

Parental Leave for Fathers: A New World-Order

Parental Leave Reimagined: The Constitutional Court's Landmark Decision 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

INTRODUCTION

The Constitutional Court's decision in *Van Wyk and Others v Minister of Employment and Labour* marks a formative development in South African labour law, reforming the legal landscape surrounding parental leave. The judgement directly confronts longstanding gender stereotypes within the labour law sector advancing the constitutional values of equality and dignity within the workplace.

By declaring specific sections of the *Basic Conditions of Employment Act* 75 of 1997 ("**BCEA**") and their corresponding counterparts in the *Unemployment Insurance Act* 63 of 2001 ("**UIF Act**") unconstitutional, the Constitutional Court directed a transformative interpretation of parental rights consistent with the values of the Constitution.

BACKGROUND FACTS

The litigation was initiated when Mr van Wyk, the first applicant, sought four months paternity leave to assume primary caregiving responsibilities for his newborn child while his wife continued operating her business. His employer denied the request, granting only the statutory 10 days paternal leave under section 25A of the BCEA. The applicants, joined by Sonke Gender Justice and the Commission for Gender Equality ("**CGE**"), challenged the constitutionality of the parental leave provisions on the basis that they unfairly discriminated between mothers and fathers, biological and adoptive parents, as well as commissioning parents involved in surrogacy agreements.

THE CONSTITUTIONAL ISSUES

The impugned legislative scheme created multiple tiers of parental entitlement. The primary tier privileging birth mothers to receive four consecutive months of

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maternity leave while the second-tier benefits birth fathers and non-birth parents granting them only 10 days of parental leave. The third tier entitles adoptive parents to 10 weeks, provided the child is under two years old.

Finally, the fourth tier enables Commissioning parents in surrogacy agreements to enjoy 10 weeks consecutively or the same parental leave referred to in section 25A of the BCEA.

The applicants contended that these distinctions entrenched gendered caregiving roles and infringe on the rights to equality and human dignity¹. The CGE further challenged the arbitrary age cap of two years old in section 25B(1) of the BCEA, arguing that it unfairly discriminated against parents choosing to adopt older children.

THE HIGH COURT'S FINDINGS

The High Court found it evident that the relevant sections of the BCEA did indeed differentiate between biological mothers and fathers and between a birth mother and other mothers or parents. The High Court held the statutory regime to be irrational and discriminatory on the grounds that the BCEA perpetuated outdated gender norms by presuming mothers as the primary caregivers and fathers as secondary participants. The Court ordered a temporary "reading-in" of shared parental leave for both parents, pending legislative reform. However, it declined to invalidate the two-year age cap on adoption leave.

THE CONSTITUTIONAL COURT'S JUDGMENT

The Constitutional Court confirmed the High Court's declaration of invalidity and expanded on it further. The Constitutional Court held that the BCEA and UIF Act indeed unfairly discriminated between varying classes of parents based on gender, family structure, and the selected method of parenthood.

Furthermore, it was found that the legislative framework infringes on both the right to equality and dignity, because it differentiated without rational justification

and denied non-biological parents the freedom to structure their familial responsibilities.

The Constitutional Court held that the two-year age cap for adoption leave was irrational and unconstitutional, as it unjustifiably excluded adoptive parents of older children who would equally require sufficient time for bonding and care of the adopted child.

The Constitutional Court suspended the declaration of invalidity for 36 months, granting Parliament time to amend the BCEA as well as the UIF Act. In the interim, the Court prescribed a provisional “reading-in” allowing four months and ten days parental leave to be shared between parents, regardless of gender or parental category as well as the equal treatment of adoptive and commissioning parents in the interim.

The Constitutional Court applied the principle of substantive equality, recognising that formal equality under the Constitution has failed to account for modern gender roles and family diversity. By placing parental leave within the ambit of human dignity, the Constitutional Court affirmed that the right to family life includes the autonomy to determine caregiving arrangements free from legislative prescription. This judgment underscores that workplace policies must not encourage gender stereotypes.

The Constitutional Court embraced an inclusive understanding of the family unit by explicitly extending equal protection to same-sex parents, adoptive parents, and commissioning parents in surrogacy arrangements. This ultimately aligns South African labour law with the *Children’s Act*² as well as the constitutional commitment to non-discrimination.

CONCLUSION

The Constitutional Court in *Van Wyk* has corrected legislative injustices by bridging the gap between workplace equality and substantive family justice. The judgment harmonises and modernises labour rights with the evolving social fabric of South Africa, ensuring that the law advances the dignity of all parents equally.



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¹Sections 9 and 10 of the Constitution of the Republic of South Africa, 1994, respectively

²38 of 2005