

EMPLOYMENT

Cutting the baby in half – when equality meets reality: Paid maternity leave after Van Wyk v Minister of Employment and Labour

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The Constitutional Court’s recent judgment in *Van Wyk and Others v Minister of Employment and Labour and Others (CCT 308/23) [2025] ZACC 20* has been widely celebrated as a victory for parental equality. The Court has confirmed that certain provisions of the Basic Conditions of Employment Act (BCEA) and Unemployment Insurance Act (UIF Act) unfairly discriminated between categories of parents and children and has introduced an interim regime allowing parents to share a combined four months and ten days of leave between them when their child is born or adopted.

The Court’s order suspends and modifies the operation of section 25 of the BCEA, creating a shared-leave entitlement for parents. This aspect of the judgement alone is expected to be the cause of disputes; the Court even anticipates that in the event of disagreement, the leave contemplated in the relevant section should be apportioned between the parents in such a way that each parent’s total parental leave is as close as possible to half of four months and 10 days. In practice, disagreements are likely to arise. Employers, especially where the male and female partner are employed by different organizations (which is the overwhelming majority of all dual-income households), are likely to now be pulled into the middle of these disputes.

Even more worryingly, while the judgment is transformative in principle, it leaves employers facing an uncomfortable additional question in practice: what happens to existing paid maternity-leave policies that apply only to female employees? The reason for this is that the BCEA establishes minimum unpaid leave entitlements; most South African employers, particularly in the professional and corporate sectors, have long gone further than the statutory minimum by granting paid maternity leave to female employees. Those benefits have typically been designed around the former BCEA regime – four months’ maternity leave linked to childbirth. Under the new dispensation, these benefits now intersect with a gender-neutral leave structure that the BCEA never contemplated when those policies were drafted.

The immediate question is: if the employer continues paying only female employees, is that unfair discrimination? At first glance, yes – a policy that pays only female employees during parental leave appears inconsistent with the new constitutional principle of equality.

The Court recognised that the categorisation of a birth mother as a distinct category of beneficiary of leave entitlements, apart from “other mothers or parents” constituted unfair discrimination, primarily on the basis that the Minister of Employment and Labour ultimately conceded this to be the case and did not further argue this distinction. However, this glosses over the biological case that a birth mother, as opposed to any other category, requires a period of physical recovery and preparation. As such, this period of preparation and recovery would likely substantially decrease such mother’s leave entitlement in the event that she is forced to take an equal portion of parental leave with the father of the child if they are unable to reach agreement on the proportioning of such leave. As such, birth mothers are now treated the same as “other mothers or parents”. This is problematic for paid maternity and parental leave policies, as there does not appear to be any substantial basis upon which a distinction can be made between a birth mother and other mothers or parents. The only advantage that a birth mother appears to obtain from this judgement is that “*the mother must have preference in respect of the time currently allocated as preparation for and recovery from birth*”.

The following are common scenarios where paid leave policies may need to be reconsidered and redrafted from current formulations.

Biological parents

An employer’s policy currently grants four months’ fully paid maternity leave to birth mothers. A male employee whose partner gives birth now requests two months’ shared leave under the Constitutional Court order.

Although the employer must grant this leave request, if the employer refuses to pay the male employee on the basis that only women receive paid maternity leave, the differentiation may no longer be objectively justifiable.

Parents through surrogacy and adoptive parents

Surrogate parents, same-sex and adoptive are entitled to share four months and ten days of parental leave. A paid-maternity-leave policy limited to “female employees who give birth” will exclude them entirely, despite their parental role being equivalent. This exclusion has no medical justification and would almost certainly constitute unfair discrimination.

The way forward for employers

The immediate legal risk is not that existing maternity policies are unlawful per se, but that their application may now result in indirect unfair discrimination. Employers should therefore review and amend their maternity-leave and parental-leave policies to align with the Constitutional Court’s interim framework. They should consider allowing for paid maternity benefits to birth mothers, based on the election of the parents, with a minimum requirement that the birth mother should be entitled to not less than half of four months and 10 days. All other categories of parents entitled to parental leave should then also have a paid entitlement. The likely outcome of this requirement for fairness may in fact have an opposite effect, namely that paid entitlements are removed for all categories and policies are updated (following fair processes to do so) to take away paid maternity benefits. The economic reality of the workplace may simply be that employers cannot afford a further large percentage of their workforce being unproductive for at least two months, while still being paid.

Additionally, policies should clarify eligibility and proof requirements, ensuring compliance with the Protection of Personal Information Act No.4 of 2013 when verifying the other parent’s employment and leave allocation.

The Constitutional Court has rightly moved South African law toward equality of parenting. Yet equality on paper does not automatically translate into fairness in the workplace. In striving for equality, the Court may have forgotten Solomon’s wisdom — equality doesn’t always mean cutting the baby in half. Employers who continue to pay only female employees for parental leave may find themselves defending policies that no longer fit the constitutional landscape.



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