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Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
JUDGMENT

Case no: J 817/15

In the matter between:

SAMANCOR CHROME LTD
(EASTERN CHROME MINES)

Appellant

and

NUM OBO KHOMOTJO MAHLANGU

First Respondent

CCMA

Second Respondent

MAHLOMELELE CHRISTOPHER
MELLO N.O.

Third Respondent

Heard: 1 August 2018

Delivered: 29 August 2018

Summary: Appeal – Employment Equity Act s 10(8) – alleged discrimination on grounds of pregnancy. Employee placed on unpaid leave in accordance with employer's maternity leave policy when alternative position could not be found. Commissioner's findings erroneous and relief *ultra vires*. Appeal upheld.

JUDGMENT

STEENKAMP J

Introduction

- [1] This is an appeal from the CCMA in terms of s 10(8) of the Employment Equity Act¹ and Rule 9 of this Court's rules. The arbitrator² found that the employer, Samancor³, had unfairly discriminated against its employee, Ms Mahlangu⁴, on the basis of the prohibited ground of pregnancy. He ordered Samancor to pay her R20 000, 00 as compensation and R42 000, 00 as damages. He also ordered Samancor to "take the necessary steps to redraft its policy on the treatment of pregnant employees to prevent the same or similar unfair discrimination occurring in future in respect of other employees". The company appeals against that finding and the relief ordered.

Background facts

- [2] The employee, Ms Mahlangu, worked for Samancor as a "utility vehicle operator" (i.e. a heavy duty truck driver) underground. She fell pregnant for the second time in a period of three years. She reported her pregnancy to her employer on 28 May 2014. In accordance with the company's health and safety policy it relieved her of her hazardous responsibilities underground with immediate effect.
- [3] The employee's maternity leave would commence on 29 November 2014. However, the company placed on unpaid leave from 3 June 2014. The central controversy in this dispute and appeal is what the reason for that first period of unpaid leave was. The company says that it was unable to find her a suitable alternative position and therefore placed her on unpaid leave in accordance with its maternity policy. The employee says that the company unfairly discriminated against her by reason of her pregnancy.

¹ Act 55 of 1998 (EEA).

² Mohlemelele Christopher Mello, the third respondent.

³ The appellant.

⁴ The first respondent, represented by her trade union, the National Union of Mineworkers (NUM).

- [4] The employee's trade union, NUM, referred a dispute on her behalf to the CCMA in terms of section 6 of the Employment Equity Act, alleging unfair discrimination on the grounds of pregnancy.

The arbitration award

- [5] The arbitrator found that the company had unfairly discriminated against the employee, having heard the evidence of Ms Mahlangu and that of the mine's human resources superintendent, Ms Gladys Dube.
- [6] Ms Dube referred the arbitrator to the company's pregnancy policy. It provides that if no suitable alternative work can be found for a pregnant employee working in hazard this area is, the employee is placed on unpaid leave until she goes on maternity leave. The reason why the employee was not offered an alternative position is that there was no suitable alternative post available. Ms Mahlangu disputed that and testified that she was told by one Lucetta Motala in the human resources Department that the reason for her unpaid leave was that she fell pregnant twice in a three year cycle.
- [7] Having considered the burden of proof codified in section 11 of the EEA, the arbitrator found:

"There is no question that the applicant was treated differently to other employees and the reason for the different treatment was her pregnancy. The applicant has thus succeeded in linking the alleged discriminatory conduct of the respondent with one of the prohibited grounds listed in section 6(1) of the Act. The onus of proof is therefore the respondent in terms of section 11(1) supra, to prove that unfair discrimination complained of did not take place as alleged; or is rational and not unfair, or is otherwise justifiable."

- [8] The arbitrator noted that Ms Mahlangu was the only person who was not offered alternative work before the commencement of her maternity leave and was put on unpaid leave before the commencement of her maternity leave. He found that the reason for her "forced unpaid leave" prior to her official maternity leave was that she fell pregnant twice within a three-year cycle. The reason for this conclusion is that it was recorded on a document headed "pregnant employees details".

[9] The arbitrator also took into account that another employee, Ms Elsie Mmanoge, reported her pregnancy a few days after Ms Mahlangu did, yet she was given alternative work to clean offices.

[10] The arbitrator concluded:

“There is no doubt that the applicant was subjected to unfair treatment by being put on unpaid leave simply because she fell pregnant twice in three years. She was the only person who fell pregnant twice in three years; that is why she was the only person subjected to this type of treatment out of a total of 18 pregnant employees. She was clearly unfairly discriminated against on the basis of her pregnancy.

The employer failed to show that the different treatment on a listed ground was rational and not unfair, or otherwise justifiable. I accordingly find that the applicant was unfairly discriminated against on the listed ground of pregnancy.”

[11] Although he did not form part of the complaint before him, the arbitrator further found that the company’s policy on pregnant employees, which allows for unpaid leave where no suitable non-hazardous position can be found, “is problematic”. He ordered the company to redraft its pregnancy policy “to ensure that it removes any provisions that may lead to any unfair discrimination.

[12] Turning to the appropriate remedy for the employee, he ordered the company to pay her compensation of R20 000, 00 for the impairment of her dignity and self-esteem. He also ordered the company to pay her damages equivalent to 5 months’ remuneration.

Appeal grounds

[13] Ms *Mthlane* argued that the appeal revolves around one central factual controversy: What was the reason for which the company placed Ms Mahlangu on unpaid leave from 4 June to 28 November 2014, i.e. before her maternity leave started on 29 November 2014?

[14] The further ground of appeal is that it was not competent for the Commissioner to make the order directing the company to redraft its pregnancy policy.

Evaluation / Analysis

- [15] The question to be decided, differently put, is: was the company's conduct justifiable in terms of s 11(1)(b) of the EEA?
- [16] Before setting out the legal framework, it is important to understand the concepts of "unpaid leave" and "maternity leave" in the context of Samancor's maternity leave policy. The "pregnancy in workplace procedures" state as its objective: "to address the needs and protect both pregnant and lactating (breastfeeding) employees at Eastern Chrome Mine. It goes on to note that section 26(1) of the Basic Conditions of Employment Act⁵ prohibits an employer from requiring or permitting a pregnant employee or an employee who is breastfeeding to perform work that is hazardous to the health of the employee or the health of her child or foetus. Where reasonably practicable, the company may offer suitable alternative employment to an employee who is engaged in hazardous work during pregnancy. If there is no suitable alternative work, the employee will be sent on unpaid leave.
- [17] Employees in the bargaining unit are granted four months' paid maternity leave. The policy goes on to state:
- "The maternity leave will only be applicable once during a three-year cycle. Should a female take maternity leave twice during a three-year cycle, the second occurrence would be as per the BCEA stipulations, i.e. four months unpaid."
- [18] The policy therefore makes a distinction between paid maternity leave; unpaid maternity leave; and unpaid leave granted as a result of the company not being able to find suitable alternative placement for a pregnant employee who otherwise works in hazardous conditions.
- [19] In this case, the company says it placed Ms Mahlangu on unpaid leave before her maternity leave commenced because it could not find any suitable placement for her. And her (subsequent) maternity leave was unpaid because it was her second pregnancy in three years. Ms Mahlangu

⁵ Act 75 of 1997 (BCEA).

says the reason for her (initial) unpaid leave was because it was her second pregnancy in three years, and that that reason is discriminatory.

The central factual controversy

[20] The central factual controversy, then, is whether the reason for Ms Mahlangu's unpaid leave from 4 June to 28 November 2014 (i.e. before the commencement of her maternity leave on 29 November 2014) was because the company could not find an alternative position in which to accommodate her (the company's position); or whether it was because she fell pregnant for a second time in a three-year cycle (the employee's allegation).

[21] On an undated spreadsheet headed "pregnant employees details", Ms Mahlangu's name appears together with those of 20 other employees. It is recorded that she reported her pregnancy on 28 May 2014 and had been granted maternity leave from November 2014 to February 2015. Under the heading, "suggested alternative work areas", the following appears:

"To be sent on unpaid leave – second occurrence in a three-year cycle – employee refuses to sign the unpaid leave form still sitting at union offices."

[22] When questioned by the Commissioner, Ms Dube stated that the reason why the employee went on unpaid leave from four June to 20 November was because "there was no alternative work where she could be accommodated". She further testified that she had consulted extensively with two shop stewards, in the presence of Ms Mahlangu, regarding her investigations to identify an alternative position. No such positions could be found. Regarding the fact that the other employee, Ms Mmanoge, had been accommodated, she surmised that at the time when Ms Mmanoge's accommodation was investigated a vacancy had arisen which did not exist when Ms Mahlangu's accommodation was investigated.

[23] With regard to the spreadsheet recording the details of pregnant employees, Ms Du be explained that the unpaid leave being referred to on the spreadsheet was the unpaid maternity leave that Ms Mahlangu was to go on from 29 November 2014, and not the period of unpaid leave before

then. This was consistent with the provision in the pregnancy policy to the effect that, where an employee takes maternity leave twice in a three-year cycle, the “second occurrence” is treated as being unpaid maternity leave in accordance with the BCEA.

[24] Ms Mahlangu, on the other hand, alleged that Ms Motala had told that the reason she was being sent on unpaid leave was that it was a second pregnancy in a three-year cycle.

[25] Ms *Mthlane* pointed out in argument that this version (regarding Ms Motala) had not been put to Ms Dube before the company had closed its case. It only makes for the first time during Ms Mahlangu’s evidence in chief. In those circumstances, Ms Mahlangu’s evidence on this point felt to be disregarded by the Commissioner.⁶

[26] As Ms *Mthlane* pointed out, there are also aspects of Ms Mahlangu’s evidence which are consistent with Ms Dube’s evidence that frigates attempts were made to secure an alternative position. This includes the following testimony by Ms Mahlangu:

26.1 Mr Brits, an HR manager, told her that there was no alternative position in which she could be accommodated.

26.2 The same information was conveyed to the shop stewards, Messrs Tsoaledi and Ratang.

26.3 Ms Dube had a meeting with NUM regarding investigating the availability of an alternative position.

26.4 She was aware that the company was seeking an alternative position and the shop stewards told her so.

[27] I agree with Ms *Mthlane* that, on the evidence before the arbitrator, the balance of probabilities weighed in favour of the company’s case to the

⁶ Referring to *Small v Smith* 1954 (3) SA 434 (SWA) at 438 E-G: “It is, in my opinion, elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness and if need be to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so is to give him fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness’s evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved.” This principle was applied by the LAC in the context of arbitration proceedings in *ABSA Brokers (Pty) Ltd v Moshoana NO* [2005] 10 BLLR 939 (LAC) pa [39].

effect that Ms Mahlangu was placed on unpaid leave (before the commencement of her maternity leave) because an alternative position could not be identified for her, and not because of her second pregnancy in a three-year cycle.

[28] The arbitrator erred in relation to a number of findings:

28.1 He found that Samancor had treated Ms Mahlangu differently to other employees because of her pregnancy and that it put her on unpaid leave because she had fallen pregnant twice in a three-year cycle. But the evidence shows on a balance of probabilities that the reason for her unpaid leave (prior to her maternity leave) was that the employer could not find another suitable, non-hazardous position in which to accommodate her.

28.2 The arbitrator rejected Ms Dube's evidence about the recordal on the spreadsheet. He ignored her reasonable explanation for the reference to the second pregnancy.

28.3 He accepted the version that Ms Motala had told the employee that the reason for her unpaid leave was her second pregnancy, ignoring the fact that this version was never put to the company's witness.

28.4 He found that Ms Dube could not explain why the other pregnant employee, Ms Mmanoge, was placed in an alternative position. But Ms Dube explained that the company looked for and found a position for Ms Mmanoge after they had been unable to do the same for Ms Mahlangu. This may not have been the best way to go about it, but it was a cogent explanation.

28.5 The arbitrator found *mero motu* that Samancor's pregnancy policy is "problematic" and could lead to discrimination on the grounds of pregnancy. The union and the employee never complained about the policy itself. This was not part of the dispute before the arbitrator. He impermissibly decided on an unarticulated complaint.⁷

⁷ Cf *Rustenburg Platinum Mine v SAEWA obo Bester and Others* (2018) 39 ILJ 1503 (CC); 2018 (8) BCLR 951 (CC); [2018] 8 BLLR 735 (CC) par [46].

28.6 He found, without any evidence, that the company had told Ms Mahlangu how many times and when she should fall pregnant.

28.7 He found that the employee “might have suffered” humiliation “having to explain to her family and probably the community that the reason for her forced unpaid leave was that she fell pregnant twice within a three year period”. The employee led no such evidence.

[29] For all these reasons, the appeal must succeed.

[30] Furthermore, the employee showed no differentiation between her and other, non-pregnant, employees. The reason why she was placed on unpaid leave was in accordance with the pregnancy policy and the BCEA. The only difference she could point to was in the treatment of Ms Mmanoge, who was placed in an alternative position. And the reason for that treatment was explained by Ms Dube. The employer had discharged the onus in s 11(1) of the EEA:

“(1) If unfair discrimination is alleged on a ground listed in section 6(1), the employer against whom the allegation is made must prove, on a balance of probabilities, that such discrimination –

(a) did not take place as alleged; or

(b) is rational and not unfair, or is otherwise justifiable.”

[31] Ms *Mthlane* referred in this regard to the recent judgment of this Court in *Jonase*.⁸ In that case, in circumstances not dissimilar to this one, the Court held:

“In this case, the employees complained that they were treated differently from other pregnant employees. Yet the commissioner simply found that the company had discriminated against them because they were pregnant. The complaint, contrary to what the commissioner found, was negated by their comparator being other pregnant women. The treatment of some pregnant women compared to other pregnant women simply cannot constitute discrimination based on pregnancy. They were not treated differently because they were pregnant; they were treated differently from some other pregnant employees who were given alternative employment because they did not have the requisite skills.”

⁸ *Impala Platinum Ltd v Jonase & ors* (Unreported, J 689/15, 24 August 2017) par [15].

[32] For that reason too, the appeal must succeed.

The order to redraft the pregnancy policy

[33] The other reason why the appeal must succeed is that the Commissioner acted beyond his powers when deciding on the remedy. He ordered the company to redraft its pregnancy policy in circumstances where that was never part of the relief sought by the union or its member. The policy was, quite simply, never under attack.

[34] This, too, is remarkably similar to *Jonase's* case, where the Court held:⁹

“As set out above, the complainants never complained about the fairness of the policy on pregnant employees itself; yet the commissioner mero motu ordered Impala Platinum to amend it.

It was not within the commissioner's powers to strike down the policy. It was not part of the complaint before her.

As Murphy J pointed out only last week in *South African Reserve Bank v Public Protector*¹⁰ in the context of a review application, a functionary may not impose a remedy that goes beyond the original complaint before her. The same goes for this appeal: The commissioner was not empowered to impose the remedy that she did. The fairness of the policy was not part of the complaint before her. And Impala Platinum was not called upon to defend the fairness of the policy as applied to all pregnant employees. The appeal must succeed on that ground as well.”

[35] The same holds true for the case before me.

Conclusion

[36] For all these reasons, the appeal must be upheld. With regard to costs, I take into account that Ms Mahlangu is still employed on the mine and that there is an ongoing relationship between the parties. In law and fairness¹¹, I do not consider a costs award to be warranted.

⁹ *Jonase (supra)* par [26] – [28].

¹⁰ [2017] ZAGPPHC 443 (15 August 2017) paras 39-42.

¹¹ Cf *Zungu v Premier of the Province of KwaZulu-Natal and Others* (2018) 39 ILJ 523 (CC); [2018] 4 BLLR 323 (CC); 2018 (6) BCLR 686 (CC).

Order

[37] I therefore make the following order:

37.1 The appeal is upheld, with no order as to costs.

37.2 The arbitrator's award is replaced with the following:

“The complaint of unfair discrimination is dismissed.”

Steenkamp J

APPEARANCES

APPLICANT: Ms Gugu Mthalane of Solomon Holmes attorneys
(Hheads of argument drafted by Anton Myburgh
SC and Riaz Itkin).

FIRST RESPONDENT: Mr E S Makinta
(Hheads of argument drafted by P L Mokoena SC
and M Z Makoti)
Instructed by Mothobi Attorneys.

LABOUR COURT