

## **JUDGMENT REAFFIRMS RIGHTS OF PEOPLE WITH HIV TO NON-DISCRIMINATION IN EMPLOYMENT**

## **AWARD-WINNING HORSE RIDING INSTRUCTOR LIVING WITH HIV WINS 12 MONTHS' COMPENSATION**

## **DISMISSAL DECLARED "AUTOMATICALLY UNFAIR"**

16 February 2011

SECTION27 welcomes the judgment handed down by Judge Bhoola today in the Labour Court in the case of *Gary Shane Allpass v Mooikloof Estates (Pty) Ltd*.

The case concerns the unfair dismissal in 2008 of a horse riding instructor on the grounds of his HIV status. The ruling follows the institution of legal proceedings on behalf of Mr Allpass by Webber Wentzel Attorneys, with the assistance of SECTION27. In her judgment, Judge Bhoola noted that "this court is indebted to the AIDS Law Project for its assistance." SECTION27 incorporates the AIDS Law Project.

We thank Webber Wentzel attorneys and Advocates Warren Bank and Adila Hassim for an example of great use of law in the public interest and to protect human rights.

### **Summary of the Case and Judgment**

The full judgment is available at:

[www.section27.org.za/wp-content/uploads/2011/02/Allpass\\_Mooikloof\\_Judgement\\_JS178\\_09.pdf](http://www.section27.org.za/wp-content/uploads/2011/02/Allpass_Mooikloof_Judgement_JS178_09.pdf)

but in brief, the background and important findings of the court are as follow:

The court declared Mr Allpass's dismissal as automatically unfair in terms of section 187(1)(f) of the Labour Relations Act, 1995 (LRA). The employer was ordered to pay Mr Allpass compensation of twelve months' remuneration "reflecting both restitution as well as a punitive element for unfair discrimination on the grounds of his HIV status." The employer was also ordered to pay all Mr Allpass's legal costs

Mr Allpass has been living with HIV for almost twenty years. Before he was offered the position of a horse riding instructor and stable manager with effect from 1 November 2008, he was interviewed and asked about his state of health. He stated that he was in 'good health', which, in terms of medical evidence presented, was a true reflection of the situation.

Sometime in November 2008 the employer required Mr Allpass and two other employees (out of a staff of 30) to fill in a form that required them to disclose if they were on any chronic medication. Mr Allpass complied with the instruction and, amongst other things, listed the medicines that he takes daily to manage his HIV infection.

Judge Bhoola describes this form – which the employer claimed to be a standard administrative form – as "at the very least ... an attempt to extract information about the applicant's HIV status, and would therefore constitute unfair discrimination based on HIV."

The disclosure of his HIV infection so infuriated Mr Allpass's superior, Mr Dawie Malan, that he immediately terminated Mr Allpass's employment. Without any medical justification, his subsequent letter of dismissal stated that the ground of dismissal was that Mr Allpass was "severely ill". In the employer's mind, being HIV positive – without anything more – renders one severely ill. With this in mind, the employer had expected Mr. Allpass to disclose his HIV status when asked in his interview for the job whether his general state of health was good.

Contrary to the views held by the respondents of Mr Allpass' state of health, Judge Bhoola notes as 'inescapable fact' that Mr Allpass:

"had no medical or physical impediment preventing him from performing his duties...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". (our emphasis)**

Mr Allpass' dismissal was not the end of his humiliation. As part of the terms of his contract of employment he lived on the Mooikloof Estate in the east of Pretoria where he worked. Several days after his unfair dismissal Mr Allpass was insulted and called a 'moffie' and vagrant', manhandled and evicted by a security manager, even though he had no alternative accommodation at the time.

In this regard Judge Bhoola dismissed Allpass' claim for R150,000 in damages arising from these events. This claim was not upheld, in large part because it took place after his dismissal and was carried out by a third party and not the respondents. Judge Bhoola accepted that "it must ... be inferred from the circumstantial evidence that the instruction for his eviction must have emanated from the respondent and it should accordingly be held liable", but found that there is not "a sufficient causal nexus on which the Malans can be held liable" and therefore "the only appropriate cause of action a civil claim in delict (damages)."

### **Challenging Stereotypes and Stigma**

The judgment confirms that Mr Allpass was dismissed summarily after his former employer discovered that he has HIV.

It further reveals that the whole conduct of the employer was unfair in that there was no hearing or due process as required by law. His good health and ability to perform all his duties were considered irrelevant by the employer when the arbitrary and prejudicial decision to fire him was taken.

Particularly significant is the judges' rejection of the employers' attempt to hide HIV as the cause of the dismissal by claiming that the real reason was his allergy to penicillin which he was required to administer to horses as part of his job. Concocting lawful justifications appears to be a common practice by employers and one that must be fought.

But it did not succeed in this case. However, it does re-emphasise the problem of ongoing unfair discrimination, stigma and stereotyping of people with HIV. The attitudes that underpin stigma even crept into the court room. For example, during the conclusion of the hearing in December 2010 the respondents' legal counsel directly accused Allpass of jumping on the "HIV bandwagon" in order to cover up the real reasons for his dismissal. In paragraphs 68 and 69, Judge Bhoola responded to this as follows:

"The respondent accused the applicant 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.

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 misconceptions that impact on the livelihood and dignity of human beings.**" (Our emphasis)

### **Affirming Existing Laws and Policies**

We welcome the judge's affirmation of the intention of laws such as the LRA to prevent such actions by employers. We also note her affirmation of national and international policies on HIV and employment, and references to foundational judgments such as that in the *Hoffman v SAA* where such unfair discrimination was described as condemning people with HIV to "economic death".

The tragedy, however, is that after so many years and the coming into force of such important laws, this type of unfair discrimination remains rife, especially among small employers.

In conclusion therefore we call on:

- the Department of Labour, the Department of Health, the South African National AIDS Council (SANAC) and trade union federations to step up public education about HIV and labour rights and
- those who find themselves in similar situations to seek legal assistance to take steps to challenge such conduct.

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**ENDS**