IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG) REPORTABLE

In the matter between **Case no.JS844/07**

Nicolene Symm Swart **Applicant**

and

Greenmachine Horticultural Services
(A division of Sterikleen (Pty) Ltd)) **Respondent**

Judgment

Bhoola AJ

Introduction

[1] The applicant seeks relief arising from an alleged automatically unfair dismissal on the basis of her pregnancy, or a reason related to her pregnancy, in terms of section 187(1)(e) of the Labour Relations Act, 66 of 1995 ("the Act"). Alternatively, she claims that her dismissal was procedurally and substantively unfair. The respondent resists both claims.

The applicant's version

[2] The applicant, Ms. Nicolene Swart, was the first witness. It is common cause that she was employed as a co-ordinator by the respondent on 1 April 2007. Her job involved supervisory and administrative functions relating to indoor and outdoor area horticultural services performed by the respondent. Her employment was not subject to a probation period. She reported to Mrs. Arlainé Kramer ("Kramer"), a Divisional Manager, and also performed some functions as Kramer's Personal Assistant. Her testimony was that she enjoyed her first month of employment, and got on well with Kramer and other staff. She was dismissed on 17 August 2007.

[3] It is common cause that during May 2007 the respondent held a team building event for employees at Sun City. The applicant travelled to Sun City with a co-employee, Sheldon Uys ("Uys"), who was also a friend. Her testimony was that *en route* to Sun City she disclosed to him that she had conducted a home pregnancy test and suspected that she might be pregnant.

[4] It is common cause that the applicant consulted a doctor and underwent a blood test on 3 May 2007. She testified that she received

telephonic confirmation of her pregnancy based on this test from her doctor a week later.

[5] The applicant testified that it was after this that things between herself and Kramer "kind of went a little bit sour". Kramer summoned her to her office about a week and a half after the Sun City trip, and enquired whether she was pregnant. The applicant confirmed that she was and that she had had intended notifying Kramer after informing her family, and had not wanted Kramer to find out through the grapevine. Kramer was supportive and replied that they should discuss maternity leave and establish how advanced the pregnancy was. She subsequently approved leave for the applicant to consult her gynaecologist. On 12 June 2007 the applicant consulted her gynaecologist who confirmed that she was about 19 weeks pregnant. She duly informed Kramer and requested maternity leave in November. Kramer replied that she did not anticipate this to be a problem since most businesses closed over the December holiday period. Kramer indicated that they needed to agree the period of leave she was entitled to as she had only been in the employ of the Respondent for a few months. The applicant testified that after this everything seemed *"normal".*

[6] On 3 July 2007 an issue arose concerning an afternoon's leave that the applicant had taken the previous day. According to her Kramer had approved the leave but when she returned to work she was issued with a written warning. Despite Kramer's admonition about unauthorised leave the warning did not relate to leave but referred to "continuous discussions" regarding non-performance. The applicant said she had not been aware of any issues relating to her performance. Despite Kramer's reference to non-performance, the warning cited three offences, intentional or negligent cause of damage to employer; action detrimental to interest of employer; and conduct affecting employer/employee relationship.

[7] On 11 July 2007 the applicant received a final written warning related to the alleged non-performance. She provided a written response the next day dealing with the areas of non-performance referred to therein.

[8] On 24 July 2007 an incident occurred in which Kramer reprimanded the applicant in the presence of other staff for not having obtained payment from a client. It turned out that payment had in fact been made and Kramer had reprimanded her in error. The applicant was upset. That evening she began experiencing cramps and "blood spotting". Notwithstanding this she reported for work the next day, 25 July, but when the cramps intensified she informed Kramer that she had to seek medical treatment. Kramer's response was that she had to ensure that all her work was up to date before leaving. The applicant testified that she attended to a few issues with the accounts department and left work. She consulted her gynaecologist and was admitted to hospital on account of suspected pre-term labour. She telephoned Kramer *en route* to the hospital to inform her. She was given medication to stop

the cramps, discharged and told to rest. The following day, 26 July, she duly informed Kramer by way of a cell phone text message that she had been booked off sick and would return to work on Monday 30 July. She also notified Uys and asked him to contact her if there were any work related he needed assistance with.

[9] That afternoon Kramer had a letter delivered to the applicant's home. The letter stated:
"In due consideration for you being pregnant but regarding your performance and various warnings on file, the Company is considering the possibility of formal disciplinary action.
With your current health situation and this may or may not affect your ability to perform your duties, we request the following:
"1. Prior to returning back to full duty we request a doctor's letter stating that you and the baby are fit to do so;
2. In the event that you are fit to continue with your duties, we must be informed in writing by a doctor when your due date is and when your maternity leave commences".

[10] The applicant returned to work on Monday 30 July 2007 and completed a leave form to which she attached a medical certificate she had obtained from the hospital confirming that she had been treated on 25 July and was fit to resume work that day. She also responded to various work related emails that had been sent by Kramer on 25 and 26 July in her absence.

[11] On 1 August 2007 the applicant replied as follows to the letter delivered to her home:
"Please accept written confirmation that I am informing you that I am currently +_ 26 weeks pregnant and my due date is approximately 3 November 2007. I am applying to take maternity leave from 25 October 2007 and will return to full duty in February 2008. I would also like to bring the following to your attention: I would need to take some time off work from time to time for check ups with the Doctor at the Coronation Provincial Hospital, as my medical aid will not be covering the Hospital and Doctor costs when I go into labour. I cannot afford to pay as a private patient. I don't get a fixed time appointment and I need to be at the Coronation Provincial Hospital at 7.00am and wait till a doctor can see me, The closer I get to my due date the appointments will change to once a week...Trust you find the above in order".

[12] Kramer replied on 2 August 2007 indicating that the letter was not acceptable for the following reasons:
"You were advised to submit a doctor's letter regarding your health prior to returning to duty and you have not done this.
You were instructed to obtain a doctor's confirmation of your due date and maternity leave, and you have not done this.
You are again instructed to submit this information by Tuesday 7th August 2007." The letter further informed the applicant that she had exhausted all her sick leave.

[13] The applicant testified that she had not been able to submit the "*doctor's confirmation"* of her due date maternity leave, as this would have required her to go to the hospital to obtain this. Her application for a day's leave to attend to this request had not been approved by Kramer on account of a public holiday that week. However, the applicant said she had complied with the first request in the respondent's letter by submitting the medical certificate from the hospital confirming that she was fit to resume work on 30 July 2007.

[14] On 3 August 2007 the applicant replied by email to Kramer's queries related to poor performance, and on 6 August she wrote a formal letter advising the respondent again of her maternity leave dates. In addition, she responded in writing once again to the substantive issues raised by Kramer relating to her alleged poor performance. She testified that thereafter Kramer called her in and said she had consulted her lawyers "*about your position and we are trying to figure out what we can do about you being pregnant".*

[15] On 6 August 2007 the applicant had sent an email to the Commission for Conciliation, Mediation and Arbitration ("CCMA"), requesting advice in regard to her the manner in which her employer had been treating her since the disclosure of her pregnancy, and her employer's allegation that she had "*lied about my pregnancy when I started otherwise I wouldn't have got the job".* She stated in the email that the "*stress and shouting she is putting me through is putting unnecessary stress on my unborn baby".* She is advised by the CCMA to lodge a grievance but this is pre-empted by a notice to attend a disciplinary enquiry issued to her on 7 August 2007.

[16] It is common cause that a disciplinary enquiry followed on 15 August 2007 at which the applicant was charged with the following:

1. *Gross insubordination*
   -not responding to instructions from your employer;
   -not responding to same requests over and over again.
2. *Conduct affecting employer/employee relationship detrimentally;*
   -Both items under gross insubordination above.
   -Leaving desk in a mess: In your absence we are not able to assess what has been done and what still needs to be done.
3. *Neglect of duty – all items under 1 and 2 above;*
4. *Omission of critical information at time of application of (sic) employment regarding pregnancy".*

[17] The applicant's evidence was that the chairperson of the enquiry put to her that she had deliberately deceived her employer by denying that she was pregnant despite this being obvious at the time of the Sun City trip. She had explained to him that she had a medical reason for not realising this sooner. Her explanation was that :
"any normal person I think can know that they are pregnant with the

changes their body has made, but as I have said earlier, I had just recently returned from the UK where I was living on my own for a while, so you never cooked and you ate a lot of fast food so I had picked up weight. So I did not pick up on the picked up weight immediately. With my menstrual cycle that was rigging (sic) havoc in my life and it was not something that I thought of being pregnant at all".

[18] In regard to her work performance, the applicant confirmed at the enquiry that she had dealt with all the reminders from Kramer regarding outstanding work, even when she had been on sick leave. I do not propose dealing with all the relevant incidents, but for instance in regard to the complaint that her filing that was not up to date, she testified at her enquiry that she had brought her sister in to work at one point to assist her because "*it was just too much for one person to do, with trying to do all your other duties on a daily basis".* In addition, in response the respondent's constant complaint that her desk was untidy, the applicant admitted this and testified that it contained all the files she was currently working on and that she had expected to return to work on the day she was hospitalised to sort it out. The applicant's testimony was that the "*flurry of emails*" from Kramer escalated after "*we found out that I was pregnant and more so after my first warning".* Her explanation at the enquiry was that she was an independent employee and was not required to report to Kramer on every task she had completed, and that she prioritised tasks based on urgency which meant that on certain occasions there was a delay of a day or so in replying to an email from Kramer requesting feedback on an issue.

[19] The applicant testified that Kramer had put only one question in cross examination to her in the enquiry. This is recorded in the chairperson's finding as follows, under the heading cross examination:
"Question : You hid the fact that you are pregnant from the employer for 18 (eighteen) weeks.
Answer: I did not know that I was pregnant and on the very first occasion that you asked me whether I was pregnant, I confirmed that I was pregnant".

[20] During the proceedings before this court the applicant was subjected to intrusive cross examination on personal issues. She was asked about her marital status, as well as when she would probably have conceived. It was put to her by the respondent's attorney that she was about one month pregnant when she was interviewed by Kramer for the job, and that she must have known this at the time. She denied this and explained that her failure to notice any signs relating to a possible pregnancy were caused by her having put on weight and a genetic medical condition that she had been diagnosed with. She explained that the condition, known as menoragia, caused irregular menstruation.

[21] The applicant denied that her failure to disclose her pregnancy had been motivated by fear of not being appointed. She said that her appointment was not subject to probation. She denied furthermore that

she had finally disclosed her pregnancy to her employer in mid-June only after being confronted about this on numerous occasions. The applicant indicated that Kramer had approved her leave to consult a gynaecologist on 12 June 2007 and she had accordingly known about the pregnancy for about a month before this. The respondent's attorney, was reprimanded by the court and reminded to respect the constitutional rights of the applicant when he sought to cross examine her on her sexual behaviour and how a pregnancy arose. He put it to her that pregnancy was not *"caused by standing in the wind*". This line of questioning was improper and disrespectful to the applicant, and exceeded the bounds of legitimate cross examination. The applicant's attorney also interjected on her behalf and this line of questioning was not proceeded with.

[22] The applicant conceded in cross examination that there was one other employee on maternity leave. She also conceded that Kramer was initially practical and supportive of her, even during the threatened pre-term labour.

[23] It was put to the applicant that she had not alleged discrimination on the grounds of her pregnancy prior to approaching this court for relief, and moreover that she had never mentioned this at the disciplinary enquiry. She replied that notwithstanding her dismissal she had sent a written response to the respondent outlining the areas in respect of which the chairperson's findings incorrectly reflected what had transpired during the enquiry. I do not intend to make any finding in regard to her charge that Kramer and the chairperson were guilty of collusion and dishonesty. It is apparent from both the applicant's and Kramer's testimony that there were areas of inconsistency between the chairperson's finding and the evidence led, as well as inconsistencies that appear from his handwritten contemporaneous notes and his subsequent ruling. I deal with this further below.

[24] It was put to the applicant in cross examination that there was no reason for her not to disclose her pregnancy and that she was under no legal obligation to do so at her interview with Kramer or on appointment. She testified that she would in any event have done so had she known at the time, as she saw this as an ethical obligation and a *"matter of respect*" to her employer.

[25] The applicant testified that she was *"being picked on and I was been (sic) discriminated against, in some way or other, as I was not allowed enough work time to complete an instruction or request".* She told the court that Kramer constantly linked her alleged non-performance to her pregnancy and told her on numerous occasions to stop using her pregnancy as an excuse. Her testimony was that, according to Kramer "*my work was not being done because I was pregnant and I should stop hiding behind my pregnancy"*. She denied that she had ever relied on her pregnancy to justify any non performance.

[26] Mrs Ester Swart, the applicant's mother, was called as the applicant's second witness. She corroborated the applicant's evidence about her initial lack of knowledge of her pregnancy, and confirmed that this was due to the medical condition which stopped the applicant menstruating for months at a time. Mrs Swart testified that notwithstanding the fact that applicant and her fiancé lived with her, she was *"not... impressed*" by the news of the pregnancy, and confirmed that she had only been given the news in the second or third week of May.

Respondent's version

[27] The first witness for the respondent was Mrs Arlaine Kramer ("Kramer"), the Divisional Manager to whom the applicant reported. Her testimony was that during the Sun City trip everyone was speculating about the applicant's pregnancy on account of her "*showing"* and the fact that she was "*going to bed early, being very careful what she ate....and drank".* Kramer testified that she sought confirmation from the applicant thereafter on numerous occasions, and was met with emphatic denials.

[28] Kramer further testified that during June Uys informed her that he had overheard the applicant confirming her pregnancy to someone during a telephone conversation. Kramer said she summoned the applicant to her office again and it was on this occasion that applicant finally confirmed that she was pregnant.

[29] Kramer's evidence was that her attempt to confirm whether the applicant was pregnant was motivated by the need to ensure proper planning of the respondent's business operations. She testified that, given that the applicant was in a key position and that her pregnancy seemed to be fairly advanced, she feared that the applicant would simply arrive one day and announce that the was going on maternity leave. She denied that the pregnancy itself was relevant. She testified that the applicant was charged with misconduct because "*her position is a critical position in the company. She is the backbone of the division, and if she was pregnant I needed to plan for when she would be on maternity leave*". Kramer testified that the respondent had a human resources policy in place to enable it to deal with maternity leave, as it was not uncommon for one or more employees to be on maternity leave at any given point in time. She said that she simply sought confirmation from the applicant to enable her to plan the divisional operations for which she was responsible. In addition, her evidence was that she wanted to mitigate the respondent's risk, and this was what motivated her to seek the "*doctor's confirmation,* so that she could be sure when the applicant was fit to resume work and when she would be on maternity leave.

[30] In her evidence Kramer denied that she had refused the Applicant's request for leave at any time, and said that despite the fact that the applicant had exhausted her sick leave, she was still entitled to annual

leave.

[31] Kramer's evidence was that the applicant's decline in performance and lack of interest in her work may have been due to her pregnancy. She expressed this in the following terms : *"I just assume it must be lack of interest, some people when they fall pregnant, well they get so involved with their pregnancy, maybe it [her work] was not that important to her anymore."* This perceived lack of interest and the applicant's failure to respond "*timeously enough*" to her emails frustrated her enormously and was what led to the insubordination charges. Kramer admitted that she was a *"control freak*" and needed to be constantly updated on developments pertaining to her division and the applicant's work, and that she was in turn accountable for daily reports to her superiors.. She testified that all employees were aware of this character trait.

[32] Kramer's evidence about the disciplinary offences with which the applicant was charged, and which led to her eventual dismissal was that:

- the gross insubordination charge related to the Applicant's failure to respond to repeated instructions from her employer;
- the charge of *"conduct affecting employer/employee relationship"* related to the applicant's failure to fulfil her work obligations, as well as to the continuously untidy state of her desk; and
- the non-disclosure led to a breakdown of trust.

[33] Kramer's further testimony was that the applicant's misconduct was evident from her repeated emails requesting information. Thereafter, she stated that the emails had been "*reminders"* following verbal instructions that had not been complied with, and furthermore were only a *"sample*" of the numerous emails she had sent. Her testimony was that she had not produced in evidence all the email correspondence she had sent to the applicant in regard to her alleged failure to perform, in that had she done so "*we would be here forever".*

[34] The second witness for the respondent was Lodewyk Pienaar ("Pienaar"), a labour consultant who was the chairperson of the applicant's disciplinary enquiry. He testified that he had no knowledge of the applicant's case prior to the hearing. His evidence was that applicant had pleaded not guilty to all the charges and had been found to have committed all of them, including the charge relating to non-disclosure of her pregnancy.

[35] Pienaar confirmed Kramer's testimony as being that she had *"lost trust*" in the applicant arising both from neglect of her work and *"the fact that she had not been forthright when asked specifically whether she was pregnant or not".*

[36] Pienaar testified that he took account of the applicant's pregnancy only as a mitigating factor in deciding on an appropriate sanction. His

reasoning was as follows:
"It could not be ignored that the employee was pregnant at this stage, although very early in her pregnancy, and specifically the employee's testimony that on the 25th she was not at work and that she apparently had cramps – I took it upon myself to rule on this matter of the pregnancy. And the test that I applied was how do you(sic) deal with an employee with misconduct during the period of pregnancy. And I made sure that her pregnancy did not interfere with her ability to do the tasks at hand... Even though she did not in any way say that her pregnancy prohibited her or impacted on her abilities to do the tasks at hand, I took it into account. ...I found on the facts at hand that none of the instructions given to the employee was rendered impossible to do due to her pregnancy... and there is no medical reason for her not to complete her duties and that her misconduct is therefore related to misconduct and not ill health. In straightforward terms there was no medical reason for her not to do her job, she simply did not do her duties".

[37] Pienaar's testimony was that the respondent felt abused by the applicant's non-disclosure in that "*the moment she got the job, she first did her duties well and after she became pregnant she neglected her duties and was waiting for maternity leave".* He pointed out that Kramer's evidence, as he recorded in his finding, was that "*the moment she was confirming (sic) the position, started to neglect her duties"*. He understood this to mean that the applicant neglected her duties as soon as her probation period ended and her appointment as Co-ordinator was confirmed. It was put to him in cross examination by the applicant's attorney that this was inconsistent with Kramer's version that the applicant had been an exemplary employee for the first two months of her employment. He did not accept this. He thereafter conceded that Kramer's version was that "*she did do her duties exemplary (sic), and then at some stage when she found out that she was pregnant or whatever her personal circumstances was, she ceased to do those duties".* When the applicant's attorney attempted to clarify when exactly the neglect of duties began, Pienaar denied having made the concession that it coincided with her pregnancy.

[38] Pienaar testified that Kramer's need to confirm whether the applicant was pregnant related to "*wanting her to tell them that she was pregnant so that they could arrange maternity leave, and she did not comply with that instruction. So only in relation to that did it become relevant in the hearing".* It was put to him by the applicant's attorney this was incorrect and he disputed it. He re-asserted that the only reason why the applicant's pregnancy was relevant was that he could not ignore it, but that the enquiry focused on her non-performance and not her pregnancy. When he was then prompted to explain what other issues she could not ignore at the enquiry, he replied, a tad sarcastically, that "*she was white, she is a woman and she was pregnant, things that cannot be ignored".*

[39] During cross-examination Pienaar was requested to explain various other apparent inconsistencies in his finding but he denied that they were inconsistent.

[40] In my view it is also clear from Pienaar's evidence that there were a number of procedural errors in the enquiry. This is however not relevant to my finding in this matter I do not propose to deal with them.

[41] The Respondent called Sheldon Uys ("Uys"), the outdoor area manager of respondent as its third witness. Uys testified that the applicant had told him *en route* to Sun City that she suspected she was pregnant and had done a home pregnancy test. In addition, about two to three weeks after the Sun City trip he overheard the applicant tell someone telephonically that she was pregnant. He reported this to Kramer because he was concerned about how the pregnancy would impact on the respondent's operations particularly over the holiday period. His testimony was that when the applicant began her employment with the respondent, "*everything went well; it was actually a dream, less overtime*". There were differences in his and Kramer's versions of what the applicant's responsibilities entailed but they are not relevant and I do not propose to deal with them. As a result of work pressure, which he attributed to his having to deal with some administrative functions he thought the applicant was responsible for, he suffered a mild heart attack. However, when specific functions were put to him, and he was shown emails relating to the applicant's involvement in matters he said he had been forced to take over as a result of her failure to perform, for instance the ordering of uniforms, he denied knowledge of the emails. His evidence was even vaguer in relation to whether the applicant had arranged meetings with suppliers of staff uniforms, and details regarding the delivery of the uniforms. He denied knowing when the applicant was dismissed. Uys admitted that he had assisted the applicant with tasks often without the knowledge of Kramer and other staff, and that his motivation for doing so was that he "*had a soft spot for her".*

Submissions

[42] Mr Voyi, appearing for the applicant, argued that the underlying reason for her dismissal was the non-disclosure of her pregnancy, and there was insufficient evidence of poor performance. He submitted further that the applicant had discharged the onus of proving that her pregnancy or a reason related thereto was the dominant reason for her dismissal.

[43] Mr Pienaar, on behalf of the respondent, submitted that the issue was whether a person in the same position as the applicant would on a preponderance of probabilities succeed in proving procedural and substantive unfairness as alleged in her referral. In relation to the

automatically unfair dismissal, he argued that the applicant's case did not even remotely bring her complaint within the confines of the discrimination envisaged in section 187(1)(e). He suggested further that the discrimination claim was belated, it was a *"red herring*" motivated by the applicant's greed, and that the charge relating to it was "incidental". Finally, he submitted that the reason for the applicant's dismissal was misconduct relating to dereliction of her duties, and this had been established by the respondent in its evidence.

Analysis of evidence and submissions

[44] It is clear from Kramer's evidence that she was extremely upset with the applicant. She had conceded that that key issue was her loss of trust in the applicant: *"You know, if you get employed in a position, you start a relationship with the employer hopefully based on trust. So if I come and lie to you about something before I even start, how is your relationship going to build from there. I do not like lies, I must be honest, I do not deal very well with people who do not tell me the truth. So if you start a relationship like that where can you go; that is the one side of it. The other side of it is, had she said to me she was pregnant, we would have dealt with it differently. Maybe I would not have given her such a responsible job".* Therein lies the rub. Her version is not that the omission charge was incidental. Indeed she saw the omission as a lie and therefore as fundamental to the relationship between herself and the applicant. She conceded furthermore, as she had in the disciplinary enquiry, that the applicant was abusing the respondent in that *"she did not think she was on probation, but she also knew she could not find a job in her pregnant state at that stage".* This is the reason why the relationship declined once it came to light that the applicant had in fact been pregnant at the time of her appointment and had not disclosed this. The operational concerns were not critical as Kramer's testimony was that the Respondent frequently had one or more employees on maternity leave. Despite her articulation of her primary concern as being the need for business planning, she required only applicant's leave dates to do so, and she had been given those dates, even on Respondent's version, as early as mid-June.

[45] Kramer presented inconsistent evidence regarding the applicant's declining performance. She testified in the disciplinary enquiry that the applicant was an *"exceptional employee for the first two months".* Thereafter, her testimony was that "*she was phenomenal in the first month".* The chairperson records her testimony as being that the applicant started to neglect her duties the moment she was *"confirming (sic) in the position*". When it was put to her in cross examination that her evidence to the enquiry was that the applicant had been a bad performer from day one she denies it and only admits it when she is referred to the chairperson's report. She then testifies that it was only *"after a while*" that the applicant began neglecting her duties, and that

the reference to exceptional performance in the first two months had been an *"overstatement*". When the applicant's legal representative asked her clarify exactly when the alleged non-performance began she became visibly annoyed and replied: *"well that is pedantic..because in the beginning Nicolene was great, whether it was a month or six weeks, or four weeks or three weeks, she did the job... thereafter she did not do the job".*

[46] Kramer's testimony to the effect that the applicant had never provided information about her due date and maternity leave dates was incorrect as she had received this verbally and in writing during June and the end of July respectively.

[47] Kramer has not convinced this court that her repeated requests for the "*doctor's confirmation*" was a rational and reasonable request in the circumstances. Furthermore, Kramer's persistence in regard to this was inconsistent with her admission that the timing of maternity leave was a personal decision. She expressed the reasons for requesting the "*doctor's confirmation*" as being, *inter alia*, that:

- She had been requested by the Respondent's Managing Director to obtain medical confirmation of Applicant's pregnancy leave and due dates;
- The certificate was necessary because Applicant "*had exhausted all her sick leave and was still not feeling well".*
- "*Everything had been so confused in terms of all of this that we just wanted something in writing from her doctor*".
- It was a fair request given *"her pre-term labour issues and problems that she was experiencing",* which had not been resolved when the applicant returned to work at the end of July, and she was concerned that it may recur.

[48] Kramer also knew that her request would have caused great inconvenience to the applicant as she would have to take a day's leave to go to the provincial hospital to obtain it. Furthermore, Kramer had denied the applicant's request for leave rendering this impossible within the unreasonable deadline that had been set. Soon after this the applicant was dismissed. In this context, the only conclusion that can be drawn is that Kramer's persistence in regard to the *"doctor's confirmation"* was nothing short of pure vindictiveness. This is also the only plausible explanation for delivery of the notice of threatened disciplinary action to Applicant's home knowing she was in pre-term labour, and the "*flurry"* of emails during the applicant's sick leave, regarding, *inter alia*, her untidy desk, which could hardly have been said to be critical to the respondent's operations. None of her emails related to matters that were of such extreme urgency or so critical to the business that they could not have waited until the applicant returned to work and the threat of pre-term labour was over. Kramer's explanation that the emails were simply a result of the "*way she worked*" was inconsistent in the light of her evidence that timeous planning was key to her role as Divisional Manager. It is clear to me

from the evidence that the embarked on a concerted campaign to harass and victimise the applicant because she was upset by the non-disclosure.

[49] Furthermore, Kramer's obvious support for Uys on account of his stress related heart condition was not forthcoming towards the applicant. The only conclusion that can be drawn from this is that she was angry with the Applicant on account of her non-disclosure. Although there are limits to the extent to which employers can be expected to be sympathetic towards employees in regard to pregnancy, as established in *Woolworths (Pty) Ltd v Whitehead* [2000] 6 BLLR 640 (LAC) and *Wardlaw v Supreme Mouldings (Pty) Ltd* [2004] 6 BLLR 613 (LC), the applicant's case was never that respondent should have shown sympathy towards her. She had never expected this nor had she attributed any of the alleged performance issues to her pregnancy or the threatened pre-term labour. Her evidence was that she had always performed and that the poor performance charges were spurious.

[50] Kramer's testimony that she needed to confirm the pregnancy as early as possible in order to plan is not consistent with the apparent ease with which Applicant was replaced after her dismissal, or Kramer's evidence that she dealt with pregnancy issues on a daily basis with the numerous female employees at the respondent. If anything, it renders her version less than credible because if it was so common to replace or support staff that were frequently proceeding on maternity leave this would not justify her insistence on disclosure of the applicant's pregnancy and insistence on medical confirmation of her maternity leave date months in advance.

[51] The other difficulty with Kramer's evidence is that she admitted that she called the chairperson of the enquiry for advice prior to the enquiry, although her explanation was that there were three advisors to the respondent and she did not know who would arrive to chair the enquiry. She subsequently denied that she had discussed the matter with him. This also conflicts with the applicant's testimony that it was common practice for Kramer to discuss matters with the chairperson prior to an enquiry, and she had herself been involved in a number of enquiries involving other employees where this had occurred.

[52] Kramer's evidence was that she counselled applicant through the warnings because she "*was highly frustrated but.. wanted to work with her…I wanted to try and make sure that we sorted things out. I only charged her with that [omission] because we went to a hearing, and that became part of a hearing and that was the last step; that is why".* This does not sound like an employer who genuinely believes an employee is not performing, which renders her evidence even less credible.

[53] Pienaar was a most unsatisfactory witness. He contradicted Kramer's

version that she had discussed the matter with him prior to the hearing, which she also subsequently retracted in cross examination. He backtracked on the point at which he had said the applicant's failure to perform began. He misconstrued the nature of the issues relating to the omission charge in the enquiry and said he took the applicant's pregnancy into account merely as a mitigating factor when in fact he found her guilty on the charge relating to failure to disclose. It is not implausible that he would seek to protect his client.

[54] There were numerous inconsistencies between Pienaar's handwritten notes made contemporaneously at the enquiry and the summary of evidence in his subsequent ruling. In regard to the applicant's leave and due dates he testified that she said "*by that date she had not decided when she would be going on maternity leave".* However, a different version appears in his handwritten notes, which reflects her evidence on this issue as being that the "*"doctor told me that he can't decide my due date...did say I am fit to work and said I should decide due date".* Contrary to this his ruling then describes her evidence to be as follows:

"*Pregnancy*

The Accused indicates that her doctors are unable to tell her when her due date is and she must therefore "decide" what date she wants to go on maternity leave. She is therefore not in the (sic) position to comply with the company's request that a doctor must indicate whether she is healthy or not and whether she is ready to resume her duties and until what date".

[55] The evidence of Kramer and Pienaar was also contradictory in regard to the stage of the applicant's pregnancy, although there is no reason why the employer should have been concerned about this. In the enquiry, which took place in August, Pienaar's observation was that the applicant's pregnancy was "*in its early stages*".. On the other hand, Kramer's concern was the detrimental impact on the business if the applicant simply left saying *"cheers guys..I am going on leave*", given that her pregnancy was at an advanced stage.

[56] Uys's evidence did not take the matter further. From his testimony it is clear that his reasons for supporting the applicant with her work were purely personal, self-motivated and voluntary, and that Kramer had duplicated her instructions on some matters to him as well as the applicant. He admitted that the applicant had disclosed her suspected pregnancy to him as early as the Sun City trip, and in this regard he contradicted Kramer's version that the first time he had found out was when he overheard the applicant's telephone conversation in mid-June.

[57] Kramer conceded that if she had known at the time of her appointment that the applicant was pregnant she might not have appointed her as Co-ordinator. This contradicts her evidence that the issue of pregnancy is a normal occurrence at the workplace of the respondent and it is fairly easy to plan for it, and is tantamount to an admission in regard to

discrimination that the applicant complains of.

[58] The applicant's version was that her relationship with Kramer began deteriorating once Kramer knew she was pregnant and, more importantly, that she had been pregnant at the time of her appointment. This is a plausible explanation for why the omission justified a disciplinary charge when it had not been a problem initially, and corroborates the applicant's version that the relationship between the parties had been normal for the first two months and Kramer had initially been supportive.

[59] Kramer's evidence that the written warnings and disciplinary charges were actually in respect of misconduct and not poor performance is also not credible in the light of the fact that she seemed to have been advised on a regular basis by the labour consultants in the process of disciplining the applicant. Furthermore, she was an obviously experienced senior manager who had been involved in numerous disciplinary processes, rendering any lack of understanding on her part less than likely.

[60] The applicant was a reliable and impressive witness who gave coherent and consistent evidence. She did not dispute that she was pregnant at the time of her commencement of employment, and her evidence that she had not been ware of this was credible given the medical condition she had, which was confirmed by her mother. She denied that she had deliberately misled the Respondent by not disclosing her pregnancy at the time of her interview and subsequent appointment. She did not know that she had no legal duty to disclose and when this was put to her said she would have disclosed in any event because she saw it as an issue of personal ethics and respect to the employer.

[61] I do not consider it necessary to deal with whether the finding of the disciplinary enquiry in relation to the charges other than the charge relating to non-disclosure was justified. What is relevant is that the applicant was charged with non-disclosure of her pregnancy, found guilty on this charge, and that it was one of the charges that led to her ultimate dismissal. It was not treated as merely "incidental" or a "red herring" at the enquiry, as was submitted by the respondent, but was connected to the other three charges in that on the respondent's own version there was a causal nexus between her pregnancy and her conduct.

[62] The other issue that arose, although I am not required to decide this, is the employer's insistence that the applicant takes maternity leave less than the statutory minimum she is entitled to, on account of her length of service. In addition, the manner in which her sick leave was calculated, resulting in the conclusion that she had exhausted all her leave, may constitute a contravention of the Basic Conditions of Employment Act, 75 of 1997.

Finding

[63] A dismissal is automatically unfair in terms of section 187 (1) (e) of the Act if it is based on an employee's intended pregnancy, her pregnancy or a reason related to her pregnancy.

[64] In regard to the onus of proof the Labour Appeal Court held in *Kroukam v SA Airlink (Pty) Ltd* (2005) 26 ILJ 2153 (LAC), that section 187 imposes an evidential burden on the employee to adduce evidence which is sufficient to raise a credible possibility that an automatically unfair dismissal has occurred. The employer must then discharge the burden of proving that the dismissal was not automatically unfair. In the view of Francis J in *De Beer v SA Export Connection CC t/a Global Paws* [2008] 1 BLLR 36 (LC), this requires the employer to refute that the dismissal was for pregnancy or a reason related to pregnancy. In this instance the respondent is not able to refute this and its case is that the applicant was charged with misconduct constituting non-disclosure of her pregnancy at the time of her appointment, and dismissed, *inter alia,* as a result of this. The respondent's contention that the non-disclosure charge was "incidental" is not borne out by the evidence. It is clear, in my view that the applicant was dismissed for her pregnancy or a reason related to her pregnancy. The respondent has not produced evidence to show that the reason for her dismissal fell outside the circumstances contemplated in section 187(1)(e).

[65] It is trite that a pregnant employee has no legal obligation to disclose her pregnancy other than as required for purposes of the Basic Conditions of Employment Act, 75 of 1997. This obligation extends to both an actual or planned pregnancy. The employee is the arbiter, in consultation with her doctor, of when it would be necessary for her to commence maternity leave and her health and that of her baby is the primary consideration in this regard. Although the timing of her leave may in certain instances be subject to operational requirements, this is not an issue as long as she exercises her choice in this regard and does not do so at the expense of her health. The employer is not required by law to consent to maternity leave – every female employee has a statutory entitlement of four months unpaid leave under the Basic Conditions of Employment Act. Maternity leave, like annual leave, is a legal right not a privilege. The only difference is that in the case of maternity leave biological factors militate against the employer's convenience being a relevant consideration in the timing. Not only was the applicant in this instance unreasonably being asked to provide medical proof of when her maternity leave would commence and when her baby was due, she was subjected to harassment as a result of her failure to do so, and may have been denied her statutory entitlement to sick leave.

[66] Although I have had scant regard to the other charges for which the applicant was dismissed, and I have not made a finding in regard to

whether or not there was gross dereliction of duty on the part of the applicant, I have no doubt that the applicant's conduct was not of the same species that the court had to contend with in *Wardlaw v Supreme Mouldings (Pty) Ltd* [2004] 6 BLLR 613 (LC*).* Furthermore, we are not here dealing with such a tenuous link to pregnancy as existed in *Wardlaw,* but an admission that the applicant was indeed dismissed, as one of the reasons, for her pregnancy or a reason related thereto.

[67] However, even if the respondent's contention that there were other reasons for the applicant's dismissal is accepted, it is not able to show that these are unconnected to her pregnancy. On the legal causation test set out in *Kroukam,* the applicant has discharged the onus of proving that the non-disclosure of her pregnancy was the *"dominant"* or *"most likely cause*" of her dismissal.

[68] I have furthermore had regard to the *dictum* that the onus on the employee as described by Zondo JP in *Kroukam* is much heavier in cases relying on automatically unfair dismissal than in dismissals alleged to be "*ordinarily unfair".* He described this as follows:
"*In my view a court should be slow to infer that the reason why an employer has brought disciplinary charges against an employee or the reason why the employer has dismissed an employee is for illegitimate reason(s)...unless there is sufficient evidence to justify such a conclusion. A court should be even slower to come to that conclusion in a case where it does seem that the employer may have had a basis for bringing disciplinary charges against an employee even if the court would not have done the same had it been in the employer's shoes*" (*Kroukam*, supra,at 1201 para 86).

[69] Zondo JP added however that where a proper basis is laid for finding the contrary the court should not hesitate to do so. For the reasons advanced above, this is clearly one of those instances. I accordingly do not need to consider whether the dismissal was *"ordinarily unfair".*

[70] I am accordingly of the view that the applicant has succeeded in proving that her dismissal was for her pregnancy or for a reason related to her pregnancy.

In the result I make the following order:

1) The dismissal of the applicant constitutes an automatically unfair dismissal as envisaged by section 187(1)(e) of the Act.
2) The applicant does not seek reinstatement. In the circumstances, and taking into account the applicant's period of service, the respondent is ordered to pay the applicant compensation in the sum of R96 000.00 computed on the basis of 12 months' remuneration at the rate of R8000.00.
3) I see no reason why costs should not follow the result.

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U Bhoola
Acting Judge of the Labour Court

Date of hearing: 20, 21& 22 October 2008
Date of judgement: 1 December 2008

Appearances:
For the Applicant: Mr N. Voyi, Ndumiso P Voyi Attorneys
For the Respondent: Mr J L Pienaar, Louw Pienaar Attorneys