IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA117/2018

In the matter between:

KHOMOTJO MAHLANGU **Appellant**

and

SAMANCOR CHROME LTD

(EASTERN CHROME MINES) **First Respondent**

Heard: **4 March 2020**

Delivered: **18 May 2020**

Summary: Employment Equity Act 55 of 1998----Unfair discrimination ---Pregnancy---Mine having maternity policy providing for unpaid maternity leave if employee falls pregnant twice within a three-year circle and placing pregnant employee is alternative position prior to maternity leave----employer not placing employee into alternative position prior to unpaid maternity leave----evidence proving that another employee placed in alternative position----constituted differentiation----such differentiation amounting to unfair discrimination.

Coram: Waglay JP, Jappie JA and Savage AJA

JUDGMENT

SAVAGE AJA

Introduction

[1] This appeal, with the leave of the Court *a quo*, is against the judgment and order of the Labour Court (Steenkamp J) made on 29 August 2018. The appellant, Ms Khomotjo Mahlangu, referred an unfair labour practice dispute to the Commission for Conciliation Mediation and Arbitration ('the CCMA'). The certificate of outcome recorded that the dispute concerned unfair discrimination and the appellant referred the matter to arbitration in terms of s 6 of the Employment Equity Act 55 of 1998 ('the EEA'). The arbitrator found *inter alia* that the respondent, Samancor Chrome Limited (Eastern Chrome Mines), had unfairly discriminated against the appellant on the grounds of pregnancy. The Labour Court upheld the respondent's appeal, brought in terms of s 10(8) of the EEA, and dismissed the claim of unfair discrimination.

[2] The appellant is employed by the respondent as an underground heavy-duty truck driver. She fell pregnant for the second time in a period of three years and reported her pregnancy to the respondent on 28 May 2014. In accordance with the respondent's health and safety policy, it relieved her of her hazardous responsibilities underground with immediate effect. The appellant's maternity leave was to commence on 29 November 2014. She was placed on unpaid leave from 4 June 2014 to 28 November 2014. The respondent stated that this was because it was unable to find her a suitable alternative position. The appellant took issue with the fact that she was the only pregnant employee who was not offered alternative employment by the respondent before her maternity leave commenced.

[3] Clause 4.3 of the respondent's Pregnancy in the Workplace Procedure ('the policy') states that:

> '1) In terms of section 26(2) of the BCEA, where reasonably practicable, the Company may offer suitable alternative employment to an employee during pregnancy and breast-feeding if she is engaged in risk work…
>
> 2) If possible alternative employment will be on terms that are no less favourable than the employee's ordinary terms and conditions of employment.

3) if there is no suitable alternative work, the employee will be sent on unpaid leave….'

[4] In addition, the clause provides that:

'…maternity leave will only be applicable once during a three-year cycle. Should a female take maternity leave twice during the three-year cycle, the second occurrence would be as per the BCEA stipulations, i.e. four (4) months unpaid…'

[5] The appellant claims that the respondent unfairly discriminated against her by reason of her pregnancy in not placing her in an alternative position in the period prior to 29 November 2014 when she went on unpaid leave.

Arbitration award

[6] The evidence for the respondent at arbitration was that, in terms of its policy, if no suitable alternative work can be found for a pregnant employee working in a hazardous area, that employee is placed on unpaid leave until she goes on maternity leave. The evidence of Ms Gladys Dube, the respondent's human resources superintendent, was that, save for the appellant, other employees who were pregnant at the time of the appellant's pregnancy were either placed in alternative positions or went on maternity leave. Ms Dube stated that '…*when we check her situation according to the company policy, we checked that her pregnancy was the second occurrence in a three year time*.' Thereafter Ms Dube testified that the reason the appellant was placed on unpaid leave was that an alternative position could not be found for her. She accepted however that another employee who had reported her pregnancy on 2 June 2014 (after the appellant had reported her pregnancy) was placed into an alternative position.

[7] The respondent's leave schedule recorded that the appellant was '*to be sent on unpaid leave - Second Occurrence in a three-year cycle – employee refuses to sign the unpaid leave form still sitting at the union offices'*. Although it was not put to Ms Dube in cross-examination, the appellant testified that she was told by a person in the respondent's human resources department, that

the reason for her unpaid leave was that she had fallen pregnant twice in a three-year cycle.

[8] The arbitrator took into account that the respondent provided another employee, who had reported her pregnancy a few days after the appellant, an alternative position. It was found that the appellant had been subjected to unfair treatment by being put on unpaid leave '*simply because she fell pregnant twice in three years*'. This was so in that she was the only person from a number of pregnant employees who was not given alternative work. It was found that the appellant had been unfairly discriminated against on pregnancy as a listed ground in s 6(1) of the EEA in that the respondent had '*failed to show that the different treatment on a listed ground was rational and not unfair, or otherwise justifiable*'.

[9] Although it did not form part of the dispute before him, the arbitrator stated that the respondent's policy on pregnant employees was 'problematic' and ordered the respondent to redraft the policy to ensure that it removes any provisions that may lead to any unfair discrimination. It was ordered that the respondent pays the appellant compensation in the amount of R20 000,00 for the impairment of her dignity and self-esteem, as well as damages equivalent to five months' remuneration.

Judgment of the Labour Court

[10] Dissatisfied with the arbitration award, the respondent referred the matter on appeal to the Labour Court. The grounds of appeal were that the arbitrator had failed to have regard to the terms of the policy agreed with the union, the fact that no alternative position was available and that it was not competent for the arbitrator to order that the policy be redrafted.

[11] The Labour Court considered whether, as the respondent claimed, the reason for the appellant's unpaid leave was because the respondent could not find an alternative position into which to accommodate her, or whether it was because she fell pregnant for a second time in a three-year cycle, as the appellant claimed.

[12] The Labour Court found that the balance of probabilities weighed in favour of the respondent's case that the appellant was placed on unpaid leave before the commencement of her maternity leave because an alternative position could not be found for her and not because of her second pregnancy in the three-year cycle. It was found that the arbitrator had erred in finding that the respondent had treated the appellant differently to other employees because of her pregnancy and that it had placed her on unpaid leave because she had fallen pregnant twice in a three-year cycle. The respondent's witness explained that another employee had been accommodated in an alternative position after the appellant because a vacancy had arisen. Furthermore, the unpaid leave spreadsheet referenced the appellant's unpaid maternity leave from 29 November 2014; and the version that the appellant was told that the reason for her unpaid leave prior to her maternity leave was due to her second pregnancy was not put to the respondent's witness.

[13] The Court found that the respondent had discharged the onus to prove that no discrimination took place and that the appellant was placed on unpaid leave as suitable alternative employment was not available.

[14] The Court found further that the arbitrator's award in relation to the respondent's procedure was impermissible since this was not part of the dispute before him. Furthermore, and without evidence from the appellant the arbitrator erred in finding that the appellant '*might have suffered'* humiliation '*having to explain to her family and probably the community that the reason for her unpaid leave was that she fell pregnant twice within a three year period'*. The appeal was consequently upheld with no order of costs.

Evaluation

[15] Section 48(1) of the EEA permits a commissioner of the CCMA at arbitration to make '*any appropriate arbitration award that gives effect to a provision of this Act*'. This includes an award of damages in terms of s 50(2)(b), which may not exceed the amount stated in the determination made by the Minister in terms of section 6 (3) of the Basic Conditions of Employment Act.[1] A damages

[1] Section 48(2) of the EEA.

award is intended to compensate loss suffered as a result of a breach of rights under the EEA. Evidence must be placed before the commissioner to justify such award. That evidence was not placed before the arbitrator in this matter. In awarding damages to the appellant for an alleged impairment of her dignity and self-esteem the arbitrator had erred. In addition, the validity of the respondent's pregnancy policy was not an issue before the arbitrator for determination. His finding that the policy was 'problematic' and the order made that the respondent redraft such policy was therefore impermissible.

[16] Section 6(1) of the EEA provides that:

> '(1) 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, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground.'

[17] In terms of 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.'

[18] In *Harksen v Lane NO & others,*[2] it was stated that to determine whether differentiation amounts to unfair discrimination requires a two-stage analysis:

> '(i) 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

[2] [1997] ZACC 12; 1997 (11) BCLR 1489 (CC); 1998 (1) SA 300 (CC) para 53.

dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(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.'

[19] In *Solidarity & others v Department of Correctional Services & others (Police & Prisons Civil Rights Union & another as Amici Curiae)*,[3] in considering s 11(1) of the EEA it was stated:

> 'One cannot "prove, on a balance of probabilities", that anything is "rational and not unfair or is otherwise justifiable", because it is only a fact that can be proved. Whether conduct is rational or fair or justifiable is not a question of fact but a value judgment.[4]

[20] Ms Dube initially explained in her evidence that the appellant did not receive alternative employment given that the policy relating to her second pregnancy in a three-year cycle applied. However, the policy prescribed only that unpaid maternity leave was to be taken if an employee was pregnant twice in a three-year cycle. It did not bar alternative employment being found for such an employee. The respondent's leave schedule, which recorded that the appellant was '*to be sent on unpaid leave - Second Occurrence in a three-year cycle – employee refuses to sign the unpaid leave form still sitting at the union offices',* supports Ms Dube's evidence in this regard. It set out the position as it applied when the appellant left work in June 2014, after not having been provided with an alternative position. As much is apparent from the fact that, aggrieved with the situation in which she found herself, the appellant refused to sign the unpaid leave form.

[3] 2016] ZACC 18; (2016) 37 ILJ 1995 (CC); 2016 (5) SA 594 (CC); [2016] 10 BLLR 959 (CC); 2016 (10) BCLR 1349 (CC) at para 82.

[4] *Media Workers Association of SA & others v The Press Corporation of SA Ltd* [1992] ZASCA 149; 1992 (4) SA 791 (A); (1992) 13 ILJ 1391 (A) at 1397H-1398B.

[21] Further support for this as the reason she was placed on unpaid leave is found in the appellant's testimony that she was told by Ms Lucetta Motala of the human resources department that she was placed on unpaid leave as she had fallen pregnant twice in a three-year cycle. While it is so that this version was not put to Ms Dube in cross-examination, the duty to do so is not an inflexible rule cast in stone[5] and is not to be applied mechanically, but with due regard to the facts and circumstances of the case.[6] The rationale of the rule is that, if it is intended to argue that the evidence of a witness should be rejected, the opportunity to answer points supposedly unfavourable should be afforded to such witness in cross-examination. In this case, Ms Dube had already in evidence stated that the reason no alternative employment was provided to the appellant was one related to the policy. It mattered not, therefore, that the version was not put to her.

[22] Later in her evidence, Ms Dube amended her version when she stated that the appellant was not provided with alternative employment in that no position could be found for her. Yet, it went unexplained why, if this was so, a position was found days later for another employee.

[23] It is apparent from the facts that in its treatment of the appellant, the respondent differentiated between the appellant and other employees. This differentiation arose on the basis of her pregnancy for a second occasion in a three-year cycle. The respondent failed to show that the discrimination was rational and not unfair or was otherwise justifiable. In the circumstances, the conclusion is inescapable that the respondent's decision in refusing to place the appellant into alternative employment with effect from 4 June 2014, prior to her unpaid maternity leave scheduled to commence on 29 November 2014, constituted an act of unfair discrimination.

[24] Since no damages were proved by the appellant, she is only entitled to receive the salary she would have earned had she be placed into alternative employment from 4 June 2014 to 29 November 2014. The arbitrator erred

[5] *S v Abader* 2008 (1) SACR 347 at 356.
[6] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000(1) SA 1 (CC) at para 61.

both in awarding damages to the appellant and in ordering the relief that he did in respect of the respondent's policy when no such dispute was before him. The arbitration award in these respects cannot stand.

[25] It follows for these reasons that the appeal must succeed and the order of the Labour Court set aside. Having regard to considerations of fairness and equity, the view I take is that both parties should pay their own costs.

Order

[26] For these reasons, the following order is made:

1. The appeal succeeds.

2. The order of the Labour Court is set aside and replaced as follows:

"1. The review application succeeds with no order as to costs.

2. The arbitration award is set aside and replaced as follows:

'1. The respondent unfairly discriminated against the applicant on the prohibited ground of pregnancy.

2. The respondent is to pay the applicant the salary due to her for the period from 4 June 2014 to 28 November 2014 within ten (10) days.'

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SAVAGE AJA

Waglay JP and Jappie JA agree.

APPEARANCES:

FOR THE APPELLANT:	E S Makinta
	Instructed by Mothobi Attorneys
FOR THE THIRD RESPONDENT:	F Venter
	Instructed by Solomon Holmes Attorneys