IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG **CASE NO: JS/1378/01**

In the matter between:

WARDLAW, ANA LUISA Applicant

and

SUPREME MOULDINGS (PTY) LIMITED Respondent

JUDGMENT

JAMMY AJ

1. The Applicant in this matter was employed by the Respondent on 1 September 1999 and was summarily dismissed by it on 9 October 2002. She contends that the termination of her employment is automatically and/or substantively unfair for reasons set out in her statement of case as follows:

"a) The reason for the termination of the Applicant's employment was not for a good reason, but instead for reasons relating to the Applicant taking maternity leave. In this regard the Respondent is in breach of the provisions of Section 187(1)(e) and (f) of the Labour Relations Act.

b) Even if the Applicant was negligent as alleged, an allegation the Applicant denies, given the complete absence of any form of corrective discipline as required by the Code of Good Practice, the summary dismissal of the Applicant is wholly inappropriate.

c) The charges were not proved".

2. The termination of her employment was moreover procedurally unfair, it is alleged, for the reasons, *inter alia*, that the chairman was biased, that she was given no opportunity to state her case, that the chairman was not in the Respondent's employ, that she was summarily dismissed rather than being afforded corrective discipline, that she was subjected to "inappropriate pressure" by the chairman "to plead guilty to certain charges" and that the Respondent "failed to comply with the provisions of clause 2, 7, 8 and 9 of the Schedule 8 to the Labour Relations Act".

3. The relief sought by the Applicant is payment of compensation "in a sum equal to two years' salary" and costs. An initial claim for reinstatement in her former employment was not pursued.

4. Section 187(1) of the Labour Relations Act 1995 ("the Act") defines those reasons for an employee's dismissal which will render it automatically unfair. That will be the case if, *inter alia*, the reason for such dismissal is –

"(e) The employee's pregnancy, intended pregnancy, or any reason related to her pregnancy;

or (f) That the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility".

5. The applicability in this matter of Section 187(1)(e) will emerge from what follows. The applicability in the relevant circumstances of the provisions of sub-section (f) is less clear unless, as the Respondent suggests, it is based on a contention of gender discrimination sourced in the common cause fact of the Applicant's pregnancy.

6. The claim for compensation "in a sum equal to two years' salary" is manifestly based on the alleged breach by the Respondent of the

provisions of Section 187(1)(e) and (f), read with Section 194(3) of the Act, which limits the compensation awarded to an employee whose dismissal is automatically unfair to a maximum of the equivalent of twenty-four months' remuneration.

7. A pre-trial conference between the legal representatives of the parties was held on 4 October 2002. The minute of that conference records the Applicant's intention "to show that the termination of the Applicant's services constitutes unfair discrimination as provided for in terms of Section 6 of the Employment Equity Act and constitutes breach of her common law contract of employment", in addition to being without a sufficient reason or fair procedure. The prohibited grounds of discrimination in that statutory provision are recognised as being a mirror of the automatically unfair criteria defined in Section 187(1)(f) of the Labour Relations Act.

8. The Respondent's intention, on the other hand, is precisely and narrowly stated in the minute. It will argue, it is recorded, that this Court's jurisdiction "should be limited to the question whether, having regard to the reason for the termination of the Applicant's employment, such termination constitutes an automatically unfair dismissal." If it is found, as there inferred and subsequently vigorously argued, that that was not the case, that is the end of the matter. Questions of the fairness or otherwise of substantive reasons unrelated to Section 187 of the Act and/or the procedural aspects of the Applicant's dismissal are, in the absence of the mutual consent of the parties contemplated in Section 158(2)(b) of the Act, issues for determination by arbitration under the auspices of the Commission for Conciliation, Mediation and Arbitration (CCMA). It is common cause, the Respondent correctly contends, that no such consent was either indicated or alleged in the present instance.

9. The Jurisdiction Issue

9.1 Section 191(5)(b) and (13) of the Act limits the jurisdiction of this

Court in disputes relating to allegations of unfair dismissal, to certain specified instances, the only one of which having application in this matter being an allegation that the dismissal was automatically unfair. As was stated in the unreported Labour Court case of –

Fick and Others v Midi TV (Pty) Ltd. Case No. C96/2002

"This Court, unlike the High Court, does not have a general inherent jurisdiction to adjudicate upon matters before it. Albeit that this Court has the same status as the High Court, it remains a creature of statute. Absent the criteria enumerated in Section 191(5)(b) and (13) of the Act, the Court would therefore not have jurisdiction to entertain a dispute relative to unfair dismissal, other than in the circumstances envisaged by Section 158(2) of the Act, in which case this Court would sit as an arbitrator".

9.2 I have referred to the absence in this matter of any evidence of the consent criterion there referred to and in these circumstances the cardinal issue in the determination of the existence or otherwise of this Court's jurisdiction to entertain the dispute between the parties, is whether or not the Applicant was automatically unfairly dismissed as a consequence of her pregnancy, "or any reason related to her pregnancy".

9.3 Counsel for the Applicant argues correctly that in terms of Section 192(2) of the Act, the Respondent, if as in this case it disputes that any aspect of the Applicant's dismissal rendered it automatically unfair, bears the onus to show that a fair reason exists that is unrelated to her pregnancy and that such a reason justifies her dismissal. The determination whether or not that onus has been discharged, is however, save in the specific circumstances to which the statute makes reference, not a matter falling within this Court's jurisdiction but is one to be determined under the auspices of the CCMA as provided for in Section 191. There is no substance, in my view, for the somewhat startling contention advanced by the Applicant that jurisdiction can be vested in this Court through the simple

medium of its arbitrary selection by the employee as the preferred forum for the adjudication of the dispute in question. That submission is manifestly sourced in misinterpretation of the provisions of Section 191(5)(b) to which I have already made reference and does not bear further analysis.

9.4 The Applicant, in the context of her statement of case, the amendments thereto and the pre-trial minute, seeks in this Court the adjudication, in addition to her allegation of the automatic unfairness of her dismissal, of her contention that it was, in any event, "not for a good reason" and "inappropriate ... given the complete absence of any form of corrective discipline as required by the Code of Good Practice", as well as her contention that, having being effected without notice, it was in breach of her contract of employment and in contravention of the relevant provisions of the Basic Conditions of Employment Act. I reiterate, for the reasons which I have stated, that these latter issues are beyond the jurisdiction of this Court and that the sole issue to which this judgment will be confined is the determination whether or not the Applicant's dismissal was automatically unfair, entitling her to the relief sought in her statement of case or otherwise. I turn now therefore to deal with that issue.

10. The Dismissal

10.1 The Applicant went on maternity leave on 28 May 2001 and, following the birth of her child, returned to work on 1st October 2001. On that day she received notice to attend a disciplinary enquiry to be held on 5 October 2001. The charges which she would be required to answer were set out in that notice as follows:

"1 Gross negligence and dereliction of duties in that you failed/or refused and/or neglected to produce

proper financial records for the company, which was your direct responsibility.

2 Gross negligence and dereliction of duties in that you failed and/or refused and/or neglected to fulfil your most basic functions and duties as Group financial Manager of the company in one or more or all of the following respects.

2.1 Not one of the company's General Ledger accounts has been reconciled.
2.2 The Cash Book has not been reconciled since September 2000.
2.3 The entire General Ledger was poorly maintained and lacked integrity.

3. Gross negligence and dereliction of duties in that you failed and/or refused and/or or neglected to properly manage, support and assist your support personnel to ensure that the financial records of the company are properly kept and maintained, resulting in an almost complete breakdown of the company's accounting records, control and system.

4. Gross negligence and dereliction of duties, in that, upon recent of investigation of your department, for which you are directly responsible, the following material irregularities were found:

4.1 VAT Returns have not been properly reconciled, which makes it impossible to ascertain if VAT has been correctly claimed.
4.2 VAT for Johannesburg has not been paid for 7 months, resulting in penalties of R65000 and the Managing Director being summoned to appear in court. This therefore caused direct financial loss to the company and brought the company into disrepute.
4.3 VAT for Cape Town has not been paid for 8 months, resulting in further penalties (still to come) and financial prejudice to the company.
4.4 The PAYE payments for employees at Johannesburg has also been paid late, resulting in the company being liable in an amount of R35000 in fines and interest, to the Receiver of Revenue.
4.5 The Johannesburg RSC levies have not been paid since November 2000, and Cape Town RSC levies have not been paid for the last year, which will also give rise to a liability by the company for fines and interest, which are currently being awaited.
4.6 UIF returns have not been properly completed and/or submitted.

5 Breach of your duty of utmost good faith towards the company in your capacity as General Financial Manager of the company, having regard to your unlawful behaviour as aforesaid".

10.2 The chairperson of the enquiry, described in the disciplinary notice as "independent and external ... to ensure complete impartiality", was certain Mr Vernon Carr who, following its conclusion on 5 October 2001, presented his findings. They are recorded by him as follows:

"2.1 The accused holds a high profile position within the company and she is adequately qualified to fulfil the position. The company relies greatly on their employees as they compete in very competitive market. It is therefore vital that the company be placed in a position where they can trust their employees and where the employees act in the best interest of the business. The accused should therefore have acted in a diligent and reliable manner. The accused has through her actions demonstrated a lack of trustworthiness and has not always acted in the best interest of the company.

2.2 The accused's negligent behaviour has resulted in the company incurring huge fines with reference to the late payments of the VAT, PAYE and non-payment of the RSC levies. It is noted that these responsibilities are fairly elementary and could have been managed with ease and is indicative of her dereliction of her duties.

2.3 The accused did not report the fact that she could not timeously produce the company's financial records.

2.4 The company views the accused's misconduct in a very serious light as she has failed and neglected her duties as Group Financial Manager. The accused initially accepted the responsibilities of her position, but she failed to act in such a manner and has therefore rendered the continued employment relationship intolerable.

2.5 It is therefore my recommendation to the company that the accused be dismissed with immediate effect".

10.3 Detailed evidence relating to the charges against the Applicant which, the Respondent contends justified her eventual dismissal, was adduced in the course of this trial, with ongoing references to a comprehensive volume of documents relative thereto, by the Group Managing Director, Mr M A Formato, the General Manager of its East London factory, Mr F J Schultz and, briefly, by a shipping clerk in the Respondent's employ, Ms B Doyle. The Applicant, Ms Wardlaw, was

the sole witness in response. I do not propose to traverse that evidence in unnecessary detail. In the course of an extended hearing the Applicant's position, the responsibilities attaching thereto, the fairness or otherwise of the Respondent's perceptions and expectations of her functions and the perceived extent of her alleged derelictions in their discharge, as well as the Applicant's acknowledgements, disputations, analyses and explanations relating to her own performance, the computer problems and the general administrative state of affairs in the company at the time that she left on maternity leave, were vigorously examined and debated in the course of prolonged testimony and cross-examination on both sides.

10.4 Comprehensive argument was submitted relating to issues of probability where facts were disputed and to the perceived credibility of witnesses. Both Mr Formato and Mr Schultz testified regarding the problems being experienced with the computer system, cash-flow problems and pressure from the Respondent's bank to produce management accounts relative to its overdraft limit. At the stage that, in the context of her pregnancy, the Applicant departed on maternity leave, the Respondent, in the prevailing circumstances was left in an invidious position in relation to the workload which she had carried.

10.5 The neglect and inadequacy of various critical aspects of her performance in the responsibility which she held, it was stated, only became apparent during her absence in the face of the urgent need to address the serious problems which had now manifested themselves. It was in that context that, on the advice of its consultants and attorneys, the disciplinary action against the Applicant upon her return to work, was instituted.

10.6 The Applicant's response to these submissions was based in essence on a defensive challenge to the allegations of her performance inadequacy. In certain respects, factual allegations were disputed, in others, blame was diverted. The hostility towards her, resulting in the

disciplinary proceedings and her eventual dismissal was, she contended, fundamentally sourced in the Respondent's irritation at her enforced absence from work, as a consequence of her pregnancy, at a critically inconvenient time, having regard to the prevailing state of affairs in the Respondent's financial administration.

10.7 That her absence and resultant unavailability to perform her functions and to assist in addressing the adverse circumstances in which the Respondent was operating at the time was a source of considerable inconvenience to it, is not open to debate. Whether or not her pregnancy and consequent absence was the reason for her dismissal, rather than the areas and instances of alleged gross negligence, derelictions of duty and breaches of good faith relied upon by the Respondent to justify it, is however another question. A comparable examination of the principles of such an enquiry was conducted by the Labour Appeal Court in –

SA Chemical Workers' Union and Others v Afrox Limited (1999) 20 ILJ 1718

The issue in that case was whether or not the dismissal of the Appellants was automatically unfair as a consequence of their participation in a strike or had been effected as an operational requirement of the Respondent. At page 1726, Froneman D J P said this -

"The enquiry into the reason for the dismissal is an objective one, where the employer's motive for the dismissal will merely be one of a number of factors to be considered. This issue (the reason for the dismissal) is essentially one of causation and I can see no reason why the usual twofold approach to causation, applied in other fields of law, should not be utilised here ... The first step is to determine *factual* causation: was participation or support, or intended participation or support, of the protected strike a *sine qua non* (or prerequisite) for the dismissal? Put another way, would the dismissal have occurred if there was no participation or support of the strike? If the answer is yes, then the dismissal was not automatically unfair. If the answer is no, that does not immediately render the dismissal automatically unfair; the next issue is one of *legal* causation, namely whether such participation or conduct

was the "main" or "dominant", or "proximate", or "most likely" cause of the dismissal. There are no hard and fast rules to determine the question of legal causation ... I would respectfully venture to suggest that the most practical way of approaching the issue would be to determine what the most probable inference is that may be drawn from the established facts as a cause of the dismissal, in much the same way as the most probable or plausible inference is drawn from circumstantial evidence in civil cases. It is important to remember that at this stage the fairness of the dismissal is not yet an issue. Only if this test of legal causation also shows that the most probable cause for the dismissal was only participation or support of the protected strike, can it be said that the dismissal was automatically unfair in terms of Section 187(1)(a). If that probable inference cannot be drawn at this stage, the enquiry proceeds a step further".

10.8 In my view, formed on a *conspectus* of the evidence adduced in this matter, the Applicant's submission that the disciplinary action to which she was subjected and her resultant dismissal were the consequence of a vindictive reaction by the Respondent to the fact of her pregnancy and the inconvenience of her absence in that regard at a time when the Respondent was under severe administrative pressure, cannot be sustained in the face of the detailed allegations of negligence and incompetence upon which the Respondent is adamant that it was based. I emphasise however that whilst I have concluded that the Applicant's allegation of automatically unfair dismissal cannot therefore stand, it is, in the words of Froneman D J P to which I have referred, "... important to remember that at this stage the fairness of the dismissal is not yet an issue". I reiterate that, if and when it does become an issue, its adjudication will not be the function of this Court which, as I have made clear, does not have jurisdiction to perform it.

10.9 In the same context, the Applicant's allegations of breach of contract and contravention on the part of the Respondent of the applicable provisions of the Basic Conditions of Employment Act arising from her dismissal without notice, are inextricably linked to the fairness or otherwise of her dismissal for the substantive reasons alleged by the

Respondent. I reiterate that the determination of those specific issues is not the business of this Court but, as with what the Respondent contends to be the factually accurate reasons for her dismissal, is the function of the forum designated by the statute properly to deal with it.

11. Conclusion

11.1 I conclude therefore that on the case brought by her before this Court, the Applicant has failed to demonstrate that the reason for her dismissal, whether fair or not, was her pregnancy or any reason related thereto. She is also unable to establish any other unfair conduct by the Respondent over which this Court would have jurisdiction and her application must accordingly fail.

11.2 I can find no reason, in the submissions made to me, to deviate from the established principle that an award of costs would ordinarily follow the result and the order that I make is accordingly the following.

11.2.1 The dismissal of the Applicant by the Respondent was not automatically unfair. Save as aforesaid this Court has no jurisdiction to entertain the dispute between the parties.

11.2.2 The Applicant's claims are accordingly dismissed.

11.2.3 The Applicant is to pay the Respondent's party and party costs of these proceedings as taxed or agreed between the parties.

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B M JAMMY
Acting Judge of the Labour Court

5 April 2004

Representation:

For the Applicant:
Adv A G Heyns
Instructed by
Blake Bester Inc

For the Respondent:
Mr N Schultz
Bate Chubb & Dickson Inc