Diau v. Botswana Building Society

Case No. IC 50/2003

Country: Botswana
Region: Africa
Year: 2003
Court: Industrial Court
Health Topics: HIV/AIDS, Informed consent
Human Rights: Freedom from discrimination, Right to bodily integrity, Right to work

Facts

D was offered employment by B, a building society, as a security officer, subjecting her to undergoing and passing a full medical examination, including submission of certified documentation as to her HIV status. D began a six month probationary period which finished on 27 August 2002. After some reflection D informed B on 7 October 2002 that she would not provide such a certificate on the grounds that she considered it to be a private matter. Twelve days later B wrote to D withdrawing its offer of permanent employment without providing any reasons.

D challenged the lawfulness of the termination on the grounds that the instruction to undergo an HIV test was an unreasonable breach of her rights to liberty and equal protection under the law, protection from degrading treatment, privacy and not to suffer unfair discrimination as guaranteed by ss 31, 7(1)2, 9(1)3 and 15(2)4 (as read with 15(3)5) respectively of the Constitution and that she was entitled to disobey it. In this context D argued that B was bound to observe the Bill of Rights given that it operated in the public domain for the benefit of the public and that the government was a shareholder.

D also argued that her six month probationary period was contrary to s 20(1)6 of the Employment Act ('the Act') which stipulated that it should not exceed three months in the case of unskilled workers and that therefore her contract of employment was void pursuant to s 377 of the Act. In addition, D argued that B was in breach of s 20(2)8 of the Act as read with ss 18 and 19 because it did not give D the required 30 days notice of termination.

B submitted that the case did not concern the Constitution and therefore whether it had horizontal effect and whether B was an organ of the state or not. Instead, B argued, it concerned the lawfulness of the termination in terms of the Act and, in this regard, s 20(2) only dealt with situations where contracts of employment were terminated during the probationary period and not subsequently as here. B maintained that it was within its rights not to confirm D's employment after the six-month period and was not obliged to give any reasons for its decisions. Furthermore, B argued that it only delayed advising D of the decision not to offer her the permanent position because she had requested for an opportunity to consider whether she wanted to undergo the HIV test. B also challenged the fact that D was an unskilled worker in terms of s 20(1) of the Act.

D sought reinstatement or compensation for unfair dismissal pursuant to s 19(1) of the Trades Disputes Act together with orders declaring (a) the instruction to conduct a test in breach of s 9(1) of the Constitution; (b) the dismissal to be in breach of ss 3, 7(1) and 15(2) and (c) the failure to provide pre-test and post-test counselling to be in breach of s 7(1).

[Adapted from INTERIGHTS summary, with permission]

Decision and Reasoning

In granting the application and making declarations of unconstitutionality in relation to ss 3(a) and 7(1) of the Constitution, the Court held that:

(1) In order to determine whether an employee was skilled or unskilled regard must be had to the nature of the employment, the person's qualifications if they were required for the job, what training the employee had undergone for such employment and the employee's relevant experience (Gaopotlake v Dulux Botswana Pty

Ltd IC 97/99 applied). Given that D's job did not require any special training or expertise, together with only very low formal qualifications of primary education and basic literacy and numeracy, D can be classified as unskilled. Therefore the probation period was unlawful and null and void to the extent that it breached s 37 the Act.

(2) In any event, even if D was skilled, she had still completed her probationary period on 24 August 2002 and at the time of her dismissal in October was a permanent employee. Consequently, the last day B could have terminated her contract of employment was 24 August. The fact that D did not initially respond to the instruction to undergo an HIV test did not by any stretch of the imagination extend the probationary period. The fact of the matter is that D continued to work for B until 19 October when she was effectively dismissed.
(3) Section 20(2) whilst stating that a contract of employment during the probationary period may be terminated by not less than 14 days notice does not suggest that any employee on probation should be given notice of 14 days. Instead, if the probationer was a monthly paid employee, as here, they were entitled to one month's notice. There was nothing to suggest that B had complied with this requirement. Nor did B provide any reasons for termination which, given that D was no longer subject to s 20(2), it clearly should have done. In the circumstances the termination of D's contract was procedurally and substantively unfair (Phirinyane v Batignolles IC 18/94 considered).

(4) Despite the absence of an official reason the inference was clear that D was dismissed because she refused to undergo an HIV test. The instruction to undergo such a test was irrational and unreasonable to the extent that it was not related to the inherent requirements of the job and amounted to compulsory post-employment testing.

(5) There was at the time no specific legislation governing issues of HIV/AIDS in the workplace although there was a National Policy on HIV/AIDS ('the Policy'). To the extent that it encouraged voluntary but not compulsory pre- and post-employment testing as part of the assessment of fitness to work the Policy appeared to be consistent with the World Health Organization, SADC Code of Good Practice on HIV/AIDS and Employment (1997) and HIV/AIDS and Human Rights: International Guidelines (United Nations 1998) and ILO Guidelines on HIV/AIDS. The Policy recognized that compulsory pre- and post-employment testing was not unnecessary and could lead to stigmatization.

(6) The Policy was a very progressive document that sought to eliminate HIV/AIDS-related unfair discrimination and to promote equality and fairness, especially in the workplace, giving effect to the country's international obligations. In this respect the Policy augmented the Constitution to the extent that the latter entrenched the rights to equality, human dignity, liberty and privacy. Accordingly, even though the Policy was not law, breaches of its provisions may, in appropriate cases, constitute evidence of breach of constitutional provisions. Indeed, in the absence of a statutory framework dealing with HIV/AIDS the starting point must be the Constitution and relevant international, regional and sub regional human rights instruments. Therefore although it was not strictly necessary to consider the constitutional issues at stake, given that the termination of D's contract had already been held to be unlawful and unfair, the fundamental importance of the issues and fact that some have never been subject to judicial scrutiny warranted further inquiry.

(7) Regarding whether B should be subject to the Bill of Rights, no evidence had been provided that the government was a shareholder. Even though it had been held that this was the case in another judgment, it was well known that a judge cannot use a finding of fact made by another judge in a different case (dicta of Legwaila JP in Rapula Jimson v Botswana Building Society IC 35 2003 considered). Based on a reading of the Building Societies Act, B is a private organisation operating in the public domain. Merely because it was established under statute does not make B a statutory body since otherwise all companies or societies were public entities. Nor was B a state organ as ordinarily understood in constitutional law referring to the executive, legislature, judiciary and government departments.

(8) Although other jurisdictions have tended not to have affirmed the horizontal application of constitutional rights, great caution has to be exercised when placing reliance on the jurisprudence from other countries where the constitutional provisions differ significantly as here. For example whilst s 8 of the South African Constitution limited its application to organs of the state and this had been interpreted to mean that it should be applied vertically and to a limited extent to private relations the Constitution of Botswana contained no such restriction (Hoffman v South African Airways 2000(2) ILJ CC 2357, Du Plessis & Ors v De Klerk & Anor 1996 (3) SA 856, Retail Wholesale and Department Store Union Local 580 v Dolphin Delivery Ltd (1987) 33 DLR (4th) 174, Gunaratne v Peoples Bank 1987 CLR 383 considered). Instead s 18 simply required that the person prove that a right had been or was likely to be contravened in relation to him without specifying by whom. Similarly, s 9(1), protecting against unlawful invasions of privacy, refers to entry by others onto someone's premises whilst not specifying that 'others' should only apply to state organs.

(9) Hence there was no basis to interpret the Constitution in a restrictive manner. Instead, in a world where private organisations wield so much power, to exclude them from the ambit of the Bill of Rights would be to both give them a blanket license to abuse human rights and fail to give true meaning to the spirit of the Constitution. In general any activity, operation, undertaking or enterprise operating in the community and open to the public, should be subject to horizontal application. In particular, this would include corporations, multinationals and local companies that engaged in trade and commerce dealing with the public; together with commercial and professional firms relying on the public for their custom or support and hotels and restaurants (dicta of Friedman JP in Baloro & Ors v University of Bophuthatswana & Ors 1995 (4) SA 197 applied). At the same time, the dangers of opening up wholesale private relations to constitutional scrutiny were recognised. It should only be done in exceptional cases depending upon the nature of the conduct and particular circumstances.

(10) The need for private entities to be held accountable was particularly strong in employment relationships which are often characterised by unequal bargaining power between employee and employer. Accordingly, B fell within the scope of the Bill of Rights and was bound by its provisions.

(11) On the facts of this case, whilst B might have undermined D's right not to be searched and to privacy, no invasion had been established since the latter refused to undergo any test which could have resulted in a breach of s 9(1) (Jansen v Van Vuuren & Anor NNO v Kruger 1993 (4) SA 842 considered).

(12) Similarly, whilst B's request that D should undergo an HIV test was quite strange and on the face of it quite irrational, it cannot be held that D's subsequent dismissal amounted to discrimination within the meaning of s 15(2) as read with s 15(3). On the evidence whilst D's dismissal could have been premised on the suspicion that D was HIV positive there was no evidence to suggest that B suspected her to be so and therefore treated her differently. If that was the case it would clearly amount to a breach of s 15(2) notwithstanding that HIV status or perceived status was not among the listed grounds in s 15(3), since such listed grounds were not exhaustive but merely provided examples of outlawed discrimination that was offensive to human dignity in addition to being irrational (Hoffmann v South African Airways ILJ CC 2357 applied). This was reinforced by the fact that the ILO Declaration on Fundamental Principles and Rights at Work June 1998 reaffirmed the constitutional principle of elimination of discrimination at the workplace in line with the values contained in ILO Convention No 111 (Discrimination in Employment and Occupation Convention) 1958 ratified by Botswana.

(13) The right to be treated with dignity and not to be subject to inhuman and degrading treatment was an intrinsic part of the right to life and permeated the entire Bill of Rights. The right to dignity required respecting the fact that an individual should be the master of his or her own body and that they should be free to resist any potential violation of their privacy and/or bodily integrity. Therefore to punish an individual for refusing to agree to such a violation was demeaning, undignified, degrading and disrespectful to the intrinsic worth of human beings. This was particularly the case in the context of HIV/AIDS where even the remotest suspicion of positive status could breed intense prejudice, ostracisation and stigmatisation. The symbolic effect of punishing an employee for refusing to undergo an HIV test was to say that all those who refuse were not competent to be employed and should be condemned to unemployment and a form of economic death for simply saying ‘as a human being I have decided not to test for HIV/AIDS.’ (dicta of Ngcobo J in Hoffman at p 2370-1; X v Y 1998 2 All ER 648; X v Y Corp & Anor [1999] LRC 688 and X v Commonwealth of Australia & Anor 2000 4 LRC 240 applied).

(14) Whilst people should be encouraged to test voluntarily through persuasion and education in order to give informed consent as being in their own interests so that if they are positive they can receive treatment at the earliest opportunity, they should not be forced to. Such compulsion was as inhuman and degrading as it was counterproductive.

(15) The autonomy protected by s 3(a) of the Constitution encompasses not only freedom from physical constraint but also those matters that could be properly characterised as inherently personal free from irrational and unjustified interference by others going to the core of what it means to enjoy individual dignity and independence. In this context choosing whether to test or not was a private decision striking at the heart of personal autonomy and should not be interfered with by any entity whether the state or an employer in the absence of any compelling reasons to the contrary (City of Longueuil v Godbout & Anor 1997 3 SCR 884 applied).

(16) Reinstatement under s 19(1) of the Trade Disputes Act was a discretionary remedy. It could only be considered where the termination has been held to be unlawful or motivated on the grounds of sex, trade

union membership or activity, the lodging of a complaint or grievance, religious, tribal or political affiliation or where the employment relationship has irrevocably broken down (Catherine Hirshfield v Express Cartage Botswana Pty Ltd IC 67/96 applied). Even then it must not be awarded lightly and would be dependent upon certain factors balancing the interests of the employee and the employer such as the employee's employment opportunities and work security, the unfair disruption to the employer's business and harmful effect on the employment relationship (Consolidate Frame Cotton Corporation Ltd v The President of the Industrial Court (1986) 7 ILJ 489 applied). However, in this case there was no evidence that (a) an order of reinstatement would unfairly affect B's business; (b) that the position had been filled; (c) that such an order would undermine management authority or that (d) the relationship between the parties had broken down irretrievably. In such circumstances and given the appalling and disgraceful treatment of D it was appropriate to make an order of reinstatement plus compensation equivalent to four months' salary.

[Adapted from INTERIGHTS summary, with permission]

Decision Excerpts

"To punish an individual for refusing to agree to a violation of her privacy or bodily integrity is demeaning, undignified, degrading and disrespectful to the intrinsic worth of being human. Punishing the Applicant for refusing an invasion of her right to privacy and bodily integrity is inconsistent with human dignity. This is particularly so in the context of HIV/AIDS where even the remotest suspicion of being HIV/AIDS can breed intense prejudice, ostracization and stigmatization. This is the context within which one must analyse the right to dignity in this case. The symbolic effect of punishing an employee for refusing to undergo an HIV test is to say that all those who refuse to undergo an HIV/AIDS test are not competent to be employed - they should lose their jobs and by extension be condemned to unemployment - a form of economic death for simply saying, as a human being, I have decided not to test for HIV/AIDS." (page 64)

"It is incompetent to force people to undergo HIV testing. People must be encouraged to test voluntarily through persuasion and education. After all, common sense dictates that it is prudent for people to know their status so that if positive they can take treatment at the earliest opportunity. Compelling people to undergo HIV test is inhuman and degrading in addition to being counter productive. In this case the Applicant paid the highest price for refusing to undergo the HIV test: deprivation of livelihood by losing her job." (page 67)

"I take it that human rights matter most during periods of crisis - a period when the weak and marginalized are particularly vulnerable. HIVIAIDS is an epidemic that has brought a crises of immense proportions. This calls for heightened vigilance to any conduct ihat infringes the baseline right - the right to dignity." (page 68)

"Informed consent is premised on the view that the person to be tested is the master of his or her own life and body. In the premises it should follow that the ultimate decision whether or not to test lies with him or her, not the employer, not even the medical doctor. The purpose of informed consent is to honour a person's right to self determination and freedom of choice." (page 70)