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Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: J 698/15

In the matter between:

IMPALA PLATINUM LTD Appellant and

JONASE, NOMAKHUMSHA ELISE **First Respondent**

TIKANE, MARY **Second Respondent**

CCMA **Third Respondent**

E HLONGWANE N.O. **Fourth Respondent**

Heard: 17 August 2017 **Delivered**: 24 August 2017

Summary: Appeal in terms of Employment Equity Act s 10(8).

JUDGMENT

STEENKAMP J

Introduction

[1] This is an appeal in terms of s 10(8) of the Employment Equity Act[1] against an arbitration award made in terms of s 6 of the EEA.

[2] The relevant subsections are these:

> "**Section 6 Prohibition of unfair discrimination**
>
> (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."
>
> **"Section 10 Disputes concerning this Chapter**
>
> (1) …
>
> (2) Any party to a dispute concerning this Chapter may refer the dispute in writing to the CCMA within six months after the act or omission that allegedly constitutes unfair discrimination.
>
> (3) …
>
> (4) …
>
> (5) The CCMA must attempt to resolve the dispute through conciliation.
>
> (6) If the dispute remains unresolved after conciliation–
>
> (a) any party to the dispute may refer it to the Labour Court for adjudication;
>
> (aA) an employee may refer the dispute to the CCMA for arbitration if—
>
> (i) the employee alleges unfair discrimination on the grounds of sexual harassment; or
>
> (ii) in any other case, that employee earns less than the amount stated in the determination made by the Minister in terms of section 6 (3) of the Basic Conditions of Employment Act; or

[1] Act 55 of 1998 (EEA).

(b) any party to the dispute may refer it to the CCMA for arbitration if all the parties to the dispute consent to arbitration of the dispute.

(7) …

(8) A person affected by an award made by a commissioner of the CCMA pursuant to a dispute contemplated in subsection (6) (aA) may appeal to the Labour Court against that award within 14 days of the date of the award, but the Labour Court, on good cause shown, may extend the period within which that person may appeal."

[3] In this case, two employees[2] – Ms Nomakhumsha Elsie Jonase and Ms Mary Tikane – referred a dispute to the CCMA[3] in terms of s 10(6)(aA)(ii), alleging discrimination based on pregnancy. Conciliation having failed, the arbitrator[4] found in their favour and made the following award:[5]

"The employer, Impala Platinum Ltd, is ordered to compensate the applicants, Nomakhumsha Elsie Jonase = R17 000 (R8 500 per month x 2 months); and Mary Tikane = R 32 000 (R16 000 per months x 2 months) for the unfair discrimination not later than 24 April 2015.

The employer is ordered to amend its policy to accommodate pregnant women to prevent the same or similar unfair discrimination from occurring in future by no later than the 25th May 2015.

The employer is ordered to pay a loss of salary to the applicants amounting to R34 000 (R8 500 x 4 months) (Jonase); and R64 000 (R16 000 x 4 months) (Mary) by no later than 24 April 2015."

Background facts

[4] Both employees worked underground at an Impala Platinum mine. They were two of a number of employees who became pregnant "due to the strike", as their trade union, AMCU, put it. The company has a policy that provides that it will attempt to place pregnant women in suitable alternative

[2] The first and second respondents in this appeal. There were initially five complainants, but only two attended the arbitration and the award dealt only with them.

[3] The third respondent.

[4] The fourth respondent, Commissioner Elelwani Hlungwani.

[5] Quoted verbatim.

employment on surface "where reasonably practicable" in order to prevent any risk to the health and safety of pregnant women working underground or their unborn children.

[5] The two complainants were amongst those who were moved to the surface. The employer could not find alternative places for them (and a number of others). Out of 21 pregnant employees, only two had the requisite skills for available administrative posts. The other employees were then told to take their four months' paid maternity leave, with a further choice of unpaid maternity leave of up to six months. Before going on maternity leave, these two complainants were accommodated in the union offices and paid their salaries for about three months, even though they were not doing any work for the company, while the company still sought alternative positions.

[6] The complainants referred a dispute to the CCMA in November 2014. They allege unfair discrimination in terms of s 10 of the EEA and stated: "We want to be treated fair like other pregnant employees". Conciliation failed. They referred the dispute to arbitration and stated again: "We want to be treated fair like other pregnant employees".

The award

[7] The arbitrator heard the evidence of Ms Jonase and Ms Tikane; and that of the company's human resources officer, Tsokgofatse Molefe Mabyane. The arbitrator correctly noted that it was the employees' submission that they were unfairly discriminated against "as the employer failed to find them alternative employment"; and the employer's submission that it had complied with its policy on pregnant employees.

[8] The arbitrator then found, without further ado:

> "It is clear from the evidence provided that the applicants were indeed discriminated against. The truth of the matter is that the duty I son the employer to provide employees with a safe working environment, however, that does not mean that employees should be prejudiced or be disadvantaged in the process. I agree with the employer that it is risky to allow pregnant employees to work underground but I disagree with the fact that an employer can direct employees to take unpaid leave where it is unable to secure an alternative. I am of the view that the employer's failure

> to find alternatives was unfair to employees and that constitutes discrimination as the sole reason for the failure is the employees' pregnancy. The employer is actually saying those who fell pregnant would do that at their own peril as there is no guarantee that an alternative will be found, and that cannot be condoned."

[9] The commissioner found that "the applicants were treated differently from other pregnant employees"; and from that, concluded that "the differentiation amounted to unfair discrimination". She went further and found that the maternity policy "is unfair as it discriminates against pregnant employees"; and that the employer had a responsibility to find alternative employment for the complainants or to pay them.

Grounds of appeal

[10] The appellant raises three grounds of appeal:

10.1 The commissioner erred in finding that, on the facts before her, discrimination had been established.

10.2 The commissioner wrongly considered issues not before her and granted relief that was outside her proper remit.

10.3 The commissioner wrongly concluded that the failure by Implats to secure suitable alternative employment for these two employees was *per se* unfair discrimination.

Evaluation

[11] Mr *Masher*, for the company, argued that the arbitrator wrongly concluded that discrimination had been proven; and that she acted in excess of her powers, i.e. *ultra vires*, in ordering the company to amend its policy. Mr *Cook*, for the employees, submitted that they had established discrimination on the ground of pregnancy; and that the arbitrator had correctly decided on the policy, as "the fairness of the policy was central to the matter".

Was discrimination proven?

[12] The test for discrimination on a listed ground is by now well known.[6] The first question to be asked is whether there was differentiation amounting to discrimination. If there is and it is on listed ground then discrimination will be established. And then the next step of the inquiry is whether the discrimination was unfair. In order to establish unfairness the commissioner would have had to focus on the impact of the discrimination on the complainants and other persons who are similarly situated. In the context of the EEA, the Constitutional Court in *Mbana v Shepstone & Wylie*[7] reiterated:

> "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 any 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."

[13] But in that case, the applicant – who claimed unfair discrimination based on race – did not get out of the starting blocks as her comparator was also black:[8]

> "What is startling is that Mr Mchunu's case demonstrates how the differential treatment was unlikely attributable to race or social origin. Like

[6] *Harksen v Lane* 1998 (1) SA 300 (CC) par 54.

[7] (2015) 36 *ILJ* 1805 (CC) paras 25-26.

[8] *Shepstone & Wylie* above paras 35-36.

> Ms Mbana, he is also a black person. In the circumstances, Ms Mbana's claim that she was discriminated against on the basis of race loses traction. Although Ms Mbana alleges that Mr Mchunu was employed by the respondent because he had a bursary from Unilever, a large client of the respondent, she proffers no evidence to sustain this allegation.
>
> She has similarly failed to demonstrate how the alleged unfair discrimination was based on an arbitrary ground. Ms Mbana has not shown that the respondent's recruitment policy was irrational, that it amounted to discrimination or that it was unfair. Instead, the respondent has reasonably justified its policy and its application of the policy to her circumstances."

[14] A similar point was made by Cheadle AJ in *Lewis v Media 24 Ltd*[9]:

> "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."

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

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[9] (2010) 31 *ILJ* 2416 (LC) paras 36-37.

[16] Mr *Cook* argued that "the matter did not deal solely with the discrimination within a category of pregnant women, it also dealt with the discrimination of pregnant women in respect to other employees. It is submitted that the true complaint was not about the alleged unfair treatment of certain women within the category of pregnant women, rather it was about the discriminatory treatment of pregnant women as opposed to employees who were not pregnant."

[17] That submission is simply not borne out by the documents, evidence, arguments and facts before the arbitrator. Examples abound.

[18] In their referral to conciliation, the employees[10] describe their dispute as "unfair discrimination s 10 related to pregnancy"; but then they confine that dispute to state that the outcome they require is that "we want to be treated fair <u>like other pregnant employees</u>".[11]

[19] If there was any uncertainty that "other pregnant employees" were the comparators in respect of whom the complainants wanted to be treated alike, that was dispelled after conciliation had failed and they referred the dispute to arbitration. Again, they stated unequivocally in LRA form 7.13: "We want to be treated fair like other <u>pregnant employees</u>".

[20] At the start of the arbitration itself, the commissioner gave the parties an opportunity to make opening statements. The employees were represented by an AMCU trade union official, Mr Eric Ntsimane. He said:

> "According to Impala procedure concerning pregnant women there is a clause that says the pregnant women must be given alternative employment if such employment is available. And in this regard these ladies [i.e. the two employees who referred the dispute to arbitration] do have alternative jobs that was communicated to the union from the HR at the shafts and at top management. They communicated with us that they are having a problem, they've got a lot of women who are pregnant due to the strike.
>
> …

[10] At that stage, the two employees now before Court as well as three others.

[11] My underlining.

> After those ladies were given those alternate jobs, we were surprised some of them were withdrawn from those offices. … Now we feel very strongly that those who were removed were unfairly discriminated because there is a job…"

[21] It was clear that the Union's and the employees' complaint was that they were treated differently from other pregnant employees who were given alternative surface jobs. Not once did they complain about all pregnant women, or even pregnant women working underground, from being treated differently to other workers because of their pregnancy. Nor did they complain that the policy itself was unfair. In fact, explained Mr Ntsimane: "What I will ask the Commissioner to decide on is to see to it that the pregnant ladies are treated with respect and the company follows their procedure."[11] "Because they [the complainants] still haven't got their rights, the company is not even treating them as the treated the other pregnant ladies."

[22] At the arbitration the second respondent, Ms Tikane, was specifically asked under cross-examination: "Now why would you believe that you were unfairly treated?" Her response relates only to the other pregnant employees:

> "It's because after the meeting between the union and the management it was then said that the two ladies who reported after us they will be kept until they are 7 months pregnant and then they said the rest of us we can go home."

[23] The commissioner also pertinently asked the first respondent, Ms Jonase: "Why do you believe you were unfairly discriminated?" [*sic*]. Her response:

> "Because people that I was with them at the Minpro Service doing the same job they were left behind while I was sent home and even in my shaft they were people who reported while I was there but they were left behind without space."

[24] And when the commissioner asked her what relief she thought, she did not ask for the policy to be amended with regard to all pregnant employees. Her response was:

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[11] My underlining.

> "Commissioner the directive should state clearly that if the company has a policy that a pregnant woman will be afforded alternative employment it should be like that and if the company says it does not have alternative employment for pregnant women it should clearly state that not only other few people should have alternative employment."

[25] The arbitrator applied the incorrect test to establish the existence of discrimination based on pregnancy. On that ground alone, the appeal must succeed. The employees have not established discrimination on the ground of pregnancy.

Ultra vires?

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

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

[28] As Murphy J pointed out only last week in *South African Reserve Bank v Public Protector*[12] in the context of a review application, a functionary may not impose a remedy that goes beyond the original complaint before her. The same goes for this appeal: The commissioner was not empowered to impose the remedy that she did. The fairness of the policy was not part of the complaint before her. And Impala Platinum was not called upon to defend the fairness of the policy as applied to all pregnant employees. The appeal must succeed on that ground as well.

Duty to find suitable alternative employment

[29] The commissioner found that there is an absolute duty on Implats to find suitable alternative employment for pregnant employees and that the failure to do so is *per se* unfair discrimination. But that is not what the policy provides for, and the policy—which sets out guidelines in any event – was

[12] [2017] ZAGPPHC 443 (15 August 2017) paras 39-42.

not challenged. The policy aims to ensure that pregnant employees are not exposed to a dangerous workplace, i.e. underground. It states:

> "Where a woman is withdrawn from a particular job on grounds of health and safety the company will not guarantee 'risk-free' employment and will only provide alternative employment if such employment is available. It is not a legal requirement nor is it a legal obligation that Implats creates a position to accommodate such an employee."

[30] If the employer cannot find them suitable alternative employment, the maternity policy kicks in. In this case, there were no suitable alternative positions available for the complainants. And in those circumstances, there was no further duty on the employer to create non-existent positions for them. The employer acted lawfully, rationally and in accordance with its own policy.

Conclusion

[31] The complaint was not about the policy itself; it was directed at the way it was applied to these two (initially five) complainants vis-à-vis other pregnant employees. Put differently, the complainants compared themselves to other similarly situated pregnant employees.

[32] The complainants failed to establish any discrimination. The commissioner exceeded her powers when she ordered the company to amend its policy when that was not the complaint before her. And there was no absolute duty on the employer to find alternative positions for the complainants.

Costs

[33] Mr *Masher* asked for costs to follow the result. I am not persuaded. It appears that AMCU is no longer representing the two employees (at least not formally). They are still employed by Implats. They had an award in their favour, and it was not unreasonable of them to oppose the appeal. Taking the dictates of fairness into account, I do not consider a costs award to be appropriate.

Order

[34] I therefore make the following order:

34.1 The appeal in terms of s 10(8) of the Employment Equity Act is upheld.

34.2 The arbitration award of the fourth respondent, Commissioner E Hlungwane, dated 25 March 2015 is set aside.

34.3 It is declared that the appellant, Impala Platinum Ltd, did not unfairly discriminate against the first and second respondents.

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Anton Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	Dion Masher of Edward Nathan Sonnenbergs.
FIRST and SECOND RESPONDENTS:	A L Cook Instructed by Larry Dave Inc.