Employment Law

ALERT

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CLIFFE DEKKER HOFMEYR

INCORPORATING
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"All parents of whatever stripe": Changing the landscape of parental and maternity leave

On 25 October 2023, the Gauteng High Court per Sutherland DJP handed down judgment declaring the provisions of the Basic Conditions of Employment Act 75 of 1997 (BCEA) relating to maternity, parental, adoption and commissioning parental leave and the relevant provisions of the Unemployment Insurance Act 63 of 2001 (UIA) unconstitutional and invalid for falling foul of the rights to equality and dignity in terms of sections 9 and 10 of the Constitution of the Republic of South Africa, 1996 (Constitution).

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The court suspended the declaration of invalidity for two years in order for Parliament to affect the required amendments to cure the unconstitutionality of the provisions of the BCEA and UIA. In the interim, the court has ordered a reading of the legislation that affords all parents four consecutive months' parental leave (parents of a qualifying child are in a position to share the four months leave as they elect) until Parliament remedies the defect. In ordering interim relief, the court held as follows:

> *"In my view the appropriate immediate means by which to remove inequality, in the interim period, is the proposal advanced by the Van Wyks; i.e. all parents of whatever stripe, enjoy 4 consecutive months' parental leave, collectively. In other words, each pair of parents of a qualifying child shall share the 4 months leave as they elect."*

The application was launched by Werner van Wyk and his spouse, Ika van Wyk. During Mrs van Wyk's pregnancy Mr van Wyk applied to his employer for the four month maternity leave benefit. The employer refused on the basis that its maternity leave policy did not provide for persons other than the birthing mother to receive the maternity leave benefit. The reason that Mr van Wyk applied for the maternity leave benefit was that his spouse was attending to the management of her two businesses and as a result, she was not able to take a four month leave period to provide the necessary nurturing for a newborn baby without unpredictable and potentially serious consequences for her businesses. Given his employer's refusal of his application for the four month maternity leave benefit, Mr van Wyk negotiated an unpaid sabbatical period with his employer. Mr van Wyk was not able to claim maternity benefits from the Unemployment Insurance Fund.

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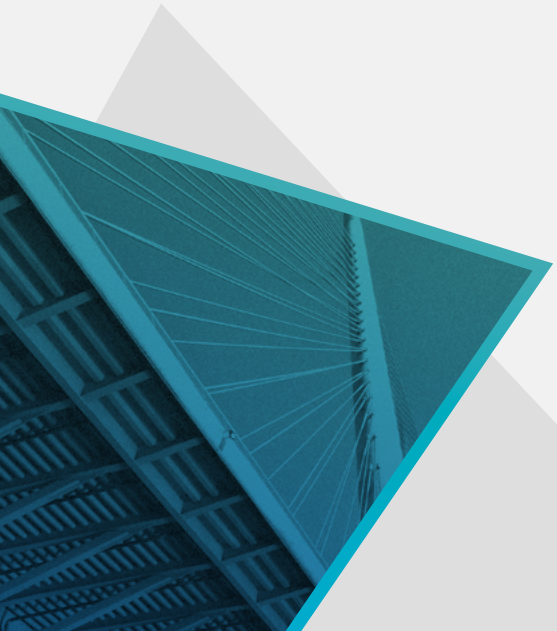

The Van Wyks' scenario exposed the need, for which many have advocated, for the reform of labour law to reflect a gender egalitarian approach to parental leave benefits.

The Van Wyks and Sonke Gender Justice launched their application initially seeking a declaration of invalidity of sections 25 and 26 of the BCEA. The Van Wyks later expanded the relief which they sought to include a gender-neutral reading of the term "*employee*" in the relevant provisions of section 25 of the BCEA, which would afford a parent who is not the birthing parent the right to the maternity leave benefit. In the alternative they sought a declaration of unconstitutionality and invalidity. The Commission for Gender Equality, a Chapter 9 institution, joined the case at an advanced stage. They also sought a declaration of invalidity of the existing legislation.

In his opposition the Minister of Employment and Labour (Minister) focused on the separation of powers doctrine, i.e. that this matter was best left for Parliament to solve in its role as the designated policy maker and resource allocator, and that the National Economic Development and Labour Council (NEDLAC) would need to be involved given that an employment law may be amended.

The court considered the separation of powers argument as the relief sought by Sonke Gender Justice and the Commission for Gender Equality would necessitate amendments to the UIA, which implicates resource allocation by government. However, the court did not find this line of argument persuasive as it was neither called upon nor did it intend to make qualitative decisions on the allocation of public resources. The court indicated that because a matter has resource allocation implications is not sufficient reason to avoid a declaration of invalidity. The court also noted that the Minister did not put before the court any data or details in support of his argument.

In relation to the Minister's NEDLAC argument, the court found that

> *"Plainly, there is no legal principle to draw upon which compels a person who challenges an employment law as unconstitutional to first exhaust the prospects of winning support in NEDLAC."*

The court declared the relevant provisions of the BCEA and the UIA invalid given that they are inconsistent with the constitutional rights to equality and dignity and:

(a) unfairly discriminate between mothers and fathers; and

(b) unfairly discriminate between one set of parents and another on the basis of whether their children –

  (i) were born of the mother.

  (ii) were adopted.

  (iii) were conceived by surrogacy.

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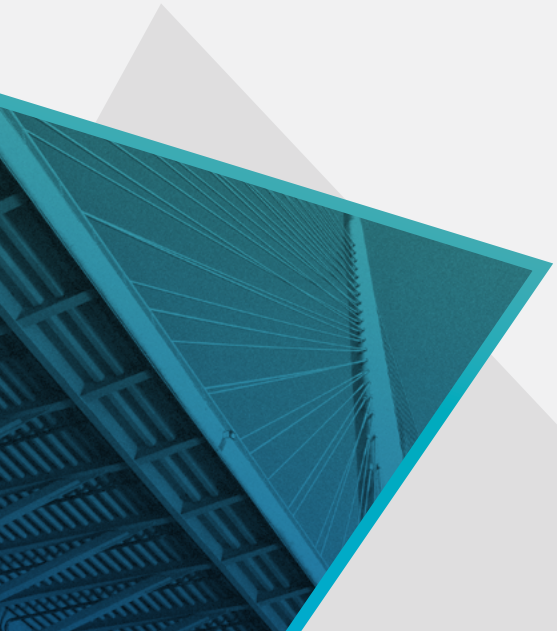
The court accepted that identifying the physiological aspects of a birth-mother's experience and treating a birth-mother discreetly and differently, is not discrimination. However, what is of interest in this case is child-nurture generally, not merely child birth per se. In respect of nurture (not breastfeeding) any parent is able to provide comprehensive nurture to their child. The existing wording of the BCEA does not recognise a dynamic in terms of which both parents are, in equal measure, committed to the nurturing of their child. The court found no cogent reason to distinguish between a birthing parent and a non-birthing parent (including parents who have adopted or commissioned a surrogacy) in respect of the nurturing care that a newborn baby requires for its safety and to flourish. The court also indicated that the assumption that the birthing parent is and should always be the primary care giver does not take into account different parental modalities and is not aligned with the constitutional ethos of gender equality and the dignity afforded to all people, including parents.

According to the court:

> *"Parenting is sui generis and undoubtedly onerous, involving actual work, resilience in the face of exasperation, anxiety, unrelenting close attention to the new-born, extreme exhaustion, sacrifice of sleep and sacrifice of the pursuit of other interests. A father who chooses to share in this experience for his own well-being, no less than that of his children and of their mother, can indeed complain that the absence of equal recognition in the BCEA is unfair discrimination. A mother can on the same premise rightly complain that to assign her role as the primary care-giver who should bear the rigours of parenthood single-handed, is a choice that she and the father should make, not the legislature..."*



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The court considering the best interests of the child and the fact that the premise of the care-giving leave entitlements in the BCEA is for the nurturing of a newborn baby or toddler and is not limited to the physiological recovery after giving birth (although a birthing parent is certainly entitled to such a recovery period). The court found that the distinctions in the BCEA between birthing and non-birthing parents are not validly substantiated when it results in less care for a child in one scenario (for example, in the event of an adoption), and more care for a child in another scenario (for example, when a parent gives birth to a child).

Any declaration of invalidity made by a High Court must be referred to the Constitutional Court for confirmation. Accordingly, the Constitutional Court will in due course deliver its decision on whether to confirm the High Court's declaration of invalidity of the BCEA care-giving leave provisions, and the corresponding provisions in the UIA. The Minister may also appeal the judgment and in this regard may request that the order of invalidity be suspended pending the finalisation of the appeal.

Gillian Lumb, Anli Bezuidenhout, Nadeem Mahomed and Alex van Greuning

Note: *There appears to be an error in the interim relief provision of the order in respect of section 25B of the BCEA relating to adoption leave. As the order reads, it allows for an additional 10 consecutive weeks leave to one of the adoptive parents, in addition to the four consecutive months of parental leave. In line with the reasoning of the judgment, this is an error as it does not accord with the aim of the order which seeks to provide the same duration of leave for all parents irrespective of whether the parent has given birth to the child.*

OUR TEAM

For more information about our Employment Law practice and services in South Africa and Kenya, please contact:

Aadil Patel
Practice Head & Director:
Employment Law
Joint Sector Head:
Government & State-Owned Entities
T +27 (0)11 562 1107
E aadil.patel@cdhlegal.com

Anli Bezuidenhout
Director:
Employment Law
T +27 (0)21 481 6351
E anli.bezuidenhout@cdhlegal.com

Jose Jorge
Sector Head:
Consumer Goods, Services & Retail
Director: Employment Law
T +27 (0)21 481 6319
E jose.jorge@cdhlegal.com

Fiona Leppan
Director:
Employment Law
T +27 (0)11 562 1152
E fiona.leppan@cdhlegal.com

Gillian Lumb
Director:
Employment Law
T +27 (0)21 481 6315
E gillian.lumb@cdhlegal.com

Imraan Mahomed
Director:
Employment Law
T +27 (0)11 562 1459
E imraan.mahomed@cdhlegal.com

Phetheni Nkuna
Director:
Employment Law
T +27 (0)11 562 1478
E phetheni.nkuna@cdhlegal.com

Desmond Odhiambo
Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E desmond.odhiambo@cdhlegal.com

Hugo Pienaar
Sector Head:
Infrastructure, Transport & Logistics
Director: Employment Law
T +27 (0)11 562 1350
E hugo.pienaar@cdhlegal.com

Thabang Rapuleng
Counsel:
Employment Law
T +27 (0)11 562 1759
E thabang.rapuleng@cdhlegal.com

Njeri Wagacha
Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E njeri.wagacha@cdhlegal.com

Mohsina Chenia
Executive Consultant:
Employment Law
T +27 (0)11 562 1299
E mohsina.chenia@cdhlegal.com

Jean Ewang
Consultant:
Employment Law
M +27 (0)73 909 1940
E jean.ewang@cdhlegal.com

Ebrahim Patelia
Legal Consultant:
Employment Law
T +27 (0)11 562 1000
E ebrahim.patelia@cdhlegal.com

Nadeem Mahomed
Professional Support Lawyer:
Employment Law
T +27 (0)11 562 1936
E nadeem.mahomed@cdhlegal.com

OUR TEAM

For more information about our Employment Law practice and services in South Africa and Kenya, please contact:

Asma Cachalia
Senior Associate:
Employment Law
T +27 (0)11 562 1333
E asma.cachalia@cdhlegal.com

Rizichi Kashero-Ondego
Senior Associate | Kenya
T +254 731 086 649
T +254 204 409 918
T +254 710 560 114
E rizichi.kashero-ondego@cdhlegal.com

Jordyne Löser
Senior Associate:
Employment Law
T +27 (0)11 562 1479
E jordyne.loser@cdhlegal.com

Leila Moosa
Senior Associate:
Employment Law
T +27 (0)21 481 6318
E leila.moosa@cdhlegal.com

Christine Mugenyu
Senior Associate | Kenya
T +254 731 086 649
T +254 204 409 918
T +254 710 560 114
E christine.mugenyu@cdhlegal.com

JJ van der Walt
Senior Associate:
Employment Law
T +27 (0)11 562 1289
E jj.vanderwalt@cdhlegal.com

Malesale Letwaba
Associate:
Employment Law
T +27 (0)11 562 1710
E malesale.letwaba@cdhlegal.com

Biron Madisa
Associate:
Employment Law
T +27 (0)11 562 1031
E biron.madisa@cdhlegal.com

Kgodisho Phashe
Associate:
Employment Law
T +27 (0)11 562 1086
E kgodisho.phashe@cdhlegal.com

Tshepiso Rasetlola
Associate:
Employment Law
T +27 (0)11 562 1260
E tshepiso.rasetlola@cdhlegal.com

Taryn York
Associate:
Employment Law
T +27 (0)11 562 1732
E taryn.york@cdhlegal.com

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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JOHANNESBURG
1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.
Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN
11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI
Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114
E cdhkenya@cdhlegal.com

STELLENBOSCH
14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA