DISCRIMINATION IN EMPLOYMENT

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

COURT HOLDING

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

Summary of Facts

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

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

Issue

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

Court's Analysis

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

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

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

Conclusion

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

Significance

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

Gary Shane Allpass v. Mooikloof Estates (Pty) Ltd.
[2011] ZALCJHB 7, Case No. JS178/09
South Africa, Labour Court

COURT HOLDING

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

Summary of Facts

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

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

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