

ISSUE

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# PARENTAL LEAVE EQUALITY: A CONSTITUTIONAL SHIFT

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## Introduction to Expanded Parental Leave Provisions

On January 1, 2020, sections of the Labour Relations Amendment Act (LRA) came into effect, modifying the Basic Conditions of Employment Act (BCEA) to include parental, adoption, and commissioning parental leave. However, in 2022, the constitutionality of these sections was questioned in the case of *Werner Van Wyk & 3 others v. Minister of Employment and Labour*, with a ruling issued on October 25, 2023.

## Current Parental Leave Provisions under the BCEA

- **Maternity Leave (Section 25):** Female employees are entitled to four months of unpaid maternity leave, which can begin up to four weeks before the expected birth date or earlier if medically necessary.
- **Parental Leave (Section 25A):** All parents are entitled to 10 days of parental leave following the birth or legal adoption of their child.
- **Adoption Leave (Section 25B):** One adoptive parent is entitled to 10 weeks of leave for adopting a child under two years old, while the other parent receives 10 days of parental leave.
- **Commissioning Parental Leave (Section 25C):** In a surrogacy arrangement, one commissioning parent may take 10 weeks of leave, while the other is entitled to 10 days of leave.

While the BCEA allows both male and female employees to qualify for parental, adoption, or commissioning parental leave, only a female employee who is pregnant can take maternity leave.

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## **A Challenge to Parental Leave Inequality**

In their court case, Mr. and Mrs. Van Wyk argued that parental leave laws unfairly differentiate between mothers and fathers and do not reflect the varied family dynamics of modern society. Mrs. Van Wyk, a business owner, preferred to return to work shortly after childbirth to maintain her business, while Mr. Van Wyk, a salaried employee, wanted to take a more extended role as the primary caregiver. However, Mr. Van Wyk was only entitled to 10 days of parental leave, which led to financial strain and disrupted their family plans.

The Van Wyks argued that sections of the BCEA and Unemployment Insurance Fund (UIF) Act (2001) violated sections 9 and 10 of the Constitution by unfairly discriminating based on gender and family type. The court agreed, finding that the BCEA failed to account for the needs of families like the Van Wyks and was in breach of Constitutional protections for equality and dignity. Parliament now has two years to amend these laws to address this disparity.

The court supported the Van Wyks' proposal: all parents should be entitled to four months of parental leave, shared flexibly between parents as they see fit.

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## **Interim Changes to Parental Leave**

As part of the interim order, Section 25(1) of the BCEA has been amended. Now:

- Single parents are entitled to four consecutive months of parental leave.
- Paired parents collectively have four months of leave, which they can split between them as they choose.

Parents who contribute to the UIF will also be eligible for the related benefits.

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## **Adoption Leave for Children Under Two Years Old**

The court also reviewed the restriction in Section 25B limiting adoption leave to children under two years of age. It determined that this age limit does not constitute unfair discrimination and is consistent with the policy's intended benefit.

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## **Suspension of Invalidity and Timeline for Amendments**


The court's declaration of invalidity is suspended for two years, allowing Parliament time to amend the BCEA and address the identified constitutional defects. During this two-year period, the interim order will remain in effect, providing immediate relief to affected families.

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## **Conclusion**

This constitutional shift marks a significant step toward greater equality in parental leave, allowing families more flexibility to decide what works best for them. We will keep you updated on further developments as Parliament works to implement these important changes.

Regards



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