IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Of interest to other Judges

Case no: JS 706/14

In the matter between:

TSHEGOFATSO MANYETSA **Applicant**

and

NEW KLEINFONTEIN GOLD MINE (PTY) LTD **Respondent**

Heard: **23, 24, 25 & 27 October 2017**

Delivered: **7 November 2017**

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction:

[1] Since the advent of the democratic dispensation and the adoption of the Constitution of the Republic of South Africa[1], our country has come a long way in advancing women's rights through various pieces of progressive

[1] Act 108 of 1996

legislation, more particularly for their protection in the world of work[2]. In giving effect to the constitutional right to equality, the primary focus of these pieces of legislation is to protect women and pregnant employees from unfavourable treatment in the workplace. Landman J (as he then was) in *Mashaba v Cuzen and Woods Attorneys,* long recognised that;

> '…the purpose of protecting female employees from dismissal for reasons of pregnancy, intended pregnancy or reasons related to pregnancy, is to ensure as far as possible that female employees are not disadvantaged, as they traditionally have been, by virtue of them being women and the child-bearing members of the human race[3]'.

[2] In a study conducted in 2010 under the ILO, South Africa was found to rank the highest in Africa with its four months' maternity leave[4], whilst the standard established by Convention 183[5] is at least 14 weeks. (Tunisia, with its leave period of 30 days, provides the shortest leave period among the African countries covered in the report).

[3] Notwithstanding great strides made in the protection of pregnant women in the workplace, they nonetheless continue to find themselves in unenviable positions where they suffer economic hardship as a consequence of their temporary condition, which forces them to be off work. As an example, and in extreme cases such as to be discussed in this case, pregnant employees are compelled to take unpaid maternity leave where they work in high risk areas and where suitable alternative employment cannot be secured for them in the workplace. Effectively, these employees are rendered 'unemployed' whilst still

[2] Viz, The Labour Relations Act 66 of 1995, the Employment Equity Act 55 of 1998; Act 4 of 2000; the Basic Conditions of Employment Act 75 of 1997; the Unemployment Insurance Act 63 of 2001; Promotion of Equality and Prevention of Unfair Discrimination Act (No. 4 of 2000); The Protection from Harassment Act (no. 17 of 2011, and the Occupational Health and Safety Act 85 of 1993.
[3] *(2000) 21 ILJ 402 (LC)* at para 14
[4] Maternity at Work: A Review of National Legislation. Cornell University ILR School at page 6. In terms of section 24 (4) of the Unemployment Insurance Act, maximum period of maternity leave is 17.32 weeks
[5] ILO Maternity Protection Convention, 2000 (No. 183)

officially employed, until such time that they can claim whatever nominal amounts are claimable under the Unemployment Insurance Fund, or when they can officially return to work.

[4] It can further not be doubted that whilst on maternity leave, whether paid or not, pregnant employees by virtue of their absence from the workplace in certain instances invariably lose out on advantages of being at the workplace, such as bonuses, promotions, and career development in the form of training and development offered to other employees. They continue to worry about the prospects of their continued employment once they disclose their pregnancy or even after child birth. They worry about the health of their babies and their own general wellbeing upon their return to the workplace or their normal work-stations. Workplaces that provide child care facilities are a rarity. These problems cuts across industries, but are even more prevalent in sectors of our economy that are traditionally male dominated such as mining. In the end, and in a cruel twist of irony, rather than enjoying motherhood and child rearing, female employees become unintended casualties of their own pregnancies or womanhood.

[5] It is appreciated that the Labour Relations Act (LRA) covers instances of unfair labour practices where pregnant employees feel hard done by what may be seen as employer unfair practices. However, specific pieces of legislation that deal with pregnant employees such as the Basic Conditions of Emploment Act (BCEA) still fall short in addressing some of the problems highlighted as above. I am constraint to state that in my view, any unfair, unjust and unreasonable consequence flowing from a female employee's pregnancy is directly attributable to the shortfalls in legislation meant to protect them. The facts of this case highlight the inadequacies in our legislative measures that were meant to protect pregnant employees especially in the mining industry.

[6] The applicant approached this Court by way of a statement of claim for an order declaring the conduct of the respondent to have constituted unfair discrimination as contemplated in the provisions of section 6(1) of the Employment Equity Act (the EEA). Her claim is that the respondent's policy on

maternity and its implementation discriminated against her on the grounds of her pregnancy.

[7] In the event that this Court found in her favour, the applicant seeks damages in terms of the provisions of section 50(2)(b) of the EEA, equivalent to R159 501.25 which is her actual monetary loss suffered during the period she was placed on unpaid suspension during her pregnancy.

[8] Moreover, the applicant seeks compensation equivalent R79 750.63 in terms of the provisions of section 50 (2) of the EEA, which is calculated taking into account her normal monthly salary and multiplied with the period for which she was on unpaid maternity leave for five months. On a general note, she further sought an order directing the respondent to take steps to prevent the same unfair discrimination or similar practice in the future in respect of other employees in terms of section 50 (2) of the EEA.

Background:

[9] The respondent is a subsidiary of Gold One Africa Limited. As at 2013, the respondent had 2000 employees, of which 10% were females. Many of the female employees are employed in the respondent's A, B, and C bands. The applicant's claim came about within the context of the following common cause facts as outlined in the parties' signed pre-trial minutes;

[10] She commenced her employment with the respondent on 2 November 2009 as an Underground Electrician based at its sub-Nigel. With effect from 1 March 2010 to date, she has been based at the respondent's Modder East plant as a Plant Electrician in its Metallurgical Department. In 2014, or at the time of the dispute, she was employed at grade C2 and earned R31 900.00 per month.

[11] On 3 July 2013, the respondent adopted the *'Maternity Leave and Women in Risk Areas Policy'* (the Policy) to be applicable at its Modder East mine. The purpose of the Policy is *inter alia* to make provisions for the protection of

pregnant female employees rendering their services in work areas defined as high risk or hazardous to their health and that of their unborn children[6].

[12] The respondent also has a mandatory code of practice (Code of Ethics) dealing with the fitness of persons within its ranks to perform work at Modder East. In terms of this Code, female employees who are pregnant are prohibited from performing any duties in any high risk areas which are considered hazardous to their health or that of their unborn babies. There is also a Women in Mining Task Team consisting of representatives from Modder East management and female employees (as represented by National Union of Mineworkers), that is meant to look after the welfare and interests of female employees.

[13] In May 2014, the applicant informed her direct supervisor, Mr R. Berry that she was pregnant. As the applicant's area of work is considered to be a health risk or hazardous because of the presence of chemicals such as cyanide, ionising radiation, hazardous gases, fumes etc., the respondent had to move her from that area and find her '*risk free alternative, suitable work'* (a term used in the Policy).

[14] On 20 June 2014, the applicant approached the respondent's Human Resources Superintendent, Ms Karen Rule (Rule), and advised her of her pregnancy. This was out of her concern about the nature of the duties she performed at that point. At that meeting, Rule provided the applicant with a copy of the Policy and explained it to her in detail.

[6] Clause 4 of the Policy provides that;

'RISK AREA/WORK

Risk work in areas such as underground, refineries, concentrators and laboratories where there are physical, chemical or biological dangers and exposures would generally be considered to be work that is hazardous to the health of a pregnant employee or an employee nursing a child. Physical exposures (such as ionizing radiation and thermal stresses), chemical exposures (such as vapours and fumes, gases, flammable, combustible and explosive material) and physical stresses such as extended periods of working, sitting or standing in awkward positions, often accompanied by vibration, could be detrimental to the health of both the pregnant worker and her unborn child.

Any work where there is exposure to physical, chemical or biological hazards must be considered potentially dangerous to the health of a female pregnant employee.'

[15] At the stage that the applicant met with Rule, she was now stationed at the adjacent offices performing administrative tasks. The tasks that the applicant were performing were however not attached to any position. In effect, there was no position available in the plant offices for the administrative work that the applicant was performing. Moreover, there was no such position on the respondent's organogram, nor did it form part of its labour plan.

[16] With effect from 20 June 2014, the applicant was placed on leave. On 23 June 2014, Mr G. Shadow, the respondent's Chief Safety Office sent correspondence to plant management, and expressed his concerns that due to health and safety reasons, the applicant could not perform any tasks at the plant or plant offices. On the same day, the applicant was requested by Mr M. Moeketsi, the respondent's Human Resources Superintendent, to attend a Pregnancy Consultation Committee meeting which was to be held on 26 June 2014. Clause 5.2 of the Policy[7] makes provision for such a meeting. The meeting was also attended by Dr S. Ranchhod, the respondent's Occupational Health Medical Practitioner. At the same meeting, Dr. Ranchhod issued a note stating that in view of her pregnancy, appropriate work had to be found for the applicant on surface.

[17] On 27 June 2014, the Plant Management informed Mr F. Mokoena, the respondent's Human Resource Supervisor that it wished to retain the applicant at the plant offices to perform administrative duties. Rule was also informed of the Plant Management's wishes. Her response was that there was no position available at the plant office for the applicant while she was pregnant. Moreover, Rule indicated that the applicant could not be accommodated where there was no position available as that would have been unfair to all other pregnant employees who were already on unpaid maternity leave while awaiting to be placed in alternative suitable positions.

[7] **5.2 Consultation**
A consultation process will be done with the affected employee no later than 5 working days after the diagnosis. The following will be present:
- The Occupational Health Practitioner
- The Human Resources Manager Modder East
- The Human Resources Superintendent Staffing
- The employee
- The employee's representative
- The recognised union representative

[18] On 1 July 2013, Rule communicated with the applicant and requested her to wait for a management meeting which was to deliberate and decide on whether she could be placed in the Control Room for the duration of her pregnancy. During the same period, the applicant was called to a meeting attended by the respondent's Messrs S. Fani and M. Phillips, and was informed that there was an open position for her at the AMMS offices, as the incumbent, Mr Gert was on leave. The applicant was directed to continue working at the plant offices during Mr Gert's absence. The applicant was furthermore informed by Phillips that the position at the AMMS office was on inferior terms and conditions than those of her position as Electrician.

[19] The management meeting referred to above occurred on 1 July 2014. In that meeting, it was concluded that the applicant could not be placed in the Control Room in the position of Supervisor as underground working experience was a requirement for that position. The applicant did not possess such working experience. On 2 July 2014, the applicant's counsel in this case, Mr Mmusinyane directed correspondence to the respondent, wherein he complained that the latter was unfairly discriminating against the applicant based on her pregnancy.

[20] On 3 July 2014, the applicant was informed by Rule that there was no alternative position available for her for the duration of her pregnancy. She was further informed that in terms of the Policy, she had to commence with her unpaid extended maternity leave. The applicant was requested by Rule to sign a leave form but she had declined to do so.

[21] On 7 July 2014, the respondent invited the applicant to a job interview for a position of Receptionist. The interviews were held on 11 July 2014. During the interview, the applicant enquired whether the position would be offered on the same terms and conditions as those of her current position as an Electrician. Upon being advised that the position would be offered on less terms and conditions, she declined to participate any further in the interview process.

[22] The applicant's period of unpaid maternity leave commenced from 3 July 2014 until 20 November 2014. She then took four months' paid

maternity leave from 21 November 2014 until 22 March 2015. On 4 July 2014, the applicant referred a dispute to the Commission for Conciliation Mediation and Arbitration. Conciliation having failed, she then referred the present claim on 5 September 2014.

The issues for determination:

[23] These issues to be determined were narrowed down in the parties' supplementary pre-trial minutes. Evidence in this regard was led on behalf of the respondent by Ms. Rule; Ms Angelique Booysen (neé De Kok), the respondent's Senior Supervisor: Inventory Control and Spares; Mr. Izak Marais, the respondent's then COO; Ms. Marlie Van der Walt, the respondent's Junior Safety Officer, and the applicant, who was the sole witness in her case. Some of the issues raised for determination fell by the ways side as a result of concessions made either during cross-examination or arguments. These issues and my conclusions therein are as follows;

(a) Was the Policy which came into effect on 1 January 2013 and approved on 3 July 2013 binding on the applicant?

[24] As recorded in the supplementary pre-trial minute, it was common cause that in terms of clause 3.3 of the applicant's contract of employment, she is bound by all company policies, and is deemed to have received notification of new and amended policies if they are posted on the company's official noticeboards. The only dispute between the parties is whether the Policy was communicated to employees in July 2013 by it being posted on the official noticeboards, and being emailed to those who had access to emails.

[25] The applicant conceded that the Policy was binding on her. She however denied that she ever received a copy the Policy, and contended that she only got to know of it when she disclosed her pregnancy. She denied further that she was made aware of the Policy during her induction training, and disputed that a copy was ever posted on the notice boards in her department. This was so, as even her senior managers were not aware of it, hence they had

allowed her to work in high risk areas for a period of 25 days after it was known that she was pregnant.

[26] The respondent's case through Rule's evidence was that the Policy was communicated to all employees through the internal *'Fastlane Communication'* on 8 July 2013,[8] and that the copies of the Policy were further placed on notice boards. As far as Rule was aware, there were four notice boards in the applicant's department where the Policy was posted. Furthermore, as part of all employees' induction, the Policy was also discussed at those inductions amongst other HR policies, and the applicant had attended such induction on 21 October 2013[9]

[27] One cannot quarrel with the submissions made on behalf of the applicant that employees should be informed of new policies or changes in existing policies. At the same time however, where an employee's contract of employment stipulates that she is deemed to be bound by a variety of the employer's various policies, there is a duty upon that employee to keep abreast of these policies and new developments in that regard. In this case in particular, by virtue of the deeming provisions of clause 3.3[10] of the applicant's contract of employment, it does not assist her to deny knowledge of the Policy.

[28] I nonetheless find it inconceivable let alone improbable that a senior employee in the applicant's position could not have known of such a policy. In any event, even if there is merit that she could not have known of it, it was common cause that upon disclosing her pregnancy, she was furnished with a copy of the Policy by Rule, which details were explained to her. For all intents and purposes therefore, that Policy remained binding on her as she had

[8] Page 10 of the Combined Bundle of Documents
[9] Page 71O of the Combined Bundle of Documents
[10] '**3. EMPLOYEE OBLIGATIONS**
The Employee hereby
3.1…
3.2…
3.3 Agrees to comply with all Company policies, procedures and regulations, as amended from time to time. The Employee will be deemed to have received notification of any changes to the Company's existing policies, procedures and regulations, provided that such amendments on your policies have been posted on the Company's Official notice boards as prescribed by the policy governing the publication of new policies and amendment'

conceded, and I fail to appreciate how her denial of the knowledge of the Policy has any impact on the further issues to be determined in this case.

(b) Is paragraph 5.4 of the Policy in contravention of the provisions of section 26 (2) of the Basic Conditions of Employment Act?

[29] The applicant's case was that where she performed work considered high risk during her pregnancy, the provisions of section 26(2) of the BCEA *guaranteed* her suitable alternative employment on no less favourable terms and conditions of employment applicable to her, and that by placing her on unpaid maternity leave in accordance with paragraph 5.4 of the Policy, the respondent acted contrary to the provisions of the BCEA to her detriment.

[30] Clause 5.4 of the Policy provides that;

> **'5.4. Alternative Work and Lactating**
>
> If the Company is unable to offer suitable alternative 'risk free' work for the duration of an employee's pregnancy and 6 (six) months after the birth of the child (where the mother is breastfeeding), management would allow the employee to go on extended unpaid maternity leave. However, every endeavour must be made to offer suitable alternative risk free work (with necessary training) on terms and conditions that are no less favourable than the ordinary terms and conditions of employment'

[31] Section 26 of the BCEA provides that;

> **'Protection of employees before and after birth of a child**
>
> (1) No employer may require or permit a pregnant employee or an employee who is nursing her child to perform work that is hazardous to her health or the health of her child.
>
> (2) During an employee's pregnancy, and for a period of six months after the birth of her child, her employer must offer her suitable, alternative employment on terms and conditions that are no less favourable than her ordinary terms and conditions of employment, if—

(a) the employee is required to perform night work, as defined in section 17(1) or her work poses a danger to her health or safety or that of her child; and

(b) it is practicable for the employer to do so.'

[32] I will not burden this judgment with the interpretation of the Policy safe to state that as I understand the provisions, once an employee is found to be pregnant, the employer is obliged, (flowing from the word *'must'*), *to make every endeavour* to offer her suitable alternative risk free work on terms and conditions that are no less favourable than the ordinary terms and conditions of employment. Where necessary, training should be provided to the employee to perform the alternative work.

[33] I do not understand the above obligations to involve a meaningless box-ticking exercise. Thus, there must be a genuine endeavour to offer the affected employee suitable alternative risk free work in view of the adverse consequences for the affected employee if the employer is unsuccessful in that regard. Ultimately, whether such a genuine endeavour was made is a question of fact and evidence. Be that as it may, in the event that every endeavour made at securing 'suitable alternative risk free' work did not yield any positive results, the provisions related to extended unpaid maternity leave kicked in. Thus on its plain reading, the provision does not guarantee (reading from the word *endeavour*) that alternative work will be found, nor is there an obligation on the employer to create any such alternative suitable work.

[34] In interpreting the provisions of the BCEA, which interpretation must be purposive[11], the starting point is section 39(2) of the Constitution of the Republic which provide that;

> "When interpreting any legislation . . . every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."[12]

[11] *Steenkamp and Others v Edcon Limited* (2016) 37 ILJ 564 (CC) at para 101

[12] Section 39 (2) was interpreted in *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2000 (10) BCLR 1079 (CC) at para 22 to mean;

> "The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of

[35] Section 26 (2) of the BCEA further ought to be read within the context of the purpose of that Act as outlined in its section 2[13]. The respondent's case was that the applicant's interpretation of section 26 (2) of the BCEA to the effect that it guaranteed suitable alternative employment on no less favourable terms and conditions of employment was wrong.

[36] The Policy, as per its paragraph 6 stipulates that it is modelled on the provisions of the BCEA. Both the Policy and the BCEA recognise the importance of the health and safety of a pregnant employee and the unborn child, and both places an obligation on the employer to offer the pregnant employee *'suitable, alternative employment'* (the BCEA) or *'suitable risk-free work'* (the Policy) on terms and conditions that are no less favourable than her ordinary terms and conditions of employment.

[37] The obligations as indicated above are essentially in tandem with the International Labour Organisation's (ILO) Maternity Protection Recommendation[14], which deals with the protection of pregnant and breastfeeding employees. The provisions of section 26 of the BCEA together with those of the Code give effect to the Recommendation, *albeit* South Africa has yet to ratify it.

[38] In terms of Article 6 (2) of the Recommendation, where a pregnant or nursing employee works in a job where significant risk has been identified the employer must take measures to:

1. eliminate the risk;

2. adapt the employees working conditions;

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legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution."

[13] Which is;

to advance economic development and social justice by fulfilling the primary objects of this Act which are—

(a) to give effect to and regulate the right to fair labour practices conferred by section 23(1) of the Constitution—
  (i) by establishing and enforcing basic conditions of employment; and
  (ii) by regulating the variation of basic conditions of employment;

(b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation.

[14] 200 (No. 183) and Recommendation 200 (No. 191)

3. transfer the employee to another post without loss of pay, and if this is not feasible;

4. provide the employee with paid leave.

[39] The difference therefore between the Policy, the provisions of section 26 (2) of the BCEA, and the Recommendation becomes apparent when the employer reaches a point where a conclusion is reached that 'suitable, risk free alternative' or 'suitable alternative employment' cannot be secured, or where it is not practicable or 'feasible' to offer the pregnant employee such an alternative[15]. There is a clearly a *lacuna* in provisions of the BCEA in this regard, as well as in the Code. In terms of the Policy however, and obviously with the purpose of addressing the *lacuna* in the BCEA, a pregnant employee is placed on extended unpaid maternity leave.

[40] In terms of the Recommendations as is apparent on the other hand, an employer is obliged to provide the employee with paid leave. Consistent with this Recommendation, and as further submitted on behalf of the respondent, EEC Directive 92/85[16] as well as the UK Employment Rights Act, 1996, makes provision for employees suspended from work on maternity grounds to be paid remuneration whilst on suspension. Other legislative provisions in the UK extent female employees' protections[17].

[41] The applicant's contention nonetheless that by virtue of the word *'must'* in the provisions of section 26(2), she is guaranteed suitable alternative employment on the same terms and conditions applicable to her position as an Electrician. This contention however as correctly pointed out on behalf of the respondent is erroneous, as it demonstrates a failure to read these provisions in their totality and within context.

[15] See also *Employer duties towards pregnant and lactating employees in the hospitality industry in South Africa* (Professor Advocate Stella Vettori. Graduate School of Business Leadership, UNISA) in African Journal of Hospitality, Tourism and Leisure - Vol. 5 (4) - (2016) at page 3

[16] Council Directive 92/85/EEC of 19 October 1992 in the Introduction of Measures to Encourage Improvements in the Safety and Health at Work of Pregnant Workers and Workers who have Recently Given Birth or are Breastfeeding

[17] Further legislative protections in the United Kingdom come in the form of the Equality Act 2010; the Employment Protection (Consolidation) Act 1978; the Employment Rights Act 1996; the Pregnant Workers Directive 92/85/EC of 19 October 1992; and the Management of Health and Safety at Work Regulations 1999.

[42] Section 26 (2) (b) adds a *proviso* to the effect that suitable alternative employment on terms and conditions that are no less favourable that an employee's ordinary terms and conditions must be offered *if it is* '*practicable'* for the employer to do so. This *proviso* is equally emphasised in the Code of Good Practice[18]. Thus section 26 (2) of the BCEA cannot be read to the exclusion of section 26 (2) (b).

[43] The term *'practicable'* is not defined in the BCEA, and its ordinary meaning implies whether something is capable of being put into practice or of being done or accomplished. Various meanings can equally be ascribed to the term, including, feasible[19], which is also a term used in the Recommendation. It can also be in reference to something realistic, possible, workable, attainable, achievable, or viable.

[44] As to whether it is *'practicable'* or feasible for the employer to offer suitable alternative employment is a question of fact, to be objectively determined by whether *inter alia*, employment positions not involving risk to which pregnant or breast-feeding employees could be transferred are available, and if available, whether they are also suitable. Thus, '*practicable'* is intrinsically attached to *'suitability'*.

[18] Code of Good Practice on the Protection of Employees during pregnancy and after the birth of a child. Government Gazette Vol. 401, No. 19453, 13 November 1998. Regulation Gazette, No. 6342. No. R. 1441 at Item **5. PROTECTING THE HEALTH OF PREGNANT AND BREAST-FEEDING EMPLOYEES**

5.3 which provides that;

'Where appropriate, employers should also maintain a list of employment positions not involving risk to which pregnant or breast-feeding employees could be transferred.*

***** In terms of section 26(2) of the BCEA an employer must offer suitable alternative employment to an employee during pregnancy if her work poses a danger to her health or safety or that of her child or if the employee is engaged in night work (between 18:00 and 06:00, unless it is not practicable to do so. Alternative employment must be on terms that are no less favourable than the employee's ordinary terms and conditions of employment.'

[19] Xstrata South Africa (Pty) Ltd (Lydenburg Alloy Works) v Num Obo Masha and Others (2016) 37 ILJ 2313 (LAC at para 11, where it was held that;

"…The object of section 193(2)(c) of the LRA is to exceptionally permit the employer relief when it is not practically feasible to reinstate; for instance, where the employee's job no longer exists, or the employer is facing liquidation, relocation or the like. The term "not reasonably practicable" in section 193(2)(c) does not equate with "practical", as the arbitrator assumed. It refers to the concept of feasibility. Something is not feasible if it is beyond possibility. The employer must show that the possibilities of its situation make reinstatement inappropriate…"

[45] The above approach is supported by Du Toit[20] as pointed out on behalf of the respondent, particularly in regards to the meaning of *'suitable, alternative employment'* and *'terms and conditions that are no less favourable'*. To this end, the learned author states that alternative employment should be suitable from a health and safety point of view and appropriate to the skills level of the employee. On a more contentious level however as demonstrated in this case, the learned author further states that an employees' remuneration cannot be reduced even if the alternative employment is graded at a lower level that her ordinary job. This however is not supported by an interpretation of the provisions of section 26 (2) of the BCEA.

[46] It cannot therefore be doubted that the test of 'suitable alternative employment' involves a consideration of whether upon the employer's assessment, the position is indeed available, whether that positions is capable of being a suitable alternative, and whether in fact suitable for that particular employee. The test will further involve an assessment of the job content of the identified alternative position, the appropriate skills and experience of the affected pregnant employee, the terms of the alternative position and its concomitant responsibilities. The employee's specific personal circumstances also need to be considered. In the end, a proper assessment needs to take into account that, what may be considered as an alternative, may not necessarily be suitable for that employee, and in the same vein, what might appear suitable might not necessarily be an alternative or available for the employee.

[47] Applying the above to the facts of this case, it follows that it cannot be read in the provisions of section 26 (2) of the BCEA that suitable, alternative employment is guaranteed in the event of a pregnant employee having to be moved from high risk or hazardous work area. A purposive interpretation of these provisions reveal that they were meant to protect pregnant employees by guaranteeing the right to be considered for alternative suitable employment in the event that they had to be removed from their ordinary duties. This is in line with the constitutionally guaranteed right to fair labour practices. These

[20] Du Toit et al, Labour Relations Law (6th ed) at 613, fn 159

provisions however do not guarantee the right to alternative employment or guarantee that the employer will make that alternative employment available. Furthermore, and to the extent that the differences between the provisions of the Recommendations and those of section 26 (2) of the BCEA have been outlined above in an instance where alternative suitable employment cannot be found for that employee, there is further no obligation to place that employee on paid maternity.

[48] To conclude on this issue then, a combination of factors as outlined elsewhere in this judgment must be considered in determining not only whether a position is a suitable alternative, but also whether it is practicable to place that pregnant employee in the alternative position identified. It follows therefore that it cannot be said that paragraph 5.4 of the Policy is in contravention of the provisions of section 26 (2) of the BCEA as the latter provisions do not guarantee suitable alternative employment, nor do they guarantee paid extended maternity leave.

(c) Is clause 5.4 of the Policy in contravention of section 6 (1) of the EEA?

(d) If clause 5.4 of the Policy is not in contravention of section 26 (2) of the BCEA and/or section 6 (1) of the EEA, did the company discriminate against the applicant on the grounds of her race in its application of the policy?

[49] The two issues for consideration are intertwined and will for the sake of expedience be dealt with simultaneously. The applicant's further contention was that since clause 5.4 of the Policy provided for the respondent to place pregnant employees on unpaid maternity leave before their paid maternity leave kicked in, it unfairly discriminated against them on the grounds of their pregnancy.

[50] The respondent's contention on the other hand was that clause 5.4 read together with the Policy as a whole did not give rise to the alleged discrimination. In the alternative, the respondent's contention was that insofar as it does, such discrimination was rational and not unfair, or is otherwise justifiable.

[51] Section 6 (1) of the EEA provides that;

> "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, family responsibility, ethnical social origin, colour, sexual orientation, age, disability, religion, HIV status, conscious, belief, political opinion, culture, language, birth or on any other arbitrary ground."

[52] To the extent that the respondent had submitted that in the event that it is found that the policy was contrary to the provisions of section 6 (1) of the EEA, section 6(2) of the EEA further provides that:

> "It is not unfair discrimination to—
>
> (a) take affirmative action measures consistent with the purpose of this Act; or
>
> (b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job."

[53] As further submitted on behalf of the parties, the Constitutional Court in *Mbana v Shepstone & Wylie*[21] confirmed that the test for unfair discrimination in the context of labour law is comparable to that laid down by the Constitutional Court in *Harksen*[22]. The Court further confirmed that the first step is to establish whether the respondent's policy differentiates between people. The second step entailed establishing whether that differentiation amounted to discrimination. The third step involved determining whether the discrimination was unfair. If the discrimination was based on any of the listed grounds in section 9 of the Constitution, it is presumed to be unfair. Once an allegation of unfair discrimination based on any of the listed grounds in section 6 of the EEA is made, section 11 of the EEA places the burden of proof on the employer to prove that such discrimination did not take place or that it is justified[23].

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[21] *Harksen v Lane NO and Others 1998 (1) SA 300 (CC)* at para 54.
[22] *2015) 36 ILJ 1805 (CC)* at para
[23] At paras 25 - 27

[54] It cannot be doubted that an important consideration in this and similar cases is that it involves the creation of a balance between pregnant employees' right not to be unfairly discriminated against, and their employers' obligation to ensure a safe and healthy working environment for them and their foetuses or new borns.

[55] As to whether the Policy discriminates against female pregnant employees in contravention of section 6 (2) of the EEA needs to be assessed against the conclusion reached above that the Policy is not in contravention of the provisions of section 26 (2) of the BCEA. The constitutionality of either the provisions of the Policy or those of the BCEA is not a matter before me. In my view, once it was concluded that the provisions of the Policy do not contravene those of section 26 (2) of the BCEA, there can be no basis for a conclusion that they nonetheless contravene those of section 6(1) of the EEA, especially since it was common cause that the Policy is modelled on the BCEA. To hold otherwise would in effect countenance an attack on the constitutionality of the BCEA, which as already indicated, is not a matter before me.

[56] For the sake of completeness however, and it being apparent that the Policy only applies to women on account of their pregnancy, it can be accepted on the face of it that indeed it differentiates between people. It is however trite that not all differentiation amounts to discrimination[24], as a determination in that regards involves a two - stage enquiry set out in *Harksen*[25]. At most, it was conceded on behalf of the respondent that the provisions indirectly discriminates against pregnant employees.

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[24] *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC) at para 17

[25] At para 54 where it was held that;

> "Firstly, does the differentiation amount to discrimination? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
>
> (b)(ii) If the differentiation amounts to discrimination, does it amount to unfair discrimination? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation."

[57] The burden of proof is on the respondent to prove that the discrimination is justified. The applicant's case was that the alleged discrimination was also based of her race, in view of her being placed on unpaid maternity leave whilst her white female colleagues were protected and provided with alternative positions in the plant and closer to radiation areas during their pregnancy. The evidence in this regard however revealed that in respect of the two white female colleagues;

57.1 Booysen worked in the main stores on surface, which is considered an area that is risk free. During her pregnancy, she was instructed to work for about six days in the stores within the metallurgical plant to attend to some urgent and extraordinary audit. Upon it being brought to her attention that she should not be in the area, she returned to her safe area of work.

57.2 The applicant's complaint in regard to Van der Walt is similar in relation to Booysen, who is employed as Junior Safety Officer/Radiation Protection Monitor. The applicant's testimony was that she saw Van der Walt taking radiation measurements at the metallurgical plant when she was pregnant.

57.3 The applicant further complained that as evident from an analysis of the figures compiled in respect of the respondent's schedule of employees who went on maternity leave, black female employees were generally discriminated against as the respondent was quick to find alternative suitable employment for white pregnant colleagues whilst the bulk of black females were sent on extended unpaid maternity leave.

[58] It was argued on behalf of the applicant that in view of the above evidence, the respondent endeavoured to cover up racial discrimination in all facets and why it could not reasonably accommodate the applicant with a suitably alternative risk-free job. The difficulty with the logical conclusion of this argument is that if white employees are allowed to work in hazardous areas during their pregnancy, black pregnant employees should be deserving of the

same hazardous treatment. If the applicant's arguments are taken to their logical conclusion, effectively, the respondent is encouraged to flout all health and safety regulations together with all applicable legislative provisions, failing which it is deemed to have been discriminatory in its practices. This proposition is clearly problematic.

[59] Marais in his evidence conceded that it was wrong to expose Van der Walt and Booysens to health risks whilst they were pregnant. The only conclusion to be reached based on the evidence is that both of them, to the extent that they had found themselves working in hazardous area, were not placed in those areas as part of any process under clause 5.4 of the Policy. The applicant's contentions and arguments therefore that she should have been afforded alternative work in the same vein as was offered to De Kock and Van der Walt is clearly untenable and devoid of any logic. The basis of the applicant's alleged racial discrimination therefore ought to be rejected.

[60] In regard to the general complaint of discrimination against black pregnant employees, this argument as demonstrated through Rule's evidence lacks any merit as the figures referred to in these proceedings indicate that as at November 2014, there were 200 females employed by the respondent of which 10% were white. Of these, only two worked in high risk/hazardous areas. During the period under consideration, i.e., between August 2011 and November 2014, 56 employees became pregnant and 46 of those were black, one was coloured and 9 were white. Of the 46 black pregnant employees, 16 were placed on unpaid maternity leave due to no alternative risk-free positions being available; 16 were placed in alternative risk-free positions, and 13 worked in non-hazardous areas, and there was no need to move them to other areas. On the other hand, one coloured employee and 9 white employees worked in non-hazardous areas, and there was equally no need to remove them from their workstations during their pregnancy.

[61] In the light of the above figures, *albeit* it was conceded that some of the black female employees were only placed in alternative positions after having gone on unpaid maternity leave, there can be no basis for a conclusion that the respondent generally discriminated against black pregnant employees. By

some fate, the two white female employees' normal duties were conducted in risk-free areas and there was therefore no need to remove them upon they becoming pregnant, whilst a bulk of black employees' normal duties were in hazardous areas. Any comparison to the applicant's white colleagues is therefore not only negated by the work stations the black and white female employees found themselves in, but also by the untenable consequences already pointed out in this judgment had the applicant been allowed to work in similar circumstances as Van der Walt and De Kock when they were pregnant.

[62] I further did not understand the applicant's case to be that she compared herself to other black pregnant females, as this would have been a non-starter. Furthermore, it was not her case that she was discriminated against on arbitrary grounds for any comparison to be made with her black counterparts. In the end, black pregnant employees were placed on unpaid maternity leave, not as a consequence of their pregnancy or their race, but purely due to the respondent not being able to place them in suitable, risk-free, alternative positions because there existed no other positions, or because they did not have the required skills to fill the positions on offer[26]. The issue of whether any such positions were explored shall further be explored below in the course of this judgment.

[63] In the light of the above, I am in agreement with the submissions made on behalf of the respondent that even if it could be argued that the applicant and other black pregnant employees found themselves having to take unpaid extended maternity leave, this was necessitated by the inherent requirements of their jobs in line with the defence contemplated in section 6 (2) of the EEA. Thus, the applicant being an Electrician undertaking hazardous work, once she disclosed her pregnancy, she had to be removed from that work, because not only the Policy, but also the BCEA, the Code and other applicable regulations required her to be removed from that work. Effectively as the applicant had conceded, she was incapacitated to perform her normal duties.

[26] See similar conclusions in *Impala Platinum Ltd v Jonase and Others (J698/15) [2017] ZALCCT 39 (24 August 2017)* at para 15

[64] To the extent that the applicant had alleged that the unfair discrimination based on account of her pregnancy further arose when she was placed on unpaid suspension/extended maternity leave, it is already concluded in this judgment that as a result of the *lacuna* in the provisions of section 26 (2) of the BCEA, and further based on her own concessions, it was left to the respondent as to what to do in circumstances where suitable alternative risk-free employment could not be secured.

[65] It was correctly pointed out on behalf of the respondent that the placing of the applicant on unpaid suspension was at a point of a statutorily sanctioned reasonable process arising from her no longer meeting an inherent requirement of her job as an Electrician. The contention however on behalf of the respondent that it is implicit in section 26 (2) of the BCEA that incapacitated employees can be placed on unpaid suspension is partly correct. As persistently repeated in this judgment, there is a l*acuna* in that provision, which in my view implies that the employer in such circumstances, can fill that void from a range of possibilities, which include placing the pregnant employee on paid suspension, or placing her on unpaid suspension, or, even considering other forms of leave which will not impact on the finances of the employee whilst she is pregnant and unable to work to perform her duties prior to taking official maternity leave.

[66] As already indicated however, clause 5.4 of the Policy is explicit in this regard. It can therefore not be correct that in circumstances where a suitable, alternative risk-free work cannot be secured, and the pregnant employee is placed on extended unpaid maternity leave, the employer would have acted unfairly. This is even moreso in circumstances where an employee cannot demonstrate that the employer had not made genuine endeavours to find that alternative. Thus, any alleged unfairness or lack of rationality in implementing the extended unpaid maternity leave ought to be considered within the context of whether indeed genuine endeavours were made to find alternatives.

[67] Be that as it may, the Policy having been modelled on the BCEA and the Code, clause 5.4 cannot therefore be attacked on the grounds of being unfair

or not rational, particularly in the light of the *lacuna* in section 26 (2) of the BCEA, and further

(d) If clause 5.4 of the Policy is not in contravention of section 26 (2) of the BCEA and/or section 6 (1) of the EEA, did the company comply with clause 5.4 of the Policy in relation to the applicant?

[68] This issue has to a large extent been answered, particularly within the context of what is deemed to be a 'suitable alternative risk free' job. However, for the sake of completeness, the four 'suitable alternative risk free' jobs identified by the applicant as being available will be explored. This in any event boils down to complaints regarding the procedures followed in concluding that there was no suitable risk-free job available to the applicant, and as correctly pointed out on behalf of the respondent, the relief sought by the applicant is not in relation to procedural fairness.

(i) Administrative positions in the plant and AMMS offices:

[69] Marais' testimony was that in seeking suitable, alternative risk free positions for pregnant employees, the respondent looked at available positions, and the requirements of the position which were then matched with a candidate's experience, skills set and qualifications. It was common cause that after the applicant had disclosed her pregnancy, and prior to being finally placed on unpaid maternity leave, she had performed administrative duties in the plant office between 24 June 2014 and 3 July 2014. This position however, like that in the AMMS office did not exist, nor was it in the respondent's labour plan. Worst still, there was no vacancy in the AMMS office where the applicant could be placed.

[70] The applicant conceded that the above was indeed the position in respect of the two positions, and in my view, her contention that she never sought a permanent post, but reasonable accommodation does not take the matter any further. Reasonable accommodation in this instance is clearly a euphemism for securing suitable alternative employment, and if this was not feasible on the common cause facts that the administration position was out of bounds, that should be the end of the matter. This was particularly so since on the

applicant's own version, it was not her expectation that the respondent should create a position for her. Her reliance therefore on the fact that Mokone, the Human Resources Supervisor informed her that she could be retained in the administration position does not further assist her, as it is not for Mokoena to decide what her fate should be and what was a suitable alternative for her. A further consideration in this regard was that on Rule's uncontested version, it would have been unfair to other pregnant employees who were placed on extended maternity leave and waiting for placements, to have simply placed the applicant in any other available position.

(ii) The receptionist position:

[71] The less said about this position the better. It was common cause that this position was at level A, at a salary of R5 000.00, even though Marias' contention was that the actual position offered was that of a Switchboard Operator. The applicant nonetheless contended that the position should have been offered to her on the same terms and conditions to her those applicable to her as an Electrician in accordance with clause 5.4 of the Policy. Her argument is further based on the fact that the respondent had invited her for the interview.

[72] This again goes back to the issues already discussed, i.e. that an alternative position may be available but not necessarily suitable for an employee. Furthermore, it was common cause that the applicant had refused to take any further part in the interview process for this position upon being informed that it would be offered at its applicable terms. It therefore follows that even if the position was offered to her, it would not have been offered on the same terms and conditions applicable to her. The positions of switchboard operator and that of Electrician are clearly not in same league in terms of skills and responsibilities. I further did not understand the applicant's case under cross-examination to be that she pursued this issue.

(iii) The Control Room Supervisor position:

[73] The applicant's contention was that this position was available and should have been offered to her. She accused the respondent of having failed to

consult her about it or even conducting any investigation in determining the extent to which she could lack or be in need of the necessary training to perform its tasks.

[74] Marais' testimony was that the position was indeed available as a consideration. The applicant however was not qualified to take over the control room as she did not have a blasting certificate, nor had she worked as a Miner. Training for a blast certificate takes nine months, and the applicant's four months' stint underground was not sufficient for her to assume the role of control room supervisor.

[75] I did not understand the applicant's case to be that she had extensive underground experience, or that she had the necessary qualification. Her contention that she should have been trained for the job equally lacks merit in view of Marais' uncontested version that the training period for the position extended to nine months. Marais was adamant that even if training was considered, it was not possible to conduct such training on surface to accommodate the applicant.

[76] The conclusion therefore is that position of control room supervisor was available but not suitable for the applicant in view of her skills, knowledge, experience and the inherent requirements of that post. She was further excluded from consideration of that position as she had not qualified as a Miner in terms of the provisions of Mines Health and Safety Act, and I fail to appreciate how it can be said that the provisions of clause 5.4 on the whole were not complied with.

Conclusions:

[77] To summarise then, the respondent's Policy which came into effect on 1 January 2013 and approved in July 2013 was binding upon the applicant. Paragraph 5.4 of the Policy is not in contravention of the provisions of section 26 (2) of the BCEA nor those of section 6 (1) of the EEA. The respondent, in ultimately placing the applicant on unpaid extended maternity leave complied with the provisions of clause 5.4 by making endeavours to find suitable, alternative risk free employment for the her. In the absence of success in that

regard, the only option under the circumstances was to place the applicant on extended unpaid maternity leave in terms of the provisions of the Policy. That ultimate decision cannot be construed as unfair or not rational, as it accords with the interpretation of section 26 (2) of the BCEA. Equally so, there is no merit in the applicant's contentions that she was unfairly discriminated against either on account of her pregnancy or her race. It follows that her claim should be dismissed.

Costs:

[78] In terms of the provisions of section 162 of the LRA, the Court may make an order of costs upon a consideration of the requirements of law and fairness. The issues for consideration in this case cannot by any stretch of imagination be construed as trivial, as they raise pertinent questions surrounding maternity rights of female employees and a proper interpretation of the provisions of section 26 (2) of the BCEA. The applicant had in her testimony, attested to the devastating consequences of being placed on extended unpaid maternity leave, which include having to give up her residence and vehicle, and having to be looked after by her family before and after childbirth. These, as already indicated elsewhere in this judgement, are unintended consequences of her pregnancy, and the failure of legislative measures, or the failure of recognised unions to negotiate for provisions of satisfactory or fair guidelines in regard to circumstances where pregnant employees have to be removed from their normal positions, and where ultimately the employer cannot find suitable, risk-free alternatives despite genuine endeavours. The provisions of section 26 (2) of the BCEA clearly fall short of the ILO Recommendations referred to in this judgment in that regard. To this end, it has to be concluded that there is no basis in either law or fairness that warrants a cost order in this case.

[79] In the premises, the following order is made;

1. The Applicant's claim is dismissed.

2. There is no order as to costs

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E. Tlhotlhalemaje

Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicant:	Adv. B. Mmusinyane
Instructed by:	TR Attorneys
On behalf of the Respondent:	A.T Myburgh SC with Adv. P.M Pillay
Instructed by:	Edward Nathan Sonnenberg Inc.