

IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG

CASE NUMBER: Js 242/05

In the matter between:

Mikra Uys

Applicant

and

Imperial Car Rental (Pty) Ltd

Respondent

JUDGMENT

CELE AJ

Introduction

- [1] This is a claim about an automatically unfair dismissal of the applicant by the respondent on the basis of her pregnancy. In the alternative, the applicant claims that her dismissal was substantively and procedurally unfair. The respondent opposed these claims.

Background facts

- [2] The applicant commenced her employment with the respondent as a Rental Agent but was promoted to the position of a Branch Manager. She reported to the National Credit Manager, one Ms Annabela Gones Duarte, who was based at the head office of the respondent. Ms Durte has since reverted to her maiden surname of Andrade. I shall refer to her as Ms Duarte, in line with such reference in the pleadings. The applicant left the respondent to go and work in various other companies.
- [3] Ms Duarte was in charge of a staff compliment of 25 employees, 98% of whom were women. Most of them had children and had been pregnant while they were in the employ of the respondent. All worked in an open plan type of an office.
- [4] As the National Credit Manager, Ms Duarte was in charge of the debtors department which had about R100m owed to it by its clients at any given time. Her department also offered credit card services which entailed credit card charge backs, where a client utilised the credit card services, and was querying an amount, the department had 5-7 days within which to process and submit documentation in relation therewith to the bank of the client. That would be proving to such bank that the client utilised credit card services. Where the department failed to timeously produce such proof to the bank, the bank reversed the whole transaction, resulting in the account of the respondent being debited with the amount of the transaction. That resulted in the respondent having to recover the transaction fees directly from the client, instead of being credited with the payment by the bank concerned. The staff of the department had therefore to work in a spirit of some

urgency, in the belief that the quicker they got to the client, the better were chances of recovering money outstanding to the respondent. The work of the department entailed the generation of a lot of paper work. The working environment was generally extremely pressurised.

[5] In November 2004, the applicant came to the reception area of the respondent and met Ms Duarte. The applicant showed interest in coming back to work for the respondent as she enquired about the availability of the position. She learnt from Ms Duarte that there was a vacancy in her Credit Control Department. They discussed about that position and the applicant showed interest, whereafter Ms Duarte arranged for a job interview which was held on 17 November 2004. Ms Duarte was alone when she conducted the interview of the applicant. She arranged for the second interview of the applicant and scheduled it for 19 November 2004. Ms Duarte was a member of the panel, together with Ms Jenny Venancio who was an Assistant Credit Control Manager and Ms Irene Rhoda who was a Departmental Supervisor of the respondent. Ms Duarte also telephoned the previous employer to enquire about the remuneration of the applicant. The applicant was advised that she would take over the functions of one Ms Claire Patisson who was due to go on maternity leave in May 2005.

[6] After the interview, Ms Venancio telephoned the applicant and informed her that Ms Duarte liked her to spend a day in the department to ensure that it would be the kind of job she wanted. It was also to ensure that the applicant fitted in with the rest of the staff. The applicant agreed and then spent Monday, 22 November

2004 in Ms Duarte's Department. Ms Duarte had a discussion with her on the job expectations. The applicant was excited about the job offer which she accepted. She had informed the interview panel that her take home salary with her previous employer was R 7 400=00 per month. Her first day at work was on 24 November 2004. The applicant was asked by the respondent to produce proof of her earnings with her previous employer. The applicant produced an RIP 5 certificate copy.

- [7] She presented herself with a very happy or bubbly mood. Ms Duarte gave her a letter of appointment to sign in acceptance of the job offer. Its contents read:

“We have pleasure in confirming your appointment as a Debtors Administrator, with effect from 24 November 2004, at our head office.

Your commencing salary will be R 8 200, your employment will be subject to conditions of employment as contained in the Annexe hereto (Form IG/Pers/5).

Please signify your acceptance of the position and the terms and conditions pertaining there by signing this letter and returning it to me as soon as possible.”

- [8] The bottom part of the letter has a portion for the applicant's signature and a date. The applicant took the letter but did not sign it on that day. The applicant spent the first day at work, training with Ms Patisson on the administration process of charge backs. Ms Patisson handed to the applicant 3 arch lever files which were made up of sub files with report of the clients of the respondent to continue to work on.

[9] On 25 November 2004 the applicant informed Ms Duarte that she had conducted a home pregnancy test which confirmed that she was pregnant. She wanted to know if she could still sign the letter of appointment. The news came as a shock to Ms Duarte, who became very angry at the time. Ms Duarte told the applicant that, that changed everything and she told her that she needed time to think about the situation. Later Ms Duarte called the applicant and told her to sign the letter of appointment because she was already employed by the respondent. She was then given to Ms Patisson who was to train her on the job. She had to work with files of clients in what was referred to as “Charge backs”. This relates to a follow up process to retrieve money for car rental which had been given to customers. A review of these files was constantly conducted by supervisors and managers.

[10] On 08 December 2004 Ms Venancio discovered that there were 24 charge back files missing. These had been signed for by the applicant. The files were kept in binders, which in turn were kept in an unlocked credenza. That led to the applicant being served, on 09 December 2004, with notification of a disciplinary enquiry and she was suspended from duty, pending the enquiry. The charges were described as:

1) Gross Negligence

By loosing 24 credit card charge backs files.

2) Deliberately giving untrue and misleading

information:

By being dishonest about salary, as per attached e-mail Mikra advise that she was clearing R 7 400=00.

3) Unsatisfactory work performance:

Constantly on a cell phone, complaining to other staff.
No sense of urgency or persistence when following upon outstanding amounts or documents.

[11] The applicant was found to have committed all the acts of misconduct with which she was charged and was dismissed. She lodged an appeal which was not successful. Thereafter she referred a dispute about an automatically unfair dismissal, alternatively unfair dismissal to the Commission for Conciliation, Mediation and Arbitration (“the CCMA”) for conciliation but it was not resolved and a certificate to that effect was issued. The applicant referred the dispute to this Court by means of statement of claim. The respondent duly filed its answer to the statement of claim. The parties failed to resolve the dispute during the pre-trial conference held but filed a minute thereof.

[12] The respondent admitted that it dismissed the applicant, but it alleged that different circumstances led to it than those which the applicant submitted. The respondent led the evidence of two witnesses, Ms Duarte and Ms Patisson whereafter the applicant testified and was the only witness in her case.

[13] I will then deal with the evidence of the parties as it unfolded during the trial, in so far as it impacts on the disputed facts. Such

may be categorised into the following:

1. Appointment of the applicant.

1.1 The reception meeting

1.2 The interviews

2. The applicant at work.

2.1 The applicant's first two days at work

2.2 The period thereafter.

3. The charges.

1. Appointment of the applicant

1.1 The reception meeting

[14] The evidence of Ms Duarte is that the applicant informed her that she had had bad experiences as a result of miscarriages she had gone through. She had then put the idea of starting a family at the back of her mind and was, at the time on contraceptives.

[15] The version of the applicant was that she discussed with Ms Duarte that she was not planning to start a family. They spoke about her life and she told Ms Duarte that she had been trying to conceive but not at the time. She denied that she told Ms Duarte that she was on contraceptives and she said that she had never been on them.

1.2 The interviews

[16] Ms Duarte was alone on 17 November 2004 when she interviewed the applicant. She testified that before the interview and in an

informal manner, she had asked the applicant about her family. She said she was mindful of the fact that, during the interview, it was not permissible of her to ask the applicant if she was or was not pregnant. That evidence was not contested by the applicant.

- [17] The applicant was subjected to a second interview on 19 November 2004. The issue of pregnancy was raised by the applicant when she wanted to know if the respondent had a policy against pregnancy. Ms Duarte's evidence was that the applicant's question was met with laughter by the panellists who then told her that no such policy existed as it would be unconstitutional if it existed. The applicant agreed with that version.

2. The applicant at work

2.1 The applicant's first two days

- [18] Ms Patisson testified that the applicant constantly interrupted the training by smoking, going to other people and by being on her cellular telephone, attending to her private matters. She said that Ms Duarte had told the applicant to keep notes of what she was trained on but the applicant did not do so. In respect of the handling of the files, Ms Patisson said that she trained the applicant not to remove the files from the arch levers but to flag those that she was working on at the time.
- [19] The applicant conceded that she used her cellular telephone, mainly for incoming calls with the knowledge that there was no policy of the respondent against its use. She said that Ms Patisson was training her as Ms Duarte was still going to explain her

responsibilities and functions to her.

- [20] The applicant testified that when she returned to work on the second day, she had a feeling that she had to be honest with Ms Duarte in telling her of her pregnancy before she signed the letter of appointment. According to her, Ms Duarte should, at most, have been surprised by the report. She said that she hoped that Ms Duarte would be happy for her. The applicant said that she was disappointed when Ms Duarte told her that that changed everything and that she would have to address the issue of her pregnancy with management in the credit control department. She said that when Ms Duarte called her back, she told her that it would be unconstitutional to tell her not to sign the letter of appointment and further said that she was “pissed off”. The applicant said that she was extremely upset by the reaction of Ms Duarte which burst her bubble as she had been looking forward to a career with a permanent appointment.
- [21] The applicant said that after she reported her pregnancy, she was constantly in tears. She said that at one stage Ms Venancio called her to the garden and said to her that she was to think about things, go home and come back on the next day being fine. She said that she explained to Ms Venancio why she was upset and Ms Venancio told her that Ms Duarte would get over it. She conceded that her emotional state might have had been due to her pregnancy.
- [22] Ms Duarte testified that the news of the applicant’s pregnancy took her by total shock as she had just taken her on. She conceded that she was very angry at the time and did not know what to do whereafter she told the applicant to give her a few minutes to think

the situation out. She said that she called the applicant back later, and told her to sign the letter of appointment as she was already in the employ of the respondent. She said that she told the applicant to work hard and prove herself that she was capable of the position as she was new. She denied that she said she was “pissed off” but conceded that she said that it changed everything.

The period thereafter:

- [23] Ms Patisson said that she continued with the training of the applicant due to the fact that she had to start all over again because of the applicant’s interruptions. She said that the training lasted for a week when it could have been shorter. She testified that the applicant told her about her pregnancy and asked her a few questions about hers. According to her, the applicant cried a lot, went out to speak on her cellular telephone and to speak to others but the applicant did not tell her why she was upset, nor did she ask her.
- [24] Ms Patisson denied that she and Ms Duarte treated the applicant badly because she was pregnant. She said that as she was also pregnant; they were both treated similarly at work. She testified that she heard from the grapevine that the applicant was telling the staff that she and Ms Duarte were ill-treating her. The rumour was that she did not train her well but was not about her pregnancy. She said that it frustrated her when the applicant came to her to ask work related questions but she was never nasty towards her.
- [25] Ms Patisson pointed out that Ms Duarte was fairly busy as it was their financial year and that she was also a Director of Imperial Car

Rental in Mozambique, which made her very involved. She said that after the training was over, she handed all files to the applicant and that it was on Monday following the week's training when the handing over took place. She said that the files were complete when she handed them over to the applicant for her to continue to work on. When she was shown her signature and a date of 24 November 2004, she conceded that it was the date of a hand over. She said she still made follow ups with the applicant after the hand over as she still had to go over bank statements to check if there were charge backs. She testified that it was during that time when she noticed a few files lying outside of the file bundle and she told the applicant not to remove them as there would be a book review done. According to her, the applicant did not do as she was told. She said that there were few acknowledgements which clients had signed and there were charge backs with queries but the applicant did not action or follow them up as she ought to have.

[26] Ms Patisson said that she proceeded to Ms Duarte to report the applicant's failure to do as she had been trained and that instead, she was constantly crying. According to Ms Patisson there was a day when the applicant asked them if there were any cash back files lying around, she said every body tried to help locate those files but in vain. She said that she did not think that the applicant realised the importance of the missing documents.

[27] Ms Duarte testified that on a day after the applicant had signed the letter of appointment, the applicant arrived at work with a negative mood which put Ms Patisson, who was still training her, under a strain as it was towards month end. At that stage Ms Patisson was

four months pregnant and the applicant was gossiping in the office, resulting in Ms Patisson feeling uncomfortable.

[28] Ms Duarte said that there was a day when she called the applicant to her office to counsel her over her continuous gossiping. That, she said, related to a complaint by the applicant who was saying that Ms Duarte was not spending time with her. She said she told her that she could not afford to have time for each of her staff who were more than 20 in all. When the applicant denied gossiping, Ms Duarte said that she wanted to call certain staff to confirm the allegation but stopped when the applicant resiled from disputing it. Such gossip, she said, revolved around the applicant complaining that she was pressured by work. She denied that the gossip related to her treating the applicant badly.

[29] According to Ms Duarte pregnancy was not an illness. She had had staff who had been pregnant and at some stage she had been pregnant herself. She said that she told the applicant to sign the letter of appointment, pregnancy notwithstanding. She said that the policy of the company was to grant maternity leave to the pregnant staff but that the company did not stand to lose anything as it would be unpaid leave.

[30] Ms Duarte said that she would conduct constant and unannounced book checking of the staff in her department. Such inspection was known as book review. She said that she told Ms Venancio that she (Ms Duarte) was to have a book review with the applicant. It was then at the beginning of December. She had then to reschedule that review, as she had to be off-duty. When she came back to work she received a report that Ms Venancio had checked the work of the

applicant only to find that there were a number of files missing. When a file went missing, the company was at risk of losing revenue. She testified that in her 9 years with the company, no file had gone missing in her department. She said she had called the applicant to find out what had happened and said that those files were never found. She said she checked the files which were available and found that not all steps to collect money had been followed up by the applicant. She said that she then decided to charge the applicant and therefore served her with a notice of suspension and then with one of an internal disciplinary hearing.

[31] According to Ms Duarte, the applicant had already had two counselling meetings with her when she served her with a notice of suspension. Later, she said that she did not want to call those meetings counselling sessions. She said that she could not remember the exact dates when she had the meetings with the applicant. Ms Duarte identified a letter, which she said she had written with the intention of giving to the applicant as a written warning. When the report of the missing files came to her, she decided not to give her the letter instead she suspended the applicant, pending the hearing.

[32] Ms Duarte testified that of the 69 files that were given to the applicant to work on, 24 had gone missing. She referred to the lost files as constituting a significant number as they were about a third of the files she was working with. She said that the time it took to work on each file to completion was not the same. It was her evidence that she did not know how the files were lost but she suspected that the applicant deliberately lost the files to cut down

on the work she had to do on them. Such work entailed telephoning the clients, making follow-ups and so on. She conceded that there was electronic recording pertaining to the files but added that people do take short cuts. She estimated the costs of making copies of the files to be about R 500=00 per file but agreed that, at the time the files went missing the cost was about R 350=00. She gave an estimate of a potential loss to the company for all 24 files to be around R 200 000. She explained that at the disciplinary enquiry she had given a figure of the potential loss as R 95 000 but she said that a lot more had still to be done to recover the outstanding money, which she said explained escalated costs associated with such recovery.

- [33] Ms Duarte said that she bore no knowledge of questions that the applicant had reserved for her. She denied having known about a meeting which was requested by the applicant with her but agreed that she had postponed the occasions on which she had planned to do book-reviews with the applicant.
- [34] According to Ms Duarte, the applicant knew who to turn to for help, or for any queries she might have had, in the absence of Ms Duarte. She said that Ms Venancio and Ms Rhoda were there for her and that Ms Patisson was only to help train the applicant.
- [35] The evidence of the applicant on this period is that as soon as she came to work on a day after she signed the letter of appointment, she was not greeted. There was a bad atmosphere at work. She worked for the week and volunteered for a Saturday as it was a month end and they had been asked to help. On 30 November

2004, a Tuesday, she had a meeting with Ms Duarte because she had been very frustrated with her work. There was a lot, which she said she had to query. She had seen that Ms Patisson was upset with her, even if she denied it. Ms Duarte told her to understand that Ms Patisson was also pregnant and therefore that she (applicant) was to avoid going to her every second to ask questions. She felt cut off and that the only person she could go to for help was Ms Duarte.

[36] The applicant said that she was to have a meeting with Ms Duarte on 01 December 2004 but it was postponed to the next day and again postponed to 06 December 2004. A week had then gone by without her queries receiving attention. On Friday of that week no one worked, as the staff collected money for children. By then she had a feeling that Ms Duarte had changed and had become hard towards her. She did not know what the gossip related to, as she did not speak to the staff about her pregnancy.

[37] On 06 December 2004, the applicant went to meet with Ms Duarte and took her files and a number of questions she had prepared along. Ms Duarte started by screaming at her for not stamping the files. That upset her as she did not even know that there was such a company stamp to affix on them. While still on such a bad mood, Ms Duarte went through the files and said that they were in a mass, as they had not been chronologically arranged. She pushed the files to her, saying that the applicant was to bring them back when they had been sorted out. She said that the files were in the same arrangement they had been in when Ms Patisson handed them over to her.

[38] The applicant testified that she was very upset when she left Ms Duarte as a result of how she was treated at the time. She had hoped there would be a constructive meeting. She said that she could not even raise the queries, which Ms Duarte knew very well she wanted to sort out with her.

[39] On Wednesday, Ms Venancio came to her for a book review. She was taken by surprise as she still hoped that someone would come, sit and work with her. Ms Venancio pulled a report from the computer system and they used a list to go through the files as she was shown what to do. They would tick those files they had dealt with but they found reports of the files to be missing. Ms Venancio told her to look for the missing files, adding that she was in trouble and that her life with the company was finished, if the files were not found. The applicant said that she had to telephone the clients concerned with the files but that as it was already late, they had to work until 18H00. Ms Venancio left her, saying that she would report the matter to Ms Duarte. She never, thereafter saw Ms Duarte until the day she served her with a notice of suspension.

The charges

(a) Gross negligence

[40] It was alleged that the negligence of the applicant was constituted by a loss of 24 credit card “charge backs” files. In the evidence led, the files were also referred to as reports. The reports were loose papers containing information pertaining to files kept in arch lever files. It has always been beyond dispute between the parties that:

- The 24 files were not in their binders and could not be located when Ms Venancio held a book review with the applicant on 08 December 2004.
- Ms Duarte was off-duty when it was established that 24 files given to the applicant were missing.
- The credenza in which the files were normally kept would not be locked.
- The date on which the files went missing could not be established.

[41] Ms Duarte refuted an allegation put to her on behalf of the applicant that she had lost the 24 files herself so as to get rid of the applicant because of her pregnancy. In regard to getting rid of the applicant, Ms Duarte had said that the relationship with the applicant had broken down and that the applicant conceded to that fact, during the disciplinary hearing. She said that if the applicant had asked, at the disciplinary hearing to be given a second chance that could have been done, in which event she could have been given a final warning. She said that the company was put at risk of a substantial financial loss as a result of the lost files. She said that she could not have resorted to causing such a loss in order to get rid of the applicant. When she was pressed for a suggestion of how the files could have been lost, she said that they were probably lost by the applicant in an attempt to cover up for the book review or to take short cuts in the work she was to do.

[42] According to Ms Duarte the applicant worked in an open-plan-type

office where the staff took turns to go to their breaks. There would therefore always be some people in the office, during office hours. Even though the files were not locked in, no file went missing in her department for 9 years since she worked for the company and that since 2002 no files had gone missing.

[43] The applicant's evidence was that the files were deliberately taken away to put her in a bad light and that the case against her was a fabrication so as to get rid of her. At first, she could not suggest who could have done it but when pressured, she implicated Ms Duarte, Ms Venancio, Ms Patisson and Ms Rhoda as they had a problem with her being pregnant. The applicant was unable to proffer an explanation of when the reports went missing. She said that she had worked on the files two days before it was found that they were missing. It was suggested to her, on behalf of the respondents, that she should have noticed that some reports were missing as they were about a third of the reports she was working on. Her response was that nothing seemed amiss to her until Ms Venancio discovered that the 24 files were missing. According to her, the reports were removed from different arch lever files.

[44] The applicant explained that as on 08 December 2004, the working relationship had become so strained that she was made to take her lunch and tea breaks alone instead of her being grouped with 2 or 3 other staff as had been the practice. She suggested that the files could have been taken during such breaks.

[45] The applicant conceded that the record of the internal disciplinary hearing filed with the pleadings, was a fair recordal of what was said. In relation to the lost files, the applicant was recorded in the

minutes as having said that she did not know who it was that committed such an act, nor did she know the reason for it. It was put to her that she did not proffer her pregnancy as the reason for her dismissal, during the internal disciplinary hearing. She responded by saying that she had said that she was dismissed for her pregnancy. When that was taken further, she then agreed that she said that she did not know why somebody had sabotaged her.

(b) Deliberately giving untrue information

[46] The allegation was that the applicant advised the respondent that she was remunerated in an amount of R 7400-00, by her former employer when in fact, the respondent was allegedly advised by the applicant's former employer that her remuneration was between R 5000-00 and R 6000-00 together with an "occasional incentive payment".

[47] When the applicant applied for a position with the respondent, after the reception meeting, she supplied her curriculum vitae and information through an e-mail, of the remuneration she said she had received from her former employer. The e-mail reads:

"I need to take a few things into account e.g.: My car, bond, groceries and miscellaneous accounts as well as petrol works out to approximately R 7000-00 a month, and as I am not sure how your incentives work, I am not sure what basic to ask for. I currently clear R 7400-00 and would obviously like not to drop in salary if possible. I have not stopped travelling since I moved to Johannesburg 6 years ago, so I am pretty used to that, and even if I went into ops, I will still be travelling a lot, as long as I can just clear enough to pay for my petrol, I won't mind the travelling."

[48] Further correspondence was entered into between Ms Duarte and the applicant and that is contained in the same e-mail report filed on the record. It is beyond dispute that the applicant was asked to submit a salary advice from her previous employer to the respondent. The dispute, in this record, relates to the period when she was asked, how often the request were made and by whom. It is common cause that the applicant did not furnish the respondent with the salary advice as requested but she handed in a copy of her RIP 5 tax certificate. The main dispute however, revolves around the truth of the remuneration which the applicant received from her former employer.

[49] Ms Duarte testified that she asked the applicant to produce her salary slip from the time the applicant joined the company and did so on various occasions. She said that Ms Venancio also asked the applicant to hand in her salary slip. She said that it was only one day before her suspension that the applicant handed in a copy of her RIP 5 certificate.

[50] The evidence of the applicant was that Ms Venancio asked her on Monday, 06 November 2004 to bring her pay slip. On the next day she handed in a copy of her RIP 5 to her as she could not find the last pay slip from her former employer. She said that Ms Duarte never asked her to bring her payslip.

[51] It is not in dispute that when Ms Duarte received a copy of the RIP 5, she told the applicant that the applicant had overstated her salary when she said that she took home R 7400-00 and therefore lied to her. She said that the applicant told her that the R 7400-00 was

correct, Ms Duarte said that when she queried the amount further, the applicant retorted by saying what could one do to better herself. According to the RIP 5 certificate, Ms Duarte said that remuneration of the applicant was between R 5000-00 and R 6000-00 per month when a travelling allowance of about R 2100 was excluded. She said that even if one added a commission to R 5000-R6000, it would not come to R 7400-00. She testified that she had shown the RIP 5 certificate to the applicant in the course of querying the salary representation made to her by the applicant.

- [52] In her evidence, the applicant said that she had not used the RIP 5 certificate as a basis for the calculation of her remuneration with the previous employer. She said that Ms Duarte had not shown her the RIP 5. She said that Ms Duarte asked why she kept on lying to her and referred to R 7400-00 in the e-mail as a lie. She admitted having said how could she better herself and said that she felt trapped as she had no document with her. She testified that Ms Duarte told her that she would find out if there were any legal implications on her salary representation and would come back to her on 09 December 2004. She admitted that Ms Duarte was entitled to assume, on the basis of the e-mail and the RIP 5 certificate that she had lied but said that Ms Duarte was supposed to have looked at other avenues. When asked what it was that Ms Duarte fabricated on this charge, she merely said that Ms Duarte assumed that she lied. When she was repeatedly asked, on behalf of the respondent, to produce the pay slip, she said that she had not been able to find one and that she had not spoken to her former employer since she left them. She admitted that she did not give details of her earnings during the internal disciplinary hearing.

(c) **Unsatisfactory work performance**

- [53] The allegation was that the applicant was constantly on a cellular telephone, that she complained to other staff and that she showed no sense of urgency or persistence when following upon outstanding amounts or documents.
- [54] Ms Patisson testified that the applicant was constantly on her cellular telephone attending to her private matters during the training period. The applicant conceded that she used her cellular telephone but that once she was admonished by Ms Duarte she stopped using her telephone constantly. Ms Patisson said that she had heard that the applicant was complaining about her to the staff. She denied that the complaint related to the ill-treatment of the applicant because of her pregnancy but said it related to the training she had offered to her. Ms Duarte said that she admonished the applicant for continuously gossiping about the company and about her, saying that she was not spending time with her (the applicant). She said that she explained to the applicant that, as she had 25 staff members, she could not spend time with all of them. The applicant said that it was raised with her that she complained to the staff but that no details of it were given to her.
- [55] Ms Patisson testified that the applicant did not follow her training instructions. She said that there were acknowledgements that the clients had signed which needed a follow up but the applicant had not actioned them, she said that there were charge backs which she could have prevented. In addition there were charge backs with queries which needed her attention but she did not follow them up.

She testified that the applicant was supposed to go through all the files everyday and that it took half a day to do so. She said that she took the matter up with Ms Duarte and reported also that the applicant was constantly crying and had not taken any notes during the training.

- [56] The applicant said that there was no dispute that her performance was not up to scratch. That was due to her not being given proper training, for which she said that she was blaming the respondent. According to her, what was done was to explain the procedures for handing over. As regards the procedures, she said that she would not have problems. When it was submitted to her that it took 3 to 4 days to train a young lady who came from school, she said that she was not there to see that and could not comment on it. Notwithstanding the presence of her supervisors in her department, the applicant felt that Ms Duarte was to blame for not training her. She said that she had always had direct dealings with Ms Duarte when she (applicant) was a Branch Manager. She assumed then that she would still approach her at any time.

Submission by the parties

- [57] Mr Wesley appeared for the applicant and Mr Van Der Merwe represented the respondent. Mr Wesley placed reliance on section 187 (1) (a) of the Labour Relations Act (“the Act”) to submit that a dismissal is automatically unfair if the reasons for it is the employee’s pregnancy, intended pregnancy or any reason related to her pregnancy. He then relied on the decision of this court in **Botha**

v Import Export International CC (1999) 20 ILJ (LC) at paragraph 19 to submit, correctly in my view, that the phrase “**any reason related to her pregnancy**” must be interpreted broadly and requires no more than that the dismissal be “**associated with**” a woman’s pregnancy. He conceded that an employee alleging that her dismissal was automatically unfair because she was pregnant bears an evidentiary burden. He said that an employee needed to show that the employer was aware of her pregnancy and that the dismissal was “**possibly**” based on this condition. Once the evidential burden is discharged, the onus remained upon the employer to prove the reason for a dismissal, so he submitted.

[58] Mr Wesley correctly pointed out that it was common cause that the respondent was aware of the applicant’s pregnancy when she was dismissed. He said that the applicant’s case was that she was dismissed for a reason related to her pregnancy. In respect of the claim that the applicant’s dismissal was automatically unfair, he submitted that, the Court’s function was to determine whether the dominant cause of her dismissal was a reason “**associated with**” the applicant’s pregnancy. In respect of the alternative claim that the dismissal was unfair, he said that the Court must simply determine whether the respondent has proved that there was a fair reason for the dismissal of the applicant and that the dismissal was effected in accordance with a fair procedure.

[59] Mr Van Der Merwe found it unnecessary to address me on the applicable legal principles, presumably assuming that the law in this respect is trite.

[60] In dealing with evidential material, Mr Wesley said that the evidence before Court shows not merely the “**possibility**” that the applicant was dismissed for a reason related to her pregnancy but indeed that this was the actual reason for her dismissal. He said that in so far as the respondent attempted to prove that the applicant’s dismissal was for a fair reason, based on the three charges brought against her, it has not shown that she in fact committed the misconduct with which she was charged or even that the misconduct with which she was charged warranted dismissal even if proved.

[61] Mr Van Der Merwe’s submission was that the applicant’s total case for alleged automatically unfair dismissal was based on the premise that the three disciplinary charges, that were brought against her, were fabricated by the respondent company and therefore totally lacked foundation.

[62] He submitted that the applicant failed to demonstrate that the reason for her dismissal was the fact that she was pregnant or any other reason relating to her pregnancy. He said that the balance of probabilities in this case showed that there was indeed substance in the charges brought against the applicant and thus that the respondent company had valid reason to call her before a disciplinary enquiry.

Analysis

[64] Mr Wesley laid a correct legal basis for the resolution of the disputed facts. The decision in **Kroukam v SA Airlink (Pty) Ltd**

(2005) 26 ILJ 2153 (LAC), dealt with the application of section 187 which is relevant in the matter at hand. In paragraphs 28 and 29, Davis AJA had this to say:

“[28] In my view, s 187 imposes an evidential burden upon the employee to produce evidence which is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place. It then behoves the employer to prove to the contrary, that is to produce evidence to show that the reason for the dismissal did not fall within the circumstances envisaged in s 187 for constituting an automatically unfair dismissal.

[29] The further question then arises as to the approach to the evidence led by the respective parties. The answer can be illustrated by way of the following example: Assume that an employee can show that she was pregnant and dismissed upon the employer gaining knowledge thereof. The court would examine whether, upon an evaluation of all the evidence, pregnancy was the “dominant” or most likely cause of the dismissal. Within the frame work of this approach, it is now possible to return to the facts of this case and the key finding of the court a quo, that the argument that the appellant was dismissed for union activities was completely without merit.”

[64] As evidence showed, the working environment in the credit control department headed by Ms Duarte was much pressurised and relatively stressful. To inform the applicant of that atmosphere, the respondent asked her to spend a day in that department to make sure that she was aware of what would be expected from her, to see whether she would fit in with the rest of the staff and for her to

decide if she really wanted the job. She was shown the office where she would work and was introduced to the staff she was to work with, which included Ms Venancio, who was an Assistant Manager and Ms Rhoda, the Department Supervisor. It was in a jovial mood that the applicant indicated to the respondent that she was accepting the job offer.

[65] On her very first working day, the applicant was given a letter of appointment. The document was structured in a very simple format, with just 3 paragraphs. She was asked to sign it as she had already accepted the job offer and had tendered her services. She however chose, as she was probably entitled to, not to sign it at that moment, but rather go home and she returned to work on the next day to consider signing it. With this undisputed facts in mind, I turn to consider the evidential material before me.

[66] According to the respondent, the main reason for the dismissal of the applicant was the loss of the 24 files and an admission by the applicant that the working relationship had broken down. The undisputed evidence of the respondent was that the applicant was the custodian of all the 24 files, among others, at the times material to this matter. The evidence of the applicant was that she did not cause the loss of the files as they were deliberately removed from the arch lever files to put her in a bad light with the respondent. Mr Wesley submitted that neither Ms Duarte nor Ms Patisson could suggest any plausible explanation for how such an extra ordinary number of files might have gone missing. It was indeed the evidence of the respondent that the volume of the files was extra ordinary. Yet the very person who was working on the files on the

day they were found missing had not taken note of the reduced volume, she was then working with until she was called to a book review. This on her part was either a token of negligence by itself or she was acting with full knowledge of the reduced work load. The evidence of Ms Patisson and Ms Duarte which was never challenged was that no file had gone missing in their department until and after the loss of the 24 files. Therefore a plausible explanation of their loss was to have come from the applicant and not from Ms Patisson and Ms Duarte.

- [67] Mr Wesley attacked the suggestion by Mr Van Der Merwe put to the applicant that she had deliberately removed the reports because she feared incurring Ms Duarte's wrath during her book review. He said that the accusation was without any factual foundation as much as it was implausible, again because the applicant would not avoid anything by removing the files. He said that their absence was immediately noticeable. According to the applicant, their absence was not immediately noticeable. The applicant had no experience of a book review and would therefore not have known whether a person doing a book review could easily detect any file which had been removed. She learnt for the first time through Ms Venancio that a list of the files would be drawn from the computer and that each file was checked through that list. She therefore had no experience that removing a file or files would not necessarily avoid anything. In my view, the accusation was quite plausible.

- [68] That, the financial position of the respondent was compromised by the lost files, was beyond dispute. A marked delay in processing a claim from the bank of a client or a delay in processing a charge back could cause a financial loss to the respondent. That fact, was well known to the employees of the respondent who then had accepted the pressurised environment in which they worked. In my view, it does not come across as a plausible suggestion that the files were lost by a person whose sole aim and purpose was to compromise the applicant in her standing with the respondent.
- [69] Inconclusive as it may well be, Ms Duarte was not at work on the day it was found that 24 files were missing. Added to this consideration, is the fact that Ms Duarte was already contemplating and in fact had prepared a written warning which she sought to serve on the applicant. The written warning is a detailed account of events which she said had occurred at the office from the time the applicant approached her for a job offer till Ms Durte advised the applicant, as she said, that her pregnancy was not to be an influencing factor in her work performance. In my view, it is not conceivable that while she was writing that letter, Ms Duarte was, at the same time, removing or planning to remove the 24 files as a ploy to get rid of the applicant. I have taken note that the letter is dated 06 December 2004 and that it was not handed to the applicant as Ms Duarte was not at work on the next day.
- [70] Ms Patisson and Ms Duarte came across as credible and honest witnesses who testified in a simple and straight forward manner. The observation is made, notwithstanding the exaggeration in Ms Patisson's evidence on the period of training she had with the

applicant and, on how often the applicant used her cellular telephone. I do not share the same criticism that Mr Wesley gave on the evidence of these witness in describing how constantly the applicant cried. I am unable to make a similar commendation with the applicant as a witness as I have made with the respondent's witnesses. She was unable to withstand cross examination on some material issues. She confirmed the record of the internal disciplinary hearing as a fair recordal of the proceedings. In relation to the lost files, paragraph 92 of the minutes of the disciplinary hearing records the applicant as having said that she might have been sabotaged but did not know who would commit such an act, nor the reason for it. At trial she ascribed sabotage to her pregnancy. She said that she had disclosed the same at the disciplinary hearing only to be confronted by her lack of knowledge for the sabotage. When she was given an opportunity to explain who it was that could have had a vendetta against her, to deliberately remove the files, she exonerated Ms Duarte, which in its self was a contradiction, and she had a great difficulty in suggesting another person. When it was put to her that she had made serious allegations with innuendos and was offered a chance to identify the culprit, she looked up to court for assistance, saying that she was not sure what to do then as she was not there to accuse anyone.

- [71] During the internal disciplinary hearing, the applicant is recorded as having not shown that her dismissal was for a reason related to her pregnancy. The association of dismissal with pregnancy appears to have surfaced for the first time when a dispute about automatically unfair dismissal was referred to the CCMA.

- [72] In my view, the respondent presented evidence which was both coherent and credible and on which reliance can confidently be placed in determining the most plausible version. That of the applicant was marred with material contradictions and inconsistencies. Therefore, where the evidence of the applicant stands in contradiction to that of the respondent, I will prefer that of the respondent in the resolution of any factual dispute in this matter.
- [73] Ms Duarte was admittedly very angry upon being told that the applicant was pregnant. On the version of both the applicant and Ms Duarte, the latter needed time to cool down and once she had gained her composure she recalled the applicant, to her office and told her to go ahead and sign the letter of appointment. On more than one occasion Ms Duarte advised the applicant not to treat her pregnancy as an illness but rather to stand up to the work challenges and prove herself worthy. In my view therefore, the probabilities of this case are overwhelming in suggesting that Ms Duarte did not use the lost files as an escape route to eliminate the applicant. The lost files and the applicant's pregnancy were, in my view, always two separate issues.
- [74] I accept it as a plausible suggestion by Mr Van der Merwe that the attitude of Ms Duarte towards the applicant did not related to her pregnancy but to Ms Duarte's state of mind after perceiving that she had been lied to.
- [75] A proper conspectus of all evidential material informs me that, the dismissal of the applicant was not associated with or possibly

based on the pregnancy of the applicant. In my view therefore, her dismissal was not automatically unfair.

[76] The justice of this matter demands that I should proceed and investigate whether or not the dismissal of the applicant was for a fair reason without remitting it to the CCMA.

[77] The remuneration of the applicant was determined by the respondent on the basis of the representation made by the applicant in her e-mail message. The incumbents of the post which was given to the applicant normally earned much less remuneration than was offered to the applicant. A special dispensation had to be made for the applicant. The applicant was subsequently asked to produce a pay slip from her former employer as a means of verifying her claim. The request by the respondent was evidently reasonable. It then behoved of the applicant to duly comply. I accept the credible evidence of Ms Duarte that the applicant was asked more than once to produce a pay slip. When the applicant finally produced an RIP 5 certificate, she failed to produce proof to back up her claim of her remuneration with her former employer as the contents of the RIP 5 certificate, she chose to produce, contradicted such a claim. In my view the applicant lied about her remuneration with the former employer.

[78] The applicant admitted that her work performance was not good. She attributed blame to the respondent for it. I accept the credible evidence of the respondent that an incumbent of the post assigned to the applicant needed a few days' training. The applicant admitted that she used her cellular telephone during the working period. She however explained, which was not contradicted, that

she closed her telephone once she was admonished against its constant use. She admitted that she removed the reports from the arch levers when she was working on them but said that no one had told her not to remove them but to flag them. Yet, soon thereafter she denied having removed the reports from the arch levers. This charge therefore had merits.

[79] The second and third counts were of such trivial nature that, by themselves, they could not reasonably justify a dismissal. Ms Duarte conceded to that fact. In its magnitude, the first count, even though serious, should not have been considered without taking into account, the known circumstances of the applicant. I am alive to the fact that she did not help to mitigate her circumstances. There was still room left for her rehabilitation within the company. Ms Duarte conceded to the fact but added that the applicant was dismissed also because of her admission that the work relationship had broken down. Indeed, there were accusations and counter accusations in a working environment centred around allegations of gossiping. All factors considered, I find that I should not defer to the sanction imposed by the respondent, as in my view, it was unjust. No attack was levelled at the procedure adopted during the disciplinary hearing. In fact, the applicant appeared to have been satisfied by such procedure.

[80] Accordingly, I find that the dismissal of the applicant was substantively unfair but procedurally fair. In my view, however, the applicant is not entitled to the maximum compensation permitted by section 194 of the Act. In this matter, the costs should not necessarily follow the results. I proceed to make the following

order:

1. The respondent is ordered to compensate the applicant at the rate equivalent to 6 months' remuneration which is 6 x R 8 200 = R 49 200.
2. No costs order is made.

CELE AJ

Date of hearing : 23 June 2006

Date of Judgment: 15 September 2006

Appearances

For the Applicant : Advocate M A Wesley

Instructed by : WEBBER WENZEL BOWENS

For the Respondent : Advocate C W Van Der Merwe

Instructed by : M D SWANEPOEL ATTORNEYS

