

Pregnancy in Mining

Balancing workplace safety and employment security

A legal framework for fair and workable
accommodation

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Protection can become exclusion

A pregnant employee discloses her pregnancy.

The mine removes her from hazardous work—but then sends her home without pay because it says no alternative position is available.

Who should bear the economic cost of the workplace risk?

01 Disclosure

She reports the pregnancy early.

02 Removal

Her ordinary work is treated as hazardous.

03 Unpaid absence

Safety is achieved by removing her income.

Section 26 BCEA: the employer's duties

01 **Protect**

The employer may not require or permit a pregnant or nursing employee to perform work that is hazardous to her health or the health of her child.

02 **Accommodate**

If she performs night work, or her work poses a danger to her health or safety or that of her child, the employer must offer suitable alternative employment.

03 **Preserve**

The alternative employment must be on terms and conditions that are no less favourable than her ordinary terms and conditions of employment.

04 **Determine practicability**

The duty to offer suitable alternative employment applies only if it is practicable for the employer to do so.

Practicability qualifies alternative employment—not the prohibition against hazardous work.

Mine Health and Safety Act 29 of 1996

THE GENERAL SAFETY DUTY

Section 2(1)(a)–(b)

The mine must, as far as reasonably practicable, be designed, constructed and equipped for safe operation and a healthy working environment, and operated and maintained so employees can work without endangering themselves or others.

Section 5(1)

The employer must, as far as reasonably practicable, provide and maintain a working environment that is safe and without risk to employees’ health.

SECTION 11 READ WITH THE CODE: ASSESS THE WORKPLACE RISK AND THEN ACT

THE MHSA RISK ASSESSMENT

Section 11(1) requires the employer to:

- identify hazards to health or safety to which employees may be exposed while at work — s 11(1)(a);
- assess the risks to health or safety to which employees may be exposed while at work — s 11(1)(b);
- record the significant hazards identified and risks assessed — s 11(1)(c); and
- make those records available for inspection by employees — s 11(1)(d).

Section 11(2)–(4)

After consulting the health and safety committee, the employer must implement and periodically review measures to eliminate, control or minimise risk.

THE PREGNANCY-SPECIFIC ENQUIRY UNDER THE CODE

Clause 5.7

After notification of pregnancy, the employee’s workplace situation should be evaluated. The evaluation should include an examination by a qualified medical professional, her job, workplace practices and potential workplace exposures.

Clause 5.8

If the evaluation reveals a risk, the employer must inform the employee and, after consultation, determine steps to prevent exposure by adjusting her working conditions.

Clauses 5.10–5.11

Where uncertainty remains, an occupational health practitioner may be consulted. If adjustments cannot be made, transfer should follow under s 26(2). The assessment must be reviewed regularly.

THE REQUIRED SEQUENCE

Evaluate the employee’s situation → identify any risk → consult and adjust working conditions → if adjustments cannot be made, transfer in accordance with s 26(2).

Pregnancy engages equality and reproductive autonomy

SECTIONS 9 AND 12(2): EQUALITY, REPRODUCTIVE CHOICE AND BODILY INTEGRITY

s 9(1)	Equality before the law	Everyone is equal before the law and has the right to equal protection and benefit of the law.
s 9(3)–(4)	Pregnancy is expressly protected	Neither the State nor a private person may discriminate unfairly, directly or indirectly, on a listed ground—including pregnancy.
s 9(5)	Unfairness is presumed	Discrimination on a listed ground is unfair unless it is established that the discrimination is fair.
s 12(2)(a)	Reproductive decision-making	Everyone has the right to bodily and psychological integrity, including the right to make decisions concerning reproduction.
s 12(2)(b)	Security in and control over the body	Bodily and psychological integrity also includes the right to security in and control over one’s body.

Pregnancy engages equality and bodily autonomy. Workplace safety measures must protect health without penalising reproductive choice.

The EEA prohibits pregnancy discrimination

SECTION 6(1) OF THE EMPLOYMENT EQUITY ACT 55 OF 1998

No person may unfairly discriminate, directly or indirectly, against an employee in any employment policy or practice on a listed ground—including pregnancy.

WHAT DOES SECTION 6(1) COVER?

An employment policy or practice

Section 1 includes decisions about remuneration and benefits; terms and conditions of employment; job assignments; the working environment; transfer; demotion; discipline and dismissal.

HOW DOES IT APPLY HERE?

The pregnancy-related decision

Removing an employee from her ordinary work, deciding whether to accommodate or transfer her, and placing her on unpaid leave are employment decisions. If those decisions are taken because she is pregnant, section 6(1) is engaged.

THE NEXT QUESTION

Section 6(1) does not make every pregnancy-related distinction unlawful. The remaining enquiry is whether the treatment amounts to discrimination and, if so, whether it is unfair. Section 11(1) then places the burden on the employer.

Section 11(1): the outcome turns on the facts

THE BURDEN WHERE PREGNANCY DISCRIMINATION IS ALLEGED

Because pregnancy is a listed ground, the employer bears the burden under section 11(1): it must show that the alleged discrimination did not occur, or was rational and not unfair, or otherwise justifiable.

WHAT MUST BE PROVED?

The employer proves the facts

- the precise hazard and the employee's actual exposure;
- the risk assessment and any occupational-health advice;
- the controls or adjustments investigated;
- the alternative work considered and whether it was suitable and practicable; and
- whether the policy was applied consistently.

WHAT DOES THE COURT DECIDE?

The court evaluates those facts

In *Moleme*, the Court measured rationality and justifiability against the steps actually taken to comply with section 26 of the BCEA and the Code. The same legal test may therefore produce different outcomes where the work, risk, assessment, accommodation options or evidence differ.

Mbana: the unfair-discrimination test

Mbana v Shepstone & Wylie [2015] ZACC 11 | Constitutional Court

Context The employee alleged race and social-origin discrimination arising from differential treatment in a candidate-attorney recruitment process. Although Mbana was not a pregnancy case, the Constitutional Court stated the general EEA test.

THE THREE-STAGE ENQUIRY — PARAGRAPH 26

- 1

Differentiation

Does the employer’s policy or conduct differentiate between people?
- 2

Discrimination

Does the differentiation amount to discrimination?
- 3

Unfairness

If it is discrimination, is the discrimination unfair?

THE CONSEQUENCES — PARAGRAPHS 25–27

- Listed ground**

If the discrimination is based on a ground listed in section 9 of the Constitution, unfairness is presumed.
- Burden of proof**

For a ground listed in section 6(1) of the EEA, section 11(1) requires the employer to prove that the discrimination did not occur or was justified.
- Outcome**

Ms Mbana’s claim failed because the employer objectively justified the different treatment on the facts.

Paragraph 38 Business and operational needs are not accepted on the employer’s own say-so: genuine and legitimate needs must be objectively demonstrated. In a pregnancy case, that requires evidence—not a general assertion that mining is hazardous.

Suitable alternative work—and the ‘no work, no pay’ gap

SECTION 26(2) OF THE BCEA: WHEN DOES THE DUTY ARISE?

Trigger	s 26(2)(a)	The employee performs night work, or her work poses a danger to her health or safety or that of her child.
Duty	s 26(2)	The employer must offer suitable alternative employment during pregnancy and for six months after birth.
Protected terms	s 26(2)	The alternative must be on terms and conditions no less favourable than her ordinary terms and conditions.
Qualification	s 26(2)(b)	The duty to offer suitable alternative employment applies only if it is practicable for the employer to do so.

The statutory gap

Section 26(1) prohibits hazardous work. Section 26(2) preserves terms only where suitable alternative employment is practicable. The BCEA does not expressly determine remuneration where the ordinary work cannot safely continue and no suitable alternative is practicable.

The enquiry therefore returns to the EEA and Mbana: did unpaid exclusion differentiate on pregnancy; was it discrimination; was it unfair; and can the employer objectively justify both its process and the economic consequence?

Manyetsa: the facts and the search for alternative work

MANYETSA v NEW KLEINFONTEIN GOLD MINE (PTY) LTD [2017] ZALCJHB 404

THE EMPLOYEE AND THE POLICY

Ms Manyetsa was a plant electrician in the metallurgical department. Her work area was treated as hazardous because it involved cyanide, ionising radiation, hazardous gases and fumes. The mine’s maternity and women-in-risk-areas policy required every endeavour to find suitable risk-free work; failing that, it provided for extended unpaid maternity leave.

After disclosure She was temporarily assigned administrative duties while the mine considered possible placements. On 3 July 2014 she was informed that no alternative position was available and was placed on extended unpaid leave until 20 November 2014.

THE POSITIONS CONSIDERED

Plant / AMMS administration	No established position in the labour plan and no vacancy. The temporary duties did not constitute an available post.
Control-room supervisor	Available, but not suitable: she lacked underground experience, a blasting certificate and miner qualification. Training would take nine months and could not be done on surface.
Receptionist	She ended the interview after being told that the position carried less favourable terms than her electrician post.
Temporary AMMS cover	The temporary incumbent-replacement arrangement was on inferior terms and did not establish an enduring suitable vacancy.

THE CLAIM Ms Manyetsa alleged that the policy and its implementation unfairly discriminated against her on pregnancy and race, contrary to section 6(1) of the EEA. She argued that section 26(2) of the BCEA guaranteed suitable alternative employment on terms no less favourable than her ordinary terms.

The decisive factual question became whether the mine had genuinely investigated available and suitable alternatives before invoking unpaid leave.

Manyetsa: precedent and limits

WHAT SECTION 26(2) REQUIRES

Genuine endeavour — paras 32–33	The search may not be a meaningless box-ticking exercise. Whether genuine endeavours were made is a question of fact and evidence.
Suitability — para 46	Consider availability; whether the post is a genuine alternative; job content; skills and experience; terms and responsibilities; and the employee’s personal circumstances.
No guaranteed position — paras 47–48	Section 26(2) guarantees the right to be considered for suitable alternative work. It does not guarantee that a post will be available or require the employer to create one.
Practicability	The alternative must be both available and suitable for that employee. A position may be available but unsuitable—or appear suitable but not actually be available.

The statutory gap — paras 39 and 65

The BCEA and Code do not determine what must happen when no suitable alternative is practicable. The Court said the employer could fill the gap from a range of possibilities: paid suspension, unpaid suspension, or another form of leave that does not harm the employee financially.

The outcome—and the limit

The claim was dismissed because the policy expressly provided for unpaid leave and the mine proved genuine endeavours. Manyetsa is not blanket authority for immediate unpaid leave: the outcome depends on the policy, the process, the posts investigated, the employee’s suitability and the evidence.

Mahlangu: the policy, the comparator and the evidence

MAHLANGU v SAMANCOR CHROME LTD (EASTERN CHROME MINES) [2020] ZALAC 14

THE FACTS

Ms Mahlangu was an underground heavy-duty truck driver. She reported her second pregnancy within a three-year period on 28 May 2014. The mine immediately relieved her of hazardous underground duties and placed her on unpaid leave from 4 June until her maternity leave began on 29 November 2014.

Her complaint

She alleged that she was the only pregnant employee denied alternative work and that the real reason was her second pregnancy within the policy’s three-year cycle.

THE POLICY

The Pregnancy in the Workplace Procedure stated that:

- where reasonably practicable, the company may offer suitable alternative work to an employee engaged in risk work;
- if possible, the alternative work will be on no-less-favourable terms;
- if there is no suitable alternative work, the employee will be sent on unpaid leave; and
- maternity leave taken for a second pregnancy within a three-year cycle would be unpaid.

THE EVIDENTIAL CONFLICT

Employer’s first version HR initially linked the decision to the policy governing a second pregnancy within three years.

Changed version HR later said no alternative position could be found.

Contemporaneous record The leave schedule stated: ‘unpaid leave — Second Occurrence in a three-year cycle’.

Comparator Another employee who disclosed her pregnancy several days later was placed in alternative work; the differentiation was not satisfactorily explained.

Mahlangu: the employer failed to justify the differentiation

THE LABOUR APPEAL COURT’S ANALYSIS

1. Differentiation	Ms Mahlangu was treated differently from other pregnant employees: she was denied alternative work while another employee who disclosed later was accommodated.
2. Discrimination	The differentiation arose from her pregnancy for a second occasion within the three-year cycle—a listed ground under section 6(1) of the EEA.
3. Unfairness	Under section 11(1), the mine had to show that the discrimination was rational and not unfair or otherwise justifiable. Its conflicting versions and unexplained comparator meant that it failed to do so.
4. Result	The refusal to place her in alternative employment from 4 June to 28 November 2014 constituted unfair discrimination on pregnancy.

The order

The Court declared unfair discrimination and ordered payment of the salary Ms Mahlangu would have earned during the period of unpaid exclusion. Separate damages were refused because they had not been proved.

The precedent—and its limit

Mahlangu does not hold that alternative work is always available or that every unpaid-leave policy is invalid. It shows that the employer must prove its stated reason with consistent, contemporaneous evidence—and must explain why a later-disclosing pregnant employee was accommodated when the claimant was not.

Moleme: ‘no alternative post’ was not the end of the enquiry

MOLEME v INDURADEC COATINGS (PTY) LTD [2025] ZALCD 18

WHAT HAPPENED

Ms Moleme was an R&D chemist working in a laboratory with solvent-based coatings and chemical substances. After she disclosed her pregnancy, she asked to be removed from the laboratory because of the possible risk to her unborn child. The employer allowed her to perform limited functions away from the laboratory.

The employer then placed her on extended unpaid maternity leave. It said that laboratory work was unsafe, no alternative position existed, and section 26(2) required alternative work only where that was practicable.

WHAT THE EMPLOYER DID—AND DID NOT DO

Medical practitioners	Her gynaecologist and GP said workplace safety fell outside their expertise and recommended assessment by a health-and-safety professional.
Respirator proposal	The employer considered whether a respirator might permit continued laboratory work, but obtained no expert determination.
Consultation	The parties discussed alternatives. The employer rejected research-only work because no relevant project was available.
Missing step	No occupational-health or safety practitioner assessed the actual exposures or feasible modifications to her workstation and duties.

THE QUESTION THE COURT SEPARATED

Section 26(2): Was a suitable alternative position practicably available?

EEA justification: Was exclusion from her existing job necessary, rational and fair?

These were related questions—but they did not have the same answer.

Moleme: the missing risk assessment made the exclusion unjustifiable

THE COURT'S TWO DISTINCT FINDINGS

1. Section 26(2) was satisfied

The duty to offer suitable alternative employment is conditional on practicability. On the evidence, there was no vacant alternative position and no viable research-only function. The employee had not identified another available post. The employer therefore proved that alternative employment was not practicable.

Manyetsa remained applicable: section 26(2) does not guarantee a new post and does not oblige the employer to create work that does not exist.

The order

The Court declared unfair discrimination and awarded compensation equal to 11 months' salary—R724 086—plus costs. It considered the lost income, financial consequences and infringement of dignity.

2. But the discrimination was not justified

Removing Ms Moleme and placing her on unpaid leave because she was pregnant constituted discrimination on a listed ground. Under section 11(1) of the EEA, the employer had to establish that the discrimination was rational and not unfair, or was otherwise justifiable.

It could not do so. Without the assessment required by clauses 5.7 and 5.10 of the Code, the employer did not know whether exposure could be removed or reduced, or whether adjustments, protective equipment or changes to working conditions could permit her to continue safely in her own job.

The principle for mining employers

An employer cannot move directly from 'possible hazard' to 'unpaid leave'. It must first establish the actual risk and consider whether that risk can be eliminated, controlled or accommodated in the employee's existing work. Only then does the enquiry move to suitable alternative employment—and, if none is practicable, the legal consequences of exclusion.

What if there is genuinely no reasonable accommodation?

THE CURRENT POSITION AFTER MANYETSA, MAHLANGU AND MOLEME

Before unpaid leave can be considered

Actual risk	An individual assessment must establish the danger arising from the employee's actual duties and working conditions.
Existing work	The employer must test whether adjustments to duties, hours, exposure, equipment or working conditions can make her own work safe.
Alternative work	It must genuinely investigate available positions, suitability, the employee's skills and any reasonable training.
Justification	The employer must prove that exclusion is rational and not unfair or is otherwise justifiable under section 11(1) of the EEA.

What the cases now establish

Manyetsa (2017)	Alternative employment is not guaranteed; the employer need not create a post. Unpaid leave may follow only after genuine endeavours under an applicable policy.
Mahlangu (2020)	The employer must give a consistent, evidence-based reason and explain the different treatment of comparable pregnant employees.
Moleme (2025)	Even where no alternative post exists, exclusion is unjustifiable if the employer did not assess whether the employee's own work could be made safe.

THE RESULT

Unpaid leave remains a possible measure of last resort. It is not automatic: the employer must prove both the factual basis for excluding the employee and the fairness of doing so.

The law requires a balance—not an automatic outcome

SECTION 26(2) REQUIRES ALTERNATIVE EMPLOYMENT TO BE BOTH SUITABLE AND PRACTICABLE

The employee's rights

- equality and freedom from pregnancy discrimination;
- reproductive autonomy;
- a safe working environment;
- fair labour practices; and
- continued employment and economic security.

The employee cannot be required to choose between protecting her pregnancy and preserving her livelihood.

The employer's legitimate interests

- receiving the work for which it remunerates the employee;
- maintaining safety, competence and production standards;
- paying ordinary terms while the employee may perform less complex work;
- covering or redistributing her ordinary functions;
- avoiding duplication and unsustainable operational cost; and
- not creating a post or disregarding essential qualifications.

These are genuine operational and financial considerations—but they must be established with evidence.

THE BALANCE

The question is not whether accommodation is cost-free. It is whether suitable alternative employment is reasonably workable in the circumstances, after the consequences for both parties have been properly considered.

How should the employer balance suitability and skills?

AN AVAILABLE POSITION IS NOT NECESSARILY A SUITABLE POSITION

The suitability enquiry

The employer must identify:

- the position’s essential qualifications, licensing and safety requirements;
- the employee’s existing skills, experience and ability to perform the work safely;
- whether a skills gap can reasonably be addressed through short-term training;
- whether duties can be adjusted temporarily without compromising safety or operations; and
- whether the placement can be made on terms no less favourable than the employee’s ordinary terms.

Applying the balance

Unskilled employee → specialist post

The employer need not disregard essential qualifications or place an employee in a safety-critical position she cannot perform. It must, however, consider training where the gap can reasonably be bridged.

Highly skilled employee → less complex work

Temporary placement may be suitable if she can perform the work safely. Her ordinary terms and conditions may not be reduced merely because the temporary duties are less complex.

No workable match

The employer should consider advance cross-training, temporary reassignment across departments and, through policy or collective agreement, paid protective leave.

THE PRINCIPLE

Suitability protects both sides: the employee must be capable of performing the work, and the employer must not impose unnecessary barriers to her placement.

Collective bargaining can close the statutory gap

THE PARTIES SHOULD AGREE ON THE PROCESS AND THE FINANCIAL PROTECTION BEFORE PREGNANCY ARISES

1. A binding pregnancy and high-risk work agreement

The agreement should require:

- individual occupational-health risk assessment;
- consideration of adjustments to existing work;
- a documented search across the operation;
- reasonable training and temporary reassignment;
- consultation with the employee and her union;
- written reasons and an internal review; and
- unpaid leave only after genuine endeavours have failed.

2. A negotiated income-protection formula

The collective agreement must determine:

- the contribution base: ordinary basic or pensionable salary;
- the contribution rate and employer–employee split;
- the benefit: an agreed percentage of ordinary basic salary;
- a minimum benefit and maximum monthly cap;
- when payment begins and how long it continues; and
- deductions for UIF or other remuneration received for the same period.

The contribution and benefit rates must be actuarially costed and agreed; they should not be assumed or fixed without evidence.

NO BOX-TICKING

The agreement must bind the employer to take the required steps; it cannot operate as advance permission to place pregnant employees on unpaid leave. The financial risk should be shared rather than transferred to the individual woman.

CONCLUSION

The law requires a balance— not an automatic outcome

THE EMPLOYEE

Health and safety • equality • reproductive autonomy
• continued employment and income

THE EMPLOYER

A safe workplace • performance for
remuneration • operational sustainability

THE REQUIRED ENQUIRY

Identify the actual risk → investigate controls and adjustments → offer suitable alternative work if practicable → justify the final decision on evidence.

THE INDUSTRY RESPONSE

If neither adjustment nor transfer is genuinely practicable, advance policies and collective agreements should address the financial risk fairly and sustainably.

Safety must not become automatic economic exclusion.

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Kagiso Dulcie Magano is a practising advocate and one of the founding members of the Tshwane Society of Advocates. Her practice includes labour law, tax law, administrative law and commercial litigation.

She holds an LLB and an LLM in Taxation from the University of Pretoria, as well as an LLM in Corporate Law from the University of the Witwatersrand. She is currently completing an LLM in International Economic Law through the University of South Africa. Before joining the Bar, she practised as an attorney, conveyancer and notary.

She periodically acts as a Judge of the Labour Court. She is also a member of the Training Committee at the Tshwane Society of Advocates, Chairperson of the Tax Board, and a member of the Financial Services Tribunal and the Financial Intelligence Centre Appeal Board and serves on the board of the Bafokeng Women's Foundation.

Every mine worker returning from work unharmed every day. Striving for zero harm in our lifetime.