Can employers arrange HIV-tests for their employees?

HIV (and AIDS) is a pandemic which according to statistics will have devastating consequences not only in South Africa but on the rest of the continent. It is estimated that in South Africa alone approximately 1 500 persons are infected daily with HIV which figure, is to say the least, shocking.

The International Labour Organisation (ILO) estimates that by 2020 the labour force in South Africa will be 17% smaller than it was in 2000. The report also mentions that AIDS-related illnesses and deaths of workers will effect employers by increasing costs and reducing revenues. Employers will be required to spend more on health, burial, training and recruitment or replacement of employees. There will be a reduction in revenues due to absenteeism related to illnesses, attendance at funerals, time spent on caring for the ill and training of replacements. The advent of HIV/AIDS has brought with it a new manifestation of discrimination, namely unfair discrimination on the grounds of HIV/AIDS status of persons including employees.

The impact of HIV/AIDS on the South African economy is a worrying factor and an increasing number of businesses are requiring information on HIV prevalence in their workforce so as to assess the potential impact of HIV/AIDS on the workforce.

In the case of Joy Mining Machinery, A Division of Harnischfeger (SA) (Pty)Ltd v National Union of Metal Workers of SA and Others (2002) 23 IJL391 (SC), Joy Mining Machinery approached the Labour Court to get permission to arrange HIV testing for its employees.

The question obviously arises whether an employer is entitled to arrange HIV testing for its employees and, if so, under what circumstances can such HIV testing be permitted.

The answer to this question can be found in the Employment Equity Act 55 of 1998. Section 7(2) of this Act provides that testing of an employee to determine that employee’s HIV status, is prohibited unless such testing is determined to be justifiable by the Labour Court in terms of Section 50(4) of this Act. This provision

means that an employer who wishes to test his employees to determine their HIV status must apply to the Labour Court for permission.

Section 50(4) of the Act provides that if the Labour Court declares that the medical testing of an employee as contemplated in Section 7 is justifiable, the Court may make any Order that it considers is appropriate in the circumstances including imposing conditions relating to:

a) the provision of counselling;
b) the maintenance of confidentiality;
c) the period during which the authorisation for any testing applies; and
d) the category or categories of jobs or employees in respect of which authorisation ….for testing applies.

The facts in the Joy Mining Machinery case were that Joy Mining, which employs 800 employees and carries on business nationally as a manufacturer, supplier and service provider in respect of machinery to the mining industries, wished to test its employees for HIV in order to determine the incidents of the disease amongst its staff so as to be better able to deal with the pandemic. It had the support of the Unions as well as most non-union employees for the HIV test.

In its application Joy Mining pointed out that the need to test for HIV was to establish the exact HIV prevalence existing at its workplace so as to enable them to be in a better position to evaluate its training and awareness programme as well as being able to formulate future plans based on a more accurate prevalence study. It further pointed out that the purpose for the test was that as an employer it needed to know the extent of HIV infection among its workforce in order to be proactive regarding prevention of employees becoming infected with HIV, to treat at least the symptoms of the disease and to plan for contingencies and other eventualities.

Joy Mining made it clear to the employees that participation was voluntary and no one would be forced to participate. Employees were further ensured that confidentiality and anonymity of employees would be safeguarded as the procedure proposed which inter alia made provision that employees would not be asked their names, would ensure that confidentiality and anonymity was safeguarded.

Joy Mining was also instrumental in preparing its employees for HIV testing as

various consultations between all relevant stake holders took place. Meetings were held and the benefits associated with knowing the prevalence of HIV within the company in order to face the crises rather than being unprepared, were dealt with.

In view of the fact that the testing was to be confidential, there would be no need for Joy Mining to arrange post-testing counselling for its employees. Employers who wished to know whether they were HIV positive, however, would be required to arrange their own tests and Joy Mining would advise such employees where to obtain assistance should they wish to have a private test.

What the Court had, therefore, to determine was whether the proposed testing for HIV status was justifiable. The Court was of the opinion that in deciding whether a HIV test is justifiable, would be appropriate to take into account considerations relating to unfair discrimination, the need for HIV testing, the purpose of the test, the medical facts, employment conditions, social policy, the fair distribution of employee benefits, the inherent requirements of the job and the category or categories of jobs or employees concerned.

The Court also pointed out that it also wished to be informed about the following criterion which although does it did not relate to justifiability, was relevant to arriving at a proper decision, namely: the attitude of the employees, whether the test was intended to be voluntary/compulsory, the financing of the test, preparation for the test, that is whether the employees were able to give their informed consent, pre-test counselling, the nature of the proposed test and procedure and post-testing counselling.

As it appears from the highlighted parts above, Joy Mining did deal with most of these aspects.

Having regard to all the factors as set out in Joy Mining's application the provisions of the Act as well as the factors which must be taken into account in order to determine the justifiability, the Court granted the Order sought by Joy Mining which mean that Joy Mining was allowed to proceed with the arrangement of HIV testing for their employees.

Although it could be argued that Joy Mining's application might have been made easy by the fact that it had the support of its employees who agreed to voluntarily participating in the testing, it is clear from the Court's judgment that the fact that

the employees volunteered, did not play much of a role in convincing the Court to grant the Order in favour of Joy Mining. As a matter of fact in the recent case of Irvin & Johnston Ltd v Trawler and Line Fishing Union 2003 (3) SA 212, the Court held that the individual employees' attitude to the testing is not stated to be a relevant factor in the Act, and it would not seem to be naturally accommodated within any of the stated criteria of justifiability. The Court held that the employees' desire and willingness to undergo the testing would not be relevant in assessing the justifiability thereof. One can, therefore, say that the willingness of employees to undergo HIV tests is just one of the factors which the Court may take into account with all the other relevant factors as set out above in assessing the justifiability of HIV tests.

It is important to draw a clear distinction between medical testing as provided for in Section 7(1) of the Employment Equity Act and testing of an employee to determine that employee's HIV status as provided for in Section 7(2) of the Act.

Medical testing includes any test, question, enquiry or other means designed to ascertain, or which has the effect of enabling an employer to ascertain whether an employee has any medical condition. These tests normally take the form of X-rays, eye tests, lung function etc and which are very commonly used by mines to assess whether employees are fit to work underground. Now, in terms of the Act it is not necessary for employers to apply to the Labour Court for permissions to do medical testing on their employees as an employee may form an opinion as to whether medical testing for conditions other than

HIV infection, is justifiable or not. It is, however, in the case of HIV testing that the issue of justifiability must be determined in advance by the Labour Court.

The question may obviously arise as to what the position is regarding HIV testing in cases where the nature of the employment is such that HIV testing might become an inherent requirement of such a job and there have been arguments that HIV testing might be an inherent requirement for people who work, for example, in a butchery or even domestic workers. Well, the answer to this question lies in Section 7(2) of the Employment Equity Act which basically provides that testing of employees to determine their HIV status is prohibited unless the employer applies to the Labour Court for permission and in each case the Labour Court will have to determine whether such testing is justifiable after taking into account all the relevant factors as set out above.

As stated above, the advent of HIV/AIDS has brought with it a new manifestation of discrimination, namely unfair discrimination on the grounds of HIV/AIDS status of persons, and the stigma and discrimination which normally accompany being HIV positive, might be the reason why the consent of the Labour Court has generally been set as a pre-condition for testing. As a matter of fact in Hoffmann v South African Airways 2001 (1)SA 1 (CC)(2000 (11) BCLR 1211) the Constitutional Court described people living with HIV/AIDS as one of the most vulnerable groups in our society, and the Legislature's concern for this group is reflected, inter alia in the more stringent requirement for HIV testing imposed by Section 7(2) of the Employment Equity Act 55 of 1998.