

**IN THE LABOUR COURT OF SOUTH AFRICA
(Held at Johannesburg)**

Case No: J 158/02

In the matter between:

**JOY MINING MACHINERY A DIVISION OF
HARNISCHFEGER (SOUTH AFRICA) (PTY) LIMITED**
Applicant

and

NATIONAL UNION OF METAL WORKERS

1st Respondent

NATIONAL EMPLOYEES TRADE

2nd Respondent

3rd and further

respondents

JUDGMENT

Landman J:

1. On 22 January 2002. I made the following order in this matter:

IT IS ORDERED THAT:

1. the non-compliance with rule 7 of the Rules for the Conduct of Proceedings in the Labour Court be condoned;
2. applicant be authorised and permitted, in terms of section 7(2) of the Employment Equity Act 55 of 1998 ("the Act"), to perform the ELISA HIV test on the members of first and second respondents, whose names appear on pages 37 to 42 of the paginated papers (attached hereto as Annexure "A") and third and further respondents, whose names appear on pages 43 to 48 of the paginated papers (attached hereto as Annexure "B"), on the following conditions:
 - 2.1 that the testing shall be voluntary;
 - 2.2 that the test to be used is the ELISA saliva test;
 - 2.3 that the tests are to be done on an anonymous basis, i.e. the employees participating in the survey will be asked to supply a saliva sample, as well as their age and job category. At no time will the participating employee be asked their name, nor will such information be recorded on the sample.
 - 2.4 that the tests are to be conducted on 23 and 24 January and 1 February 2002 only;
 - 2.5 that the employees have been advised that they may request a private test which will enable them to know their own HIV status but this will not form part of the survey nor will such testing be done by the applicant or on its behalf;
 - 2.6 that the sample will be received and processed by an employee of the Aids Management & Support company. The applicant and its management will not be involved apart from participating in the survey as employees themselves.
 - 2.7 that the applicant at no time intends to discriminate against HIV positive employees should it become aware of such status;
 - 2.8 that the testing would at all times only be done with the consent of the employee and would not be requested as a condition of employment, promotion and/or any other benefits;
 - 2.9 that the intention of the testing shall be to find out what percentage of employees at the applicant is HIV infected in order to assist the applicant to plan an effective HIV/AIDS prevention strategy.
 - 2.10 that the testing will not be a job requirement;
 - 2.11 that no prejudicial inference will be drawn from a refusal to submit to testing nor

will the applicant be aware of which employees have undergone testing. The applicant will only be informed of the percentage of employees who have participated and the percentage of employees within the various age groups and job bands who have tested positive.

3. This order, together with a notice that every employee may decline to take the test without being subjected to any prejudice on that account, is to be placed at all entrances to the testing area and on all company notice boards.
 4. This order is to be served on the first and second respondents.
 5. This order is to be served on the employees listed on Annexure "B" hereto by e-mail.
2. These are my reasons for making the order.

3. HIV (and AIDS) is a pandemic. The International Labour Organisation estimates that by 2020 the labour force in South Africa will be 17% smaller than it was in 2000. See the report prepared for the 88th ILO Conference. The report also mentions that AIDS-related illnesses and deaths of workers will affect employers by increasing costs and reducing revenues. Employers will be required to spend more on health care, burial, training and recruitment of replacement employees. There will be a reduction in revenues due to absenteeism related to illness, 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 the HIV/Aids status of a person including employees.

4. Joy Mining Machinery carries on business nationally as a manufacturer, supplier and service provider in respect of machinery to the mining industry. Joy Mining employs about 800 employees. Joy Mining, with the support of the representative union and most non-union employees, wishes to test its employees for HIV in order to determine the incidence of the disease amongst its staff so as to be better able to deal with the pandemic. It has applied for an order in terms of s 7(2) of the Employment Equity Act 55 of 1998 (EEA).

5. Section 7(2) of the EEA reads:

“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 s 50(4) of this Act”

6. The powers which a court may exercise should it be satisfied that testing for HIV be permitted are set out in s 50(4) of the EEA. This section reads as follows:

“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 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 the authorisation for testing applies.”

7. Section 7(2) of the EEA is unhappily worded. It refers to the determination of justifiability in terms of s 50(4) but that section in turn sets out the powers of the court on the premise that the testing has been determined to be justifiable.

8. Employees who may not be tested for their HIV status are those employees who fall within the scope and ambit of the EEA (members of the National Defence Force, the National Intelligence Agency and the South African Secret Service are excluded). Joy Mining’s employees fall within the first category.

9. ‘HIV’ is defined in s 1 of the EEA and means the Human Immunodeficiency Virus. The **Merck Manual** 16th edition 77 defines:

HIV as “Infection caused by one of several related retro viruses that became incorporated into the host cell DNA and results in a wide range of clinical presentations varying from asymptomatic carrier states to severely debilitating and fatal disorders.”

and

AIDS as “Acquired immunodeficiency syndrome as a secondary immunodeficiency syndrome resulting from HIV infection and characterised by opportunistic infections, neurological dysfunction, and a variety of other syndromes.”

See also the Code of Good practice: Key aspects of HIV/AIDS and employment (the Code) published on 1 December 2000.

10. The glossary to the code provides some guidance on the what testing for HIV entails. It provides :

“Taking a medical test to determine a person’s HIV status. This may include written or verbal questions inquiring about previous HIV tests; questions related to the assessment of “risk behaviour” (for example questions regarding sexual practices, the number of sexual partners or sexual orientation); and any other indirect methods designed to ascertain an employee’s or job applicant’s HIV status”

11. Section 1 of the EEA defines “medical testing” as including any test, question, inquiry or other means designed to ascertain, or which has the effect of enabling the employer to ascertain, whether an employee has any medical condition. Medical testing itself is the subjection of the employee to one or more medical tests. These tests may take the form of X-rays, ultrasonography, audiometry, eye tests, lung function, ECG , tests for sensitisation and cytology. See chapter on Medical and Biological Monitoring in John Mathews **Health and Safety at Work** 2nd ed. The test for HIV, more properly a procedure, may be administered in various way. The procedure may be non-invasive eg the employee providing the opportunity for a smear of saliva to be taken. Or it may be invasive eg involve the drawing of blood. Usually a test will require the co-operation of the employee.

12. An employer who wishes to test its employees to determine their HIV status must apply to the Labour Court for permission. Ordinarily this requires the employer to serve a notice of motion and supporting affidavits on the affected employees and their union or representative. The court has a discretion to grant an order or issue a rule nisi calling on the respondents to show cause why an order should not be granted.

13. The court must determine whether the proposed testing for HIV status is justifiable. When is it justifiable to test an employee or employees to determine their HIV status? It worthwhile pausing a moment to consider what is meant by justifiable.

14. Justifiable has the following meaning: “2. Able to be legally or morally justified; able to be shown to be just, reasonable or correct; defensible.” Shorter Oxford English Dictionary. It would seem that whether something is justifiable must be tested against certain norms and values eg the standard of reasonableness, legality ie the applicable legal rules or moral standards etc.

15. In the context of the EEA “justifiability” will be informed by the statute including the objects of the Act and guidelines for interpreting the Act. The purpose of the EEA is to achieve equity in the workplace by-

- (a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and
- (b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce. See s 3.

16. The EEA must be interpreted -

- (a) in compliance with the Constitution;
- (b) so as to give effect to its purpose;
- (c) taking into account any relevant code of good practice issued in terms of this Act or any other employment law; and
- (d) in compliance with the international law obligations of the Republic, in particular those contained in the International Labour Organisation Convention (111) concerning Discrimination in Respect of Employment and Occupation. See s 4.

17. Section 7(2) of the EEA does not provide any guidance about when it would be justifiable. But s 7(1)(b) which deals with medical testing generally sets out the factors which must be present or at least considered in deciding whether a medical test is justifiable. The test must be justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of the job. I am of the opinion that in deciding whether a HIV test is justifiable it is appropriate to also take into account the more general test for medical

testing set out in s 7(b) of the EEA.

18. Section 54(1)(a) of the EEA permits the Minister of Labour to issue any code of good practice. A Code of Good practice: Key aspects of HIV/AIDS and employment was published on 1 Decmeber 2000. Clause 7 deals with HIV testing, confidentiality and disclosure. It reads:

7.1. HIV Testing

7.1.1. No employer may require an employee, or an applicant for employment, to undertake an HIV test in order to ascertain that employee's HIV status. As provided for in the Employment Equity Act, employers may approach the Labour Court to obtain authorisation for testing

7.1.2. Whether s 7 (2) of the Employment Equity Act prevents an employer-provided health service supplying a test to an employee who requests a test, depends on whether the Labour Courts would accept that an employee can knowingly agree to waive the protection in the section. This issue has- not yet been decided by the courts.

7.1.3. In implementing the sections below, it is recommended that parties take note of the position set out in item 7.1.2.

7.1.4. Authorised testing

Employers must approach the Labour Court for authorisation in, amongst others, the following circumstances:

(i)during an application for employment;

(ii)as a condition of employment;

(iii)during procedures related to termination of employment;

(iv)as an eligibility requirement for training or staff development programmes; and

(v)as an access requirement to obtain employee benefits.

7.1.5. Permissible testing

(a) An employer may provide testing to an employee who has requested a test in the following circumstances:

(i) As part of a health care service provided in the workplace;

(ii) In the event of an occupational accident carrying a risk of exposure to blood or other body fluids;

(iii) For the purposes of applying for compensation following an occupational accident involving a risk of exposure to blood or other body fluids.

(b) Furthermore, such testing may only take place within the following defined conditions:

(i) At the initiative of an employee;

(ii) Within a health care worker and employee-patient relationship;

(iii) With informed consent and pre- and post-test counseling, as defined by the Department of Health's National Policy on Testing for HIV; and

(iv) With strict procedures relating to confidentiality of an employee's HIV status as described in clause 7.2 of this code.

7.1.6. All testing, including both authorised and permissible testing, should be conducted in accordance with the Department Health's National

7.1.7. Informed consent means that the individual has been provided with information, understands it and based on this has agreed to undertake the HIV test. It implies that the individual understands what the test is, why it is necessary, the benefits, risks, alternatives and any possible social implications of the outcome.

7.1.8. 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. Where such research is done, the information obtained may not be used to unfairly discriminate against individuals or groups of persons. Testing will not be considered anonymous if there is a reasonable possibility that a person's HIV status can be deduced from the results.

19. Some general observations need to be made about the code. First s 54 of the EEA does not specify the purpose of a code. However it may be implied that a code issued under this subsection is intended to provide guidance to a court and other persons applying the EEA. It may be assumed that a court would take a code into account in adjudicating a matter. This is not to say that the court is bound by a code. Merely that if the court does not find a part of a code acceptable that reasons would be given for not following the code. Second a code, although not a piece of delegated legislation, must not stray beyond the ambit, purpose and scope of the EEA. To the extent that it does this the code is void and inapplicable.

20. Clauses 7.1.2 and 7.1.5 raises the question whether an employee may waive his or her rights under the EEA and request an employer or a health service provided by the employer to provide a HIV test. There is little difference between an employee initiated request and an employee consenting to an employer initiated test. This issue does not arise for decision in this case. When the issue arises the court would have to take account of the ban on testing for HIV . The exception to the ban ie it may be conducted with the permission of the Labour Court. Policy considerations in weighing against consent namely the subordinate position of employees vis-à-vis their employer. The effect of a collective agreement containing consent to a test. Emergency situations including those where the employee is incapable of consenting.

21. Clause 7.1.8 seems to permit an employer to test its employees on an anonymous “unlinked“ basis by means of epidemiological HIV testing. But, says the code, testing will not be considered anonymous if there is a reasonable possibility that a person’s HIV status can be deduced from the result. Several observations need to be made. The first is that it is by no means clear that anonymous unlinked epidemiological testing is lawful. See the remarks of FFW van Oosten “HIV infection, blood test and informed consent” in JJ Joubert **Essays in honour of SA Strauss** (1995) 301-303. The second concern is who is to decide whether such a

test will guarantee anonymity and when should this decision be made. This may be an indication why the consent of the Labour Court has generally been set as a pre-condition to testing.

22. In my opinion the Labour Court, in determining the testing of an employer's employees for their HIV status is justifiable, will take the following considerations into account, in so far as they are applicable to the factual circumstances of the case:

- the prohibition on 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.
- the category or categories of jobs or employees concerned

23. The court will also so wish to be informed about the following which does not go to justifiability but which is also relevant to arriving at a proper decision:

- the attitude of the employees
- whether the test is intended to be voluntary/compulsory
- the financing of the test
- preparations for the test ie whether the employees are able to formulate make informed consent
- pre-test counselling
- the nature of the proposed test and procedure
- post testing counselling

24. The need to test for HIV

The need to test for HIV must be shown. Where sufficient data is available from other sources there may not be a need to test a specific workforce for their HIV status.

Joy has attempted to gauge the extent of the HIV problem at its workplace by commissioning an HIV prevalence study based on the demographic groups at its workplace. This study was later found to be unhelpful as it did not reflect the Joy Mining's experience of the incidence of HIV/Aids. Joy Mining then decided that it would be more helpful to establish the exact HIV prevalence existing at its workplace itself in order to be in a better position to evaluate its training and awareness programme as well as being able to formulate future plans based on more accurate prevalence study.

25. The purpose of the test

An employer needs to know the extent of HIV infection among its work force in order to:

(a) To be pro-active regards prevention of employees becoming infected with HIV

Joy Mining has engaged since or during 1997, in an effort to deal with the AIDS crisis facing South Africa. To this end Joy Mining implemented various programmes dealing with education and awareness campaigns. Joy Mining also distributed condoms and provided for the treatment of sexually transmitted diseases (STD's) at its on-site clinics.

(b) To treat at a minimum, the symptoms of the disease.

In the case of Joy Mining it has on site clinics which treat sexually transmitted diseases. No specific information was supplied as to the treatment, if any, envisaged for HIV infected employees (or dependants) but details cannot be realistically expected until a survey has been conducted.

(c) To plan for contingencies and other eventualities.

Joy Mining wishes to be in a position to formulate a strategy to deal with the incidence of HIV in its workplace. Clearly there are a number of aspects of its employment practices which may require adaptation. These may included the fair distribution of employee benefits, medical aid and the training of replacement labour.

26. Preparation of the employees for testing

Joy has been instrumental in preparing its employees for HIV testing. As envisioned by the Code of Good Practice on Preparation, implementation and monitoring of Employment Equity Plans. Consultation took place between all relevant stakeholders at several meetings. The meetings also dealt with the benefits associated with knowing the prevalence of HIV within the company in order to face the crisis rather than being unprepared for it. The first meeting took place on 21 August 2001, at which Dr Clive Evian of the AIDS Management & Support Company, held a presentation covering, inter alia, the benefits of knowing the prevalence of HIV within the company. The presentation was attended by all shop stewards, all Human Resources staff, the factory director, as well as Mr Johan Maritz, as the senior management representative.

The meetings also dealt with the benefits associated with knowing the prevalence of HIV within the company in order to face the crisis rather than being unprepared.

The shop stewards reported to the Human Resources department on 9 November 2001 that their members supported the survey. The only concern raised by the unions was that there would be pressure within departments to participate in the survey. The applicant addressed this concern by stating that the employees could either participate as they came on site or in the clinics situated on-site. This would prevent anyone being able to ascertain whether a specific employee has participated in the survey or not.

Subsequently further presentations were held during working hours to inform all employees of the survey as well as the reasons for the survey. These presentations were held at the Steeldale and Wadeville plants on 21 September 2001. All employees were encouraged to attend these presentations.

In order to further inform all non-unionised employees of the survey and to ascertain their support Joy Mining attached a memo to all employees payslips during the week of 9 October 2001. 45% of employees handed in their letters detailing whether or not they were in favour of the survey. 98% of those who responded were in favour of the survey.

27. Targeted employees - informed consent

Joy has made it plain in the prelude to this application and in the application itself that participation is voluntary and no one will be forced to participate. Joy Mining however told its employees:

“It is, however, important that you participate as the information will be more reliable and valuable if more people participate. It would be best if all the employees took part in the survey.”

The survey results will be presented to the Ops Council and Union Representatives. These results, because of the anonymous nature of their collection, cannot inform the company who is infected. Only the percentage of people who are affected will be known. The numbers in each job category are large enough so as to ensure absolute anonymity.

Joy has invited employee representatives to send observers to the collection points to make sure that participation is voluntary and that the specimens are all anonymous. Employees are to be notified of where these collection points will be. At each point the nursing sister will ask the employee who presents whether he or she wishes to participate and will check that the employee agrees to participate. If the employee refuses to participate, the employee will not be forced to do so and no further action will be taken. The nurses who collect the saliva specimens are independent and are not employed by Joy Mining. They work for Dr Clive Evian of AIDS Management and Support, who is a registered medical specialist.

28. Post testing counselling

There will be no need for post testing counselling in this case. Employees who wish to know whether they are HIV positive will be required to arrange for their own tests. They will be advised where to obtain assistance should they wish to have a private test.

29. Confidentiality

The confidentiality and anonymity of the employees must, in this case, be safeguarded at the time of testing. The proposed procedure will ensure this. The employees will not be asked for their names. An employee who declines to take the test may be asked:

“Should you disagree to participate:

- The nurse may ask your age and job grade / category.
- You can choose to give this information or refuse if you do not want to.
- No further action will be taken.”

30. The overall scheme of the exercise indicates that it will not be for the account of the employees.

31. In formulating the order, I believe, a court must pay attention, where applicable on the facts, to:

- the declaration permitting testing
- the imposition of conditions regarding that it considers 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 the authorisation for testing applies.
- measures to prevent the possibility of unfair discrimination
- pre-test briefing to ensure informed consent
- pre-test counselling
- the nature of the proposed test and details of the procedure for conducting it
- post testing counselling
- proof of consent by minors and persons suffering from a legal disability.
- service of the order so that the employees concerned and their trade union or representatives will be fully apprised of their rights.

32. In the premises the order set out in paragraph 1 was made.

SIGNED AND DATED AT BRAAMFONTEIN THIS 31ST DAY OF
JANUARY 2002.

A A Landman

Judge of the Labour Court of South Africa

Atty for applicant: Mr Van Rensburg of Webber Wentzel