REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case no: 2022-017842

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES

2023/10/25 [signature]

DATE SIGNATURE

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**
As Amici Curiae:	
CENTRE FOR HUMAN RIGHTS, UNIVERSITY OF PRETORIA	**First Amicus Curiae**

SOLIDARITY CENTER, SOUTH AFRICA	**Second Amicus Curiae**
INTERNATIONAL LAWYERS ASSISTING WORKERS NETWORK	**Third Amicus Curiae**
LABOUR RESEARCH SERVICE	**Fourth Amicus Curiae**
NATIONAL EMPLOYMENT' ASSOCIATION OF SOUTH AFRICA(NEASA)	**Fifth Amicus Curiae**
SIYASANGA NJAMBATWA	**Sixth Amicus Curiae**

This judgment has been delivered by uploading to the digital database of the Gauteng Division of the High Court of South Africa on 25 October 2023 at 10h00 and by delivery by email to the parties.

ORDER

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(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;

(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.

(14) The costs of the first, second, third and fourth applicants, including the costs of two counsel where so employed, shall in accordance with the *Biowatch* principle, be borne by the Minister of Labour.

JUDGMENT

Sutherland DJP:

Introduction

[1] This application is about allegations of unconstitutionality of sections 25, 25A, 25B and 25C in the Basic Conditions of Employment Act 75 of 1997 (BCEA) which deal with maternity and parental leave. [1] The BCEA is one of a suite of

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[1] The relevant portions of the provisions of the BCEA are:

25 Maternity leave

(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 stillborn child is entitled to maternity leave for six weeks after the miscarriage or stillbirth, whether or not the employee had commenced maternity leave at the time of the miscarriage or stillbirth.

(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 (63 of 2001).

25A Parental leave

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

(2) An employee may commence parental leave on

(a) the day that 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 co

mpetent 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, o f 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) 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 provisio ns of the Unemployment Insurance Act, 2001 (Act 63 of 2001).

25B Adoption leave

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 a prospective adoptive parent by a competent c ourt, 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 provisi ons of the Unemployment Insurance Act, 2001 (Act 63 of 2001).

(6) If an adoption order is made in respect of two adoptive parents, one of the adoptive parent s 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 pa rents,pending the finalisation of an order in respect of that child, one of the prospective adopti ve parents may apply for adoption leave and the other prospective adoptive parent
may apply for the parental leave referred to in section 25A: Provided that the selection of choi ce must be exercised at the option of the two prospective adoptive parents.).

25C Commissioning parental leave

An employee, who is a commissioning parent in a surrogate motherhood agreement is, subje ct 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, o f 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 surrogat e 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, subje ct to the provisions of the Unemployment Insurance Act, 2001 (Act 63 of 2001).

statutes that regulate employment and labour relations. The font of the value choices in these statutes lies, in particular, in sections 13, 18, 22 and 23 of the Constitution which touch on employment. Section 9 of the Constitution on the right to equality and section 10 of the Constitution on the right to dignity, of course, pervade every aspect of life.[2] The present controversy is about whether these particular provisions in the BCEA are unconstitutional because they unfairly discriminate against persons in violation of section 9 or 10 of the constitution.

[2] There are three sets of applicants. The first and second applicants are Werner and Ika Van Wyk, a married couple and parents of a child. The second applicant is Sonke Gender Justice whose role is public advocacy in support of gender equality. The Third applicant is the Commission for Gender

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(6) If a surrogate motherhood agreement has two commissioning parents, one of the commiss ioning parents may apply for commissioning
parental leave and the other commissioning parent may apply for the parental leave referred t o in section 25A: Provided that the selection ofchoice must be exercised at the option of the t wo 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 38 of 2005); and
'surrogate motherhood agreement' has the meaning assigned to it in section 1 of the Children' s Act, 2005 (Act 38 of 2005).

[2] Section 9 of the Constitution:
Equality
(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

Section 10 of the Constitution:
Human dignity
Everyone has inherent dignity and the right to have their dignity respected and protected.

Equality (CGE), a Chapter 9 institution. The sole respondent is the Minister of Labour who is the custodian of the BCEA.

[3] In addition, there are 6 entities who joined as *amici curiae.* Four of them, the Center for Human Rights of the University of Pretoria, Solidarity Center South Africa, International Lawyers Assisting Workers Network and the Labour Research Service advance a common argument in support of the applicants' criticism of the BCEA. A fifth *amicus,* is the National Employers Association of South Africa (NEASA), who makes common cause with the Minister of Labour in opposing the criticism of the BCEA. The 6th amicus did not participate in the hearing.

[4] The contested sections are in chapter 3 of the BCEA. This chapter regulates the minimum leave that an employer must grant to employees in respect of several circumstances. The policy norm informing the statutory regulation of leave is that employees should be entitled to time off work for a guaranteed minimum duration under specified circumstances, a right which does not exist in terms of the common law. As such, this is a quality-of-life-policy choice. Accordingly, the first basic benefit the BCEA creates is paid annual leave, stipulated in section 20 and 22. The second basic benefit, stipulated in section 22, is a minimum duration of paid leave to recover from illness. Third, in section 27, provision is made for three days paid family responsibility leave in every leave cycle; plainly intended to cater for a response to a family emergency.

[5] A fourth category of leave relates to the relationship of the employees qua parents to their children. This guaranteed period of leave dos not compel an employer to pay to employee. Sections 25, 25A, 25B, 25C, and 26 regulate the granting of such leave. The most recent amendments, ie, Sections 25A – 25C were introduced by Act 3 of 2018 and came into effect on 1 January 2020.

[6] The cited provisions of the BCEA differentiate three categories of child. A child born of a mother, a child born by surrogacy, and an adopted child.

[7] A birth-mother's circumstances are dealt with in section 25 and section 26. Section 26 addresses explicitly the physiological dimension of pregnancy and of child nurture immediately post-birth. A mother shall not be permitted to perform work hazardous to her health or that of the child during pregnancy and for 6 months after birth. Section 25(3) forbids a mother working for 6 weeks after the date of birth unless a doctor or midwife approves thereof.

[8] Section 25 goes on to provide for a total of 4 consecutive months' maternity leave for a birth-mother, of which one month may be taken prior to the date of birth. In terms of section 25A (1) and 25A (2)(a) a father is entitled to 10 days leave from date of birth of the child.

[9] Section 25B deals with an adopted child. The recognition of leave for a parent in this category is limited to a child who is not more than two years old. The section recognises both adoptive parents. It must be read with section 25A. 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 this election. Obviously, no provision is made for physiological recovery. The provisions are gender neutral and a pair of same-sex parents is not distinguished from a heterosexual pair. The period of 10 weeks leave is 6 weeks less than that to which a birth-mother is entitled, i.e. 16 weeks/ 4months.

[10] The third category of child is one born via surrogacy. The leave is guaranteed for the genetically linked parents, called the 'commissioning parents' in the statute. The Section says nothing whatever about the surrogate herself.

Section 25C regulates this category of leave. The entitlements are identical to that provided for adoptive parents; ergo, 10 weeks or 10 days.

[11] The guaranteed leave in Section 25A, 25B and 25C which is compulsory for an employer to grant, as alluded to above, does not require an employer to pay any remuneration. The effect of the BCEA is that the employee has the time off work and has job security upon return to work. In all three categories the employee on this type of leave may claim a financial benefit from the Unemployment Insurance Fund in such sums as are determined by the Minister of Labour.[3] It is commonplace for major employers to contract with employees to grant leave to cater for new-borns. That phenomenon does not bear on the jurisprudential issues at stake in this case.

[12] It is plain and uncontroversial that there is a differentiation made between mothers and fathers and between a birth–mother and other mothers or parents.

[13] The claims made and relief which is sought by the applicants, in simple terms can be described thus:

(1) Section 25(1) is unconstitutional because no valid grounds exist to distinguish one parent–employee from another. Thus, both parents should be entitled to parental leave in equal measure and the failure provide so is unfair discrimination and violates the dignity of all parents. Suggestions as to how equality and dignity might be achieved varies: the Van Wyks' suggest that both parents share the 4-months leave according to their election; the Gender Commission and Sonke Gender suggest both parents each have an equal and contemporaneous leave entitlement.

[3] See: Unemployment Insurance Act 63 of 2002 (UIF Act), sections 24, 26A,27, 29A.

(2) The differentiation in the duration of prescribed leave available to each of the three classes of parents, i.e. a birth mother and father; adoptive parents and parents of a child born through surrogacy, constitutes unfair discrimination and violates the dignity of all parents. It is contended that all categories should enjoy an equal duration of leave.

(3) Furthermore, the notion that the prescribed leave is available to adoptive parents only in respect of a child of less than two years of age is challenged as irrational and as unfair discrimination.

[14] The Minister argues that the present suite of benefits in the BCEA compares favourably with other states' benefits more especially if appropriate jurisdictions are chosen to compare, that choice being directed by having regard to countries which have socio-economic profiles similar to that of South Africa.

[15] Resistance by the Minister to the challenges to the BCEA is based on the proposition that what is in the statute does not violate any constitutional guarantees. This is, in a limited sense, technically true, because the true location of the criticism is *what is not* in the BCEA, but such distinction is unhelpful in conducting the analysis. Furthermore, the Minister contends that the controversy put before the court is not suitable for judicial adjudication because it is intrinsically a matter of social policy involving resource-allocation which is subject matter better left to Parliament to evaluate and make choices. NEASA also opposes the relief sought as supposedly bad for business and shares the Minister's view that the controversy should be left to Parliament to address. Their views are addressed discretely hereafter.

The approach to the adjudication of the challenge of unconstitutionality

[16] The crux of the case is about unequal treatment of persons. The approach to the resolution of a controversy about inequality is that set out in *Harksen v Lane 1998 (1) SA 300 (CC) at para [54]* per Goldstone J:

> [54] .... it may be as well to tabulate the stages of enquiry which become necessary where an attack is made on a provision in reliance on s 8 of the interim Constitution [section 9 of the final Constitution] They are:
>
> *(a)* Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of s 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.
>
> *(b)* Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:
>
> (i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
>
> (ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.
>
> If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of s 8(2).
>
> *(c)* If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (s 33 of the interim Constitution).'
>
> *(emphasis added)*

Is there unfair discrimination in the provisions?

[17] That there is differentiation on grounds of gender requires no further explication. There is also differentiation between categories of parenthood. The controversy is therefore engaged at the second stage of a *Harksen* enquiry: is there discrimination *per se* and if so, is it unfair.

[18] It seems to me that identifying the physiological aspect of a birth-mother's experience and treating a birth-mother discretely and differently is not discrimination as contemplated. The objective facts about pregnancy and child-birth are self-evident and that experience is not shared by anyone other than another birth-mother. However, that consideration is not truly significant in this case because the proper location of the controversial policy choices evident in the BCEA is in respect of child-nurture, not merely a birth-mother's experience of pregnancy and child-birth per se and her need for a physiological recovery period. In respect of nurture, save for breast-feeding, both parents are able to provide comprehensive nurture to their child, and in this regard it is not cogent to contend that the BCEA does not discriminate on grounds of gender.

[19] The logic intrinsic in the controversial provisions is that one parent is a primary caregiver and the other is an ancillary parent. Because the scheme of the BCEA is that birth-mother is *par excellence* the primary caregiver, she therefore gets 4 months' *maternity* leave. The ancillary father gets 10 days leave. The commissioning mother in respect of a surrogacy birth (ie the genetic mother) who experiences no physiological trauma, gets 10 weeks leave; 6 weeks less than a birth-mother. The rationale for this difference can only be a weighting for the absence of a need for a physiological recovery.[4] A

[4] It was argued by the applicants that the ostensible reason for differential periods of leave is that the legislature deemed adoptive or surrogacy children as deserving of less nurture. In my view it is unnecessary to attribute a malicious intent to the differential. Rather, it is simply the result of a failure of imagination and a bean–counting approach to determining time off work. Reference was also made to *Wilkinson v Crawford 2021 (4) SA 323 (CC)*, where the court tentatively criticised the distinction put forward between biological children and adoptive children in the interpretation a will as being unfair

similar mind-set informs the leave period for the adoptive parent – construed implicitly to be – typically - a 'mother', though the provisions do allow for a broader application to same-sex couples.

[20] By deconstructing the policy choices inherent in the scheme of the sections, it can be inferred that the framers perspective of the family is that the relationship between the parents and their respective relationships with their child are asymmetrical. It cannot be denied that such a dynamic is commonplace in society. However, such a modality, if applied to the exclusion of other modalities, does not allow space for the other modalities, which are no less legitimate having regard to the egalitarian norms espoused in the Constitution. Thus, for a family in which an egalitarian dynamic prevails, and in which, therefore, both parents are, in equal measure, according to their abilities, comprehensively engaged in the work of nurturing their child, the statute affords no recognition and indeed facilitates a disruption to the social dynamic which prevails in that family.[5]

[21] True enough, it must indeed be borne in mind that the BCEA is a statute which addresses minimum benefits in relation to employment and is not an instrument to regulate family life or prescribe norms by which free people should organise their family life. The state does nevertheless intervene in that realm but does so in other statutes, of which the Childrens' Act 38 of 2005 is of foremost importance in relation to the controversy in this case. Nonetheless, the BCEA must find application in a way that is in harmony with the Childrens' Act no less than with the Constitution.

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discrimination. I doubt that that decision in that context offers assistance in a controversy about distinctions between different categories of parents in the employment environment.

[5] See: *SAPS v Barnard 2014 (6) SA 123 (CC)* per Moseneke J at para [28] to [39]. At para [28] in particular, it is held that: 'Our Constitutional democracy is founded on explicit values. Chief of these, for present purposes, are human dignity and the achievement of equality in a non-racial, non-sexist society under the rule of law.'

[22] Chapter 15 of the Childrens' Act deals with adoption. Section 229 states that the purpose of adoption is to 'protect and nurture children by providing a safe healthy environment with positive support and promote the goals of permanency planning by connecting children to other safe and nurturing family relationships intended to last a lifetime'. It must follow that section 25B of the BCEA was enacted to facilitate the achievement of these goals. The Childrens' Act does not address the practical conditions under which a child who is adopted must be 'received' by the adoptive parents and the process of establishing a bond between the child and both adoptive parents be accomplished. Chapter 19 of the Childrens' Act regulates surrogate motherhood. Obviously, save for the experience of an actual pregnancy, the position of the commissioning mother and father are indistinguishable from a birth-mother and father. Chapter 3 of the Childrens' Act deals with parental 'responsibilities and rights.' These apply to all three categories of child as identified in the BCEA. The provisions of this chapter stipulate, as a norm, equal duties and rights by each parent. Married partners are addressed in sections 19 and 20 in those express terms. The circumstances of unmarried parents give rise, in sections 20 and 21, to differential treatment of the father, to cater for potential fluid relationships between father and mother and the de facto intimacy or remoteness of the father's involvement with the mother and with the child. This variable does not intrude on the jurisprudential issues at stake.

[23] Upon the premise that the leave entitlements, and duration of the leave, are provided for the purpose of the nurture of a baby or toddler, not merely to allow a literal physiological recovery from giving birth, it seems plain that the distinctions made in the BCEA are at odds with the objectives of sections 9 and 10 of the Constitution and also at odds with the norms inherent in the Childrens' Act.

[24] The first irrationality is the provision for a 10 - week period of leave for commissioning and adoptive 'mothers' rather than a 16 - week period of leave

provided for a birth-mother. Axiomatically during the 6 weeks after birth during which a birth-mother may not work except under certain prescribed conditions and during which she is recovering physically, she is nevertheless *nurturing her child in parallel*. Why dock 6 weeks off the period available to commissioning and adoptive mothers because they did not experience physical child-birth? What impelling rationale could inform the need for the distinction to be made? [6] No honourable explanation comes to mind and no legitimate governmental objective is discernible. In my view, the discrimination is unfair. Mothers in all three categories of child identified in this judgment ought to be entitled to the same period of leave for the purpose of child nurture if inequality, as proscribed by section 9 of the Constitution, is to be avoided.

[25] The second aspect of note is whether distinguishing fathers and mothers in relation to child-nurture is unfair discrimination as regards the duration of leave entitlements. The practical question is about an *opportunity* for a father to participate in child-nurture at the critical early stage of childhood. The delinquent-father problem is not a relevant factor in deciding this question, albeit that the fact that a father always has the option not to be an involved parent may require separate attention by the legislature. The 'opportunity premise' requires further explication.

[26] To accord a paltry 10 days' leave to a father speaks to a mind-set 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

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[6] The Canadian decision in *British Columbia Rights Tribunal in re A v Board of Education of School District no 36 (Surrey) [2020] BCHTD No 167* at para [125] was cited by the Minister as an example of a justified distinction between a birth-mother and an adoptive mother. However, the case addressed a preliminary procedural issue and ordered the case to a merits hearing. The controversy was about a reduction of benefits to adoptive parents in order to equalise benefits to all classes of parent. It considered a collective agreement not a statute. The distinction was an issue because there were separate leave-benefits for pregnancy per se, which were different to 'parental' leave.

dignity. Long standing cultural norms which exalt motherhood are not a legitimate platform for a cantilever to distinguish mothers' and fathers' roles. [7]

[27] 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 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, and in denying the parents the right to choose for themselves impairs her dignity. [8]

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[7] See: *Van der Merwe v Road Accident Fund 2006 (4) SA 230 (CC)*. The issue was whether the Matrimonial Property Act 88 of 1994, because it distinguished spouses married in or out of community of property, with the effect that a spouse in community could not sue the other spouse for bodily injuries, was unconstitutional. It was held that such an effect served no legitimate governmental purpose and was declared unconstitutional. At para [51] the distinction, in this context was described as a relic of the common law which was not useful.
I was also referred to *MA v State Information Technology agency 2015 (6) SA 250 (LC)* where Gush J was required to consider an employer policy on maternity leave. The policy was applied only to mothers and not to commissioning parents. A male spouse in a same-sex union was denied 'maternity' leave. The Labour Court held that the policy was discriminatory. The cause of action was that the 'mothers only' application was in contravention of section 6(1) of the Employment Equity act 55 of 1998. The Labour court did not interpret the BCEA or deal with whether or not the BECA was unconstitutional. The rationale of that court is at paras [13] to [18]. The thesis is that the policy had to be consistent with the best interest of the child as contemplated in section 28 of the Childrens' Act. The decision does not however contribute anything to the resolution of jurisprudential controversy before this court.

[8] See: *President of the RSA v Hugo 1997 (4) SA 1 (CC)* at para [37 to [39], per Goldstone J:
[37] 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 care giver, but some

[28] The example of the Van Wyk family is an illustration of this very denial. Mr Van Wyk is a salaried employee. Mrs Van Wyk is in business for her own account. They preferred that Mrs Van Wyk return to trade as soon as possible because the business might fail were she not to be active. In turn, Mr Van Wyk would be the primary care-giver during the early infancy of their child. Obviously, no question of maternity leave arose for Mrs Van Wyk. Mr Van Wyk was ineligible for any more than 10 days' paternity leave. What he did do was to take extended leave, partly unpaid, from his employer by means of an ad hoc arrangement. He was not entitled to any UIF pay-out. This outcome triggers a violation of section 9 of the Constitution. The value of this example is to illustrate that their family model is not catered for by the BCEA. No sound reason exists for it not to do so. Indeed, the Van Wyk family dynamic is wholly consistent with norms that the Constitution exalts.

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other woman fulfils that role, whether she be the grandmother, stepmother, sister, or aunt of the child concerned. However, although it may generally be true that mothers bear an unequal share of the burden of child rearing in our society as compared to the burden borne by fathers, it cannot be said that it will ordinarily be *fair* to discriminate between women and men on that basis.
[38] For all that it is a privilege and the source of enormous human satisfaction and pleasure, there can be no doubt that the task of rearing children is a burdensome one. It requires time, money and emotional energy. For women without skills or financial resources, its challenges are particularly acute. For many South African women, the difficulties of being responsible for the social and economic burdens of child rearing, in circumstances where they have few skills and scant financial resources, are immense. The failure by fathers to shoulder their share of the financial and social burden of child rearing is a primary cause of this Hardship. The result of being responsible for children makes it more difficult for women to compete in the labour market and is one of the causes of the deep inequalities experienced by women in employment. The generalisation upon which the President relied is therefore a fact which is one of the root causes of women's inequality in our society. That parenting may have emotional and personal rewards for women should not blind us to the tremendous burden it imposes at the same time. It is unlikely that we will achieve a more egalitarian society until responsibilities for child rearing are more equally shared.

[39] The fact, therefore, that the generalisation upon which the appellants rely is true does not answer the question of whether the discrimination concerned is fair. Indeed, it will often be unfair for discrimination to be based on that particular generalisation. Women's responsibilities in the home for housekeeping and child rearing have historically been given as reasons for excluding them from other spheres of life. In a case note concerning *Incorporated Law Society v Wookey* which denied women the right to be admitted as attorneys, a commentator wrote:
'A revolt against nature is involved in any proposal to allow women to enter into the legal profession. This idea is incompatible with the ideas and duties of Motherhood.
To use the generalisation that women bear a greater proportion of the burdens of child rearing or justifying treatment that deprives women of benefits or advantages or imposes disadvantages upon them would clearly, therefore, be unfair.'

The two-year age-cap for adopted children

[29] What informs the cap of two years of age for an entitlement to guaranteed leave in respect of an adopted child? Prima facie, it suggests an intention to stipulate an equivalence between the adopted child and the babies that birth-mothers and commissioning mothers would be nurturing during this period of leave; i.e. the guaranteed leave is intended to be only for *early* child-care. This equivalence is itself not irrational; it cannot be argued that a policy invented to cater for new-borns, when extended, sticks to that initial premise of early child care. However, it is appropriate to ask whether it is a sound policy, in the sense that it is in harmony with the norms of the chapter on adoption in the Childrens' Act? By way of a blunt example, must one infer that a two-year old can be packed off to day-care and is, thus, a child who is outside the scope of the benefit contemplated? On this, I suspect reasonable people may differ. An older child is usually engaged in a wider range of activity which does not require a parent's full-time presence. In that context, what perspective might one take of the bonding process that is needed between newly adoptive parents and the newly adopted child, regardless of the age of the child at the time of the adoption? Probably, as was argued, the older the child is when adopted, the more likely an intense immediate bonding experience is essential.[9] Can it however be said, for that reason, that an employment benefit aimed only at nurture of an adopted toddler is unfair discrimination? In my view, one cannot go that far. Even were one to be of the view that an older child would benefit to an important degree from such presence of the adoptive parents, it does not in my view necessarily follow that the absence of what is a good idea demonstrates unfair discrimination. The BCEA is not the appropriate statute to regulate bonding experiences *per se*. If it is deemed appropriate to closely regulate the bonding process between adoptive parents and an adopted child, that matter must be addressed elsewhere, perhaps in amendments to the Childrens' Act. Accordingly, in my view, the two-year cap is not out of kilter with the scope of

[9] It should not be assumed that all adoptions are of children who are strangers to the adoptive parents. Indeed, commonplace procedures for adoption of older children would often involve a long period of acquaintance before the adoption order is granted. Leave from an employer in such circumstances might be superfluous.

the intended benefit and does not trigger a cogent complaint of unfair discrimination.

Literature

[30] Substantial volumes of literature were provided to me of a comparative law nature. What the literature shows is that around the world many countries have recognised that both parents should enjoy equal opportunities to engage in early child nurture. No country which has provided such employment benefits has done so other than by way of statute. It is notable that the current BCEA regime on parental leave is not *per se* in violation of any international instrument, whether or not South Africa has pledged adherence thereto.

[31] To traverse the volume of material would be unrewarding and superfluous. I allude to some of the material which illustrates the trends internationally. In Clause 10 of International Labour Organization Recommendation(ILO) 191 (2000) it is contemplated that leave be available to fathers and adoptive parents despite the recommendation dealing otherwise, entirely with a birth-mother's circumstances.[10] Clause 10 (5) calls specifically for leave for both adoptive parents. The BCEA complies broadly, but unequally.

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[10] ILO Recommendation 191, para 10:
(1) In the case of the death of the mother before the expiry of postnatal leave, the employed father of the child should be entitled to take leave of a duration equal to the unexpired portion of the postnatal maternity leave.
(2) In the case of sickness or hospitalization of the mother after childbirth and before the expiry of postnatal leave, and where the mother cannot look after the child, the employed father of the child should be entitled to leave of a duration equal to the unexpired portion of the postnatal maternity leave, in accordance with national law and practice, to look after the child.
(3) The employed mother or the employed father of the child should be entitled to parental leave during a period following the expiry of maternity leave.
(4) The period during which parental leave might be granted, the length of the leave and other modalities, including the payment of parental benefits and the use and distribution of parental leave between the employed parents, should be determined by national laws or regulations or in any manner consistent with national practice.

[32] In the Convention on the Elimination of all Forms of Discrimination against Women (1981), to which South Africa acceded in 1993, article 5 provides:

> 'States Parties shall take all appropriate measures:
> (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;
> (b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases'.
> (Emphasis added)

[33] There are many examples where other countries prescribe more generous periods of leave. However, it is no part of this case that the court is called upon to address more than the question of an inequality of the duration of leave for each class of parent and for fathers and mothers or same-sex partners. The helpfulness of this literature is in the ubiquitous recognition of parents *qua* parents rather than a strict delineation between fathers and mothers, a norm wholly in line with the International instruments and with our Constitution.

The basis of opposition to the declaration of unconstitutionality

[33] I turn to deal specifically with the main perspectives articulated by the Minister and by NEASA. They are, in my view, unconvincing.

The Minister

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(5) Where national law and practice provide for adoption, adoptive parents should have access to the system of protection offered by the Convention, especially regarding leave, benefits and employment protection.

[34] The first aspect of significance is the absence of any evidence produced by the Minister. This is a pity because the themes addressed in the Minister's affidavit are, in certain respects, premised on assumptions bereft of substantiation. The absence of relevant evidence impoverishes the arguments.[11]

[35] Among the contentions advanced is the suggestion that the very fact that Parliament has recently examined the BCEA and has enacted the provisions now being criticised should be given substantial weight. The amendments were the fruits of a process of consultation under the auspices of NEDLAC.[12] The implication is that the policy makers have applied their minds to these issues and the BCEA, as amended, reflects a recently achieved societal consensus among the law-makers and stakeholders. Because the provision by statute of benefits to employees implicates policy choices about resource allocation the contention is that criticisms and amendments about an employment statute ought to be processed through NEDLAC before approaching a court. It is not however contended that this court lacks jurisdiction to entertain the application, but rather that in being circumspect about declaring a statute in violation of the constitution, this is a factor that ought to dissuade the court from dealing with the issues. Paradoxically, it is then also contended that the application is an abuse.[13] Plainly, there is no legal principle to draw upon which compels a person who challenges an employment law as unconstitutional to first exhaust the prospects of winning support in NEDLAC.

[36] The second proposition is a subtle shift from the first, ie that the issue is unsuitable for judicial scrutiny because dealing with it risks trespassing into the realm reserved for the legislature. This is a contention that warrants

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[11] See: *New Nation Movement NPC v President, RSA 2020 (6) SA 298 (CC) at para [11] Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Woman's Legal Centre amicus Curiae) 2001 (4) SA 491 (CC at para[19]; Mahlangu and Another v Minister of Labour 2021 (1) BCLR 1 (CC) at para [127]*

[12] NEDLAC Act 35 of 1994.

[13] The case law cited in support of the proposition is unhelpful. The cases deal with setting aside executive or administrative decisions, not provisions of a statute.

serious examination. As a general rule, issues that implicate resource allocation are rarely appropriate for judicial intervention because judges do not govern the country. But in this case, is that a genuine risk? There seems to be two aspects to consider.

[37] First, if a law is unconstitutional the harm exists immediately. It must be declared so. A court does not walk away from that conclusion if it is justified jurisprudentially. This proposition is not controversial.

[38] Second, there is an obvious direct financial impact on the UIF. It can be speculated that the number of people eligible for UIF benefits will multiply. However, this outcome can be managed by the Minister within the existing laws. The Government can choose to keep the same amount of funding budgeted for the UIF and reduce the benefits to stay within budget. Equal treatment to everyone as required for Constitutional Compliance can be achieved. If the choice is made to increase levies to fund the greater demand for benefits this does indeed mean larger contributions by employers. Thus, it is contended that ultimately, the additional benefits of leave have a negative effect on the economy by diverting the resources of Business. Unhappily, the Minister has evaded sharing with the court what the effect might be. Most obviously to run with this type of thesis it is necessary to know how many maternity beneficiaries there are in any year, how many employers have paid maternity benefits, how many employers grant paid paternity benefits, and what proportion of the labour force is covered by these contracts as contributors to the UIF. None of this data has been placed before the court.

[39] However, even if there is certainty that the State would bear greater costs to eliminate unfair discrimination, and would have to impose additional UIF levies on the employer segment of the nation to do so, that risk has not in the past been a reason not to make the declaration of unconstitutionality. A distinction must be maintained between the exposure to increased costs the state experiences in this type of case from the circumstances where

qualitative choices have to be made about allocation of public resources which are axiomatically unsuitable for judicial intervention.[14] No qualitative choices are at stake in this controversy. There is no disregard for the separation of powers.

[40] The proposition is advanced that the application is 'not procedurally justified and negates the realities of South African society and culture and economic realities.' What can this mean? The contention is fleshed out by the suggestion that the legislature should not 'attempt to engineer cultural and societal changes in the family structures'. The 'free services' of mothers and the 'roles of fathers' ought not to be interfered with. No more motivation is provided. Perhaps the less said about this mind-set is best. It suffices to say that the subordination of women as family-servants and commodities, however widespread such attitudes may be among many inhabitants of the country, is in no degree consistent with the norms of the Constitution. The reach of the Constitution, in its most modest aspirations, requires social equality between men and women and is uncompromising in actualising that as the *status quo* for everyone.

NEASA

[41] NEASA's perspective is wholly in lock-step with that of the Minister. Three themes are notable.

[42] The first theme is a defence of the absence of evidence and a contention that the applicants owed the court the evidence. In this NEASA is mistaken. To this suggestion, it adds the results of an opinion survey of its members to illustrate hostility. Such opinions are of no value and in any event without

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[14] See: *Khosa and Another v Minister of Social Development and Others 2004 (6) SA (CC)* at para [45]: 'It is also important to realise that even where the State may be able to justify not paying benefits to everyone who is entitled to those benefits under s 27 on the grounds that to do so would be unaffordable, the criteria upon which they choose to limit the payment of those benefits (in this case citizenship) must be consistent with the Bill of Rights as a whole. Thus if the means chosen by the Legislature to give effect to the State's positive obligation under s 27 unreasonably limits other constitutional rights, that too must be taken into account.'

evidence of whether NEASA speaks for 1% or 75% of employers' the survey is meaningless.

[43] Second, again premised on, presumably, the opinions of its membership it advances the contention that wider statutory benefits shall discourage employers from agreeing to pay voluntary pregnancy leave payments. By voluntary, I infer it is meant the additional benefits resulting from collective bargaining rather than from motives of charity. It is unclear whether the overall burden on employers of the probable additional statutory levies would not be offset by there being no need to collectively bargain over such benefits. No data on the extent to which employers already contract to pay for maternity leave or parental leave was adduced.

[44] Third, is the caution about the abuse of the system by wily fathers. No more need to be said about that issue which is a red herring.

Conclusions and Remedy

[45] It follows that the declaratory orders sought by the applicants are well founded. The Sections in the BCEA do offend sections 9 and 10 of the Constitution. Parliament must get to work to eliminate the inequalities.

[46] What is appropriate to address the circumstances of the interim period until that is accomplished? Plainly, Parliament shall have to make substantive changes and a range of options exist in how to eliminate inequality. The suggested interim orders suggested by the various applicants differ in line with the different relief sought by them.

[47] In my view the appropriate immediate means by which to remove inequality, in the interim period, is the proposal advanced on behalf of the Van Wyks; i.e.

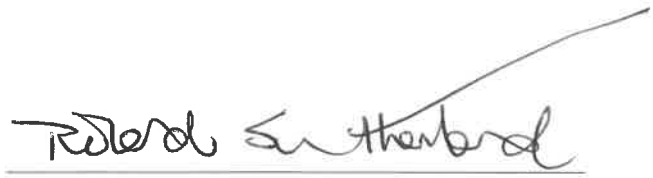
all parents of whatever stripe, enjoy 4 consecutive months' parental leave, collectively. In other words, each pair of parents of a qualifying child shall share the 4 months leave as they elect.

Costs

[48] It has been submitted that the *Biowatch* principle apply to the costs order and that the applicants should get their costs. I agree.[15]

The Order

[49] For these reasons, the order is made as set out above.



Roland Sutherland

Deputy Judge President,

Gauteng Division of the High Court of South Africa, Johannesburg

Heard: 23 August 2023

Judgment: 25 October 2023

[15] *Biowatch Trust v Registrar Genetic Resources 2009 (6) SA 232 (CC) at para [43].*

Appearances:

First and second Applicants:
Adv N. Rajab-Budlender SC,
With her, Adv L. Minnie
Instructed by Webber Wentzel.

Third Applicant,
Adv M Letzler,
Instructed by Dentons.

Fourth Applicant,
Adv H Barnes SC,
With her Adv M Rasivhetshele and Adv K Ramela
(Heads of Argument Barnes SC, Adv E Broster and Adv A Abdool Karim)
Instructed by Norton Rose Fulbright South Africa Inc.

Respondent
Adv S J Coetzee SC,
With him, Adv J Langa
Instructed by the State Attorney.

First to Fourth Amici
Adv J Bhima,
Instructed by Lawyers for Human Rights.

Fifth Amicus
Attorney P Wassenaar of Kriek Wassenaar and Venter.

Sixth Amicus
(No Appearance)