



Reportable

**REPUBLIC OF SOUTH AFRICA**

**THE LABOUR COURT OF SOUTH AFRICA, DURBAN**

**JUDGMENT**

Case no: D 312/2012

In the matter between:

**M I A**

**Applicant**

and

**STATE INFORMATION TECHNOLOGY**

**AGENCY (PTY) LTD**

**Respondent**

**Heard:** 19 and 20 November 2014

**Delivered:** 26 March 2015

**Summary:** Application brought in terms of section 6 of the Employment Equity Act by a parent in a duly registered union to have the respondent's decision to deny the applicant 4 months paid "maternity" leave following the birth of their child by a surrogate to constitute unfair discrimination.

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**JUDGMENT**

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GUSH J

[1] In this matter the applicant applies to have the respondent's refusal to grant him paid "maternity" leave on the basis that he is not the biological

mother of his child under a surrogacy agreement to constitute unfair discrimination on the grounds of gender, sex, family responsibility and sexual orientation as provided for in section 61 of the Employment Equity Act<sup>1</sup>. The relief the applicant seeks, for himself and “other similarly placed applicants” (sic) is for the court to direct the respondent to refrain from so discriminating and accord due recognition of their rights. In addition the applicant seeks damages and payment for the unpaid leave he was required to take to care for his child.

- [2] When the applicant applied for maternity leave, the respondent refused to grant maternity leave on the grounds that its policies and Basic Conditions of Employment Act only covered “female” employees and were silent on the issue of leave for surrogate parents. The respondent initially offered the applicant “family responsibility leave” or special unpaid leave. Subsequently the respondent granted the applicant two months paid adoption leave and two months unpaid leave.
- [3] The applicant is employed by the respondent in the capacity of a Senior Specialist: Business Architecture.
- [4] On 23 May 2010, whilst so employed, the applicant entered into a civil union with his spouse in accordance with the provisions of the Civil Union Act<sup>2</sup>.
- [5] On 4 July 2011 and in accordance with section 292 of the Children’s Act<sup>3</sup> the applicant and his spouse entered into a surrogacy agreement with a surrogate mother. The surrogacy agreement was confirmed as an order of court on 13 July 2011.
- [6] The relevant terms of the surrogacy agreement applicable to this matter are:
- a. The commissioning parents are the parents of the child born to the surrogate;

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<sup>1</sup> Act 55 of 1998

<sup>2</sup> Act 17 of 2006

<sup>3</sup> Act 38 of 2005

- b. The child is born from the surrogate mother as a result of artificial fertilisation using gametes from at least one of the commissioning parents ;
- c. The surrogate hands over the child to the commissioning parents at birth and the surrogate has no further contact with the child thereafter.
- d. The commissioning parents from that time onwards are, in terms of the agreement, deemed to be the parents of the child and are responsible for the child.

[7] In anticipation of the birth of the child the applicant applied to his employer the respondent for paid maternity leave from the date of confinement for a period of four months.

[8] The applicant, aggrieved by this decision referred a dispute regarding unfair discrimination the CCMA for conciliation. It is this dispute that is for this court.

[9] The law governing maternity leave is set out in section 25 of The Basic Conditions of Employment Act<sup>4</sup> and provides as follows:

(1) An employee is entitled to at least four consecutive months maternity leave.

(2) An employee may commence maternity leave –

a. at any time from four weeks before the expected date of birth, unless otherwise agreed; or

b. ...

[10] The respondent maternity leave policy is similar to the provisions of the Basic Conditions of Employment Act. The respondent's policy provides for "paid maternity leave of a maximum of four months"; that this leave "**shall** be taken four weeks prior to the expected date of birth or at an earlier date ..." (My emphasis). Whilst this was not an issue raised by the parties in

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<sup>4</sup> Act 75 of 1997

argument or in the pleadings it is clear that the requirement that the leave “shall” be taken four weeks prior to confinement is more restrictive than the provisions of the act.

[11] Unlike the basic conditions of employment act the respondent in addition grants two months “maternity leave on full salary to “permanent” employees adopting a child younger than 24 months.

[12] In argument the respondent denied that its policy was discriminatory and relied on the word “maternity” as being the defining character of the leave viz that it was only due to and a right to be enjoyed by female employees. The respondent in its pleadings averred that the maternity leave policy was specifically designed

“... to cater for employees who give birth ... based on an understanding that pregnancy and childbirth create an undeniable physiological effect that prevents biological mothers from working during portions of the pregnancy and during the post-partum period.

Thus at least 10 weeks of maternity leave benefits have been introduced to protect birth mothers from an earning interaction due to the physical incapacity to work immediately before and after childbirth.”<sup>5</sup>

[13] This approach ignores the fact that the right to maternity leave as created in the Basic Conditions of Employment Act in the current circumstances is an entitlement not linked solely to the welfare and health of the child’s mother but must of necessity be interpreted to and take into account the best interests of the child . Not to do so would be to ignore the Bill of Rights in the Constitution of the Republic of South Africa<sup>6</sup> and the Children’s Act. Section 28 of the Constitution provides:

28 Children

(1) every child has a right-

a. ...

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<sup>5</sup> Pleadings pages 9-10 paras 3.3 and 3.4

<sup>6</sup> 1996

b. To family care or parental care ...

- [14] The Children's Act specifically records not only that the act is an extension of the rights contained in Section 28 but specifically provides:

**Best interests of child paramount**

In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance must be applied.<sup>7</sup>

- [15] Surrogacy agreements are regulated by the Children's Act.
- [16] The surrogacy agreement specifically provides that the newly born child is immediately handed to the commissioning parents. During his evidence the applicant explained that for various reasons that he and his spouse had decided that he, the applicant, would perform the role usually performed by the birthmother by taking immediate responsibility for the child and accordingly he would apply for maternity leave. The applicant explained that the child was taken straight from the surrogate and given to him and that the surrogate did not even have sight of the child. Only one commissioning parent was permitted to be present at the birth and he had accepted this role.
- [17] Given these circumstances there is no reason why an employee in the position of the applicant should not be entitled to "maternity leave" and equally no reason why such maternity leave should not be for the same duration as the maternity leave to which a natural mother is entitled.
- [18] The legislation governing "civil unions" and surrogacy agreements is relatively recent. This legislation is a consequence of the adoption of the Bill of Rights in the Constitution. That our law recognises same-sex marriages and regulates the rights of parents who have entered into surrogacy agreements suggests that any policy adopted by an employer likewise should recognise or be interpreted or amended to adequately protect the rights that flow from the Civil Union Act and the Children's Act.

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<sup>7</sup> Section 9

[19] It is clear that in order to properly deal with matters such as this it is necessary to amend the legislation and in particular the Basic Conditions of Employment Act. In this matter however it is not the provisions of the Basic Conditions of Employment Act that are under scrutiny. The respondent relied on its own policies governing maternity leave in refusing to grant the applicant for month's maternity leave.

[20] The relief that the applicant sought was an order:

- a. directing the respondent to refrain from unfairly discriminating against the applicant and employees in the applicant's position;
- b. directing the respondent to accord due and full recognition of the applicant and employees in the applicant's position their rights as natural maternal parents;
- c. directing the respondent to recognise give effect the right to paid maternity leave to the applicant and employees in the applicant's position ;
- d. directing the respondent to pay the applicant the sum equivalent to 2 months remuneration;
- e. damages in the sum of R400,000;
- f. costs.

[21] I am not satisfied that it is necessary to make such an order. It is clear that the application of the respondent's policy on maternity leave discriminates unfairly against employees in the applicant's position. It is sufficient to direct that the respondent in applying its policy regarding maternity leave give recognition of the status of parties to a Civil Union and recognise the rights of commissioning parents in a surrogacy agreement.

[22] As far as the claims by the applicant for two months remuneration and damages are concerned, I am persuaded that the applicant is entitled to an order directing the respondent to pay him the sum equivalent to two

months remuneration but not to an order for damages. The applicant did not lead evidence sufficient to justify an order for damages other than for the amount he should have been paid for unpaid leave he was required to take.

[23] As far as costs are concerned there is no reason why in law or fairness that costs should not follow the result.

[24] Accordingly for the reasons set out above I make the following order:

- a. The respondent's application of its maternity leave policy by refusing the applicant paid maternity leave is declared to constitute unfair discrimination;
- b. the respondent is directed that in applying its policy regarding maternity leave it shall:
  - i. recognise the status of parties to a Civil Union; and
  - ii. not discriminate against the rights of commissioning parents who have entered into a surrogacy agreement.
- c. The respondent is ordered to pay the applicant an amount equivalent to two months' salary
- d. The respondent is ordered to pay the applicants costs.

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D H Gush

Judge of the labour Court of South Africa

## APPEARANCES

FOR THE APPLICANT:

Adv Linscott

Instructed by ENS Attorneys

FOR THE FIRST RESPONDENT:

Adv M Zulu

Instructed by Ngcube Inc Attorneys

LABOUR COURT