REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

CASE NO: 9735/2011

DATE: 6 February 2015

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

F[...] B[...] K[...] **PLAINTIFF**

AND

THE MINISTER OF DEFENCE **DEFENDANT**

JUDGMENT

VAN NIEKERK J

Introduction

[1] The plaintiff is a member of the South African National Defence Force (SANDF). It is not disputed that during August 2004, he was diagnosed as HIV positive, after tests conducted by medical personnel in the employ of the SANDF. The plaintiff voluntarily left the SANDF on 31 March 2006 and was paid a severance package. Some two years later, in May 2008, the plaintiff applied for appointment to the Reserve Force. During the course of medical screening conducted for the purposes of that application, a rapid (pinprick) assay returned a result of HIV negative.

[2] The plaintiff sought redress in terms of the SANDF's internal procedures for what he contended to be an incorrect diagnosis of his HIV status in 2004. He claimed that he would not have left the SANDF in 2006 had it not been for the incorrect diagnosis, and that he was entitled in those circumstances to reinstatement with retrospective effect. During the course of the internal procedures, the Surgeon General concluded ultimately that the 'only explanation' for the different diagnoses was a confusion between two members of the SANDF with the same names and dates of birth but different force numbers, the one being 94870268RR (the plaintiff acknowledges that this is his force number), the other being 94850054RR (the plaintiff asserts that this is the force number of an unknown third party). After intervention at ministerial level, and on the basis of what the SANDF then acknowledged to be a mistaken diagnosis, the plaintiff was re-appointed to the SANDF in December 2009 on a twelve month fixed term contract. He was thereafter reinstated in the permanent force, with effect from January 2011. The plaintiff has since attained the rank of major, and expects to remain in the permanent force until his retirement in 2031.

[3] The plaintiff maintained that the redress afforded him (his reappointment to the permanent force) was inadequate and insisted on reinstatement with effect from the date of his withdrawal from the SANDF on 31 March 2006. The SANDF refused to acquiesce in this demand, on the basis that the plaintiff had been under no compulsion to leave the SANDF and that his decision to do had been entirely voluntary. That refusal led to the institution of the present proceedings.

The nature of the plaintiffs claim and the relief sought

[4] In these proceedings, the plaintiff contends that on account of the negligence of the SANDF's medical personnel in misdiagnosing him as HIV positive in August 2004, he is entitled to reinstatement in the SANDF, with retrospective effect and with full benefits, from 31 March 2006. He seeks a declaratory order to this effect. The plaintiff also claims general damages and as an alternative to the claim for reinstatement, he claims special damages for loss of income.

[5] The parties had originally agreed that the trial would proceed in respect of both the merits and quantum. When the matter was called, the court was advised that one of the expert witnesses scheduled to give evidence had suffered a stroke and was unable to testify. It was agreed that in these circumstances the matter would proceed only in respect of the merits, and a separation order was accordingly granted.

[6] Although the particulars of claim are not drafted in the most elegant terms, the plaintiffs case is that the medical personnel employed at 2 Military Hospital in Cape Town were negligent when conducting the test that resulted in the incorrect health status by failing to ascertain the correct name, serial number and\or identity number of the patient before releasing the result of the blood test to the plaintiff; alternatively, by confusing the blood samples of different patients resulting in incorrect results being released to the plaintiff.

The plaintiff avers that on account of the incorrect diagnosis by the SANDF's employees he 'followed a process of exit' from the SANDF, a process referred to as the 'mobility exit mechanism or MEM, finalised on 31 March 2006. The plaintiff avers further that he suffered shame, humiliation, severe feelings of guilt and emotional instability due to the misdiagnosis and that for a period of two years following his leaving the SANDF, he received no salary, pension medical aid or housing subsidy.

[7] The particulars of claim further record that after the health assessment conducted on 23 May 2008 and the result of the rapid test to the effect that he was HIV negative, he requested reinstatement into the SANDF. The plaintiff avers that the failure to reinstate him as a permanent member of the SANDF is unlawful, alternatively, that the relevant members of the SANDF, acting in the course and scope of their employment, acted negligently in that they failed to consider his case for reinstatement. The plaintiff avers further that the continuous failure to reinstate him caused him to suffer emotional distress and to suffer a loss of income for the period April 2006 to 15 December 2009. The plaintiff submits that it is 'fair and just' that he be reinstated into the SANDF in the position he held in March 2006, with full benefits and pay.

[8] The SANDF had initially admitted that that the diagnosis of HIV positive following the tests conducted by its employees in August 2004 was incorrect; the only issue placed in dispute was that of negligence. In July 2013, the SANDF filed a notice to amend its plea. In terms of the amendment, the SANDF averred that the plaintiff tested HIV positive on 23 November 2004 on a rapid test and a laboratory test, and that the same diagnosis was made in January 2005 when a CD4 count of 615 and a viral load of 15 500 were recorded. The SANDF averred further that on 23 May 2008, a rapid test was done on the plaintiff, and that he did not undergo a CD4 count or a viral load count test. The effect of the amendment was to withdraw an admission by the SANDF that the diagnosis reached in August 2004 was incorrect, to assert its correctness and deny that any of its employees had made any mistake in the diagnosis. The plaintiff did not object to the amendment, except for that part of it which referred to the HIV status of the plaintiffs wife. That is not an issue which is relevant to the present proceedings.

[9] During argument, counsel for the plaintiff submitted that in these circumstances, there is an onus on the SANDF to prove the positive averments made in its amended plea. As I understood the submission, it was for the SANDF to establish that its employees had not been negligent in reaching the diagnosis they did in August 2004. There is no merit in this submission. Given the limited objection to the proposed amendment, and in the absence of any objection to the substance of the notice of amendment, the plaintiff is deemed to have consented at least to that part of the amendment to which he did not object. There is no reason therefore why any amendment to the plea should vary the ordinarily applicable rule, i.e. that to succeed in his claim, the onus rests throughout on the plaintiff to prove, on a preponderance of probabilities, that the employees of the SANDF were negligent in one or more of the respects alleged in the particulars of claim.

[10] It is appropriate at this juncture to deal also with the question of remedy. As I have indicated, the primary relief sought by the applicant is retrospective reinstatement into the SANDF. The nature of these proceedings is an Aquilian action, in which the plaintiff asserts that the SANDF personnel acted unlawfully and negligently by incorrectly diagnosing him as HIV positive. The remedy available to a plaintiff in these circumstances is damages. Although counsel for the SANDF acknowledged that this matter ought more properly to have been raised by way of a special plea, she submitted that the facts disclose that the plaintiff's election to seek a discharge from the SANDF by way of the MEM process was an entirely voluntary act on his part, and that it is not open to him in these circumstances to claim reinstatement. The authority referred to, *Kynoch Fertilizers Ltd v Webster* [1998] 1 BLLR 27 (LAC), in which the Labour Appeal Court found that a resignation once accepted amounts to a settlement that deprived an employee of the right to seek reinstatement or compensation, is in my view misplaced. That authority relates to the application of the Labour Relations Act, 66 of 1995, and in particular, the effect of an act of resignation on rights and remedies which might otherwise have been available to an employee under the Act for an unfair dismissal. The present matter concerns a delictual claim. Whether or not the plaintiff left the employ of the SANDF on account of the diagnosis which he contends to be incorrect and whether he would have remained in the SANDF but for the diagnosis is an issue that more properly goes to causation. Given the nature of the action instituted by the plaintiff, it is not open to him to contend, as he does, that if the SANDF is found to be negligent, he is entitled to an order of reinstatement. It is not competent for this court, except perhaps in an application for interim interdictory relief, to entertain any claim for what amounts to specific performance on account of any negligence on the part of the SANDF or its employees. Orders of reinstatement may be the primary remedy in respect of other causes of action (for example, clams of unfair dismissal or unfair labour practice under the Labour Relations Act, or a contractual claim) but having elected to institute an Aquilian action, his claim for the plaintiff is limited to his alternative claim for special damages.

[11] In short, the legal issue at stake can be reduced to the following: Whether the medical personnel employed by the SANDF at 2 Military Hospital were negligent when diagnosing the plaintiff as HIV positive, either by not ascertaining the correct name, serial number, and identity number of the patient before releasing the results to the plaintiff; alternatively, by confusing blood samples of different patients resulting in the incorrect results being released to the plaintiff. Given the nature of the pleadings and the evidence, the key factual issue is whether the diagnosis was wrong.

The evidence

[12] I do not intend to repeat the evidence of all of the witnesses. The plaintiff testified, after which he closed his case. For the SANDF, evidence was given by a Lt Col Letadi (the plaintiff's career officer at the relevant time), Dr Buckton (a medical doctor and employee of the SANDF), Col van der Merwe (a human resources

officer), Major EC Engelbrecht (a medical technologist in the employ of the SANDF), Dr MJ Engelbrecht and Dr Cook (both medical doctors employed by the SANDF).

[13] The plaintiff testified that prior to his integration into the SANDF in 2002, he was an APLA operative. He is currently based in Makhado, with the rank of major, deployed as an operations officer with a responsibility for protection services, and in particular, base security. The plaintiff was based in Langebaan in 2004. It is common cause that in August 2004, a blood test was conducted at the base clinic. The plaintiff was subsequently advised during an interview with a doctor in the employ of the SANDF that the results indicated that he was HIV positive. When the doctor telephoned to obtain the results, he used the plaintiffs force number 94870268.

[14] The plaintiff testified that the diagnosis affected him profoundly and that he feared that he would die in circumstances where he had lived an unfulfilled life. He advised his career officer, a Major Lebatsi, of his HIV status and he decided ultimately to leave the SANDF by way of the MEM. At that stage, the plaintiff stated that he had accepted that the diagnosis was a threat to his life and that the certainty of the payment of a lump sum would enable him to build a home and thus provide some security for his dependents.

[15] The plaintiff stated that he left the SANDF on 31 March 2006. He returned to his home in East London and lived with his family in a flat on his mother's property. He disclosed his HIV status to his youngest sister who in turn informed the plaintiffs mother. The plaintiff stated that his mother reacted in a manner that was wholly unexpected - she ultimately secured an order evicting the plaintiff and his family from the premises. The plaintiff later received a lump sum of R 217,000 and utilised the money to build a house in the Limpopo province

[16] The plaintiff applied to join the reserve force during April 2008. He completed the necessary application forms and later underwent a health assessment. The assessment included a test for HIV status form of a pinprick test; the result was that the plaintiff was HIV-negative. It was on this basis that the plaintiff lodged a grievance, contending that the diagnosis conveyed to him in August 2004 was incorrect and that but for the incorrect diagnosis, he would not have left the SANDF. As I have indicated, it is not disputed that the SANDF, under the impression that it was at fault on account of a possible confusion of blood samples in August 2004, reappointed the plaintiff ultimately to the permanent force.

[17] The SANDF's case emerged during cross-examination. In short, the SANDF contends that although it had initially adopted the view that there was possible confusion of blood samples when an HIV test was conducted on the plaintiff in August 2004 thus resulting in an incorrect diagnosis, subsequent investigation had revealed that the person identified as having the same names and date of birth as the plaintiff but with a different force number, is in fact the plaintiff. In other words, there was no other person who shared a name

and date of birth with the plaintiff - both force numbers in question had been allocated to him, and there was therefore no confusion of the blood samples taken in August 2004. Further, the HIV tests conducted on the plaintiff during 2004 and later in 2005 unequivocally establish that the plaintiff is HIV positive. The test conducted in 2008 was based only on a pinprick and the result was a false negative. There was therefore no confusion and no incorrect diagnosis, and no negligence on the part of any of the SANDF's employees.

[18] The plaintiff denied all of these propositions. He denied that he was ever in the Army, and asserted that he had been integrated into the SANDF only in 2002. The plaintiff denied that documents put to him which indicated that he had been on strength in the SANDF as early as 16 February 1995, when a F[...] B[...] K[...] with ID number [...] and force number 94850054 had been appointed as a scout in the SA Intelligence Corps. The plaintiff proffered the theory that during the repatriation process in 1994, his personal particulars were used by some unknown person to gain appointment in the SANDF. The plaintiff testified that between 1996 when he applied for and was granted demobilization and 2002, he was employed in East London until his reintegration in the SANDF in 2002. The plaintiff acknowledged that he had given his consent to participate in the Phidisa programme after the diagnosis in August 2004, and that he had participated in the programme. He had not been tested for his HIV status since the pinprick test conducted during the health assessment in 2008.

[19] Lt Col Letabi testified that prior to the plaintiffs decision to apply for a discharge from the SANDF in terms of the MEM policy, he had conducted a number of discussions with the plaintiff, both formal and informal, all aimed at persuading the plaintiff not to leave the force. The plaintiff had never conveyed to him that he was HIV positive, and stated that his primary reasons for wishing to leave the force concerned his family and finances, although in the period June to December 2004, the plaintiff did mention health concerns.

[20] Col van der Merwe testified that he knew the plaintiff personally and that he had been engaged in discussions with him regarding his return to the SANDF during 2007 and 2008. Van der Merwe testified that he had visited the SANDF archives to conduct an investigation into the files of members with force numbers 94870268RR and 94850054RR. The SANDF was aware at that stage that the names and surnames of the members were identical; what he sought to investigate particularly was the difference in the force numbers. File 94850054 disclosed that the member F[...] B[...] K[...] with ID number [...] had enrolled as a scout with the SA Intelligence corps in February 1996. Also on file was a copy of a temporary ID which recorded the identity number on the file as being that of a F[...] B[...] K[...] born on 24 March 1971. He also examined the file in respect of force number 94870268. This file related to a F[....] B[...] K[...], born on [...] 1971, with identity number issued in 1995 being [...]. When he examined the files further, he found that the banking particulars given by the persons concerned (in other words, the bank account number given by the member for purposes of payment of his remuneration) was the same, as was the given address of the next of kin (in

this instance, the name and address of the plaintiffs mother). The signatures of the force member on the documentation contained in the respective files also seemed to him to be the same. Col van der Merwe explained the difference in force numbers by reference to the temporary and permanent identity documents respectively - one number was referenced to a temporary identity document issued to the plaintiff, the other to a permanent identity document issued to the plaintiff on a later date. In his view, the plaintiff had obtained a temporary identity document and was allocated force number 9[...], and using a permanent identity document was later allocated a different force number, [...], the number presently used by the plaintiff. Col van der Merwe concluded that in the light of his investigation and the documentation available to him, the 'two K[...]'s' initially thought to have existed were one and the same person.

[21] Dr Sally Buckton, a medical practitioner in the employ of the SANDF, gave evidence *inter alia* concerning the findings of a medical examination of the plaintiff conducted on 3 July 2008. These are recorded on a form referred to as a 'DD50'. The medical category assigned to the plaintiff is recorded as G1K1, meaning that the plaintiff was in good health. Dr Buckton testified that an element of the medical screening comprised a HIV test if positive, would result in the drawing of blood and the forwarding of the specimen to laboratory for analysis and confirmation. In the plaintiff's case, the rapid HIV test returned a result of negative. In Dr Buckton's view, a rapid test was capable of resulting in a false negative; there was about a 5% incidence of false negatives. She testified further that it was not economically viable to take blood samples at each screening. The result of the screening was in any event only valid for 12 months.

[22] Dr Terry Marshall, a virologist employed by Ampath Laboratories, was not personally involved in any of the test conducted either in 2004 or 2008 but gave evidence as to her report, prepared for the purposes of Rule 36. Dr Marshall testified that the results of the test conducted on 23 August 2004, both the rapid finger prick HIV assay and the confirmatory testing using laboratory-based assays, conformed with internationally accepted guidelines. The results of the laboratory tests (for HIV ELISA, HIV Western Blot, and baseline HIV viral load and CD4 testing) served as more than sufficient confirmation of HIV infection in the plaintiff. Dr Marshall noted further that further monitoring as part of the Phidisa project incorporated additional viral load and CD4 assays performed through the same laboratory system on 5 July 2005. The results of that test, in her opinion further supported the HIV infected status of the plaintiff. In regard to the test conducted on 23 May 2008, a testing for HIV using a rapid essay, Dr Marshall expressed the opinion that in general, a biological testing system is 100% accurate and that falsely positive and negative results will occur from time to time even in the best quality assured environments. In her view, it was far more likely that the test result obtained in 2008 was a falsely negative result.

[23] Major Engelbrecht gave evidence on the protocol for the testing of blood specimens. Referring to a preliminary report dated 23 August 2004, the witness testified that the blood test concerned was probably

conducted on 23 August 2004. The procedure is one that contemplates confirmation of the force number on the relevant form with the specimen, the completion of documentation and the capturing of the data on the IT system and the forwarding of the specimen to the laboratory for analysis. In the event that a specimen is found to be reactive, it is forwarded to the Groote Schuur hospital for repeat testing. Major Engelbrecht also testified as to the laboratory report that 27 August 2004, prepared by the National health laboratory service at Groote Schuur, which confirmed a reactive diagnosis on the ELISA method.

[24] Dr MJ Engelbrecht, a medical practitioner in the employ of the SANDF gave evidence concerning the Phidisa project, a project initiated by the SANDF to both conduct research into members affected by sexually-transmitted diseases and HIV\AIDS and to offer medical assistance and counselling to those who test positive. The witness was referred to and confirmed an averment in an affidavit deposed to by the plaintiff on 25 August 2010, in support of an application for the condonation of his non-compliance with section 3 (2) of the Institution of Legal Proceedings against Certain Organs of the State Act, 40 of 200 under observation by the witness In the affidavit, the plaintiff had stated that he participated in the Phidisa project. The objective of the programme was to avoid the stigma attaching to HIV and to provide patients diagnosed HIV positive with hope, opportunities and medical assistance. Dr Engelbrecht described the process of initiation into the program, by reference to the relevant documentation. In the plaintiffs case, the relevant source document disclosed that the plaintiff had been provided with information concerning the programme and had given his consent to participation in the program. The note records that the plaintiff was ‘very eager to sign'. He is recorded as having stated that he had tested positive for HIV, and that he was concerned about his CD4 count. The source document further recorded the plaintiffs personal particulars, including his name, number and rank and date of birth. A rapid HIV test conducted as part of the screening visit indicated that the plaintiff was HIV positive. A follow-up visit was scheduled for 30 November 2004. The witness testified further on the pathology reports received consequent on the screening visit. These included the results of a CD4 cell count, an ELISA test and a western blot test, all of which returned a result of HIV positive. Research protocol in what was a blind test. A ‘research’ file was compiled reflecting only a reference number with no names or other personal details and a second ‘source’ folder, in which the name of the patient and other personal details were apparent. A register was kept in which a unique number assigned to the patient enabled the two files to be linked.

[25] Dr Cook testified that she was employed in the SANDF during 2004 and that she had been engaged in the Phidisa program since 2004. The witness explained the research protocol and the system of two folders, one a research file the other source file, is the basis on which information was collected and collated. The witness gave evidence concerning the protocol used during the screening visit in November 2004. The witness had personally examined the plaintiff on 28 June 2005. The consultation was part of the Phidisa program follow-up for HIV-positive patients. She recorded the plaintiff’s history and his CD4 count of 612

and viral load of 28 000, results obtained from the laboratory results dated 23 November 2004. During the course of a discussion with him, and by reference to contemporaneous notes, she testified that the patient was eager to join the programme on account of concern regarding a high CD4 count, and that he disclosed that he had been HIV positive since 2002. She had personally drawn a blood sample a week before the consultation. She saw the plaintiff on 5 July 2005 and recorded the results of the blood test being a CD4 count of 615 and a viral load of 15 500, all indicative of a HIV-positive status. The witness was referred to the pathology reports, none of which contain the plaintiff's name. The reports simply referred to subject initials as 'FBK' (it is common cause of these other plaintiffs initials), a subject number 03-001-245 and a date of birth, in this instance, '24-Mar-1971', which, it is common cause, is the plaintiffs date of birth. Dr. Cook explained that personal particulars of patients was not made available to medical personnel not participants in the program, who had access to both the source file (which disclosed or personal details) and the research file, which did not. A register was kept in terms of which it is possible to correlate the reference numbers and the personal profile of the patients concerned. In this instance, Dr. Cook testified that she had seen the plaintiff (although she could not recall him personally and that all of the signifiers on pathology reports were consistent with the personal particulars of the plaintiff, at least insofar as his initials and date of birth are concerned. Dr. Cook denied that there was any possibility of a mix up of blood samples given that the protocols that were observed.

Analysis

[26] The evidence obviously discloses a number of material disputes of fact. For present purposes, that which is most material is the correctness or otherwise of the diagnosis of HIV positive made in respect of the plaintiff during August 2004. It is incumbent on the plaintiff to prove, on a balance of probabilities, that the employees of the SANDF were negligent in misdiagnosing his HIV status. In other words, as I have indicated above, it is incumbent on him to establish that the results of the test were in fact incorrect. This enquiry has two elements -whether the medical personnel concerned failed to ensure the correct name, serial number, and identity number of the patient were recorded before releasing the results to the plaintiff; alternatively whether the blood samples of different patients were confused resulting in the incorrect results being released to the plaintiff.

[27] It is not disputed that the plaintiff was diagnosed to be HIV positive and that the status was confirmed by a laboratory at 2 Military Hospital in Cape Town on 30 August 2004 and that the plaintiff was a participant in the Phidisa project. The plaintiff's case, in essence, is that the SANDF could not establish a chain of evidence in respect of the blood tests conducted during August 2004, November 2004, January 2005 and June 2005. The documents concerned were not linked to the plaintiff; they simply disclose the results of a patient. In particular, there was no link drawn between the plaintiff and the patient with file number

03-001-245, but for his date of birth being 1971 and his initials being 'FBK'. In the light of the confusion with the other member of the SANDF with the initials 'FDK' and the same date of birth but with a different force number, the simple reference to initials and the year of birth was insufficient to link the plaintiff with the results of the various tests. This submission was made in the context of an allegation of tampering with evidence - the plaintiff alleges that the subject number or unique number on certain of the pathology reports had been blacked out and a sticker generated during 2011, seven years after the information was generated, placed at the bottom of the page. The plaintiff submits that in the circumstances, the court must draw negative inference from the fact that the documents originally provided by way of discovery had been tampered with in this way, while the original documents, disclose shortly before the commencement of the trial disclosed no such 'tampering'.

[28] In my view, there is nothing sinister or significant in relation to the state of the documentation. The documents originally provided during the course of discovery had the subject number of the patient concerned deleted and stickers recording the plaintiffs personal details have been affixed to the bottom of the page concerned. The evidence was that the documents had been prepared for the purposes of this litigation and whoever prepare the documentation thought that the unique subject number ought to be deleted and the plaintiff's full personal particulars provided. Be that as it may, and as inadequate as that explanation might be, the fact remains that the original documentation was furnished to the plaintiff prior to the commencement of trial and that document clearly indicates the subject number allocated to the patient concerned, and did not in any detail disclose the plaintiffs personal particulars.

[29] The question that arises is whether a nexus can be drawn between the various tests and reports conducted between November 2004 and July 2005, and the plaintiff. It is appropriate perhaps at this point to assess the thesis advanced initially by the SANDF and now by the plaintiff, i.e. that there were two different persons, with the initials and names FB K[...].

[30] This contention was refuted by the evidence of Col Van der Merwe. His evidence, which was not seriously called into question during cross examination, explained the circumstances in which the plaintiff came to be issued with two (different) force numbers, each linked to a different identity document held at various times by the plaintiff. The plaintiff did not deny that he had held a temporary identity document and later a permanent identity document, or that these documents appeared in the files examined by Col van der Merwe. The evidence that confirms a nexus between the files (and therefore the force numbers in issue) in two material respects. The first was a common bank account number, which the plaintiff conceded was his bank account number. Only he could have provided this information to the SANDF, which he must have done when he was enrolled in the Intelligence Corps in 1995 and later when he was integrated into the SANDF, in the Air force. The second is the address of a next of kin, where in each case, the nominee was the

plaintiffs mother and the address given that of her home in East London. Only the plaintiff could have provided this information. In these circumstances, the probabilities are overwhelming that the FB K[...]'s with force numbers 94870268RR and 94850054RR, both born on 24 March 1971 is one and the same person - the plaintiff.

[31] The diagnosis of Dr Cook, in particular, rules out any possibility of a misdiagnosis of the plaintiffs HIV status, either on the basis of a mistaken identity or otherwise. First, even if there were another FB K[...] with the same date of birth as the plaintiff but with a different force number, I fail to appreciate how it can be contended on the available evidence that the plaintiffs blood sample came to be mixed up with of that other person with the same name. Patients participating in the Phidisa programme were allocated a unique subject number (in the plaintiffs case, it is not disputed that this number is 03-001-245) and the testing protocols were conducted on the basis on this number. There is no mention of force number, let alone full names and ranks, on any of the documents submitted to the laboratory, or any of the reports returned by the laboratory to Phidisa. The reports generated by the laboratory in November 2004 and again in 2005, all of which indicated a diagnosis of HIV positive, could only relate to the plaintiff. The high CD 4 count and viral load disclosed during Dr Cook's examination of the plaintiff in 2005 confirmed the diagnosis made in August 2004. Dr Cook was familiar with both the research file and the source file, and confirmed the documents therein and the personal details of the plaintiff. Major Engelbrecht's evidence confirms the preliminary HIV status of the plaintiff as at 23 August 2004, and his personal details on the preliminary report prepared when the plaintiff reported for testing on that day. Dr Engelbrecht's evidence further excludes the possibility of any mistaken identity or an incorrect diagnosis.

[32] In support of his contention that the diagnosis of his HIV condition made in 2004 was incorrect, the plaintiff proffers no more than the result of the rapid test conducted in 2008. In the face of the compelling evidence as to the plaintiffs, and the fact that the rapid test conducted in 2008 was in no way a definitive or even confirmed diagnosis, and given the results of the tests conducted by SANDF medical personnel during 2004 and 2005 and the links to the plaintiff, the probabilities are overwhelming that the diagnosis of the plaintiffs HIV status in August 2004 was correct, and that none of the medical personnel concerned were in any way negligent.

[33] In my view, the plaintiff has failed, on the balance of probabilities, to discharge the onus that the SANDF or any of its employees were negligent either by failing to ascertain the correct name, serial number and/or identity number of the patient before releasing the result of the blood test to the plaintiff, or by confusing the blood samples of different patients resulting in incorrect results being released to the plaintiff.

[34] The SANDF was represented by senior counsel throughout, and there is no reason why the costs of senior counsel ought not to be allowed.

I make the following order:

1. The plaintiff's claim is dismissed with costs, such costs to include the costs of senior counsel.

ANDRÉ VAN NIEKERK

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

For the Plaintiff: Adv. G Botha SC, with him Adv. LD Scholtz, instructed by Thys Cronje Inc.

For the Defendant: Adv. Nellie Cassim SC, instructed by the state attorney