Any parent is entitled to four months parental leave, rules High Court

Sections of the Basic Conditions of Employment and the Unemployment Insurance Fund acts declared unconstitutional

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Illustration: Lisa Nelson

- **The Johannesburg High Court has given Parliament two years to "cure the defects" in the Basic Conditions of Employment Act and the Unemployment Insurance Fund Act.**
- **The court declared sections of these acts unconstitutional for unfairly discriminating against mothers and fathers, surrogate and adopting parents when it comes to "maternity leave".**
- **In the meantime, all parents are entitled to four months "parental leave" collectively and, if they contribute, to UIF benefits.**

- **The ruling has to be confirmed by the Constitutional Court, and the Minister may still note an intention to apply for leave to appeal it.**

Sections of the Basic Conditions of Employment Act (BCEA) and the Unemployment Insurance Fund Act have been declared unconstitutional because, when it comes to "maternity leave", they unfairly discriminate against mothers and fathers, surrogate parents, and those who adopt children..

Johannesburg High Court Judge Roland Sutherland suspended the declaration of invalidity for two years to give Parliament time to "cure the defects".

However, in the meantime, Judge Sutherland has ruled that all parents are entitled to four months "parental leave" and, if they contribute, to UIF benefits.

The ruling has to be confirmed by the Constitutional Court, and the Minister of Labour may note an intention to apply for leave to appeal it.

Read the judgment here

The matter was brought to court by a Polokwane couple, Werner and Ika van Wyk, Sonke Gender Justice, and the Commission for Gender Equality, with several other organisations acting as amicus curiae.

The sole respondent was the Minister of Labour, the custodian of the BCEA.

The contested sections are in Chapter 3 of the Basic Conditions of Employment Act which regulates the minimum leave that an employer must grant to employees who become parents. It provides for a total of four consecutive months of maternity leave for a birth mother and ten days paternity leave for a father from the date the child is born.

It also provides for "gender neutral" leave for parents who adopt children. One of the parents is entitled to consecutive ten weeks and the other parent to ten days leave, with the election being left up to the individuals.

With regards to children born via surrogacy, the Act guarantees leave for the genetically linked parent, however it says nothing about the surrogate.

The Act does not require an employer to pay any remuneration, but parents can claim from the UIF if they contribute.

Judge Sutherland, in his ruling this week, said it was plain and uncontroversial that there was a differentiation made between mothers and fathers, and between a birth mother and other mothers or parents.

He said the applicants argued that this was unconstitutional in that it was unfair discrimination and violated the dignity of all parents.

"Suggestions as to how equality and dignity might be achieved varies. The Van Wyk's suggest that both parents share the four months leave according to their election. The Gender Commission and Sonke Gender suggest both parents each have an equal and contemporaneous leave entitlement," he said.

The Minister argued that the present suite of benefits compared favourably with other countries with similar socio-economic profiles, that the Act did not violate any constitutional guarantees. The National Employment Association of South Africa (an amicus) also opposed the relief sought as being "bad for business" and best left to Parliament.

"The crux of the case is about unequal treatment of persons," Judge Sutherland said.

He said, save for breastfeeding, both parents were able to provide comprehensive care to their child and it was not cogent to contend that the BCEA does not discriminate on the grounds of gender.

The judge said from a deconstruction of the policy choices made in the Act, it could be inferred that the framers had a particular perspective of a family and had excluded "other modalities" which were no less legitimate.

While the Act was not an instrument to regulate family life or prescribe norms by which people should organise their lives, it must find application in a way that is in harmony with the Children's Act and the Constitution.

"Upon the premise that the leave entitlements and duration of 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 the Constitution and the norms inherent in the Childrens' Act."

The first irrationality, the judge said, was the provision of a ten-week period of leave for commissioning and adoptive "mothers", rather than a 16-week period leave provided for a birth mother.

"Why dock off six weeks because they did not experience physical childbirth? What impelling rationale could inform the need for the distinction to be made … No legitimate governmental objective is discernible. In my view the discrimination is unfair. Mothers in all three categories ought to be entitled to the same period of leave for the purpose of child nurture."

Judge Sutherland said, to accord a "paltry" ten days leave to a father "speaks to a mindset that regards the father's involvement in early parenting as marginal".

He noted that a major argument advanced in the case was that it was unfair on the mother to be deemed and doomed to be the principal caregiver, and that the "burden" of childcare should be equally shared with the father.

"A father who chooses to share in this experience for his own well-being, no less than that of his children and their mother, can indeed complain that the absence of recognition in the BCEA is unfair discrimination."

Judge Sutherland said the example of the Van Wyk family was an illustration of this very denial. Mr Van Wyk is a salaried employee. Mrs Van Wyk runs her own business. They preferred Mrs van Wyk to return to work as soon as possible and for her husband to be the primary caregiver, but he was only entitled to ten days paternity leave and no UIF.

"The value of this example is to illustrate that their family model is not catered for by the BCEA and no sound reason exists for it not to do so."

He said Parliament must "get to work to eliminate these inequalities".

In the interim, the proposal advanced by the Van Wyk's "that all parents of whatever stripe, enjoy four consecutive months of parental leave collectively" was appropriate, the judge ruled.