CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 308/23

In the matter between:

WERNER VAN WYK	First Applicant
IKA VAN WYK	Second Applicant
SONKE GENDER JUSTICE	Third Applicant
COMMISSION FOR GENDER EQUALITY	Fourth Applicant

and

MINISTER OF EMPLOYMENT AND LABOUR	Respondent

and

CENTRE FOR HUMAN RIGHTS, UNIVERSITY OF PRETORIA	First Amicus Curiae
SOLIDARITY CENTRE, SOUTH AFRICA	Second Amicus Curiae
INTERNATIONAL LAWYERS ASSISTING WORKERS NETWORK	Third Amicus Curiae
LABOUR RESEARCH SERVICE	Fourth Amicus Curiae
CENTRE FOR CHILD LAW	Fifth Amicus Curiae

Case CCT 309/23

In the matter between:

COMMISSION FOR GENDER EQUALITY	First Applicant
SONKE GENDER JUSTICE	Second Applicant
and	
MINISTER OF EMPLOYMENT AND LABOUR	First Respondent
WERNER VAN WYK	Second Respondent
IKA VAN WYK	Third Respondent
and	
CENTRE FOR HUMAN RIGHTS, UNIVERSITY OF PRETORIA	First Amicus Curiae
SOLIDARITY CENTRE, SOUTH AFRICA	Second Amicus Curiae
INTERNATIONAL LAWYERS ASSISTING WORKERS NETWORK	Third Amicus Curiae
LABOUR RESEARCH SERVICE	Fourth Amicus Curiae
CENTRE FOR CHILD LAW	Fifth Amicus Curiae

Neutral citation:	*Van Wyk and Others v Minister of Employment and Labour*; *Commission for Gender Equality and Another v Minister of Employment and Labour and Others* [2025] ZACC 20
Coram:	Madlanga ADCJ, Kollapen J, Majiedt J, Mhlantla J, Rogers J, Seegobin AJ, Theron J, Tolmay AJ and Tshiqi J
Judgment:	Tshiqi J (unanimous)
Heard on:	05 November 2024
Decided on:	03 October 2025
Summary:	Basic Conditions of Employment Act 75 of 1997 – maternity leave – parental leave – adoption leave – commissioning parental leave – surrogacy – unfair discrimination – equality – human dignity – Unemployment Insurance Act 63 of 2001 – benefits

ORDER

On application for confirmation of the order of constitutional invalidity by the High Court of South Africa, Gauteng Division, Johannesburg and on application for leave to appeal against part of the order of the said Court, the following order is made:

1. The Commission for Gender Equality is granted leave to appeal against the High Court's decision not to declare, as invalid and inconsistent with the Constitution, the age limitation of two years in section 25B(1) of the Basic Conditions of Employment Act 75 of 1997 (BCEA) and section 27(1)(c) of the Unemployment Insurance Act 63 of 2001 (UIF Act).
2. The declaration made by the High Court, that sections 25, 25A, 25B and 25C of the BCEA dealing with maternity and parental leave, together with the corresponding sections 24, 26A, 27 and 29A of the UIF Act, are invalid and inconsistent with the Constitution to the extent that they unfairly discriminate between different classes of parents as to the length of parental leave available to parents and as to the unemployment benefits to which they are entitled, and the periods for which unemployment benefits are paid, is confirmed.
3. It is declared that section 25B(1) of the BCEA and section 27(1)(c) of the UIF Act are invalid and inconsistent with the Constitution to the extent that they limit parental leave and related benefits to the case where the adopted child is below the age of two years.
4. The declarations of constitutional invalidity referred to in paragraphs 2 and 3 are suspended for a period of 36 months from the date of this order to afford Parliament an opportunity to remedy the constitutional defects giving rise to the constitutional invalidity.

5. Pending the coming into force of any remedial legislation as contemplated in paragraph 4, the impugned provisions of the BCEA shall read as follows, the changes being indicated by underlining:

(a) Section 25 of the BCEA shall read:

"25. Parental leave

(1) An employee who is—

(a) a single parent; or

(b) the only employed party in a parental relationship, is entitled to at least four consecutive months' parental leave.

(2) A female employee who is expecting the birth of a child may commence parental leave—

(a) at any time from four weeks before the expected date of birth, unless otherwise agreed; or

(b) on a date from which a medical practitioner or a midwife certifies that it is necessary for the employee's health or that of her unborn child.

(2A) Where section 25(2) does not apply, an employee may commence parental leave on—

(a) the day that the employee's child is born; or

(b) where section 25B or section 25C is applicable, the date mentioned in section 25B(2) or section 25C(2) as the case may be.

(3) No female employee who has given birth to a child may work for six weeks after the birth of her child, unless a medical practitioner or midwife certifies that she is fit to do so.

(4) An employee who has a miscarriage during the third trimester of pregnancy or bears a stillborn child is entitled to parental leave for six weeks after the miscarriage or stillbirth, whether or not the employee had commenced parental leave at the time of the miscarriage or stillbirth.

(4A) If both parties to a parental relationship are employed, the parties are entitled in the aggregate to four months and ten days' parental leave, inclusive of any parental leave taken in terms of subsections (2) and (3).

(4B) The remainder of the parental leave referred to in subsection (4A), after deducting any parental leave taken in terms of subsections (2) and

(3), may be taken by the parties in such manner as they may agree, including concurrently or consecutively, or partly concurrently and partly consecutively, save that any such parental leave, inclusive of the leave contemplated in subsections (2) and (3) must be taken by the party concerned in a single sequence of consecutive days.

(4C) If the parties cannot agree on the manner in which the remainder of the parental leave referred to in subsection (4B) is to be taken, such remainder shall 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 ten days, provided that such leave is completed within a period of four months from the birth of the child or, where applicable, from the date referred to in section 25B(2) or 25C(2).

(4D) For purposes of subsection (4A), a party shall be deemed to be a party to a parental relationship if such a party has assumed parental rights and responsibilities over the child as contemplated in the Children's Act, 2005 (Act No. 38 of 2005).

(5) An employee must notify an employer in writing, unless the employee is unable to do so, of the date on which the employee intends to—

(a) commence parental leave; and

(b) return to work after parental leave.

(6) Notification in terms of subsection (5) must be given—

(a) at least four weeks before the employee intends to commence parental leave; or

(b) if it is not reasonably practicable to do so, as soon as is reasonably practicable.

(7) The payment of parental benefits will be determined by the Minister subject to the provisions of the Unemployment Insurance Act, 2001 (Act No. 63 of 2001)."

(b) Section 25A of the BCEA shall be deleted.

(c) Section 25B of the BCEA shall read:

25B. Adoption leave

(1) An employee, who is an adoptive parent of a child who is below the age of two, is subject to subsection (6), entitled to the parental leave referred to in section 25(1).

(2) An employee may commence adoption leave on the date—

(a) that the adoption order is granted; or

(b) that a child is placed in the care of a prospective adoptive parent by a competent court, pending the finalisation of an adoption order in respect of that child,

whichever date occurs first.

(3) An employee must notify an employer in writing, unless the employee is unable to do so, of the date on which the employee intends to—

(a) commence adoption leave; and

(b) return to work after adoption leave.

(4) Notification in terms of subsection (3) must be given—

(a) at least one month before the date referred to in subsection (2); or

(b) if it is not reasonably practicable to do so, as soon as is reasonably practicable.

(5) The payment of adoption benefits will be determined by the Minister, subject to the provisions of the Unemployment Insurance Act, 2001 (Act No. 63 of 2001).

(6) If an adoption order is made in respect of two adoptive parents, both parties are entitled in the aggregate to four months and ten days' adoption leave.

(6A) The adoption leave referred to in subsection (6), may be taken by the parties in such manner as they may agree, including concurrently or consecutively, or partly concurrently and partly consecutively.

(6B) If the parties cannot agree on the manner in which the adoption leave referred to in subsection (6) is to be taken, such adoption leave shall be apportioned between the parents in such a way that each parent's total adoption leave is as close as possible to half of four months and ten days, provided that such balance is completed within a period of four months from the adoption of the child.

(7) If a competent court orders that a child is placed in the care of two prospective adoptive parents, pending the finalisation of an adoption order in respect of that child, the two prospective adoptive parents are entitled to leave in terms of subsection (6).

(d) Section 25C of the BCEA shall read:

25C. Commissioning parental leave

(1) An employee, who is a commissioning parent in a surrogate motherhood agreement is, entitled to leave as stipulated in section 25(1).

(2) An employee may commence commissioning parental leave on the date a child is born as a result of a surrogate motherhood agreement.

(3) An employee must notify an employer in writing, unless the employee is unable to do so, of the date on which the employee intends to—

(a) commence commissioning parental leave; and

(b) return to work after commissioning parental leave.

(4) Notification in terms of subsection (3) must be given—

(a) at least one month before a child is expected to be born as a result of a surrogate motherhood agreement; or

(b) if it is not reasonably practicable to do so, as soon as is reasonably practicable.

(5) The payment of commissioning parental benefits will be determined by the Minister, subject to the provisions of the Unemployment Insurance Act, 2001 (Act No. 63 of 2001).

(6) Where there are two commissioning parents, they shall each be entitled in the aggregate to four months and ten days' commissioning parental leave.

(6A) The commissioning parental leave referred to in subsection (6), may be taken by the parties in such manner as they may agree, including concurrently or consecutively, or partly concurrently and partly consecutively.

(6B) If the parties cannot agree on the manner in which the commissioning parental leave referred to in subsection (6) is to be taken, such commissioning parental leave shall be apportioned between the parents in such a way that each parent's total commissioning parental leave is as close as possible to half of four months and ten days, provided that such balance is completed within a period of four months from the birth of the child.

(7) In this section, unless the context otherwise indicates—

'commissioning parent' has the meaning assigned to it in section 1 of the Children's Act, 2005 (Act No. 38 of 2005); and

'surrogate motherhood agreement' has the meaning assigned to it in section 1 of the Children's Act, 2005 (Act No. 38 of 2005)."

6. Not later than six months before the expiry of the 36-month suspension period, the Minister of Employment and Labour, (Minister) must furnish a report to the Registrar, on notice to the parties, as to whether remedial legislation in respect of the BCEA and UIF Act has been brought into operation and, if such legislation has not been brought into operation, when it is expected to be brought into operation and the further processes that need to be completed in order for such legislation to be brought into operation.
7. Upon the furnishing of such report, or in the absence of such report, any of the parties may apply, insofar as it is necessary, for supplementary relief to become operative upon the expiry of the 36-month suspension period. Such application shall be brought not later than four months before the expiry of the suspension period, and its further conduct shall be regulated by directions issued by the Chief Justice.
8. The Minister must pay the applicants' costs in this Court, including the costs of two counsel where so employed.

JUDGMENT

TSHIQI J (Madlanga ADCJ, Kollapen J, Majiedt J, Mhlantla J, Rogers J, Seegobin AJ, Theron J and Tolmay AJ concurring):

Introduction

[1] The applicants in these two applications seek to confirm an order of the High Court[1] to the effect that sections 25, 25A, 25B and 25C of the Basic Conditions of

[1] *Van Wyk v Minister of Employment and Labour* [2023] ZAGPJHC 1213; [2024] 1 BLLR 93 (GJ); (2024) 45 ILJ 194 (GJ) (High Court judgment).

Employment Act[2] (BCEA), dealing with maternity and parental leave, together with the corresponding sections 24, 26A, 27 and 29A of the Unemployment Insurance Act[3] (UIF Act), are inconsistent with the Constitution.

[2] For convenience, the two applications have been consolidated because they seek similar orders.

[3] In the first application, the first and second applicants are Mr Werner van Wyk and Mrs Ika van Wyk, a married couple. The necessity for adequate paternity leave for Mr van Wyk before and after the birth of the couple's first child was a catalyst to the present proceedings. The third applicant is Sonke Gender Justice (Sonke), a non-profit organisation that advocates for gender equality. The fourth applicant is the Commission for Gender Equality (Commission), an institution established under Chapter 9 of the Constitution. The respondent is the Minister of Employment and Labour (Minister), cited in her official capacity as the cabinet minister responsible for the administration of both the BCEA and the UIF Act.

[4] In the second application, the Commission is the first applicant and Sonke is the second applicant. The first respondent is the Minister. The second and third respondents are Mr and Mrs van Wyk. The Minister has filed a notice to abide the decision of this Court in both applications, but has filed written submissions to assist this Court in its determination of the matters.

[5] The Minister requests condonation for the late filing of her written submissions and states that the previous Minister had initially not intended to file written submissions. The Minister was later advised that as the custodian and administrator of the impugned legislation, she has a duty to make submissions before this Court to assist it in providing for the appropriate relief. Furthermore, the Minister appointed new

[2] 75 of 1997.

[3] 63 of 2001.

senior counsel who had to familiarise himself with the record. The explanation offered by the Minister for the late filing of her written submissions is adequate. Consequently, condonation for the late filing of the Minister's written submissions is granted.

[6] There are five entities who were admitted as amici curiae (friends of the court). They are, the Centre for Human Rights of the University of Pretoria, Solidarity Centre, South Africa, the International Lawyers Assisting Workers Network, the Labour Research Service and the Centre for Child Law. They advance arguments in support of the applicants' criticism of the BCEA and the corresponding sections of the UIF Act. The Court is grateful to all the amici for their submissions.

The impugned provisions

[7] Because of the similarities in the impugned provisions of the BCEA and the UIF Act and to avoid duplication, I will not reproduce the relevant provisions of the UIF Act but will simply summarise them. I will refer directly to the provisions of the BCEA.

The BCEA

[8] The challenged sections of the BCEA are in chapter 3 of the Act. This chapter regulates the minimum leave that an employer must grant to employees in several circumstances. Sections 25, 25A, 25B and 25C regulate the granting of leave for the exercise of parental rights. The provisions are challenged on the basis that they differentiate between categories of parents and children, namely: a child born by their birth mother; a child born by surrogacy and an adopted child; between birth mothers and all other parents including fathers, parents in same-sex relationships, adoptive and commissioning parents. Section 25B is also challenged on the basis that it limits the eligibility for parental leave to parents who adopt children who are two years and younger.

[9] As the challenge to section 25B is also aimed at the capping of the maximum age of adopted children in order for the adoptive parents to be eligible for parental leave, I will firstly deal with the differentiation pertaining to leave available to adoptive parents and their children together with other categories and then deal with the differentiation pertaining to the capping of the age of adopted children separately. The first challenge is that the provisions are discriminatory regarding the availability of parental leave and its duration between different categories of parents: birth mothers, biological fathers, adoptive parents and commissioning parents. The second challenge is directed solely at the capping of the age of adopted children. I will start with the differentiation between the broader categories.

Differentiation between different categories of parents

[10] Section 25 deals with maternity leave and provides:

> "(1) An employee is entitled to at least four consecutive months' maternity leave.
>
> (2) An employee may commence maternity leave—
>
> (a) at any time from four weeks before the expected date of birth, unless otherwise agreed; or
>
> (b) on a date from which a medical practitioner or a midwife certifies that it is necessary for the employee's health or that of her unborn child.
>
> (3) No employee may work for six weeks after the birth of her child, unless a medical practitioner or midwife certifies that she is fit to do so.
>
> (4) An employee who has a miscarriage during the third trimester of pregnancy or bears a still-born child is entitled to maternity leave for six weeks after the miscarriage or still-birth, whether or not the employee had commenced maternity leave at the time of the miscarriage or still-birth.
>
> (5) An employee must notify an employer in writing, unless the employee is unable to do so, of the date on which the employee intends to—
>
> (a) commence maternity leave; and
>
> (b) return to work after maternity leave.

(6) Notification in terms of subsection (5) must be given—

(a) at least four weeks before the employee intends to commence maternity leave; or

(b) if it is not reasonably practicable to do so, as soon as is reasonably practicable.

(7) The payment of maternity benefits will be determined by the Minister subject to the provisions of the Unemployment Insurance Act, 2001 (Act No. 63 of 2001)."

[11] Section 25A is focused on a parent, other than the birth mother.[4] It states:

"(1) An employee, who is a parent of a child, is entitled to at least ten consecutive days parental leave.

(2) An employee may commence parental leave on—

(a) the date the employee's child is born; or

(b) the date—

(i) that the adoption order is granted; or

(ii) that a child is placed in the care of a prospective adoptive parent by a competent court, pending the finalisation of an adoption order in respect of that child, whichever date occurs first.

(3) An employee must notify an employer in writing, unless the employee is unable to do so, of the date on which the employee intends to—

(a) commence parental leave; and

(b) return to work after parental leave.

(4) Notification in terms of subsection (3) must be given—

(a) at least one month before the—

(i) employee's child is expected to be born; or

(ii) the date referred to in subsection 2(b); or

(b) if it is not reasonably practicable to do so, as soon as is reasonably practicable.

(5) The payment of parental benefits will be determined by the Minister, subject to the provisions of the Unemployment Insurance Act, 2001 (Act No. 63 of 2001)."

[4] It is safe to assume that it is aimed at biological fathers or other parents in same-sex relationships.

[12] Section 25B deals with adoptive parents.[5] It provides:

> "(1) An employee, who is an adoptive parent of a child who is below the age of two, is subject to subsection (6), entitled to—
>
> (a) adoption leave of at least ten weeks consecutively; or
>
> (b) the parental leave referred to in section 25A.
>
> (2) An employee may commence adoption leave on the date—
>
> (a) that the adoption order is granted; or
>
> (b) that a child is placed in the care of the prospective adoptive parent by a competent court, pending the finalisation of an adoption order in respect of that child, whichever date occurs first.
>
> (3) An employee must notify an employer in writing, unless the employee is unable to do so, of the date on which the employee intends to—
>
> (a) commence adoption leave; and
>
> (b) return to work after adoption leave.
>
> (4) Notification in terms of subsection (3) must be given—
>
> (a) at least one month before the date referred to in subsection (2); or
>
> (b) if it is not reasonably practicable to do so, as soon as is reasonably practicable.
>
> (5) The payment of adoption benefits will be determined by the Minister, subject to the provisions of the Unemployment Insurance Act, 2001 (Act No. 63 of 2001).
>
> (6) If an adoption order is made in respect of two adoptive parents, one of the adoptive parents may apply for adoption leave and the other adoptive parent may apply for the parental leave referred to in section 25A: Provided that the selection of choice must be exercised at the option of the two adoptive parents.
>
> (7) If a competent court orders that a child is placed in the care of two prospective adoptive parents, pending the finalisation of an adoption order in respect of that child, one of the prospective adoptive parents may apply for adoption leave and the other prospective adoptive parent

[5] As stated, the capping of the age of adopted children will be dealt with separately. At this stage of the analysis, the focus is on the discrimination of leave available to birth mothers *vis-a-vis* other categories of parents.

may apply for the parental leave referred to in section 25A: Provided that the selection of choice must be exercised at the option of the two prospective adoptive parents."

[13] Section 25C deals with commissioning parents. It states:

"(1) An employee, who is a commissioning parent in a surrogate motherhood agreement is, subject to subsection (6), entitled to—

(a) commissioning parental leave of at least ten weeks consecutively; or

(b) the parental leave referred to in section 25A.

(2) An employee may commence commissioning parental leave on the date a child is born as a result of a surrogate motherhood agreement.

(3) An employee must notify an employer in writing, unless the employee is unable to do so, of the date on which the employee intends to—

(a) commence commissioning parental leave; and

(b) return to work after commissioning parental leave.

(4) Notification in terms of subsection (3) must be given—

(a) at least one month before a child is expected to be born as a result of a surrogate motherhood agreement; or

(b) if it is not reasonably practicable to do so, as soon as is reasonably practicable.

(5) The payment of adoption benefits will be determined by the Minister, subject to the provisions of the Unemployment Insurance Act, 2001 (Act No. 63 of 2001).

(6) If a surrogate motherhood agreement has two commissioning parents, one of the commissioning parents may apply for commissioning parental leave referred to in section 25A: Provided that the selection of choice must be exercised at the option of the two commissioning parents.

(7) In this section, unless the context otherwise indicates—

'commissioning parent' has the meaning assigned to it in section 1 of the Children's Act, 2005 (Act No. 38 of 2005); and

'surrogate motherhood agreement' has the meaning assigned to it in section 1 of the Children's Act, 2005 (Act No. 38 of 2005)."

[14] In relation to biological parents, these provisions may be summarised as follows: section 25 provides for a total of four consecutive months' maternity leave for a birth mother, of which four weeks may be taken prior to the date of birth. In terms of section 25A, another parent other than the birth mother is entitled to 10 days' leave from the date of birth of the child.

[15] The effect of these provisions is that the employee is entitled to take time off from work and has job security upon return. Employers are not obliged to remunerate employees for their period of absence but it is commonplace for major employers to contract with employees to do so. The employee may claim a financial benefit from the Unemployment Insurance Fund (UIF) in such sums as determined by the Minister.

[16] Section 25(3) forbids a mother from working for six weeks after the date of birth, unless a doctor or midwife approves.

[17] The challenged provisions of the UIF Act may be summarised as follows:

(a) Section 24 prescribes maternity leave benefits for birth-giving mothers.

(b) Section 26A prescribes parental leave benefits for registered biological fathers, adoptive parents to children under the age of two years and commissioning parents in surrogacy agreements. The latter two categories of parents are confined to those parents who do not claim the benefits in section 27 and section 29A.

(c) Section 27 provides for adoption benefits for an adoptive parent of a child below the age of two years.

(d) Section 29A confers commissioning parental benefits on commissioning parents in surrogacy agreements.

Background facts

[18] The unfairness and the unconstitutionality of the provisions came into focus when Mr van Wyk, an employee, approached his employer seeking four months'

consecutive paternity leave. Mrs van Wyk was, and still is, in business for her own account. Mr and Mrs van Wyk agreed with each other, before the birth of their son, that Mr van Wyk would assume primary responsibility for taking care of their son as soon as possible after the birth since Mrs van Wyk had two businesses to run. When Mr van Wyk approached his employer with the request for paternity leave, he was informed that he was only eligible for 10 days' parental leave.

[19] Given the potential financial ramifications that Mrs van Wyk's businesses would suffer if she were to take four months' maternity leave, Mr van Wyk opted to take extended unpaid leave of six months from his employer. It is not in dispute that his decision consequently affected the household finances, his working conditions and his career prospects.

Litigation history

High Court

[20] Unhappy with the scenario, Mr and Mrs van Wyk, along with Sonke, approached the High Court for an order declaring section 25 of the BCEA to be invalid and inconsistent with the Constitution and for the declaration to be suspended for a period of 24 months from the date of declaration to allow Parliament to correct the defects.

[21] The constitutional challenge rested on three grounds, namely that:

(a) the differentiation between mothers and fathers in section 25 serves no legitimate governmental purpose and is irrational;

(b) if it indeed serves any legitimate governmental purpose, it nevertheless amounts to unfair discrimination with no justification; and

(c) section 25 is in any event offensive to the dignity of parents as it prescribes the manner in which families may be legitimately structured and it deprives parents of the fundamental choice of how they may nurture their own children.

[22] The Commission brought an application to intervene as a fourth applicant, challenging the provisions on similar grounds. An order joining the Commission was duly granted.

[23] The former Minister defended both applications. It was contended that the BCEA had been previously amended through a process of consultation under the auspices of the National Economic, Development and Labour Council Act[6] (NEDLAC Act), which consequently implies that the policymakers in those consultations had applied their minds in remedying the BCEA to reflect societal consensus between law-makers and stakeholders.

[24] In addition, the Minister submitted that the provision of benefits implicates resource allocation and that decisions with the potential to affect such allocation is generally reserved for Parliament and ought to be processed through the National Economic, Development and Labour Council (NEDLAC) before a court is approached. This is because such matters are rarely appropriate for judicial intervention as judges do not govern the country.

[25] The High Court found that it was evident that there was differentiation between mothers and fathers, and between a birth mother and other mothers or parents in the impugned provisions of the BCEA. The Court, relying on *Harksen*,[7] determined whether the differentiation bore a rational connection to a legitimate governmental purpose, whether it amounted to unfair discrimination, and if unfair, whether the provision could be justified under the limitation clause in the Constitution.[8]

[26] The High Court found that the differentiation between fathers and mothers amounted to unfair discrimination, specifically regarding the duration of entitled leave. That Court held that the case should not focus on delinquent fathers but should

[6] 35 of 1994.

[7] *Harsken v Lane N.O.* [1997] ZACC 12; 1997 (11) BCLR 1489 (CC); 1998 (1) SA 300 (CC) (*Harksen*).

[8] High Court judgment above n 1 at para 16.

determine whether fathers generally have an opportunity to participate in child-nurturing in the early stages of childhood.

[27] The High Court held that it is unfair for the mother to be deemed the primary caregiver when the burden of child care should be equally shared with the father, considering that parenting is *sui generis* (unique) in nature. That Court additionally stated the following:

> "A father who chooses to share in this experience for his own wellbeing, 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 caregiver who should bear the rigours of parenthood single-handed, is a choice that she and the father should make, not the Legislature, and in denying the parents the right to choose for themselves impairs her dignity."[9]

[28] With regard to the shorter leave period available to adoptive and commissioning mothers in a surrogate agreement, the High Court found that there was no reasonable explanation or legitimate governmental objective for a 10-week period of leave rather than the four-month period of leave provided for a birth mother.[10] The Court found that all mothers in all parenting categories should be entitled to the same period of leave if inequality is to be avoided.

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[9] High Court judgment above n 1 at para 27. See also *President of the Republic of South Africa v Hugo* [1997] ZACC 4; 1997 (1) SACR 567 (CC); [1998] JOL 1543 (CC) at para 37, where Goldstone J said:

> "The reason given by the President for the special remission of sentence of mothers with small children is that it will serve the interests of children. To support this, he relies upon the evidence of Ms Starke that mothers are, generally speaking, primarily responsible for the care of small children in our society. Although no statistical or survey evidence was produced to establish this fact, I see no reason to doubt the assertion that mothers, as a matter of fact, bear more responsibilities for child rearing in our society than do fathers. This statement, of course, is a generalisation. There will, doubtless, be particular instances where fathers bear more responsibilities than mothers for the care of children. In addition, there will also be many cases where a natural mother is not the primary caregiver, but some other woman fulfils that role, whether she be the grandmother, stepmother, sister, or aunt of the child concerned."

[10] High Court judgment above n 1 at para 24.

[29] The Court then dealt with what the Minister advanced as a legitimate governmental purpose and how the amendments to the impugned provisions in the BCEA and the UIF Act would have an obvious financial impact on the UIF, as the number of people eligible for UIF benefits and the extent of their benefits will multiply. The High Court reasoned that such an outcome can be managed.[11] It suggested that the State could keep the same amount of funding budgeted for in the UIF and reduce the amount payable as a benefit to stay within budget.[12] Furthermore, the Court stated that even if there was certainty that the State would bear greater costs to eliminate the unfair discrimination and may have to impose additional UIF levies on employers, the possibility of such a risk had not in the past been a reason to refrain from making declarations of unconstitutionality. It therefore held that such a risk was not a reason to do so in the circumstances of this case.[13]

[30] The High Court held that the Minister had failed to articulate a legitimate governmental purpose for the differentiation in the impugned provisions and to plead material facts to show justification for the discrimination.[14]

[31] The High Court thus made a declaration of constitutional invalidity with a reading-in to safeguard the rights of parents and children during the two-year suspension period. The High Court's order reads thus:

> "(1) It is declared that the provisions of sections 25, 25A, 25B and 25C of the Basic Conditions of Employment Act No 75 of 1997 (BCEA), and the corresponding provisions of the Unemployment Insurance Fund Act No 63 of 2001 (UIF Act), sections 24, 26A, 27, 29A, are invalid by reason of inconsistency with sections 9 and 10 of the Constitution, to the extent that the provisions—
>
> (a) Unfairly discriminate between mothers and fathers;

[11] Id at para 38.

[12] Id at para 39.

[13] Id.

[14] Id at paras 39-40.

(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 conceived by surrogacy.

iii. Were adopted.

(2) The declaration of invalidity is suspended for two years from the date of this judgment to allow Parliament to cure the defects.

(3) Pending remedial legislation being enacted, the provisions shall be read as set out below—

(4) In section 25(1), the provisions are deleted and substituted with:

'An employee who is a single parent is entitled, and employees, who are a pair of parents, are collectively entitled, to at least four months' consecutive months' parental leave, which, in the case of a pair of parents, be taken in accordance with their election, as follows:

(a) One or other parent shall take the whole of the period, or

(b) Each parent shall take turns at taking the leave.

(c) Both employers must be notified prior to the date of birth in writing of the election and if a shared arrangement is chosen, the period or periods to be taken by each of the parents must be stipulated.'

(5) In section 25(2) the word 'employee' shall be substituted with the word 'pregnant mother'.

(6) In section 25, wherever the word 'maternity' appears it shall, where the context requires, be read as 'parental'.

(7) Section 25A(1) is deleted and substituted with:

'An employee who is a parent of a child is entitled to the leave stipulated in section 25(1)'.

(8) Section 25A(2)(a) is amplified by the addition after the word 'born': 'subject to the provisions of section 25(2)'.

(9) Section 25B(1)(b) is deleted and substituted with: 'the leave stipulated in section 25(1)'.

(10) Section 25B(6) is deleted and substituted with:

'If an adoption order is made in respect of two adoptive parents, they shall each be entitled to leave as stipulated in section 25(1)'.

(11) In Section 25C(1) the provisions are deleted and substituted with:

'An employee who is a commissioning parent in a surrogate motherhood agreement is entitled to leave as stipulated in section 25(1)'.

(12) Section 25C(6) is deleted and substituted with:

> 'Where there are two commissioning parents, they shall each be entitled to leave as stipulated in section 25(1)'.
>
> (13) The provisions of sections 25(7), 25A(5) and 25B(5) and 25C(5) and the corresponding provisions in the UIF Act, sections 24, 26A, 27, 29A, shall be read to be consistent with changes effected by this order and, accordingly, each parent who is a contributor, as defined in the UIF Act, shall be entitled to the benefits as prescribed therein."[15]

In this Court

[32] As stated, the applicants seek to confirm the order that the relevant provisions are inconsistent with the Constitution on the basis that they discriminate unfairly and are in violation of the equality and human dignity rights as entrenched in sections 9 and 10 of the Constitution. Consequently, this matter engages this Court's jurisdiction as empowered by sections 167(5) and 172(2) of the Constitution, which mandates this Court to consider orders of invalidity made by other courts.

[33] Mr and Mrs van Wyk, Sonke and the Commission support the order of invalidity. They argue that the current leave regime in the BCEA and the UIF Act provide greater benefits to birth mothers than the other categories of parents.

[34] The Minister accepts that there is a differentiation between birth mothers, other parents and their children. This pertains to leave available to fathers after the birth of their children, mothers who are unable to conceive and give birth to their own children, parents who opt for adoption and those who opt for surrogacy. She concedes that the differentiation is discriminatory on the basis of gender and human dignity. Discrimination on the basis of gender is one of the grounds of discrimination specified in section 9(3) of the Constitution.

[35] The Minister also acknowledges that discrimination on a specified ground in section 9(3) is automatically unfair and that there is no basis on which it can be justified

[15] Id at para 49.

in terms of the justification analysis. The Minister accepts that the provisions are inconsistent with the Constitution and further accepts that there is a need to reform the parental leave regime contained in the BCEA. She states that her team is presently focusing on the necessary reforms to the legislation as expeditiously as possible, and urges this Court, in any event, to give consideration to her submissions which, as stated, are merely made to assist this Court to reach a just and equitable decision.

[36] As a result of the Minister's stance, it is unnecessary to engage in an analysis on whether the provisions are discriminatory, whether the discrimination is unfair and whether the provisions are invalid as they are inconsistent with the Constitution. The Minister has accepted that the provisions are defective in all these respects.

[37] I now turn to the enquiry whether the discrimination also violates the right to human dignity as envisaged in section 10. It has been conceded by the Minister that the provisions also violate the right to human dignity of persons who are not birth mothers and are therefore inconsistent with section 10. The Minister also conceded that the discrimination is unfair and that it is unconstitutional.

[38] The human dignity of such persons is violated because they are not afforded the humane protection afforded to birth mothers. The protection of birth mothers to the exclusion of other parents has the unfortunate consequence of perpetuating the assumption that women are and should be the primary caregivers of children. The father is marginalised and deprived of the opportunity to involve himself as a parent in the upbringing of the baby during the early stages of life. The parents are also deprived of the choice to structure their child-nurturing responsibilities rather than being assigned caregiving and parental responsibilities based on their gender. The provisions are also discriminatory to adoptive parents and parents in surrogate arrangements.

[39] If, for instance, parents who opt for adoption or surrogacy have a new-born child, their entitlement to leave is much less than that available to those who have a child biologically. Of course, in respect of birth mothers, I accept that there are health

considerations during which the mother has to be confined before birth and afterwards for recovery purposes, but it cannot be gainsaid that there is also a period for nurturing. In respect of the other categories, there is an inadequate period set aside for the purposes of nurturing.

[40] The insufficient period of leave provided to adoptive and commissioning parents reduces the role they can play in nurturing their child. By allocating a shorter period of leave, the challenged provisions imply that these parents require less time with their children and that their caregiving obligations are less onerous, which is unfounded. This not only diminishes the time available for establishing secure attachment, but also denies adoptive parents the flexibility to manage their caregiving duties in a manner that reflects the unique needs of their family, thus compromising their dignity and equal standing as parents.

[41] The disparity and unequal treatment towards adoptive and commissioning parents not only marginalises the role that commissioning and adoptive parents play in the early life of their child but also reduces the recognition of their responsibilities as compared to biological parents. The distinction drawn by the statutory regime treats them as a lesser class of parents. Furthermore, the shorter period of leave deprives commissioning parents of the opportunity to structure their parental responsibilities according to their personal circumstances, thereby intruding upon their private life and undermining their dignity.

[42] There are several reasons why certain couples opt for adoption or surrogacy. They should not be penalised for this. There are also many reasons why partners decide that the father should be the primary caregiver. The case of Mr and Mrs van Wyk has shown that even in instances where the other partner is a birth mother, circumstances may dictate that the father assumes the role of primary caregiver. Legislation that prevents them, without any legitimate reason, from arranging their affairs according to their personal circumstances and preferences, intrudes upon their private space unnecessarily and impacts their human dignity.

[43] In *Dawood*,[16] this Court highlighted the interconnectedness of the right to equality with the right to human dignity, and why the right to human dignity is significant. It reasoned:

> "Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhumane or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a *value* fundamental to our Constitution, it is a justiciable and enforceable *right* that must be respected and protected. In many cases, however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour."[17] (Emphasis in original.)

[44] In *Harksen*, this Court said:

> "The prohibition of unfair discrimination in the Constitution provides a bulwark against invasions which impair human dignity or which affect people adversely in a comparably serious manner. However, as L'Heureux-Dubé J acknowledged in *Egan v Canada*, 'Dignity [is] a notoriously elusive concept . . . it is clear that [it] cannot, by itself, bear the weight of section 15's task on its shoulders. It needs precision and elaboration'. It is made clear in paragraph 43 of *Hugo* that this stage of the enquiry focuses primarily on the experience of the 'victim' of discrimination. In the final analysis, it is the impact of the discrimination on the complainant that is the determining factor regarding the unfairness of the discrimination."[18]

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[16] *Dawood v Minister of Home Affairs*; *Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC).

[17] Id at para 35.

[18] *Harksen* above n 7 at para 51.

[45] During argument, the Minister urged this Court to exercise caution when considering leave available to fathers and parents who opt for adoption and surrogacy. The basis for this note of caution is that the decision to afford more generous leave to birth mothers is justified by the need to protect the health and well-being of the mother and child before birth and to allow the mother adequate time to recover from giving birth. This entails nurturing as well. There is no doubt that birth mothers need more time before and after birth – this is not disputed. The problem is, as already stated, that there is no basis to deprive willing fathers an opportunity to nurture their children and to deprive parents in other categories of an adequate opportunity of nurturing.

[46] As the High Court also stated:

> "To accord a paltry 10 days' leave to a father speaks to a mindset that regards the father's involvement in early-parenting as marginal. In my view this is per se offensive to the norms of the Constitution in that it impairs a father's dignity. Long-standing cultural norms which exalt motherhood are not a legitimate platform for a cantilever to distinguish mothers' and fathers' roles.
>
> A major argument advanced to criticise this provision is that it is unfair on the mother to be deemed and doomed to be the principal caregiver and the 'burden' of child care should be equally shared with the father. Parenting is *sui generis* and undoubtedly onerous, involving actual work, resilience in the face of exasperation, anxiety, unrelenting close attention to the newborn, 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 wellbeing, 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 caregiver who should bear the rigours of parenthood single-handed is a choice that she and the father should make, not the legislature, and in denying the parents the right to choose for themselves impairs her dignity."[19] (Footnotes omitted.)

[47] The High Court was also correct in rejecting, as illegitimate or irrelevant, the argument that there would be financial implications for the UIF if there were equal

[19] High Court judgment above n 1 at paras 26-7.

treatment of parents. The High Court reasoned that those implications could be managed by the Minister within the existing laws. The Minister could, so said the High Court, choose to keep the same amount of funding budgeted for the UIF and reduce the benefits to stay within budget. However, whatever could be done by the Minister, is an irrelevant consideration to the finding that the provisions are not consistent with the Constitution.

[48] It must thus follow that sections 25, 25A, 25B and 25C of the BCEA and the corresponding sections 24, 26A, 27 and 29A of the UIF Act, which regulate the granting of leave for the exercise of parental rights and the granting of related benefits from the UIF, are not consistent with the Constitution. As stated, the parents of adopted children are eligible to only 10 weeks' adoption leave or the parental leave of 10 consecutive days' parental leave as envisaged in section 25A. This, compared to the leave to which the birth mother is entitled, is discriminatory, unfair and not justifiable. The Minister, as already stated, did not argue otherwise. Consequently, the order of unconstitutionality should be confirmed. What remains to be considered, before turning to remedy, are the provisions of sections 25B of the BCEA and 27 of the UIF Act to the extent that they limit eligibility for adoption and parental leave to parents who adopt children who are younger than two years. This feature was the subject of a constitutional challenge by the Commission.

Capping of the age of children relating to leave available to adoptive parents

[49] Leave for a parent in this category is only available if the adopted child is younger than two years. The Commission attacked these provisions on the basis that section 25B differentiates between parents adopting children who are two years and older and parents adopting children younger than two years; and that the section at the same time differentiates between those two categories of adopted children.

[50] The section recognises that both parents may be treated as adoptive parents. If section 25B is read with section 25A, it means that one parent is entitled to 10 consecutive weeks' leave and the other to the 10 days leave alluded to in

section 25A. The parents exercise an election on which one takes the longer or the shorter period. The provisions are gender-neutral and a pair of same-sex parents are not treated differently from heterosexual parents.

[51] The High Court found that the age capping in respect of adopted children is not unconstitutional as it does not trigger a compelling complaint of unfair discrimination. It considered the argument that the older the child is when adopted, the more likely a bonding experience is essential but found that an employment benefit aimed at only the nurturing of an adopted infant could not necessarily be considered to amount to unfair discrimination. The High Court further provided that perhaps the BCEA is not the appropriate statute to regulate bonding experiences. Such a matter should be addressed and amended in other pieces of legislation such as the Children's Act.[20]

[52] In this Court, the Commission submits that adopted children of all ages require consistent care on arrival and that such care does not diminish with age but heightens. The basis for this is that older children require greater attention and support to ensure effective bonding, integration within the new family and to prevent a breakdown in placement. The Commission further submits that the lack of parental leave benefits for parents of adopted children who are two years and older further decreases the likelihood of such children being adopted. They further argue that there is no legitimate governmental purpose for the differentiation between parents adopting children who are two years and older, and other adoptive parents. Consequently, the Commission seeks that the words "who is below the age of two" be deleted from the section.

[53] Sonke supports the stance by the Commission and the proposed reading-down of the section through the deletion of the words "who is below the age of two".

[20] 38 of 2005.

[54] The Minister contends that the age cap argument pertaining to adoption leave, as pleaded by the Commission, falls flat because even though an adoption may take place sometime after a child is born, it cannot be denied that parameters are necessary.

Is the capping of the age discriminatory?

[55] It is trite that if section 9 is invoked to attack a legislative provision or executive conduct on the ground that it differentiates between people or categories of people in a manner that amounts to unequal treatment or unfair discrimination, the first enquiry must be directed to the question of whether the impugned provision does, in fact, differentiate between people or categories of people. Here, the answer must be in the affirmative. That the provisions differentiate between categories of adoptive parents and their children on the basis of age cannot be disputed. Indeed, adoptive parents of children who are older than two years, and their children, are treated differently from parents and children younger than two years.

[56] The next enquiry is if the provision does so differentiate, then in order not to fall foul of section 9(1) of the Constitution, there must be a rational connection between the differentiation in question and the legitimate governmental purpose it is designed to further or achieve. If it is justified in that way, then it does not amount to a breach of section 9(1).

[57] The Minister proffers that the governmental purpose for this differentiation is to create an "equivalence" between parental leave for when a child is born and for an adopted child when they are young. She additionally argues that the differentiation does not occur in respect of children per se, but in respect of the financial benefit afforded to their parents.

[58] The Minister's arguments in this regard do not hold water. The age cap set is in respect of children under the age of two years and the maternity leave has such an effect that birth parents leave their children who are much younger than two years. Birth mothers return to work whilst their children are three to four months old, unless they

make special arrangements with their employer. If the Minister is concerned about equalising the two scenarios, it has not been argued why a four, six or 12-month age cap would be inappropriate. There is no explanation as to how two years was set as an appropriate age cap and why it should be regarded as a reasonable cap. I fail to see the creation of the "equivalence" alleged by the Minister.

[59] I also reject the argument that the differentiation does not occur in respect of children. Of course, there is a financial benefit resulting from the UIF claim, but the adopted children older than two years are treated differently because they are not afforded time to be with their employed parents when they join their new families and there is no opportunity afforded for them to adjust to the new family at all. It also cannot be gainsaid, as the Commission has argued, that the lack of parental leave benefits for parents of adopted children who are two years and older further decreases the likelihood of such children being adopted because there is absolutely no leave after such children join their new family.

[60] Therefore, there is a differentiation between adoptive parents, based on the age of the children they adopt, and also a differentiation between adopted children themselves, based on their age. Such differentiation amounts to discrimination as age is one of the specified grounds of discrimination in section 9(3). I also conclude that the discrimination is indeed unfair. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in their situation.[21]

[61] In *Harksen*, it was held that once it has been established that the provision is unfair, the next enquiry is whether the provision can be justified under the limitation clause.[22] I now turn to this enquiry.

[21] *Harksen* above n 7 at para 51.

[22] Id at para 53.

[62] The onus is on the Minister to show that the age cap is justifiable as envisaged in section 36(1) of the Constitution.[23] This requires a proportionality enquiry. This Court in *Makwanyane*[24] held that the balancing of different interests forms an inherent requirement of proportionality:

> "In the balancing process, the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question."[25]

[63] The right that is sought to be limited here is the right of adoptive parents who adopt children who are two years or older, and the right of the adopted children themselves. The extent of the limitation is that the parents are not afforded an opportunity to be at home, away from the workplace for the same period as the parents of the other children, and that their adopted children are not afforded the opportunity to be with their adoptive parents after adoption. As stated above, I accept that the primary focus of granting leave after a family has acquired a child, either through birth or other means, is nurturing. However, adjustment to a new environment is also very important and although it is not the primary focus of the legislation, it cannot be excluded.

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[23] Section 36(1) of the Constitution provides as follows:

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose."

[24] *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).

[25] Id at para 104.

[64] The extent of the limitation is such that there is no leave at all for adoptive parents with adopted children who are two years or older. As stated above, the Minister submits that the scheme attempts to create a kind of "equivalence" between parental leave for when a child is born, and parental leave for a young adopted child. The consequence, so argues the Minister, is that rather than discriminating against adoptive parents, the age cap actually functions to afford similar benefits to different categories of parents.

[65] This argument by the Minister is flawed, as already stated. It does not address the differentiation between adopted children below the age of two years and those above it. It focuses on the parents. However, the focus cannot be on the parents alone to the exclusion of the children, because the whole regime around maternity, paternity and adoption leave centres around both the parents and the children, with the parents being the givers of nurturing, and the children being the recipients or beneficiaries.

[66] The Minister further argues that unlike the parents of a three or five-year-old, adoptive parents of an infant are unlikely to be able to rely on day-care facilities because the infant is entirely reliant on the care of its parents in a way a child who is 10 years old is not.

[67] The gist of this argument is that adopted children above the two-year age cap, may be sent to day-care facilities whilst a child younger than two years is unlikely to be ready to be sent to such facilities. However, this argument raises this question: what is the difference between a child who is just under the age of two years (say, 23 months), and a child who is two years or just over that age (24 or 25 months)? Should we assume that a 24 or 25-month-old child would be able to adjust and is suited for a day care facility whilst a 23-month-old child would not be, or is not so suited? Are these factors not dependent on the facts of a matter, including the circumstances of both the adoptive parents and the child?

[68] Where the State seeks to limit constitutional rights in the Bill of Rights, it must support this by providing clear and convincing reasons. The Minister submits that the

parental leave scheme, as currently structured, is designed to provide parents with leave when the child is born. She argues that adoption may take place sometime after the child is born and that there is a need to ensure that some parameters are set to ensure that parental leave functions in a manner analogous to other parents.

[69] I accept that there is a need for the child and the parents to be afforded an opportunity to be together after a child has joined a family. This need arises for all children, whether they join their families through birth or adoption or surrogacy. This is not afforded to adoptive parents and their children who are above the age of two years. The Minister does not address the fact that children adjust differently and that a child who is two years and two months old, and excluded by the age cap, may be less stable and need more time with the adoptive parents than the one under the age of two years who is covered by the age cap. It has not been suggested that this is not possible.

[70] I agree with the Minister that a parameter has to be set on adoptive leave. Except for arguing that the parental leave for adoptive parents should be analogous to the one afforded to other parents, there is no other justification proffered. I have rejected the submission that the two-year age cap can be justified on this basis. The Minister does not say why a parameter at two years of age is reasonable or that a different parameter would be ill-suited. Generally, birth mothers go back to work after four months. These children are much younger than two years. The Minister does not explain how capping the adoption at two years of age is analogous to when a mother goes back to work, leaving a four-month-old child.

[71] Furthermore, when analysing whether adoptive leave should mirror the leave provided to other categories of parents, it is evident that the two are fundamentally different. Whilst leave for new-borns is focused on supporting the immediate and intensive needs of infancy, adoptive leave also addresses a broader spectrum of challenges. Adoptive parents, particularly those caring for children over the age of two, face the added complexities of facilitating the child's integration into a new family and navigating cultural and environmental shifts. This multifaceted responsibility, which

extends beyond mere physical care, calls for a tailored leave framework that recognises the unique demands of adoption, rather than a one-size-fits-all approach.

[72] Therefore, parental leave, irrespective of the child's age, is not solely about meeting the needs of the child, such as nurturing, but also to allow children of different ages a period to integrate and adapt in the new family unit. It cannot be disputed that in certain instances adopted children may require additional care and support depending on the circumstances they come from.

[73] The historical origins and initial rationale of the legislative scheme holds limited weight in light of the current contemporary family dynamics and evolving social norms, and the imperatives of section 28 of the Constitution alongside the Children's Act. It is not clear to me what a reasonable cap should be. This is a matter best left for final determination by the Legislature. As the unfair discrimination cannot be justified, an order that the capping of the age at two years is unconstitutional must therefore follow.

Relief

[74] Having held that sections 25, 25A, 25B and 25C of the BCEA and the corresponding sections of the UIF Act are inconsistent with the Constitution, it is appropriate for this Court to make an order affording Parliament an opportunity to cure the defects.

[75] The Minister has informed this Court that her department is in the process of initiating amendments to the legislation. Although this Court cannot second-guess what those amendments will be, it suffices to state that all the parties involved in the matter have a common understanding of the deficiencies in the provisions – save for the arguments on the age cap.

[76] The appropriate relief, with respect to the age cap, would be for it to be left to Parliament to decide on whether it is indeed necessary, what factors to take into account,

and at what age it is appropriate to cap it, in the event it finds that it is appropriate to do so.

[77] Regarding the discrimination relating to the duration of the leave period between birth mothers and other categories of parents, an order for interim relief, whilst affording Parliament an opportunity to cure the defects, is appropriate.

[78] The parties have made different submissions on how an interim reading-in could be made. The Van Wyks propose an interim relief that entitles both parents the benefit of four months parental leave independently. The Commission prays for an order that affords both parents collectively the benefit of four months' parental leave, to be shared between them such that they take turns at taking leave. It is envisaged by the Commission that each employer would be notified in advance, as soon as reasonably possible, of the election if a shared arrangement is chosen and the periods to be taken by each parent. Sonke seeks an order to the effect that each parent, as defined in the BCEA, be entitled to four months' parental leave. The effect of the order sought by Sonke would be that the total period of leave which both parents are entitled to is eight months.

[79] Although the Minister agrees that the confirmation should be granted, she does not support the stance that both parents ought to be granted four months' leave each, for budgetary considerations.

[80] The Minister proposes the suspension of the declaration of invalidity as a complete remedy.

[81] At the hearing in this Court, it became evident that the reading-in contained in the order of the High Court has certain fundamental difficulties. Although it orders a sharing of four months of parental leave, the 10 days' parental leave available to fathers has been taken away. It is not clear how the four months would be shared by the respective parents, and how the rights of the birth mother will be protected in order to

ensure that she obtains the leave necessary in preparation for and recovery after birth. An appropriate order should also seek to avoid abuse of leave by absent fathers.

[82] I hold that interim relief along the following lines would be appropriate: the current allowance of four months (for biological mothers) should be retained. Leave should not be restricted to mothers but should extend to fathers as well. Where only one of the parents is employed, such parent should be entitled to the full parental leave. In the case of a biological birth, the mother must have preference in respect of the time currently allocated as preparation for and recovery from birth. Subject to this qualification, the parents should be entitled to share the available days as they choose. In the event of disagreement, the leave contemplated in the relevant section shall 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. There should be a requirement that a father who wishes to avail himself for paternity leave qualifies as one who has assumed parental rights and responsibilities over the child as contemplated in the Children's Act. The additional 10 days contemplated in section 25A should also be allowed, giving a total of four months and 10 days leave to be shared between the parents.

[83] Lastly, in respect to the remedying of the corresponding UIF provisions, I find it inappropriate for this Court to provide an interim reading-in that has an effect before the suspension period lapses, as the UIF Act is regulated differently from the BCEA. This Court does not have sufficient information at its disposal regarding how the benefits in the corresponding provisions of the UIF are calculated. Furthermore, while financial considerations may not be relevant in assessing the constitutionality of a provision, they may dictate caution when it comes to an interim remedy, particularly when there may be more than one constitutionally compliant solution. In the present case, interim amendments to the UIF Act corresponding to those we make in respect of the BCEA could have substantial financial implications. In the current regime, only biological mothers in employment receive lengthy UIF benefits, up to a maximum of 17.32 weeks (approximately four months). There must be many instances of couples

where the mother is unemployed but the father is employed. If the employed father were now to be granted 17.32 weeks' UIF benefit, an enormous additional burden might be imposed on the UIF. It is thus preferable for the law-maker to decide the extent of UIF benefits to be conferred on employed parents in a non-discriminatory manner.

[84] However, there is the possibility that, despite the generous suspension period of 36 months, remedial legislation may not be brought into force during that period. In that event, the declaration of invalidity in respect of the impugned provisions of the UIF Act would come into force and there would be no legislative provision at all for UIF benefits in respect of biological, adoptive and commissioning parents. Clearly, that is untenable. Although this Court could at this stage provide a reading-in that will become operative after 36 months, the eventuality for which such a reading-in provides may never come to pass. Given that a reading-in in respect of the impugned provisions of the UIF Act is more complex than in the case of the BCEA, it seems preferable to defer the question of such a reading-in. The order shall thus include a direction that this question be timeously brought to the Court's notice for supplementary relief, in the event of it appearing likely that there will be a need for a reading-in remedy. The same will apply to the two-year age cap in section 25B(1) of the BCEA.

Costs

[85] As stated above, the Minister has not opposed this application. However, the applicants have had to approach this Court in order to obtain an order of declaration of invalidity. Consequently, the Minister should pay the costs of the application.

[86] I therefore make the following order:

1. The Commission for Gender Equality is granted leave to appeal against the High Court's decision not to declare, as invalid and inconsistent with the Constitution, the age limitation of two years in section 25B(1) of the Basic Conditions of Employment Act 75 of 1997 and section 27(1)(c) of the Unemployment Insurance Act 63 of 2001 (UIF Act).

2. The declaration made by the High Court, that sections 25, 25A, 25B and 25C of the BCEA dealing with maternity and parental leave, together with the corresponding sections 24, 26A, 27 and 29A of the UIF Act, are invalid and inconsistent with the Constitution to the extent that they unfairly discriminate between different classes of parents as to the length of parental leave available to parents and as to the unemployment benefits to which they are entitled, and the periods for which unemployment benefits are paid, is confirmed.

3. It is declared that section 25B(1) of the BCEA and section 27(1)(c) of the UIF Act are invalid and inconsistent with the Constitution to the extent that they limit parental leave and related benefits to the case where the adopted child is below the age of two years.

4. The declarations of constitutional invalidity referred to in paragraphs 2 and 3 are suspended for a period of 36 months from the date of this order to afford Parliament an opportunity to remedy the constitutional defects giving rise to the constitutional invalidity.

5. Pending the coming into force of any remedial legislation as contemplated in paragraph 4, the impugned provisions of the BCEA shall read as follows, the changes being indicated by underlining:

(a) Section 25 of the BCEA shall read:

"25. Parental leave

(1) An employee who is—

(a) a single parent; or

(b) the only employed party in a parental relationship, is entitled to at least four consecutive months' parental leave.

(2) A female employee who is expecting the birth of a child may commence parental leave—

(a) at any time from four weeks before the expected date of birth, unless otherwise agreed; or

(b) on a date from which a medical practitioner or a midwife certifies that it is necessary for the employee's health or that of her unborn child.

(2A) Where section 25(2) does not apply, an employee may commence parental leave on—

(b) the day that the employee's child is born; or

(b) where section 25B or section 25C is applicable, the date mentioned in section 25B(2) or section 25C(2) as the case may be.

(3) No female employee who has given birth to a child may work for six weeks after the birth of her child, unless a medical practitioner or midwife certifies that she is fit to do so.

(4) An employee who has a miscarriage during the third trimester of pregnancy or bears a stillborn child is entitled to parental leave for six weeks after the miscarriage or stillbirth, whether or not the employee had commenced parental leave at the time of the miscarriage or stillbirth.

(4A) If both parties to a parental relationship are employed, the parties are entitled in the aggregate to four months and ten days' parental leave, inclusive of any parental leave taken in terms of subsections (2) and (3).

(4B) The remainder of the parental leave referred to in subsection (4A), after deducting any parental leave taken in terms of subsections (2) and (3), may be taken by the parties in such manner as they may agree, including concurrently or consecutively, or partly concurrently and partly consecutively, save that any such parental leave, inclusive of the leave contemplated in subsections (2) and (3) must be taken by the party concerned in a single sequence of consecutive days.

(4C) If the parties cannot agree on the manner in which the remainder of the parental leave referred to in subsection (4B) is to be taken, such remainder shall 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 ten days, provided that such leave is completed within a period of four months from the birth of the child or, where applicable, from the date referred to in section 25B(2) or 25C(2).

(4D) For purposes of subsection (4A), a party shall be deemed to be a party to a parental relationship if such a party has assumed parental rights and responsibilities over the child as contemplated in the Children's Act, 2005 (Act No. 38 of 2005).

(5) An employee must notify an employer in writing, unless the employee is unable to do so, of the date on which the employee intends to—

(a) commence parental leave; and

(b) return to work after parental leave.

(6) Notification in terms of subsection (5) must be given—

(a) at least four weeks before the employee intends to commence parental leave; or

(b) if it is not reasonably practicable to do so, as soon as is reasonably practicable.

(7) The payment of parental benefits will be determined by the Minister subject to the provisions of the Unemployment Insurance Act, 2001 (Act No. 63 of 2001)."

(b) Section 25A of the BCEA shall be deleted.

(c) Section 25B of the BCEA shall read:

25B. Adoption leave

(1) An employee, who is an adoptive parent of a child who is below the age of two, is subject to subsection (6), entitled to the parental leave referred to in section 25(1).

(2) An employee may commence adoption leave on the date—

(a) that the adoption order is granted; or

(b) that a child is placed in the care of a prospective adoptive parent by a competent court, pending the finalisation of an adoption order in respect of that child,

whichever date occurs first.

(3) An employee must notify an employer in writing, unless the employee is unable to do so, of the date on which the employee intends to—

(a) commence adoption leave; and

(b) return to work after adoption leave.

(4) Notification in terms of subsection (3) must be given—

(a) at least one month before the date referred to in subsection (2); or

(b) if it is not reasonably practicable to do so, as soon as is reasonably practicable.

(5) The payment of adoption benefits will be determined by the Minister, subject to the provisions of the Unemployment Insurance Act, 2001 (Act No. 63 of 2001).

(6) If an adoption order is made in respect of two adoptive parents, both parties are entitled in the aggregate to four months and ten days' adoption leave.

(6A) The adoption leave referred to in subsection (6), may be taken by the parties in such manner as they may agree, including concurrently or consecutively, or partly concurrently and partly consecutively.

(6B) If the parties cannot agree on the manner in which the adoption leave referred to in subsection (6) is to be taken, such adoption leave shall be apportioned between the parents in such a way that each parent's total adoption leave is as close as possible to half of four months and ten days, provided that such balance is completed within a period of four months from the adoption of the child.

(7) If a competent court orders that a child is placed in the care of two prospective adoptive parents, pending the finalisation of an adoption order in respect of that child, the two prospective adoptive parents are entitled to leave in terms of subsection (6).

(d) Section 25C of the BCEA shall read:

25C. Commissioning parental leave

(1) An employee, who is a commissioning parent in a surrogate motherhood agreement is, entitled to leave as stipulated in section 25(1).

(2) An employee may commence commissioning parental leave on the date a child is born as a result of a surrogate motherhood agreement.

(3) An employee must notify an employer in writing, unless the employee is unable to do so, of the date on which the employee intends to—

(a) commence commissioning parental leave; and

(b) return to work after commissioning parental leave.

(4) Notification in terms of subsection (3) must be given—

(a) at least one month before a child is expected to be born as a result of a surrogate motherhood agreement; or

(b) if it is not reasonably practicable to do so, as soon as is reasonably practicable.

(5) The payment of commissioning parental benefits will be determined by the Minister, subject to the provisions of the Unemployment Insurance Act, 2001 (Act No. 63 of 2001).

(6) Where there are two commissioning parents, they shall each be entitled in the aggregate to four months and ten days' commissioning parental leave.

(6A) The commissioning parental leave referred to in subsection (6), may be taken by the parties in such manner as they may agree, including concurrently or consecutively, or partly concurrently and partly consecutively.

(6B) If the parties cannot agree on the manner in which the commissioning parental leave referred to in subsection (6) is to be taken, such commissioning parental leave shall be apportioned between the parents in such a way that each parent's total commissioning parental leave is as close as possible to half of four months and ten days, provided that such balance is completed within a period of four months from the birth of the child.

(7) In this section, unless the context otherwise indicates—

'commissioning parent' has the meaning assigned to it in section 1 of the Children's Act, 2005 (Act No. 38 of 2005); and

'surrogate motherhood agreement' has the meaning assigned to it in section 1 of the Children's Act, 2005 (Act No. 38 of 2005)."

6. Not later than six months before the expiry of the 36-month suspension period, the Minister of Employment and Labour, (Minister) must furnish a report to the Registrar, on notice to the parties, as to whether remedial legislation in respect of the BCEA and UIF Act has been brought into operation and, if such legislation has not been brought into operation, when it is expected to be brought into operation and the further processes that need to be completed in order for such legislation to be brought into operation.

7. Upon the furnishing of such report, or in the absence of such report, any of the parties may apply, insofar as it is necessary, for supplementary relief to become operative upon the expiry of the 36-month suspension period. Such application shall be brought not later than four months before the expiry of the suspension period, and its further conduct shall be regulated by directions issued by the Chief Justice.

8. The Minister must pay the applicants' costs in this Court, including the costs of two counsel where so employed.

Case CCT 308/23 *Van Wyk and Others v Minister of Employment and Labour*:

For the First and Second Applicants:	N Rajab-Budlender SC, L Minné and S Mirzoyev instructed by Webber Wentzel
For the Third Applicant:	M Letzler instructed by Bowman Gilfillan Incorporated
For the Fourth Applicant:	H Barnes SC, M Rasivhetshele and K Ramela instructed by Norton Rose Fulbright South Africa Incorporated
For the Respondent:	F Boda SC and J Langa instructed by Office of the State Attorney, Johannesburg
For the Amici:	J Bhima and T Thumbiran instructed by Lawyers for Human Rights

Case CCT 309/23 *Commission of Gender Equality and Another v Minister of Employment and Labour and Others*:

For the First Applicant:	H Barnes SC, M Rasivhetshele and K Ramela instructed by Norton Rose Fulbright South Africa Incorporated
For the Second Applicant:	M Letzler instructed by Bowman Gilfillan Incorporated
For the First Respondent:	F Boda SC and J Langa instructed by Office of the State Attorney, Johannesburg
For the Second and Third Respondents:	N Rajab-Budlender SC, L Minné and S Mirzoyev instructed by Webber Wentzel
For the Amici:	J Bhima and T Thumbiran instructed by Lawyers for Human Right