WOOLWORTHS (PTY) LTD v WHITEHEAD (WOMEN'S LEGAL CENTRE TRUST INTERVENING) 2000 (3) SA 529 (LAC) 2000 (3) SA p529

Citation 2000 (3) SA 529 (LAC)

Case No CA 06/99

Court Labour Appeal Court

Judge Zondo AJP, Conradie JA, Willis JA

Heard March 14, 2000

Judgment April 3, 2000

Counsel M S M Brassey SC (with him A E Franklin) for the appellant.

H C Nieuwoudt, attorney, for the respondent.

H Cheadle, attorney, for the amicus curiae.

Annotations Link to Case Annotations

Flynote : Sleutelwoorde

Labour law - Labour Relations Act 66 of 1995 - Unfair labour practice - What constitutes - Failure to appoint prospective employee on G ground of pregnancy - Employers entitled to take pregnancy into account in deciding whether or not to employ prospective employee - In casu, employer's decision influenced not so much by employee's pregnancy per se as by range of relevant factors, including unavailability - Not having acted out of bigotry or prejudice - In H circumstances, employer's decision not arbitrary or unreasonable, but based on perfectly rational and commercially understandable considerations - Failure to appoint employee not constituting unfair labour practice as defined in item 2(1)(a) of Schedule 7 to Act. I

Labour law - Labour Relations Act 66 of 1995 - Unfair labour practice - What constitutes - Item 2(1)(a) of Schedule 7 to Act - Item, which defines residual unfair labour practices, principally designed to prevent acts resulting from bigotry or prejudice.

Labour law - Labour Relations Act 66 of 1995 - Unfair labour practice - What constitutes - Item 2(1)(a) read with item 2(2)(c) of Schedule 7 to J

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Act - No basis for view that, for discrimination not to be unfair for purposes of item 2(1)(a) A (which defines residual unfair labour practices), it necessarily has to be 'based on an inherent requirement of the particular job', as provided in item 2(2)(c).

Labour law - Labour Relations Act 66 of 1995 - Unfair labour practice - What constitutes - Though profitability should not dictate whether or not discrimination unfair, it is relevant consideration. B

[zHNz]Headnote : Kopnota

During the second half of 1997 the appellant had advertised a vacancy for a 'Human Resources: Information and Technology Generalist'. In October of that year the respondent was interviewed for the position. She was offered the job but turned it down. The appellant continued its search and received a response from C one Y, who was better qualified than the respondent. The appellant again contacted the respondent and this time she was interested. At the subsequent interview she told the interviewer, one I, that she was pregnant and was herself informed that there were other candidates who still had to be interviewed before a final decision was made. Though under the impression that she would be permanently appointed, the D respondent was some days later offered a temporary contract expiring just in time for her confinement. The respondent declined the offer and Y was appointed to the advertised post. The respondent contended in the Labour Court that she was passed over because of her pregnancy, ie discriminated against because of her sex, an unfair labour practice contrary to the provisions of item 2(1)(a) read with item 2(2)(a) of Schedule 7 to the Labour Relations Act 66 of 1995 (the Act). The appellant did not E deny that it had taken the pregnancy into account but contended that it had done so for operational reasons because what it needed was uninterrupted service for a period of at least 12 months (the continuity requirement). The Labour Court, pointing out that no employer can be guaranteed that an employee will be able to serve for an uninterrupted period like 12 months and that the pregnancy of a F prospective employee could therefore not be taken into account, held that the appellant's continuity requirement was arbitrary and unreasonable and that the appellant had committed an unfair labour practice as intended in item 2(1)(a) of the Act. In an appeal to the Labour Appeal Court the Women's Legal Centre Trust was granted permission to intervene as amicus curiae. G

Item 2(1)(a) of Schedule 7 to the Act provided that 'an unfair labour practice means any unfair act or omission that arises between an employer and an employee, involving . . . the unfair discrimination, either directly or indirectly, against an employee on any arbitrary ground, including, but not limited to race, gender, sex . . . '. Pregnancy was not specifically mentioned. Item 2(2)(a) provided that ' ''employee'' includes an H applicant for employment'. Item 2(2)(c) provided that 'any discrimination based on an inherent requirement of the particular job does not constitute unfair discrimination'.

Held (per Willis JA, Zondo AJP concurring, but for different reasons; Conradie JA dissenting), that unfair discrimination required a convergence of and a linkage between separate and distinct elements before legal consequences could arise: if a certain fact, A (the taking into account of the respondent's I pregnancy), was not the reason or cause or conditio sine qua non for the occurrence of a certain event, B (the decision not to employ her on a permanent basis), then there was no nexus between A and B and the question arose whether or not there had in fact been discrimination. If the continuity requirement was rejected as a factor, then the only plausible reason why the respondent was not offered the position was that she was not J

the best candidate, and then the fact that the appellant had regard to the fact of her pregnancy was A irrelevant. Indeed, apart from the continuity factor and the claim that she was not the best

candidate for the post, no rational explanation existed for the appellant's failure to offer the respondent a permanent position. (Paragraphs [70] and [84] - [86] at 551G/H - I/J and 553F/G - 554D.)

Held, further, that it was impossible to determine whether, but for the fact of the respondent's pregnancy, the applicant would B have secured the permanent position. (Paragraph [76] at 552F - G.)

Held, further, that the matter had to be decided without reference to item 2(2)(c) of Schedule 7. Counsel for the intervening party's argument that only 'discrimination based on an inherent requirement of the particular job' as intended in item 2(2)(c) was not unfair was unacceptable: if this had been C its intention, the Legislature could have said so explicitly, and because it was not difficult to imagine situations besides the inherent requirements of a particular job where discrimination would not be unfair, the maxim expressio unius est exclusio alterius did not apply. (Paragraphs [122] - [123] at 558E/F - 559C, paraphrased.)

Held, further, that the concept of fairness in the context of unfair dismissal as intended in the Act was an elastic D concept that had to take account of the norms and values of society as well as its realities. It required a multidimensional evaluation and had to be looked at from the perspective of both the prospective employee as well as the employer and the interests of society as a whole. Policy considerations also played a role. (Paragraph [127] at 5559H - I.)

Held, further, that the word 'arbitrary' in item 2(1)(a) denoted the absence of reason, or, at the very E least, the absence of a justifiable reason. In the instant case, given the appellant's continuity requirement, there was nothing arbitrary in its having taken into account the respondent's pregnancy in deciding whether or not to offer her a contract of permanent employment. The Court a quo was accordingly wrong on this account. (Paragraphs [128] and [129] at 559I/J - 560C.) F

Held, further, that the Court a quo had also erred in holding that employers could not be guaranteed that any employee would be able to serve for an uninterrupted time and that therefore the pregnancy could not be taken into account: employers had to base their commercial decisions on reasonable probabilities. Risk-taking was intrinsic to enterprise and risk was discounted, inter alia, by an evaluation of the probabilities. (Paragraph [130] at 560C/D - D/E.) G

Held, further, that the appellant did not act unreasonably but took into account perfectly rational and commercially understandable considerations. It did not act out of bigotry or prejudice, the mischief item 2(1)(a) was principally designed to prevent. Though the respondent's pregnancy was hardly irrelevant, the dominant impression was that the appellant was influenced not so much by the respondent's pregnancy as by a range of H other factors it was entitled to take into account, including her unavailability. (Paragraph [131] - [133] at 560D/E - I, paraphrased.)

Held, further, that, although profit could not dictate whether or not discrimination was unfair, it was a relevant consideration. An enquiry as to fairness involved a moral or value judgment made in the light of all the circumstances, and to hold that I an employer was not entitled to take into account a prospective employee's pregnancy would be regarded as being so economically irrational as to be fundamentally harmful to society. To find that the pregnancy of a prospective employee cannot be

taken into account in deciding whether or not to offer her employment might seem to be fair to prospective employees, but it would certainly be unfair to employers and J

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society as a whole and, by reason of the damaging consequences of such a finding on society, ultimately unfair to prospective employees A as well. (Paragraphs [134] - [136] and [149] at 560I/J - 561C/D.)

Held (per Zondo AJP), that it was clear from the evidence that the reason why the respondent was not appointed was that Y was a much better candidate for the job than herself. Though her pregnancy was clearly taken into account, the respondent was unable to show that, but for her pregnancy, she would have been appointed to B the position. There was no causal connection between her not being appointed and her pregnancy and thus the respondent did not act unfairly when it decided not to appoint her. (Paragraph [24] at 540B/C - D/E.) Appeal allowed.

The decision in the Labour Court in Whitehead v Woolworths (Pty) Ltd (1999) 20 ILJ 2133 reversed. C

[zCAz]Cases Considered

Annotations

Reported cases

Administrator, Transvaal, and Others v Zenzile and Others 1991 (1) SA 21 (A): dictum at 37G - H applied

Beckingham v Boksburg Licensing Board 1931 TPD 280: dictum at 282 - 3 applied D

Benicon Group v National Union of Metalworkers of SA and Others (1999) 20 ILJ 2777 (SCA): dicta at 2779I and 2787D applied

Bernberg v De Aar Licensing Board 1947 (2) SA 80 (C): dictum at 92 applied

Botha v A Import Export International CC (1999) 20 ILJ 2580 (LC): dictum at 2586H - J approved E

Chotabhai v Union Government (Minister of Justice) and Registrar of Asiatics 1911 AD 13: dictum at 28 applied

Consolidated Diamond Mines of South West Africa Ltd v Administrator, SWA and Another 1958 (4) SA 572 (A): dictum at 648G - H applied

Dekker v Stichting Vormingsentrum Voor Jong Volwassenen (VJV-Sentrum) Plus [1992] ICR 325: compared F

Dube and Others v Nasionale Sweisware (Pty) Ltd 1998 (3) SA 956 (SCA) ((1998) 19 ILJ 1033): dictum at 960E - F (SA) and 1036I - 1037A (ILJ) applied

Ferodo (Pty) Ltd v De Ruiter (1993) 14 ILJ 974 (LAC): referred to

Gericke v Sack 1978 (1) SA 821 (A): referred to

Kadiaka v Amalgamated Beverage Industries (1999) 20 ILJ 373 (LC): applied G

Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ('Perskor') 1992 (4) SA 791 (A) ((1992) 13 ILJ 1391): dictum at 798H - I (SA) and 1400C - D (ILJ) applied

National Automobile and Allied Workers' Union (now known as National Union of Metalworkers of South Africa) v Borg-Warner SA (Pty) Ltd 1994 (3) SA 15 (A): dictum at 26G applied H

National Union of Metalworkers of SA v Vetsak Co-operative Ltd and Others 1996 (4) SA 577 (A): dicta at 591G - 592D and 593G - H applied

S v Mokgethi en Andere 1990 (1) SA 32 (A): dictum at 40A applied

SA Commercial, Catering and Allied Workers' Union and Others v Irvin & Johnson Ltd (1999) 20 ILJ 2302 (LAC): dictum at 2314I - 2315A applied I

South African Estates and Finance Corporation Ltd v Commissioner for Inland Revenue 1927 AD 230: dictum at 236 applied

South African Roads Board v Johannesburg City Council 1991 (4) SA 1 (A): dictum at 16G applied

Webb v EMO Air Cargo (UK) Ltd [1993] 1 WLR 49 (HL) ([1992] 4 All ER 929): considered J

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Webb v EMO Air Cargo (UK) Ltd [1994] IRLR 482: compared A

Whitehead v Woolworths (Pty) Ltd (1999) 20 ILJ 2133 (LC): reversed on appeal.

[zSTz]Statutes Considered

Statutes

The Labour Relations Act 66 of 1995, Schedule 7 item 2(1)(a), 2(2)(a) and 2(2)(c): see Juta's Statutes of South Africa 1998 vol 4 at 2-242. B

[zCIz]Case Information

Appeal from a decision in the Labour Court, reported at (1999) 20 ILJ 2133. The facts appear from the judgments of Zondo AJP and Willis JA.

M S M Brassey SC (with him A E Franklin) for the appellant.

H C Nieuwoudt, attorney, for the respondent. C

H Cheadle, attorney, for the amicus curiae.

Cur adv vult.

Postea (April 3).

[zJDz]Judgment

Zondo AJP:

Introduction D

[1] I have had the benefit of reading the judgment prepared by my Colleague, Willis JA, which appears below. I agree with him that the appeal should succeed. As the approach I adopt in this matter differs from his, I consider it necessary to give my own reasons for my E conclusion. As the facts of the case have been set out in Willis JA's judgment, I do not propose setting them out in great detail in this judgment but will nevertheless refer to those that seem to me to be important in the light of my approach to the matter.

[2] During the second half of 1997 the appellant advertised a vacancy for a position it termed: Human Resources: Information and F Technology Generalist. In October of that year the respondent was interviewed for such position. She was thereafter offered the job but turned it down and gave as the reason that she was not happy with the aspect of remuneration. G

[3] The appellant continued its search for a candidate to take up this position. Later on the appellant decided to advertise the position again. It was advertised both in a local newspaper as well as in a national newspaper. One of the responses to the advertisement this time was from one Dr Young. Dr Young had not been a candidate in October 1997 when the respondent was offered the position. H

[4] In seeking to fill the position the appellant decided to contact the respondent again to see whether her circumstances had changed. It transpired that her circumstances had in fact changed and she was then interested in the position. In her evidence she conceded that when contact was made with her this time she was informed by the I appellant that there were other candidates that the appellant would still have to interview before it could make a decision as to who should get the job.

[5] The appellant's Mr Inskip, who was the senior executive of the appellant under whom the position fell, had an interview with the J

respondent on 17 December 1997. Both in her evidence-in-chief and under cross-examination, the respondent admitted that, A although, at the end of the interview of 17 December, she had felt very confident of her prospects of getting the job, Mr Inskip had made it clear that he needed to see other candidates before he could make a final decision on whom the appellant would give the job to. She accepted under cross-examination that, as at the end of the interview B of 17 December 1997, the job could go to any one of the candidates, including herself, although she thought her prospects were very good.

[6] The respondent testified that at the end of the interview she had with Mr Inskip on 17 December, Mr Inskip said he C would come back to her with his final decision on who among the candidates was getting the job. Mr Inskip denied having said he would revert to the respondent the following day. He said he had told the respondent that the two of them needed to communicate later. On 17

December Mr Inskip left for a business trip that would take him to, among other places, Lesotho. The 17th was a Wednesday. He returned D on Friday 19 December.

[7] Mr Inskip testified that on his return on 19 December, he telephoned the respondent and left a message on her voice mail to the effect that she should call him back so that they could take their discussions further. The respondent testified that Mr Inskip had left a message on her cellular phone asking her to phone him back E as he wanted to 'finalise the paperwork'. She said that she inferred from this that he had made his final decision on which candidate was getting the job and that she was that candidate. She did not return his call on the same day but only did so the following day, namely, 20 December. F

[8] Under cross-examination Mr Inskip denied the respondent's evidence that his message was to the effect that he wanted to 'complete the paperwork' but conceded that, if he had left such a message, that could have given the respondent the impression that he had decided on her as the successful candidate. However, he insisted that he could nost have left such a message as G

(a) there was no paperwork to complete and

(b) he had not yet interviewed Dr Young about whom he had formed a very good impression after reading his curriculum vitae and whom he thought was a key candidate.

[9] On 20 December the respondent telephoned Mr Inskip at home in response to his message of the previous day. The H respondent testified that, in that telephone conversation, Mr Inskip told her that, in the light of her pregnancy, his boss, a Mr Sturrock, was concerned about her being offered a permanent position. Mr Inskip denied this evidence. It is common cause that Mr Inskip asked I the respondent whether she preferred a permanent position as an employee or a contract. The respondent testified that it was clear to her that Mr Inskip was trying to back out of the permanent position as an employee that she says he had given her the previous day by leaving a message to the effect that he wanted to complete the paperwork. She testified that, while at the end of J

the interview of 17 December she had been very excited, believing that she had good A prospects of getting the job, at the end of the conversation on 20 December, she was very concerned about whether she would still be given the job. The two agreed that if there was to be any offer, it should be made in writing. She gave Mr Inskip particulars of how she could be contacted in George in writing where she was going to be for some days. B

[10] On 23 December Mr Inskip telephoned the respondent again. During that telephone conversation, it is common cause, Mr Inskip offered the respondent a fixed term contract that would have expired just in time for her confinement. It is common cause that at that stage Mr Inskip had not as yet interviewed Dr Young. Asked why he C offered the respondent a fixed term contract even before he could interview Dr Young and decide whether he would offer the job to Dr Young, Mr Inskip testified that he wanted to keep the appellant's options open.

[11] Mr Inskip was also asked whether he would not have offered the job to the respondent if it had turned out that Dr Young was D not suitable. Mr Inskip's answer to this was that, if the appellant had not found a suitable candidate who would also meet the appellant's continuity requirement, he would have offered the job to the respondent because, as he put it under cross-examination, it would be 'better than nothing'. This evidence was not challenged. Although E he did not say so in so many words it is clear that Mr Inskip wanted to ensure that, should Dr Young be found after an interview not to be suitable for the position, he could negotiate with the respondent for the conversion of the fixed term contract to an employment contract on a permanent basis. The respondent did not accept the offer of a F fixed term contract. Subsequently Mr Inskip interviewed Dr Young and Dr Young was appointed to the job.

[12] The respondent's primary claim in the Court a quo was that she had been dismissed by the appellant after she had been appointed to the position of Human Resources: Information and Technology Generalist. She claimed that the dismissal had been unfair G and sought compensation. However, the Court a quo dismissed that claim but granted her relief on the basis of an unfair labour practice claim. The unfair labour practice claim was that the appellant had committed an unfair labour practice in not appointing her as its Human Resources: Information and Technology Generalist (but appointing someone else). There was no cross-appeal against the Court a H quo's order dismissing the dismissal claim. Accordingly we do not have to concern ourselves with it.

[13] It is important to emphasise that the basis of the dismissal claim was that the respondent was appointed to the position of Human Resources: Generalist but that the appellant later reneged on the appointment. The only basis for the respondent's claim I that she was appointed was that she inferred such appointment from the message allegedly left by Mr Inskip on her cellular telephone on 19 December that she should call him back as he wanted to, in her version, 'complete the paperwork'. It is not because she was at any stage made an offer of the position. Indeed, under J

cross-examination, she conceded that the appellant never at any stage said it was making A her an offer for that position. And, prior to 19 December - especially from the interview of 17 December with Mr Inskip - the position had not been anything more than that she had gained the impression during the interview that she had good prospects of getting the job. B

[14] I thought I must mention the above basis of the claim because, in my judgment, it is relevant to the determination of the question whether, as at 19 or 20 December, Mr Inskip had taken a final decision on which candidate would get the job of Human Resources: Generalist. That question is highly significant because the case argued before us was that, had it not been for her pregnancy, the respondent, C and not Dr Young, would have been given that job. The respondent complains that the appellant's conduct in not appointing her to that position was based on her pregnancy and that such conduct on the appellant's part constituted discrimination on grounds of sex and, therefore, was an unfair labour practice in terms of the definition of an unfair labour practice as defined in item 2(1)(a) of D Schedule 7 to the Labour Relations Act 66 of 1995 ('the Act'). She claimed that by virtue of being denied appointment on grounds of unfair discrimination, she was entitled to compensation. Item 2(1)(a) says that, for purposes of that item, an unfair labour practice means E

'any unfair act or omission that arises between an employer and an employee involving -

(a) the unfair discrimination, either directly or indirectly, against an employee on any arbitrary ground, including, but not limited to race, gender, sex, . . . sexual orientation, . . . marital status or family responsibility; . . .'.

[15] The appellant's case was argued before us on the basis that the appellant conceded that it had discriminated against the F respondent but challenged the contention that such discrimination had been unfair. Mr Brassey, who, together with Mr Franklin, appeared for the appellant submitted that the discrimination did not take the form of the appellant disqualifying the respondent altogether from possible appointment to the position of G Human Resources: Generalist. He submitted that what happened was that the fact that the respondent was pregnant and would, therefore, by virtue of such pregnancy, not be able to meet the appellant's continuity requirement, was taken into account together with the fact that there was another candidate, namely, Dr Young, whom the appellant H found was a far better candidate than the respondent and would be able to meet the continuity requirement of the appellant's operations.

[16] Although Mr Brassey submitted that the pregnancy of the respondent did not take her out of the category of persons who could be offered the job, there are areas in the evidence of Mr Inskip which could be said not to corroborate Mr Brassey's I submission. That is evidence where Mr Inskip testified that the respondent's pregnancy rendered her unsuitable for the job or disqualified her for the job because of the fact that she would not be able to be in the job continuously for a minimum period of 12 months in accordance with the appellant's assessment of what would be required of the candidate who got the job. However, there was J

important evidence by Mr Inskip which, in my judgment, makes it clear that the effect of A his evidence was not that the pregnancy put the respondent outside the category of persons who could be offered the job. That is the evidence Mr Inskip gave that, if the appellant had not found a suitable candidate who could meet the appellant's continuity requirement, the appellant would have appointed the respondent as that would be B 'better than nothing'. This means that in that event the appellant would have had to accommodate the fact that, after four months or so of commencing in the new job, the respondent would have had to take a maternity leave. If the attitude of the appellant was that the respondent's pregnancy disqualified her from the job in the sense that it put her outside the category of persons who could be offered the C job, Mr Inskip's evidence would have been to the effect that, even if the appellant was not able to find a suitable candidate who would meet the continuity requirement, it could not offer the job to the respondent because of her inability to meet that requirement. D

[17] Mr Niewoudt, who appeared for the respondent, did not argue that there was no evidential basis for Mr Brassey's submission that pregnancy was considered by the appellant only in the context that it reduced her rating in terms of prospects for the job. Accordingly the case must be decided on the basis that pregnancy was considered on the basis that it prevented the respondent from E meeting the appellant's continuity requirement in circumstances where, to say the least, it

wanted a candidate who would be able, once he or she had commenced in the job, to be in the job continuously for at least 12 months because of the issues that would need to be attended to by the successful candidate over that period. F

[18] Bearing the above in mind, in my judgment what becomes very important in terms of the facts of this case is that:

(a) the respondent did not dispute that Dr Young, the candidate whom the appellant ultimately appointed, was a better candidate than herself - in this regard the uncontested evidence of Mr G Inskip was that, academically, Dr Young had an undergraduate degree in Human Resource Management, a further honours degree, with a commerce degree in Information and Technology, an MBA degree and a doctorate in Human Resources Management; he had co-authored a book which focused on H Human Resources with Information Technology; he had had 17 years experience in Human Resources/IT field; he had substantial experience in three of the largest financial institutions in South Africa; he had won the best speaker award at a conference; he had spoken at numerous I local and international conferences; his duties had included the HR general functions with a focus on recruitment; a focus on change management; Mr Inskip's uncontradicted evidence was that Dr Young had 'the unique combination of skills that I was looking for - he exceeded our requirements as well as having the practical experience that we were J

looking for'; academically the respondent appears to have had a BA degree; she also had much less experience than Dr Young's 17 A years;

(b) the respondent conceded under cross-examination that, although at the end of the interview she had with Mr Inskip on 17 December she was excited at her prospects of getting the job, Mr Inskip had emphasised that he still needed to see other candidates B before he could take a final decision on which candidate would be given the job; indeed she conceded under cross-examination that she accepted that the job could go to any one of the candidates after the interview;

(c) the respondent also conceded under cross-examination that Mr Inskip did not at any stage say to her he was offering her the job; the closest he came, even on the respondent's C own evidence, was that she inferred from the message that Mr Inskip left on her voice mail that he wanted to 'complete the paperwork' that Mr Inskip was offering the job to her; D

(d) the respondent does not even go as far as saying that the quality of her candidacy for the job was on the same level as that of Dr Young's;

(e) although the respondent's attorney argued that this was not a case where the appellant was justified in taking the respondent's pregnancy into account against her, it was not the E respondent's case that the appellant's decision to appoint Dr Young should be set aside and the appellant be ordered to consider her application for the job as well as that of Dr Young afresh without taking pregnancy into account; obviously she would have had her baby by now - but there is nothing that precluded her from approaching the Court F below on an urgent basis soon after the

appellant's decision to give the job to Dr Young to seek to have the appellant ordered to reconsider the two applications without the respondent's pregnancy being a factor at a time when, if she was successful, she could still take up the job. G

[19] In the light of the above it seems to me that, if the respondent's attack on the appellant's decision not to appoint her but to appoint Dr Young is the contention that, but for her pregnancy, she would have been appointed to the job despite the fact that there was a candidate who, without any doubt, was a far better candidate, such attack is based on very little more than a suspicion which is not H supported by any evidence. There can be no doubting the fact that at the time when Mr Inskip had to make a decision as to whom he would give the job, Dr Young also wanted the job, he had been interviewed and the appellant had been immensely impressed by Dr Young; and that the appellant believed at that time that Dr Young was a far better candidate. I

[20] It was conceded also by the respondent that Mr Inskip had made it clear to her that he would need to see other candidates before he could make up his mind finally: Mr Inskip testified, and this was never disputed by the respondent, that there was no way he was prepared to take a final decision on whom he would offer the job to until he had J

interviewed Dr Young as well. He emphasised that, even after looking at Dr Young's curriculum A vitae, he considered Dr Young 'a key candidate' even before he could interview him. That this was Mr Inskip's view of Dr Young already on the day of his interview with the respondent, namely, 17 December, was not disputed. In those circumstances I can see no basis why by 19 December Mr Inskip could have decided to offer the job to the respondent in circumstances where he had not yet had an B interview with Dr Young. Accordingly I am unable to agree that Mr Inskip could in any way have decided between 17 and 19 December that he would give the job to the respondent.

[21] The respondent believed that Mr Sturrock was responsible for what she regarded as a change of attitude on the part C of Mr Inskip towards her 'candidacy'. She said this was because Mr Inskip had told her that Mr Sturrock was unhappy that she be given the job in the light of her pregnancy. Even assuming that this is what occurred, where does that take the respondent's case? Mr Inskip would have spoken to Mr Sturrock between his interview of the respondent D and his making his final decision on which candidate he should give the job. In this regard it must be remembered that Mr Inskip's evidence that the final decision on which candidate would get the job lay with him was not challenged.

[22] Let us assume that as on 17 December Mr Inskip felt almost sure that, after seeing Dr Young, he would choose the respondent for the job. In that event the question that arises is E whether, between the date of the interview and the date of the taking of the final decision by the employer on which of the candidates he gives the job to, an employer is not entitled to change his mind about which candidate he thinks is the best for the job. Clearly, an employer is entitled to change his mind between those two events provided he has F not yet made an offer to anyone of the candidates. In my judgment it is irrelevant whether the change of mind is due to his own reconsideration of issues or whether he has spoken to a colleague or an adviser. The fact of the matter is that the period

between the interview and the taking of the final decision is for the employer to consider all the candidates - their strengths and weaknesses as well as what his/her G business requirements are before he makes the final decision to give the job to one of the candidates or, indeed, not to give the job to any one of the candidates.

[23] In some cases the employer will have been, or will be perceived by a candidate for employment to have been, very impressed with the candidate, but that does not give that candidate the right to H the job over the other candidates. In another case a candidate will come out of an interview depressed, thinking that he/she did badly in the interview and will therefore not get the job, only to be nicely surprised later that he/she is the one who is ultimately offered the job. In this regard I think of a court scenario. In regard to what the I judgment of a Judge will be in a court case, legal practitioners know very well that a party should not rely too much on how the Judge appeared to be receptive to a particular party's argument because it happens so very often that a Judge who appeared during argument to be persuaded by the arguments of a particular party ultimately gives judgment against that party. The change J

usually occurs between the hearing in Court and the date when the Judge makes his/her final A decision on the matter. Job applicants must see interviews exactly in the same way if they do not wish to be disappointed. The respondent failed to see her interview with Mr Inskip on 17 December in this way despite the fact that Mr Inskip emphasised that he was still to see other candidates. That she saw the interview in this way was no fault B of the appellant.

[24] The respondent is unable to show that, but for her pregnancy, she would have been appointed to the position despite the appellant having another candidate who was better suited for the job than herself. The result of this is that, in my view, there is no causal connection between her not being appointed and her pregnancy. C The reason why in the end she was not appointed was simply that there was a stronger candidate than herself. It is true that her pregnancy was taken into account against her but there is no evidence that, if it had not been taken into account, she, and not Dr Young, would necessarily have been appointed. Accordingly I can find nothing unfair D about the appellant's decision not to appoint the respondent to the position but to appoint a better candidate than her.

[25] The basis on which I have found that the appellant's decision not to appoint the respondent did not constitute an unfair labour practice, namely, that there was a better candidate than her, E was presented as an alternative defence in argument before us. The first defence was the so-called continuity defence. However, on a reading of the appellant's response to the respondent's statement of claim in the Court a quo, it is clear that the defence that there was a better candidate was not necessarily an alternative defence. In fact it appears to be the main defence although the F continuity defence is also reflected therein.

[26] I am satisfied that the continuity requirement was not a sufficient ground on its own to justify the decision not to appoint the respondent. To my mind, the true position is that the appointment of a candidate who would have had to be away for three months into the job would cause the

appellant no more than some inconvenience and some G amount of disruption but such disruption would not be of such a serious nature on its own as to justify not appointing such a candidate on that ground alone. However, in this case the respondent's inability to meet the continuity requirement was not the only factor responsible for her not being appointed. She simply had a much stronger candidate to H compete against. In my view that she would have been appointed if she was not pregnant even if Dr Young was one of the candidates cannot be anything more than a suspicion.

[27] Lastly I wish to make an observation or two about the fact that the case that was argued before us concerned the appellant's I decision not to appoint the respondent to the position of Human Resources: Information and Technology Generalist. Although this is the case that was argued before us, I have in the course of going through the record noted that such complaint is nowhere mentioned in the respondent's statement of claim nor is such a complaint mentioned in the respondent's long J

letter of 8 January 1998 where she sought to record what she was unhappy about. Indeed it is also not even A mentioned in her attorney's letters to the appellant. In fact the only case that is reflected in the respondent's statement of claim and correspondence is the one which was dismissed by the Court a quo and against which she did not cross-appeal. That is the case that she had been appointed to the position and that the appellant B repudiated the agreement in terms of which she had already been appointed. It may well be that, once the Court a quo had rejected the version that the respondent had been appointed already, that should have been the end of the matter.

[28] Lastly I agree with what Conradie JA says in his judgment about whether or not the amicus curiae should have been C admitted. Even though the basis on which I have decided the matter did not require much of the arguments presented by the amicus, I am unable to say that the amicus was unnecessary or that he addressed collateral issues. I think he was sufficiently helpful to the Court.

[29] In the result I agree with the order made by Willis JA. D

[zJDz]Judgment

Conradie JA:

[30] Discrimination based on sex falls within the purview of item 2(1)(a) of Schedule 7 to the Labour Relations Act 66 of 1995 ('the Act') and therefore Mr Brassey for the E appellant accepted that discrimination by reason of a woman's pregnancy also does. Since item 2(1)(b) proclaims that the term 'employee' includes an applicant for employment, it was common cause that the respondent fell within the protection of the section. It was further common cause that the appellant took the F respondent's pregnancy into account in denying her a post for which she was suitably qualified. It was said that the reason for taking her pregnancy into account was operational. Any incumbent would have to provide the appellant with uninterrupted continuity of employment for a period of at least 12 months. I shall for the sake of brevity refer to this as 'the continuity requirement'. The

respondent could not fulfil this requirement. She would have had to take three months' G maternity leave after only five months in the post.

[31] The continuity requirement was the defence pleaded by the appellant in the Court a quo. In the context of resisting the respondent's (failed) claim that she had actually been appointed to the post, the appellant pleaded that it would not have appointed her H when it was alleged to have done so since other candidates were yet to be interviewed. It neglected, however, to mention in its statement of defence another defence which assumed prominence during the trial. One of the candidates was a Dr Young who was said by the appellant to have I been by far the better candidate. He was later appointed to the post. Faced with such superior competition, it was said, in the alternative, the respondent would not have been appointed to the post even if she had not been pregnant. There was, accordingly, no causal connection between whatever discrimination there might have been and the respondent's failure to obtain the post. The only witness for the appellant was J

Mr R J D Inskip. Conclusions about the (allegedly pressing) operational necessity for the continuity requirement can be A drawn from no other source. It is necessary to embark upon a detailed discussion of the cogency of Inskip's evidence, assessed against that of the respondent and the background facts.

[32] It is common cause that the respondent was offered the post of Human Resources: Generalist with the appellant during October B 1997. She could, because of her husband's job situation, not then accept the offer. The post was re-advertised. The respondent was requested to apply again. By now her husband's firm had agreed that he might relocate to its Cape Town office, so that the move to Cape Town was no longer an impediment. She was interviewed by Inskip on 17 C December 1997. By this time Young, whose curriculum vitae had been received, had been contacted, but not by Inskip. A man called Dickson spoke to him on 15 December. Nevertheless, Inskip said, on the basis of his curriculum vitae he was - on the 17th already - regarded as a key candidate. By that I understand him to have meant that no decision about the appointment of the respondent D could have been made until Young had been assessed.

[33] It is common cause that the respondent at that interview revealed the fact of her pregnancy. According to Inskip he expressed no negative view about it. He said in evidence that he was not sure how to react to it. The respondent went somewhat further E in her evidence; she testified that Inskip had assured her that her pregnancy would not be a problem. Inskip's silence was a curious response, particularly since he maintained that the continuity requirement had been stressed in every interview. He conceded that he had failed to advise the respondent that continuity might be a F problem. My impression is that the continuity requirement was not then nearly as important as it was later made out to be. Inskip gave another indication that he, at the time, thought little of the continuity requirement. He sent the respondent to consult the appellant's human resources personnel on various matters, including its maternity leave policy. Why he should have done this if he considered the G respondent's pregnancy to be a serious obstacle to her appointment, is unclear.

[34] It is common cause that Inskip stated at the interview that he still had other candidates to interview. The respondent testified that she was nevertheless told that she would be advised by H Inskip of his final decision the next morning. Inskip's version is that he undertook to telephone her the next day but one. Of course, if Inskip had been serious about Young (or the continuity requirement) he could not possibly have told the respondent this. He had no intention of interviewing Young before again speaking to the respondent. In fact, he was leaving on a business trip in the afternoon I of 17 December which would take him out of town until the afternoon of Friday, 19 December.

[35] True to his undertaking Inskip did telephone the respondent the next day but one. He testified that his purpose in leaving a message on her cell phone was to 'have further discussions with her about taking the J

position forward as to where we were'. He professed to have no recollection, however, of having said (as the A respondent testified he did) that he wanted to finalise the paperwork. There is obviously not a great deal of difference between 'taking the position forward' and 'finalising the paperwork'. 'Taking the position forward' could only mean advancing beyond the stage reached at the interview two days earlier. How far forward Inskip B wished to take the position, having regard to the fact that he had not yet interviewed his key candidate, is, on his version, unclear. Why he should have wanted to take the position forward with a person whom he described in evidence as a candidate of last resort, one who, if there were no alternative, would be better than nothing, is equally unclear. On the respondent's version, however, it is crystal clear: he had C decided to appoint her. Inskip's testimony that he could not recall having said that he wished to finalise the paperwork rings hollow if one considers that the only appropriate response for him would have been 'of course I could have said no such thing: I still had Young to interview'.

[36] The ambiguity of Inskip's position is demonstrated by his further testimony: '. . . (T)he reason for me wanting to leave the D message was to say, ''let's continue the discussions and let's - let me update you as to where we are''.' On the appellant's case there were at that time no discussions to pursue. There was no updating to be done: absolutely nothing further had happened since the interview. I accordingly prefer the respondent's version that Inskip had indeed E called to 'finalise the paperwork'. Young was, at that stage, so unimportant that he had evidently decided not even to interview him and the continuity requirement played (true to his assurance to the respondent at the interview) no role. F

[37] Not having established contact with the respondent, Inskip later on Friday 19 December left a second message on her cell phone giving her his home telephone number. The matter which he wished to discuss was manifestly too pressing to wait until Monday. It was indeed. We know from the evidence of the respondent that Mr Sturrock, the appellant's financial director, had in the mean time G expressed his concern to Inskip about the respondent's pregnancy.

[38] In response to his messages, the respondent telephoned Inskip on the morning of Saturday 20 December. She says that she became alarmed at the tenor of the discussion. Inskip began by

enquiring whether she was interested in a permanent position or in a H consultancy position, matters which had all been decided upon the previous Wednesday: she had then said that she would prefer a permanent post as a Woolworths' employee. Inskip testified that 'the intention was to ask her which of the options would be more suitable to her'. This evidence reeks of improbability. There was no reason to contact I the respondent over the weekend to discuss this with her. It is not as though an offer acceptable to her had urgently to be weighed against one made to another candidate. Young had still not been seen. Whereas the previous day Inskip had intended to move things forward, he was now, on his own version, intent on moving things backward. The lack of any other J

explanation for the turn which events took on the Saturday makes me come to only one conclusion: although Inskip denied it, A Sturrock had indeed expressed reservations about the respondent's pregnancy.

[39] The next question is why, if those reservations were based on substantial reasons of operational continuity, Inskip did not openly and honestly debate them with the respondent that Saturday morning; B that he did not do so seems to suggest that he had no faith in their validity. Instead, he resorted to subterfuge and evasion raising, as we have seen, questions which had already been answered. The following Tuesday, 23 December, Inskip's sinister suppression of whatever Sturrock had conveyed to him, assumed alarming proportions. 23 December was the day on which Inskip finally managed to telephonically C contact Young. He testified that this telephone conversation persuaded him that Young really was the perfect candidate. The impression he conveyed was that, subject to a face-to-face interview, the job was Young's. Of course, there were still concerns such as why Young was prepared to move from a bigger to a smaller job (which was also less D well remunerated) and whether he was not perhaps overqualified for the post. Remuneration was not discussed with Young, nor was the date on which he might be able to commence his services, but Inskip had, according to him, found a first class incumbent for the job of Human Resources: Generalist.

[40] That is the scenario. It remains to test it against the probabilities. When Inskip telephoned the respondent after having E spoken to Young he knew that he had found the candidate of his dreams for the very post for which the respondent was competing. He did not yet know when Young, if appointed, would be able to start. He could therefore not, even temporarily, offer the respondent the post for F which she had applied. By doing so, he would risk having two people in the same job. However, according to Inskip he was no longer thinking of appointing the respondent to the generalist post. She was to be appointed to accomplish specific tasks while the appellant was pursuing discussions with Young to try to conclude a contract of employment with him. The respondent was told none of this. She was not told that G she was now being offered a job for which she had not applied. I cannot conceive of any reason for Inskip to have acted in such an underhand way. It was either an outrageous non-disclosure to the respondent that the whole nature of her job had changed, or the version is a later invention. I think that it was the latter. If Young had really been H such a strong candidate at that time, one would have expected the end of the respondent's temporary employment to be made to coincide with the commencement date of his

permanent employment. Instead, it coincided with the approximate commencement date of the respondent's maternity leave. If he had really been on the scene, I would have I expected Inskip to delay any offer of temporary employment to the respondent until Young's starting date had been ascertained. Then it could have been arranged for the respondent to stand in for Young until he could start. Furthermore, if I am correct in thinking that Young was not at that stage a factor, the appellant could not have hoped to solve its continuity problem by offering the respondent a J

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fixed Sterm contract involving, as it would, a transfer of functions to a new incumbent when it came to an end. This would in turn tend to A suggest that although the continuity requirement may have been desirable, it was not of pressing operational significance.

[41] The fact that Young's existence was even at this late stage not revealed to the respondent creates considerable doubt in B my mind that Young made anything like the impact on Inskip that he later thought it politic to portray. Indeed, the respondent testified that when she spoke to Ms M Klingenberg (to whom she had been referred during Inskip's absence on leave), she was on 6 January 1998 for the first time told of the supposedly pressing need for continuity. That was given as the reason for her having lost C a post which she believed she to all intents and purposes already had. The reason given was not that Young was, even before the respondent's interview, thought to be a superior candidate. This shows that even then Young had not emerged as a strong contender. He was only interviewed once the respondent had declined the offer of fixed term employment. D

[42] I am not suggesting that it might not have been more convenient for the appellant to have had continuity in the post of Human Resources: Generalist, but I am not, on the evidence, persuaded that it was such a vital requirement that it should have led to the rejection of the respondent's candidature on this ground. It could E not, and did not, explain Inskip's enthusiasm for the respondent at a time when the requirements of the post were well known to him. It is a fair inference that his rapid change of opinion after the intervention of his superior, the financial director, was due to an instruction to act in the way he did. This was the respondent's F evidence. It is probably correct. The sinister aspect of it is that Inskip at no time tried to justify his change of stance by explaining that he himself had mistakenly underrated the importance of the continuity requirement. Instead, he denied that he had had a change of heart. This, in my view, shakes the continuity defence to its foundations.

[43] An analysis of the evidence concerning the continuity requirement shows why Inskip did not regard it as vital. There had been G (we are not told when) a merger between the information technology division of the appellant and an external company acquired by the appellant. The acquisition meant that some one hundred people had to be integrated into the existing division. This meant in turn that staff policies of the external company had to be brought into line with those H of the appellant. The year 2000 project, it was said, required attention but that, I would have thought, was Inskip's field. There were issues related to retention of staff, and the development of new strategies and operational procedures, including a staff retention policy and making up a significant backlog on recruitment. Now, these I tasks, important as they no doubt were, cannot in my view be said to have vitally depended upon the respondent's presence at the workplace during the months

of June to August 1998. The respondent was not going to be ill. She offered to attend to the appellant's business during her maternity leave. Doubtless much of the development work could, if required, have been done from home. J

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Advice and support could, if required, have been furnished from home. The respondent as A captain of the ship did not have to man the bridge all day. In my view the reason for rejecting the respondent on the grounds of her pregnancy comes nowhere near to meeting the stringent test proposed by the authorities.

[44] This is not really a case about women's rights. It is a B case about a manager who, having made the correct decision in the first place, was persuaded by a superior to reverse it, and was then left to cover up as best he could. It nevertheless aroused sufficient interest with a body known as the Women's Legal Centre Trust, the objectives of which are to promote and protect the rights and interests of women and C to intervene on behalf of women in litigation which involves women's rights. This body applied under Rule 7 of the Rules of this Court for permission to intervene as amicus curiae in the appeal. The application was granted despite Mr Brassey's objection that the trust deed did not empower the trust to intervene in this manner. D He argued that the power to give legal assistance free of charge to the public, particularly to women, in cases which involve public interest or constitutional litigation was not wide enough to encompass intervention as amicus curiae on behalf of a litigant. I do not think that the power should be read so restrictively. 'Legal assistance' is an expression of wide and general import; it does not cover only financial assistance. It cannot be said that the E respondent was not being legally assisted. Submissions which were considered to be relevant to the protection of her rights were advanced by the trust. The point can accordingly not succeed.

[45] Mr Cheadle, who appeared for the Trust, submitted that discrimination on an arbitrary ground (which includes, but is not F limited to, the grounds set forth in item 2(1)(a)) would be fair if, in terms of item 2(2)(c), it is based on 'an inherent requirement of the particular job'. He argued further that a criterion for evaluating the fairness of discrimination which was less strict (eg a criterion which made discrimination fair if the legitimate G objects of the employer were hereby promoted) would not give effect to the purpose of item 2. 'Inherent requirements of the job' Mr Cheadle suggested, are limited to fixed attributes of a job, those that are permanent in nature. He suggested further that there was, in addition to the two specified categories of fair discrimination (those relating H to affirmative action in sub-item (2)(b) and inherent requirement of a particular job in sub-item (2)(c)) what he called a general defence of fairness, which, although open-textured, should not detract from the general proposition that defences which have the effect of limiting equality in the workplace, should be strictly construed. I

[46] The continuity requirement, he submitted, was not an inherent requirement of the job. It could not be one since it would in terms of the Basic Conditions of Employment Act 75 of 1997 be unlawful to make it a condition of employment that an employee might not take maternity leave (s 25), sick leave (s 22), annual leave (s 20) or family responsibility J

leave (s 27). Accordingly, the requirement of uninterrupted job continuity in itself would not have justified a A refusal to employ the applicant on the grounds of her pregnancy.

[47] Mr Brassey submitted that pregnancy of a job applicant may legitimately be taken into account where the operational requirements of the job are such that it would be unreasonable to B expect the employer to employ the applicant. In examining the reasonableness of the decision one would have to be satisfied that it was rationally related to the appellant's business interests and gave proper weight to the respondent's interest, as a woman, to equal treatment. This test is less strict than the one suggested by Mr Cheadle as the correct one. I do not have to choose between the two. In C my view the appellant fails even on the lesser test.

[48] The evidence shows that at the time of the interview Inskip's mind was untroubled by such requirements as continuity. He was the one best placed to know whether continuity was important or not. He evidently thought it was not. Since Inskip denied that Sturrock had spoken to him about the respondent's pregnancy one does not know D why the latter considered the continuity requirement to be sufficiently important to justify rejection of a pregnant applicant. This leaves the appellant with the dilemma that, between Sturrock who thought at the time that continuity was important and Inskip who thought at the time that it was not, it has failed to demonstrate that the continuity E requirement was operationally so important that it would have been unreasonable to expect of the appellant to employ the respondent.

[49] Having said this, I should say something about onus. Mr Brassey in opening his argument was not disposed to concede that the appellant bore a (proper) onus. F He conceded, however, that there was an evidentiary burden on the appellant to justify its conduct once such conduct was made to look discriminatory. Such evidentiary onus arose from the circumstance that, since the facts relating to the justification for the discrimination were peculiarly within the knowledge of the appellant, the respondent needed to adduce less evidence to G establish a prima facie case. (Gericke v Sack 1978 (1) SA 821 (A) at 827D - G.) Mr Cheadle, on the other hand, argued that s 9(5) of the Constitution of South Africa Act 108 of 1996 imposed an onus upon a discriminator to prove that the discrimination was justified. It is not necessary for me to decide the issue. Once it was common cause that the respondent's pregnancy had H operated against her, the appellant became obliged to explain why that was so. It became burdened with an evidentiary onus which obliged it to present evidence lest it fail to persuade the Court of the merit of its case. At the trial the appellant commenced leading evidence without demur; evidently it saw things differently then. I

[50] The motivation for the discrimination was at best inadequately revealed. Inskip said that it was operationally necessary, but he did not think this from the beginning and, since he did not admit that Sturrock had expressed any reservations about the respondent's condition, he could obviously not explain the import of what Sturrock had said to him. J

A fortiori, he was not able to reveal whether he was or was not persuaded by what Sturrock had A said. Perhaps there was a difference of opinion on the topic which it was, for the sake of forensic solidarity, thought prudent to conceal. Added to this there was the failure (to which I adverted earlier) to show in any depth or with any conviction why the respondent's absence during the months of her maternity leave would be crucial. B

[51] The Court a quo awarded the respondent a solatium. A court hearing an unfair discrimination matter in terms of item 4 of Schedule 7 'has the power to determine [it] on terms it deems reasonable, including, but not limited to, the ordering of reinstatement or compensation'. The industrial court was by s 46(9)(c) of the Labour Relations Act 28 of 1956 empowered C to determine disputes referred to it 'on such terms as it may deem reasonable, including but not limited to the ordering of reinstatement or compensation. . . .' A considerable body of law was built up by the old Labour Appeal Court in considering the proper approach to awards of compensation made under the identical wording of s 46(9)(c). It is necessary only to refer to Ferodo D (Pty) Ltd v De Ruiter (1993) 14 ILJ 974 (LAC) at 981C - H, a passage on the computation of compensation which has consistently been followed. Sentimental damages are not awarded unless there has been an injuria, that is to say, a slight to the plaintiff's rights of personality such as dignity and a good reputation. In casu, the respondent did not rely on an injuria. She set out to prove actual financial loss. I did E not understand Mr Nieuwoudt, for the respondent, to strenuously argue for an award of non-patrimonial loss. Had the respondent been given the post she applied for, she would have earned R300 000 over a period of one year - she only claimed loss of salary for twelve months. From this amount of R300 000 should be deducted the R130 000 which she F might have earned if she had not rejected the appellant's offer of temporary employment. I consider that she was obliged to accept the offer in order to mitigate her loss. In addition she earned R26 000 in September and October. Deducting, say, R160 000 from R300 000 leaves an award of R140 000. I would alter the award of the court a quo to R140 000. G

[52] It remains to consider the question of costs occasioned by the intervention of the amicus curiae. Mr Brassey's point that the intervention was ultra vires has been dealt with above. His further submission was that the amicus raised issues collateral to those defined by the pleadings and the parameters of the lis between the parties, and that this went beyond the proper functions of an amicus. H I do not agree. The amicus has contributed valuable submissions on the appropriateness of the test for determining unfairness and has assisted the Court on the question of onus. In my view the amicus does not deserve to be mulcted in costs. The amicus has not asked for costs so that, acceding to Mr Brassey's argument of last resort, I I dismiss the appeal with costs and would make no order for costs consequent upon the intervention.

[zJDz]Judgment

Willis JA:

[53] I have had the benefit of reading the judgments prepared by my J

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learned Brothers Zondo AJP and Conradie JA. I agree with the order A proposed by Zondo AJP.

[54] My reasons follow.

[55] It is a paradox of the human condition that the noblest of our aspirations are often in conflict. In this regard, the ideals of freedom and equality have been the giants that have bestrode the stage B in modern times. In this case, certain derivatives of the ideals of freedom and equality have clashed with complex intensity. On the one hand there is the ideal of maximising economic rationality in order to increase the prosperity and hence the freedom of our society. On the other, there is the ideal of minimising those disadvantages that women C experience as a result of pregnancy in order that we may come closer to a state of equality between women and men.

[56] Against the background of the awe-inspiring progress that has been achieved in the natural sciences, the temptation is great to believe that, ultimately, enduring solutions to tensions between our D social ideals are discoverable: that, by the application of sufficient intellectual rigour, the condition of humanity may be made perfect. The truth, I fear, is probably rather more mundane: we have to muddle through as best we can, taking into account our times and circumstances. E

[57] In this matter, obviously, a decision has to be made. I am conscious, however, that whatever decision this Court drives at will have an imperfect result. I hope, however, that this decision reflects an endeavour to accommodate our ideals as a society within the constraints of our times and circumstances. F

[58] This is an appeal against the finding of the Labour Court that the appellant ('the employer') had committed an unfair labour practice as contemplated by item 2(1)(a) of Schedule 7 to the Labour Relations Act 66 of 1995 ('the LRA') by declining to appoint the respondent ('the applicant') by reason of the fact G that she was pregnant. The employer also appeals against the decision of the Court a quo to award her R200 000 as compensation consequent upon its finding. The Court a quo granted leave to appeal to this Court.

[59] The decision of the Court a quo has been reported (Whitehead v Woolworths (Pty) Ltd (1999) 20 H ILJ 2133 (LC)).

[60] The Women's Legal Centre Trust ('the Trust') made an application in terms of Rule 7 of the Rules of this Court to be joined as an amicus curiae. The Judge President granted the application. The feminae of classical Rome may have I preferred that the Trust be admitted as amica curiae, in order to avoid the use of sexist language in the application of the Rules of Court. The Trust made full and very helpful submissions. The following gem does, however, appear in its heads of argument: 'Pregnancy is the means by which human life is reproduced and is accordingly of fundamental importance to our society at large.' I hope J

that this judgment will make it clear that this Court does not imagine A that it occupies a plane of etiolated sanctity!

[61] As a result of a merger between the information technology department of the employer with an external information technology department the employer required the services of a 'Human Resources Generalist'. B

[62] By reason of the merger, approximately one hundred people had to be integrated into the employer's existing information technology (IT) division. New policies and procedures, relating, inter alia, to staff matters had to be developed. The IT division was experiencing a high level of staff turnover. Furthermore, C a number of key human resources (HR) staff had resigned for a variety of reasons.

[63] The HR Generalist would be responsible for some 450 employees.

[64] In July 1997, the employer advertised the vacancy for this position and the applicant, who had a bachelor's degree in industrial D psychology, applied therefor. After complex negotiations which included the possibility of her being employed as an independent contractor on a consultancy basis, she was offered the position in October 1997. She declined the position. At the time she and her husband were based in Gauteng.

[65] The employer became increasingly desperate to fill the position. It advertised in November 1997 in a newspaper circulating in E Cape Town and also one circulating nationally. Consequent upon this advertisement five potential candidates, including the present incumbent, were shortlisted. It was also decided to approach the applicant to see whether her circumstances had changed and whether she might be interested in being considered for the position. As a result of a change in her circumstances, in particular the fact that her F husband had obtained a position in Cape Town, she said that she would. Arrangements were made for her to be interviewed while she and her husband were on holiday in Cape Town. This suited the convenience of both parties. G

[66] In the meanwhile the applicant discovered that she had, quite unexpectedly, become pregnant and at the interview held in Cape Town disclosed this fact to her prospective employer. A certain Mr Inskip conducted the interview on behalf of the employer. If the applicant were to have been engaged, her employment in the vacant position would have commenced on 1 January 1998. If the applicant H were to take up this position, she would have to take maternity leave for three months after some four months in the post.

[67] According to the applicant, she understood both on 17 December and on 19 December 1997 when a telephonic conversation I took place between her and Mr Inskip, that she would, subject to certain formalities being completed, be appointed to the position. The employer offered her a fixed term contract of five months on 23 December 1997. According to the applicant the employer advised her at the time that it could not offer her a permanent position by reason of her pregnancy. This offer the J

applicant declined. At that stage the employer had not yet secured the appointment of the present incumbent. A

[68] The position was subsequently awarded to a male person who had two honours degrees, an MBA and a doctorate in which he specialised in IT. He had 17 years of experience in the field of HR and IT, considerably more than the applicant. The employer contends that this person was undoubtedly the better candidate for the position and would B have been appointed anyway, regardless of whether the applicant had been pregnant or not. His curriculum vitae and his accomplishments indicate that he undoubtedly was. At the time of the interview with the applicant, the employer had concerns as to whether he was perhaps 'too high powered', 'too expensive' and whether he C would have 'staying power'. If one reads between the lines of the record, I think it would be neither unfair nor unkind to either the employer or the present incumbent to note that it seems the employer had concerns that he may be some kind of eccentric academic. The employer needed to interview him to decide whether its fears were well founded or not. D

[69] The employer furthermore contended that, given the problems it was experiencing and the nature of the job, it required uninterrupted continuity of employment in the post for a period of between 12 and 18 months and, by reason of the fact that the applicant would have been unable to fulfil this requirement, the decision not to E offer her permanent employment was a rational and commercially justifiable one. Mr Brassey, who appeared for the employer, correctly accepts that the employer 'took the respondent's pregnancy into account in assessing her application for employment'. The record clearly shows that this is indeed what occurred. F

[70] Mr Brassey also very fairly accepted that in so doing it discriminated on the grounds of pregnancy. I am not entirely convinced that he was correct in doing so. I should normally avoid an intellectualised approach to giving a judgment such as this. Nevertheless, for reasons which I shall develop later, the issue of G causation arises with some force in this case. Unfair discrimination is, in a certain sense analogous to a gevolgsmisdaad. This means that there must be a convergence of and a linkage between separate and distinct elements before legal consequences can arise. If a certain fact (taking into account the applicant's pregnancy) (a) is not the reason or cause or conditio sine qua H non for occurrence of a certain event (the decision not to employ her on a permanent basis - (b)), then there has been no nexus established between (a) and (b) and the question arises as to whether there has in fact been discrimination? (See, for example, S v Mokgethi en Andere 1990 (1) SA 32 (A) and in particular the authorities, both criminal and civil, cited therein at 40A.) Obviously, one must first ascertain that I there has been discrimination before one can determine whether that discrimination has been unfair.

[71] Perhaps the explanation for Mr Brassey's concession lies in the difficulties that arise in the use of language - in saying what one means and meaning what one says. In the days when Mr Brassey and I were J

schoolboys the use of the word 'discrimination' in its modern sense was, if not unheard of, A considered to be a serious solecism. One has only to compare the current Oxford Dictionary with fairly recent past editions to understand that 'discrimination' in the sense of being some kind of concrete act that impacts unjustly, prejudicially and negatively upon another is a modern concept.

Undoubtedly, Mr Brassey is correct if the word 'discrimination' is used in its older, more B traditional sense.

[72] Mr Cheadle, who appeared for the Trust, submitted that we should adopt an approach to discrimination similar to that adopted in Europe and North America. There is undoubtedly much merit in this submission although, for reasons which I deal with later, I do not think that it is appropriate to adopt a 'carbon copy' approach. C Nevertheless, I have little doubt from having read the welter of articles and case law from around the world to which Mr Cheadle referred the Court that in European and North American case and statute law and within the ILO 'discrimination' is used in the modern sense of the word. D

[73] Mr Brassey, again very fairly and correctly, accepted that discrimination on the grounds of pregnancy is a form of discrimination on the grounds of sex.

[74] Mr Cheadle pointed out that this latter concession reflects the law in the European Community, Canada and the United States of America. E

[75] Both Mr Nieuwoudt, who appeared for the applicant, and Mr Cheadle accepted that the fact of pregnancy may be a relevant factor which may fairly be taken into account in deciding whether or not to offer employment to a woman. F

[76] It is impossible, in my view, ex post facto, to unscramble the events and determine within a comfortable margin of certainty whether, but for the fact of her pregnancy, the applicant would have secured the permanent position.

[77] The temptation is great to decide this matter according to the question of onus. Although the parties touched upon this G issue, they did not argue on this point with the full rigour that would have been inevitable if they thought this was the appropriate manner to decide a case such as this. Mindful of the fact that the question of onus in cases involving alleged unfair dismissals is even more controversial than the substantive merits of this particular case, H I shall not do so. This much is clear, however: if the onus were to rest on the applicant, at least to the extent of having to prove the alleged act of discrimination, then, in my view she would experience real difficulties, by reason of the issue of causation outlined above. I

[78] There are a number of aspects in regard to which I respectfully disagree with the judgment of Conradie JA.

[79] Even if one accepts - and I am not sure the record justifies such a conclusion - that Mr Inskip, the person who had interviewed the applicant on 17 December 1997, had there and then made up his mind J

to employ the applicant, it is common cause that the applicant was aware during both the interview which took place on 17 December A 1997 and the follow-up conversation which took place on 19 December that whether or not she would be offered the position would depend on (a) the outcome of interviews with other shortlisted candidates and (b) confirmation by his superiors. B

[80] My own view is that Mr Inskip's version that he was trying, between 17 and 23 December, to keep his options open is more plausible. Against the background of the problems which the employer was experiencing, any reasonable person would have done the same.

[81] I also disagree with Conradie JA as to his finding that the fact that Mr Inskip did not during the interview on 17 December C indicate to the applicant that her pregnancy might have a negative impact on her eligibility for the position indicates that this requirement was not really important to the employer.

[82] Mr Inskip explains this by saying not only that he knew that 'pregnancy was a sensitive issue' but also by saying, as I have D indicated earlier, that he was trying to keep his options open.

[83] I disagree with Conradie JA as to the significance which he attaches to the fact that the employer failed to state in its reply to applicant's statement of claim that it had a better candidate, namely E the present incumbent, in mind at the time either of the interview or the offer on 23 December. It is stated very clearly in the reply that the applicant was made aware of the fact that there were other potential candidates. Furthermore, at the time when the offer of fixed term employment was made, the employer had not yet held an interview with the present incumbent, much less secured his services. F

[84] If one rejects as a factor genuinely relevant to the employer its need for uninterrupted continuity of employment, then the only plausible reason why the applicant was not offered the position was that she was, quite simply, not the best candidate. If this is the case, then the fact that the employer had regard to the fact of her G pregnancy is irrelevant. It is rather like the difference between temptation and sin: a thought which enters one's mind can only become an unfair labour practice if it is acted upon.

[85] Indeed, if one rejects H

(i) the uninterrupted continuity of employment factor as having genuinely influenced the employer's decision; and

(ii) the claim that she was not the best candidate for the position; and

(iii) the possibility that it may have been a combination of these reasons that led to the decision not to offer her permanent employment, I then one is left with the question: why was she not offered permanent employment?

[86] No other plausible explanation was put to the employer during cross-examination. Leaving aside the question of whether it is then fair to the employer to speculate as to possible reasons why the applicant was J

not offered the position I think only two other possibilities can come to mind. The one is that the employer had some A kind of irrational antipathy towards pregnant women employees. Given the fact that this employer has a policy of giving female employees paid maternity leave, thus making it

one of the most progressive employers in the country in this regard, and the fact that it has a great many female employees of child-bearing age in its employ, this B scenario is hardly likely. The other is that the employer did not want to bear the cost of paying the applicant for maternity leave so soon after it would have engaged her. Given the importance of filling this position, this cost could not have been significant. Furthermore, the record shows that the terms and conditions of her possible employment were highly negotiable. Besides, it would be ironic indeed if when an C employer adopts a progressive policy of paying its female employees in full during their maternity leave, this policy were to count against it in speculating as to possible reasons why the employee was not offered permanent employment.

[87] Sight must not be lost of the fact that the applicant's pregnancy may have been a factor that operated in her favour, at least D to the extent of her being offered the fixed term contract. Had she not disclosed her pregnancy, the employer may well have decided not to make her any offer at all until it had interviewed the present incumbent and ascertained (a) whether he was indeed suitable and (b) whether he would be prepared to work for it. E

[88] The Court a quo found that

'(n)ot only is the requirement of uninterrupted job continuity for a period of at least 12 months not objectively justifiable, I cannot find such a condition to be reasonable'. F

[89] The Court a quo also found that

'(n)o employer can receive any guarantee that an incumbent will remain in its employ for an uninterrupted period of time. In the absence of such guarantee, I am satisfied that to place such a requirement can be no more than a decision arrived at on an arbitrary ground.' G

[90] The Court a quo held that

'if profitability is to dictate whether or not discrimination is unfair, it would negate the very essence for the need of a Bill of Rights'.

[91] The Court a quo decided to award the applicant an amount equal to two-thirds of what she would have earned over a H 12-month period had she not been discriminated against and offered the position for which she was invited to apply, and arrived at the sum of R200 000 accordingly.

[92] Item 2(1)(a) of Schedule 7 to the LRA provides as follows:

'For the purposes of this item, an unfair labour practice means any unfair act or omission that arises between an employer and an I employee, involving - the unfair discrimination, either directly or indirectly, against an employee on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.'

[93] Item 2(2)(a) of the same Schedule provides that: J

'For the purposes of sub-item (1)(a) - A

. . .

''employee'' includes an applicant for employment; . . .'.

[94] Item 2(1)(a) of Schedule 7 does not pertinently mention pregnancy as a prohibited ground of discrimination for a prospective employee.

[95] Significantly, s 187(1)(e) of the LRA enumerates as one of the grounds for a dismissal being B 'automatically unfair',

'the employee's pregnancy, intended pregnancy, or any reason related to her pregnancy'.

[96] Section 9(4) read together with s 9(3) of our Constitution enumerates pregnancy as one of the grounds upon which a person may not C discriminate unfairly.

[97] Pregnancy is similarly listed in s 6(1) of the Employment Equity Act 55 of 1998 and s 1(xxii)(a) of the Promotion of Equality Act 4 of 2000.

[98] The applicant originally relied on s 187(1)(e) of the LRA to found her claim. The Court a quo correctly D found that she could not do so as she had not been dismissed.

[99] In the case of Botha v A Import Export International CC (1999) 20 ILJ 2580 (LC), Marcus AJ approved the decision of the court a quo (at 2587E - F). E

[100] In the same case the learned Judge said at 2586H - J:

'It follows that forms of detrimental treatment other than dismissal arising from a woman's pregnancy could constitute direct unfair discrimination. For example, a failure to appoint an applicant for employment because of her pregnancy or intended pregnancy could constitute unfair discrimination.' F

[101] I agree with that which the learned Judge has said in the immediately aforementioned quote. He advisedly used the word 'could' rather than something more peremptory. Each case must, of course, be decided on its own merits.

[102] Marcus AJ seems to have been much influenced by the decision in Dekker v Stichting Vormingsentrum Voor Jong G Volwassenen (VJV-Sentrum) Plus [1992] ICR 325.

[103] In that case the applicant applied to the respondent for the post of instructor at the training centre for young adults run by the respondent. She informed the committee dealing with the applications that she was three months' pregnant. The committee H nonetheless put her name forward to the board of management of the respondent as the most suitable candidate. The respondent later informed the applicant by letter that she would not be appointed. In that letter the respondent explained that the reason for the decision was that she was already pregnant at the time of her I application and that, according to the information it had obtained, the Risicofonds Sociale Voorzieningen Bijzonder Onderwijs (Assurance Fund) would not reimburse it for the maternity benefits that it would be obliged to pay her during her maternity leave. As a result the respondent

would, financially, be unable to employ a replacement during the applicant's absence and would be short-staffed. J

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[104] The Arrondissementsrechtbank (District Court) Haarlem and the Gerechtshof (Regional Court of Appeal) both, in turn, dismissed the A applicant's claim for compensation. The applicant then further appealed to the Hoge Raad der Nederlanden (Supreme Court of the Netherlands). That Court then referred the matter to the Court of Justice of the European Communities (ECJ) for a preliminary ruling. B

[105] The ECJ held in para 12:

'(I)t should be observed that only women can be refused employment on the ground of pregnancy and such a refusal therefore constitutes direct discrimination on the ground of sex. A refusal of employment on account of the financial consequences of absence due to pregnancy must be regarded as based, essentially, on the fact of C pregnancy. Such discrimination cannot be justified on grounds relating to the financial loss which an employer who appointed a pregnant woman would suffer for the duration of her maternity leave.'

[106] The ECJ had, however, to interpret Articles 2 and 3 of the Council Directive of 9 February 1976 (76/207/EEC) on the implementation of the principle of equal treatment for men and women as D regards access to employment, vocational training and promotion and working conditions.

[107] Article 2(1) of the Directive provides:

'(T)he principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or E indirectly by reference in particular to marital or family status.'

[108] Article 3(1) provides:

'Application of the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex in the conditions, including selection criteria, for access to all jobs or F posts. . . .'

[109] It is immediately apparent that the wording of these articles states the position in absolute terms whereas item 2(1)(a) of Schedule 7 of the LRA does not.

[110] Marcus AJ also referred to the following in Webb v EMO Air Cargo (UK) Ltd [1993] 1 WLR 49 at 53H ([1992] 4 All ER G 929 (HL) at 934a):

'Child-bearing and the capacity for child-bearing are characteristics of the female sex. So to apply these characteristics as the criterion for dismissal or refusal to employ is to apply a gender-based criterion. . . .'

[111] A careful reading of the speech of Lord Keith of Kinkel, with which his four other noble and learned friends agreed, reveals a H rather more complex evaluation of the issue than the first glance at this single sentence quoted by Marcus AJ would suggest.

[112] Indeed the opening words of his Lordship's speech read as follows:

'My Lords, this appeal involves a difficult and interesting question in the field of sex discrimination.' I

[113] Their Lordships considered the preliminary ruling of the ECJ in the Dekker case supra and nevertheless decided, in turn, to refer the issue before them to the ECJ for another preliminary ruling. They were concerned that: J

'The European Court did not, in Dekker's case and the Hertz case, have to consider the situation where a woman, on A account of her pregnancy, will not be able to carry out, at the time when her services are required, the particular job for which she is applying or for which she has been engaged. The two decisions do not give any clear indication whether in such a situation the court would regard the fundamental reason for the refusal to engage the woman or for dismissing her as being her unavailability for the job and not her pregnancy.' B

(At 940d - e (All ER).)

[114] We in South Africa have a well-developed jurisprudence in the field of tax law and to assist us to distinguish between contracts that may be classified as locatio conductio operis and locatio conductio operarum - summoning examples that readily C spring to mind - that enables us immediately to understand the significance of the final sentence in the last-mentioned quote. This is especially the case if one substitutes the word 'dominant' for 'fundamental' therein. There may well be merit in borrowing from such jurisprudence to develop suitable tests to determine, in complex situations, whether there has been unfair discrimination. D

[115] In the matter of Webb v EMO Air Cargo (UK) Ltd [1994] IRLR 482, the ECJ gave its preliminary ruling in which it held that

'dismissal of a pregnant woman recruited for an indefinite period cannot be justified on grounds related to her inability to fulfil a fundamental condition of her employment contract'. E

It went on to say that

'the protection afforded by Community law to a woman during pregnancy and after childbirth cannot be dependent on whether her presence at work during maternity is essential to the proper functioning of the undertaking in which she is employed'. F

[116] Section 6(1) of the Employment Equity Act 55 of 1998 provides as follows:

'No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy,

marital status, G family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.'

[117] A decision made in regard to a single individual can hardly be described as a 'policy' or 'practice'. The decision of the employer in this case is, furthermore, not indicative of any policy or H practice which it has adopted towards pregnant women. As I have already indicated above, there is nothing remotely to suggest that this particular employer has adopted an attitude akin to 'we do not want women who are or may fall pregnant to work for us'. The Employment Equity Act came into operation after the act complained of in this case. This notwithstanding, I am of the view that, for these reasons, I s 6(1) of that Act is inapplicable to the present case.

[118] In my view, the omission by the Legislature of any reference to pregnancy in item 2(1)(a) of Schedule 7 of the LRA must have been deliberate. Mr Cheadle agreed. J

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[119] Moreover, it is important to have regard to the fact that not only item 2(1)(a) of Schedule 7 but also our A Constitution prohibits unfair discrimination and not discrimination per se. In this regard, the European Articles referred to above differ materially from the provision upon which the applicant bases her claim. It is not difficult to imagine situations where it would not be unfair to discriminate on any of the grounds enumerated in B either item 2(1)(a) or the Constitution. For example, I do not think that I should require too much persuasion to accept that a film director, seeking to audition candidates to perform the role of a person famous in history, could fairly restrict the range of eligible applicants to persons who matched or at least closely approximated that person in sex, age, and general appearance. C

[120] Such a view would be supportable without recourse to item 2(2)(c) of Schedule 7 of the LRA which provides that:

> 'For the purposes of sub-item (1)(a) -
>
> . . .
>
> (c) any discrimination based on an inherent requirement of the particular job does not constitute unfair discrimination.' D

[121] According to the ILO Report of the Committee of Experts 1988 to which Mr Cheadle referred the Court, discrimination of such a nature (ie of the kind given in my example of the film director) is often expressly justified in various national statutes (at 130). E

[122] I agree with the original submission of the applicant that this matter should be decided without reliance on the provisions of this sub-item. The employer did not even seek to do so. The issue could hardly arise when, on the employer's own version of events, it would have employed the applicant had it not been able to secure the services F of any other suitable person for the position. Indeed, Mr Brassey fairly conceded that the requirement of uninterrupted continuity of employment was not an absolute requirement for this particular position.

[123] Mr Cheadle, on the other hand, submitted that the provisions of item 2(2)(c) were of absolutely critical G importance to the outcome of this case. The applicant, having heard the submissions of the Trust in this regard, later joined hands with her on this issue. Mr Cheadle submitted that the only instances of discrimination not being unfair would be those covered by this provision, ie he submitted that unless discrimination were based on an inherent requirement of a particular job it would be H unfair. I disagree that this is the correct interpretation of the law. Had this been the intention of the Legislature it could very easily have said so. Mr Cheadle must therefore rely on the maxim unius inclusio est alterius exclusio or expressio unius est exclusio alterius. This has been described by Hoexter JA as a 'last refuge' (see Administrator, Transvaal, and Others v I Zenzile and Others 1991 (1) SA 21 (A) at 37G - H). The maxim is not a rigid rule of statutory construction and must always be applied with great caution (see, for example, Chotabhai v Union Government (Minister of Justice) and Registrar of Asiatics 1911 AD 13 at 28; South African Estates and Finance Corporation Ltd v Commissioner for Inland Revenue 1927 AD 230 at 236; Consolidated Diamond Mines of South West Africa Ltd v J

Administrator, SWA, and Another 1958 (4) SA 572 (A) at 648G - H; Administrator, Transvaal, and A Others v Zenzile and Others (supra); South African Roads Board v Johannesburg City Council 1991 (4) SA 1 (A) at 16G; National Automobile and Allied Workers' Union (now known as National Union of Metalworkers of South Africa) v Borg-Warner SA (Pty) Ltd 1994 (3) SA 15 (A) at 26G). It is not difficult to imagine situations outside of the inherent requirements of a particular B job where discrimination would not be unfair (see, for example the ILO Report of the Committee of Experts, chap 3). Accordingly, rather than there being considerations of policy as to why the maxim should apply, the converse is the case.

[124] The Trust submitted that an analysis of whether discrimination is fair should take into account factors such as: C

(i) the impact of the discrimination on the complainant;

(ii) the position of the complainant in society;

(iii) the nature and the extent of the discrimination;

(iv) whether the discrimination has a legitimate purpose and to what extent it achieves that purpose; D

(v) whether there are less disadvantageous means to achieve the purpose;

(vi) whether and to what extent the respondent has taken reasonable steps to address the disadvantage caused by the discrimination, or to accommodate diversity. E

[125] Without accepting this as an exhaustive list, I think there is much merit in this submission and shall have regard to these factors in coming to a decision.

[126] An evaluation of fairness, within the context of the LRA, requires that, at the very least, the situation is looked at from both F the employer's and the employee's perspective (see, for example, National Union of Metalworkers of SA v Vetsak Co-operative Ltd and Others 1996 (4) SA 577 (A) at 593G - H; Dube and Others v Nasionale Sweisware (Pty) Ltd 1998 (3) SA 956 (SCA) at 960E - F ((1998) 19 ILJ 1033 at 1037D); SA Commercial, Catering G and Allied Workers' Union and Others v Irvin & Johnson Ltd (1999) 20 ILJ 2302 (LAC) at 2314I - 2315A; Benicon Group v National Union of Metalworkers of SA and Others (1999) 20 ILJ 2777 (SCA) at 2779I and 2787D).

[127] Fairness is an elastic and organic concept. It is impossible to define with exact precision. It has to take account of H the norms and values of our society as well as its realities. Fairness, particularly in the context of the LRA, requires an evaluation that is multi-dimensional. One must look at it not only from the perspective of prospective employees but also employers and the interests of society as a whole. Policy considerations play a role. There may be features in the nature of the issue which call for restraint by a court in coming I to a conclusion that a particular act of discrimination is unfair.

[128] The word 'arbitrary' denotes the absence of reason or, at the very least, the absence of a justifiable reason (see Beckingham v Boksburg Licensing Board 1931 TPD 280 at 282 - 3; Bernberg v De Aar Licensing J

Board 1947 (2) SA 80 (C) at 92; Kadiaka v Amalgamated Beverage Industries (1999) 20 A ILJ 373 (LC); Baxter Administrative Law at 521 - 2; The Oxford English Dictionary).

[129] Given the facts of this particular case, it seems to me that there is nothing arbitrary in the employer taking into account the applicant's pregnancy in deciding whether or not to offer her a contract of permanent employment. The employer testified that, given B the nature of the position and in the particular circumstances then prevailing, it needed continuity in the position for an uninterrupted period of time of at least 12 months. For the reasons outlined above, it is difficult to disbelieve this evidence. I disagree with the Court a quo that the employer arrived at its decision on an C arbitrary ground.

[130] I also disagree with the Court a quo that because no employer can receive any guarantee that any employee will be able to serve for an uninterrupted period of time, the pregnancy of a prospective employee cannot be taken into account. Employers must base their commercial decisions on reasonable probabilities. Risk-taking is intrinsic to enterprise. Risk is discounted, inter alia, by D an evaluation of probabilities.

[131] I disagree that the employer acted unreasonably. On the contrary, it took into account perfectly rational and commercially understandable considerations. These considerations were, in the circumstances, neither trivial nor insubstantial. It did not act out of E bigotry or prejudice which, it seems to me, is the mischief that item 2(1)(a) of Schedule 7 to the LRA is principally designed to prevent.

[132] The issue of the applicant's pregnancy can hardly be described as irrelevant, especially in the light of the fact that the applicant herself raised the matter and in the light of her reasons for doing so as well as the concessions she made under cross-examination. F

[133] Indeed, it is clear that if the applicant were indeed the most suitable candidate, the fundamental reason for the issue of the applicant's pregnancy influencing its decision as to whether or not to offer her the position which she thought she would obtain was her unavailability for the job. It was a position for which it would not be G a simple matter to find an effective replacement during her absence on maternity leave. Depending on the facts of a particular case, there may be other indicia which may assist a Court in making its determination. The dominant impression is that the decision of the employer was influenced not so much by the pregnancy of the employee H per se but rather by a range of factors which it could legitimately take into account, including her unavailability. The dominant impression is thus not one of an employer averse to pregnant women being employed by it. It is also not one of an employer that unreasonably seeks to avoid the employment of pregnant women. It is clear that the employee's pregnancy was not the sole reason for her I not being offered the permanent position.

[134] I agree that profitability is not to dictate whether or not discrimination is unfair. Nevertheless, profitability is a relevant consideration. If the labour courts were to make their decisions entirely indifferent to profitability, the consequences for our society would be disastrous. J

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[135] An enquiry as to fairness involves a moral or value judgment taking into account all the circumstances. (See, for example, A Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ('Perskor') 1992 (4) SA 791 (A) at 798H - I ((1992 13 ILJ 1391 at 1400C - D); Vetsak (supra at 591G - 592D); Nasionale Sweisware (supra at 960E - F (SA) and 1036J - 1037A (ILJ)); Benicon v NUMSA (supra at 2779I).) B

[136] A careful balancing of interests is required in a case such as this. We live in a country with pervasive poverty, poor social security, high unemployment and a low growth rate. Without a rapidly expanding economy, it will be impossible to deliver to our society so many of the changes and improvements it so desperately needs. At this C stage of our history, to hold that an employer cannot take into account a prospective employee's pregnancy would be widely regarded as being so economically irrational as to be fundamentally harmful to our society.

[137] The ILO Report of the Committee of Experts makes it clear over and over again that although the general thrust of D the direction of the democratic nations of the world community on issues of discrimination is unmistakable, there are a number of nuanced differences of approach within the community of nations. I hope that it is quite clear that, as a general rule, this Court views with disfavour discrimination on the grounds of pregnancy, even where it concerns applicants for employment. E

[138] The changing roles of women - and, related to that, of men as well - the changing nature of parenting, the changing nature of work, and the changing character of the workplace present all in our society with challenges that are bewildering in their complexity. Among these F challenges is

the issue of how our society is fairly to deal with the pregnancy of women. Closely related to that is the whole issue of parenting and its interface with the workplace. There are no readily available solutions. I have no doubt, however, that in respect of this issue, as with so many others, the solution does not lie in this Court presenting society with unrealistic rules of law - however attractive they may otherwise seem to be. Fairness refracts when beamed through G the prism of reality.

[139] Mr Cheadle referred the Court to what is, in my respectful view, an excellent article by Professor Catherine O'Regan, now a Judge of our Constitutional Court entitled 'Equality at work and the limits of the law: Symmetry and individualism in anti-discrimination' H legislation appearing in Gender and the New SA Legal Order edited by Christina Murray and published by Juta's in 1994.

[140] She points out that simply prohibiting discrimination on grounds of pregnancy fails to resolve the complex policy question of how the costs incurred in childbearing should be borne in our society. I She also cautions against adopting an Aristotelian concept of equality.

[141] She says:

'In conclusion, anti-discrimination legislation is unlikely to be an effective tool to promote equality for women in employment because it is founded on J

principles of symmetry and individualism. The principle of symmetry requires women to be treated in the same way as A men; but it breaks down where women are biologically different to men, for example, in the case of pregnancy and where their social experience is different.'

[142] If women are to experience the full richness of life as citizens of our country, we shall have to think more deeply about the issues of motherhood and parenting than rely on narrowly focused rules B of law.

[143] For example, I have difficulties with the notion expressed by Conradie JA that it would somehow be practical or acceptable for the applicant to direct her department during her maternity leave by telephone, telefacsimile or e-mail. This idea was put forward by Mr C Nieuwoudt with apparent seriousness. Clearly, he was very persuasive. I think that Western culture could derive much wisdom from the view prevalent in African, Hindu, Muslim and Chinese cultures that the first few weeks of a child's life should be a special time with its mother, with both of them freed as much as possible from outside distractions and surrounded by love and support. Moreover, motherhood is not some D minor inconvenience in a woman's life. I also think we should be astute not to cultivate the idea that motherhood is entirely secondary to the greater glories of job satisfaction.

[144] The difference in wording between the Articles which the ECJ had to interpret and the provision which this Court must interpret E justifies differing conclusions. Policy considerations would also, in my view, justify different conclusions. One cannot avoid an evaluation that is contextual. South Africa, at present, does not have the levels of affluence, the low birthrates and some highly developed insurance systems that, inter alia, make decisions such as that in the Dekker case easily absorbable in the social fabric that F exists in Europe. In this regard, I refer to two

illustrations. In the matter of Webb v EMO Air Cargo (UK) Ltd [1994] IRLR 482 (supra) the ECJ gave as one of its most important reasons for its decision, the need to encourage women to have children. This is hardly the situation in South Africa. According to the ILO Report of the Committee of Experts (supra), in Germany women are allowed to leave their employment for a period of up to five years G for the purpose of raising a child, without losing their seniority and right to promotion (at 150). This would be unthinkable in South Africa at the moment. We are not that desperate to encourage the arrival of new citizens.

[145] There can be little doubt, in my mind, that a decision in favour of the applicant will favour elites. It will, however, act to H the detriment of the poor.

[146] It is a simple matter for an employer to accommodate the pregnancy of the shelf-packer in a supermarket, the waitress in a I restaurant, the receptionist at an hotel, the seamstress working on the production line of a clothing factory. It is not difficult to accommodate the pregnancy of women in the numerous lowly paid, dreary and routine jobs with which women, especially, are burdened.

[147] When it comes to executive positions of critical importance, the consequences go beyond imposing a burden on employers. They impact J

negatively on the capacity of the economy, as a whole, to grow and, in so doing, its capacity to create new jobs. A

[148] In my view it would be inappropriate for this Court to deliver a judgment as though it were cocooned in the intellectual and moral parameters of a rich, first world country. It would be inappropriate to ignore the fact that, as a general rule, the existence of elites can only be justified if they produce a dividend for society B that exceeds the costs which they incur.

[149] To find that the pregnancy of a prospective employee cannot be taken into account in deciding whether or not to offer her employment may seem to be fair to prospective employees but it would C certainly be unfair to employers and society as a whole and, by reason of the damaging consequences of such a finding upon society as a whole, ultimately unfair to prospective employees as well. After all, prospective employees need jobs to apply for in the first place.

[150] In the light of the conclusion I have reached, it is unnecessary for me to consider the employer's criticisms of the Court D a quo's computation of damages.

[151] The Court a quo made a costs order against the employer. There are insufficiently strong reasons to depart from the usual practice in this Court of making costs follow the result. The E parties agreed that the matter merited the services of two counsel. Against the background of this case, it would be unfair to mulct the Trust in costs. In the result the order I make is the following:

(1) The appeal is upheld with costs, which costs are to include the costs of two counsel. F

(2) The order of the Court a quo is set aside and the following is substituted therefor:

'The application is dismissed with costs.'

(3) There is no order affecting the costs to be paid to or by the amicus curiae. G

Appellant's Attorneys: Perrott, Van Niekerk & Woodhouse Inc. Respondent's Attorneys: Jan S de Villiers & Son. Attorney for the amicus curiae: Women's Legal Centre.