

## **ANOTHER VIEW ON HIV/AIDS TESTING AT THE WORKPLACE**

**PFG Building Glass (Pty) Ltd v Chemical  
Engineering Pulp Paper Wood  
& Allied Workers Union  
(2003) 24 ILJ 974 (LC)**

### **1 Introduction**

In the third of a trilogy of cases (the first two being *Joy Mining Machinery (A division of Harnischfeger (SA) (Pty) Ltd) v NUMSA* (2002) 23 ILJ 391 (LC) and *Irvin and Johnson Ltd v Trawler and Line Fishing Union* (2003) 24 ILJ 565 (LC)) interpreting the boundaries of section 7(2) of the Employment Equity Act 55 of 1998 (hereinafter referred to as "EEA"), the Labour Court in *PFG Building Glass (Pty) Ltd v Chemical Engineering Pulp Paper Wood & Allied Workers Union* ((2003) 24 ILJ 974 (LC)) (hereinafter referred to as "*PFG Building Glass (Pty) Ltd v CEPPWAWU*") has yet again approached the issue of HIV/Aids testing at the workplace from a different perspective.

In this case the applicant sought a declarator pronouncing that authorisation for the anonymous and voluntary testing of employees for HIV/Aids at the workplace was unnecessary, as such testing does not fall within the scope of section 7(2) of the EEA. Section 7(2) of the EEA expressly prohibits the testing of an employee to establish HIV/Aids status, unless such testing is "determined to be justifiable by the labour court ...". A similar order was sought and granted in the earlier decision of Rogers AJ in *Irvin and Johnson Ltd v Trawler and Line Fishing Union* (*supra*) on different grounds. Unlike Rogers AJ in *Irvin and Johnson Ltd v Trawler and Line Fishing Union* (*supra*), Pillay J in *PFG Building Glass (Pty) Ltd v CEPPWAWU* (*supra*) chose to interpret this provision on the grounds identified by section 3 of the EEA, being "compliance with the Constitution, so as to give effect to its purpose, taking into account any relevant code of good practice ... and compliance with international law obligations ...".

### **2 Compliance with the Constitution**

In establishing whether section 7(2) complies with the Constitution, the court noted that it is necessary to identify the fundamental rights that may be affected and establish the contents of these rights. The rights infringed by HIV/Aids testing are the rights to bodily and psychological integrity, which includes the right to security in and control over one's body (as protected by s 12(2)(b) of the Constitution) and the right not to be subjected to medical or scientific experiments without informed consent (as protected by s 12(2)(c) of the Constitution). Implicit in these rights are the fundamental rights to

dignity (as protected by s 10 of the Constitution) and privacy (as protected by s 14 of the Constitution). The content of the rights protected by s 12(2)(b) and (c), according to Pillay J, is the “right of everyone to control their bodies by consenting or not consenting to or subjecting or not subjecting their bodies to any treatment, test, experiment or any other physical, mental or psychological experience” (*PFG Building Glass (Pty) Ltd v CEPPWAWU supra* 984 par 17).

No right is absolute and this fundamental right to control one's body may be limited by other competing fundamental rights, such as the right of access to information, where, for example, good corporate governance may require shareholders to be informed of a looming risk to the viability of an enterprise posed by soaring HIV/Aids levels at a workplace. In *Irvin and Johnson Ltd v Trawler and Line Fishing Union (supra)* the Labour Court recognised the need for HIV/Aids testing to establish the prevalence and potential impact of HIV/Aids on the workforce in order to implement appropriate manpower planning to minimise the damaging effects of high mortality rates. Similarly the right to free economic activity, where, for example, the right to effectively manage an enterprise is hindered by an employee's refusal to be tested for HIV/Aids status, can in appropriate circumstances justify a limitation of section 12(2)(b) rights.

### 3 Compulsory testing

Compulsory testing, as pointed out by Rogers AJ in *Irvin and Johnson Ltd v Trawler and Line Fishing Union (supra)* is the “imposition by the employer of a requirement that employees ... submit to testing on the pain of some or other sanction or disadvantage if they refuse consent” (*Irvin and Johnson Ltd v Trawler and Line Fishing Union (supra)* 573 par 28). Section 7(2) of the EEA and clauses 5.3.3 and 7.1.1 of the Code of Good Practice on Key Aspects of HIV/Aids and Employment (R1298 in GG of 1 December 2000) both clearly prohibit the testing of employees in order to ascertain HIV status, unless the Labour Court declares such a test to be justifiable. Clause 7.1.4 of the Code stipulates the conditions for the Labour Court's authorisation of testing.

This order will only be granted if the testing and consequent breach of the constitutionally protected right to bodily integrity is deemed to be justifiable, in accordance with the constitutional limitation clause contained in section 36 of the Constitution. In testing the justifiability of the limitation of a fundamental right, the court is required to consider the purpose served by the limitation, the nature and extent of the limitation, the relationship between the limitation and its purpose and whether there are less restrictive options available. In the context of HIV/Aids testing, the purpose of testing would depend upon the employer's reasons for doing so. An unfairly discriminatory reason would be in direct contravention of section 6 of the EEA and the Constitution and would be prohibited (*Hoffmann v SA Airways (2000) 21 ILJ 2357 (CC)*). Testing which is aimed at enabling the employer to obtain statistical data, so as to effectively manage the demands of the workplace and employee benefits, would fulfil a legitimate purpose. In assessing the nature and extent of the limitation the court will be required to

examine the testing process including the methodology, requirements of confidentiality and pre- and post-testing counselling.

As noted by Rogers AJ in *Irvin and Johnson Ltd v Trawler and Line Fishing Union (supra)* and Landman J in *Joy Mining Machinery (A division of Harnischfeger (SA) (Pty) Ltd) v NUMSA (supra)*, HIV is a medical condition and testing for HIV/Aids would fall under the definition of medical testing as defined by section 1 of the EEA, being any test to ascertain or to enable the employer to ascertain “whether an employee has any medical condition”. Accordingly the criteria for justifiable medical testing identified in section 7(1)(b), namely whether “it is justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of a job tested”, must also be considered. A direct relationship will need to be established between the identified purpose of the testing and the actual tests conducted. Section 50(4) enables the court to impose conditions, such as the provision of counselling and the maintenance of confidentiality, so as to bring the tests within “justifiable limits” (*PFG Building Glass (Pty) Ltd v CEPPWAWU (supra)* 987 par 39). All efforts will have to be made to curtail the effect of the limitation as much as possible, such as ensuring the confidentiality of results, which is indispensable to the testing process, or conducting anonymous testing, which is seemingly sanctioned by clause 7.1.8 of the Code. Thus, unlike the approach of Landman J in *Joy Mining Machinery (A division of Harnischfeger (SA) (Pty) Ltd) v NUMSA (supra)* and Rogers AJ in *Irvin and Johnson Ltd v Trawler and Line Fishing Union (supra)*, both of whom relied on equitable considerations and the provisions of section 7(1)(b) for guidance in assessing the ambit of justifiable testing, Pillay J instead opted to determine justifiability in terms of the constitutional limitation clause. In so doing, the court was required to balance countervailing rights in order to give effect to the “values of an open and democratic society based on human dignity, equality and freedom” (*PFG Building Glass (Pty) Ltd v CEPPWAWU (supra)* 987 par 38 referring to *S v Makwanyane* 1995 3 SA 391 (CC)).

#### **4 Voluntary testing**

Testing is voluntary where the decision whether to submit to testing remains that of the employee at all times and no disadvantage attaches to a decision by an employee not to submit to testing (*Irvin and Johnson Ltd v Trawler and Line Fishing Union (supra)* 573 par 28). A literal interpretation of section 7(2), the Labour Court held in *PFG Building Glass (Pty) Ltd v CEPPWAWU (supra)* 996 par 83, “casts the prohibition against testing so wide” that it would appear that Labour Court authorisation is still required if the employee voluntarily consents to testing. This requirement is in direct conflict with the constitutional right to control one’s own body and conversely the right of an employee to voluntarily consent to HIV/Aids testing, provided that such consent is informed and voluntary. Pillay J expressed further dissatisfaction with the provisions of clause 7.1.5 of the Code that recognises permissible testing in limited circumstances, where an employee has requested a test as part of a health-care service, in the event of an occupational accident carrying risk of exposure to blood or bodily fluids and for compensation

arising from this exposure. By imposing minimum conditions on the testing procedure, the court held that an employee's constitutional right to agree to terms and conditions of testing is infringed. The court pointed out that an employee is entitled to agree to "contract on terms that are not in conflict with constitutional values" (*PFG Building Glass (Pty) Ltd v CEPPWAWU supra* 993 par 71). Furthermore, the court added, at common law *volenti non fit iniuria* and consent are both valid defences to the infringement of the right to bodily integrity. The court concluded that, provided employees consent to HIV testing, whether on their own initiative or the employer's, it is not open to the Labour Court to interfere with this decision as voluntary testing falls beyond the ambit of section 7(2). There is no limitation of the right to bodily integrity, no constitutional infraction and accordingly no contravention of the EEA.

This conclusion reiterates the finding of the court in *Irvin and Johnson Ltd v Trawler and Line Fishing Union (supra)* but on different grounds. In *Irvin and Johnson Ltd v Trawler and Line Fishing Union (supra)* the court held that a literal interpretation of section 7(2) read with clause 15.2 of the Code, which recommends the implementation of HIV/Aids programmes and the encouraging of voluntary testing, results in an absurdity. This together with the provisions of section 10 of the EEA, which provides that the determination of disputes arising out of section 7 can give rise to an employee applying for an urgent interdict or an order prohibiting compulsory testing, neither of which are applicable to voluntary testing, led the court to conclude that it is "improbable that voluntary testing was intended to fall within the ambit of section 7". (*Irvin and Johnson Ltd v Trawler and Line Fishing Union supra* 575 par 35).

## 5 Anonymous testing

Anonymous testing, in terms of clause 7.1.8. of the Code, is where there is no "reasonable possibility that a person's HIV status can be deduced from the results". The court was required to consider whether section 7(2) prohibited anonymous testing.

The court noted that as section 7 is housed within Chapter 2 of the EEA, the chapter that deals with the prohibition against unfair discrimination at the workplace, it would appear that the primary purpose of prohibiting HIV/Aids testing and requiring the express authorisation of the Labour Court is to prevent unfair discrimination. Relying on this purpose, Rogers AJ in *Irvin and Johnson Ltd v Trawler and Line Fishing Union (supra)* held that "where employees are tested in such a way that the employer is unable to identify which employees are suffering from the medical condition in question, the risk of discrimination ... is absent" (570 par 19). Rogers AJ relied on the wording of section 7(2) that prohibits testing which would enable the employer to "ascertain" the HIV/Aids status of employees. Genuine anonymous testing would not have this effect. Rogers AJ found support for his decision in clause 7.1.8. of the Code of Good Practice which provides that "anonymous, unlinked surveillance or epidemiological HIV testing in the workplace may occur provided it is undertaken in accordance with ethical and legal principles regarding such research". The court in *Irvin and Johnson Ltd v Trawler and Line Fishing Union (supra)* concluded that, in the absence

of any possibility of discrimination, anonymous testing would fall outside the ambit of section 7(2).

In *PFG Building Glass (Pty) Ltd v CEPPWAWU (supra)* the court disagreed with this approach. Relying on the constitutional protection against being subjected to medical and scientific experiments without informed consent, Pillay J concluded that, in the absence of consent by the employees, even in the event of anonymous testing, the Labour Court must determine the justifiability of the testing. The court concluded that anonymous testing, without the employee's consent, is prohibited by section 7(2) of the EEA.

Reservations against anonymous testing were also expressed by Landman J in the earlier decision of the court in *Joy Mining Machinery (A division of Harnischfeger (SA) (Pty) Ltd) v NUMSA (supra)*, where, despite the provisions of clause 7.1.8 of the Code, concerns were raised as to whether anonymity would be guaranteed, who was to decide this and when this should be done. Landman J pointed out that the Code of Good Practice is merely intended to provide guidance to the courts and the courts may disagree with provisions of the Code and provide reasons for doing so. Provisions of the Code which disregard the purpose and scope of the EEA would be inapplicable and void. Landman J was of the opinion, albeit *obiter*, that the consent of the Labour Court would be required before conducting anonymous testing.

## 6 Analysis

As noted by the court in *Joy Mining Machinery (A division of Harnischfeger (SA) (Pty) Ltd) v NUMSA (supra)*, section 7(2) of the EEA is "unhappily worded" (395 par 7). A literal interpretation of this provision draws no distinction between compulsory, voluntary and anonymous testing – an interpretation that gives rise to the absurd result that consensual testing may only be conducted following an application to the Labour Court. Testing is prohibited unless deemed justifiable by the Labour Court in terms of section 50(4), a section that stipulates the powers of the court on the premise that testing has already been found to be justified. The courts in *Joy Mining Machinery (A division of Harnischfeger (SA) (Pty) Ltd) v NUMSA (supra)*, *Irvin and Johnson Ltd v Trawler and Line Fishing Union (supra)* and *PFG Building Glass (Pty) Ltd v CEPPWAWU (supra)* have all attempted to interpret this clumsy provision so as to give effect to its intended purpose. In *PFG Building Glass (Pty) Ltd v CEPPWAWU (supra)* the court relied on a constitutional interpretation, as opposed to *Irvin and Johnson* in which the court relied on a purposive approach. While both methods of interpretation are legally sound, the findings of the court in these two decisions differ in one important respect. In *PFG Building Glass (Pty) Ltd v CEPPWAWU (supra)* the court held that anonymous testing may not be conducted without an employee's informed consent. In *Irvin and Johnson Ltd v Trawler and Line Fishing Union (supra)* the court held that anonymous testing fell beyond the ambit of section 7(2) and that neither the consent of the employee or the Labour Court was required. The constitutional protection of bodily integrity unequivocally prohibits any form of testing without a person's consent and anonymous testing is no exception to this rule. As the Constitution is our

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supreme law, it would appear that the interpretation of the court in *PFG Building Glass (Pty) Ltd v CEPPWAWU (supra)* is to be preferred.

## **7 Conclusion**

The Labour Court, in both *PFG Building Glass (Pty) Ltd v CEPPWAWU (supra)* and *Irvin and Johnson Ltd Trawler and Line Fishing Union (supra)*, has found that voluntary HIV/Aids testing falls beyond the ambit of section 7(2) of the EEA. Consensual testing may be conducted, without the permission of the Labour Court, provided that such testing complies with the requirements of confidentiality and is undertaken with “informed consent” (as defined by clause 7.1.7 of the Code), meaning that “the individual has been provided with information, understands it and based on this has agreed to undertake the HIV test”. In the context of the Aids pandemic that is gripping South Africa, and considering the value of reliable statistics and appropriate manpower planning, these decisions can only be celebrated.

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