A critique on the judgment in Woolworths (Pty) Ltd v Whitehead (Women’s Legal Centre Trust Intervening) 2000 (3) SA 529 (LAC)

Frances Anderson

The case that seems to have been too much to bear for the Woolworths management was that of Ms Whitehead, a woman who had entered into a fixed-term contract with the company. After a year of successful employment, she informed her employer that she was pregnant. Despite this, the company decided not to offer her a permanent position. This decision was made in the absence of any evidence that Ms Whitehead was not suitable for the position.

The Labour Court dismissed Ms Whitehead’s claim for unfair discrimination, interpreting the fact that she was pregnant as a non-economic reason. The Labour Appeal Court, however, dissented and reversed this decision. The CAPE Town Court of Appeal upheld the Labour Appeal Court’s judgment.

In his judgment, Zondo J. stated: “It is not for this Court to substitute its view for that of the judge who heard the evidence.” In other words, the judge who had the opportunity to hear and observe the evidence was best placed to make the decision.

Whitehead’s case highlights the need for workplace policies that respect the rights of pregnant workers. The company’s actions were seen as discriminatory, and their decision was overturned by the Labour Appeal Court. The case also serves as a reminder of the importance of ensuring a fair and equitable workplace environment.

In conclusion, Whitehead’s case shows how the law can be used to protect the rights of pregnant women in the workplace. The decision was a victory for fairness and equality, and it sends a clear message that discrimination on the grounds of pregnancy is unacceptable.

The case of Whitehead serves as a reminder of the importance of not only having policies in place, but also ensuring that they are implemented fairly and equitably. It is essential that companies take steps to prevent discrimination in the workplace, and that they are held accountable when they do not.

The case of Whitehead is a call to action for all employers. It is a reminder that the law is on the side of fairness and equality, and that companies must act in accordance with it. The case also serves as an example of how the law can be used to protect the rights of pregnant women in the workplace.

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intensity. On the one hand there is the ideal of maximizing economic rationality in order to increase the prosperity and hence the freedom of our society. On the other, there is the ideal of minimizing those disadvantages that women experience as a result of pregnancy in order that we may come closer to a state of equality between women and men. 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 social ideals are discoverable: that, by the application of sufficient intellectual rigor, the condition of humanity may be made perfect. The truth, I fear, is probably rather more mundane: we have to middle through as best we can, taking into account our times and circumstances.

This is a startling departure from plain language—an indispensable requirement for making the law accessible to all the people of South Africa and, particularly, to persons in the workplace.

In his judgment, Willis J found that Woolworths' requirement of twelve months of uninterrupted continuity of employment was understandable and stated that it would be economically irrational in our country not to take a prospective employee's pregnancy into account. He firmly rejected the idea that Ms Whitehead could have worked from home during her maternity leave using telephone, fax and e-mail and stated:

'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 minor inconvenience in a woman's life. I also think we should be attempting to cultivate the idea that motherhood is entirely secondary to the greater glory of job satisfaction'.

It could be asked, was the father's role in all of this coin bonding? Perhaps he is the stereotypical, unemotional, pin-striped executive making important deals in the boardroom (or, more likely, on the golf course!). Willis J's deference to the interesting array of cultures seems to be of his own making as it appears that no evidence of any kind was led on how well mothers in African, Hindu, Muslim and Chinese cultures bring up their babies and how poorly those in Western cultures do. As for his rejection of working from home, technology has made this quite feasible and possible and is, in fact, the way in which many men and women work very effectively in the new economy today.

But this is not all. Willis J also found cause to say that 'It is a simple matter for an employer to accommodate the pregnancy of the shelf-packer in a supermarket, the waitress in a restaurant, the receptionist at a 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. When it comes to executive positions of critical im-

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portance, the consequences go beyond imposing a burden on employers. They impact negatively on the capacity of the economy as a whole, to grow and, in so doing, its capacity to create new jobs (562H-563A).

This statement seems to imply that the South African economy can cope with maternity leave being given only to women in lowly paid jobs. Woe betide any woman who aspires to an executive position, for she will have to choose between the boardroom and the baby. This seems to reinforce stereotypes and to strip women of some of their basic statutory rights and protections.

One must remember that Ms Whitehead was applying for a position as a human resources: information and technology generalist. Notwithstanding the level of this appointment, Woolworths still argued that it needed continuity in the position for an uninterrupted period of time of at least twelve months. If this is required of a Woolworths’ HR generalist, the question might well be asked whether such an onerous requirement applies to the more senior people in the company structure as well!

Apart from the judgments in this matter, a further comment made in the case worthy of note is that of Woolworths’ counsel, Martin Brassey SC, who, in argument, noted that a comparison could be made by considering the case of a male actor with intermittent penile dysfunction who applies for a part in a pornographic film. How this simile is meant to bear any meaningful resemblance to the circumstance of a pregnant woman who applies for a job is difficult to see. One would also have thought that such imagery has no place in the Labour Appeal Court.

In passing, it is interesting to note that there are no women on the bench of the Labour Appeal Court and only one permanent woman judge in the Labour Court in the whole of South Africa.

There is no doubt that the outcome of this matter is regrettable, particularly for women who aspire to contribute significantly to our country’s economy and, at the same time, experience motherhood.

It is not only in the interests of women but in the interests of South African society as a whole that the order in this case should be challenged and firmly set aside by the Constitutional Court without delay.

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Frances Anderson has told De Rebus that, since writing this article, the following has transpired: Ms Whitehead filed an application for leave to appeal to the Constitutional Court against the Labour Appeal Court’s judgment. Prior to the hearing of this application, the entire matter was settled between the parties, the terms of settlement being confidential.
A step forward or a slap in the face?

Lubbe and Others v Cape plc and related appeals
27-7-2000 (House of Lords)

Andrew Henderson

In Lubbe and Others v Cape plc the judicial committee of the House of Lords was required to decide whether a number of actions against the defendant company ought to be heard in England or in South Africa.

The actions related to the plaintiffs' exposure to asbestos while employed by the defendant's subsidiary. The alleged exposure had occurred in South Africa although the defendant was based in England. In 1997 actions were begun in England but stayed after the defendant undertook to submit to the South African jurisdiction. The first instance judge held that South Africa was the more appropriate jurisdiction, but this was overturned in the Court of Appeal on the basis that the defendant had failed to show that South Africa was indeed more appropriate.

Thereafter other actions were commenced, with all the actions being ordered to proceed as a group action. (There are now some 3,000 claims.) On the defendant's application the actions were, however, once again stayed. The decision to stay proceedings was this time upheld by the Court of Appeal - the court expressing the confidence that legal representation could be made available in South Africa to the extent necessary to achieve proper consideration of the plaintiffs' case.

The plaintiffs appealed to the House of Lords.

In determining whether to stay proceedings on the ground of forum non conveniens, the founding principle is that a stay will be granted where an English court is satisfied that there is some other tribunal in which the case might be tried more suitably for the interest of all the parties and for the interests of justice. This principle is derived from Sim v Kohinov (1892) 19 R 665 and Spiliada Maritime Corporation v Vansalex Ltd (1987) AC 460. In its application of the principle a court is required to ask the following:

1. Has the defendant shown that England is not the natural or appropriate forum?
2. Even if England is not the natural or appropriate forum, would the claimant obtain justice in the foreign jurisdiction?

(The questions comprise what is commonly referred to as the 'Spiliada test'.)

Their Lordships answered the first question in Cape plc's favour; in respect of the second, however, the defendants failed. In one of his first speeches as senior law lord, Lord Bingham observed that a finding of substantial injustice was not an easy condition to fulfil. It was not necessarily enough to show that legal aid was available in England but not in the more appropriate forum.

From the material before the House, Lord Bingham drew, among others, the following conclusions:

1. The proceedings could be handled efficiently, cost-effectively and expeditiously only on a group basis.
2. The claims raised a serious legal issue concerning the defendant's duty as parent company.
3. The possibility existed that the proceedings might culminate in settlement.
4. There was no convincing evidence to suggest that legal aid or the necessary funding might be available in South Africa.
5. If the proceedings were stayed in favour of the more appropriate South African forum, the plaintiffs would probably have no means of obtaining the professional representation and expert evidence which would be essential if the claims were to be justly decided.

His Lordship observed that the absence of established procedures in South Africa for handling group actions was not a compelling consideration in deciding whether South Africa was the appropriate forum. However, it reinforced the plaintiff's submissions on funding. He further noted that any considerations not related to the private interests of the parties and the ends of justice had no bearing on the decision. Public interest considerations were thus irrelevant when determining where the proceedings ought to be tried.

Lord Hope delivered a concurring opinion, emphasising the fact that considerations of public policy were irrelevant and were to be left out when applying the Spiliada test. Lords Hoffman, Hobhouse and Steyn agreed with both opinions.

On the one hand the decision in Lubbe can be viewed as a step forward for greater accountability of multinational corporations. Of course the courts in England will still have to resolve questions about corporate responsibility and the control which parent companies have over the actions of their subsidiaries. They will also have to grapple with the personal injury aspects, particularly the issues of whether claims ought to be time-barred.

On the other hand the decision is a slap in the face for the South African system of justice. Their Lordships suggest that because it would be possible to fund actions in South Africa only on a contingency fee basis, no South African lawyer would be willing to take on the plaintiffs' cases. There is an irony here: Had the Lubbe litigation been initiated in England this year, it would probably have had to be conducted on a conditional fee basis as legal aid is no longer normally available in personal injury claims.

The logic of the decision in Lubbe is that the current system being employed in England does not supply 'substantial justice'. This is perhaps of some consolation to South African lawyers.

It will be interesting to see whether South African lawyers also take up the cause of the plaintiffs, or some of the plaintiffs, in Lubbe. Those that do will probably do so on a contingency fee basis. This would give rise to the second irony: South African lawyers would be doing the very thing that their lordships suggested they are incapable of doing.

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