

# The Reasonable Accommodation of Employees with Cancer and their Right to Privacy in the Workplace



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## Abstract

The duty of employers to reasonably accommodate employees living with disabilities is fundamental and is invoked on a daily basis in response to various health conditions which employees experience, such as cancer. While executing this fundamental duty, employers must be mindful of other rights which employees have, such as the right to privacy. Employers run the risk of violating the employees' right to privacy in the process of accommodating them if the employer discloses confidential medical information which must be used only for the purpose of making accommodations for the employee concerned, in this context an employee with cancer. This paper focuses on the duty of employers to reasonably accommodate such employees, and the right to privacy of the employees. Further, this paper aims to investigate if a balance can be maintained between the duty of the employer to make such accommodations and the right to privacy of the employees.

## Keywords

Reasonable accommodation; cancer; employee; right to privacy; disability; employer; discrimination; substantive equality

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## 1 Introduction

The duty which is placed on employers to provide reasonable accommodation is a non-discriminatory mechanism in its constitutional form, and a juridical tool which is aimed at achieving substantive equality among people;<sup>1</sup> and in this context, specifically employees with cancer. The principle of reasonable accommodation serves as an integral part of and is the justification for direct or indirect discrimination which is fair. This is due to the fact that reasonable accommodation gives recognition to equality. This principle recognises that in order to achieve equality among people, it might be necessary to treat people differently.<sup>2</sup> In broad terms, reasonable accommodation entails taking positive steps in order to meet the needs of people who suffer from physical or psychological conditions which other people may not experience. If an employer takes positive steps to reasonably accommodate employees with disabilities, the employer cannot be viewed as acting discriminatorily; but instead his or her actions should be considered as positive steps taken towards eliminating any form of discrimination in the workplace. An employer must not violate the right to privacy of the employee with the disability while making such accommodations, the employee having disclosed his or her medical condition to the employer voluntarily and not as a legal duty. The employer must not use the information about the medical condition of the employee in an arbitrary manner which is unrelated to the duty to reasonably accommodate the employee, because this will amount to a violation of the right to privacy of the concerned employee.

## 2 The rationale for and the foundation of the duty of the employer to reasonably accommodate employees with cancer

In as much as employers are required to embrace diversity in the workplace, they are not expected to incur undue hardships in the process of embracing diversity.<sup>3</sup> The type of reasonable accommodation required will depend on the nature and essential functions of the job, the work environment and the nature of the specific impairment experienced by each individual concerned.<sup>4</sup> Reasonable accommodation on the part of the employer is

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<sup>1</sup> Bernard 2014 *PELJ* 2871.

<sup>2</sup> Ngwena *Disabled People and the Search for Equality* 460.

<sup>3</sup> Bernard 2014 *PELJ* 2880.

<sup>4</sup> BC Public Service Employee Relations Commission *Manager's Guide* 5.

based on three interrelated criteria which justify its purpose. Firstly, it must effectively remove the barriers or obstacles which prevent an individual employee who is otherwise qualified from being able to carry out his or her duties.<sup>5</sup> Secondly, the accommodation must allow the individual employee with a disability to enjoy equal access to the benefits and opportunities of employment, such as the right to promotion in the workplace.<sup>6</sup> Thirdly, employers can adopt the most cost-effective means which is consistent with the two criteria outlined above.<sup>7</sup>

These three criteria serve as yardsticks for use in determining if the duty to provide reasonable accommodation has been fulfilled on the part of the employer. In such consideration the court will take into account the rational and proportional relationship between the measure employed and the purpose it seeks to achieve,<sup>8</sup> which in the context of this study is to make it possible for employees with cancer to continue working, despite their medical condition, and to overcome any effect which their condition may possibly have on their ability to work.

In the court case of *MEC for Education, Kwazulu Natal v Pillay*,<sup>9</sup> the Constitutional Court stated that:

... reasonable accommodation requires that the employer must take positive measures such as removing access barriers, even if it means incurring additional hardships or expenses to ensure that all employees enjoy their right to equality.<sup>10</sup>

In the light of the above, Bernard argues that the duty of reasonable accommodation on the part of employers could either be positive, such as making alterations to the working environment to enable the employee with disability to work, or it could be negative, in cases where financial hardships can be incurred by the employer to effect the necessary alterations in the workplace in order to achieve equality in the workplace through reasonable accommodation.<sup>11</sup> Bernard also notes that the duty on the part of employers to reasonably accommodate employees is not absolute in the sense that no

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<sup>5</sup> BC Public Service Employee Relations Commission *Manager's Guide* 5-6.

<sup>6</sup> BC Public Service Employee Relations Commission *Manager's Guide* 6.

<sup>7</sup> BC Public Service Employee Relations Commission *Manager's Guide* 7.

<sup>8</sup> BC Public Service Employee Relations Commission *Manager's Guide* 7.

<sup>9</sup> *MEC for Education, Kwazulu Natal v Pillay* 2008 1 SA 474 (CC) (hereafter *MEC for Education, KZN v Pillay* case) para 73.

<sup>10</sup> *MEC for Education, KZN v Pillay* case para 73.

<sup>11</sup> Bernard 2014 *PELJ* 2881.

court can expect an employer to excessively incur expenses if it cannot reasonably accommodate the employee due to his or her state of health.<sup>12</sup>

Reasonable accommodation aims to balance the interests of the employer and the employee concerned by ensuring that there is equity in employment, in order to avoid a situation where one party benefits at the expense of the other. This conclusion is inherent in the dictum that for the accommodation to be reasonable there must be a rational connection between the measure being employed to provide such accommodation and the purpose which it seeks to achieve.

In *Department of Correctional Services v POPCRU*<sup>13</sup> the court found that there was no justification for the claim to reasonable accommodation on the basis that there was no relationship between the measure and the purpose which the measure sought to achieve.<sup>14</sup> This case involved a work policy in the Correctional Services Department which prohibited women from having dreadlocks in the workplace.<sup>15</sup> However, all the employees, both male and female, were expected to wear similar clothing because the policy on uniform was the same for both genders except in regard to the hairstyle of female employees.<sup>16</sup> The Department argued that the restriction applicable to female employees was justified as if they wore long hair such as dreadlocks this would put them at risk of being easily harmed by prison inmates.<sup>17</sup> The rebuttal was that short hair for female employees was not an inherent requirement for the job in terms of section 187(2) of the *Labour Relations Act* 66 of 1995.<sup>18</sup>

It was found that the employees were still exemplary officers despite wearing their hair in dreadlocks.<sup>19</sup> No evidence was submitted that the employees were less disciplined or performed their duties poorly as a result of their hairstyles. The discriminatory prohibition on dreadlocks was therefore found to be unfair, disproportionate and overly restrictive.<sup>20</sup> The court held that:

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<sup>12</sup> Bernard 2014 *PELJ* 2881.

<sup>13</sup> *Department of Correctional Services v POPCRU* 2011 32 ILJ 2629 (LAC) (hereafter *Department of Correctional Services v POPCRU* case) para 41.

<sup>14</sup> *Department of Correctional Services v POPCRU* case para 42.

<sup>15</sup> *Department of Correctional Services v POPCRU* case para 42.

<sup>16</sup> *Department of Correctional Services v POPCRU* case para 43.

<sup>17</sup> *Department of Correctional Services v POPCRU* case para 43.

<sup>18</sup> *Department of Correctional Services v POPCRU* case para 43.

<sup>19</sup> *Department of Correctional Services v POPCRU* case para 44.

<sup>20</sup> *Department of Correctional Services v POPCRU* case 2630.

[a] refusal to reasonably accommodate diversity and the lack of rationality in its measure aimed at the legitimate purpose of discipline, security and uniformity leads inescapably to the conclusion that the discriminatory prohibition on dreadlocks was unfair, disproportionate and overly restrictive.<sup>21</sup>

The abovementioned case clearly displays the extent of the operation of the duty to provide reasonable accommodation on the basis of diversity, although it was denied by the employer in this case.

Reasonable accommodation is a non-discriminatory principle in the sense that it ensures that employment equity is upheld in the workplace. Section 15(1) of the *Employment Equity Act* makes room for the designated employer to implement affirmative action measures in order to ensure that all suitably qualified people from designated groups are represented in all categories of employment in the workplace.<sup>22</sup> However, reasonable accommodation is not an affirmative action measure, although it can be used to ensure that equity is maintained in the workplace. Reasonable accommodation and affirmative action measures share similar goals such as to ensure that substantive equality is achieved in the workplace, but they are two different concepts which should not be mistakenly construed as one.<sup>23</sup>

Furthermore, section 5 of the *Employment Equity Act* provides that every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.<sup>24</sup> Section 15(2)(c) of the *Employment Equity Act* places a duty on employers to ensure that they provide reasonable accommodation for employees living with disabilities. The aim of such accommodation is to reduce the impact of the impairment on the person's capacity to fulfil the essential functions of the job, and ensure that there is a culture of equity in the workplace.<sup>25</sup> The duty of employers to reasonably accommodate employees emanates from section 9(2) of the *Constitution of the Republic of South Africa* (hereafter referred to as the *Constitution*), which states that equality entails the full and equal enjoyment of all rights and freedoms by all persons. As such, legislative and other measures designed to protect or advance people or categories of people who are disadvantaged by unfair discrimination may be implemented with an aim to promote the spirit of equality in the

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<sup>21</sup> *Department of Correctional Services v POPCRU* case para 44-45.

<sup>22</sup> Section 15(1) of the *Employment Equity Act* 55 of 1998.

<sup>23</sup> *Ngwena Disabled People and the Search for Equality* 461.

<sup>24</sup> Section 5 of the *Employment Equity Act* 55 of 1998.

<sup>25</sup> Section 15(2)(c) of the *Employment Equity Act* 55 of 1998.

workplace.<sup>26</sup> This is what is referred to as substantive equality, which simply means treating people equally while taking their background into account.

In the Constitutional Court case of *Minister of Finance v Van Heerden*,<sup>27</sup> the court reasoned that the legislation pertaining to substantive equality recognises that besides the uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systemic privilege which still exist.<sup>28</sup> The role of the *Constitution* is to enjoin us to dismantle them and to prevent the creation of new patterns of disadvantage. It is therefore important for the courts to scrutinise the complainants' situation in society in each case of equality claims. Furthermore, the courts should inquire into the complainants' history and vulnerability, as well as the history, nature and purpose of the discriminatory practice concerned, and whether it ameliorates or adds to the disadvantage experienced by a group in a real-life context, in order to determine its fairness in the light of the values of our *Constitution*.<sup>29</sup> In the assessment of fairness or otherwise, a flexible but situation-sensitive approach is necessary because of the shifting patterns of harmful discrimination and the stereotypical response in our evolving democratic society. The enquiry into unfair discrimination takes place in several stages, as outlined above.<sup>30</sup>

Therefore, in the context of patients with cancer as employees, their medical condition must not be isolated in assessing whether or not the employer has discriminated against them, because all employees are entitled to equality.<sup>31</sup> Employees with cancer are also protected by the *Employment Equity Act*, as they may experience long-term or short-term impairment as a consequence of the side-effects of the treatment administered to them. At times, cancer treatment such as chemotherapy may render patients unable

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<sup>26</sup> Section 9(2) of the *Constitution of the Republic of South Africa*, 1996. See further De Vos and Freedman *South African Constitutional Law* 421. They argue that the right to equality can best be described in two ways. Firstly, the right to equality does not entail a guarantee that all people should be treated identically all the time, regardless of their personal attributes or characteristics, social or economic status. The right should therefore be viewed as entailing more than a formal prohibition against discrimination. Secondly, the right to equality must guarantee more than equality before the law and must focus on the effects or impacts of legal rules or other differentiating treatment. The right to equality cannot therefore focus merely on whether two or more people have been treated in an identical manner by the legal rule or by the company or another individual concerned.

<sup>27</sup> *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) (hereafter *Minister of Finance v Van Heerden* case) para 26.

<sup>28</sup> *Minister of Finance v Van Heerden* case para 26.

<sup>29</sup> *Minister of Finance v Van Heerden* case para 27.

<sup>30</sup> *Minister of Finance v Van Heerden* case para 27.

<sup>31</sup> Kok 2001 TSAR 294-295.

to perform their duties effectively and result in their being categorised as being afflicted with a disability in terms of the *Employment Equity Act*.<sup>32</sup>

The question of whether a disease such as cancer amounts to a disability for the purposes of the *Employment Equity Act* has not been tested in our courts. However, people who suffer from HIV/AIDS and are thereby rendered unable to work can claim a disability grant under the *Social Assistance Act*.<sup>33</sup> It is possible to argue that since cancer has the potential to leave a person with a temporary or permanent disability in the form of a physical or a psychological impairment, then a person living with cancer could become unable to work and could surely claim a the grant under the *Social Assistance Act*, like a person with HIV/AIDS.<sup>34</sup> Whether cancer or HIV/AIDS amounts to a disability is a question of fact which will be determined by a court of law on the basis of the facts of each case, including the effect of the disease on the overall health of the individual. However, only time will tell whether health conditions such as cancer will be recognised as disabilities in our law. In England and the USA cancer is recognised as a progressive disease which can render an employee unable to work. and it thus amounts to a disability.<sup>35</sup> In those jurisdictions the law has responded to the societal challenge of cancer and hence its recognition as a progressive condition which can result to a disability.

After the cancer has developed, the inability of an employee with cancer to perform his or her duties is likely to be influenced by a number of factors such as the employee's age, the stage at which the cancer was diagnosed,

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<sup>32</sup> Section 5(1) of the *Employment Equity Act* 55 of 1998.

<sup>33</sup> Section 5 of the *Social Assistance Act* 13 of 2004 states that people who are living with HIV/AIDS which renders them unable to work are entitled to a disability grant. However, the grant is conditional on the employee concerned being unable to continue with work. The moment the medical condition of the employee improves through treatment with ARV's, then the disability grant of the employee concerned will terminate.

<sup>34</sup> Section 9 of the *Social Assistance Act* 13 of 2004 states the conditions in terms of which a person who suffers from HIV/AIDS can receive a disability grant, in circumstances where the HIV renders the person unable to work. The argument raised in this study is that cancer is a chronic disease which can render a person unable to work, just like HIV, and thus an employee with cancer whom the cancer has affected adversely can surely claim a disability grant.

<sup>35</sup> Refer to s 6(1) of the *Equality Act*, 2010, which states that a person is said to have a disability if he/she has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on the person's ability to carry out normal day-to-day activities. S 3 of the *American Amended Discrimination Act*, 2008 defines disability as a physical or mental impairment that substantially limits one or more major life activities of an individual, and record for such impairment is necessary for the purpose of this Act to prove the extent of the physical or mental impairment, in order to be considered as a disability.

the financial status and level of education of the patient, the physical demands of the job, and the presence of any other disease in the employee's body.<sup>36</sup> The reason for outlining these factors is that in certain instances employees with cancer can resume work after treatment and can even seek further employment.<sup>37</sup> However, in the case of physically demanding jobs, the position may be different.<sup>38</sup> Most employees with cancer who return to work appear to be those who are highly knowledgeable, skilled and well-educated.<sup>39</sup> Employees with cancer who don't know their rights regarding fair labour practice may be confronted with harsh and abusive circumstances when they return to work, owing to their lack of education and prior experience of the new circumstances.<sup>40</sup> Consequently, a large number of these uneducated employees end up by not returning to work, taking early retirement, or simply changing jobs.<sup>41</sup>

The issue of reasonable accommodation is relevant to jobs which are physically demanding as well; because reasonable accommodation would obviously be necessary in jobs which require physical skills and strength. It would be reasonable and justifiable not to put an employee with cancer in a physically demanding job. When it comes to providing reasonable accommodation on the part of employers, the major problem area has to do with employees with cancer.<sup>42</sup> They are usually reluctant to request reasonable accommodation because they are afraid of appearing as different; and also experience feelings of fear about their ability to work. Employees with cancer also fear having to disclose their health status as they anticipate that such disclosure will result in the violation of their right to privacy, as will be discussed below.<sup>43</sup> Some of these difficulties may be attributed to the fact that employees with cancer tend to not want to become a burden to the employer due to their condition. In this regard employees with cancer have common feelings which they may experience as feelings of guilt.<sup>44</sup> They are encouraged to overcome these negative emotions, because there is a legal duty that rests on the employer to accommodate their needs.<sup>45</sup> This paper is aimed at emphasising that employees with

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<sup>36</sup> Ganz *Cancer Survivorship* 272.

<sup>37</sup> Lindbohm *et al* 2004 *EJC* 2488.

<sup>38</sup> Cancer Council Australia date unknown [http://www.cancer.org.au/content/pdf/AboutCancer/support/workingwithcancer\\_sect2.pdf](http://www.cancer.org.au/content/pdf/AboutCancer/support/workingwithcancer_sect2.pdf).

<sup>39</sup> Cancer Journey Advisory Group *Research* 45.

<sup>40</sup> Doyal and Hoffman 2009 *CME* 458.

<sup>41</sup> Van Hoey 2017 <http://www.cancer.net/coping/relationships-and-cancer/cancer-and-workplace-discrimination>.

<sup>42</sup> Stergiou-Kita *et al* 2015 *J Cancer Surviv* 489.

<sup>43</sup> Stergiou-Kita *et al* 2015 *J Cancer Surviv* 490.

<sup>44</sup> Stergiou-Kita *et al* 2015 *J Cancer Surviv* 491.

<sup>45</sup> Stergiou-Kita *et al* 2015 *J Cancer Surviv* 492.



cancer do not have to feel that the employer is doing them a favour by providing reasonable accommodation, because in actual fact this is a legal duty which rests on the employer, provided that the cancer renders the employee unable to work, as outlined above.<sup>46</sup>

### **3 The essentials of the duty of the employer to provide reasonable accommodation in a general context**

The following paragraphs will be dedicated to discussing the main elements of reasonable accommodation in order to grasp understand the notion as it is defined in our law. Furthermore, the focus will shift slightly to highlight the role of knowledge in inducing the employee to claim the right to reasonable accommodation in the workplace. It is recognised that knowledge is power, and it is thus essential for all affected parties to understand what is required of them and to what extent they are protected by law. This discussion is aimed at establishing the exact nature and process of reasonable accommodation, especially in its practical rather than theoretical form.

#### **3.1 *The meaning of reasonable accommodation***

The question of what precisely constitutes reasonable accommodation on the part of the employer has not been adequately tested in the Labour Courts.<sup>47</sup> However, it may suffice to say that reasonable accommodation constitutes the act of making existing facilities more easily accessible; adapting existing equipment or acquiring new equipment for the purpose; re-organising workstations; providing specialised supervision; and restructuring work distribution, so that non-essential functions can be redirected to other people.<sup>48</sup> In a nutshell, reasonable accommodation refers to making the necessary changes in the workplace in order to ensure that an employee can perform his or her core employment duties effectively. It ought to be noted that the obligation which rests on the employer to provide reasonable accommodation is not absolute. This duty need not be fulfilled if it will cause the business of the employer to suffer.<sup>49</sup> This means that the employer will not need to make reasonable accommodation if the provision

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<sup>46</sup> Section 15(2)(c) of the *Employment Equity Act* 55 of 1998.

<sup>47</sup> Marumoagae 2012 *PELJ* 350.

<sup>48</sup> Marumoagae 2012 *PELJ* 351.

<sup>49</sup> Marumoagae 2012 *PELJ* 352.

thereof is found to be contrary to the operational needs or requirements of the company.<sup>50</sup>

The principle of reasonable accommodation was considered in *Kievits Kroon Country Estate v Mmoledi*.<sup>51</sup> In this case the employee was dismissed from work after taking leave for the purposes of training to be a traditional healer.<sup>52</sup> The employee applied for unpaid leave but the employer refused to grant the leave regardless of the employee's having submitted all the necessary documents pertaining to her initiation in support of her leave application.<sup>53</sup> Upon her return to work the employee was subjected to a disciplinary hearing and she was dismissed for misconduct on the basis that she acted unlawfully by absconding from work without the approval of the employer.<sup>54</sup> The employee took the matter to the CCMA, where the commissioner found the conduct of the employer to be unlawful, due to the fact that he did not exercise empathy towards and understanding of the cultural background of the employee. Therefore, the employer's refusal to grant the employee unpaid leave amounted to a failure to provide reasonable accommodation.<sup>55</sup> On review, the Labour Court found that the decision of the commissioner in favour of the employee was reasonable and dismissed the review application that had been initiated by the employer.<sup>56</sup> The matter was taken on appeal to the Labour Appeal Court. The court held that both parties were required to be realistic in relation to each other in order to ensure harmony in the employer–employee relationship, and to achieve a united society.<sup>57</sup> Accommodating one another was nothing other than asserting the spirit of "Ubuntu", which was part of the heritage of our society, and which ought to be upheld in all relationships. Accordingly, the appeal was dismissed with costs, on the basis that the employer failed to accommodate the employee's cultural and religious practices by refusing to grant her leave to undergo this practice.<sup>58</sup>

According to the approach adopted by the courts, employers ought to appreciate the kind of society in which we live. As there is a rapid increase

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<sup>50</sup> In terms of the inherent requirements of the job or the operational needs of the business the employer can dismiss the employee on this ground and will not be viewed as unfair dismissal in terms of the *Labour Relations Act* 66 of 1995.

<sup>51</sup> *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi* 2012 11 BLLR 1099 (LAC) (hereafter *Kievits Kroon Country Estate v Mmoledi* case) para 12.

<sup>52</sup> *Kievits Kroon Country Estate v Mmoledi* case 1099.

<sup>53</sup> *Kievits Kroon Country Estate v Mmoledi* case para 13.

<sup>54</sup> *Kievits Kroon Country Estate v Mmoledi* case para 14.

<sup>55</sup> *Kievits Kroon Country Estate v Mmoledi* case para 16.

<sup>56</sup> *Kievits Kroon Country Estate v Mmoledi* case para 16.

<sup>57</sup> *Kievits Kroon Country Estate v Mmoledi* case para 18.

<sup>58</sup> *Kievits Kroon Country Estate v Mmoledi* case para 18.

in the number of persons living with cancer; it is vital for employers to pay attention to this reality and for employees to also understand that they are obliged to do only what they reasonably can to accommodate them. In the case sketched above, it is clear that the court ruled in favour of the employee because the employer failed to reasonably accommodate the cultural beliefs of the particular employee. In the context of an employee with cancer, the courts are likely to find that an employer would be acting unreasonably if he or she were to fail to recognise that a particular employee with cancer required extended leave for the purposes of obtaining therapy and treatment.

The aspect of reasonable accommodation was best summed up in the court case of *Ontario Public Services Employees Union v Ontario (Ontario Human Rights Commission)*,<sup>59</sup> in which it was held that the most appropriate reasonable accommodation is one that definitely respects the dignity of the individual with a disability; one that meets the individual's needs; one that best promotes the integration and full participation of the individual concerned; and one that ensures that confidentiality is well maintained throughout.<sup>60</sup> Therefore, by accommodating an employee in this way the rights to equality and human dignity are effectively restored and upheld by the employer.<sup>61</sup> As this paper is aimed at ensuring that employees with cancer neither lose their right to enter into any form of occupation nor have their human dignity violated in the process, this paper endorses the description of what is termed appropriate accommodation as described in the *Ontario* case above.<sup>62</sup> The principle which is derived from this case is that basic knowledge and understanding of cancer is important in order to ensure that equity and human dignity is restored in the workplace, as protected by the *Constitution*.<sup>63</sup> In addition, employees also need to have knowledge of and understand the contents of their right to be reasonably

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<sup>59</sup> *Ontario Public Services Employees Union v Ontario (Ontario Human Rights Commission)* 2015 ONCA 495 (hereafter *Ontario Public Services Employees Union v Ontario* case). In this case an employee experienced unfair discrimination in the workplace. She was discriminated against on the basis of gender while working as a cook in a prison facility. The conduct of the employer was found to be unfair on the basis that it discriminated unjustly against the applicant just because she was a female, and on the grounds that she was being treated differently from her male colleagues.

<sup>60</sup> *Ontario Public Services Employees Union v Ontario* case para 12.

<sup>61</sup> *Ontario Public Services Employees Union v Ontario* case para 12.

<sup>62</sup> *Ontario Public Services Employees Union v Ontario* case para 13.

<sup>63</sup> The *Constitution of the Republic of South Africa*, 1996 protects the right to human dignity in terms of s 10, and the right to enter into trade or occupation is protected in terms of s 23. Also see the *Ontario Public Services Employees Union v Ontario* case 497.

accommodated by the employer, as this forms a constituent part of ensuring that their rights are effectively enforced.

### **3.2 *The role of knowledge regarding workplace accommodation***

First and foremost, knowledge regarding workplace accommodation is crucial to starting the process. This entails that the employee know about his or her right to request reasonable accommodation, and that the employer understand his or her corresponding duty to provide for such accommodation.<sup>64</sup> If both parties are knowledgeable on this issue, this should ensure that the employee is successfully re-integrated in the workplace, as their mutual knowledge would be conducive to open communication between them.<sup>65</sup>

### **3.3 *The employer's ability to provide reasonable accommodation***

Part of the process of enforcing the employee's right to be reasonably accommodated is that an affected employee has to establish through a discussion with the employer whether the employer has the ability to provide such reasonable accommodation or not based on operational requirements of the company. The employee will first have to request the provision of reasonable accommodation in order to initiate the necessary communication between the parties; and thereafter will be able to establish whether his or her request can be met.<sup>66</sup> In return, this process will allow for an understanding between the parties, and for the employer to assess his or her position with regards to providing reasonable accommodation without incurring any form of undue hardships. The reasonable accommodation to be provided should be beneficial for both the employer and the employee.<sup>67</sup> Thus, to facilitate this mutual benefit the two parties ought to negotiate their approach to the matter and finally agree on the way forward.

### **3.4 *The negotiation of reasonable accommodation***

An important factor to be taken into account is the negotiation of reasonable accommodation. This entails that the employer and the employee with cancer ought to enter into a form of a negotiation regarding their respective needs in order to reach a mutual understanding of how best to address them, and finally agree on a reasonable accommodation plan which benefits

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<sup>64</sup> Fesko 1999 [https://www.communityinclusion.org/article.php?article\\_id=77](https://www.communityinclusion.org/article.php?article_id=77) 4.

<sup>65</sup> Fesko 1999 [https://www.communityinclusion.org/article.php?article\\_id=77](https://www.communityinclusion.org/article.php?article_id=77) 4-5.

<sup>66</sup> Fesko 1999 [https://www.communityinclusion.org/article.php?article\\_id=77](https://www.communityinclusion.org/article.php?article_id=77) 6.

<sup>67</sup> Shaw and Feuerstein 2004 *J Occup Rehabil* 216.

both of them.<sup>68</sup> Smaller companies and those companies that are struggling to stay financially afloat tend to have difficulty in providing reasonable accommodation for employees with cancer; hence the proposed process of negotiation between the parties is important.<sup>69</sup> This could be described as a give-and-take process as it is not aimed at unduly benefitting one party at the expense of the other. Ultimately, the process is designed to ensure that equity is maintained by allowing both the employer and the employee with cancer to receive a benefit out of the facilitation of reasonable accommodation.

#### **4 Reasonable accommodation in the context of employees with cancer**

In the context of cancer, reasonably accommodating an employee with cancer entails conducting a four-staged inquiry in order to ensure that the employee is fully re-integrated into the workplace. The elements described above as forming part of the concept of reasonable accommodation remain relevant in the case of employees with cancer. However, the following elements are specifically applicable to the process of reasonably accommodating an employee with cancer from a European perspective, and could serve as the foundation for the South African position.

##### **4.1 A gradual return to work and flexibility**

Firstly, an employee with cancer should return to work gradually. This requires that there be flexibility in re-integrating him or her into the workplace, as he or she will have been away from work for a while.<sup>70</sup> Progressive re-integration consists of allowing the employee with cancer to do fewer hours of work and facilitating flexibility, such as allowing him or her to take work home where possible. This would surely assist with building both the physical and mental strength of the employee with cancer and would be beneficial to his or her health.<sup>71</sup> During the process of re-integrating the employee in the workplace, his or her right to privacy must also not be compromised, as the employer must allow for the employee with cancer to take medication in a private area.<sup>72</sup> This would boost the self-confidence of the employee and facilitate a speedy recovery. Furthermore, this might help in avoiding the situation where the employee has to take

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<sup>68</sup> Shaw and Feuerstein 2004 *J Occup Rehabil* 217.

<sup>69</sup> Ganz *Cancer Survivorship* 21-22.

<sup>70</sup> Kennedy 2007 *Eur J Cancer Care* 17.

<sup>71</sup> Kennedy 2007 *Eur J Cancer Care* 18.

<sup>72</sup> Kennedy 2007 *Eur J Cancer Care* 18.

medication in front of his or her colleagues, who may possibly make the employee feel inferior by having to answer questions about his or her health condition.<sup>73</sup>

#### **4.2 Modifications of work and performance expectations**

Secondly, the duty of the employer to modify the work and performance expectations of the employee requires the elimination of some duties which the employee with cancer used previously to carry out.<sup>74</sup> While this is being done it must be kept in mind that the employee is still recovering and possibly undergoing treatment; and thus the employer must be reasonable enough to accept that work which previously used to be completed in an hour could now probably be done in one hour and thirty minutes instead.<sup>75</sup>

#### **4.3 Retraining the employee with cancer**

Thirdly, the employer has a duty to train the employee with cancer again upon his or her return to work. It is important to note that training the employee upon his or her return does not constitute demotion, which would be an unfair labour practice.<sup>76</sup> In this context, the purpose of training the employee once again has to do with assisting the employee to do his or her work, with the assistance of a mentor or colleague.<sup>77</sup> The duty to train the employee all over again is normally dependent on the duration of the period for which the employee with cancer has been away from work. The longer the employee with cancer has been away from work, the more likely it is that he or she will require training. Employees usually react well to this retraining, as it helps to ensure that they are re-integrated in the workplace effectively.<sup>78</sup>

#### **4.4 Modification of the physical workplace environment**

Modifying the physical workplace environment and providing adaptive aids and technologies for employees with cancer is a duty that entails removing any obstacle which might prevent the employee from doing his or her job; as well as providing the relevant employee with a conducive work-station.<sup>79</sup> For example, if the work of an employee who suffers from a physical

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<sup>73</sup> Kennedy 2007 *Eur J Cancer Care* 18.

<sup>74</sup> Kennedy 2007 *Eur J Cancer Care* 18-19.

<sup>75</sup> Kennedy 2007 *Eur J Cancer Care* 20.

<sup>76</sup> Refer to Mehnert 2011 *Crit Rev Oncol Hematol* 109; Kennedy 2007 *Eur J Cancer Care* 20.

<sup>77</sup> Kennedy 2007 *Eur J Cancer Care* 21.

<sup>78</sup> Kennedy 2007 *Eur J Cancer Care* 21.

<sup>79</sup> Kennedy 2007 *Eur J Cancer Care* 22.

deformity requires moving up and down stairs, then the employer can recommend that he or she should use a lift or should be stationed where he or she does not need to move up and down when conducting his or her duties. This will amount to reasonable accommodation. With regard to the physical environment, reasonable accommodation might include the adaptation of various features such as the modification of the office temperature. It might also be necessary to change the working shifts to accommodate the employee's medical check-up routine, to permit the employee to work from home, and to call a doctor although the general policy of the employer might prohibit the use of the company's telephone for personal reasons.<sup>80</sup>

The focus of the paper will now shift to the right to privacy of the employee with cancer, while the employer is providing reasonable accommodation to the employee concerned.

## 5 The right to privacy

Before discussing the right to privacy in South African law, it is important to note that the *Constitution* entrenches this right in section 14.<sup>81</sup> Furthermore, it is necessary to take into consideration that the right to privacy is also upheld and protected by various statutes. These include the *Protection of Personal Information Act 4 of 2013* and the *National Health Act 61 of 2003*.<sup>82</sup> For the purposes of this paper only the common law and constitutional position with regard to the right to privacy will be explored. Furthermore, it is important for the reader to take note of the fact that the right to privacy is broad and a lot of cases have come before our courts; but for the purposes of this paper, only the landmark cases which form part of the backbone of the right to privacy in terms of both the common law and the Constitution will be referred to.

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<sup>80</sup> Kennedy 2007 *Eur J Cancer Care* 22.

<sup>81</sup> Section 14 of the *Constitution of the Republic of South Africa*, 1996 and s 2(a) of the *Protection of Personal Information Act 4 of 2013*, which set out the purpose of the Act by stating that the aim of the Act is to give effect to the constitutional right to privacy by safeguarding personal information when processed by a responsible party, subject to justifiable limitations that are aimed balancing the right to privacy against other rights, particularly the right to access to information; and by protecting important interests, including the free flow of information within the Republic and across international borders.

<sup>82</sup> Section 2 of the *Protection of Personal Information Act 4 of 2013* and s 14 of the *National Health Act 61 of 2003*.

### 5.1 *The common law definition of privacy*

Under common law, every person has personality rights such as the rights to physical integrity, freedom, reputation, dignity and privacy.<sup>83</sup> According to Neethling, privacy is defined as an individual condition of a person's life, which is characterised by seclusion from the public and publicity.<sup>84</sup> As a person may determine that certain personal facts are to be excluded from the knowledge of other people, this means that the right to privacy is violated when a person learns of private information about another person without the consent of the latter.<sup>85</sup>

The right to privacy has long been entrenched in the common law, in which everyone has personality rights, which include the right to physical integrity, freedom, reputation, dignity and privacy.<sup>86</sup> The right to privacy has been recognised as an independent personal right that applies to both natural persons and juristic persons, such as companies.<sup>87</sup> The violation of the right to privacy is determined by the court in terms of the reasonableness standard in terms of the interests of the community in order to guard against any form of injustice perpetrated against an individual or a company.<sup>88</sup> Privacy underpins dignity, since a violation of the right to privacy infringes on the right to dignity.<sup>89</sup> This is because these two rights relate to each other, in the sense that the right to privacy ensures that one is entitled to maintain the confidentiality of information the publication of which may damage the dignity of the person.<sup>90</sup>

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<sup>83</sup> Neethling, Potgieter and Visser *Law of Personality* 31.

<sup>84</sup> Neethling, Potgieter and Visser *Law of Personality* 32.

<sup>85</sup> Roos 2008 *PELJ* 62.

<sup>86</sup> Roos 2008 *PELJ* 62-63.

<sup>87</sup> Neethling, Potgieter and Visser *Law of Personality* 217.

<sup>88</sup> Neethling, Potgieter and Visser *Law of Personality* 218.

<sup>89</sup> Section 10 of the *Constitution of the Republic of South Africa*, 1996 states that everyone has the right to dignity and to have his or her dignity respected and protected.

<sup>90</sup> See *C v Minister of Correctional Services* 1996 4 SA 292 (T) 293. In this case the plaintiff was a prisoner in the custody of the defendant, which was the department of correctional services in Johannesburg. The plaintiff was working in the kitchen to help with the preparation of food for other inmates. The Department of Correctional Services (appearing as the defendant) informed all inmates that it would conduct an HIV/AIDS testing session for all inmates and they were at liberty to refuse to undergo the tests should they so wish. In this case the plaintiff claimed that his right to privacy was violated on the basis that he was told that he had HIV in the presence of other inmates and was not provided with all the necessary counselling. The court held that indeed the defendant department had violated the right to privacy of the plaintiff on the basis that the informed consent of the plaintiff had not been obtained and the plaintiff had not been provided with all the counselling necessary to enable him to deal with the trauma. The people who conducted the testing had not been qualified



This rich history which emanates from common law with regard to the right to privacy and other related rights such as dignity and reputation clearly affirms Burchell's view that "the common law of privacy in South Africa still provides the lion's share when it comes to the right to privacy standard".<sup>91</sup> This is despite the fact that currently, in the new constitutional dispensation, the rights to privacy, dignity, reputation and freedom are recognised individually and independently in order to give them greater import, which was not the position in common law, where these rights were treated collectively rather than individually.<sup>92</sup>

## **5.2 Legality of the common law right to privacy in the constitutional era**

The right to privacy has long been protected in our law, dating back from the time it was inherited from the Roman law system, in which the *actio iniuriarum* was provided as a remedy in cases where there was an invasion of the sanctity of a person's home.<sup>93</sup> This was the position before the constitutional dispensation came into existence and provided for the right to privacy in terms of section 14 of the *Constitution*.<sup>94</sup> Two examples of case decisions dealing with the common law right to privacy can be found in the 1900s. An English case will be discussed first and a South African case thereafter.

In *Tolly v Fry and Sons Ltd*<sup>95</sup> the plaintiff was an amateur golfer and the defendant was a producer of candy. The defendant, in his advertisement of chocolates, showed the plaintiff with a bar of chocolate protruding from his

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medical personnel but staff members of the department, and this was inappropriate. The right to privacy of the plaintiff had been compromised in the sense that he had been told of his status in front of other inmates and this could result in his experiencing discrimination and marginalisation from other inmates owing to his HIV status. The defendant department was ordered to compensate the plaintiff for all the loss he had suffered as a result of the violation of his right to privacy.

<sup>91</sup> Burchell 1999 SALJ 1.

<sup>92</sup> Section 14 of the *Constitution of the Republic of South Africa*, 1996 protects the right to privacy; s 10 of the *Constitution* protects the right to human dignity and s 12 of the *Constitution* protects the right to freedom and security of everyone.

<sup>93</sup> Neethling, Potgieter and Visser *Law of Personality* 253. The remedy with regard to the *actio iniuriarum*, which developed from Roman law, was established and used to recover damages (*Solutium*) based on the intentional infringements of one of the acknowledged personality rights. In order to succeed with this remedy, an infringement of a legally acknowledged interest of personality is required and such infringement has to be intentional in the process. Refer further to *Jackson v NICRO* 1976 3 SA 1 (A) 11, in which the history and purpose of this Roman remedy was clearly outlined and applied.

<sup>94</sup> Section 14 of the *Constitution of the Republic of South Africa*, 1996.

<sup>95</sup> *Tolly v Fry and Sons Ltd* [1931] AC 333; [1931] UKHL 1 (hereafter *Tolly v Fry* case).

back pocket.<sup>96</sup> This advertisement was not done with the consent of the plaintiff, and the plaintiff challenged it on the basis that it violated his right to dignity and privacy. Furthermore, the plaintiff argued that the advertisement was been composed and published without his consent; and that it had the potential to destroy his golfing career, as he was still an amateur.<sup>97</sup> The court found the conduct of the defendant as unlawful and ordered the defendant to compensate the plaintiff for the loss or harm which he had suffered as a result of the advertisement.<sup>98</sup>

In the case of *O'Keeffe v Argus Printing and Publishing Company Ltd*<sup>99</sup> the plaintiff was a well-known radio personality who consented to the publication of her photograph, taken at a pistol range, to be used for a newspaper article by the defendant company.<sup>100</sup> The defendant company, however, used the photograph of the plaintiff for advertising purposes, which was not what the plaintiff consented to in the first place. Watermeyer AJ held the view that the conduct of the respondent company was unlawful and that the respondent acted contrary to the right to privacy of the plaintiff. The respondent was ordered to compensate the plaintiff for the violation of her right to privacy with regard to the derogatory advertisement.<sup>101</sup>

### **5.3 The right to privacy in terms of section 14 of the Constitution of the Republic of South Africa**

Section 14 of the *Constitution* states that everyone has the right to privacy, which includes the right not to have their person or their home searched, their property searched, their possessions seized, or the privacy of their communications infringed.<sup>102</sup> Schoeman defines privacy as a state or condition of limited access to a person.<sup>103</sup> The right to privacy was also considered in *National Media Ltd ao v Jooste*.<sup>104</sup> Harms AJ explained that the right to privacy can best be described as an individual condition of life characterised by its being kept from the public and publicity. This condition includes all personal facts which the individual has determined to be excluded from the knowledge of other people and in respect of which he or

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<sup>96</sup> *Tolly v Fry* case 334.

<sup>97</sup> *Tolly v Fry* case 334.

<sup>98</sup> *Tolly v Fry* case 334-335.

<sup>99</sup> *O'Keeffe v Argus Printing and Publishing Company Ltd* 1954 3 SA 244 (C) (hereafter *O'Keeffe v Argus Printing and Publishing Company* case) 245.

<sup>100</sup> *O'Keeffe v Argus Printing and Publishing Company* case 244.

<sup>101</sup> *O'Keeffe v Argus Printing and Publishing Company* case 245.

<sup>102</sup> Section 14 of the *Constitution of the Republic of South Africa*, 1996.

<sup>103</sup> Schoeman *Philosophical Dimensions of Privacy* 5.

<sup>104</sup> *National Media Ltd ao v Jooste* 1996 3 SA 262 (A) (hereafter *National Media Ltd ao v Jooste* case) 263.

she wills that they be kept private.<sup>105</sup> *Kennedy and Arnold v Ireland*<sup>106</sup> takes the discussion of the right to privacy further by stating that:

... though not specifically guaranteed by the Constitution, the right to privacy is one of the fundamental personal rights of the citizen which flow from the Christian and democratic nature of the state. The nature of the right to privacy must be such as to ensure the dignity and freedom of an individual in the type of society envisaged by the Constitution, namely a sovereign, independent and democratic society.<sup>107</sup>

This reasoning by the court surely infers the position of the South African judiciary in this democratic state, which will protect the right to privacy of an individual from other people.

## **6 The duty of the employee to disclose and its effect on the employer's duties to provide reasonable accommodation**

An employee can voluntarily disclose to the employer that he or she has been diagnosed with cancer, and to further disclose the effect of the disease on his or her capacity.<sup>108</sup> The employee with cancer is strongly encouraged to disclose his or her cancer status in order to allow the employer to assist the employee with the necessary reasonable accommodation. This disclosure will ensure that the employer is in a position to make the necessary

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<sup>105</sup> *National Media Ltd ao v Jooste* case 262-263.

<sup>106</sup> *Kennedy and Arnold v Ireland* [1987] IR 587.

<sup>107</sup> *Kennedy and Arnold v Ireland* [1987] IR 587.

<sup>108</sup> See Devane *Making the Shift* 11 and Herbst *CANSA Guidelines* 14-16, which state that the employee needs to disclose as soon as possible to the employer that he or she has been diagnosed with cancer. The employee must explain to the employer the treatment that he or she will be taking and the effect of this treatment on the ability of the employee to perform his or her duties. This will enable the employer to understand the capabilities of the employee and at some stage to make necessary changes to the working conditions of the employee. This social responsibility is in line with s 9 of the *Constitution*, which promotes equality and prohibits unfair discrimination. This is what CANSA strives to achieve through robust awareness of education as to what cancer is, by communication between the employer and the employee with cancer. If this is the position then the objective of eliminating discrimination both in society in general and in the work place in particular will surely be achieved, through knowledge and awareness about cancer; but all of this starts with communication as it has been achieved in the fight against HIV/AIDS through greater awareness and education. The employee is expected to come up with solutions and explain how he or she is going to cope during this period. The employee can also ask for assistance on the part of the employer to allow him or her to effectively do his or her duties. These social responsibilities ascribed by CANSA to the employee resemble the duties which are set out by the *Basic Conditions of Employment Act* as pertaining to the employee. It is clear that CANSA has ensured that it will be easy for both the employee and the employer to accept these responsibilities because they are in line with the Basic Conditions of Employment and do not require the employer to do anything extraordinary which is contrary to his or her business interests or contrary to the provisions of the law.

arrangements to accommodate the employee in the work place, because the employer will now be aware of the medical condition of the employee.<sup>109</sup> However, this disclosure of the employee is protected in terms of section 14 of the *Constitution*, which refers to a person's right to privacy.

This means that the disclosure which the employee with cancer provides to the employer binds the employer not to disclose this information to people outside the employment setup, as that would amount to unlawful disclosure and would constitute a violation of section 14 of the *Constitution*.<sup>110</sup> However, any disclosure by the employer to fellow employees so as to assist the employee with re-integration in the workplace will not amount to the violation of section 14 of the *Constitution*.<sup>111</sup> In this context *Hyundai Motor Distributors v Smit* serves as the basis. The Constitutional Court stated therein that:

... the right to privacy is implicated whenever a person has the ability to decide what he or she wishes to disclose to the public [;] and the expectation that such decision will be respected is reasonable.<sup>112</sup>

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<sup>109</sup> Section 15(2)(c) of the *Employment Equity Act* 55 of 1998.

<sup>110</sup> The right to privacy is a fundamental constitutional right which is protected in terms of s 14 of the *Constitution of the Republic of South Africa*, 1996.

<sup>111</sup> In this case the employee with cancer must provide consent for the employer to disclose his or her medical condition to fellow employees in order to safeguard the right of the employee to privacy. See s 14 of the *Constitution of the Republic of South Africa*, 1996.

<sup>112</sup> In *In Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 1 SA 545 (CC) 545. This case dealt with an important issue regarding the circumstances under which judicial officers may grant a warrant of search and seizure for the purposes of investigating criminal activity. The matter arose when the respondents, including Mr Rautenbach and the "Wheel of Africa" group of companies applied to the Transvaal High Court for relief following a raid on their offices in November 1999 during which a large quantity of documents and computer records were seized. In the High Court, Southwood J declared s 29(5) read with ss 28(13) and (14) of the *National Prosecuting Authority Act* 32 of 1998 ("the Act") unconstitutional to the extent that these provisions permitted the authorisation of a search warrant by a judicial officer in the absence of reasonable grounds to suspect that an offence had been committed. The matter was referred to the Constitutional Court for confirmation of the order declaring these provisions unconstitutional. The appellants lodged an appeal against this order. The Act creates a framework for the establishment of specialised bodies, called Investigating Directorates, to investigate certain specified offences. Three Investigating Directorates have been established since the commencement of the Act. In order to fulfil their mandate of successfully investigating and ultimately prosecuting offenders of these specific crimes, Investigating Directorates may conduct two types of investigatory procedure, an "inquiry" and a "preparatory investigation". S 29 grants the Investigating Directorates powers to search and seize property, in order to facilitate its investigations. Limitations are placed by the Act on the exercise of such powers and one of these is a requirement that the search and seizure of property must occur only once a

Currently, in the new constitutional dispensation, there are various court cases that serve as precedent in protecting the right to privacy in our law, and which ought to be discussed in order to give a comprehensive layout of the constitutional right to privacy and the manner in which it is upheld by the

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warrant has been issued by a judicial officer. A search warrant may be granted if the evidence before the judicial officer meets an appropriate standard. This standard in the context of an inquiry clearly requires a reasonable suspicion that a specified offence has been committed. The exact nature of the standard set by s 29(5) in the context of a preparatory investigation and the constitutional validity thereof was the subject of challenge in this case. The Constitutional Court, in a unanimous decision delivered by Langa DP, declined to confirm the order of the High Court. It was held that the right to privacy is clearly violated in a search and seizure operation envisaged by the Act. However, according to a proper interpretation of s 29(5), an adequate justificatory basis has to be provided for the suspicion that an offence has been committed before a judicial officer may authorise a search warrant for the purposes of a preparatory investigation. Langa DP held that the section provides sufficient safeguards against an unwarranted invasion of privacy and thus meets the requirements of the limitations clause. In order to reach the conclusion that s 29(5) was consistent with the Constitution, a proper interpretation of this section had to be arrived at. This interpretive exercise had to be performed in the light of the principle of constitutional interpretation that judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section. Under the new constitutional order, statutes must be interpreted through the prism of the Bill of Rights and, in particular, in light of its 'spirit, purport and objects'. Langa DP went on to undertake a detailed analysis of the relevant provisions. Upon a reading of s 29(5) in the context of a preparatory investigation, it appeared that there was indeed a requirement that a judicial officer should issue a warrant only where there are reasonable grounds to believe that an article connected with a preparatory investigation is on certain specific premises. The Act was, however, not explicit regarding the class of offences in respect of which the reasonable suspicion must exist. The purpose of a preparatory investigation is to determine whether there are reasonable grounds to believe that a specified offence - which falls within the jurisdiction of an Investigating Directorate - has been committed. It is clear that, as a result, a precondition for the issue of a warrant for the purposes of a preparatory investigation must be something less than a reasonable suspicion that a specified offence has been committed. There could be instances where an Investigating Directorate wishes to search and seize property for the purposes of a preparatory investigation in order to determine whether an offence that has come to its attention is in fact a specified offence that falls within its jurisdiction. In those circumstances, there may well be a reasonable suspicion that an offence, which might be a specified offence, has been committed. Thus, a requirement that there be reasonable grounds to suspect that an offence had been committed is not inconsistent with the purpose of a preparatory investigation. The effect of this decision is that the Act is to be read in future by judicial officers as conferring on them the authority to grant search and seizure warrants for purposes of a preparatory investigation only in circumstances where there are reasonable grounds to believe that an offence, which might be a specified offence, has been committed. In such circumstances, a balance is struck between protecting the right to the privacy of individuals and promoting the important interest of the state in the effective investigation of criminal activity so as to curb the high incidence of crime in our society. The appeal accordingly succeeded and the court declined to confirm the order of the High Court.

courts. Furthermore, one also has to account for court cases which specifically dealt with the aspects of how to balance the employee's right to privacy with his or her duty to disclose certain conditions such as cancer.

For example in *Mistry v Interim National Medical and Dental Council*<sup>113</sup> a raid had been carried out in the surgery of a Dr Mistry in Pinetown by an inspector and a health official without Dr Mistry's consent and knowledge.<sup>114</sup> They seized medicines and other health equipment from his medical centre, and as a result of this Dr Mistry brought the matter to court in order get a ruling on the constitutionality of section 28 of the *Medicines and Related Substance Act Control Act* 101 of 1965. He further claimed for the items which were taken from his medical centre during this search to be returned to him; and finally he argued that the conduct of the inspector and health official was in actual fact violating his right to privacy.<sup>115</sup>

Sachs J delivered the unanimous judgment in which he held that the provisions which are in place to guide the approach of state officials when entering the private property of civilians are important in a democratic society, as against in a police state.<sup>116</sup> He held further that these provisions secure respect for people's right to privacy, while at the same time ensuring that police officers act within the boundaries of the law and do not act as they please. In passing, Sachs J noted that South Africa has a rich history of police brutality and anarchy, which had had dire consequences of violating the human rights to privacy and dignity, and he emphasised that such conduct was not acceptable in the new constitutional dispensation.<sup>117</sup> The protection of the right to privacy of all citizens was important and fundamental.

Section 28(1) of the *Medicines and Related Substance Control Act* grants inspectors a wide scope of powers to enter into the private dwellings of people and is undoubtedly unconstitutional because it contravenes the

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<sup>113</sup> *Mistry v Interim National Medical and Dental Council* 1998 4 SA 1127 (CC) (hereafter *Mistry v Interim National Medical and Dental Council* case), the constitutionality of s 28(1) of the *Interim National Medical and Dental Council Act* 101 of 1965 (*Medicines Act*), which authorises inspectors of the institution to enter any premises, vessels, cars and aircraft to search and seize medical equipment and medicines on a reasonable belief that illegal activities are being committed. This compromised the right to privacy as provided for in terms of s 14 of the then Interim Constitution.

<sup>114</sup> *Mistry v Interim National Medical and Dental Council* case para 14.

<sup>115</sup> *Mistry v Interim National Medical and Dental Council* case para 14.

<sup>116</sup> *Mistry v Interim National Medical and Dental Council* case para 15.

<sup>117</sup> *Mistry v Interim National Medical and Dental Council* case para 15.

*Constitution* as it undermines and compromises people's right to privacy.<sup>118</sup> The claim instituted by Dr Mistry regarding the violation of his right to privacy and for the return of the goods which were taken during the search was rejected by the court.<sup>119</sup> The reason for the court's rejection of the claim was because his right to privacy had not been violated as the inspector had not communicated the information about the search to third parties; and further, Dr Mistry had failed to prove that the law in terms of which these officials had acted was in actual fact invalid at the time the goods were taken.<sup>120</sup> In this case is clear that Dr Mistry failed to discharge his onus of proof on a balance of probabilities that the health inspector acted unlawfully.

## **7 Balancing the employee's right to privacy with the employee's option to disclose his or her medical condition**

An employee with cancer who discloses his or her health condition to the employer surely expects a level of respect and tolerance on the part of the employer in order to maintain a good working relationship with the employer and fellow employees. However, in practice employees with cancer are cautious when it comes to disclosing their medical condition to their employers,<sup>121</sup> since they fear being categorised or stereotyped as people who have cancer.<sup>122</sup> Employees with cancer are typically reluctant to disclose their medical condition to their employers because they believe that their employers and fellow employees will treat them differently once they know about their medical condition. Disclosure makes them less attractive for job opportunities, as employers are likely to find it difficult to provide employees with cancer with reasonable accommodation in order for them to function well in the workplace.<sup>123</sup>

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<sup>118</sup> *Mistry v Interim National Medical and Dental Council* case 886 and s 28(1)(a) of the *Medicines and Related Substance Control Act* 101 of 1965 states that a health inspector may enter a place or premises from which a person authorised under that Act to compound or dispense medicines or scheduled substances or from which the holder of a licence as contemplated in s 22C(1)(b) conducts business or any premises, vehicle, place, vessel or aircraft if he or she has reason to suspect that an offence in terms of that Act has been or is being committed at or in such premises, place, vessel or aircraft or that an attempt has been made or is being made there to commit such an offence.

<sup>119</sup> *Mistry v Interim National Medical and Dental Council* case 886.

<sup>120</sup> *Mistry v Interim National Medical and Dental Council* case 888.

<sup>121</sup> *Martinez Childhood Cancer Survivors Workplace Experiences* 19.

<sup>122</sup> *Martinez Childhood Cancer Survivors Workplace Experiences* 19.

<sup>123</sup> *Martinez Childhood Cancer Survivors Workplace Experiences* 20.

Despite all these challenges which employees with cancer experience when it comes to disclosing their medical condition to employers, they are encouraged to disclose their medical condition, because a failure to do so can yield negative results for them. Managing a dangerous condition such as cancer can be burdensome on an isolated individual, and the stress could result in the loss of the psychological resources necessary for effective performance of a job, and necessary also to assist in the overall healing process.<sup>124</sup> This is what Wegner and Lane describe as the "secrecy cycle of cancer", which is very consuming and detrimental to the overall health of the individual and must be avoided at all costs.<sup>125</sup> One is compelled by this line of reasoning to agree with the sentiments of Collins and Miller, who argue that an employee with cancer who discloses that he or she has cancer is relieved of the burden of managing a displaced identity.<sup>126</sup> Disclosure can yield positive results for the employee, including job satisfaction, less job anxiety, and a greater commitment to working. These factors have been proven to lead to the speedy recovery of the employee with cancer. Working should be seen as a component of the regimen for treating cancer.<sup>127</sup>

In *C v Minister of Correctional Services*,<sup>128</sup> the plaintiff was working as a cook in prison while serving his sentence. One day all prisoners were informed about an HIV/AIDS test which everyone needed to do for purposes of screening for HIV and other sexually transmitted diseases. Emphasis was placed on the right of the prisoners to refuse to undergo such tests if they so wished and the plaintiff went for testing with the assistance of a fellow prisoner, where the test showed him to be HIV positive.<sup>129</sup> The plaintiff instituted a claim against the defendant on the basis of the violation of his right to privacy. He stated that his right to privacy had been violated as he had not provided informed consent to undergo such a test in the first place. The defendant argued that the Department had adopted the concept that informed consent was a prerequisite for testing prisoners and specified the norms which had been applicable before this incident took place.<sup>130</sup>

Judge Kirk-Cohen rejected the argument raised by the defendant on the basis that the information about the test, its purpose and the right to refuse

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<sup>124</sup> Martinez *Childhood Cancer Survivors Workplace Experiences* 20-21.

<sup>125</sup> Wegner and Lane *Emotion, Disclosure and Health* 25.

<sup>126</sup> Collins and Miller 1994 *Psychol Bull* 457.

<sup>127</sup> Ashforth and Humphrey 1993 *Acad Manag Rev* 88.

<sup>128</sup> *C v Minister of Correctional Services* case 292.

<sup>129</sup> *C v Minister of Correctional Services* case para 20.

<sup>130</sup> *C v Minister of Correctional Services* case para 20.



to submit to the test had been communicated to the plaintiff as a member of a group of prisoners standing in a row in a passage, with no privacy and no time to reflect.<sup>131</sup> What had been repeated to each prisoner in the consulting room had not been said by anyone trained in counselling and had also not been said privately but in the presence of fellow prisoners.<sup>132</sup> This clearly showed that the plaintiff had not consented to the test in the first place, and thus the conduct of the defendant amounted to the violation of the right to privacy of the plaintiff as protected by the *Constitution*.<sup>133</sup>

Another case in point that serves as authority in protecting the right to privacy in the health context is *NM v Smith*,<sup>134</sup> where the names and HIV statuses of the three applicants were published in a biography without their knowledge and consent. The three applicants brought a claim to the court on the basis that the publication violated their right to privacy and human dignity as protected by the *Constitution*.<sup>135</sup> The court was of the view that the respondents had been aware of the fact that the applicants had not given their consent with regard to the publication, but that they had gone ahead with the publication, thus violating the applicants' rights to privacy and human dignity. The use of pseudonyms would not have rendered the book less authentic and nowhere had it been shown to be in the public's interest to demand the publication of the real names of the applicants.<sup>136</sup> The court ordered the respondents to compensate the applicants for the damages arising from the violation of their rights to privacy and human dignity as protected in terms of sections 10 and 14 of the *Constitution*, respectively.<sup>137</sup>

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<sup>131</sup> *C v Minister of Correctional Services* case para 21.

<sup>132</sup> *C v Minister of Correctional Services* case para 21.

<sup>133</sup> *C v Minister of Correctional Services* case para 22.

<sup>134</sup> *NM v Smith* 2007 5 SA 250 (CC) (hereafter *NM v Smith* case) 251. *Tshabalala-Msimang v Makhanya* 2008 1 All SA 509 (W) 509. The case involved the publication of confidential information about the Minister of Health, who had been admitted in hospital, and the respondents were the editor and publisher of the Sunday Times newspaper. The publication disclosed the medical records of the patient and that she had transgressed hospital rules on several occasions as she often drank alcohol while in hospital. The Minister approached the court to order the respondents to return her hospital records, which were in their possession, and further argued that the article violated her right to privacy in terms of s 14 of the *National Health Act* and the *Constitution*. The court held that the conduct of the respondents was unlawful as they had acquired the medical records of the applicant illegally and had also disclosed such confidential information, which was protected in terms of s 14 of the *National Health Act* and the *Constitution*. The court ruled in favour of the applicant because the conduct of the respondents violated her right to privacy.

<sup>135</sup> *NM v Smith* case para 22.

<sup>136</sup> *NM v Smith* case para 22.

<sup>137</sup> *NM v Smith* case para 22.

Based on the discussion above and the court cases which entrench the right to privacy, it is clear that the right to privacy of an employee with cancer is not lost when he or she discloses his or her current state of health to an employer, and the employer may not use such information beyond accommodating the employee in the workplace. Disclosure will serve as an aid allowing the employer to understand the medical condition of the employee and provide the necessary support through reasonable accommodation, among other things. Therefore a link can be identified between the operation of the constitutional right to privacy and the right to fair labour practices in the context of the legal issues which affect employees with cancer. In order for the employer to execute his or her obligations, he or she ought to know about the employee's condition, and this requires disclosure of such information by the employee. This amounts to a justifiable limitation of the employee's right to privacy for the purposes of enabling the employer to uphold and protect the employee's rights to privacy and to fair labour practices. The truth regarding all the constitutional rights granted by our *Constitution* is emphasised here; which is that these rights are not absolute and at times ought to be reasonably and justifiably limited in order to ensure that they are effectively enforced.

## **8 Conclusion**

It is quite clear from the above that a balance can be maintained between the duty of the employer to reasonably accommodate an employee with cancer in the workplace and not violate the employee's right to privacy while executing this duty. This will be possible if the employer does not abuse his or her position of authority, and does not use the information about the medical condition of the employee contrary to the purpose for which it was disclosed for by the employee concerned.

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### **List of Abbreviations**

Acad Manag Rev

Academy of Management Review

CCMA

Commission for Conciliation, Mediation and Arbitration

CME

Continuing Medical Education

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Crit Rev Oncol Hematol	Critical Reviews in Oncology/Hematology
EJC	European Journal of Cancer
Eur J Cancer Care	European Journal of Cancer Care
J Cancer Surviv	Journal of Cancer Survivorship
J Occup Rehabil	Journal of Occupational Rehabilitation
PELJ	Potchefstroom Electronic Law Journal
Psychol Bull	Psychological Bulletin
SALJ	South African Law Journal
TSAR	Tydskrif vir die Suid-Afrikaanse Reg