IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

CASE. NO. JS 919/02

NOMAKHOSAZANA MNGUNI **APPLICATION**

AND

ROBERT GUMBI **RESPONDENT**

JUDGMENT

PAKADE .J.

[1] The issue in this case is about the dismissal of the applicant by the respondent. She testified that she was dismissed by the respondent for pregnancy related reasons. The respondent denies that he had ever dismissed the applicant. That being the case, the applicant bears the onus to prove her dismissal on a balance of probabilities and once she has done so, it will be deemed to be automatically unfair (Sec 187 (1) (e) of the Labour Relations Act, 66 of 1995 ("the Act") and the respondent will have a duty to rebut the unfairness thereof. (Section 192 of the Act)

PILATUS MANUFACTURING (PTY) LTD v MAMABOLO
(1996) 17 ILJ 120 (LAC).

[2] Dismissal is termination of a contract of employment with or without notice (section 186).

[3] The salient facts of the applicant's case are set out in his statement of claim and in her evidence before Court. From those facts it appears that as at 17 March 2002 she was in the employment of the respondent, a medical practitioner who conducts private practice in the premises situated at 278 Madondo Street, Tokoza, Alberton. There were two employees of the respondent at the time of the incident. The applicant was employed as a receptionist. Her duties were to operate a computer and filling. The other lady was doing cleaning. The applicant was coming to work at 09h00 and knock off duty at 17h00. However, on weekends she used to alternate with the cleaner, who, though unable to operate with the computer, was nevertheless able to do the filling. On weekends the applicant had to resume duty at 09h00 up to 13h00.

[4] This incident took place on Sunday 17 March 2002. The applicant was eight months pregnant. She was working on files with the respondent sitting next to her, also working on the files. The doctor gave her some appointment files to work on. This appears to be what ignited the whole saga. The applicant refused to work on them and told him that she was tired, she needed a rest. She testified that she was seated on an uncomfortable chair from 09h00 up to 13h40. She did not have a break from 12h00 to 13h00 because they were busy with the respondent. On telling him that she was tired and needed a rest, the respondent became aggressive, shouted at her and pushed her from the back to outside the surgery. He told her that she did not want to work and she must go home. After a minute she came in but the respondent pushed her out again and threw her bag at her. She remained outside for 15 minutes. The respondent locked her surgery and left, leaving her standing outside his surgery. She ultimately left for home.

[5] The respondent had told her to go home and not come to work the following day until he telephoned her to come. However, he did not telephone her until a week later, the applicant telephoned him and enquired about his promised telephone call. He then told her to come to the surgery on 26 March 2002. On 26 March 2002, she found a lady working in her position as a receptionist. The respondent told her that he was not satisfied with her work and had employed somebody else. He told her that she no longer has a job there. The applicant expressed a wish to discuss the issue of severance pay but the respondent told her to go out as he had patients to consult with.

[6] The respondent's version differs on material respects from that of the applicant. The respondent denied that the cleaner was also doing receptionist work. He testified that the applicant could not perform even the basic work of a receptionist such as faxing a document. He had to give her training. She often came to work late and had to give her verbal warnings. She used to fight with the cleaner. In November 2001 he did pregnancy

test on her and found her to be six weeks pregnant. This was confirmed by the applicant. If she was six weeks pregnant in November she could not have been 7 or 8 months on 17 or 26 March 2002. She must have been four to five months pregnant on 17 or 26 March 2002, so said the respondent.

[7] The respondent further testified that the applicant was due to take maternity leave on or about 26 March and April 2002. He discussed maternity leave with her and agreed with her on her replacement. On the last week of February to first week of March 2002, Ms Masiteng a student, approached him for a temporary job. She used to work in the afternoon in the presence of the applicant. He trained her to take over the applicant's job as the applicant was going on maternity leave. The understanding was that Masiteng would work part time before the applicant took maternity leave in preparation for her replacement for the period the applicant would be away. This was corroborated by Masiteng. However, the applicant denied this. The applicant was adamant that Masiteng was employed to take over her position after she was unfairly dismissed on 17 March 2002. The respondent corroborated by Masiteng testified that the latter assumed duties of a receptionist in the formers' surgery the very next day of the applicant's absence from duty.

[8] There is a dispute on whether Masiteng worked part time in the surgery while the applicant was still on duty. In this respect Masiteng testified that she first took her child to the doctor and that was when she asked for a job. The respondent could not commit himself as to whether he had a job for her or not. He, however, told her that there was a lady who would go for maternity leave and he would telephone her about the job later on. He then telephoned her to come for training. While she was being trained, she saw the applicant. On 26 March 2002 she resumed work as a receptionist. The applicant testified that she saw Masiteng for the first time on 26 March 2002 and not before. Before me, I have two contradictory versions of the parties. I will consider them later.

[9] The respondent further testified about the incident of the 17 March 2002. The applicant came to work late at 09h30 and she apologized for being late. At 11h30 the applicant "screamed" and said she was tired. She stopped working. He told her to go home. By that he meant to give her a rest. When he was leaving the surgery at 14h00, she found her standing outside. He then became annoyed to realize that instead of working she was staying outside. He then told her to go home and not come back to work until he telephones her. The applicant concedes that she was standing outside when the respondent locked and left the surgery. She was standing outside not because she did not want to work, but because she was scared of the respondent who was aggressive towards her.

[10] On 25 March 2002 he told the cleaner to telephone her to come to the surgery on the morning of 26 March 2002. The cleaner could not get through to her but left a message to her cellular telephone. The cleaner did not testify and this evidence is inadmissible. The respondent admits that the applicant telephoned her to inquire about her return to work and he told her to come to the surgery the following morning. After the saga of the 17 March 2002, he sought a legal advice on how to deal with the applicant and was advised to call her back and give her a reprimand, hence he called her for the 26 March 2002.

[11] On 26 March 2002 the applicant arrived at work at 11h00 with her two children. The discussion ensued between them about the events of the 17 March 2002 but the respondent had to consult with the two patients with whom he had an appointment. He told the applicant to wait for him. However, the applicant left with her belongings which were in the reception area. The respondent contacted his advisor again who told him to write her a letter calling her to work. He wrote the letter on the same 26 March 2002 and posted it by ordinary mail to the applicant's address. The applicant denied having received the letter calling her back to work.

The respondent testified that he employed Masiteng permanently in June/July on being served with a letter calling him to the CCMA. Masiteng corroborated the respondent in every material respect. She is still in the employment of the respondent and is on maternity leave from December 2003. It can hardly be expected that Masiteng would seek to differ with the respondent, her employer. She has a direct interest in this matter and is aware that her job is on the firing line should she go against the respondent. She knows how the respondent had treated the applicant and that she would receive the same treatment.

[12] The applicant is a single witness. She has to prove her dismissal on a balance of probabilities. Dealing with the question of onus, DAVIS AJA said in **PILLAY v KRISHNA 1946 AD 946 at 952:**

" in my opinion the only correct use of the word "onus" is that which I believe to be its true and original sense (cf D 31.22) namely the duty which is cast upon the particular litigant in order to be successful, of finally satisfying the court that he is entitled to succeed on his claim or defence, as the case may be, and not in the sense merely of his duty to adduce evidence to combat a prima facie case made by his opponent "

A litigant does not require many witnesses to prove his/her case on a balance of probabilities provided that if he /she is a single witness his /her evidence must be clear and satisfactory in every material respect (See **Sec 208 of the Criminal Procedure Act 51 of 1977; R v Makoena 1932 OPD 79).**

[13] Although there is a conflict in the version of the parties, they agree on some crucial issues. They agree that the applicant is no longer working for the respondent because of the incident of the 17 March 2002. They agree that on 17 March 2002 the respondent told the applicant to go home and not come back to work until she hears from him. She did not hear from him until a week later.

Although there is a dispute of fact on who between them initiated the telephone call to the other, the probabilities are infavour of the applicant having done so. The applicant was keen to go back to work. When she was told to go home on 17 March 2002 she remained outside. This is an indication that she wanted to work. It is not inconceivable that she could telephone the respondent after a week's patient waiting for his call to find out about his undertaking to call her. On the contrary, the respondent prevaricates on this point. He prefers to duck and dive. He gives hearsay evidence without confirmation from the cleaner that she telephoned the applicant. In this respect the respondent did not telephone the applicant as undertaken by him to do so. It is further common cause that the respondent did not tell the applicant to resume work on 26 March 2002 when he had an opportunity to do so. The letter written to her by the respondent on 26 March 2002 was just an attempt to pull wool on the face of the applicant. He knew he had already accomplished her dismissal and had replaced her with somebody else.

[14] The applicant was at an advanced stage of pregnancy. The respondent even testified that she was due for maternity leave on 26 March or in the first week of April 2002. The applicant was entitled to four consecutive months maternity leave which should have commenced any time from four weeks before the expected date of birth. (Section 25 of the Basic Conditions of Employment Act 75 of 1997)

[15] In my view, the conduct of the respondent on 17 March 2002 constitutes an unfair dismissal. If he did not intend to dismiss her, he should have told her what he meant by saying "go home and don't come to work until I telephone you". That the conduct of the respondent constitutes a dismissal is fortified further by the fact that Masiteng took over the applicant's position the very next day of her having been told to go home, namely on 18 March 2002. The respondent had at no stage informed the applicant that she was granting her maternity leave and her position would be taken by somebody else. He merely told her not to come to work till further notice. This was not a fair treatment on a pregnant employee. The applicant must have been traumatized, embarrassed and humiliated by the arrogance of the respondent, a medical practitioner throwing his weight on his receptionist.

[16] The meeting of the 26 March 2002, could not, on the version of the respondent have taken any longer than he expected having regard to the purpose thereof. The purpose thereof was to reprimand her and to tell her to resume work. He had just told her that he did not like her behaviour of the 17 March 2002. He did not tell her to resume work. He had ample opportunity to tell her to resume work if he so wished, before leaving to attend his patients. A reprimand could not have taken precedent over assumption of duty. A reprimand would follow upon a disciplinary hearing. It was clear from the applicant when the respondent left without telling her to resume work that she had been dismissed. If Masiteng had taken the applicant's position in contemplation of the applicant going on maternity leave the respondent should have told the applicant to go on maternity leave from that very 26 March 2002. The respondent was by no means unaware that the applicant's inability to work long hours was caused by her pregnancy and that was a clear signal that she needed maternity leave. The respondent has himself conceded that she was due for maternity leave by 26 March 2002 and there is no reason given why did he prefer to dismiss her instead of giving her maternity leave. If he did not tell her to resume work, which is one of the two things he had called her for, what else did he tell her besides a reprimand? According to him he told her nothing. The doctor was not a credible witness. His evidence bears the hallmark of a lying witness and I have difficulty in accepting it. The evidence of Masiteng is regurgitation of the respondent's evidence and is also rejected. But according to the applicant he told her something which caused her to collect her pictures in the reception and leave. This something is that he is not satisfied with her work and conduct of 17 March 2002, she no longer has a job and has been replaced. In this manner the respondent was confirming her dismissal on 17 March 2002. He had no time for the applicant. He refused to discuss the severance pay with her. What the doctor was interested in was to see his practice operating hence he pushed out the applicant and ushered in Masiteng. These are the probabilities that weigh heavily against the respondent. Clearly the applicant was dismissed because she was pregnant and such dismissal is automatically unfair.

[17] Employers are prohibited from dismissing employees for any reason related to pregnancy (section 187 (1) (e)). The phrase "any reason related to pregnancy" which the legislature has made use of in Section 187 (1) (e) is, in my view, wide enough to cover the dismissal of the applicant in this case.

When the employer dismissed an employee on grounds of pregnancy, he is obliged to apply the guidelines applicable to dismissals for medical incapacity. In this respect what TEBBUT .J stated in

HENDRICKS v MERCANTILE & GENERAL INSURANCE CO. OF SA LTD (1994) 15 ILJ 304 (LAC) at 313 A-D

is repeated in this case. The learned judge said:

" The substantive fairness of a dismissal depends on the question whether the employer can fairly be expected to continue the employment relationship bearing in mind the interests of the employee and the employer and the equities of the case. Relevant factors would include *inter alia,* the nature of the incapacity, the cause of the incapacity, the likelihood of recovery, improvement or recurrence; the period of absence and its effect on the employer's operations; the effect of the employee's disability on the other employees; and the employee's work record and length of service. Procedural fairness would involve the employee's work record and length of service. Procedural fairness would involve the employer's consulting with the employee about his ailment and, in conjunction with him, trying to find a solution to the problem, including the consideration of the provisions of suitable alternative employment for the employee."

SEE also **COLLINS v VOLKAS BANK (WESTONARIA BRANCH) a division of ABSA BANK LTD [1994] 12 BLLR 73 (LC).**

When the applicant told the respondent that she was tired and needed a rest, the respondent did not consult with her as to what the cause of tiredness was. He knew that she was pregnant and was due for maternity leave the following week. Despite knowing the cause of her tiredness he bursted into anger, physically pushed her out of the work place, threw her bag out at her and told her to go home and not to come to work. This kind of treatment of an employee is outrageous and no longer has a place in this country. Gone are the days when employees were treated in the manner the respondent has treated the applicant and could do nothing about that. The constitution guarantees the employees' rights to fair labour practice. (Section 23(1) of the Constitution of Act No.108 of 1996).

[18] The applicant claims reinstatement alternatively compensation. Somebody else has taken the applicant's position permanently. It is not practicable therefore to reinstate the applicant as there is no vacancy to which she may be reinstated. I must therefore consider the alternative relief.

[19] In terms of section 194 (1) compensation must be equal to the remuneration that would have been paid to the employee from the date of dismissal to the last day of the hearing of the arbitration or adjudication. In **JOHNSON AND JOHNSON (PTY) LTD v CHEMICAL WORKERS INDUSTRIAL UNION (1999) 20 ILJ 89 (LAC)** this provision was interpreted to mean that the employee must be compensated from the date of dismissal up to the stage when he or she receives a proper hearing in the Labour Court or on arbitration. This

occurs when the parties (or representatives) appear and complete the hearing before the presiding officer.

[20] The applicant was dismissed on the 17 March 2002 without a hearing and without prior notice. In the meeting of 26 March 2002 the respondent did not correct the mistake he had made on the 17 March 2002, namely of failing to give the applicant notice and hearing for the dismissal. The letter of the 26 March 2002 is a mere subterfuge to avoid the adverse consequences of an unfair dismissal on him. The letter is a spurious document. In any event if the letter signified a genuine change of attitude on the respondent, he should have registered it, or should have delivered it personally to the applicant (he had been to her place). Therefore, in my view the applicant cannot be penalized for not responding to the letter as she did not receive it. Indeed if she had been aware of the letter and failed to respond or reject its contents she would have been regarded as having failed to mitigate her damages substantially and would, in my view be entitled to compensation up to the time of her rejection of the terms of the letter requiring her to return to work.

Section 194(3) provides the Court with clear guidelines on awarding compensation to an employee whose dismissal is automatically unfair. It reads as follows:

"The compensation awarded to an employee whose dismissal is automatically unfair must be just and equitable in all the circumstances but not more than the equivalent of 24 months remuneration calculated at the employee's rate of remuneration on the date of dismissal"

[21] In considering whether or not to award compensation in this case, I must give due weight to the reason for the dismissal. The dismissal is automatically unfair because of the reason specified in section 187(1)(e). In the exercise of my discretion to award compensation, I have considered that it would give a perception that I have condoned the automatically unfair dismissal if I fail to award compensation in circumstances where reinstatement has also not been awarded. In determining the amount of compensation, I have considered the guidelines that are set out in **CHEMICAL ENERGY PAPER PRINTING WOOD AND ALLIED WORKERS UNION AND ANOTHER v GLASS & ALLUMINIUM 2000 CC (2000) 23 ILJ 695 (LAC)** at 709 D-J and p 710 A-B. The applicant is entitled to a maximum award permitted by section 194(3), that is, 24 months remuneration. This is so because had I ordered reinstatement with retrospective effect to the date of dismissal (which was made impossible by the respondent's conduct) the applicant would have been entitled to back pay. The purpose of that order would have been to ensure that the applicant was placed as far as possible in the position in which she would have been in had she not been dismissed. Furthermore the applicant would continue to have a job. She has not been reinstated because of the respondent's conduct and she will remain

unemployed for a considerable period of time.

[22] For these reasons, I am satisfied that the applicant is entitled to maximum compensation of 24 months. She has been out of work for almost 2 years. She was earning a salary of R1 200.00 per month from the respondent.

[23] In the premises I make the following order:

1. that the conduct of the respondent to the applicant on the 17th March 2002 constitutes a dismissal.
2. The dismissal of the applicant on 17 March 2002 is automatically unfair as it relates to the applicant's pregnancy. (section 187(1) (e)
3. The applicant is awarded compensation of R28 800.00, calculated as follows = (R1 200.00 x 24)
4. The respondent is ordered to pay to the applicant the sum of R28 800.00 within 30 days from the date hereof, together with interest thereon at the rate of 15.5 % calculated from a date two weeks a *tempore mora.*
5. The respondent is ordered to pay costs of the action.

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PAKADE J

JUDGE OF THE LABOUR COURT

DATE OF HEARING : 16 February 2004

DATE OF JUDGMENT : March 2004

APPEARANCES

FOR THE APPLICANT	:	Johannesburg Community Legal Center
FOR THE RESPONDENT	:	Adv S. D. Maritz Instructed by L S Dlalisa Attorneys.