

Parental Leave Guideline:

The effects of the judgment in
*Van Wyk and Others v Minister
of Employment and Labour*
[2023] ZAGPJHC 1213



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What is the order of the High Court?

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.

What does the judgment of the High Court order to remedy the constitutional defect?

The Court suspended the declaration of invalidity for two years for Parliament to amend the legislation in order to cure the unconstitutionality. In the interim, the Court has ordered a reading of the legislation that affords all parents 4 consecutive months' parental leave (parents of a qualifying child are in a position to share the 4 months leave as they elect) until Parliament remedies the defect. In ordering interim relief, the court held as follows: *"In my view the appropriate immediate means by which to remove inequality, in the interim period, is the proposal advanced by the Van Wyks; i.e. all parents of whatever stripe, enjoy 4 consecutive months' parental leave, collectively. In other words, each pair of parents of a qualifying child shall share the 4 months leave as they elect."*

Importantly, the interim reading of the legislation has no effect until it is confirmed by the Constitutional Court which has not yet taken place.

What was the Court's reasoning for the judgment?

The crux of the Court's reasoning lies in the fact that the BCEA treats parents differently depending on whether they are mothers or fathers, adoptive parents or parents who have a child via a surrogate.

The Court considered the best interests of the child and the fact that the premise of the care-giving leave entitlements in the BCEA is for the nurturing of a newborn baby or toddler and is not limited to the physiological recovery after giving birth. The Court however made clear that a birthing mother is entitled to such a recovery period and that the provisions providing for this physiological recovery are not unconstitutional.

The Court found that the distinctions in the BCEA between birthing and non-birthing parents are not validly substantiated when it results in less care for a child in one scenario (for example, in the event of an adoption), and more care for a child in another scenario (for example, when a parent gives birth to a child).

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

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.

Will changes to the BCEA apply immediately?

No. Any declaration of invalidity made by a High Court must be referred to the Constitutional Court for confirmation. Accordingly, the Constitutional Court must render a decision on whether to confirm the High Court's declaration of invalidity. In this process, the Constitutional Court may also amend the interim relief which the High Court crafted to cure the invalidity while Parliament decides how best to finally amend the legislation.





When does the 2-year period start during which time Parliament is required to remedy the defective legislation?

The 2-year period will begin from the date of confirmation by the Constitutional Court if the Court decides that the statute is in fact unconstitutional.

Pending the confirmation by the Constitutional Court, what is the status of parental and maternity leave?

The status quo remains intact. However, employers can possibly review their policies with a view to assessing the implications of amending its parental leave benefits if the Constitutional Court confirms the declaration of invalidity and the interim relief in due course.

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

The interim relief states that each parent shall *"take turns"* in taking the leave. This could mean that each parent will take their leave consecutively and not simultaneously. However, the employer may have a discretion to grant the leave simultaneously. Further clarity may be required on the application of simultaneous leave. This issue will hopefully be clarified by the Constitutional Court.

What are the implications for employers that currently offer paid maternity leave?

Employers that provide paid maternity leave benefits may need to extend these benefits to parental leave for all employees in line with the interim relief. Employers may also consult with their employees on amending the leave benefit. Again, this is only if the Constitutional Court confirms the finding of unconstitutionality.

What is the impact on UIF parental and maternity leave benefits?

The interim relief allows all parents 4 consecutive months' parental leave. The parents of a qualifying child are to share the 4 months' leave as they elect. Accordingly, whatever portion of the 4 months any parent takes as leave will qualify for the UIF benefit, irrespective of whether the parent is the birth-giving parent or not.

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

Yes. The interim relief 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 or a midwife 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 or midwife 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 maternity leave for six weeks after the miscarriage or still-birth.

However, pregnant women and the birth-giving parent will need to share the four-month leave allocation with the father of the child should they elect to divide the leave allocation between them after the birth of the child.

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 4 months?

Yes, the employed parent will be entitled to take 4 months leave and claim the UIF benefit, if applicable.

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.



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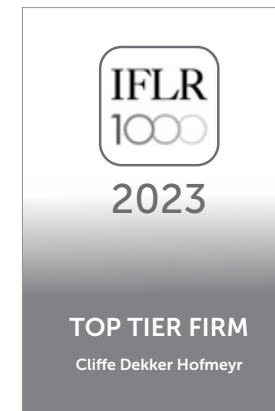
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