REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JS 1090/13

CINDY SENEKAL **Applicant**

and

ANCRO BUILDING PROJECTS CC **Respondent**

Heard: **7, 8 August 2014 and 8 December 2014**

(Written closing arguments – 27 January 2015)

Delivered: **15 April 2015**

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

[1] The applicant brought this matter before this Court, claiming that her dismissal by the respondent was due to her pregnancy, and was thus automatically unfair as contemplated in section 187(1) (e) of the Labour Relations Act[1] (the LRA). The respondent opposes the application and disputes that the applicant's dismissal was related to her pregnancy. It contends that the dismissal was due to the applicant's inability to perform her duties.

[1] Act 66 of 1995

[2] The relief sought by the applicant is as follows:

"**9. Relief sought**

9.1 Monetary compensation for the notice period that I was not afforded at a quantum equal to 1 (one) week's salary.

9.2 Monetary compensation for the unfair dismissal at a quantum equal to 24 (twenty-four) month's salary.

9.3 Costs of suit on a punitive scale."

[3] The respondent in turn prays for the applicant's claim to be dismissed with costs on a punitive scale.

Common cause facts:

[4] The applicant was employed on 25 September 2013 as a creditor's clerk. Her services were terminated on 15 October 2013. Effectively, she was in the employ of the respondent for a period of 19 working days. On 1 October 2013, and six days into her employment, the applicant disclosed to the respondent for the first time that she was pregnant.

[5] The respondent is a close corporation in the business of building projects. The respondent's set up is office-based and site-based. The owner/CEO of the respondent, Mr André Crous ("André") runs the site-based part of the business, as well as being responsible for dealing directly with the respondent's clients. The office-based operations are headed by his wife Mrs Maryna Crous ("Maryna").

[6] The respondent has a small office compliment comprising of Ms Daniella Van Heerden ("Daniella") who is employed as a personal assistant/secretary to André but also assists elsewhere in the office when the need arises. One of Crous' sons, Wayne Crous ("Wayne") shares offices with the respondent. He is a sales manager of an entity called X35, and acts as second in command whenever Maryna is not in the office.

[7] During September 2013, the respondent's business had picked up, and it had become necessary to employ another person. Furthermore, Maryna was booked on a three months' trip to Australia for the period November 2013 to January 2014. The respondent therefore urgently needed to employ a skilled creditors' clerk, and in this regard, it had appointed a recruitment agency to source suitable candidates.

The evidence:

[8] The respondent utilised the services of Decker Recruitment Agency to look for a suitable candidate. Decker Recruitment provided the respondent with copies of CVs of a number of possible candidates, including that of the applicant. Interviews were thereafter scheduled and eventually the applicant was appointed. The recruitment and appointment was done on an urgent basis over a short period of time.

[9] Sandy McCartney ("Sandy") testified that she is a partner at Decker Recruitment, whose business is to source candidates for clients looking for employees. Maryna had contacted her company with a job specification for a creditor's clerk who was strong on reconciliation and general office work. The applicant was sourced through her CV, which Decker Recruitment found on what is referred to as the 'P Net'. Where successful candidates are placed with the client, a placement fee calculated on the candidate's yearly income is charged, with placements being guaranteed for a period of three months.

[10] The applicant, who was working at another company at the time according to Sandy, was contacted through references obtained from her latest employer, Mrs Leo. Sandy testified that the she had reference checked the applicant with Mrs Leo and got a glowing report about her. Sandy was informed that the applicant was the best creditor's clerk that Mrs Leo had ever had. Sandy however was not advised at the time that Mrs Leo was in fact the applicants' mother.

[11] Sandy had also telephonically interviewed the applicant and compiled further information on her profile. The contents of the applicant's CV were further

discussed and verified with her and were then imported into the *pro forma* Decker Recruitment CV, which was provided to the respondent. Two interviews were scheduled between Maryna and the applicant pursuant to which the applicant was thereafter employed at a salary of R8 500.00 per month. Sandy's understanding was that the employment relationship would be reviewed.

[12] Subsequent to the applicant having commenced her employment with the respondent, Sandy spoke to Maryna and made enquiries about payment for the placement. Maryna informed her that she was unhappy with the applicant as she was unable to do the job despite being spoken to. She had requested a replacement candidate to be provided in terms of the guarantees between the respondent and Decker Recruitment.

[13] Sandy further testified that had she been aware of the relationship between the applicant and Mrs Leo, she would not have placed the applicant with the respondent. Sandy testified that after Maryna had complained about the applicant's performance, she had advised her about the procedures to be followed in terminating her services. She denied that she had instructed Maryna to terminate the applicant's services. She further denied that the applicant could have been dismissed due to her pregnancy, as Maryna had complained about her performance and the fact that she repeated mistakes even after being shown what to do.

Applicant's testimony:

[14] The applicant testified that she had 14 years of experience in the creditors/debtors field. She confirmed that two interviews were held with Maryna prior to her appointment. Her duties with the respondent were *inter alia* to request statements from suppliers, compile invoices, do manual reconciliations, maintain a payment schedule and provide a pack of documents to Maryna for payment to be effected.

[15] The main component of her responsibilities was the manual reconciliations. The applicant testified that she was not familiar with manual reconciliations, as she had used the computer program Pastel in the past. She nevertheless

contended that she was able to do the reconciliations manually. The applicant listed the following computer programs in her CV under the heading PC skills: MS Excel, PowerPoint, Word Perfect, Brilliant Accounting, Compu-Clearing, Revelation/Parcel Perfect/Syspro, MS Word, Outlook Express, Pastel Accounting, Pastel Evolution, Internet, and JD Edwards. She testified that the respondent had intended to implement the pastel system. However that was not yet in place hence the reconciliations were still being done manually.

[16] The applicant testified that she did not feel well on Friday, 27 September 2013 and at 13h00 during her lunch break, she had requested permission to leave and to consult her doctor. Wayne gave her the permission as Maryna was not in the office at the time. The applicant had consulted with her gynaecologist on Monday, 30 September 2013 and was advised that she was pregnant.

[17] The applicant returned to work on Tuesday 1 October 2013, and informed Wayne of her pregnancy and the latter had congratulated her. Later in the day Maryna came to the office and the applicant also informed her. Maryna also congratulated her and said to her that they will discuss the matter later. This however never took place.

[18] Under cross-examination the applicant altered her version of the events on the above dates, stating that she had instead consulted with her GP on 30 September 2013 and with her gynaecologist on 7 October 2013. As at the time of her dismissal she was 10 or 11 weeks pregnant.

[19] The applicant testified that she was able to perform her duties without problems, and that if there were any, she was not made aware of them. She contended that she was not provided with training when she started her employment and that she was only provided with the tools she needed and was expected to work. As she put it, *'she was thrown into the deep end'* without any assistance. The applicant acknowledged that companies operated differently, but she however contended that even though the respondent's accounting was done manually, she should have been shown how to do it.

[20] The applicant testified that on 15 October 2013 her services were terminated in circumstances where Maryna came into her office and advised her that

André did not want her any more as she was a risk to the company and he did not want her to be trained just to go on maternity leave a few months later. She stated that Maryna told her that she was tired of the *"huismoles"* from André and that it would be better if the applicant left.

[21] Wayne had then effected an 'EFT' payment, and thereafter, the applicant said *"dankie"* and left. The respondent disputed this version regarding the pregnancy during the applicant's cross-examination. It was put to her that Maryna was in charge of the office portion of the respondent and furthermore that it was not possible for André to demand that the applicant be dismissed when he didn't even know her let alone work with her.

[22] The applicant testified further that she would have been on maternity leave while Maryna would have been overseas and accordingly, André was not willing to permit her to take maternity leave in the absence of Maryna. This was disputed under cross examination and it was put to the applicant that Maryna would have been back in South Africa already for over a period of six months by the time that the applicant would have gone on maternity leave.

[23] The applicant contacted Maryna the day after the termination of her employment and requested her to consider employing her sister in the same position as her sister could do the same work and further since the respondent was looking for her replacement. Thereafter the applicant again contacted the respondent and requested to be furnished with a letter confirming her 'retrenchment' as her father did not believe that she had not just left her job. A letter was subsequently sent to her, dated 18 October 2013 wherein the reason given for her dismissal was that she was unable to perform recon duties.

[24] The applicant thereafter referred an unfair labour practice, unfair dismissal and severance pay dispute to the CCMA. The relief sought by the applicant was reflected as:

> *"Payment in Full for my duration of my pregnancy. Including the 4 months maternity leave. Including balance of October Salary and notice pay. (Months being Nov, Dec, Jan, Feb, March, Apr, May, Jun, Jul 2014"* (sic)

[25] The applicant alleged that her dismissal was unfair because:

> *"Discrimination against pregnancy and won't be able to find alternative employment until July 2014".*

[26] The applicant further testified that after the CCMA referral form was served, Maryna called her telephonically and begged her not to take the respondent to the CCMA. She further testified that Maryna accused her of being unfair and called her an *"ungrateful little bitch".* This version was disputed under cross-examination and by Maryna in her evidence.

[27] The applicant was cross-examined at length on her employment history as reflected in her CV, the numerous positions she had held, the short duration of those positions with long gaps of unemployment between the positions, as well as on the reasons for termination. The applicant testified that the positions were temporary in nature and that it had been her decision not to have permanent employment due to health issues experienced by her second son who was born in 2007. The respondent had however pointed out that the reasons for termination of those short positions were generally that they were temporary, or that the temporary contract were not renewed or that she was retrenched. It was also put to her that a number of her past employers were in fact businesses ventures of her mother (Mrs Leo) whose surname was different to that of the applicant and that she had however not disclosed this relationship in her CV.

[28] The applicant was cross-examined extensively on a number of aspects of her performance of her duties wherein it was put to her that she was unable to perform her duties and that she had been made aware of various problems, which had arisen, during her employment.

[29] One of the incidents mentioned was related to the applicant requesting Wayne to pay an amount of R95 000.00 into Beni Hinn Ministries as monies owed to it based on a paid bank deposit slip which she had been requested to record and file. It was put to the applicant that she had added Beni Hinn Ministries as a creditor who was owed money on the respondent's age analysis, even though Beni Hinn Ministries was in fact a beneficiary of

occasional monetary donations made by André in his personal capacity and not from the respondent. The applicant simply stated that she did not add Beni Hinn Ministries to the age analysis as it was already there (irrespective of the fact that it was not a creditor).

[30] The applicant was also cross-examined on the errors she made when compiling the packs for payment by Maryna and entering data into Microsoft Excel spread sheets as well as the occasions where Maryna sat with her and explained the error to her and how to do things correctly. These incidents were admitted by the applicant who maintained that the sessions with Maryna were not training but were mere discussions.

[31] It was further put to the applicant that she was a risk to the respondent because she was unable to correctly enter information into an excel spread sheet and that she was unable to perform her duties resulting in situations such as the Beni Hinn Ministries incident where she requested that R95 000.00 be paid to a donation beneficiary, on the basis that according to her a paid bank deposit slip meant that the amount reflected was still owed and that the beneficiary was a creditor due to be paid.

The evidence of Maryna Crous:

[32] Maryna testified about the history and set up of the respondent. She confirmed that she was in charge of the office-based portion of the respondent, and that she took her own decisions without the involvement of André. She testified that as she was going to Australia for three months from 1 November 2013 until 28 January 2014, she urgently needed to employ a person in the office before she left, as Danielle could not be expected to handle the additional workload, which would be created in her absence.

[33] Having been provided with the applicant's CV by Sandy, she was impressed with the list of computer programs, which were reflected in the CV, which gave the impression that the applicant knew what was expected of her and how to perform her duties. She testified that she had warned the applicant prior to appointing her that she would need to be fully functional from the start of her employment as she (Maryna) would not be able to train her. Following

this initial discussion, she believed that the applicant agreed with her approach and knew what was expected of her. The applicant did not have a written contract of employment with the respondent but Maryna testified that when the applicant was appointed she advised her that she would be on a trial period of three months, which the applicant had not objected to.

[34] Maryna also testified that the one issue which she had concerns about was that the applicant smoked. She testified that she was allergic to cigarette smoke and that the office was a smoke free area. The applicant agreed to smoke outside around the side of the building and that this arrangement was satisfactory. She testified that irrespective of the agreement the applicant nevertheless did not strictly abide by it. An example in this regard was when she found the applicant standing and smoking outside of the building but close to the entrance to the office. It was whilst she was standing outside and smoking near the entrance when she informed Maryna of her pregnancy.

[35] Maryna testified in regards to the process followed in doing reconciliations and further to the type of errors committed by the applicant. She testified that she had raised her concerns with the applicant and told her that she couldn't have done reconciliations before because of the type of mistakes she made. Maryna testified that the applicant included Beni Hinn ministries on the list of creditors and the implications thereof. She testified that the reconciliations needed to be done correctly as the payments are done by her or Wayne directly from the information provided to them without checking it again.

[36] Maryna testified that the applicant's pregnancy had had no bearing on the respondent's attitude towards her, but that the termination of her services was based purely on the fact that she was unable to perform duties assigned to her despite her errors being pointed out to her and being shown and told how to do her job. When the applicant's services were terminated, Maryna had calculated the remuneration due to her for the days that she had worked as well as the days where she had attended at the doctor, even though she had not worked during this time. The total days which the applicant was paid for was 11 days, being effectively the period that she had rendered any services.

[37] Maryna went to the applicant's office to speak to her about terminating her employment and had requested Wayne to stand out of sight outside the office and she left the door ajar so that he could hear what was said inside. She testified that she did not want Wayne to come in with her because it would be embarrassing enough for the applicant being told that that she couldn't do the job. Maryna did not want Wayne there as well as the applicant may feel that they had teamed against her, but that she wanted a witness to what was said. When she was advised of the termination of her service, the applicant did not react negatively or appear to be unhappy. She had merely thanked Maryna for the opportunity and stated that it would be difficult for her to find another job since she was pregnant. Maryna had then called Wayne and requested him to effect the payment once the details were agreed upon.

[38] Subsequent to the termination of the applicant's employment, the latter had requested to be provided with a letter confirming her retrenchment. Maryna had however ignored the request, as she was of the view that the applicant was not retrenched and furthermore had considered the matter closed already.

[39] Maryna was cross-examined on a number of discrepancies between the content of the response to the statement of case and the evidence tendered and put to the applicant during the proceedings. She explained these discrepancies as being due to the fact that the statement of response was drafted in her absence while she was overseas, and there was limited communication with the André who was liaising with the respondent's attorneys of record in compiling a response in her absence. The statement of response was compiled based predominantly on the content of a document, which she had drafted prior to her departure, which simply recorded her recollection of events.

The evidence of Danielle Van Heerden:

[40] Danielle testified that she had been employed by the respondent for 5 years and had done credit control duties for 3 of the years of her employment. She testified that she had assisted the applicant and shown her how to do her

work, both when she started and thereafter whenever the applicant asked her for assistance. She testified that the applicant continued to make the same mistakes even after she was shown how to do the work correctly and that this worried Danielle who was of the view that the applicant should have known how to do the work if she had the 11 years of experience in the field as she alleged. Danielle testified that both she and Maryna had assisted and corrected the applicant's work, and she was concerned about the applicant's ability to perform her duties as she did not know about things such as POD's and brought forward accounts. She had approached Maryna about her concerns.

[41] Danielle testified that after the CCMA referral forms were received, Maryna had at some point asked her and Wayne to come to listen to telephonic conversations over a speakerphone whenever the applicant called and accused Maryna of certain things. Danielle testified that Maryna was unhappy that the applicant had lied in saying that she was dismissed due to her pregnancy when it was due to her being unable to do her work. Danielle further denied that Maryna had during one of the telephonic conversations swore at the applicant or called her an *"ungrateful little bitch"* and that it was the applicant who had instead put the phone down on Maryna.

The evidence of André Crous:

[42] André is the CEO of the respondent and he looks after the site-based part of the business, whilst Maryna was responsible for the office-based operations. He testified that he was not involved in the hiring or firing of office based employees, let alone of the applicant. He denied that he was even aware of the applicant's pregnancy at the time. He testified that he did not have a problem with staff members going on maternity leave, and his view was that he did not care if an employee was pregnant or not, as long as she could do the work.

[43] He testified that when the respondent received the statement of claim, he was provided with the details of the respondent's attorneys of record by Sandy. He arranged a consultation as soon as possible and the statement of response

was drafted pursuant thereto. He testified that he did not have personal knowledge of everything required and was unable to contact Maryna who was in Australia at the time. Thus the statement of response was completed as best as possible under the circumstances as the time period for delivering same did not allow for the delays which would have been occasioned by waiting for Maryna to come back or provide further input.

[44] He testified that Maryna was under pressure at the time of hiring the applicant as she was due to travel to Australia, and she wanted to ensure that a person to be appointed could be trusted to do the job in her absence. He further contended that the respondent handled large sums of money, and it could not afford mishaps, especially because it relied on discounts received, and timeous payments.

The evidence of Wayne Crous:

[45] Wayne testified that he had made the necessary arrangements for the applicant to perform her duties when she first came in by assisted in setting up an electronic calculator for her, arranging new plug points for her to perform her duties, and having a locksmith come to the office to unlock a cupboard which contained the laptop to be used by her. He confirmed that the applicant had advised him of her pregnancy and that he had congratulated her.

[46] Wayne further testified that he did payments on the accounts if Maryna was not in the office. On one occasion he was about to process a payment based on documents provided do him by the applicant, and had realised that the totals did not tally. He had given the documents back to her and requested that she correct the document. She however took about a week to do so. He confirmed that the applicant's request for an advance on her salary was granted, and this was after she had disclosed her pregnancy.

[47] Wayne confirmed that he stood outside the door when Maryna and the applicant spoke about the termination of her employment on 15 October 2013, and that he could hear the conversation from inside when he was standing there. He testified that he was called in and requested to effect the payment of

the monies due to her, which he did. He testified that when he returned with the proof of payment, the applicant thanked them, asked to leave early and told them that they could contact her if they needed anything.

[48] Wayne testified that when the CCMA referral forms were received Danielle brought them to him and he contacted Maryna. He testified that he was present for part of the telephonic conversation between Maryna and the applicant, and the latter was asked why she had lied in the referral forms.

The legal framework and evaluation of the evidence:

[49] In the light of the dispute to be determined, Section 187 of the LRA provides that:

> ***'Automatically unfair dismissals.***-
>
> (1) *'A dismissal is automatically unfair if the employer, in dismissing the Employee, acts contrary to section 5 or, if the reason for the dismissal is-*
>
> *(a - d)….*
>
> *(e) the employee's pregnancy, intended pregnancy, or any reason related to her pregnancy;'*

[50] With ordinary cases of dismissal falling under the provisions of section 186 of the LRA a duty is imposed on an employee to establish the existence of a dismissal[2], and it is thereafter for the employer to prove that the dismissal was for a fair reason permitted in section 188 of the LRA. Where an employee however alleges that a dismissal was based on prohibited reasons such as pregnancy, more than a mere allegation in that regard is required. At most, the employee must establish that the dismissal was indeed related to the pregnancy, which fact the employer was well aware of[3].

---

[2] Section 192

[3] See *Wardlaw v Supreme Mouldings (Pty) Ltd* [2004] 6 BLLR 613 (LC) at para 11. See also *Mushava v Cuzen and Woods Attorneys* [2000] 6 BLLR 691 (LC) at para 23, where the Court held that;

> *"If the employee simply alleges unfair dismissal the employer must show that it was fair for a reason permitted in section 188. If the employee alleges it was for prohibited reasons, e.g. pregnancy, then it would seem that the employee must in addition to making the allegation at least prove that the employer was aware that the employee was pregnant and that the dismissal was possibly on this account."*

[51] In *Kroukam v SA Airlink (Pty) Ltd*[4], the Labour Appeal Court in dealt with the question of onus in respect of automatically unfair dismissal claims under section 187 of the LRA in the following terms[5];

> *'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 circumstances envisaged in s 187 for constituting an automatically unfair dismissal.'*

And

> *The further question then arises as to the approach to the evidence led by the respective parties. The answer can be illustrated by way of the following example: Assume that an employee can show that she was pregnant and dismissed upon the employer gaining knowledge thereof. The court would examine whether, upon an evaluation of all the evidence, pregnancy was the 'dominant' or most likely cause of the dismissal.'*

[52] In this case, and in regards to whether a dismissal was established, it was common cause that the applicant was informed on 15 October 2013 of the termination of her services. Her final payment was prepared and Maryna gave a copy[6] in that regard to her. According to the respondent, a formal letter of termination was issued to the applicant on 18 October 2013, *albeit* the latter contends that she only received it on 13 November 2013. In this letter, the applicant was informed that the termination of her services was with effect from 15 October 2013, on account of '*your inability to perform the Recon duties".*

[53] It was further common cause that the applicant had informed Maryna and Wayne of her pregnancy on 1 October 2013. With the dismissal having been established and further with the respondent having been made aware of the applicant's pregnancy, the next leg of the enquiry pertains to causation. Thus, what needs to be determined is whether the applicant's pregnancy or reasons

[4] (2005) 26 ILJ 2153 (LAC)
[5] Per Davis AJA at paras [28] and [29]
[6] page 71 of the evidence bundle

relating to her pregnancy was the '*dominant'*, '*proximate'*, or '*most likely cause'* of her dismissal.

[54] Thus if it is shown that the most probable cause for the dismissal was as a result of the employee's pregnancy or reasons related to her pregnancy, then it can be said that the dismissal was automatically unfair in terms of section 187(1)(e) of the LRA. If however, that probable inference cannot be drawn, and it is established on the facts that the dismissal was due to some other unrelated reason or considerations, that should be the end of the enquiry.

[55] In this case therefore, if it is established that the reason for the dismissal was unrelated to the applicant's pregnancy, i.e. that the pregnancy was not the principle or dominant reason for the dismissal, and had more to do with her performance as an employee as the respondent has contended, the claim should then fail, and the court should decline to consider the fairness of the dismissal.

[56] The crux of the applicant's case is that when she was dismissed, Maryna walked into her office, slid a copy of a document showing payments due to her across the table towards her and informed her that she could no longer keep her in the respondent's employ. The applicant alleged that she was further informed that her pregnancy was a risk to the company in that she would have to take maternity leave, and further that the respondent would have to employ another person during her maternity leave. Furthermore, the applicant alleged that Maryna informed her that she could no longer stand the *'huismoles'* (a term described as pressure put on Maryna by André at home as a result of the applicant's continued employment at the respondent whilst she was pregnant).

[57] The respondent's contention on the other hand was that Maryna went to the applicant's office, informed and explained to her that since she was incapable of performing her duties as per her job requirements, and further since she was still on probation she could not be kept.

[58] In resolving factual disputes that arise as in this case, this Court in a number of decisions has adopted the approach elucidated in *SFW Group Ltd and Another v Martell et Cie and Others*[7] held as follows;

> *", the Court said that the technique generally employed by Courts in resolving factual disputes of the kind as set out above may be summarised as follows:*
>
> > *'…To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities.*
> >
> > *As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probabilities and improbabilities of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when the court's credibility findings compel it in one direction and evaluation of the general probabilities in another. The more convincing the former, the less convincing will be latter. But when all factors are equipoised probabilities prevail'* (Citations omitted)

[59] Both parties' representatives had submitted lengthy written heads of arguments containing an exposition of the evidence as summarised above and findings, which should be made on the credibility of each of the

---

[7] 2003 (1) SA 11 (SCA) at para 5. See also *Heath v A & N Paneelkloppers* (JS932/2012) [2014] ZALCJHB 343 (9 September 2014) at para 45; *Sasol Mining (Pty) Ltd v Ngceleni NO and Others* (2011) 32 ILJ 723 (LC)

witnesses. One of the claims made in the applicant's written heads of argument was that since Maryna had described the respondent as 'old school', it was apparent that it never kept abreast with labour legislation and thus dealt with employees as it saw fit, a fact that supported the applicant's contention that she was dismissed due to her pregnancy. Furthermore, it was submitted on behalf of the applicant that all of the respondent's witnesses had a vested interest in its success in the matter and therefore their version could not have been credible

[60] It is my view that when the courts refer to section 187 of the LRA as imposing 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, the significance of this is that such evidential burden is indeed onerous. Thus conjecture and subjective perceptions as to what could have led to a dismissal as evident from the above summation of the applicant's case would not carry weight in discharging that onus.

[61] On the whole, it is my view that the applicant has not produced evidence, which is either sufficient or probable to raise a credible possibility that her dismissal was on account of her pregnancy. In my view, she was not a credible witness, and her testimony consisted of inherent improbabilities and contradictions, coupled with a demeanour that did not display openness or honesty. In the end, it is my view that the issue of her pregnancy was red-herring, conjured up to conceal the real reasons for the dismissal, being her inability to perform the tasks required of her. She proffered no evidence to support any contention that her pregnancy was the proximate or most probable cause of her dismissal. These conclusions are fortified by the following observations as gleaned from the evidence;

61.1 Her evidence was that after she had informed Maryna and Wayne of her pregnancy, the two had congratulated her. Neither Maryna nor Wayne had reacted negatively to the news, and on her version, and after congratulating her, Maryna told her that they will discuss the matter further, but this however did not take place.

61.2 In her evidence in chief, she had testified that from 1 October 2013 when she disclosed her pregnancy and until 15 October 2013 when her services were terminated, the issue of her pregnancy was not mentioned or discussed at all. On her version, her relations with Maryna thereafter remained normal, and the latter had remained supportive of her even when she had to take time off to go and see her doctor or requested an advance on her salary.

61.3 For the first time in her cross-examination, she alleged that on 12 October 2013, Maryna had informed her that André was unhappy with her pregnancy and that she was a risk to the company. In the same vein, she contended that she was informed on 15 October 2013 that her dismissal was due to her pregnancy.

61.4 It was further common cause that as at 15 October 2013, the applicant was at least 10 – 11 weeks pregnant. Maryna would have left for Australia at the beginning of November 2013 and was to return on 28 January 2014. When Maryna returned, at the most, the applicant would have been 5 – 6 months pregnant, and thus three months prior to her maternity confinement. Even if the applicant was to take her maternity leave in April 2014, it is highly improbable, that Maryna or André for that matter would have been worried about her taking maternity leave, as Maryna would long have returned from her Australian trip.

61.5 The applicant's testimony therefore, to the effect that she would have been on maternity leave whilst Maryna was overseas and that André was not willing to permit her to take maternity leave in the absence of Maryna is clearly not probable, nor does it support her contentions in regard to the reasons for the dismissal.

61.6 After the dismissal, the applicant had on 16 October 2013, asked Maryna via 'sms' for a letter of 'retrenchment', as her father thought that she had resigned from her employment. If indeed the applicant firmly held the view that she was dismissed on account of her pregnancy, surely that is a matter that she could have disclosed to her father to gain his support, rather than mislead him into believing that she was in fact retrenched. The submission made on her behalf that she was a layperson and therefore did not understand the difference between an ordinary dismissal, resignation and retrenchment is clearly far-fetched. On her version, and as evident from her career history[8], she was retrenchment at a company known as Casino Suppliers in November 2001 and had referred a dispute to the CCMA. Surely she must have known the difference between retrenchment and ordinary dismissal, and to attempt to misrepresent to her father that she was retrenched when this was not the case in my view casts doubts on her credibility.

61.7 It was not disputed that André had nothing to do with the running of the office, and even on the applicant's version, she did not work closely with him. I have no reason to doubt his version that he was not even aware of the applicant's pregnancy and even if he was, it is improbable that he would have been concerned with it since these were matters to be dealt with by Maryna, and the latter would have been back in the event the applicant wanted to take maternity leave.

61.8 As correctly pointed out on behalf of the respondent, the applicant has done nothing more than merely make an allegation, which is false if not misleading. She has failed dismally in producing any evidence sufficient to raise a credible possibility that her dismissal was related to her pregnancy.

61.9 The determination of this case, in the absence of any other evidence to show that the applicant's pregnancy was an issue at least until 15 October 2013 as per her version, hinges on what Maryna had said to her on that date when informing her of her dismissal. In the light of the improbabilities already alluded to, I am of the view that any reference to

[8] page 50 of the bundle

the word ‘risk’ in the conversation between the two could only have been in relation to the complaints surrounding the applicant’s performance rather than her pregnancy. I am further of the view that it could not have been for the first time that the applicant would have heard of complaints about her performance on 15 October 2013 or subsequent to her dismissal as she alleged. Her version that Maryna told her that she was happy with her performance is improbable, on the grounds that she could not recall when Maryna has informed her so, and also in view of the problems Maryna had confronted her with in regards to recons as early as 3 October 2013.

[62] In conclusion therefore, the applicant has not discharged the evidentiary burden placed on her to show that her dismissal was consequent upon her disclosing her pregnancy to the respondent. There is no basis for a probable inference to be drawn that indeed her pregnancy was the proximate cause of her dismissal.

[63] The bulk of the evidence led in this case pertained to the applicant’s performance and whether she could meet the requirements of her job. I am in agreement with submissions made on her behalf that the evidence led in regards to assisting or counselling her might have fallen short of the requirements of Schedule 8 of the LRA. It did not appear to be seriously challenged that the applicant was dismissed without a warning or hearing, nor was she afforded an opportunity to challenge the decision why she should not be dismissed. The applicant was barely 19 days in the employ of the respondent, and to the extent that the respondent might be found wanting with the manner with which she was dismissed, it cannot nevertheless be said that the dismissal was on a prohibited ground as contemplated in section 187 (1) (e) of the LRA. The reason for the dismissal pertained to the applicant’s performance, and this court lacks jurisdiction to determine such an issue, as it falls within that of the CCMA or Bargaining Councils. To this end, the applicant’s claim should fail.

Costs:

[64] It has already been concluded that the applicant failed to establish that her dismissal was consequent upon her disclosing her pregnancy, and had more to do with her performance. In the light of the doubts expressed about the fairness of her dismissal (which had nothing to do with her pregnancy), it is my view that considerations of law and fairness militates against an order of costs, as she might have had cause to complain about the fairness of her dismissal. She nevertheless had no basis for approaching this court.

Order:

i. The applicant's claim of an automatically unfair dismissal is dismissed.

ii. There is no order as to costs.

Tlhotlhalemaje

____

Tlhotlhalemaje, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCE:

On behalf of the Applicant: Mr MN Rajah of MN Rajah Attorneys

On behalf of the Respondent: Ms A Dippenaar of Kirchmans Inc