health was excellent. His evidence confirmed that there was no factual basis for a conclusion that someone diagnosed as HIV positive was severely ill. He confirmed that in his extensive years of practice he had never heard of a penicillin allergy being contra-indicated for the purpose of administering depocillin to a horse intravenously, and that a number of safeguards were in place to prevent accidental needle stick injury. He was specifically asked whether doctors or nurses are screened for penicillin allergies, to which he replied in the negative. He had never heard of an employment policy excluding medical practitioners, who are at high risk, on account of a penicillin allergy.

The applicable law

[34] The legal prohibition against unfair discrimination in the workplace derives from the equality right enshrined in section 9 of the Constitution of the Republic of South Africa Act, 108 of 1996, which states:

"(1) Everyone is equal before the law and has the right to equal protection and benefit of the law;

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken…."

[35] The LRA renders a dismissal for a discriminatory reason automatically unfair unless it can be justified on the grounds of inherent job requirements : section 187 (2)(a). Unfairness is premised on the reason for the dismissal and section 187 (1) defines an automatically unfair dismissal as occurring when the reason is -

> *"(f) that 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."*

[36] Where a ground is not specifically proscribed, such as HIV status, in the context of dismissal it would have to be proven to be an arbitrary ground. While discrimination based on HIV status is expressly prohibited by the Employment Equity Act, this is not so in the LRA. However in *Bootes v Eagle Inc System KZ Natal (Pty) Ltd* (2008) 29 ILJ 139 (LC) Pillay J held that HIV was an arbitrary ground as envisaged in s187(1)(f) of the LRA. The learned judge noted that dismissal of employees because of their HIV status was widely acknowledged as discrimination unless the employer could show that being free of HIV was an inherent requirement of the job.

[37] Section 6 (1) of the Employment Equity Act specifically prohibits discrimination

in the workplace in the following terms :*"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(2) makes it clear that it is not unfair discrimination to-

(a)take affirmative action measures consistent with the purpose of this Act; or

(b)distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.

[38] Section 11 of the Employment Equity Act requires an employee to allege a *prima facie* ground of unfair discrimination and places the onus on the employer to prove that the discrimination was fair. The Labour Court is empowered to grant appropriate relief for unfair discrimination as envisaged in section 50(2) as follows:

"If the Labour Court decides that an employee has been unfairly discriminated against, the Court may make any appropriate order that is just and equitable in the circumstances including-

a)payment of compensation by the employer to that employee;

b)payment of damages by the employer to that employee;

c)an order directing the employer to take steps to prevent the same unfair discrimination or a similar practice occurring in the future in respect of other employees;

d)an order directing an employer, ….to comply with Chapter III as if it were a designated employer;

e)an order directing the removal of the employer's name from the register referred to in section 41; and

f)the publication of the court's order. "

[39] The Employment Equity Act enjoins the Court to have regard to relevant codes of practice as well as international conventions. The Code of Good Practice on the

Key Aspects of HIV and AIDS in Employment ("the Code") issued in terms of section 54 (1)(a) of the EEA endorses the principle of non-discrimination based on HIV status. The Code contains detailed guidelines on disclosure and confidentiality and in this regard the following provisions are noteworthy :

"5.3.10. In accordance with both the common law and Section 14 of the Constitution of South Africa Act, No. 108 of 1996, all persons with HIV or AIDS have a right to privacy, including privacy concerning their HIV or AIDS status. Accordingly there is no general legal duty on an employee to disclose his or her HIV status to their employer or to other employees.

7.2. Confidentiality and Disclosure

7.2.1. All persons with HIV or AIDS have the legal right to privacy. An employee is therefore not legally required to disclose his or her HIV status to their employer or to other employees.

7.2.2. Where an employee chooses to voluntarily disclose his or her HIV status to the employer or to other employees, this information may not be disclosed to others without the employee's express written consent. Where written consent is not possible, steps must be taken to confirm that the employee wishes to disclose his or her status.

7.2.3. Mechanisms should be created to encourage openness, acceptance and support for those employers and employees who voluntarily disclose their HIV status within the workplace, including:

(i) encouraging persons openly living with HIV or AIDS to conduct or participate in education, prevention and awareness programmes;

(ii) encouraging the development of support groups for employees living with HIV or AIDS; and

(iii) ensuring that persons who are open about their HIV or AIDS status are not unfairly discriminated against or stigmatised."

[40] South African anti-discrimination legislation derives its mandate from International Labour Organisation Conventions, including C111 Discrimination (Employment and Occupation) Convention of 1958, which prohibits workplace discrimination on a number of specific grounds, but does not proscribe HIV discrimination. More recently, the ILO Recommendation concerning HIV and AIDS and the World of Work 200 of 2010 has recognised the impact of discrimination based on real or perceived HIV status and its increasing prevalence. The imperative to recognise discrimination based on real or perceived HIV status and to incorporate

this into Convention 111 was emphasised by Jane Hodges in *"Guidelines on addressing HIV/AIDS in the workplace through employment and labour law",* Paper No 3, Infocus Programme on Social Dialogue, International Labour Office, Geneva, 2004. Recommendation 200 provides:

"10. Real or perceived HIV status should not be a ground of discrimination the recruitment or continued employment, or the pursuit of equal opportunities consistent with the provisions of the Discrimination (Employment and Occupation) Convention, 1958.

11. Real or perceived HIV status should not be a cause for termination of employment. Temporary absence from work because of illness or caregiving duties related to HIV or AIDS should be treated in the same way as absences for other health reasons, taking into account the Termination of Employment Convention, 1982.

13. Persons with HIV-related illness should not be denied the possibility of continuing to carry out their work, with reasonable accommodation if necessary, for as long as they are medically fit to do so. Measures to redeploy such persons to work reasonably adapted to their abilities, to find other work through training or to facilitate their return to work should be encouraged, taking into consideration the relevant International Labour Organization and United Nations instruments."

[41] The prevalence of egregious discrimination on the basis of HIV and AIDS in South African society has formed the subject of extensive comment in labour and constitutional jurisprudence. It is trite, following *Hoffmann v South African Airways* (2000) 21 ILJ 2357 (CC) that discrimination on the basis of HIV status is unconstitutional. Ngcobo J's *dictum* in this regard is instructive :[1]

"The appellant is living with HIV. People who are living with HIV constitute a minority. Society has responded to their plight with intense prejudice. They have been subjected to systemic disadvantage and discrimination. They have been stigmatised and marginalised. As the present case demonstrates, they have been denied employment because of their HIV positive status without regard to their ability to perform the duties of the position from which they have been excluded. Society's response to them has forced many of them not to reveal their HIV status for fear of

1 At para [28]

prejudice. This in turn has deprived them of the help they would otherwise have received. People who are living with HIV/AIDS are one of the most vulnerable groups in our society. Notwithstanding the availability of compelling medical evidence as to how this disease is transmitted, the prejudices and stereotypes against HIV positive people still persist. In view of the prevailing prejudice against HIV positive people, any discrimination against them can, to my mind, be interpreted as a fresh instance of stigmatisation and I consider this to be an assault on their dignity. The impact of discrimination on HIV positive people is devastating. It is even more so when it occurs in the context of employment. It denies them the right to earn a living. For this reason, they enjoy special protection in our law.

Further :

"[35] ……. the devastating effects of HIV infection and the widespread lack of knowledge about it have produced a deep anxiety and considerable hysteria. Fear and ignorance can never justify the denial to all people who are HIV positive of the fundamental right to be judged on their merits. Our treatment of people who are HIV positive must be based on reasoned and medically sound judgments. They must be protected against prejudice and stereotyping. We must combat erroneous, but nevertheless prevalent, perceptions about HIV. The fact that some people who are HIV positive may, under certain circumstances, be unsuitable for employment as cabin attendants does not justify a blanket exclusion from the position of cabin attendant of all people who are HIV positive.

[36] The constitutional right of the appellant not to be unfairly discriminated against cannot be determined by ill-informed public perception of persons with HIV. "

[42] Having regard to these considerations, the court held that the denial of employment to the appellant because he was living with HIV impaired his dignity and constituted unfair discrimination. In regard to testing Ngcobo J noted (at para [51]) that *".. item 4 of the SADC Code of Conduct on HIV/AIDS and Employment, formally adopted by the SADC Council of Ministers in September 1997, lays down that HIV status 'should not be a factor in job status, promotion or transfer.' It also discourages pre-employment testing for HIV and requires that there should be no compulsory workplace testing for HIV."*

The pleadings

[43] The statement of claim sets out the cause of action under claim A as follows:

a) It is submitted that the cause of the applicant's dismissal was solely due to his HIV status.

b) Furthermore, the applicant was dismissed in a manner that violated his constitutional rights, including his right to privacy and dignity.

c) It is accordingly submitted that the applicant's dismissal was automatically unfair in terms of section 187(1)(f) of the LRA

Alternatively,

Should this honourable court find that the dismissal of applicant was not automatically unfair, it is submitted that the dismissal of the applicant by the respondent was unfair in the applicant was dismissed by the respondent for no valid reason and without the respondent following any procedure in contravention of the section 188 of the LRA.

[44] The applicant seeks maximum compensation in terms of section 194(3) of the LRA in the sum equivalent to 24 months' remuneration, amounting to R288 000.00, together with interest at a rate of 15.5% per annum *a tempora morae*. In the alternative claim he seeks maximum compensation in terms of section 194(1) of the LRA, equivalent to 12 months' remuneration, amounting to R144 000.00, together with interest at a rate of 15.5% per annum *a tempora morae.*

[45] The respondent's defence to the claim is as follows :

Ad Claim A

6.1.1During an interview on 27 October 2008 with representatives of the respondent the strenuous demands of the position were pointed out to the Applicant, and he was asked whether his health was good enough to meet those demands. Applicant replied that his health was good and that except for a sprained ankle, he had no

illnesses.

6.1.2On 29 October 2008 (sic) signed an agreement for his temporary appointment which included his job description.

6.1.3On or about 10 November Applicant volunteered information to the effect that he had three illnesses, namely asthma, deep vein thrombosis and HIV.

6.1.4The aforesaid information was in conflict with his undertakings during the interview of 27 October 2009(sic). At a disciplinary hearing held on 13 November 2008 Applicant could not provide a reasonable explanation for lying to the Respondent's representatives during the aforesaid interview, and he was dismissed due to a breakdown in trust.

6.1.5Respondent pleads in the alternative that the dismissal was fair in that the Applicant did not meet the inherent requirements of the job.

Claim B

[46] The applicant seeks damages in the sum of R150 000.00, together with interest at a rate of 15.5% per annum *a tempora morae* This claim is pleaded as follows in the statement of case:

All persons with HIV and/or AIDS have the legal right to privacy. An employee is therefore not legally required to disclose his or her HIV status to their employer or to other employees, and such employees may not be discriminated against on this basis.

It is submitted that the respondent's conduct relative to the applicant amounted to unfair discrimination in terms of the Employment Equity Act, 55 of 1998 ("the EEA").

The respondent unfairly discriminated against the applicant in terms of section 6(1) of the EEA by dismissing him and removing him from the respondent's property without any notice in a manner that humiliated him and impaired his dignity, solely on the basis of the applicant's HIV status.

[47] The respondent relies on the following defence :

Ad claim B (under the EEA):

6.2.1Respondent denies having discriminated against Applicant because of his HIV status and respectfully refers the Court to its plea in respect of Claim A. Respondent denies that it humiliated Applicant as averred. "

Evaluation of evidence and argument : Claim A

[48] Section 187 requires the applicant to make out a *prima facie* case that the dismissal was on a prohibited ground. Once the applicant discharges this evidential burden the onus is on the employer to prove that the dismissal was not for a prohibited reason. If the employer fails it would then have to raise an alternative defence that although the dismissal was on a prohibited ground and therefore discriminatory, it was nevertheless justified by an inherent requirement without which the employee could not perform the essential job requirements. This test has been described as follows by Davis JA in *Kroukam v SA Airlink (Pty) Ltd* (2005) 26 ILJ 2153 (LAC) :

"Section 187 imposes an evidential burden upon the employee to produce evidence which is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place. It then behoves the employer to prove the contrary, that is to produce evidence to show that the reason for the dismissal did not fall within the circumstances envisaged in section 187 for constituting an automatically unfair dismissal".

[49] *In casu* the fact of the applicant's dismissal, though initially in dispute, became common cause and it is only the reason for the dismissal that remains in dispute. In

this regard it is necessary to determine, where there are a number of reasons posited for the dismissal, what the main reason is, as well as to distinguish between the ostensible reason advanced by the employer and the real reason that emerges from the evidence. In this context the respondent's assertion is that the applicant committed misconduct in failing to declare that he suffered from three illnesses (including HIV) at his pre-employment interview. The applicant submits that he was dismissed for being HIV positive and that this constitutes unfair discrimination based on his HIV status and resulted in his automatically unfair dismissal.

What was the reason for the applicant's dismissal?

[50] The applicant submitted that it is common for employers with a less than legitimate motive to seek to disguise an act of discrimination as a misconduct dismissal since a dismissal for a discriminatory reason attracts significant penalties under the LRA. In this regard Mr Bank referred to *Bootes* (supra) where Pillay J held (at para [70]) that *" "camouflaging discrimination under the cloak of misconduct is one of the most insidious forms of unfair labour practices. Quick to perceive the unfairness, employees struggle to prove it"*. Pillay J found that the employer had seized on the alleged misconduct of the applicant because it sought to disguise its desire not to have an HIV positive person in its employ. *In casu*, unlike *Bootes,* the veracity of the respondent's stated reason for the dismissal (i.e. the applicant's misconduct in failing to disclose that he was seriously ill) unfortunately did not form the basis of formal charges tested at a disciplinary enquiry, and on this basis alone can be refuted.

[51] On the facts the respondent knew the applicant was homosexual and in a civil union. Mr Bank, appearing with Ms Hassim from the Aids Law Project for the applicant, submitted that it was likely that the Malans already knew at the interview that the applicant was living with HIV, since it was common cause that Malan senior had an extensive network in the equestrian community and applicant's inspiring history of successfully managing his HIV condition in the context of a successful

career had been lauded in the media and would probably have come to his attention. Thus, he submitted, the applicant's HIV status had been "floating around" and because he had not disclosed this the respondent had hoped to "catch him out" by extracting a formal disclosure on the PPF. The inference must therefore be drawn that once the respondent established this as a fact it determined to get rid of him. Mr Ackerman, for the respondent, denied that such a sinister motive could be attributed to its seeking of personal information for administrative purposes on the PPF. In this regard it is correct that the applicant had himself volunteered the information, referring to his "illnesses" and that the form only required medication and allergies to be listed. Although I am disinclined to attribute a sinister motive to the respondent in respect of the PPF, it is inexplicable that this information would be sought from only three employees of a staff of 30, and that it should moreover be sought from only those known to be homosexual. Furthermore Malan's evidence that the PPF was a standard form to record the information of all employees for payroll and administrative purposes is belied by the fact that the PPF does not request banking details, which would have been essential employee information. It is common cause that the applicant inserted this of his own accord on the PPF. Herbst's testimony that this was the first time in her five years of employment with the respondent that she had seen the PPF was not disputed and it was common cause that the content of the PPF differed substantially from the forms issued to other employees. However Malan's testimony was that he was not aware that the PPF had been sent to the applicant. Furthermore, even though the applicant volunteered more medical information than was required and had not been directly required to reveal his HIV status, this would probably have emerged had he restricted his disclosures to the chronic medication requested on the PPF. On the probabilities therefore the respondent's the circulating the PPF cannot be said to have been a mere administrative exercise. At the very least it would appear to be an attempt to extract information about the applicant's HIV status, and would therefore constitute unfair discrimination based on HIV.

[52] Mr Bank submitted that Malan had been restrained in his evidence regarding the real reason for the dismissal and that he had not fully explained Van Zyl's reaction when she saw the applicant's PPF. When applicant's Counsel revisited the

issue in cross examination Malan denied that she had said anything at the time. He then said that he could not remember what Van Zyl said although conceding that she had possibly pointed to the illnesses disclosed. Mr Bank submitted that an adverse inference should be drawn against Malan in this regard and that the evidence which was curtailed related to Van Zyl pointing out to Malan the disclosures on the PPF and being shocked by them. Although I agree with this submission it is common cause that the respondent was shocked, not by the HIV disclosure but, according to Malan, by the fact that the applicant had three illnesses in the context of his undertaking at the interview that he was healthy. What is more telling in my view is the emphasis placed by Malan on the HIV issue when he confronted the applicant, as emerged from the applicant's testimony and which was partly conceded by Malan. In the circumstances given the haste with which this occurred and its proximate cause being the PPF it is clear on the probabilities that Malan was primarily affronted by the failure to disclose the HIV condition at the interview. Had this not been the case he would have charged the applicant with dishonesty or fraudulent misrepresentation at a duly convened formal disciplinary enquiry. The implications of having employed a manager of the Centre in the belief that he was in good health only to find out that he was living with HIV and was obviously ill is the only probable explanation for Malan's outrage and the haste with which the summary dismissal of the applicant was effected. Malan asserted that he did not discriminate unfairly based on sexual orientation, but it is not inconceivable that he would draw the line at employing an HIV positive person. In this regard we did not have the benefit of Malan senior's testimony on the real reason for the dismissal, and it is noteworthy that he did not attend court on any day of the hearing despite being the respondent's attorney of record. Malan was left to defend conduct that his father (and immediate superior in respect of the Centre) would have known to be unconstitutional, unlawful and unfair.

[53] It is probable that had the applicant not rushed off angrily and the employer not felt further aggrieved by his post-dismissal conduct, a formal enquiry might have ensued at which the charges of misconduct could have been tested. Mr Ackerman conceded, correctly in my view, that the meeting fell far short of a formal disciplinary

enquiry. However it is correct, as Mr Bank submitted that that it was still open to the respondent to convene a formal disciplinary enquiry to charge him with misconduct, or to dispute that he had been dismissed at the meeting. It is furthermore improbable that the applicant would have calmly admitted to Malan that he made a mistake and then abruptly stormed off threatening to tell everyone he had been dismissed for HIV/AIDS. The applicant admitted that he became angry at the manner in which he was dismissed and in fact did run down the stairs making the threat. His evidence on this issue was not denied by Malan and was further corroborated by Herbst and is therefore common cause. His anger at being dismissed for not disclosing his HIV condition remained palpable at this hearing despite the time that had elapsed.

[54] The inescapable facts are that the applicant had no medical or physical impediment preventing him from performing his duties. This was not only his evidence and that of Prof Venter, but also Malan had been unable to dispute that (save for the two incidents related by Herbst) the applicant had acquitted himself well in a strenuous and demanding job. This renders spurious any notion that he was "severely ill" and belies the true rationale for his dismissal. The notion that HIV is synonymous with serious illness is however not unheard of. It emanates from a general stereotype about all people living with HIV, and which results in loss of dignity and a sense of self. Judge Edwin Cameron J in his poignant memoir "Witness to AIDS" described the importance of being able to work in a non-discriminatory environment on the dignity of people living with HIV and AIDS and dispenses with the notion that they are *per se* ill and unsuitable to participate in productive work. The misconception therefore that someone with HIV is so ill that he should not be employed assails the core of that person's dignity and results in the unfair and unconstitutional condemnation to "economic death" as referred to by Ngcobo J in *Hoffman* (supra).

[55] The evidence establishes that the respondent's primary concern was the applicant's HIV status, embellished as it was by the expressed concerns about the other "illnesses". Although the respondent may have had legitimate concerns about non-disclosure of what a layperson may have seen as a spate of illnesses affecting recently appointed employee's ability to work, the nub of the respondent's sense of

grievance must be the failure to disclose his HIV status. This is the real reason for the dismissal, or at least the dominant reason. This is the only conclusion that would explain Malan's outrage and the manner in which he proceeded to summarily and shoddily dismiss the applicant. This constitutes discrimination on an arbitrary ground prohibited by s 187(1)(f) and is therefore an automatically unfair dismissal. The respondent has therefore failed to discharge the onus of proving that the dismissal was not for an unfairly discriminatory reason.Once it is found that the HIV was the real reason for his dismissal the respondent is burdened with an evidentiary burden to prove that the discrimination was justified. I am now enjoined to consider the defence that the applicant's termination was justified based on an inherent job requirement. This is a defence both to the automatically unfair dismissal claim and the unfair discrimination in claim B as is discussed below.

Was the discriminatory dismissal justified by an inherent job requirement?

[56] An inherent job requirement was held to constitute an absolute defence against unfairness in *Leonard Dingler Employee Representative Council & others v Leonard Dingler (Pty) Ltd & others* (1997) 11 BLLR 1438 (LC) at 148H. Although it is not defined in the Employment Equity Act its origin can be traced to Convention 111, in respect of which the committee of experts has emphasised the need for a strict interpretation. John Grogan[2] defines it as relating to the possession of a "*particular personal physical characteristic (for example, being male or female, speaking a particular language, or being free of a disability) which must be necessary for effectively carrying out the duties attached to a particular position".*

[57] The court in *IMATU and another v City of Cape Town* ((2005) 26 ILJ 1404 (LC) at [100]), relying on **Dupper & Garbers *Employment Discrimination: A Commentary* in Thompson and Benjamin, *South African Labour Law* (Juta 2004)** warned that the inherent job requirement defence should be applied restrictively in that *"[A]ny legislatively formulated justification of discrimination constitutes, in effect, a limitation on the constitutionally entrenched right to equality and this militates against an expansive reading of the phrase "an inherent requirement of the job".* In considering whether a blanket ban on employing diabetic fire-fighters was justified Murphy AJ held:

2 *Workplace Law*, Tenth edition, Juta 2010, page 107

"110. Therefore I agree with the applicants that the respondent has failed to justify its unfair discrimination (in the form of a blanket ban). Without in any way denying that fire fighting is by its nature a hazardous occupation, to simply exclude all insulin dependent diabetics from the occupation on this ground is not justifiable.

111. The respondent is guilty of assigning characteristics which are generalised assumptions about groups of people to each individual who is a member of that group, irrespective of whether that particular individual displays the characteristics in question. It is treating all insulin dependent diabetics the same and imposing a blanket ban on the employment of that group as fire-fighters, irrespective of whether the particular individual - such as Murdoch, who is physically fit and in optimal control of his diabetes – displays any susceptibility to uncontrolled hypoglycaemic episodes."

[58] The respondent has similar difficulties in proving the exclusion of an employee allergic to penicillin, in the absence of risk assessment and objective justification that he would be rendered unable to perform his duties. The respondent relied exclusively on the expert testimony of Herbst in proving this defence. The probative value of her evidence is however nullified by her lack of medical, veterinary or para-veterinary experience, although she is undoubtedly an able and experienced equestrian manager. She was unaware that depocillin was listed as a schedule 4 drug under the Medicines and Controlled Substances Act, 101 of 1965 and as such could only be administered on medical prescription. Her opinion that a penicillin allergy was contra-indicated for the administration of depocillin because of the risk of needle stick injury was refuted by the applicant's version. She was moreover unable to dispute the applicant's evidence that the erroneous ingestion of penicillin had merely caused him to suffer a skin rash. Although Herbst was in general a truthful and reliable witness, she did exhibit a degree of reticence which appeared from her guarded responses to certain questions. This is not surprising given her status as a longstanding and loyal employee, but it has obvious implications for her evidence on the justifiability of the penicillin allergy.

[59] The applicant submitted that a non-allergy to penicillin could not constitute an inherent job requirement in that:

a) the administration of depocillin by a stable manager in the absence of a medical prescription would be unlawful.

b) the evidence of both Prof Venter and the applicant dispenses medically and factually with the notion that a penicillin allergy is a contra-indication for administering penicillin to a horse.

c) Malan conceded that other than the two incidents of which he had no direct knowledge, the applicant had performed all the strenuous requirements of the job and there had never been a crisis involving horses during his short period of employment.

[60] The penicillin defence moreover confuses inherent and essential job requirements. I am therefore in agreement with the applicant's submission that the penicillin defence was *"a thin veil"* designed to disguise the real reason for the dismissal. Had it indeed constituted a legitimate and genuine requirement of the applicant's job it would have warranted specific mention in the detailed job description provided to the applicant or specifically canvassed with him in the interview, or at the very least raised by Malan in the confrontation with him. It was moreover not mentioned in either of the dismissal notices. It is also noteworthy that the penicillin defence emerged for the first time in the respondent's expert notice on 12 November 2010, and in reply to a request for further particulars, more than two years after the cause of action arose. Furthermore, Malan's evidence that he only became aware of the applicant's penicillin allergy when this was reported to him, makes it eminently clear on the probabilities that it could not have manifested as a possible disqualification for the job of stable and yard manager at the time the applicant was employed. It is clear when regard is had to the chronology preceding this trial that the applicant is correct in asserting that the penicillin defence was a response to its expert witness notices listing eminent medical experts and HIV clinicians who would testify that the applicant was essentially healthy despite living with HIV and was more than capable of performing all work related tasks.

[61] For these reasons, in my view, the respondent has failed to prove that the

penicillin defence constituted an inherent job requirement that and that it was objectively justifiable. Moreover, on the probabilities it was established that, even had the respondent succeeded in proving that it was an inherent job requirement, on its own admission it had not affected the applicant's ability to perform his job.

Evaluation of evidence and argument : Claim B

[62] In its reply to the applicant's request for further particulars the respondent denies any reference to "*undertakings"* which were relied upon to the effect that the applicant was in good health, despite having pleaded this in its statement of defence. It pleaded that it had reason to expect of applicant to disclose his medical condition (or, to use his terminology, his illnesses) during the interview, and that his failure to do so led to a breakdown in trust justifying dismissal. Alternatively, his allergy to penicillin rendered him unfit for the position.

[63] It is trite law that the applicant was under no legal obligation to disclose his HIV status to his prospective employer and that the expectation that he should have so disclosed violates his right to dignity and privacy. It was this expectation moreover, that formed the primary reason for his dismissal.

[64] Although the questions put to the applicant in regard to his sexual orientation, religious affiliation and marital status would constitute unfair discrimination this has not been pleaded. The applicant admitted that Malan had raised these in the interview in order to "make me feel at ease and to make me think that he was not conservative". The applicant submitted that the questions on the Personal Particulars Form constituted "medical testing" as defined in section 7(1) of the Employment Equity Act, and that insofar as it related to pre-employment HIV testing

the respondent was required to comply with section 7 (2). However this does not appear to form part of the applicant's pleaded case and was raised for the first time in argument. It is accordingly not necessary to determine and the respondent's conduct has already been held to be unfairly discriminatory for other reasons as set out above in respect of the LRA claim.

[65] The relief sought in Claim B is in essence a *solatium* for the *injuria* or damages to 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.

[66] In regard to the eviction incident the applicant submitted that it was noteworthy that the respondent did not deny the incident nor did it lead any evidence to gainsay the applicant's version. There was moreover a causal link between Malan's summary dismissal of the applicant accompanied by the order that he vacates the premises, and Hattingh's insults, and despite the absence of proof that a direct instruction was issued to Hattingh, it should nevertheless be inferred from the circumstantial evidence that the that the instruction must have emanated from the respondent and it should accordingly be held liable. The respondent deigned not to tender any evidence that Hattingh was not an employee, or to suggest that someone else may have been responsible for his conduct. The applicant had never prior to the incident met Hattingh and there would have been no reason for such virulent ill-will had he not been familiar with the circumstances of the applicant's termination, and it was therefore plausible that this information must have emanated from the Malans. It could not have emanated from a source as disinvested as a benign residents association, and the probabilities indicate that Malan was upset by the applicant's continued presence on the premises despite his dismissal and the Malans commanded great respect amongst the residents and would undoubtedly have been able to summon the eviction without direct intervention. Moreover the Malans were residents of the estate and Malan had conceded that either he or Herbst had notified the homeowners' association of the applicant's dismissal. I do not agree that this circumstantial evidence, which is largely speculative, creates a sufficient causal nexus on which the Malans can be held liable. Indeed even if it does, such a claim is

not competent in this court having occurred after the dismissal of the applicant and in circumstances where the applicant seeks not to rely on vicarious liability of the employer under the EEA. Although Malan's version on the reason for the applicant's dismissal was rejected, he was otherwise a satisfactory witness and it is unlikely that (even if he was the one who informed the homeowners' association of applicant's termination) he would instruct that the applicant be treated with such visceral hatred. This leaves the only appropriate cause of action a civil claim in delict.

Remedy

[67] The compensation for an automatically unfair dismissal must be *"just and equitable in all the circumstances, but not more than the equivalent of 24 months' remuneration"* (section 194(3)). The applicant for obvious reasons does not seek reinstatement. In determining the appropriate relief under claim A for an automatically unfair dismissal the principles entrenched in *CEPPWAWU & Another v Glass and Aluminium 2000 CC* [2002] 5 BLLR 399 (LAC) (despite being decided prior to the 2002 amendments to the LRA) are still apposite, as is the approach of Davis AJA in *Kroukam* (supra) that compensation for an automatically unfair dismissal should be no less than the amount the employee would have been entitled to receive if reinstatement had been sought and should reflect the serious nature of the transgression. This approach was endorsed in Du Toit et al, *Labour Relations Law : A Comprehensive Guide*, fifth edition, LexisNexis 2006 at page 476. The fact therefore that the applicant was employed on a three month temporary employment contract, subject to review at the end of that period, is therefore relevant to the relief to which he is entitled .

[68] The respondent accused the applicant was of "tactical opportunism" in that he deliberately exploited his HIV status. It also challenged his credibility. It was put to him in cross-examination that he tended to overreact because of his HIV status, and his refusal to sign his final notice of dismissal was a manifestation of this conduct. The applicant had a valid explanation – he submitted that his refusal to sign the notice reflected his rejection of the allegation that he was dismissed for fraudulent misrepresentation and that any lay person faced with such a letter could be excused for believing that by signing he would be acquiescing with its contents as opposed to simply acknowledging receipt.

[69] This accusation appears to emanate from a stereotype about homosexuals and people with HIV – it is akin to attributing to women the characteristics of being over emotional or accusing all black people of being lazy. It is a manifestation of homophobia and it is sad that despite more than a decade of constitutional protection of privacy and anti-discrimination on these very grounds, our society is still seeped in these misperceptions that impact on the livelihood and dignity of human beings.

[70] The applicant submitted that the insinuation that the applicant was deliberately trying to mislead the respondent by not disclosing his HIV status, given that he knew they were "difficult and conservative people" should likewise be taken into consideration in the relief to be awarded to him. The fact remains that he did disclose, even though he knew he was not legally required to, within less than two weeks of his employment, fully aware of his right to privacy and confidentiality. He went further and volunteered more information than was required, which cannot be consistent with an imputation of dishonesty, within a few days of starting employment. This is laudable in the context of his awareness of his right not to disclose and must mean that he trusted his employers with this information. It cannot therefore be said that his conduct constituted a deliberate withholding of information or that it was motivated by dishonesty or deceit. The irony is that the very fear which militated against his initial disclosure in fact materialised when he subsequently disclosed.

[71] Notwithstanding these submissions however, it must be borne in mind that the applicant's evidence was that he did not *intend* to disclose to the Malans. He thought the PPF would not come to their attention and would remain at the Centre where he was in charge. Although I agree with the respondent's submission that this is not consistent with a genuine intention to disclose his HIV condition, his motivation is less relevant in the context of a legal entitlement not to disclose but is more relevant to issues of credibility. The fact that the alleged warning issued by Herbst was not canvassed with her in cross examination was attributed to an omission by the applicant's Counsel. However I am inclined to reject the applicant's version on this issue. Given the otherwise meticulous manner in which the applicant's case was conducted it is improbable that a material issue would not have been canvassed with

a witness.

[72] There are also other factors however that are relevant to the relief to be awarded. The applicant's testimony was evasive on some issues and inconsistent on others. Although Ms Hassim attributed this to his anger at the humiliation he suffered, this cannot explain for instance his insistence on two interviews followed by the concession that there was one at which both Malans were present, nor his explanation that his post-dismissal conduct reporting the respondent to the Department of Labour was not vindictive but fell within the ambit of his duties. However the lapse of time would probably account for some of the inconsistencies, particularly his inability to recall whether he was dismissed in the morning or the afternoon, although none of these are material.

[73] This leads me to the question of whether it is competent to award relief for both the dismissal under the LRA and discrimination under the EEA arising from the same set of facts. I am indebted to Counsel for producing additional heads of argument on the question of whether a dual claim is competent. The applicant's counsel submitted that the applicant was entitled to relief both in respect of the unfair discrimination meted out to him and his unfair dismissal and subsequent harassment on the grounds of his HIV status. This court has held that dual claims under the LRA and EEA arising from the same set of facts are competent : see *Evans V Japanese School of Johannesburg* [2006] 12 BLLR 1146 (LC); *Atkins v Datacentrix (Pty) Ltd* (2010) 31 ILJ 1130 (LC). In *Atkins* the employee was offered employment but prior to the commencement of his employment he advised the employer that he was transsexual and intended to undergo gender re-assignment or "sex change" surgery. The employer regarded this belated disclosure as material and a repudiation of the contract. It argued that the information should have been disclosed during the interview, and it cancelled the employment contract. The court held found that the applicant was not under an obligation to volunteer this information during the interview process. It held that he had been discriminated upon on the basis of his gender and, in the circumstances, that this was unfair. The dismissal was held to be automatically unfair and the court awarded compensation equivalent to just less than five months' remuneration. Francis J declined to award damages under the LRA

having found that no evidence to justify the claim. Furthermore, in *Ehlers v Bohler Uddeholm Africa (Pty) Ltd* (2010) 31 ILJ 2383 (LC) Francis J again found dual claims arising from the same facts to be competent but found that the applicant had not pleaded damages under the Employment Equity Act. Compensation was not an issue as the applicant was reinstated and the court ordered the employer to take steps to avoid repetition of such egregious discrimination in the future. In *POPCRU & others v Department of Correctional Services & another* [2010] 10 BLLR 1067 (LC) Cele J considered a claim under both the EEA and LRA arising from the prohibition of dreadlocks among male prison employees, which was alleged to constitute discrimination based on religion, conscience or belief and gender. The court ordered reinstatement, alternatively 20 months' compensation to those employees who did not seek reinstatement.

[74] In *Bedderson v Sparrow Schools Education Trust* [2010] 4 BLLR 363 (LC) however, Le Roux AJ declined to award the maximum compensation provided for in section 194(3) for an automatically unfair dismissal on the grounds of age. The court found that the dismissal constituted both an automatically unfair dismissal on the prohibited ground of age, as well as unfair discrimination based on age in terms of section 6(1) of the EEA. The respondent was ordered to pay the applicant an amount of R42 000.00, representing compensation equal to six months' remuneration.

[75] In *Christian v Colliers Properties* (2005) 26 ILJ 234 (LC), and despite having served a mere two days' of her employment, the employee was awarded maximum compensation under the LRA but nominal damages under the EEA. The court, referring to *Alexander v Home Office* [1988] IRLR 190 (CA) emphasised the rationale for damages for unfair discrimination as follows:

"The objective of an award for unlawful racial discrimination is restitution. For the injury to feelings, for the humiliation, for the insult, it is impossible to say what is restitution and the answer must depend on the experience and good sense of the judge and his assessors. Awards should not be minimal, because this would tend to trivialise or diminish respect for the public policy to which the Act gives effect. On the other hand, just because it is impossible to assess the monetary value of injured feelings, award should be restrained. To award sums which are generally felt to be

excessive does almost as much harm to the policy and the result which it seeks as do nominal awards."

[76] The applicant submitted that the present claim is distinguishable from *inter alia Atkins* (supra) in that the applicant led evidence about his ignominious treatment post-dismissal as well his attempts to resuscitate his relationship with private clients following the loss of his stable (no pun intended) employment. It is so that this was *ad-hoc* and required him to travel to and from Gauteng and that he had relocated after his appointment.

[77] In my view the applicant has proven an entitlement to relief arising from his unfair dismissal for a discriminatory reason. The unfair discrimination encompasses damages for loss of dignity and privacy in that he was expected to disclose his HIV status. This is in my view accommodated by the punitive element envisaged in section 194(3) of the LRA. Had the applicant not been a temporary employee on a three month contract he would have been entitled to the maximum compensation envisaged in that section, but in determining just and equitable compensation in the circumstances this must feature as a relevant consideration. I have already indicated for the reasons above that in regard to claim B this court lacks jurisdiction in respect of the *solatium* for harassment and loss of dignity arising post-dismissal, which would more properly be founded in a civil delictual claim. Insofar as it was submitted that he was being divested of an employment benefit this is in my view an insufficient causal nexus to vest the respondent with liability.

Order

[78] In the premises, I make the following order:

1. Claim A: The applicant's dismissal is declared to be automatically unfair under section 187(1)(f). The respondent is ordered to pay the applicant compensation in the sum of twelve months' remuneration, reflecting both restitution as well as a punitive element for unfair discrimination on the grounds of HIV status.

2. The applicant is entitled to the costs consequent upon the employment of two counsel, and this court is indebted to the Aids Law Project for its

assistance.

2. Claim B: The claim is dismissed, although in the interests of fairness there is no order as to costs.

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Bhoola J

Judge of the Labour Court of South Africa

Date of hearing : 29 November – 2 December 2010

Date of judgment: 16 February 2011

Appearance:

For the Applicant : Adv W Bank instructed by Webber Wentzel Attorneys and Adv A Hassim from the Aids Law Project

For the Respondent: Adv M Ackermann instructed by Hendrik Malan Attorneys