

Parental Leave Guideline:

The effects of the judgment in *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



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What are the facts of the case?

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 4-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 4-month leave period to provide the necessary nurturing for a newborn baby without unpredictable and potentially serious consequences for her businesses. As a family, they decided that Mr Van Wyk would remain at home with their child for the first four months but neither the law nor his employer's policies permitted him to claim parental leave during this period.

On 25 October 2023, the Gauteng High Court 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).

The Court declared the relevant provisions of the BCEA and the UIA invalid given that they are inconsistent with the fundamental rights to equality and dignity, in that they:

- unfairly discriminate between mothers and fathers; and
- unfairly discriminate between one set of parents and another based on whether their children:
 - were born of the mother;
 - were adopted; or
 - were conceived by surrogacy.

The declaration of invalidity made by the High Court was referred to the Constitutional Court for confirmation.

What is the finding and order of the Constitutional Court?

On 3 October 2025, the Constitutional Court handed down its judgment upholding the Gauteng Division of the High Court's order of unconstitutionality, in respect of 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.

Employment Law

The declarations of constitutional invalidity are suspended for a period of 36 months in order to afford Parliament an opportunity to remedy the constitutional defects giving rise to the constitutional invalidity. In the interim, the Court ordered the following changes with immediate effect:

- **Universal Parental Leave:** All parents—biological, adoptive, and commissioning—are entitled to four months and ten days of parental leave, to be shared as they choose and can be taken either consecutively or successively by the parents.
- **Leave Sharing:** If both parents are employed, they must agree on how to divide the leave. If they cannot agree, the leave is split as equally as possible.
- **Adoption Age Cap Removed:** New Adoptive parents of children of any age are now eligible for parental leave.
- **Pregnancy and Post-Birth Leave:** Female employees who are due to give birth may begin parental leave up to four weeks before the expected birth, or earlier if medically necessary. No female employee may work for six weeks after giving birth unless certified medically fit. These periods are included in the total parental leave allocation.
- **Single Employed Parent:** Where only one parent is employed, that parent is entitled to the full period of parental leave.
- **Notification Requirements:** Employees must notify their employer in writing of their intended leave dates and return date, at least four weeks in advance (or one month for adoption/commissioning leave), unless not possible to do.

Adoption and surrogacy:

adoption leave may begin when a child is placed with a prospective adoptive parent by court order. Commissioning parental leave may begin on the date of birth under a surrogate motherhood agreement.

What was the Court's reasoning for the judgment?

The challenge to the parental leave provisions of the BCEA was brought on the basis of sections 9 and 10 of the Constitution, which safeguard the rights to equality and dignity. The Court held that the relevant provisions of both the BCEA and the UIF are inconsistent with these constitutional guarantees.

The human dignity of parents who are not a birth mother is infringed because they are denied the equal benefits and protections granted to birth mothers. Extending such benefits exclusively to birth mothers reinforces the outdated assumption that women are, and ought to be, the primary caregivers of children. As a result, fathers, and other parents, are sidelined and deprived of the opportunity to play an active parental role during the crucial early stages of a child's life.

This legal framework also restricts parents' freedom to determine how they will share child-rearing responsibilities, instead imposing caregiving roles on the basis of gender. Moreover, the provisions discriminate against adoptive parents and those who become parents through surrogacy.





For example, when parents adopt or welcome a child through a surrogate, their entitlement to parental leave is significantly shorter than that afforded to biological parents. While it is understandable that birth mothers require time off for medical reasons before and after childbirth, nurturing is not limited to biological mothers alone. In other parental arrangements, the period allocated for bonding and caregiving is insufficient to meet the needs of both the child and the parents.

Will the changes to the BCEA apply immediately?

Yes, the Constitutional Court's interim relief applies with immediate effect until Parliament passes legislation remedying the constitutional defects of the BCEA.

When does the 3-year period start during which time Parliament is required to remedy the defective legislation?

The 36-month period begins from the date of the Constitutional Court's judgment, being 3 October 2025.

Are parents allowed to take parental leave at the same time?

The Constitutional Court's order requires that if both parents are employed, they must agree on how to divide their collective parental leave allowance, and this can be taken either consecutively or concurrently. Any parental leave must be taken by the party concerned in a single sequence of consecutive days.

What are the implications for employers?

Employers must now extend parental leave benefits to all parents, regardless of gender or birthing status. This includes fathers and non-birthing parents, who are now entitled to share in the four months and ten days of leave. Employers should review and update their leave policies to ensure compliance and avoid discrimination. Where paid maternity leave or maternity leave is access of four months and ten days is offered only to birthing mothers, these benefits should be extended equally to all parents.

Does the interim relief make provision for the physiological needs of pregnant women before and after birth?

Yes. The Constitutional Court's order maintains the provisions which allow a pregnant mother to commence parental leave at any time from four weeks before the expected date of birth, unless otherwise agreed or on a date from which a medical practitioner certifies that it is necessary for the mother's health or that of her unborn child. Furthermore, the mother may not work for six weeks after the birth of her child, unless a medical practitioner certifies that she is fit to do so.

In relation to a miscarriage during the third trimester of pregnancy or a still-born birth, the employee is entitled to parental leave for six weeks after the miscarriage or still-birth.

If the parents agree to share the parental leave, do they need to notify their employers?

Yes. If a shared arrangement for the parental leave is elected, they are required to inform both their employers in writing of this arrangement.

If one parent is unemployed can the employed parent take the full four months and 10 days?

Yes, the employed parent will be entitled to take four months and ten days leave.

Can the employers of the parents confirm the shared parental leave arrangement with each other to ensure compliance and mitigate an abuse of the parental leave provision?

It is advisable that employers have a policy regulating this and ensure that such communication is conducted with the consent of the employees and that it is compliant with the Protection of Personal Information Act, 4 of 2013.

What was the impact of the Court's order on the relevant provisions of the UIA Act that were found constitutionally invalid?

The Court found that it would be inappropriate to implement an interim reading-in that takes effect before the expiry of the 3 year suspension period, as the UIA is structured and regulated differently from the BCEA. The Court does not have sufficient information before it regarding the manner in which benefits under the relevant provisions of the UIF are calculated.

While financial considerations are not determinative in assessing the constitutionality of legislation, they may warrant caution when crafting an interim remedy, particularly where multiple constitutionally compliant solutions are possible. In this instance, interim amendments to the UIA that mirror those applied to the BCEA could have significant financial consequences.

Given that a reading-in remedy for the impugned provisions of the UIA involves greater complexity than in the case of the BCEA, it is preferable to defer this question. Accordingly, the issue may be brought before the Court in a timely manner for supplementary relief, should it become apparent that a reading-in remedy will be necessary.



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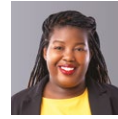
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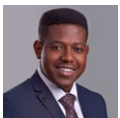
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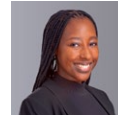
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