IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Case No: D581/2023
Not Reportable

In the matter between:

TIISETSO KEFILWE DAISY MOLEME Applicant

and

INDURADEC COATINGS (PTY) LTD Respondent

Heard: 15 and 16 August, and 4 September 2024
Delivered: This judgment was handed down electronically by circulation to the parties and / or their legal representatives by email. The date and time for handing-down is deemed 11h00 on 7 May 2025

JUDGMENT

ALLEN-YAMAN J

Introduction

[1] The applicant instituted action against the respondent in terms of s10 of the Employment Equity Act, 1998 ('the EEA') in which she claimed the following relief,

'1. A finding that the Respondent had failed to comply with the provisions of s26 of the BCEA, in removing the Applicant from the Laboratory without any duties and / or functions and placing the applicant on extended unpaid maternity leave.

2. A finding that the Respondent had unfairly discriminated against the Applicant due to her pregnancy and / or any other ground of discrimination referred to in section 6(1) of the EEA.

3. The Respondent to make payment of 24 months' compensation to the Applicant.

4. Costs of suit.'

[2] The respondent disputed that it had acted as alleged, and so defended the applicant's claim.

Background

[3] The applicant was employed by the respondent on 18 October 2021. Albeit that her contract of employment defined her Job Title as that of a 'Chemist', the evidence introduced by both parties demonstrated that in such position her functions included aspects of both research relating to, as well as the development of, products for the respondent, a chemical coating company.

[4] Having fallen pregnant some twelve weeks earlier, the applicant notified the respondent of her pregnancy in March 2023 by the transmission of an email to another of the respondent's employees, Ms Denise Foster, whom she was aware dealt with the respondent's Human Resources matters. The applicant was concerned about continuing to work in the respondent's laboratory which would expose her to certain chemicals, including Bisphenol A, and requested to be moved out of that environment. Ms Foster called her into her office and informed her that she had never had occasion to deal with such an issue and was unsure of what to do, but that she would notify the applicant's immediate superior, Mr Geoff Powell (the respondent's Technical and Commercial Manager) who would be in contact with her.

[5] Mr Powell approached the applicant later that day and instructed her to move out of the laboratory and into an office adjacent to his own. It was common cause between the parties that no work functions were assigned to her in the time she remained in that office until May 2023, despite it having been agreed between her and Mr Powell that she would be provided with a computer to enable her to carry out such limited functions as she was able to whilst she was away from the laboratory.

[6] Pursuant to the applicant having informed Mr Powell that she would be attending an ante-natal appointment on 5 April 2023, he provided her with a respirator and a letter which he requested she give her gynaecologist. The letter read,

> *'We are a paint company that manufactures and formulates various solvent based coatings. A variety of raw materials are used in the chemical makeup of our products. All safety data sheets are available but the literature does not specify pregnant persons.*
> *Daisy is locates in our lab office and her duties include lab work and development. Please can you confirm if the following breathing apparatus is sufficient for her to use or is there any recommendation that will allow her to continue to perform her duties without affecting her health or the health of her baby during this period.*
> *The lab does have extractors, air circulation and a minimal amount of product is used or tested in the lab thus reducing the exposer [sic] levels to a minimal amount.*
> *A formal response is required please.'*

[7] She did as she had been requested. Her doctor's response, however, was that the respondent's request was outside the scope of his expertise, and suggested that it ought to enlist the assistance of a Health and Safety official to assess safety of its laboratory. The applicant conveyed this response to Mr Powell the following day. Later that month he requested her to take the same letter and respirator to her general practitioner, whose response, like that of her gynaecologist, was that the question was outside the scope of her expertise, and the assistance of a Health and

Safety professional would have to be sought to obtain an answer. This too was duly conveyed to Mr Powell.

[8] Mr Powell himself telephoned an individual whom he regarded as an expert in the field of Health and Safety for advice, one Professor Barnard, alleged by Mr Powell to have previously lectured the discipline of Health and Safety. Although Professor Barnard did not tell him that it would be impossible, or that he should not make any attempt to do so, he did say that it would be difficult to find someone who would authorise the applicant's use of a respirator in the respondent's laboratory to enable her to continue to work in that environment.

[9] In the meantime, at the beginning of April 2023, Mr Powell had consulted with an official of an employer's organisation, Ms Anchel Oosthuizen. Having considered the respondent's obligations and having informed him thereof, she advised him that the respondent should meet with the applicant. Accordingly, on 9 May 2023 the applicant was given written notification of such a meeting,

> *'We hereby confirm that you have informed us that you are pregnant. Considering Section 26 of the Basic Conditions of Employment Act, and the nature of the work which the employer performs, we hereby invite you to consult with the employer on the following date, to discuss the way forward:*
> *Date: 11 May 2023*
> *Place: 4 Hawthorn Road, Westmead*
> *Time: 12h00*
> *We trust that you will find the above to be in order.'*

[10] The meeting was attended by the applicant, Mr Powell, Mr Richard Vermaak, (one of the respondent's shareholders and directors) and Ms Oosthuizen. Although there was some dispute as to what, precisely, was discussed in the course of that meeting, it was common cause that the applicant was then informed that the respondent was considering placing her on extended, unpaid maternity leave for the reason that it had been unable to identify any alternative positions in which she could then be accommodated. The applicant was requested to revert with any possible suggestions of her own.

[11] The applicant's subsequent written response read,

'Hi Geoff and Richard
As agreed in the meeting we had yesterday, I was told I would have to respond to you in writing about my stance in taking extended maternity leave.
Please note that I will not accept being obligated to take extended maternity leave without pay and my reasons are stated below:
Section 5.3 of the Code of Good Practice on the Protection of Employees During Pregnancy and after the Birth of a Child states that:
"Where appropriate, employers should also maintain a list of employment positions not involving risk to which pregnant or breast-feeing 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.
The acts stipulates that the alternatives are to be provided by the employer and not the employee who has to come up with work for themselves.
I am more than happy to discuss alternative with you and the representative from yesterday.'

[12] On 16 May 2023 the respondent notified the applicant that she was then being placed on extended, unpaid maternity leave,

'We refer to the meeting held on our premises on 11 May 2023 and your response on 12 May 2023.
During this meeting it was explained to you that the company has no other option but to place you on extended unpaid maternity leave. It was explained to you that this is for the benefit of both you and your unborn child, from a health and safety aspect, considering the chemicals which you are exposed to on a daily basis as a chemist.

We confirm that section 26 of the Basic Conditions of Employment Act reads as follows: …

It was further explained that the Code of Good Practice on the Protection of Employees During Pregnancy and After the Birth of A Child, lists the chemicals which is unsafe for a pregnant employee and her unborn child. As confirmed, the position of chemist requires you to work mainly with most of the listed chemicals.

Please note further that we have considered all possible alternative suitable risk-free employment options in the workplace.

The reason for the meeting held on 11 May 2023, was to inform you of the position the employer is faced with and to grant you the opportunity to present any suitable alternatives.

We confirm that you have indicated that you might be able to do research, however this is not an option because presently there are not any projects which require research only lab work, which is being handled by our other chemists.

We have furthermore taken the case of Manyesta v New Kleinfontein Gold Mine (Pty) Ltd (2017) 28 SALLR 73 (LC) into consideration. The court found that alternative employment in terms of section 26(2) was not a guarantee should a pregnant employee be moved from high risk or hazardous work area. AN employee however has the right to be considered for alternative suitable employment in the event they had to be moved from ordinary duties. It was further held by the court that, although section 26 states that an employer must provided alternative employment, not less favourable than the current terms and conditions, it can only do so if it is practicable for the employer to do so.

Therefore, taken the above into consideration and based thereon that there is no suitable alternative employment, we have no other option but to place you on extended unpaid maternity leave.

This will be effective from 16 May.

We trust that you will find the above to be in order.'

[13] Having had misgivings concerning the legality of the respondent's decision in circumstances in which extended maternity leave had not been medically

necessitated, she directed an enquiry to the Department of Labour in May 2023. Receiving no response, she referred a dispute to the CCMA in terms of s10 of the EEA. A certificate of non-resolution was issued on 25 July 2023, pursuant to which she initiated the present action.

[14] As a consequence of her inability to support herself and her family in KwaZulu-Natal without an income she was obliged to return to her family home in Gauteng.

[15] In January 2024, shortly after her maternity leave was scheduled to have terminated, she received a WhatsApp message from Mr Powell in which he informed her that she was then absent without leave as she had been due to return to work on the 19th of that month. In response, the applicant resigned from her employment,

> *'This email is a response to the WhatsApp message sent to myself on the 29/01/2024 (10:02am) by you.*
> *Please note that due to the decision made to place me on extended maternity leave without pay, as of May 17th 2023, I have since lost my home, my car and other properties, my credit record has been significantly tainted, which affected the ability to get alternative accommodation. I have had to relocate back to my family home in Johannesburg, with my children, as a result of insurmountable contractual debt as a failure to oblige payment arrangements and inability to self-sustain, due to no income.*
> *The decision taken above has resulted in the irreparable breaking of a trust relationship, between myself and the company.*
> *Because of the reasons state above, I am left with no choice but to resign from the role of R&D chemist at Induradec Coatings (Pty) Ltd, effective immediately.*
> *I would like to take this opportunity to thank the organisation for affording me the opportunity and wish it well on its future endeavours.'*

Analysis

[16] Having set out her version of the events which led to the respondent having placed her on extended, unpaid maternity leave in her Statement of Claim, the applicant pleaded that the legal issues which arose from the facts were:

> *'15.1 Whether the Respondent had unfairly discriminated against by the Applicant due to her pregnancy and / or any other ground as contained in section 6(1) of the EEA; and*
> *15.2 Whether the Respondent had duly complied with the provisions of section 26 of the Basic Conditions of Employment Act, 75 of 1997 ("the BCEA"), in removing the Applicant from the Laboratory without any duties and / or functions and placing the Applicant on extended unpaid maternity leave.'*

[17] The applicant's Statement of Claim failed to particularise either the legal or factual basis which informed her conclusion that the respondent's decision to have placed her on extended, unpaid maternity leave resulted in her having been unfairly discriminated against. Also not pleaded were the legal consequences which were said to have ensued as a consequence of any conclusion arrived at by this court that the respondent had failed to comply with s26 of the BCEA. In these circumstances, this court issued a directive upon the conclusion of the parties' respective cases in which the parties were directed to address certain specified issues concerning the nature of the applicant's claim in their written closing arguments.

[18] The starting point for any determination concerning unfair discrimination is the test which was established in Harksen v Lane NO and Others 1998 (1) SA 300,

> *'(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.*
> *(b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis:*
> *(i) Firstly, does the differentiation amount to "discrimination"? If 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 on whether, objectively the ground is based on attributes and characteristics which have the potential to impair the fundamental 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.

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2).'[1]

[19] In the specific context of claims concerning unfair discrimination initiated in terms of the EEA, in Mbana v Shepstone & Wylie (2015) 36 ILJ 1805 (CC) the Constitutional Court elaborated upon the enquiry to be conducted,

'The EEA proscribes unfair discrimination in a manner akin to section 9 of the Constitution. Apart from permitting differentiation on the basis of the internal requirements of a job in section 6(2)(b), the test for unfair discrimination in the context of labour law is comparable to that laid down by this Court in Harksen.

The first step is to establish whether the respondent's policy differentiates between people. The second step entails establishing whether that differentiation amounts to discrimination. The third step involves determining whether the discrimination is unfair. If the discrimination is based on an of the listed grounds in section 9 of the Constitution, it is presumed to be unfair.

It must be noted, however, that 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. Where discrimination is alleged on an arbitrary ground, the burden is on the complainant to prove that the conduct complained of is not rational, that it amounts to discrimination and that the discrimination is unfair.'[2]

[1] At paragraph 53
[2] At paragraphs 25 - 26

[20] The applicant's claim was not one in which it had been strictly necessary for the applicant to have established the existence of a comparator: the unfair treatment alleged to have been perpetrated was said to have been occasioned solely as a result of her status as a pregnant woman. As was explained by this court in Lewis v Media 24 Ltd (2010) 31 ILJ 2416 (LC),

> *'The concept of discrimination is made up of three issues: differential treatment; the listed or analogous grounds, and the basis of, or reason for, the treatment. Once a difference in treatment is based on a listed ground, the difference in treatment becomes discrimination for the purposes of section 9 of the Constitution and section 6 of the EEA.*
> *The first issue concerns the difference in treatment. There must be a difference in treatment in which the employee is less favourably treated than others. In some instances, this may require a comparison between the victim and a comparator – the so-called 'similarly situated employee'. In other instances, it may be evident that the employee is treated differently from others precisely because of the targeted nature of the treatment, for example sexual harassment or trade union victimisation.'*[3]

[21] The applicant's assertion that the differentiation was to be assessed in relation to her having been removed from the laboratory (where another employee had been left *in situ*), was made in the context of her ultimate argument that it was the respondent's eventual decision to place her on extended unpaid maternity leave which was *'not properly informed, rational and / or justifiable.'* This accorded with her evidence which revealed her complaint to have concerned the respondent's alleged failure to have complied with s26(2) of the BCEA and the certain portions of the Code of Good Practice on the Protection of Employees during Pregnancy and after the Birth of a Child ('the Code'),[4] the effect of which was that she had been excluded from her workplace.

[3] At paragraphs 36 - 37
[4] Issued in terms of s87(1) of the BCEA

[22] The respondent accepted that its decision to place the applicant on extended, unpaid maternity leave constituted differentiation, and that in circumstances in which such differentiation was on account of her pregnancy, such differentiation amounted to discrimination. It was also not disputed that such discrimination took place with an employment policy or practice as defined in the EEA. Its defence to the applicant's claim was predicated solely upon it having complied with its obligations in terms of the BCEA, as well as those established in terms of the Code.

[23] In view of the respondent's admission that an act of discrimination had taken place s11(1) of the EEA required it to prove, on a balance of probabilities, that such discrimination was rational and not unfair, or was otherwise justifiable. The Constitutional Court, in Solidarity and Others v Department of Correctional Services and Others (Police and Prisons Civil Rights Union and Another as Amici Curiae) (2016) 37 ILJ 1995 (CC) set out the approach which courts are required to follow when applying s11(1) of the EEA,

> *'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.'*[5]

[24] In consideration of the aforegoing, the issue whether the applicant was unfairly discriminated against by the respondent must be assessed in relation to the rationality of or justifiability of its decision, measured against the steps taken by it in compliance with s26 of the BCEA read with the relevant provisions of the Code.

[25] The Code is intended to provide guidelines for employers and employees in relation to the hazards to which pregnant, post-partum and breast feeding woman could potentially be exposed in the workplace. In consideration of these potential hazards, the Code identifies the legal requirements relevant to health and safety in relation to women so situated; the methods for assessing and controlling the potential hazards and risks inherent in various workplaces to their health and safety; as well as the steps to be taken to ameliorate those risks.

[5] At paragraph 82

[26] In asserting that the respondent had unfairly discriminated against her, the first of the applicant's complaints was argued on her behalf to have concerned the initial decision taken by Mr Powell to remove her from the laboratory immediately upon him having become aware that she was pregnant in circumstances in which it had been incumbent upon the respondent to have conducted an evaluation of her workplace in accordance with clause 5.7.3 of the Code. Clause 5.7 reads,

> *'5.7 When an employee notifies an employer that she is pregnant her situation in the workplace should be evaluated. The evaluation should include –*
>
> *5.7.1 an examination of the employee's physical condition by a qualified medical professional;*
>
> *5.7.2 the employee's job;*
>
> *5.7.3 workplace practices and potential workplace exposures that may affect the employee.'*

[27] That such action taken by Mr Powell had constituted some type of unfairness was neither the applicant's pleaded case, nor her evidence. On her own pleaded case, the applicant had herself requested to be removed from the laboratory immediately upon having informed the respondent of her pregnancy. Conversely, no part of her pleaded case can be interpreted to have included any complaint on her part concerning the respondent's decision to accede to her own initial request to be removed from the laboratory environment. Her subsequent evidence concerning the events of that day accorded with her pleaded case; she requested to be removed on the basis of her own appreciation of the dangers inherent in exposing her unborn child to the chemicals present in the laboratory, an appreciation which was shared by Mr Powell, and echoed in the potential hazards to which a pregnant employee might be exposed in the workplace listed in the Code. Clause 6.3 provides, *inter alia*, that *'contact with harmful chemical substances may cause infertility and foetal abnormalities. Some chemicals can be passed to the baby during breast feeding and could possibly impair the health and the development of the child.'*

[28] Despite the initial position adopted by both the applicant and Mr Powell concerning the potential risks inherent in the applicant continuing to work in the laboratory, it may nonetheless have been possible for her to have done so. Clause 5.10 of the Code required the respondent to investigate the extent of the risk of danger posed and the feasibility of any modifications or adjustments to the applicant's working conditions which may have enabled her to continue to perform her work as a Chemist. It provides,

> *'5.10 If there is any uncertainty or concern about whether an employee's workstation or working conditions should be adjusted, it may be appropriate in certain circumstances to consult and occupational health practitioner. If appropriate adjustments cannot be made, the employee should be transferred to an alternative position in accordance with section 26(2) of the BCEA.'*

[29] Clause 6.3 of the Code confirms that the potential risk of exposure to chemical hazards may be established not to be present, may be minimized, or may be negated.

> *'The Hazardous Chemical Substances Regulations, 1995, issued under the OHSA apply to all employees who carry out activities, which may expose people to hazardous chemical substances. These employers must assess the potential exposure of employees to any hazardous chemical substance and take appropriate preventive steps. The Regulations set maximum exposure levels for some 700 hazardous chemical substances.*
>
> *…*
>
> *With the exception of the Lead Regulations, there are no regulations which set maximum exposure levels of specific applications for women of childbearing age or pregnant women.* In view of the absence of occupational health standards for the exposure of pregnant or breast-feeding women to chemical substances, care should be taken to minimise exposure to chemicals, which can be inhaled, swallowed or absorbed though the skin. Where this cannot be achieved, employees should be transferred to other work in accordance with section 26(2) of the BCEA.*
>
> *the foetus or child are listed in Schedule Three below.'*

[30] The schedule referred to identifies a number of different chemicals, the risks associated with each, and the measures to be taken to avoid such risk. For example, in relation to the chemical mercury, no level of exposure is deemed to be safe for pregnant women; other chemicals, such as anaesthetic gases, require the level of exposure to be minimized; whilst the dangers present in chemicals such as antimitotic drugs can be entirely negated by the use of protective equipment.

[31] Under cross-examination Mr Powell conceded that there was no absolute bar to the applicant's potential exposure to many chemicals, and such exposure did not automatically constitute an insurmountable impediment to the applicant's continued performance of her functions. Although no endorsement of his proposal was ever obtained, he himself had conceived of the possibility that a respirator alone might have provided adequate protection to the applicant and her unborn child.

[32] What was required of the respondent was that it obtain the services of an expert in the field of Health and Safety to conduct the investigation required of it in terms of clause 5.10. Despite that this had been conveyed to Mr Powell by both the applicant's medical practitioners, the respondent's own legal advisor, Ms Oosthuizen, and the individual whose opinion the respondent trusted, Professor Barnard, no such investigation was conducted. Without such an investigation having taken place, when the respondent took the decision to place the applicant on extended, unpaid maternity leave it remained uncertain whether any adjustments to the applicant's working conditions within the laboratory could have been made which would have enabled her to have continued to perform her job as a Chemist safely, for the remainder of her pregnancy.

[33] As to the applicant's reliance on s26(2) of the BCEA, s26 provides for the protection of female employees prior to and post fact the birth of their children, as well as the protection of the unborn children of such employees, and matters ancillary thereto. It reads,

'(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.'

[34] Insofar as the respondent's failure to have placed the applicant in an alternative position in circumstances in which both parties had believed that she could not continue to work in the laboratory is concerned, it was apparent that the applicant believed that the respondent was under an absolute obligation in terms of s26(2) of the BCEA to source alternative work for her whilst she remained unable to perform the functions of a Chemist. That assumption was not correct, as was made clear by this court in Manyetsa v New Kleinfontein Gold Mine (Pty) Ltd (2018) 39 ILJ 415 (LC),

'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.

Section 26(2)(b) adds a proviso to the effect that suitable alternative employment on terms and conditions that are no less favourable than 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. Thus section 26(2) of the BCEA cannot be read to the exclusion of section 26(2)(b).

…

> *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'."*[6]

[35] In the course of the trial, the applicant did not identify any particular position to which she believed that she could have been transferred. In the absence of challenge to Mr Powell's evidence that no other positions were then available in the respondent's business into which the applicant could have been temporarily placed, there is no reason not to accept the correctness thereof.

[36] The applicant testified that at the meeting of 9 May 2024 she had suggested that although she was unable to participate in the development function of her role, she would nonetheless have been able to continue to perform research functions, as well as the administrative duties in support of the laboratory work. Mr Powell agreed that the applicant had mentioned the possibility of her continuing to perform research, but testified that as there had been no projects running at that time, there had then been no need for any research to be conducted. In her evidence in chief, the applicant disputed the correctness of Mr Powell's claim, having stated that at the time of the meeting there were projects that had still been active, albeit she did not identify any. Under cross-examination she conceded that she had not challenged Mr Powell's assertion at the meeting that there had then been no projects, and conceded further that only he would have known if there had been any projects in respect of which she could have done any research. Upon the conclusion of that meeting the applicant was requested to revert to the respondent with any other suggestions she may have had. She did not persist with the suggestion of stand-alone research, her response having been only that, *'The act stipulates that the alternatives are to be provided by the employer and not the employee who has to come up with work for themselves.'* Finally, in the letter addressed to her by the respondent in which she was informed of the respondent's decision to place her on extended, unpaid maternity leave, the respondent reiterated that there were then no

[6] At paragraphs 41 - 44

projects available in respect of which she would be able to perform only research work.

[37] In argument the applicant took issue with what was described as a lack of *'genuine effort'* on the part of the respondent to secure her alternative work. In the absence of any suggestion by her that greater effort on the part of the respondent would have ensured a different outcome, and the respondent having established both that (1) there was no alternative position into which she could have been placed, and (2) it was not practicable to retain her to perform a research function only, no amount of additional effort on the part of the respondent would have altered such factual position. In the circumstances, the respondent succeeded in establishing that s26(2) of the BCEA had been complied with.

[38] Returning to the first of the applicant's causes of action, in the absence of the respondent having caused an assessment of her working conditions in the laboratory to have been conducted by an Occupational Health and Safety practitioner in accordance with the provisions of clause 5.10 of the Code, it failed to establish that her removal from the laboratory for the duration of her pregnancy had, in fact, been necessary. In the circumstances, the respondent failed to establish a factual basis upon which this court could conclude that its decision to place the applicant on extended, unpaid maternity leave was *'rational and not unfair, or otherwise justifiable.'* It accordingly follows that this court must conclude that the applicant was unfairly discriminated against.

[39] The final issue for determination is that of compensation. Although the applicant claimed payment of the equivalent to 24 months of her salary in her Statement of Claim, it was argued on her behalf that, in the alternative, payment of an amount of 11 months' compensation would be just and equitable. Her salary at the time of her employment was R65 826.00 per month.

[40] The respondent, on the other hand, did not address the issue of compensation at all, having presented its evidence on compliance with the BCEA and the Code as a complete defence to the applicant's claim.

[41] At the time of having taken up employment with the respondent, the applicant agreed that any maternity leave taken by her would be no longer than four months, and that it would be unpaid.[7] On her unchallenged version, she had intended to work until a few days prior to the birth of her child. This being the case, her exclusion from work by the respondent resulted in her suffering the loss of her salary for a period of four months, from the middle of May 2023 until the middle of September 2023 when her child was born.

[42] The further, indirect consequence of the respondent's actions was that she was rendered unable to support herself and her family financially, the effect of which was that she was forced to abandon her independent life in KwaZulu-Natal, and return to Gauteng where she was then obliged to rely on the support of her family. In the course of this process she was paid several small amounts out of the Unemployment Insurance Fund, such amounts having been a fraction of what she would have earned, and which amounts she would in any event have received during the course of her contractual maternity leave. Given her impending need for medical care, she was of necessity obliged to apply those payments primarily to her medical aid. Her limited resources resulted in her inability to meet certain of her financial obligations, including the monthly instalment which was required to be paid in respect of her motor vehicle. As a consequence of her having defaulted in the payment of such instalments, her motor vehicle was repossessed.

[43] Although Mr Powell disputed the correctness of the applicant's evidence that he had evinced the respondent's displeasure regarding her pregnancy by expressing words to the effect that the respondent, *'was not getting value for money,'* no other possible motivation for its decision can be ascribed to it but that by placing the applicant on extended, unpaid maternity leave it sought to act in its own best financial interests. By having done so, this court accepts that its decision was not actuated *mala fides*, or with deliberate intent to discriminate against the applicant on account of her pregnancy. However, given that all that had been required of it was to have taken the step of obtaining expert advice regarding the whether the applicant could reasonably be accommodated, as it had been advised to do, its failure evinced complete indifference not only to its legal obligations but also the negative

[7] Contract of employment, clause 12.1

consequences which would inevitably and foreseeably befall the applicant by being deprived of the ability to earn her salary.

[44] Generally speaking,

> *'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.'*[8]

[45] In the case of the applicant, the invariable consequences of pregnancy were exacerbated by the manner in which the respondent treated her. In light of the aforegoing, this court finds that an amount equivalent to 11 months of the salary the applicant earned whilst employed by the respondent, as was argued by the applicant, would constitute just and equitable compensation for both her patrimonial losses as well as the infringement of her right not to have been discriminated against.

Costs

[46] The applicant sought the payment of her costs. This court can conceive of no reason, as a matter of either law or fairness, why the applicant as the successful litigant ought to bear her own costs of this litigation. Given the complexity and the importance of the issues raised, this court is of the opinion that the appropriate scale, where applicable, is Scale B.

Order

1. It is declared that the respondent unfairly discriminated against the applicant on the prohibited ground of pregnancy.

[8] Manyetsa at paragraph 4

2. The respondent is ordered to pay the applicant compensation equivalent to eleven months of the salary she earned whilst employed by it, in the amount of R724 086.00.

3. The respondent is ordered to pay the applicant's costs, the scale where applicable to be Scale B.

K Allen-Yaman
Judge of the Labour Court of South Africa

Appearances

Applicant:
Mr N Mfeka
Instructed by Ayanda Shazi and Associates Inc

Respondent:
Mr J Hayward of the National Employers' Association of South Africa