IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN CASE NO: D1022/2002

In the matter between:

NOLA NATASHA LUKIE Applicant

and

RURAL ALLIANCE CC T/A RURAL DEVELOPMENT SPECIALIST Respondent

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JUDGMENT

FRANCIS J

Introduction

1. The applicant referred a dispute to this court for adjudication contending that her dismissal is automatically unfair in terms of section 187 (1)(c) of the Labour Relations Act 66 of 1995 ("the Act"). The respondent denied that the applicant was dismissed and contended that she left its employ at her own instance due to the advanced state of her pregnancy and did not return afterwards.

The evidence led

2. The applicant is a married woman who was employed by the respondent on 6 December 2000 as a receptionist/ accounts person. She was in charge of the accounts and salaries. In September 2001 the applicant discovered that she had been pregnant since July 2001. She approached Charles Naismith a member of the respondent with whom she worked and told him about her pregnancy. He told her that it was in order and that she should work until she could manage and have the baby. In September 2001 she was granted a loan of R3 000.00 which she was required to pay off in monthly instalments of R300.00. She approached Naismith again in December. He told her to go and have the baby and not return. She took this to mean that her employment had ended. She was quite surprised and thought that she would have her baby and return. She asked Naismith if she could work until December since it was the holidays and he told her to return in January and work until she could manage and have her baby and not return.

3. The applicant returned in January 2002 and worked until the third week. She was not feeling well and approached Naismith and told him that she could work until 31 January 2002. He agreed. The applicant worked out her own salary. She prepared the time sheets for the four weeks in January 2002. She deducted the costs for the personal telephone calls that she had made. She took the time sheets to Presad who told her not to forget the loan. She had paid instalments. She deducted the outstanding balance of the loan and made out a cheque for R1 290.00 on the 31 January 2002. She worked until 31 January 2002. On that day, Presad, the other member of the respondent came to her and told her that it was her last working day. She used to earn R3 500.00 per month and this was dependant on whether it was a four or a five-week month. She was paid R20 per hour and worked 8 hours per day in a 5-day week. Naismith signed the cheque. The cheque was for a smaller amount and she needed the money. Naismith asked her to work half a day for the next month until she could manage since the new person would only be available on 1 March. She worked until 15 February 2002 and due to the state of her pregnancy and on doctors' advice she stopped working. On Monday the 18 February 2002 she spoke with Naismith who told her that it was in order for her not to return. She had the office keys on her. She referred the dispute to the CCMA on the 18 February 2002. She was not contacted by Naismith thereafter. She believed that the reason for her termination was that she went off to have her baby.

4. During cross examination the applicant said that she had a good relationship with the applicant. He was a pleasant person to work with. They got on well. When she told him that she was pregnant he told her to go on leave and agreed. In her affidavit in support of condonation she stated that he told her that he could take unpaid leave and return in May. For some reason in December he told her not to return. He told her that the respondent could not cater for someone to go off to have a baby. It was put to her that in her evidence in chief she was asked for the reason and she said that she was told to go off to have the baby and not to return and that she was now saying that they could not cater for someone to have a baby. She said that he told her that. It was put to her that Naismith would deny that he said so and it would be argued that

he denied it. She agreed that she told Naismith in September that she was pregnant and that she was told in December not to return. She was asked what she thought about the allegation that she fell pregnant and lost her job. She said that she was surprised, was traumatised and was the breadwinner. It was a permanent position and had serious impact on her personal life. She did not seek assistance at the time. She did not ask anyone. Her husband was unemployed. She told her husband and he was surprised and she thought that she had a permanent job. She did not tell Naismith that it was unfair. He clearly did not want her to come back. She was aware of the provisions of the Basic Conditions of Employment Act about maternity leave and that she could go off for four months on maternity leave and claim unpaid leave from the Department of Labour. There was no reason why she did not approach the CCMA, an attorney or the Department of Labour about her pending crisis with the respondent. It was put to her that the reason she did not do that was that Naismith did not tell her not to return to work. He said that he told her that.

5. The applicant was asked what she meant with what appears in her affidavit that at that stage she realised that the respondent had effect fully dismissed her once she had left to have her baby. Naismith dismissed her after her last day at work. She realised that she was dismissed on 31 January because it was her last day at work. It was put to her that she worked until 15 February 2002. The 31 January was officially her last day of work but she worked up to 15 February 2002. She had realised in December that she would be dismissed and admitted that she took no steps to halt the proceedings. She could not explain why she did nothing. She referred the dispute to the CCMA on Monday 18 February 2002. She had learnt from a friend, Antoinette Shubardeen who lived with her in the building that she could refer the matter to the CCMA since she was told to go off as she was going to have a baby. It was only after she had spoken to her friend that she referred the matter to the CCMA. She took up the matter with the Department of Labour to find out about her maternity benefits. She did not go there in December 2001 because she returned in January 2002 to complete her work and then went. She needed the money and had to work until the end of February. It was not true that she was not told to return because of her pregnancy. She went to the CCMA offices where she was assisted in completing the forms. When the other woman left the respondent, she did

both the accounts and reception duties. She was not told that she was not competent to do the accounts. Naismith did not discuss this with her in December. He did not tell her in December to come back in May. She did not feel in her mind that there was no position to return to in May and it was not true that this is the reason that she sought compensation. She maintained that she was dismissed on the basis that she had a baby. It was not true that she deducted the outstanding loan amount because she knew of the operational requirements and took the final payment.

6. In re-examination the applicant said that she got along well with Naismith but did not talk with him often. He used to be out of his office and communicated with her. She was afraid to tell him that she was pregnant but did so. She realised in February that she could take the dispute further. She could claim maternity benefits and refer the dispute to the CCMA. She had her baby in April and would have returned at the end of May beginning June and could not have returned immediately. In September Naismith told her to return to work in May. In December she was not told to return to work in May. The respondent did not cater for someone who is going to have a baby. This was told to her in December 2001. She signed her affidavit on 22 November 2002. She was seeking compensation and commenced employment with the respondent on 6 December 2000. This was her third child. In the third week of January she told Naismith that her last day would be January 2002 and she made out the time sheets and he told her not to forget the loan. She knew that it was her last working day. He had instructed her not to forget the loan and this is why she deducted the full loan amount.

7. The respondent called Charles Naismith as its witness. He testified that he is a member of the respondent. Prasad is the other member. He did not have a recollection of what the applicant said about their meeting in December but denied her version namely that he told her not to return to work after she had her baby. He denied that he told the applicant that the respondent did not cater for people who fell pregnant. He has a layman's understanding of Labour law and has not dealt with procedures in any respect. He knows the procedure on dismissals whether pregnancy or not and in relation to warnings. A person could not be dismissed for being pregnant from a business perspective. A woman worked in the office and

was doing a specialist position. She left and the respondent looked to the future to replace her. The applicant's skills were not probably sufficient to undertake both tasks. In October/November the other woman showed that she was leaving. It was his recollection that he discussed the operational issue with the applicant and it was an agreement that she could not do the specialised work. The other woman did some operations and it was specialised accounts work which the applicant could not do. He did not in December indicate to the applicant that she was dismissed. He did not see that she was traumatised. They had a very good relationship and were surprised to hear what she said in court. He would have liked her to have spoken to him. There are training programmes where people go to develop their skills.

8. Naismith testified that when the applicant handed him the cheque to sign, the loan amount was taken off. He did not give an instruction for the loan to be taken off. The recollection that he had is that he got the impression that she was not coming back again. He tried to help her as much. It was correct that he told her to work until she could no longer work. He found it strange that she being the breadwinner, with two children and an unemployed husband, that she decided not to return and that she deducted the full amount of the loan. When he met with her in December 2001, he told her that he needed a person to undertake both functions. It was a small office and they were working on Government programmes. She was aware of it and they spoke about it. She was told about the functions and what was required for a person to do it and was asked whether she would be able to do it. He did not say to her that he could not manage somebody who was pregnant. He did not recall what her response was but there was no argument of any disagreement. He was hoping to convey to her that there would be additional work that would have to be done. She did not object to do it. The feeling that he had was that she would not return. The applicant had time to develop in the new job. The meeting lasted for about 30 minutes. It was a general discussion about what they would do in the future. He did not expect an immediate response from her.

9. During cross examination Naismith was asked whether when the applicant came to him on 31 January 2002 to sign the cheque, he realised that the amount was lower than what she had usually received.

He said that the process with cheques was that there had to be a remittance advice that reflected the amount that had to be deducted. He saw the deductions and the amount was lower. The loan according to him had been taken over a year and she had to pay it in monthly instalments of R300.00. She had paid it for three months and than stopped for nine months and nothing happened. She decided to clear it. The loan was taken out in September 2002. It was put to him that the applicant commenced employment in December 2000. He said that the loan was taken a year before she left. She was with the respondent for two years. It was put to him that she had been with the respondent for two years and he said that time flew. It was put to him that the applicant took the loan in September 2001. He said that he did not have the figures but she stopped paying it off. He had no idea how long she had stopped. She told him that she had difficulties and had other accounts to pay off. He could not deny that she had taken the loan in September 2001 after she told him that she was pregnant. It was put to him that she did not stop paying the loan. He said that she did. She had spoken to him. He did not agree that when she approached him in the third week of January 2002 that he told her not to forget the loan. He agreed that in December 2001 that she had paid R900.00. He was her employer and had a good relationship with her.

10. Naismith was asked if he had asked the applicant why she was not coming back. He said that she did not say that she would not be returning. He had an impression in December 2001 that she would not come back but he did not ask her. He was her employer and did not canvass it with her. A woman had to start in March 2002. She started on a temporary basis and is now employed permanently. She had not started in February and that was the reason that he asked the applicant to stay in February 2002. The applicant needed funds and they needed her services. It was put to him that he said that he did it because he was assisting her and whether he was changing his version. He said he was not changing his version but they had a very good relationship. He had an impression that she would not be returning and yet he did not ask her. He denied that he told her that the respondent did not cater for persons to have babies. The respondent was a small business and it was not difficult to take a tempt for five months when she was on maternity leave. It was put to him that this was the reason that he did not tell her about his impression. He

said that he would have known it if he said it and did not say it. He had discussed the issue. She had a husband with two children. He knew that she had some difficulties but he felt that he could not interfere in her personal life. He felt that he could not manage the job that entailed to her decision. She did not tell it to him. It was put to him that he did not have the discussion with her. He said that he did and should in hindsight have tape recorded the proceedings but he could not remember what she said. He was asked if he had asked her that she would not be coming back to work. He said that he understood that he she would not be coming back on 18 February 2002 and received a telephone call from the Department of Labour that he dismissed her because she was pregnant. He did not telephone her. Her aunt had telephoned before and said that she was sick and would not be coming to work. After the call from the Department of Labour, they tried to get her mother and getting her was difficult. Somebody came to the office with a set of keys. This was also when the applicant referred her dispute to the CCMA. He did not believe that she had been dismissed for being pregnant. They tried to get her and he did not know where she lived. He said that he is not a detective who had to trace her. He agreed that he should have told her that he did not dismiss her because she was pregnant. He would have loved to sort it out before she went to the Department of Labour. He got the impression in December 2001 that she was not returning. He could not explain why she settled the loan in January 2001 when she had to go on leave. It was surprising and he accepted it. Another person could have told her not to take it off. He understood the procedure relating to dismissals. He would think it out through and if it were proper he would do it. He was asked to read paragraph 7.1.5 of his statement of response where it was stated that "under the circumstances, it is the respondent's case that while it was, in principle, desirous of dismissing the applicant at some time in the future and after it had complied with a fair procedure no such dismissal, as alleged by the applicant took place". He was asked if it were not proper to dismiss before a hearing. He said that he did not know and that it was not allowed. He was asked if he knew that there had to be a hearing before a person could be dismissed. He said that he was not aware of the procedure. Three notices had to be given first and a hearing had to be held. He did not have these circumstances previously. It was put to him that he was going to dismiss the applicant after he was given advice. He said that it was stated in paragraph 7.1.5 that she would be dismissed in the future. If it were not

competent, she could not be dismissed in the future. In December he got the impression that she could probably do the work. It was put to him that telling her not to come back to work after her pregnancy was easier. He disagreed. He said that he still had to work within the law and they were a law-abiding company. He did not create the impression and worked within the law. He denied that he dismissed her because she was pregnant. He denied that he discussed her poor work performance.

11. In re-examination he said that the applicant was five months in arrears with her loan and had only paid two months instalments.

Analysis of the evidence led and arguments raised

12. The applicant version in a nutshell is that she was employed by the respondent on 6 December 2000 as an accounts clerk and receptionist with a salary of R3 500.00 per month. During September 2001 she advised Naismith that she was pregnant. He advised her to work until she could manage and to take a month's unpaid leave prior to her delivery and then return thereafter. She approached him again in December 2001 and was told that she should work until she was unable and not to return after having had her baby. She understood this to mean that she was dismissed because she had been pregnant. She worked until 31 January 2002 when she was instructed to deduct the full outstanding amount of her loan. She had taken out the loan in September 2001. She worked half a day until 15 February 2002. On 18 February 2002 she referred her dispute to the CCMA.

13. The respondent's version is that in September 2001 the applicant informed Naismith that she was pregnant. He told her that she continue to work and take maternity leave and return in May 2001 In December 2001 Naismith met with the applicant. The applicant was a receptionist and accounts clerk. The previous person was performing specialist tasks. She left and the respondent was looking to replace her in the future. The applicant's skills were not sufficient for her to do her own work and the tasks performed by the other person. The applicant could not do specialised accounts. The respondent's intentions were

communicated to the applicant. He did not tell the applicant that she had been dismissed and nor had it made any final decisions in this regard. The respondent advised the applicant that pending her ability to work as a result of her pregnancy she was required to continue working. She worked until 15 February 2002 when the applicant left the employ of the respondent, at her own instance, due to the advanced state of her pregnancy. Subsequently she did not return. Within the first week of her maternity leave the applicant referred her dispute to the CCMA for alleged unfair dismissal.

14. This court is faced with two mutually destructive versions only one of which can be correct. In deciding which version to accept and which one to reject I am obliged to consider *inter alia* the issue on a balance of probabilities. The onus is on the applicant to prove on a balance of probabilities that her version is the truth. The onus is discharged if the applicant can show by credible evidence that her version is the more and probable and acceptable version. The credibility of the witnesses and the probability and improbability of what they say should not be regarded as separate enquiries to be considered piecemeal. They are part of a single investigation into the acceptability or otherwise of the applicant's version, an investigation where questions of demeanour and impression are measured against the content's of a witness' evidence, where the importance of any discrepancies or contradictions is assessed and where a particular story is tested against facts that cannot be disputed and against the inherent probabilities, so that at the end of the day one can say with conviction that one version is more probable and should be accepted, and that therefore the other version is false and may be rejected with safety. In this regard see *Mabona and Another v Minister of Law and Order and Others* 1988(2) SA 654 SECLD.

15. I have attempted to subject the evidence in this matter to this sort of scrutiny. I should say at the outset that from the applicant's demeanour she created a good impression indeed. The content of her evidence was, however criticised. I agree that in her examination in chief she did not say that Naismith said the respondent did not cater for people to have babies. This came out during cross examination when she was asked what reason was given to her. This version is supported by her affidavit in support of an

application for condonation which was signed on 22 November 2002. She had also testified that she had paid off R900.00 towards the loan and that she had not skipped any payments. She had only paid off R600.00. I do not make much of the criticisms that she was subjected to bearing in mind that the issues that she was required to testify occurred in December 2001. The content of her evidence was not shown to have any material improbabilities or inconsistencies. I think that she was a good witness despite the criticisms. Her version did not change much during cross examination except to what I have referred above.

16. The same cannot be said about Naismith. Naismith was extremely vague about the meeting he alleges took place with the applicant in December 2001 when he told her about the operational needs of the respondent. The applicant denied that such a meeting took place. He could not tell the court when exactly the meeting had taken place, what the applicant's response was about the meeting and what had been discussed. He went ahead and said that the meeting was a general discussion and that a further meeting would have taken place in the future. He testified that he had an impression that the applicant was not going to return after her pregnancy. He had a very good relationship with the applicant but did not discuss his impressions with her. He could not tell this court on what his impressions were based. Naismith had testified that the applicant paid only three months off the loan and did not pay it for a period of nine months and this was the reason why the balance was deducted on 31 January 2002. When he was confronted about this, he concocted a version that the loan was taken out in September 2002. He than said that it was a year before the applicant and eventually said that he did not have the figures available but that she had stopped paying it off.

17. The applicant was the sole breadwinner at the time of her dismissal. Her husband was unemployed and she had two other children to support. She had taken out a loan for R3 000.00 with the respondent in September 2001 that was also the same month that she told Naismith that she was pregnant. She was going to pay the loan off in monthly instalments of R300. I find it improbable that she would on her own have decided to deduct the full outstanding balance of the loan in January 2002 taking into account her dire

financial position. The explanation that she gave was that she was reminded by Naismith not to forget the loan that she had taken when she took the requisition for him to sign. I find the respondent's version improbable and accept the applicant's version as probable. I find it also improbable that on the respondent's version that a discussion took place with the applicant in December 2001 about her future that the applicant would have decided not to return to work after she had given birth. Naismith testified that on 18 February 2002 he received a telephone call from the Department of Labour. He was told that the applicant had said that she was dismissed for having fallen pregnant. He did not inform the person from the Department of Labour that he did not dismiss the applicant for having fallen pregnant. He did not either write to the applicant disputing that he had dismissed her for having fallen pregnant or offered to take her back once she had given birth. This supports her version that she was told by him not to return in May 2002. I prefer her version and reject the respondent's version as false.

18. Mr Caro, who appeared for the applicant contended that the applicant's claim should be dismissed on the basis that she did not place any concrete evidence before the court that she was dismissed as a result of her pregnancy. He contended that the applicant was dismissed for another reason. It was contended that at best for the applicant there was an inference that she was dismissed for other reasons. I do not agree with the respondent's contentions. In terms of section 187(1)(c) of the Act, a dismissal is automatically unfair if the reason for the dismissal is the employee's pregnancy, intended pregnancy, or any other reason related to her pregnancy. For all of these reasons, I am satisfied that the applicant has on a balance of probabilities proven that her dismissal was related to her pregnancy.

19. The applicant is not seeking reinstatement but compensation. The maximum compensation that an applicant in an automatic unfair dismissal matter is entitled to is twenty-four months remuneration. The applicant commenced employment on 6 December 2000. It is common cause that the applicant and the respondent had a good relationship. Naismith testified that he had a very good relationship with the applicant. The applicant's services were terminated on 31 January 2002. She had been employed by the

respondent for about 13 months. Her services were terminated because she was pregnant. I have some doubts whether her services would have been terminated had she not fallen pregnant. The legislature had deemed it necessary to outlaw dismissal on this ground and had deemed it necessary to double the compensation that a woman would be entitled to if her dismissal is related to her pregnancy. It is totally unacceptable that despite our Constitution and the advancement of women's rights in the workplace that some employers still dismiss women for having fallen pregnant. Women are still being discriminated against in the workplace. The applicant was not treated with compassion in this matter. When considering compensation that is just and equitable these factors should be taken into account. It is not clear whether the applicant is currently employed and whether she had found employment after she was dismissed. I have also taken into account the length of service of the applicant, the manner in which her dismissal was effected and the fact that the respondent is a small enterprise. I believe that just and equitable compensation in this matter would be to award the applicant compensation that is the equivalent of eighty weeks remuneration.

20. There is no reason why costs should not follow the result.

21. In the circumstances the following order is made:

1. The applicant's dismissal is found to be automatically unfair in terms of section 187(1)(c) of the Act;

2. The respondent is to pay the applicant compensation in the sum of R64 000.00 which is the equivalent of eighty weeks remuneration.

3. The respondent is to pay the costs of the application.

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APLICANT : L PILLAY OF SHANTA REDDY ATTORNEYS

FOR THE RESPONDENT : D CARO OF DEAN CARO & ASSOCIATES

DATE OF HEARING: 20 MAY 2004

DATE OF JUDGMENT : 28 MAY 2004