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Significant progress in the making as the High Court expands on Parental Leave opportunities



Deputy Judge President, Roland Sutherland, of the Gauteng High Court, Johannesburg, has criticised the provisions of the Basic Conditions of Employment Act (“BCEA”) with regard to parental leave and concluded that the BCEA effectively discriminates against various types of parents.

Section 25 of Basic Conditions of Employment Act (BCEA)

Section 25 of the BCEA provides for specific leave structures, including maternity leave, parental leave, and adoption leave.

Employees (females) who give birth are afforded at least four consecutive months of maternity leave. It is further important to note that the BCEA does provide for parental leave of ten consecutive leave days for employees (male) who are parents to a child who is born.

Other provisions are made for an employee (male and female) who adopts a child who is below the age of two to be afforded adoption leave of at least ten consecutive weeks, and the leave entitlements for parents of a child born via surrogacy are identical to that of parents who adopt a child below the age of two. The last provision is only eligible for one parent which requires the other parent to take parental leave of ten consecutive leave days when taking into account adoption or surrogacy.

Exploring the crux of the matter

In the recent case of ***Van Wyk and Others v Minister of Employment and Labour [2023] ZAGPJHC 1213***, Deputy Judge President, Roland Sutherland, was tasked with determining the following:

- Whether Section 25(1), unfairly discriminates between mothers and fathers, and as a consequence, violates the dignity of all parents;
- Whether the differentiation of the prescribed leave available to classes of parents (birth mother and father, adoptive parents and parents of child born via surrogacy) amounts to unfair discrimination and violates the dignity of all parents; and
- Whether the prescribed leave of adoptive parents is limited to children who are less than two years of age is irrational and amounts to unfair discrimination.

In his judgment, DJP Sutherland, confirms the differentiation made between mothers, fathers, birth mothers, and different types of parents. DJP Sutherland alluded to the legislature's belief that the dynamics that exist in a family structure, being the relationship between parents and their respective relationships with their child, are asymmetrical. DJP Sutherland notes that such a framework may not necessarily be wrong, however, it does not provide for instances of families who do not conform to such a structure.

DJP Sutherland extends the observation of the constitutional principle of equality, highlighting that the current provisions of the BCEA fail to acknowledge family configurations characterized by a more egalitarian nature. In such structures, both parents contribute equally to the upbringing of the child. As such, the provisions of the BCEA as far as it pertains to maternity and parental leave were declared to be inconsistent with the right to equality and right to dignity as set out in the Constitution. DJP Sutherland confirmed that the relevant provisions unfairly discriminate against mothers and fathers and unfairly discriminate between one set of parents and another on the basis of how those children are born.

The future of parental leave

The above case has significant implications not only for Parliament, which is now tasked with aligning the BCEA with the Constitution but also for employers and South Africa's Unemployment Benefit contributions and claims.

Although the declaration of invalidity of the provisions of the BCEA has been suspended for two years to allow remedial legislation to be enacted, the judgment of DJP Sutherland provides provisions to be used in the interim. These provisions allow single parents, as well as a pair of parents, to be collectively entitled to at least four months' consecutive parental leave.

One parent will be allowed to take the whole four-month period, alternatively, each parent may have a turn at taking the leave. Parents must notify their employer or employers prior to the date of birth in writing, together with a stipulation of the period or periods to be taken by each parent. It is further confirmed that parents of adopted children or children born of surrogacy will also be entitled to at least four months' consecutive parental leave to be taken as a whole by one parent or to be alternated between the two parents.

It was further declared that the provisions of the UIF Act be read to be consistent with the interim amended provisions of the BCEA and that each parent who is regarded as a contributor, will be entitled to claim the corresponding benefits to such parental leave.

Conclusion

The judgment by DJP Sutherland holds significant changes to the rights of parents in South Africa. However, the declaration of invalidity must be confirmed by the Constitutional Court in order to have any force or effect. Should the declaration of invalidity be confirmed, employers will be tasked to amend any provisions in employment contracts or policies and align it with the amended provisions of parental leave.

SERR Synergy has a professional team of legal advisors across South Africa who have the necessary experience and knowledge to ensure employers are compliant with the law and the constant amendments thereto. Our legal team can assist employers with the drafting and amendments of employment contracts and policies that will regulate parental leave to ensure that the amended concept of parental leave is understood and complied with.

About the Author: Bianca Harmse-Gouws is a legal advisor in the labour department of SERR Synergy's Pretoria branch. She obtained a BA Law and LLB degree from the University of Pretoria. She further obtained her LLM degree in Labour law from the University of Pretoria and is also an admitted attorney of the High Court of Gauteng.

Sources Acknowledged:

Basic Conditions of Employment Act, Act No.75 of 1997

The Constitution of the Republic of South Africa, 1996

Van Wyk and Others v Minister of Employment and Labour [2023] ZAGPJHC 1213

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