

The Maternity Protection Act No. 4 of 1998 (as amended)

In recent months I held meetings with several stakeholders who are parties to Collective Agreements. At these meetings I explained the short comings of some of the new collective agreements which are currently at the Court for registration and the reason why they cannot be registered. The parties who attended the meetings have amended their collective agreements. However, there are more than 40 collective agreements on my desk which cannot be registered due to the fact that articles which relate to Maternity benefits do not meet the legal standards.

As you may know, the Maternity Protection Act No. 4 of 1998 was enacted to protect pregnant employees' rights at work.

This legislation provides guidelines to employers on the procedure to be adopted for leave of an employee who is pregnant.

It also provides a minimum floor of rights for the pregnant employee and contributes to gender equity in the society.

The Act was recently amended by Act No. 7 of 2012; with this amendment the period of maternity leave to which an employee is entitled has increased from thirteen weeks to fourteen weeks.

Since the Amendment, there are a number of Collective Agreements which have been submitted to the Court for registration and for which objections are made by the Honourable Minister of Labour and Small and Microenterprise Development.

These objections are made not only, because parties have failed to acknowledge that the maternity leave entitlement has been increased from thirteen to fourteen weeks but also due to the fact that some critical rights offered to pregnant employees under the Act are ignored and therefore eroded.

The authors of the Article of Maternity Leave in each Collective Agreement seem to have differing interpretation of Section 7 of the Act as amended.

Section 7 embodies the spirit and intention of the Act which is the “Protection for Pregnant Employees.”

And it outlines the entitlement of a pregnant employee.

The employee is entitled to

- (a) Leave of absence for the purpose of maternity leave;
- (b) Pay while on maternity leave;
- (c) Resume work after such leave on terms no less favourable than were enjoyed by her immediately prior to her leave.

Yet, judging from the tone and actual drafting of maternity clauses in some of the collective agreements and the written policy in several companies, it appears that there are several employers who are either ambivalent or

unaware of the extent and nature of protection which the Act affords a pregnant employee.

For instance, the resumption of work by an employee is a right afforded under the Act. However there are several employers who view the right to resume work as a managerial decision and they impose certain constraints which the employee must adhere to before being allowed to return to work. Some Trade Unions accept these impositions seemingly oblivious of the workers' rights.

The second issue pertains to Section 8 of the Act. This section deals with the workers eligibility for maternity leave. As stipulated at Section 8(1) (a) of the Maternity Protection Act, the worker is not entitled to her rights under the Act unless she has been continuously employed for a period of not less than twelve months.

The Act provides that a pregnant worker must inform her employer no later than eight weeks, before the expected date of confinement that she will require leave of absence due to pregnancy.

Yet in many instances employers are insisting that the employee requests leave of absence no later than three months before the expected date of confinement.

Another issue related to the employee's eligibility for maternity leave is the fact that Section 8(1) (c) of the Act states that a worker has to submit a medical certificate to her employer, which should state the probable date of confinement.

It is clear that the Act has not given any time period for which the worker has to submit this medical certificate. Actually, the Act has afforded a discretion to the pregnant worker in relation to the submission of her medical certificate.

Some employers stipulate a time period for the submission of this medical certificate although the employer has no right under the Act to make such demands.

The Minister of Labour and Small and Micro Enterprise Development has objected to employers converting a

portion of pay to a loan in circumstances where the worker is entitled to half pay. Section 9(2) of the Act provides that an employee is entitled to receive pay from her employer to an amount equivalent to one month's leave with full pay and two months' leave with half pay.

It must be made clear that pay is a vested right and as such it is legally incorrect for pay to be viewed as a loan.

Another serious error pertains to the date on which the employee is proceeding on maternity leave. At Section 9(1) an employee is entitled to fourteen weeks maternity leave and she may elect to proceed on such leave six weeks prior to the probable date of confinement as stated in the medical certificate or at a subsequent date at the employee's discretion.

What we have been observing is that some employers impose a time for which the employee has to proceed on maternity leave and in so doing circumventing the discretion which is afforded to worker in law.

Finally Section 10(1) gives the employee a right to return to work. This section has detailed the procedure under different circumstances for an employee to return to work. Yet we have some employers who draft the terms and conditions under which an employee can return to work after maternity leave and they generally indicate that the employer has to take a decision as to whether or not the employee should return to work. Most of the cases which come to the court under the Maternity Protection Act relate to workers who have been refused employment after their maternity leave end.

I thought it was necessary to bring these concerns to your attention and I do hope that if your collective agreement has not been registered that all attempts will be made to meet with the other party with a view to making the necessary amendments. The Court will be issuing practice direction for matters related to the Maternity Protection Act and Witness Statements very shortly.