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Parenting is a job for two: The High Court declares the provisions relating to parental leave unconstitutional

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In the matter of *Van Wyk and Others v The Minister of Employment and Labour and Others* handed down on 25 October 2023 by Deputy Judge President Sutherland, the High Court, inter alia, declared unconstitutional certain sections of the Basic Conditions of Employment Act 75 of 1997 ("**BCEA**") relating to maternity, parental, adoption and commissioning parental leave, as well as sections of the Unemployment Insurance Act 63 of 2001 ("**UIF Act**") pertaining to financial benefits payable during such leave period.

The Court found that these provisions unfairly discriminated between mothers and fathers and between parents, where the child was born of the mother, as opposed to surrogacy or adoption.

This article will explore the High Court's reasoning in reaching its decision and assess the impact of this judgment on employees, employers and the State going forward.

Summary of the Judgment

The court was called upon to consider whether sections 25, 25A, 25B and 25C of the BCEA (which regulate the prescribed minimum periods for maternity, parental, adoption and commissioning parental leave) and the corresponding provisions of the UIF Act (where a parent-employee is not entitled to receive payment from the Unemployment Insurance Fund ("**UIF**")) offends section 9 (the right to equality) and section 10 (the right to dignity) of the Constitution of the Republic of South Africa, 1996 ("**Constitution**").

The court had regard to the test for unfair discrimination, as set out in *Harksen v Lane***[1]** and found that the sections in question differentiated on the grounds of gender and categories of parenthood. The court then turned to consider whether this differentiation amounts to unfair discrimination.

The first instance of potential unfair discrimination concerns the impugned provisions' different treatment of mothers and fathers. Section 25(1) of the BCEA affords mothers four months' maternity leave (one month of which can be taken before the birth), while section 25A(1) and 25A(2)(a) of the BCEA affords fathers only 10 days' parental leave, from the date of the child's birth.

The court found that these sections impair fathers' dignity, by treating their involvement in the child's early parenting as marginal. Further, by assigning the mother the role as the primary caregiver, the sections impair the dignity of both parents.

The court was of the view that parents, and not the legislature, should make the decision as to who the primary caregiver of a new born child should be.

The second potential instance of unfair discrimination relates to the differential treatment of three classes of parents namely: birth parents, adoptive parents and commissioning parents (parents of a surrogate child). Adoption and commissioning parental leave is governed by section 25B and 25C of the BCEA respectively.

In both instances, one parent is entitled to 10 weeks' leave while the other is entitled to 10 days leave, with no differentiation being drawn between mothers and fathers. For adoptive parents, this leave only applies in the case of children below the age of two.

The court found that the cumulative leave adoptive and commissioning parents are afforded amounts to six weeks less leave than the leave afforded to birth parents. The court, accepting that a birth mother will need six weeks to recover physically from the birth, noted that the birth mother will also be nurturing her child during this period.

The court held that the only differentiating factor between a birth-mother, on the one hand, and commissioning and adoptive mothers, on the other, is that the latter two did not experience child-birth. Consequently, the court held that this distinction alone was not sufficiently compelling to deprive commissioning and adoptive mothers of the same amount of leave.

Consequently, the court found that commissioning and adoptive parents are subjected to unfair discrimination and inequality by not being afforded the same period of leave to nurture their children.

The third potential instance of unfair discrimination relates to the BCEA only entitling adoptive parents to leave in circumstances where the children are younger than two years old.

The court opined that, while adoptive children older than two years and their adoptive parents could experience benefits from parental leave in respect of their bonding, the BCEA is not the appropriate statute to regulate the bonding experience of parents and children. Rather, it is concerned, inter alia, with early-child care.

Consequently, the court found that the BCEA does not unfairly discriminate against adoptive parents by restricting the leave entitlement to adoptive parents with children younger than two years old.

Drawing from this reasoning, the court found the impugned provisions of the BCEA to be invalid in that they offend section 9 and 10 Constitution by unfairly discriminating between mothers and fathers and different classes of parents.

The court commented that the manner in which the BCEA is currently structured gives effect to the prevailing societal norms of what family life should look like where the mother is seen as the primary caregiver and nurturer of a child.

The court found that the BCEA, which has been enacted to address minimum employee benefits, cannot be used to regulate and/or prescribe the manner in which parent-employees should organise their family lives and that the law and society should not be confined to the application of one modality to the exclusion of others.

To permit this would allow a move away from the egalitarian norms promoted by our Constitution. Statutes, such as the BCEA, must recognise the evolving dynamic of the family where both parents should have the option to engage equally in nurturing their child, should they elect to do so.

Having found the relevant sections of the BCEA and the UIF Act unconstitutional, the court directed parliament and the legislature to address the unconstitutional provisions of the BCEA and the UIF Act within a period of two years. In the interim period, the court directed that all parents must enjoy four consecutive months' parental leave, to be shared between the parents at their election.

Legal and Practical Implications on the Judgment

While the judgment is a positive and significant move towards eliminating unfair discrimination, creating equality in the workplace and advancing the dignity of all parents, there is little doubt that the implementation of the court's interim order is likely to create challenges in the workplace.

In circumstances where parent-employees elect to share the four month parental leave at their election, does this mean that each parent can unilaterally elect to alternate taking the leave daily, weekly or monthly, rather than dividing the four months in two equal portions.

If the parents elect to take the leave on, for example, alternative days, this could be unduly disruptive to both employers.

This begs the question whether the employers can, in these circumstances, refuse to allow the parents to take alternative leave on a daily basis or whether this refusal would give rise to a violation of the BCEA, as it must now be read in light of the

judgment.

A further challenge in the election to share parental leave could arise where one employer provides paid maternity leave while the other employer does not.

Inevitably, if the mother, who would ordinarily be entitled to paid maternity leave, elects to share parental leave with the father, in circumstances where the father's employer does not provide paid parental leave, the parents will have to accept that the father's parental leave portion will be unpaid.

The challenges do not end there. One of the concerns raised by the Minister of Employment and Labour related to the direct financial impact of the legislative amendment to the UIF.

With both parents entitled to claim for an extended period of parental leave, the number of employees eligible to claim from the UIF will inevitably increase leading to an increase in UIF costs.

However, in response to this challenge the court took the view that an increase in UIF costs should not preclude the provisions of the BCEA and the UIF Act being declared unconstitutional.

While the judgment is undoubtably a step forward in the ongoing struggle to eliminate unfair discrimination in the workplace, the practical workplace consequences of the judgment have yet to be fully comprehended, more so having regard to the current distressed economic environment in which we find ourselves.

Footnotes

[1] 1998 (1) SA 300 (CC)



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