

EMPLOYMENT

Are all parents created equal: The Constitutional Court confirms the invalidity of legislation relating to forms of parental leave

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by Kerry Fredericks – Director, Thembelihle Tshabalala – Associate and Gracie Sargood – Candidate Attorney

In the recent highly anticipated Constitutional Court judgment of *Van Wyk and Others v The Minister of Employment and Labour and Others* (CCT 308/23) [2025] ZACC 20 handed down on 3 October 2025, the Constitutional Court, *inter alia*, confirmed the judgment of Deputy Judge President Sutherland of the High Court of South Africa which found that certain provisions of the Basic Conditions of Employment Act 75 of 1997 (**BCEA**) and the Unemployment Insurance Act 63 of 2001 (**UIF Act**) relating to maternity, parental, adoption and commissioning parental leave, and to the financial benefits payable during such periods of leave, unfairly discriminated against different classes of parents and children.

Prior to the Constitutional Court's judgment, the legal position, as encapsulated in the BCEA and the UIF Act, surrounding parental leave posed two main challenges.

The first being, the differentiation between different categories of parents (namely birth mothers, fathers, parents in same-sex relationships, adoptive parents and commissioning parents) and the different categories of children (namely, a child born by their birth mother, a child born by surrogacy and an adopted child). This difference in treatment manifested as birth mothers being afforded four months' maternity leave, four weeks of which could commence prior to the birth, while adoptive and commissioning parents were only entitled to 10 days' parental leave for one parent and 10 weeks' parental leave for the other, irrespective of gender. The challenge was that the existing leave regime offered significantly greater leave benefits to birth mothers compared to the other categories of parents.

The second challenge was the difference between adoptive parents adopting children younger than two years old and those adopting older children. Only adoptive parents adopting children younger than two years old were entitled to statutory parental leave.

The Constitutional Court has now determined that the sections of the BCEA governing these leave benefits caused unfair discrimination against different categories of parents and children, and has ordered the Minister of Employment and Labour to amend the BCEA and UIF Act within 36 months to address these discriminatory practices.

In the interim, pending these amendments, the Constitutional Court has ordered that portions of section 25 of the BCEA are temporarily amended with immediate effect to afford parents the opportunity to share a total of four months and 10 days' parental leave between them, either concurrently or consecutively, as they deem fit — a period that combines the previous 10 days' parental leave and four months' maternity leave.

The Constitutional Court's Order is, however, qualified in several respects, including the following:

- In the case of biological birth, the birth mother must be given preference in respect of the leave available in order to prepare for and recover from birth (i.e. at least four weeks before and six weeks after the birth). Thereafter, parents who are both employed may share the remaining days as they choose.
- Where only one parent is employed, that parent will be entitled to the full parental leave.
- Parental leave is only afforded to a party who has assumed parental rights and responsibilities over a child as contemplated in the Children's Act 38 of 2005.
- Where there is disagreement between parents about the allocation of leave, it shall be apportioned so that each parent's total leave is as close as possible to half of the four months and 10 days, provided it is taken within four months from the child's birth.

The Constitutional Court recognised that parenting styles and family structures are unique and personal. Any parent, irrespective of gender, who welcomes a child by surrogacy, adoption, or biologically, will now be afforded the opportunity and dignity to structure their parenting regime themselves.

The Court's judgment is a significant step toward eliminating unfair discrimination, creating equality in the workplace, and advancing the dignity of all parents and children.

However, the interim measures established by the Constitutional Court may pose practical challenges for employers. Careful consideration will need to be given to the fair allocation of parental leave to both parents while ensuring the physical wellbeing of the birth mother and avoiding potential abuse and/or misuse.

In giving effect to the Constitutional Court's interim measures employers will need to give careful consideration to the challenges posed by privacy legislation, in the form of the Protection of Personal Information Act 4 of 2013, when seeking to apportion leave between parents as well as the risks that will inevitably arise in circumstances where the parents themselves are not in agreement as to the allocation of parental leave.

Employers are advised to address these concerns by implementing appropriate internal measures until such time as the BCEA has been amended.



Kerry Fredericks

Director

[View Profile](#)



Thembelihle Tshabalala

Senior Associate

[View Profile](#)