THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS 602/19

In the matter between:

VUYISILE BRIAN GUGWINI **APPLICANT**

and

NATIONAL CONSUMER COMMISSIONER **RESPONDENT**

Heard: **14 and 15 November 2022, 22 March 2023**
Final heads of argument submitted on 21 April 2023

Delivered: **06 June 2023**

This judgment was handed down electronically by consent of the parties' representatives by circulation to them via email. The date for hand-down is deemed to be 06 June 2023.

JUDGMENT

PRINSLOO, J

Introduction

[1] The Applicant approached this Court for relief and his claim is twofold – an automatically unfair dismissal claim as provided for in section 187(1)(f) of the Labour Relations Act[1] (LRA) in that the reason for his dismissal was that the Respondent unfairly discriminated against him on the ground of a disability and an unfair discrimination claim in terms of section 6 of the Employment Equity Act[2] (EEA) on the ground of his disability.

The evidence adduced

The Applicant's case

[2] The Applicant experienced difficulty with his eyesight in 2016 and he was diagnosed on 7 June 2017, whereafter he went for three operations and he had to use eye droplets until 17 January 2018. During this period (June 2017 until January 2018), he was on incapacity leave. On 17 January 2018, Dr Botha, an ophthalmologist at the Universitas Hospital, declared that the Applicant was legally blind and stated that *"please help him with DG (Disability Grant)".*

[3] On 18 January 2018, the Applicant disclosed his status, namely that he was declared legally blind, to the Respondent. He sought guidance on how to proceed going forward because he wanted to continue to serve the Respondent "*in whatever possible way*". During the said period of incapacity leave, the Applicant was not able to return to work and he could not do his job as he was undergoing treatment for his eyes and he was recovering from surgery.

[4] The Applicant applied for an extension of his temporary incapacity leave from 18 January until 31 October 2018. He recorded that with low-vision aids, he could do any job he was qualified for. His doctor stated that his incapacity was permanent. At the time of submitting the application for further incapacity leave, the impact of his disability was not known and his doctor recorded that

[1] Act 66 of 1995, as amended.
[2] Act 55 of 1998, as amended.

an occupational therapist was needed to indicate to what extent he was likely to be able to perform certain specified activities.

[5] In cross-examination, it was put to the Applicant that on 17 January 2018 his doctor, after assessing him, gave a sick note stating that he was legally blind and should be assisted with a disability grant. On the Applicant's own version, he was still not fit for duty by April 2018, and he requested further sick notes from Dr Yako in April 2018 for the periods 1 – 31 March 2018 and 1 – 30 April 2018. The response he received was that the writing of multiple sick notes was considered *"irregular and illegal as you have already been declared unfit for duty by us (as per letter dated 17 January 2018)".* The request for further sick notes was not granted.

[6] When asked about the sick note that would cover the period of April 2018, when the Applicant's doctor refused to issue another sick note because the Applicant was already declared unfit for duty, the Applicant referred to a sick note that was issued by Dr Letsoalo. Dr Letsoalo's sick note stated that the Applicant was unable to fulfil his duties for the period 1 March 2018 until 31 October 2018, but the date of examination was only on 7 December 2018. Be that as it may, the sick certificate stated that the Applicant was not fit for duty from March until October 2018.

[7] The Applicant conceded that there was no approved incapacity leave for the period 18 January until 31 October 2018 and that the application for incapacity leave for the said period was only submitted in March 2019, after his services were terminated. Notwithstanding the fact that the Applicant was not at work from January until October 2018, without any approved leave, he still received his full remuneration for the period of his absence.

[8] After the Applicant disclosed his disability to the Respondent on 18 January 2018 and sought guidance on the way forward, he followed up on 31 January 2018 and requested assistance as to whether there was *"another possible placement of employment where my skills and knowledge can be utilized with my limitations. Despite the Dr's request that I should be assisted with disability grant I am of the view that I can still contribute immensely in public*

administration. I know I do not have much choice but I am very reluctant to take ill health retirement".

[9] Mr Ndou, the Respondent's director: human resources, responded that the Applicant had to complete the forms provided to him. Once the forms were received, the application will be forwarded to the health risk manager for assessment, whereafter the Respondent will be advised about the outcome and recommendations. Mr Ndou made it clear that no decision could be taken regarding the Applicant's request or enquiry before an assessment by the Respondent's health risk manager, Thandile Health Risk Management (Thandile).

[10] The Applicant testified that his disability was permanent and irreparable, as was confirmed by Dr Yako on 28 February 2018. Dr Yako confirmed that the Applicant's left eye has chronic retinal detachment, which is inoperable.

[11] The Applicant completed the forms and Thandile was appointed to assess the case. The Applicant testified that he was not interviewed by the health risk manager, he was not asked for his medical reports and the health risk manager did not ascertain the nature and the extent of his physical impairment, his ability to do other work and they did not investigate the possibility of re-skilling the Applicant.

[12] Thandile prepared a report wherein the application for ill-health retirement was not advised. The report stated that there should first be investigations to explore duties that are suited to visually impaired individuals with the proviso that it should not impose undue hardship on the employee or the employer. The report found that the Applicant's work potential was significantly affected as he is legally blind and could no longer perform duties that require good vision and he could no longer perform the duties of a senior research director. In cross-examination, the Applicant testified that this was an attempt to undermine the requirement for reasonable accommodation as the Respondent had the responsibility to accommodate him with his limitations.

[13] The Applicant testified that unaided he would not be able to perform many of the functions of a senior researcher, but with aid, he would be able to perform those duties.

[14] In cross-examination, the Applicant however conceded that his principal treating doctor, Dr Yako, stated in the application for incapacity leave that he could not do a job which required reading and writing. He further conceded that in his application for further incapacity leave he stated that the duties and functions of his current job *"it is all about reading articles and writing research reports".* The Applicant further conceded that his job was all about reading and writing, which was exactly what his doctor stated he could not do, and he ought to follow his doctor's advice.

[15] The Applicant conceded ultimately that if he had to follow Dr Yako's advice, he could not occupy the position of a senior researcher. He later qualified that by stating that his interpretation of what Dr Yako had said was that he could not perform the task of reading or writing, without low vision aid assistance. In cross-examination, he however ultimately conceded that he could no longer perform the duties of a senior researcher.

[16] It was put to the Applicant during cross-examination that nowhere in his interaction or correspondence with the Respondent was it ever stated that he could perform the duties of a senior researcher and nowhere was the Respondent requested to provide him with low vision aid assistance. Instead, the Applicant persistently requested to be assisted with an alternative job. The Applicant agreed that it was indeed the case and that he was throughout open-minded about alternative positions.

[17] On 21 August 2018, there was a meeting between the Applicant and the Respondent to give him feedback on the ill-health retirement application. He was told about the available vacant and funded positions, namely Chief Financial Officer (CFO), ICT Manager (ICT) and Call Centre Agent. He testified that he was of the view that during the meeting he should have been told about how he could be accommodated, but instead, it was merely a narration of the available positions and the meeting was not held in good faith.

The Applicant once again expressed his willingness to work for the Respondent.

[18] The Applicant expressed an interest in the ICT position and he asked for training and assistance. His evidence was that training and assistance were never provided and ultimately no position was offered to him. He was never tested for his suitability for the ICT position.

[19] It is evident from the minutes of the meeting of 21 August 2018 that in conclusion, the Applicant was given three options, which were the ICT position, which the Applicant proposed he would have wanted to work in, a lower position at the call centre or medical boarding.

[20] On 31 August 2018, the Applicant addressed an email to the Respondent's Messrs Manyama and Ndou. He referred to the meeting of 21 August 2018 where he had expressed an interest in the ICT position, but the Respondent had serious reservations about his ability to perform as expected. He acknowledged that his eyesight limitations are an issue of concern, but mentioned that it was an opportunity worth trying, but the Respondent raised a concern about mobility, as that was a requirement for the said position. The Applicant recorded that he had considered the offer to work in the Call Centre as a call centre agent, but from the position of senior researcher, he regarded that to be *"insensitive, dehumanizing, inconsiderate, caused me discomfort and lacked compassion. With all mentioned above I am left with no option but to accept the decision of the Commission to terminate my service".*

[21] In cross-examination, the Applicant conceded that he understood that a call centre agent position was available to him and that he could work at the call centre but he did not consider the offer because to him it was riddled with unfairness and discriminatory elements. He reiterated that he had expected an assessment of the available positions to determine whether they are suitable and to see how he could be accommodated in the available positions.

[22] On 25 September 2018, the Applicant addressed an email to the Respondent's Mr Manyama, in response to a letter dated 20 September 2018. The Applicant stated that his knowledge in the ICT sector spans over 10

years, he was willing to work in the IT divisions and thought that it would only be fair for the Respondent to provide him with assistive tools and training to be able to fulfil his duties. He requested an opportunity to test his ability before concluding that his disability prohibited him from working in an IT environment. He was never so tested.

[23] The Applicant in cross-examination conceded that on 21 August 2018, three possible options were discussed with him and he conceded that he did not have the qualifications to qualify for the position of ICT manager. He further conceded that the ICT position would have required him to read and write, which his doctors advised against.

[24] The Applicant testified that he had received a letter titled "*Application for ill-health retirement*" on 31 October 2018, in terms of which his services were terminated. He however disputed that he had applied for ill-health retirement and provided the context within which he had submitted the forms.

[25] It was put to the Applicant in cross-examination that at no point prior to 31 October 2018, when his employment was terminated, did the Applicant say to the Respondent that he was ready to get back to work, in his position as senior researcher, which functions he would be able to perform with the provision of low vision aid. This proposition was not disputed.

[26] The letter of 31 October 2018 clearly set out the reasons for the termination of the Applicant's services. It was in the main because the Applicant's experience was not in line with the inherent requirements of the ICT position and because he could not discharge the duties of ICT manager successfully, given the specialised job and the organisational requirements and because of the Applicant's refusal to consider alternative work at a lower position.

[27] In respect of his claim for discrimination, the Applicant testified that he is not the only employee of the Respondent who was partially sighted. Another visually impaired employee is working in the call centre, where she is provided with what she needed to be able to do her work. His ill-health retirement was processed due to his disability. The moment he disclosed his disability, he

was good for nothing and the termination of his employment had ripped his heart apart.

[28] The Applicant conceded that his vision makes reading and writing a challenge.

The Respondent's case

[29] The Respondent's witness, Mr Ndou, is the human resources manager. He testified about the Respondent's "*Policy and procedure on incapacity leave and ill-health retirement*" (PILIR), which provides that the employer must submit an application for ill-health retirement as soon as it is evident that an employee may not be able to return to work following incapacity. An employee may also decide to apply for ill-health retirement. The policy sets out the advantages of early submission of such an application as *inter alia* allowing sufficient time for considering additional requirements such as the possible redeployment or reskilling of the employee, early commencement of processing payments and it allows for early intervention and management of a condition, thereby preventing it from resulting in permanent incapacity.

[30] From the pre-trial minute, it is evident that it was common cause that the Applicant was diagnosed with legal blindness on 17 January 2018 and that his treating doctor requested that he be assisted with a disability grant. It was further common cause that the Applicant suffered from a disability and that he had difficulty with reading and writing. On 18 January 2018, the Applicant wrote an email wherein he disclosed his disability to the Respondent, sought guidance on the way forward stated that he would *"love to continue to serve the commission in whatever possible way".*

[31] Mr Ndou explained that the doctor's note of 17 January 2018, indicating that the Applicant was legally blind and must be assisted with a disability grant, as well as the Applicant's email of 22 January 2018 wherein he requested to be provided with 'permanent disability forms', indicated that the Applicant wanted to apply for ill-health retirement.

[32] On 31 January 2018, the Applicant sent an email to follow up and requested assistance as to whether there was *"another possible placement of employment where my skills and knowledge can be utilized with my limitations. Despite the Dr's request that I should be assisted with disability grant I am of the view that I can still contribute immensely in public administration. I know I do not have much choice but I am very reluctant to take ill health retirement."*

[33] Mr Ndou testified that the Thandile report was compiled after the Applicant submitted the forms for ill-health retirement. Thandile assessed the application and the medical reports submitted and based on that, the report was produced. Specific reference is made to Dr Yako's recommendation that the Applicant use low-vision aids and that he was legally blind and that he could do a job that did not require reading and writing. The Applicant's left eye has a chronic retinal detachment that cannot be salvaged by surgery and the visual acuity of his left eye is limited to light perception. The Applicant's right eye has a visual acuity of 20/100. The Applicant's work potential and residual function capacity was recorded as that he could no longer perform the duties of a senior research director.

[34] After the Thandile report was made available, the Applicant was informed and a meeting was scheduled for 21 August 2018. During the meeting, Mr Ndou informed the Applicant about the positions which were vacant and funded at the conclusion of the meeting, three options were given to the Applicant to wit the IT position in which the Applicant proposed to work in, a lower position at the contact centre or medical boarding. It was agreed that the Applicant should inform the panel in writing about the option that would suit him best and to provide a proper motivation in support of his choice, indicating his suitability by 31 August 2018.

[35] On 31 August 2018, the Applicant addressed an email to the Respondent's Mr Manyama, in which Mr Ndou was copied, wherein he made specific reference to the meeting of 21 August 2018. Mr Ndou explained that the Applicant did not motivate for the position he was interested in and in which he could be accommodated in. Instead, he stated that he had considered the offer to work

in the call centre as a call centre agent, which offer he rejected. The Applicant stated that he was left with no option but to accept the Respondent's decision to terminate his service.

[36] The Respondent responded to the Applicant's email of 31 August 2018 on 18 September 2018. The Applicant was afforded a further three working days to submit a motivation to the Respondent, whereafter a decision would be made.

[37] On 25 September 2018, the Applicant responded that *"despite my knowledge of the ICT sector that spans over 10 years and the willingness to work in the IT division, it's only fair that the Commission provides me with assistive tools and training to be able to fulfil my duties."*

[38] On 22 October 2018, the Respondent wrote a letter to the Applicant, stating that he was legally blind and the final assessment indicated that he could no longer perform the tasks required of a senior researcher or any tasks that require reading and writing. The Respondent terminated the Applicant's services with effect from 31 October 2018.

[39] In his application for incapacity leave, the Applicant stated that the functions and duties of a senior researcher were "*all about reading and writing*". Mr Ndou confirmed that reading and writing are core aspects of the position of senior researcher and the doctors indicated that the Applicant was no longer able to perform functions which require reading and writing.

[40] The Applicant had not been back at work since 7 June 2017 and he remained on full pay until his services were terminated on 31 June 2018. For the period between 18 June and 31 October 2019, the Applicant had not submitted an application for leave and such application was only made in March 2019, after his services were already terminated. The Applicant's absence for the said period was not authorised and the money he was paid had to be recovered, but the Respondent gave him an opportunity to submit a leave form after he was already dismissed.

[41] In cross-examination, Mr Ndou was asked whether the Applicant would have been requested to fill out the ill-health retirement application form if he was

not declared legally blind. Mr Ndou explained that employees are expected to be at work every day, unless when they are absent on approved leave. Employees are entitled to 36 days of sick leave in a three-year cycle and when that is exhausted, temporary incapacity leave can be applied for. The Applicant was absent for a prolonged period and he was advised to complete the form, for consideration and assessment by the health risk manager. The Applicant was informed that no decision could be taken before an assessment by the health risk manager.

[42] It was put to Mr Ndou that the Applicant's disability was the only reason why his career with the Respondent had ended. Mr Ndou testified that after the report from Thandile was received, there was a meeting scheduled with the Applicant with the specific purpose to see if he could be accommodated elsewhere. It was for this reason that the Respondent had put forward proposals, with the expectation that the Applicant would indicate which of the proposed options were viable. The Applicant indicated that he was interested in the ICT position and the Respondent requested him to submit a motivation as to why he was of the view that the ICT position was suitable. Mr Ndou explained that the ICT position is extremely challenging and the Respondent was of the view that the Applicant did not have the required experience and qualifications for the said position, which is why he was asked to amplify in respect of his experience in respect of the ICT position and why he would be suitable for the post. On the due date, the Applicant did not make the requested submission and he was afforded a further opportunity to do so. If the Applicant made further submissions, there could have been a further engagement, but instead, the Applicant made no submissions and provided no proposal and effectively abandoned the process. The Applicant did not address the specific qualifications, experience and training required for the ICT position in a motivation as to why that position would be suitable for him. Mr Ndou stated that it was a shared responsibility of the Applicant and the Respondent to find ways to deal with the Applicant's disability and to work around it.

<u>The issues to be decided</u>

[43] The Applicant approached this Court for relief and his claim is two-fold – an automatically unfair dismissal claim as provided for in section 187(1)(f) of the LRA and an unfair discrimination claim in terms of section 6 of the EEA.

[44] The Applicant's automatically unfair dismissal claim is that the reason for his dismissal was because the Respondent unfairly discriminated against him on the ground of a disability and his unfair discrimination claim is that he was discriminated against on the ground of his disability.

[45] The Respondent pleaded that the Applicant's dismissal was fair because the ability to read and to write was an inherent requirement of the position of senior researcher as well as that of ICT manager. Those were core responsibilities of the said positions and after being declared legally blind, the Applicant could not perform the key responsibilities required in the said positions. The Applicant was not fit to perform the core responsibilities of the position of senior researcher and ICT manager and he rejected another junior, but alternative position. The Respondent disputed discrimination against the Applicant.

[46] The Applicant made the election to pursue the aforesaid causes of action in this Court and not to pursue an unfair dismissal dispute based on incapacity in the relevant bargaining council. Had an unfair dismissal dispute (incapacity) been pursued, instead of an automatically unfair dismissal dispute (discrimination) the onus, the questions and legal issues to be decided, would have been different from the issues to be decided by this Court.

The Applicant's disability

[47] The Applicant was employed as a senior researcher with the Respondent from 01 September 2011. The Applicant experienced difficulties with his eyesight and he had to undergo numerous surgical procedures as from June to September 2017.

[48] The Applicant's pleaded case is that he is diagnosed with left rhegmatogenous retinal detachment, macula off retinal detachment, albinism, nystagmus and high myopia. In short, the Applicant was diagnosed with acute

loss of vision and retinal detachment. Due to this, he has very low vision in his right eye and no vision in his left eye. He underwent several eye surgeries to repair the detached retina.

[49] The applicant was referred to Prof W.S Marais (ophthalmologist) and Dr A. Yako (ophthalmology medical officer) at the Universitas Hospital for further assessment. Following their assessments, the Applicant was declared legally blind on 17 January 2018. As a result, his specialist requested that he be assisted with a disability grant as his condition was permanent.

Ill-health retirement

[50] The Applicant was declared legally blind in January 2018 and he then informed the Respondent that his vision could not be restored. On 18 January 2018, he sought advice going forward. The Applicant conveyed his willingness to continue to work for the Respondent "*in whatever possible way*". On 22 January 2018, the Applicant requested the Respondent to assist him with "permanent disability forms".

[51] The Applicant was subsequently provided with ill-health retirement application documents, which he had completed and he provided the Respondent with the signed documents. The matter was referred to Thandile on 6 June 2018 for a conditional assessment.

[52] The Applicant's pleaded case is that he was coerced into completing the ill-health retirement forms as he never wanted to go on ill-health retirement. Considering the evidence adduced, I am not convinced that the Applicant was forced or coerced to apply for ill-health retirement. The sequence of events indicates that by January 2018 he was declared legally blind, and his treating specialist requested that he be assisted with a disability grant. The Applicant sought guidance from the Respondent on 18 January 2018 as to how to proceed going forward.

[53] On 22 January 2018, the Applicant wrote another email, indicating that he was still awaiting advice from HR, but in the meantime, he wanted to be assisted with permanent disability forms. On 31 January 2018, the Applicant

once again wrote an email stating that, despite his doctor's request that he be assisted with a disability grant, he was reluctant to take ill-health retirement, although he knew he did not have much of a choice. He requested assistance *"if there another [sic] possible placement of employment where my skills and knowledge can be utilised with my limitations".*

[54] Mr Ndou's evidence was that the permanent disability form the Applicant requested on 22 January 2018 was indeed the ill-health retirement application and that it was the first step in the process. The policy sets out the advantages of early submission of such an application as *inter alia* allowing sufficient time for considering additional requirements such as the possible redeployment or reskilling of the employee, wherefore the application form was required to do an assessment and to consider alternatives. The Applicant was informed that no decision could be taken before an assessment by the health risk manager was done.

[55] After the Applicant completed the ill-health retirement application forms, Thandile assessed the matter and made recommendations to the effect that:

i. the Applicant could not continue in the position of Senior Researcher;

ii. duties that are suited to the visually impaired must be explored; and

iii. alternative duties must be carried out if they do not impose undue hardship on either the Applicant or the Respondent.

[56] Thandile did not recommend ill-health retirement as a first option but instead recommended that alternatives be considered and that duties suitable to visually impaired individuals be explored, with the proviso that it did not impose undue hardship on either the employee or the employer.

[57] It is evident that the mere completion and submission of the ill-health retirement application form did not result in the Applicant's dismissal. It rather resulted in a report compiled by Thandile, with specific recommendations, which triggered the process that followed thereafter.

<u>The process followed</u>

[58] It is common cause that the Respondent called for a meeting with the Applicant on 21 August 2018. The reason for the meeting was to explain the Thandile recommendations to the Applicant.

[59] During the meeting, the Applicant indicated that he still wanted to work for the Respondent, he was open to what the Respondent proposed and that he would assess the situation.

[60] The Applicant was informed about funded positions which were vacant and available at the time, namely Chief Financial Officer, ICT Manager and Investigator. The Respondent indicated that there was no funded position on a horizontal level available and that a lower level position could not be offered unless the Applicant was willing to accept that and to take a knock regarding benefits. The Applicant was invited to tell the panel what he was able to do.

[61] The Applicant indicated that he has worked in IT before and has experience in IT. He indicated that he was aware of the constraints in the IT unit and that the position requires reading and writing. The Applicant indicated an interest in the ITC position and indicated that he would be a suitable candidate for the position of ICT manager.

[62] At the conclusion of the meeting, three options were given to the Applicant to wit the IT position in which the Applicant proposed to work in, a lower position at the contact centre or medical boarding. It was agreed that the Applicant should inform the panel in writing about the option that would suit him best and to provide a proper motivation in support of his choice, indicating his suitability by 31 August 2018.

[63] The Respondent had reservations about the Applicant's suitability for the ICT post, considering the challenges of the ICT position. Although the Applicant did not have qualifications for this position and it also required reading and writing, the Respondent invited the Applicant to submit motivation why he should be accommodated in this position. The Respondent anticipated that the motivation would address the specific requirements of the IT Manager position (i.e. qualification, managerial experience in the IT Environment and

computer skills). The Applicant failed to submit a written motivation for the ICT position by the agreed date.

[64] Instead, on the agreed date, 31 August 2018, the Applicant addressed an email to the Respondent wherein he stated that he had considered the offer to work in the call centre as a call centre agent, but he regarded that offer to be *inter alia* dehumanising and inconsiderate. The Applicant stated that he was left with no option but to accept the Respondent's decision to terminate his service.

[65] The Respondent responded to the Applicant's email of 31 August 2018 on 18 September 2018. It was recorded that the agreement reached on 21 August 2018 was that the Applicant would submit a written motivation to amplify his suitability for a position and the options offered to the Applicant were repeated. It was stated that the Applicant did not submit a motivation in relation to his suitability, but instead sent an email stating that he was left with no option but to accept the Respondent's decision to terminate his services. The Respondent made it clear that it had not taken any decision to terminate the Applicant's services, but rather afforded him an opportunity to submit a written motivation, which he had not done. The Applicant was afforded a further three working days to submit a motivation to the Respondent, whereafter a decision would be made.

[66] On 25 September 2018, the Applicant responded that *"despite my knowledge of the ICT sector that spans over 10 years and the willingness to work in the IT division, it's only fair that the Commission provides me with assistive tools and training to be able to fulfill my duties".*

[67] The motivation in the terms contemplated by the Respondent was not provided but instead, the Applicant sent an email to the Respondent informing it that he will not take up the position of call centre agent. He was afforded another opportunity to provide a motivation. The email of 25 September 2018 did not constitute a 'motivation' and did not address the important aspects and the Respondent's concerns regarding the Applicant's suitability for the ICT position. It merely stated that the Respondent should provide assistive tools

and training to the Applicant to be able to fulfill his duties. Which duties in what capacity or what training of tools were required, were never explained by the Applicant and he never meaningfully engaged the Respondent on those aspects.

[68] The Respondent extended a further opportunity to the Applicant to submit a proper motivation, but he did not make use of the opportunity so afforded.

[69] On 22 October 2018, the Respondent addressed a letter to the Applicant, stating that he was legally blind and the final assessment indicated that he could no longer perform the tasks required of a senior researcher or any tasks that require reading and writing. It was recorded that the Respondent was not convinced that the Applicant would be able to render an effective service at the level of ICT manager, based on the Applicant's educational qualification, experience and the operational requirements of the post, which required reading, writing and traversing uneven terrains. The Respondent stated that the Applicant was given an opportunity to either consider a lower-level position that required less reading and writing or to make a representation by means of a proposal so that the Respondent could consider his suitability for the ICT position. The Applicant failed to provide the Respondent with a motivation to support his assertion that he indeed met the inherent job requirements and minimum skill profile for the position of ICT manager.

[70] The Respondent concluded that *"in the absence of any proposal, the specialised job requirements and the organisational requirements, management is not convinced that you can successfully discharge duties as an ICT manager. Your experience is also not in line with inherent requirements of the ICT manager post. In your email dated 31 August 2018, you stated that you will not consider alternative work which is at a lower position. Based on the above, the NCC is left with no other alternative but to terminate your services with effect from 31 October 2018".*

Assistance or alternative position

[71] The Applicant's pleaded case is that the Respondent, after being informed about the Applicant's permanent disability and without trying to establish the

extent of his disability, forced the Applicant into an early retirement application process and subsequently terminated his employment.

[72] The Applicant's case is further that instead of trying to assist the Applicant in his position as senior researcher, the Respondent offered him alternative positions, knowingly that the Applicant might not be qualified or able to do the work, alternatively failed to assist him in any of the proposed positions.

[73] In respect of discrimination, it is the Applicant's case that the Respondent failed to accommodate his disability even though other partially sighted employees in the Respondent's service are being provided with the correct tools and equipment to assist them in their positions. The Respondent failed to implement reasonable accommodation to avoid discrimination.

[74] In my view, the aforesaid complaints pleaded by the Applicant are without merit. Not only is it not supported by the evidence adduced, but it is also not supported by the applicable authorities. I will fully deal with the reasons for this finding *infra.*

[75] Before setting out the reasons why the Applicant's case must fail, I have to emphasize that the approach followed, had been guided by the following *dicta* of the Constitutional Court in *Adams Damon v City of Cape Town*[3] *(Damon):*

> '[109] … At the outset, it is necessary to caution against *ad misericordiam* (appeal to pity) reasoning that attempts to persuade solely by evoking legally irrelevant feelings of sympathy. In this case, that type of reasoning would have us fixate on the fact that the applicant sustained the injury that led to his permanent disability while at work. Yet, that fact is entirely irrelevant to the legal question that is dispositive of this appeal, namely: does the Policy discriminate unfairly against the applicant?
>
> [110] Although it is tempting to have regard to the circumstances surrounding the applicant's injury, which are emotionally compelling, they are not logically connected to the central issue in the case, namely the alleged unfair discrimination brought about by the Policy's

[3] [2022] 7 BLLR 585 (CC) at paras 109 – 110.

> inherent requirement for the job of senior firefighter. One understandably empathises with the applicant's unfortunate plight and its cause, and of course, the law must be responsive to social realities. It does not exist in a vacuum. However, the law must also balance various interests, which may at times compete, and it must be applied dispassionately and in a sustainable fashion.'

[76] This Court has empathy for the Applicant and his unfortunate plight, but in deciding the issues relating to discrimination and automatically unfair dismissal, the law must be applied dispassionately, with the focus on the relevant legal questions and the applicable principles.

Discrimination

[77] Section 6(1) of the EEA prohibits unfair discrimination, including on the ground of disability. Consistent with international standards, section 6(2) creates two exceptions to the duty not to discriminate in providing that:

> 'It is not unfair discrimination to –
>
> (a) take affirmative action measures consistent with the purpose of this Act; or
>
> (b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.'

[78] Section 5 of the EEA places the duty squarely on the employer to eliminate discrimination. Reinforcing that duty, section 11(1) imposes a positive burden of proof:

> 'If unfair discrimination is alleged on a ground listed in section 6 (1), the employer against whom the allegation is made must prove, on a balance of probabilities, that such discrimination –
>
> (a) did not take place as alleged; or
>
> (b) is rational and not unfair, or is otherwise justifiable.'

[79] This burden applies to unfair discrimination alleged on the ground of disability in section 6(1). The onus also rests on an employer to prove that the discrimination is not unfair, and if it is unfair, that it is justifiable. If

implementing reasonable accommodation is impossible or an undue or unjustifiable hardship, the discrimination would not be unfair. The burden of proof informs how reasonableness and proportionality would apply in mediating the respective rights of the parties.[4]

[80] In *Damon,* the Constitutional Court dealt with a matter where the applicant was unable to fulfil the normal operational duties associated with the position he had occupied, due to his disability. There was no prospect that the applicant could be rehabilitated from his disability, as it was permanent in nature and he was unable to resume normal, operational duty in the future. The Constitutional Court held that[5]:

> 'The genesis of section 6(2)(b) is Article 1(2) of Convention 111, which lays the basis for the defence of an inherent requirement not amounting to discrimination. The CRPD does not mention the concept of the inherent requirement of a job. An inherent requirement of the job is usually impervious – a complete defence – to a claim for unfair discrimination. Of course, the requirement must be genuine. Once a requirement is determined to be inherent, then as a matter of law, it is not unfair discrimination for an employer to insist on employees meeting the requirement. An employer who proves that a requirement is inherent is protected against a claim of discrimination and therefore cannot be compelled to waive or excuse an inherent requirement to accommodate a person with disability.'

[81] In my view, it is evident that by January 2018 the Applicant knew that he could no longer continue in his position as a senior researcher. He never mentioned that he was still able to work as a senior researcher or that he could still perform the functions of a senior researcher, if assisted, and on his own version, he was seeking assistance regarding 'another possible placement' where he could be utilised, with his limitations.

[82] The medical specialists and doctors made a finding that the Applicant cannot do a job that requires reading and writing. However, the Applicant indicated

[4] The minority judgment in *Damon* at para 66.
[5] *Damon* at para 67.

that he does not wish to go on ill-health retirement and requested to be accommodated with alternative work suited for his visually impaired position.

[83] *In casu,* the Respondent pleaded that the ability to read and to write was an inherent requirement of the position of senior researcher as well as that of ICT manager. Those were core responsibilities of the said positions and are indispensable attributes that relate in an inescapable way to the performance of the jobs. It was not disputed that the ability to read and write were core responsibilities and indispensable attributes of a senior researcher and ICT manager. It is further undisputed that the Applicant's doctors as well as Thandile found that the Applicant could not do a job which required reading and writing.

[84] After being declared legally blind, the Applicant could not perform the core responsibilities of the position of senior researcher and ICT manager. This version was not disputed during the trial and in his evidence, the Applicant conceded that he could no longer perform the duties of a senior researcher and he conceded that the ICT position would have required of him to read and write, which his doctors advised against.

[85] In *Damon,* the majority held that[6]:

> '[135] The principle that physical fitness is an inherent requirement for the post of senior firefighter plays a crucial role in this case. Inherent requirements of the job refer to elements of a job that are essential to its outcome and part of its core activities. In *TDF Network Africa*, in dealing with whether a requirement is inherent or inescapable in the performance of a job, it was held that –
>
> > "the requirement must be rationally connected to the performance of the job. This means that the requirement should have been adopted in a genuine and good faith belief that it was necessary to the fulfilment of a legitimate work-related purpose and must be reasonably necessary to the accomplishment of that purpose."

[6] *Damon* at paras 135 and 140 – 143.

…

[140] The Code endorses the principle that "employers must reasonably accommodate the needs of persons with disabilities" and that "the aim of the accommodation is to reduce the impact of the impairment of the person's capacity to fulfil the essential functions of the job". The Code lists various forms of reasonable accommodations that are all aimed at enabling an employee with disabilities to do the job that they are employed to do. In other words, they are aimed at placing the employee with disabilities on an equal footing with employees without disabilities as far as the operational requirements and performance of the job are concerned. The obligation to reasonably accommodate thus applies if such reasonable accommodation will make it possible for the employee to fulfil the inherent requirements of the job. Accommodation beyond this would cease to be reasonable, because it would effectively require an employer to employ someone who cannot possibly perform the inherent requirements of the job.

[141] In this case, it is common cause that the applicant cannot meet the inherent requirements of the job of a senior firefighter. It is also not contested that no amount of reasonable accommodation will enable the applicant to meet the inherent requirement of physical fitness for a senior firefighter. Section 6(2)(a) would not avail the applicant since, at most, it would require the respondent to reasonably accommodate him. In the present instance, once the respondent has successfully raised the defense that physical fitness is an inherent requirement of the post of a senior firefighter, the question of reasonable accommodation falls away.

[142] If the first judgment's understanding of section 6(2) were to prevail, employers would effectively be required to reasonably accommodate employees who cannot meet the inherent requirements of the job to which they seek appointment. Or worse, it would place an obligation on employers to create new positions in order to accommodate employees who did not meet the inherent requirements of a different job altogether. This is plainly incompatible with the very nature and purpose of reasonable accommodation, which is to enable an

employee with disabilities to perform in accordance with the inherent requirements of the job.

[143] In my view, the first judgment's approach subverts the careful balance which the EEA strikes between, on the one hand, respecting the legitimate operational prerogatives and needs of employers, and, on the other hand, ensuring that employers take steps to ensure equitable access to the workplace...'

[86] The Applicant cannot perform a job which requires him to read and write and by not accommodating him in positions where the ability to read and write were inherent and core requirements, the Respondent did not discriminate against the Applicant on the ground of his disability. As the Constitutional Court has held: to require of employers to reasonably accommodate employees who cannot meet the inherent requirements of a job, is plainly incompatible with the very nature and purpose of reasonable accommodation, which is to enable an employee with disabilities to perform in accordance with the inherent requirements of the job.

[87] The evidence adduced showed that no amount of reasonable accommodation would enable the Applicant to meet the inherent requirements of the ability to read and write, more so where his doctors found that could not do a job which required reading and writing. On the Applicant's own concession, he had to adhere to the findings and recommendations of his medical specialists and to accommodate him in a position where reading and writing were inherent requirements, would be contra his doctors' advice.

[88] The Applicant's pleaded case is that the Respondent failed to accommodate his disability even though other partially sighted employees in the Respondent's service are being provided with the correct tools and equipment to assist them in their positions. The Respondent failed to implement reasonable accommodation to avoid discrimination. The undisputed evidence was that the Respondent has one other employee with impaired vision, and she is accommodated in the call centre, where reading and writing was not a core requirement and where the environment was such that it could accommodate her impairment.

[89] The Respondent has also offered the Applicant a position in the call centre, where the Respondent knew it was possible to accommodate visually impaired employees, but he rejected the offer as he regarded the offer dehumanizing and effectively to be an insult. The Respondent was willing and prepared to accommodate the Applicant in the same manner as its other partially sighted employee was accommodated and assisted, but he refused the offer. There was no evidence that any other partially sighted or legally blind employees were accommodated in positions that required reading and writing and that they were provided with tools and equipment to assist them, but the same treatment was refused for the Applicant.

[90] This Court cannot find that the Respondent discriminated against the Applicant, as provided in section 6(1) of the EEA, on grounds of his disability.

Disability and incapacity

[91] In *Standard Bank of SA v Commission for Conciliation, Mediation and Arbitration and Others*[7] (*Standard Bank)*, the Court held that:

> 'Disability is not synonymous with incapacity. Under Canadian law adjudicators may not find a person incapable unless they are satisfied that the needs of the person cannot be accommodated except with undue hardship. An employee is incapacitated if the employer cannot accommodate her or if she refuses an offer of reasonable accommodation. Dismissing an employee who is incapacitated in those circumstances is fair but dismissing an employee who is disabled but not incapacitated is unfair.'

[92] Put differently: the LRA recognises three grounds on which a termination of employment might be legitimate; namely the conduct of the employee, the capacity of the employee and the operational requirements of the employer's business. Dismissing an employee who is incapacitated and who cannot perform his or her normal duties, whose prognoses are poor and whose working conditions cannot be adapted or alternative work is not available and who cannot be accommodated, is not unfair. Dismissing a disabled employee who is not incapacitated, is unfair, and if the main or dominant reason for

[7] (2008) 29 ILJ 1239 (LC) at para 94.

dismissal is the employee's disability as opposed to incapacity, such dismissal will be automatically unfair.

[93] The question this Court must decide is whether the Applicant was dismissed on the ground of discrimination relating to his disability.

[94] What is an employer expected to do if an employee is incapacitated? This was considered in *Standard Bank,* and the Court held that the LRA guidelines for incapacity dismissal contemplate a four-stage enquiry before an employer effect a fair dismissal:[8]

> '[72] Stage one: The employer must enquire into whether or not the employee with a disability is able to perform her work. If the employee is able to work, that is end of the enquiry; the employer must restore her to her former position or one substantially similar to it. Where possible, the job should correspond to the employee's own choice and take account of her individual suitability for it. If the employee is unable to perform her work and her injuries are long term or permanent, then the next three stages follow.
>
> [73] Stage two: The employer must enquire into extent to which the employee is able to perform her work. This is a factual enquiry to establish the effect that her disability has on her performing her work. The employer may require medical or other expert advice to answer this question.
>
> [74] Stage three: The employer must enquire into the extent to which it can adapt the employee's work circumstances to accommodate the disability. If it is not possible to adapt the employee's work circumstances, the employer must enquire into the extent to which it can adapt the employee's duties. Adapting the employee's work circumstances takes preference over adapting the employee's duties because the employer should, as far as possible, reinstate the employee.
>
> [75] During this stage, the employer must consider alternatives short of dismissal. The employer has to take into account relevant factors

[8] *Standard Bank* at paras 72 – 76.

including 'the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement' for the employee.

[76] Stage four: If no adaptation is possible, the employer must enquire if any suitable work is available.'

[95] The Applicant's case is that his dismissal was automatically unfair and he pleaded that his employment was terminated because of his disability without:

1. establishing whether he was unable to perform his work;
2. establishing to what extent he was capable of working;
3. establishing whether his work circumstances can be adapted, and if not;
4. established whether alternative work is available and to what extent the alternative work can be adapted to accommodate the needs of the Applicant.

[96] The Applicant's case is that instead of trying to assist the Applicant in his position as senior researcher, the Respondent offered him alternative positions, knowing that the Applicant might not be qualified or able to do the work, alternatively failed to assist him in any of the proposed positions.

[97] It is common cause that the Applicant was a senior researcher, and on his own version, the job was all about reading and writing. The evidence adduced showed that the Applicant informed the Respondent that he was legally blind, that his treating doctors indicated that he could not perform a job that requires reading and writing and after the matter was assessed by Thandile, it was found that the Applicant can no longer perform the tasks of a senior researcher and that the Applicant could do a job that does not require reading and writing.

[98] The medical specialists and doctors held that the Applicant cannot do a job that requires reading and writing and during the trial, the Applicant conceded that he had challenges with reading and writing and that he could no longer

perform the duties of a researcher, where reading and writing were core activities.

[99] It is evident that the Respondent indeed established that the Applicant was unable to perform his work, being that of a senior researcher, which required the ability to read and write as core inherent requirements. The Respondent also established that there was no extent to which the Applicant would have been able to perform his duties as a researcher or to which his work circumstances could have been adapted. No amount of adaption could change the fact that reading and writing were core requirements and that the Applicant was not able to perform any job which required of him to read and write.

[100] The Applicant's complaint, that instead of trying to assist him in his position as senior researcher, the Respondent offered him alternative positions, has no merit. It was made clear in *Standard Bank* that if no adaptation is possible, the employer must enquire if any suitable work is available.

[101] The Applicant's version presented during trial to the effect that he could have performed the duties of a senior researcher, had he been provided with the necessary tools and assistance, cannot be accepted. On his own version, he accepted that he could no longer perform the duties of a senior researcher, his specialist doctors indicated that he cannot perform a job that requires reading and writing and at no stage during his engagement with the Respondent, did he express any expectation to be accommodated in his post as senior researcher, nor did he ever indicate that with assistance, he would be able to read and write, as the position would require of him to do. His treating doctors also did not state that he can perform his normal duties with assistance. The Applicant indicated throughout that he was open to alternatives, which is indicative of the fact that he understood very well that he could no longer be accommodated as a senior researcher.

[102] The Respondent engaged the Applicant in the enquiry of whether any suitable work or position was available. During this process, the Applicant expressed

his interest to assume the position of ICT Manager, which is indicative of the fact that alternative positions were discussed with the Applicant.

[103] The Applicant was given an opportunity to either consider a lower-level position that did not require reading and writing as a core requirement, or to make a representation by means of a proposal so that the Respondent could consider his suitability for the ICT position. The Applicant failed to provide the Respondent with a motivation to support his assertion that he indeed met the inherent job requirements and minimum skill profile for the position of ICT manager.

[104] The Respondent informed the Applicant that *"in the absence of any proposal, the specialised job requirements and the organisational requirements, management is not convinced that you can successfully discharge duties as an ICT manager. Your experience is also not in line with inherent requirements of the ICT manager post. In your email dated 31 August 2018, you stated that you will not consider alternative work which is at a lower position. Based on the above, the NCC is left with no other alternative but to terminate your services with effect from 31 October 2018".*

[105] The position of ICT manager was not suitable because the Applicant did not possess the required educational qualification, experience and due to the operational requirements of the post, which required reading, writing and traversing uneven terrains and the lower level position as call centre agent was rejected by the Applicant.

[106] In *Legal Aid SA v Jansen*[9] *(Jansen),* the Labour Appeal Court (LAC) considered an appeal relating to an automatic unfair dismissal in terms of the provisions of section 187(1)(f) of the LRA. The Court held that:

> '[35] An applicant seeking to establish that a dismissal is automatically unfair on any of the grounds listed in s 187(1) of the LRA must meet the requirements of causation as articulated in *SA Chemical Workers Union & others v Afrox Ltd* as follows:

[9] (2020) 41 ILJ 2580 (LAC) at paras 35 – 37.

> "The first step is to determine factual causation: was participation or support, or intended participation or support, of the protected strike a sine qua non (or prerequisite) for the dismissal? Put another way, would the dismissal have occurred if there was no participation or support of the strike? If the answer is yes, then the dismissal was not automatically unfair. If the answer is no, that does not immediately render the dismissal automatically unfair; the next issue is one of legal causation, namely whether such participation or conduct was the "main" or "dominant", or "proximate", or "most likely" cause of the dismissal. … It is important to remember that at this stage the fairness of the dismissal is not yet an issue... Only if this test of legal causation also shows that the most probable cause for the dismissal was only participation or support of the protected strike, can it be said that the dismissal was automatically unfair in terms of s 187(1)(a)."

[36] The evidentiary burdens regarding the issues arising in an alleged automatically unfair dismissal were defined in *Kroukam* as follows:

> "In my view, s 187 imposes an evidential burden upon the employee to produce evidence which is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place. It then behoves the employer to prove to the contrary, that is to produce evidence to show that the reason for the dismissal did not fall within the circumstance envisaged in s 187 for constituting an automatically unfair dismissal."

[37] In accordance with this scheme, it is incumbent on an employee alleging that the reason for his dismissal was discrimination on prohibited grounds to produce sufficient evidence raising a credible possibility that the dismissal amounted to differential treatment on the alleged ground. In the present case: is there a credible possibility that the respondent was subject to differential treatment on the prohibited ground of depression? If that credible possibility is established then the employer, in order to prevail, needs to produce sufficient evidence rebutting that credible possibility or offering fair justification for the differential treatment.' [Footnotes omitted]

[107] Thus: the Applicant has to produce sufficient evidence to raise a credible possibility that his dismissal amounted to differential treatment on the ground of his disability. If that possibility is established, the Respondent needs to produce sufficient evidence to rebut the possibility or to show a fair justification for the differential treatment.

[108] In *Jansen,* the ground for discrimination was the employee's suffering from depression. The LAC accepted that the employee was depressed and had been suffering from depression since 2011. The LAC held that:[10]

> 'However, for an employee to succeed in an automatically unfair dismissal claim based on depression, the question is different. Here the enquiry is not confined to whether the employee was depressed and if his depression impacted on his cognitive and conative capacity or diminished his blameworthiness. Rather, it is directed at a narrower determination of whether the reason for his dismissal was his depression and if he was subjected to differential treatment on that basis. Here too, the employee bears the evidentiary burden to establish a credible possibility (approaching a probability) that the reason for dismissal was differential treatment on account of his being depressed and not because he misconducted himself.'

[109] The LAC considered the test to be applied and concluded that:[11]

> 'It may well be that but for his depression factually (*conditio sine qua non*) the respondent might not have committed some of the misconduct; but, still, he has not presented a credible possibility that the dominant or proximate cause of the dismissal was his depression. The mere fact that his depression was a contributing factual cause is not sufficient ground upon which to find that there was an adequate causal link between the respondent's depression and his dismissal so as to conclude that depression was the reason for it. The criteria of legal causation, it must be said, are based upon normative value judgments. The overriding consideration in the determination of legal causation is what is fair and just in the given circumstances. One must ask what was the most immediate, proximate, decisive or substantial cause of the dismissal. What most immediately brought about the dismissal? The

[10] *Jansen* at para 44.
[11] Ibid at para 48.

proximate reason for the respondent's dismissal was his four instances of misconduct. It was not his depression, which at best was a contributing or subsidiary causative factor.'

[110] The Applicant bears the onus to show that he was indeed discriminated against for reasons relating to his disability and he has to show that his dismissal was causally connected to his disability. The Applicant has to discharge these evidentiary burdens.

[111] The same questions as in *Jansen* arise *in casu.* It is accepted that the Applicant is legally blind and that is regarded as a disability. The question is not confined to whether the Applicant was legally blind and disabled and if this impacted on his ability to perform. Rather, it is directed at a narrower determination of whether his disability was the reason for his dismissal and if he was subjected to differential treatment on that basis. The question is this: would the dismissal have occurred if there was no disability?

[112] In my view, the answer to this question is no. This however does not render the dismissal automatically unfair as the next issue to be considered is one of legal causation. The question is whether the Applicant's disability was the main or dominant cause of his dismissal. The mere fact that the Applicant's disability was a factual cause is not sufficient to find that there was an adequate causal link between the Applicant's disability and his dismissal to conclude that his disability was the reason for it.

[113] As the LAC confirmed in *Jansen*, the criteria of legal causation, are based upon normative value judgments. The overriding consideration in the determination of legal causation is what is fair and just in the given circumstances. One must ask what was the most immediate, proximate, decisive or substantial cause of the dismissal. What most immediately brought about the dismissal? The proximate reason for the Applicant's dismissal was his incapacity and his inability to perform the tasks associated with the position he was employed in. It was not his disability per se, which at best was a contributing or subsidiary causative factor.

[114] Disability does not equate to incapacity and an employee can only be regarded as incapacitated if the employer cannot accommodate him or her or if the employee refuses an offer of reasonable accommodation.

[115] It is trite that an employer may dismiss an employee for incapacity in the sense of an inability to perform the job for which the employee was engaged, more so where such incapacity is of a permanent nature. In *casu,* it is common cause that the Applicant's last day at work was 7 June 2017 and that from 7 June 2017 until 31 October 2018, the Applicant was on sick leave. He did not return to work and did not tender his services for the said period as he was unfit for duty. It is further common cause that the Applicant's impaired vision was of a permanent nature and that his vision could not be restored.

[116] The Applicant was no longer able to do any job which required reading and writing and the Respondent cannot be expected to continue with an employment relationship with an employee who was unable to perform his duties and who was absent from work for a prolonged period.

[117] The Applicant requested to be assisted in "*another possible placement of employment where his skills and knowledge can be utilized with his limitations*". It is trite that an employer is not expected to create a post for a disabled and incapacitated employee but has to accommodate the employee if it is reasonably possible to do so. The Respondent's available vacant positions were not suitable for a person who could not perform any job which required reading and writing. The suitable alternative that was available, was not acceptable to the Applicant.

[118] The Applicant has not produced adequate evidence to prove that the treatment accorded to him in any way differed from the treatment accorded to other employees or that the reason for his dismissal was his disability.

[119] The more probable reason for his dismissal was his incapacity and inability to perform the job for which he was engaged and the Respondent's inability to accommodate him in another suitable position, alternatively his refusal to accept a suitable alternative position. The Respondent had a legitimate

reason for dismissing the Applicant and the proximate reason for his dismissal was his incapacity and not the fact that he was disabled.

Conclusion

[120] In short: this Court has to examine whether, upon an evaluation of all the evidence, the Applicant's disability was the dominant or most likely cause of his dismissal.

[121] Having assessed all the evidence presented, it is my view that the Applicant has not demonstrated that there is a credible possibility that his disability was the dominant or most likely cause of his dismissal.

[122] The Applicant failed to discharge the onus to show that he was indeed discriminated against for reasons relating to his disability. As the Applicant failed to discharge these evidentiary burdens, it is the end of his case.

[123] This Court has a broad discretion in awarding costs and in my view, the interests of justice and fairness will be best served by making no order as to costs.

[124] In the premises, I make the following order:

Order

1. The Applicant's claim is dismissed.
2. There is no order as to costs.

_____

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Advocate E Liebenberg
Instructed by:	Johanette Rheeder Inc Attorneys
For the Respondent:	Advocate V Mndebele
	Instructed by Giyose Attorneys