

HOW DO SADC COUNTRIES COMPARE WITH SELECTED NON-AFRICAN COUNTRIES WITH REGARD TO LEGISLATED LEAVE FOR WORKING FATHERS AT OR AROUND THE TIME OF THE BIRTH OF THEIR CHILDREN?



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Dissertation submitted to the School of Law in partial fulfillment of the requirements for the
award of the degree of Masters in Law (LLM) at UNIVERSITY OF KWAZULU NATAL

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2015

DECLARATION

I declare that this dissertation is a product of my own work except where otherwise stated and expressly acknowledged and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

MELAINE GOVENDER, December 2015, Durban.

ACKNOWLEDGEMENTS:

I would like to take this opportunity to thank my supervisor, Dr Lisa Dancaster for her time, expertise and patience. Thank you to Adele van Heerden for editing my work and to the Attorneys Fidelity Fund for partially funding this LLM.

Without the support of my family and friends, especially my mother Tholsie Perumal and my daughter Jordan Aimee Govender I would not have been able to complete this dissertation.

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CHAPTER 1: INTRODUCTION and CONTEXT OF THE RESEARCH

1.1 BACKGROUND AND RATIONALE

Legislative change in many countries has made progress in redressing gender inequality in the labour market arising from caregiving responsibilities. Much of the focus has been on providing women, as primary caregivers, with measures to combine work and care. Less focus has been on finding legislative means to assist fathers with the combination of work and care. There are very few, if any, legislated work protected leave policies available at or around the time of the birth of their children for fathers working and living in the Southern African Development Community (SADC) countries¹. The lack of legislated leave for working fathers in the SADC countries at or around the time of the birth of their children is the basis for this research paper. The aim of this research paper is to compare and contrast leave for fathers in the SADC countries with leave in other countries selected as comparators and to suggest possible reforms around legislated leave for fathers in SADC countries.

Research has indicated the importance of children having both fathers and mothers present from birth onwards. One of the major benefits of fathers utilizing leave from employment to be with their newborn children is the effect it has on a child's self-esteem, confidence and learning abilities (higher cognitive development and better achievement at school and academically), development in social skills, empathy and lower rates of delinquency in children.² As a result of the bonding in the early stages fathers tend to continue to be more involved in the children's lives throughout their lives and they take an active role in everyday child-care tasks.³ In this article reference is made to a study conducted at the University of Oslo where the finding was that a child's performance at school improved as a result of the father having taken paternity

¹ Ryder, G. (2014) '*Maternity and paternity at work. Law and practice across the world.*' ILO Policy Brief. Accessed August 2014 from ILO website

² Africa report: Van den Berg (editor) (2015) '*State of Africa's Fathers: A MenCare Advocacy Publication.*' Adapted from Levlov, R., Van der Gaag, N., Greene, M., Kaufman, M. and Barker, G. (2015) '*State of the World's Fathers: Executive Summary: A MenCare Advocacy Publication.*' Washington, DC: Promundo, Rutgers, Save the Children, Sonke Gender Justice and the MenEngage Alliance p. 6 http://sowf.s3.amazonaws.com/wp-content/uploads/2015/06/13192403/State-of-the-Worlds-Fathers_Executive-Summary_23June2015_web.pdf accessed November 2015

³ <http://www.economist.com/blogs/economist-explains/2015/05/economist-explains-18> accessed November 2015

leave to be with the child.⁴ Fathers also benefit from this time with their children by demonstrating better mental health.

However as a result of the lack of legislation, albeit not the only reason, fathers are often unable to be present for their children. The importance of the presence of the father is beneficial to the children as well as to the fathers and mothers. Studies have shown the importance and the benefits of having fathers present at the time of the birth of their child in terms of maternal wellbeing as well. Another interesting factor raised by Forbes⁵ that could affect the legislators' decision in the promulgation of new labour protection for parental leave is the 'higher than average fertility rates'. Reference is made to certain countries where there are high fertility rates that do affect the participation of parents, and women in particular, in the workplace. By providing parental leave to parents in countries with these rates there is a greater likelihood of women returning to the workplace. This would therefore have a positive effect on addressing gender equality from a women's perspective as well. Mothers will be in a position to return to the workplace after giving birth as result of the involvement and role played by fathers in raising their children.

In SADC countries there is a similar position of high fertility hence a high birth rate. Bittencourt refers to this view of high fertility rates in the SADC countries where "the evidence suggests that southern Africa (although still a high-fertility region, Strulik and Vollmer, 2013) has escaped the worst of the Malthusian stagnation epoch and is already showing characteristics of a region in transition."⁶

The aim of this study is to look at the inadequacy and the effect of the inadequacies by highlighting the lack of legislated work protected leave policies available at or around the time of the birth of their children for fathers working and living in the SADC countries and to suggest law reform as a means of addressing the problem taking into account global trends. There needs to be cognizance of the context in each country as there is no generalized solution. In the course of addressing the aim of this dissertation as stated above, this paper will also explore and identify the way in which other selected comparator countries have changed their legislation to accommodate fathers at the time of the birth or adoption of their children. These

⁴ <http://www.economist.com/blogs/economist-explains/2015/05/economist-explains-18> accessed November 2015

⁵ Forbes, K. (2008) 'Paid Parental Leave Under (New) Labour' p.13 *Social Policy Journal of New Zealand* Issue 34

⁶ Bittencourt, M. 'Evidence on Primary Education and Fertility Rates from Southern Africa' p.19

http://www.soc.uoc.gr/macro/docs/Year/2015/papers/paper_2_98.pdf

comparators are a useful in exploring and interrogating legislative options that provide legislated leave provisions to enable working fathers to take time off from work at the time of the birth or adoption of their children.

The European Union countries mostly have leave provision for paternity leave with the exception of five countries.⁷ What is interesting to note is the higher allocation of days or weeks off allowed as legislated work protected paternity leave to fathers on the birth of their children. There have been notable changes in the provision of paternity leave as well as favorable amendments to the parental leave policies in 2015 in **Sweden** and **United Kingdom** which are part of the EU. Whilst **Australia** is not part of the EU, there have been positive changes to its paternity and parental leave policies as well in 2015. All three countries are however a part of the ILO hence the use of all three as a comparator in a non- African context as its legislative changes is relevant to this dissertation. The inclusion of Australia is to illustrate that whilst Australia is not governed by the EU standards, it is governed by the ILO standards. Similarly South Africa and the SADC region are governed by the ILO standards hence the comparator to these countries.

1.2 PROBLEM STATEMENT AND RESEARCH QUESTIONS

The limited available research reveals a gap in the legislation for leave for working fathers in the SADC countries⁸. Studies to date have not compared SADC legislative provisions of this nature with legislation from countries with more developed legislation around leave for working fathers. This paper aims to address this research gap and to expand on existing research through a comparative analysis of legislation providing leave for working fathers at or around the time of the birth of their child. In doing so, the primary research question addressed in this paper is:

Do the SADC countries provide adequate legislated leave provisions for working fathers at or around the time of the birth or adoption of their children?

In addressing this question the following additional research questions will be considered:

What legislated leave policies do the individual SADC countries have in place that allows fathers to take time off for the birth of their children?

⁷ Ryder, G. (2014) '*Maternity and paternity at work. Law and practice across the world.*' ILO Policy Brief. Accessed August 2014 from ILO website

⁸ ibid

How does SADC deal with gender equality and specifically leave for fathers?

How does the ILO and EU deal with leave for working fathers?

How does legislation providing leave for working fathers in SADC countries compare with legislation in selected international comparators, namely Australia, Sweden and the United Kingdom? There have been notable changes in the provision of paternity leave as well as favorable amendments to the parental leave policies in 2015 in **Sweden** and **United Kingdom** which are part of the EU. Whilst **Australia** is not part of the EU, there have been positive changes to its paternity and parental leave policies as well in 2015. All three countries are however a part of the ILO hence the use of all three as a comparator in a non- African context as its legislative changes is relevant to this dissertation. The inclusion of Australia is to illustrate that whilst Australia is not governed by the EU standards, it is governed by the ILO standards. Similarly South Africa and the SADC region are governed by the ILO standards hence the comparator to these countries.

Sweden is considered to be the front runner in this arena as paternity leave provisions were first introduced in Sweden in 1974. Although the UK and Australia followed much later, they have passed labour legislation that recognizes the importance of fathers having time off from work at the time of the birth or adoption of their children and the benefits this would provide to the entire family. Their leave provisions also recognize the need for compensation to parents during this period as well as it being better to not prescribe which parent should be the primary caregiver by allowing for gender neutral leave provisions during this period like Australia does.

1.3 TERMINOLOGY

Confusion around the use of terminology in relation to legislation providing leave for working fathers can mean that comparisons in legislation are not always accurate.

Dancaster and Cohen⁹ provide the following with regards to ‘paternity leave’:

“Paternity leave is the terminology commonly associated with a specific entitlement to leave for fathers at the time of the birth of their child. In a number of countries paternity leave is recognized as a distinct, ‘stand-alone’, gender-specific period of leave available only for fathers.”

⁹ Dancaster, L. & Cohen, T. (2015) ‘Leave for Working Fathers in the SADC Region’ 36 ILJ 2474 p. 2476

Paternity leave is therefore the work protected leave for fathers available immediately after the birth or adoption of their children. It is usually short in duration as can be seen from the various legislative provisions for paternity leave as well as the perceptions created that mothers are the primary caregivers to children. That stereotype is one of the reasons why there is a provision of short periods of leave for paternity leave for fathers. This dissertation aims to discuss that perception as well as to suggest that gender stereotypes are changing and as societies views change so too should the legislation to allow fathers who choose to be involved in the care of their children to be entitled to longer periods of legislated leave to take time off from work to spend with their newborn and adopted children.

In contrast, parental leave is work protected leave for a longer duration that is available to both mothers and fathers to utilize after they have used their maternity and paternity leave allocations.¹⁰

Dancaster and Cohen¹¹ provide the following with regards to 'parental leave':

*"Leave available to either parent or both parents at the expiry of maternity and paternity leave is usually termed '**parental leave**' and is intended as a period of leave for the purposes of parental bonding and the early developmental needs of the child."*

1.4 CHAPTER BREAKDOWN

The purpose of Chapter one is to provide a literature review of research examining paternity and parental leave provisions in the SADC region and to highlight the way the dissertation is set out. It provides the map of what is to come on the issue of paternity leave in the SADC region and globally.

Chapter two deals with the international standards of the International Labour Organization (ILO), Southern African Development Community (SADC) and the European Union (EU) for paternity leave and how they deal with the issue of parental leave. Each one differs and from the comparison as will be seen in detail later the EU standards appear to provide the best standards at this stage for fathers requiring work protected leave to be with their children at the time of their birth or adoption.

¹⁰ Smit, R. (2010). *'Family-Related Policies in Southern African Countries: Are Working Parents Reaping Any Benefits?' p. 17* Retrieved on August 28, 2014, from [http://www.uj.ac.za/EN/Faculties/humanities/departments/sociology/seminar/Documents/Seminar papers/Smit Family Policy SADC.pdf](http://www.uj.ac.za/EN/Faculties/humanities/departments/sociology/seminar/Documents/Seminar%20papers/Smit%20Family%20Policy%20SADC.pdf)

¹¹ Dancaster, L. & Cohen, T. (2015) *'Leave for Working Fathers in the SADC Region'* 36 *ILJ* 2474 p. 2476

Chapter three deals with the Paternity leave provisions in the SADC Countries and Paternity leave in South Africa with a discussion on family responsibility leave in South Africa. In South Africa there aren't any specific legislated paternity leave provisions. Instead Paternity leave for fathers in South Africa is allowed as a special type of leave called Family Responsibility leave. A discussion on the MIA v State Information Technology Agency (Pty) Ltd¹² case follows which illustrates the lack of jurisprudence and legislation protecting a father's right to be the caregiver to his child at the time of adoption of his child. This case illustrates the need for better paternity leave measures that need to be legislated as well as the need for gender neutral parental leave legislation in South Africa.

Chapter four looks at paternity and parental leave provisions in the European Union as well other countries that have legislated parental leave policies. The Paternity Leave in the European Union Countries is used as a comparator highlighting the need for paternity leave in the SADC region. Parental leave is a fairly new or rather in comparison to paternity leave it is a new development. Of interest are the reasons for the change in this direction to provide gender neutral parental leave policies as opposed to gender specific separate maternity and paternity leave. Parental leave policies in the European Union, Sweden, United Kingdom and Australia are used as comparator as it illustrates the different levels of legislative development across two continents as models of leave for mothers and fathers at the time of the birth or adoption of their children. This dissertation looks at the benefits as well as the reasons for the implementation of this leave and how such leave policies can be adapted in the SADC region.

Chapter five provides an analysis and discussion of the various writings and opinions on this area of labour legislation. The importance of this chapter is the way in which international legislation changes can impact and influence the changes needed in the SADC region by considering the reasons for the changes. From a SADC perspective the dissertation looks at the various challenges the SADC countries will face in implementing these changes and the reasons for the lack of legislation to date. It goes further to look at developments, trends and improvements in the SADC region with an emphasis on South Africa and internationally to determine if there is a perceived need for this type of leave provision globally and if so, why. Chapter five also proposes the recommendations for the SADC countries to be in line with international standards for the provision of paternity leave as well as parental leave policies in the workplace.

¹² MIA v State Information Technology Agency (Pty) Ltd D 312/2012 [2015] ZALCD 20

Chapter six concludes that there is a gap in legislation and governments in the SADC region, whilst having other challenges to deal with, must also address the gender inequality suffered by fathers and create legislation to protect these fathers as well as their children. From an analysis of the legislation and literature as well as the comparators more can be done in the SADC region to rectify the lack of policies in this regard. The existing literature highlights the inadequacy of the legislation. This dissertation takes it further in respect of other countries as a comparator and how they have changed legislation and policies to address this issue.

CHAPTER 2: INTERNATIONAL STANDARDS REGULATING LEAVE FOR WORKING FATHERS [International Labour Organization (ILO), Southern African Development Community (SADC) and European Union (EU)]:

2.1 INTERNATIONAL LABOUR ORGANIZATION (ILO)

The purpose of the ILO is to provide a platform to give an equal voice to workers, employers and governments to ensure that the views of the social partners are closely reflected in labour standards and in shaping policies and programmes. Its main aims are to promote rights at work, encourage decent employment opportunities, enhance social protection and strengthen dialogue on work-related issues.¹³ However with regards to the issues of this dissertation there are no ILO standards exists regarding paternity leave. This is evidenced as follows:

"No ILO standard exists concerning paternity leave. However, the Resolution concerning gender equality at the heart of decent work adopted by the International Labour Conference in 2009 recognizes that work-family reconciliation measures concern both men and women. The Resolution calls for governments to develop adequate policies for a better balance of work and family responsibilities, to include paternity and/or parental leave, with incentives for men to use them.....the need for increased involvement of fathers in parenting is also driven by the often neglected urge to recognize men's right to parenthood, together with their responsibility to share unpaid care and household work. Assumptions which frame men as breadwinners, ignoring their role as fathers and caregivers, remain extraordinarily persistent, including in the workplace, since policies do not necessarily change traditional social attitudes and behaviours."¹⁴

From the above ILO Policy Brief, Maternity and Paternity at Work¹⁵, it is clear that the issue of paternal involvement or lack thereof in many countries, is currently a global issue. However the reality is that as a result of the lack of legislation that specifically provides for the above, fathers in many countries such as the SADC countries but not limited to only the SADC region have little, if not no, labour legislated entitlement to be with their children when they are born. The intention of this dissertation is to suggest that there needs to be legislative reforms to improve, and in some instances to finally give fathers in the SADC countries, labour rights in regards to

¹³ ILO websites objectives and mission <http://www.ilo.org/global/about-the-ilo/lang--en/index.htm> accessed December 2015

¹⁴ Ryder, G. (2014) 'Maternity and paternity at work. Law and practice across the world.' ILO Policy Brief. Accessed August 2014 from ILO website

¹⁵ ibid

paternity leave entitlement. Therefore the starting point is an overview of the current legislation in these countries to determine what legislative measures are available and its extent, whether or not it is absent, alternatively to highlight if such legislation is absent in these countries labour laws.

Finland and Slovenia are the countries in the European Union offering the longest periods of paternity leave for fathers on the birth of their children. Portugal, Lithuania and Iceland also seem to be leading the way for fathers to take work protected legislated paternity leave on the birth of their children. **Finland** offers 54 working days of paid paternity leave whilst **Iceland** (not yet a European Union member) has provision for three months of paid paternity leave for fathers. Most of the remaining countries have adopted the average of a two week allocation for fathers to take paternity leave on the birth of their children.

Whilst it is clear that there has been recognition for many countries to make legislated provision for paternity leave, it is also very clear that there is a disparity between leave afforded to mothers and fathers upon the birth of their children. The legislation favours mothers in that they are granted disproportionately more leave than fathers. The reasons for this are many. Women give birth to the children therefore that is one of the reasons for the extra time provision to enable the mothers to recover after childbirth. However that is in itself is a form of gender inequality. A fathers need to or wanting to be present, to be actively involved in the childrearing from birth as well as forming bonds with their children are made difficult, if not impossible in some instances, by not allowing fathers the time off from their work duties to be with their children.

Paternity leave benefits varies from country to country but are most commonly legislated as specific leave provisions for fathers in what is considered to be the developed economies as well as Europe, Central Asia and Africa. Another common practice in many of these countries is not providing specific paternity leave but rather allowing fathers to take special leave which is either family leave, emergency leave or as in the case of South Africa, family responsibility leave.

Family responsibility leave is “short term leave for family or compassionate reasons.”¹⁶ According to Dancaster and Cohen¹⁷ this type of leave provision is usually provided in countries where there are no specific paternity or parental leave provisions. Fathers can therefore utilize this special type of leave at the time of the birth or adoption of their children to provide care for their children.

Dancaster and Baird refer to the European Union countries when assessing if the labour legislation in South Africa is adequate or not for working parents to achieve a work family responsibilities balance.¹⁸ They state that there are European Union Directives that compel European Union countries to incorporate certain work-family measures in their public policy.¹⁹ The reason for the comparator is clear from the inroads the European Union has made with regards to parents entitlement, including father’s rights, to be present with their children and actively involved in their care. These changes in the European Union have been directed by the standards raised in these countries forcing them to address the lack in provisions for paternity and parental leave which has ultimately led to the changes in paternity and parental leave policies.

2.2 SOUTHERN AFRICAN DEVELOPMENT COMMUNITY (SADC)

The SADC standards with regards to paternity and parental leave policies are lacking as there are very few, if any, leave provisions for fathers in the SADC region to take time off from work at the time of the birth or adoption of their children to care for their children. Dancaster and Cohen state that there are few SADC protocols that address policies to support working parents however none of these protocols deal with the issue of parental leave.²⁰ References are made to paternity leave and equality in care for parents in the following SADC standards. In terms of the SADC Charter on Fundamental Social Rights (2003) “member states shall create an enabling environment consistent with ILO Conventions on discrimination and equality...so that.....reasonable measures are developed to enable men and women to reconcile their occupational and family obligations and those workers in the SADC region should enjoy social security benefits.”²¹ The Code on Social Security in the SADC (2007) provides that its member

¹⁶ Dancaster, L. & Cohen, T. (2015) ‘Leave for Working Fathers in the SADC Region’ 36 ILJ 2474

¹⁷ ibid

¹⁸ Dancaster & Baird (2008) ‘Workers with Care Responsibilities: Is Work-Family Integration Adequately Addressed in South African Labour Law?’ 29 ILJ 22

¹⁹ ibid

²⁰ Dancaster, L. & Cohen, T. (2015) ‘Leave for Working Fathers in the SADC Region’ 36 ILJ 2487

²¹ ibid

states should make provisions for paternity leave so that both mothers and fathers share in the responsibility of raising their children.²²

Lastly the SADC Protocol on Gender and Development of 2008 clearly states in Article 19.4 that all parties shall provide protection and benefits for women and men during maternity and paternity leave.²³ Unfortunately this code does not specify the duration of leave for fathers in the SADC countries neither does it address the issue of payment to fathers during this period of paternity leave as to who will be responsible to pay the fathers? Is it the employer who will pay or the State through subsidies or social security schemes? In addition there is no comparator which makes the task at hand even more difficult to accurately assess the implications and possible implementation challenges.

Therefore the SADC region and especially South Africa can be guided by the European Union paternity and parental leave provisions and draw from it to enhance our labour legislation to afford equality to all mothers and fathers irrespective of gender, sexual orientation or class.

These measures were meant to be implemented by 2015. Unfortunately to date we have not seen any developments with regards to fathers and their access to paid paternity leave.

2.3 EUROPEAN UNION (EU)

In terms of the European Union Directive governing parental leave “*Workers are entitled to parental leave on the birth or adoption of a child. Such leave may be taken until the child has reached an age determined by national law and/or collective agreements, but before the age of eight. This Directive applies equally to all workers, men and women, irrespective of their type of employment contract (open-ended, fixed-term, part-time or temporary). Parental leave shall be granted for at least a period of four months. In principle, workers should be able to take all of their leave. It should therefore not be transferable from one parent to the other. However, such transfers may be authorised on condition that each parent retains at least one of the four months of leave.*”²⁴

²² Dancaster, L. & Cohen, T. (2015) ‘Leave for Working Fathers in the SADC Region’ 36 ILJ 2487

²³ SADC Protocol on Gender and Development: Equal Access to Employment and Benefits(2008) Article 19.4

²⁴ European Union Council Directive: 2010/18/EUROPEAN UNION of 8 March 2010

In essence either parent would be present in the day to day lives of their children for a minimum period of at least one month as that portion is not transferable to the other parent. Therefore fathers now have a greater mandatory time frame within which to be with their children, even if they only take the minimum time period as stipulated in the above European Union Directive.

The EUROPEAN UNION DIRECTIVE goes on further to state the following:

The conditions of access to leave and adaptability of leave shall be defined by national law and/or collective agreements..... European Union (EU) States and/or social partners may:

adapt leave to the needs of parents and employers, by granting leave on a full-time or part-time basis, in a piecemeal way or in the form of a time-credit system;

make this right subject to a length of service qualification which shall not exceed one year. Where appropriate, that period shall be calculated taking account of all of the successive fixed-term contracts concluded with the same employer;

authorise the postponement of leave by the employer, for justifiable reasons related to the organisation;

authorise special arrangements to ensure the proper operation of small undertakings.

Workers wishing to take parental leave must give notice to the employer. The period of notice shall be specified in each European Union country taking into account the interests of workers and of employers.

After taking parental leave, workers shall have the right to return to the same job. If that is not possible, the employer must offer them an equivalent or similar job consistent with their employment contract or employment relationship.

Similarly, workers shall be protected against less favorable treatment or dismissal on the grounds of an application for, or the taking of, parental leave.²⁵

This Directive clearly makes provision for maternity, paternity and parental leave which is a fairly new type of additional leave afforded to parents. This stems from studies which have shown the need for and the benefits of both parents being involved in their children's lives and perpetuates the notion of shared parenthood and "hands on parenting" by both parents. The benefits will be discussed in detail later with reference to various sources and findings on the subject.

²⁵ European Union Council Directive: 2010/18/EUROPEAN UNION of 8 March 2010

It is clear from the Directive that both parents are entitled to take time off from work to care for their children until the age of eight and is prescribed at a rate of four months over that time frame, with both parents being able to share the take up of that special leave provision of parental leave. Unfortunately even in the European Union countries, there is still no uniformity regarding the implementation of the leave and the issue of who is liable for payment to the employee during that period. Although some European Union countries provide some paid leave to fathers not all have followed suit. This is largely due to the fact that the Directive did not address that issue and therefore the countries, in giving effect to the Directive, implemented their own national policies to suit their own particular economic climate hence there is no uniformity across the board on the issue of payment.

CHAPTER 3: EVIDENCE FROM THE SADC COUNTRIES:

3.1 PATERNITY LEAVE IN THE SADC COUNTRIES:

SADC is made up of 15 countries, namely: Angola, Botswana, Congo (DRC), Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. The reason for the choice of the SADC region is we are affected in South Africa by the lack of legislation for fathers and the inequality suffered by fathers as a result of the gap in legislation. Therefore a comparison was undertaken with neighboring countries to determine if the problem is unique to South Africa or not. In conducting the research it became apparent that this a problem experienced by many other countries besides South Africa. Another reason for the comparator within the SADC region is that there are many similarities in infrastructure, political environment, economic challenges and culture. All of the SADC countries have a common thread in place which is that mothers are seen as the primary caregiver whilst fathers more often than not do not play an active care role in the lives of their children.

None of the SADC countries have parental leave policies in place, either legislated or in employers' workplace policies. Paternity leave on the other hand is legislated in seven of the fifteen SADC countries although they are not strictly legislated as paternity leave only. In some countries, like South Africa, paternity leave is taken from a special type of leave allocation most commonly referred to as Family Responsibility Leave²⁶. In addition the special leave provisions are known as Family Leave or Compassionate Leave in certain countries²⁷.

In order to understand the predicament of fathers in the SADC countries, below is a summary of the labour provisions in all the SADC countries that allow for paternity leave.

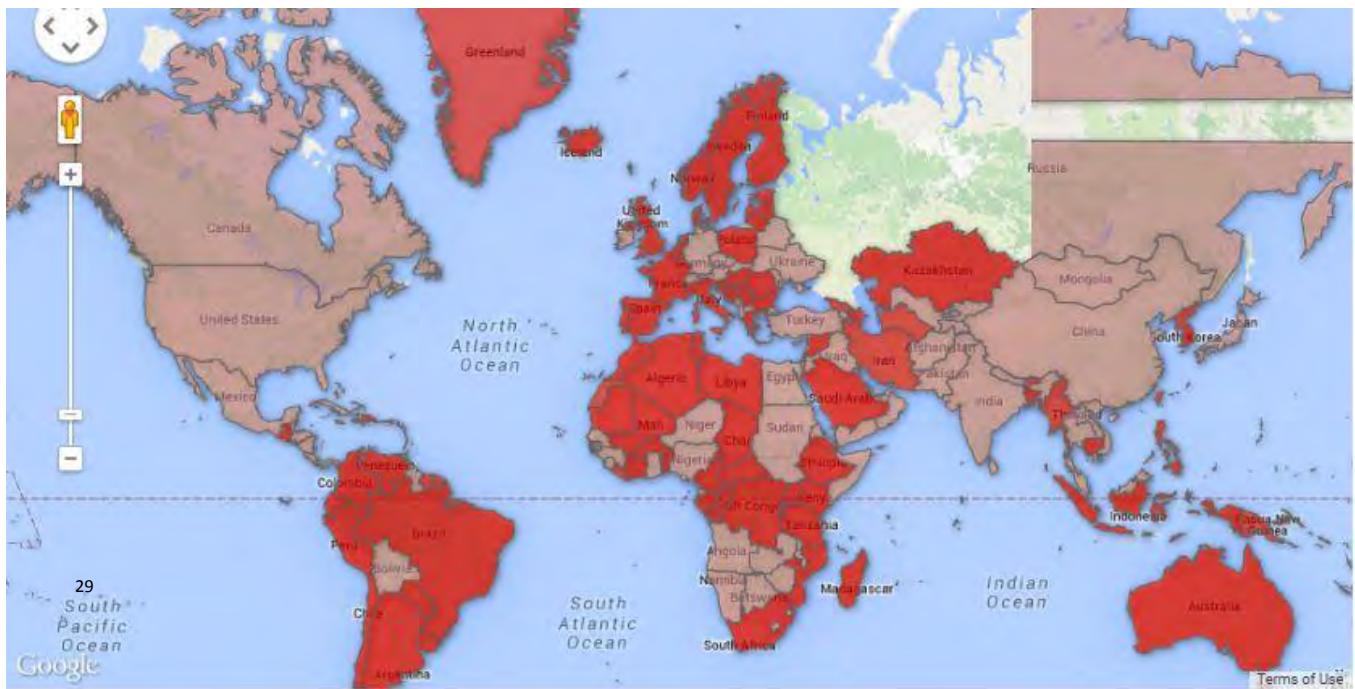
²⁶ Dancaster, L. & Cohen, T. (2015) 'Leave for Working Fathers in the SADC Region' 36 ILJ 2487

²⁷ ibid

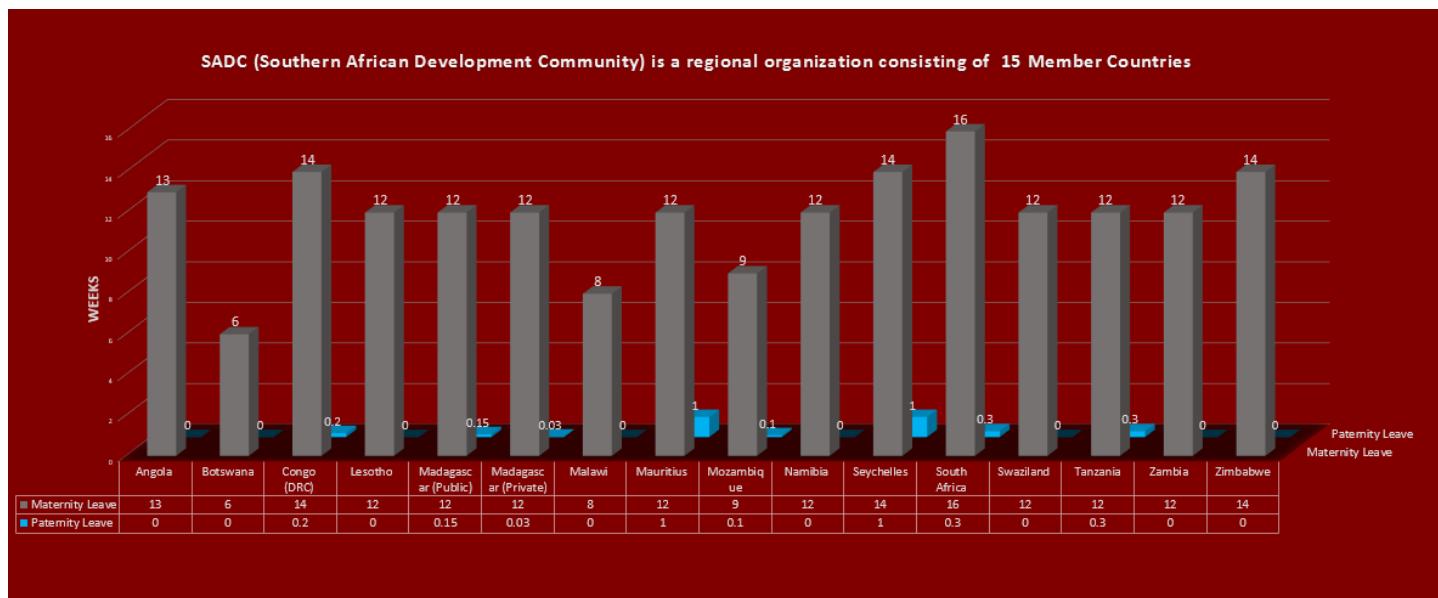
The following is a brief overview of both maternity and paternity leave provisions in the various SADC member states.²⁸

SADC (Southern African Development Community) is a regional organization consisting of 14 Member Countries		
COUNTRY	MATERNITY LEAVE PROVISIONS	PATERNITY LEAVE PROVISIONS
Angola	13 weeks (100%)	Nil
Botswana	6 weeks (100%)	Nil
Congo (DRC)	14 weeks (67%)	2 days (100%)
Lesotho	12 weeks (100%)	Nil
Madagascar	12 weeks	3 days – private sector 15 days – public sector
Malawi	8 weeks (100%)	Nil
Mauritius	12 weeks (100%)	1 week (100%)
Mozambique	9 weeks (100%)	1 day (100%)
Namibia	12 weeks (100%)	Nil
Seychelles	14 weeks(flat rate for 12 weeks thereafter unpaid leave for the remainder)	1 week (100%)
South Africa	16 weeks (100% unpaid although discretionary payment at the option of the employer)	3 days (100%)
Swaziland	12 weeks (100% for 2 weeks)	Nil
Tanzania	12 weeks (100%)	3 days (100%)
Zambia	12 weeks (100%)	Nil
Zimbabwe	14 weeks (100%)	Nil

²⁸ 'See How Much Paternity Leave New Dads Get By Country', Jack Linshi @jacklinshi June 10, 2015



This table is a representation of the above present position regarding maternity and paternity leave provisions in the SADC countries.³⁰



²⁹ Accessed from <http://time.com/3916511/parental-leave-map/> extracted on 20th August 2015

³⁰ Table done according to the information provided in: 'See How Much Paternity Leave New Dads Get By Country' Jack Linshi @jacklinshi June 10, 2015

From the table and the information above it is apparent that not all SADC countries make provision for work protected legislated leave for fathers when their children are born. In fact only seven countries have leave provisions for fathers when their children are born. Unfortunately the leave provisions are very disparate to the legislated leave provisions for mothers in the SADC countries. Even though the seven countries do have the provisions for fathers one can hardly call them fair or sufficient. These seven countries provide so called paternity leave for a period ranging from 1 day to the highest allocation which is 15 days (although the highest allocation is not available to everyone as it is only for fathers working in the public sector in Madagascar. In the private sector paternity leave provision is three days in Madagascar). Therefore a true reflection of the longest duration of paternity leave is the seven days paternity leave legislated in Mauritius. In comparison mothers are provided with maternity leave ranging from 8 weeks being the lowest to the highest which is 16 weeks.³¹

Dancaster and Cohen³² confirm the above position in their article. They state that the findings from their comparative study of the paternity leave provisions in the SADC countries reveal that paternity leave is present in some of the countries but to a minimal extent whereas parental leave policies are non-existent in the SADC region.³³ According to Dancaster and Cohen this is in contrast to many of the developed regions where parental leave is the norm. They go on further to state that ‘the idea of a period of leave for the purposes of parental involvement in early childhood development appears to be foreign to public policy in the SADC region.’³⁴ They further state that this reflects a failure on the part of these countries to comply with the SADC standards that encourage fathers to participate in the lives of their children and share the care of their children.

Olivier³⁵ refers to the Code on Social Security in the SADC where “member states are encouraged to provide for paternity leave in order to ensure that child-rearing is a shared responsibility between father and mother.”³⁶

³¹ ‘See How Much Paternity Leave New Dads Get By Country’ by Jack Linshi @jacklinshi June 10, 2015

³² Dancaster, L. & Cohen, T. (2015) ‘Leave for Working Fathers in the SADC Region’ 36 ILJ 2487

³³ ibid

³⁴ ibid

³⁵ Olivier, M. ‘International and SADC Standards and Comparative SADC Country Perspectives’, Maternity Protection Workshop paper, April 2013, accessed from www.social-protection.org/gimi/gess/RessFileDownload extracted October 2015

³⁶ Article 8 of the Code on Social Security in the SADC - Olivier, M. ‘International and SADC Standards and Comparative SADC Country Perspectives’, Maternity Protection Workshop paper, April 2013, p.3

Olivier³⁷ also refers to the insufficient paternity leave provisions in the SADC countries as “weak paternity protection”. He believes that the failure of most of the SADC countries to provide legislated paternity leave provisions for fathers is “discriminatory against men – and women.....failure to provide for paternity benefits therefore only serves to perpetuate the stereotypes about the role of women in society....”³⁸ However let us not forget that is it not just discriminatory against women but also against men hence the assertion in this research about the gender inequality faced by fathers in the SADC countries due to the failure of legislators to date to address the issue of paid paternity specific legislation to allow fathers reasonable time off from work to care for and bond with their children after their birth.

According to ILO data as of 2013 there were legislated provisions for paternity leave in 78 out of a total of 167 countries which translate to a 47% representation amongst these countries.³⁹ There was an increase in the countries that created paternity legislation globally including Africa. What was also noted is that the leave allocation varies, understandably so, from country to country. The common factor though is that the duration was noted to be a short period albeit paid leave. The norm appears to be a minimum of one day to a high of ten days.⁴⁰

This brief outline of paternity leave benefits in the SADC countries will be used for a comparative analysis of other countries and their paternity leave benefits. This comparison will be done specifically with the European Union countries and Australia that does make provision for both paternity leave as well as parental leave. The European Union countries mostly have leave provision for paternity leave with the exception of five countries.⁴¹ What is interesting to note is the higher allocation of days or weeks off allowed as legislated work protected paternity leave to fathers on the birth of their children.

³⁷ Olivier, M, ‘International and SADC Standards and Comparative SADC Country Perspectives’, Maternity Protection Workshop paper, April 2013 p.8

³⁸ ibid

³⁹ Africa report: Van den Berg (editor) (2015) ‘State of Africa’s Fathers: A MenCare Advocacy Publication.’ Adapted from Levlov, R., Van der Gaag, N., Greene, M., Kaufman, M. & Barker, G. (2015) ‘State of the World’s Fathers: Executive Summary: A MenCare Advocacy Publication.’ Washington, DC: Promundo, Rutgers, Save the Children, Sonke Gender Justice and the MenEngage Alliance p.22 <http://sowf.s3.amazonaws.com/wp-content/uploads/2015/08/19160621/State-of-Africas-Fathers-2015> accessed November 2015

⁴⁰ ibid

⁴¹ Ryder, G. (2014) ‘Maternity and paternity at work. Law and practice across the world.’ ILO Policy Brief. Accessed August 2014 from ILO website

It is clear where the SADC labour legislation has failed to address the needs of fathers and perpetuated the gender inequality albeit against fathers. The analysis of the gap in legislation is the foundation for the improvements that can be made and paves the way forward for legislative recommendations.

3.2 PATERNITY LEAVE PROVISIONS IN SOUTH AFRICA

As already stated there are no specific paternity leave provisions in South Africa. In South Africa we have the so-called paternity leave coming from a different source called family responsibility leave. Therefore there is a gap or lacuna in the labour legislation in South Africa in the provision of work protected specific legislated leave for fathers to utilize at the time of the birth or adoption of their children. Family responsibility leave in terms of Section 27 of the BCEA provisions is leave that:

An employer must grant an employee, during each annual leave cycle, at the request of the employee, three days paid leave, which the employee is entitled to take –

- (a) *when the employee's child is born;*
- (b) *when the employee's child is sick; or*
- (c) *in the event of the death of-*
 - (i) *the employee's spouse or life partner; or*
 - (ii) *the employee's parent, adoptive parent, grandparent, child, adopted child, grandchild or sibling.*⁴²

The major criticism of this particular leave provision is that it covers other needs besides just the need of the father to spend time with his newborn. Firstly, what is the position should a father have already used up the three day allocation of family responsibility leave for the year? Is the father then provided with discretionary additional leave paid for by the employer or is the father expected to utilize his paid annual leave for this specific purpose? Should the latter be the case then that defeats the purpose of the legislative provision of stand-alone paternity leave? Further that exacerbates the problems faced by fathers of newborn children and the inequality of the legal provisions for these fathers.

⁴² Basic Conditions of Employment Act 75 of 1997 s27 (2)

Secondly, is the three days sufficient in the first instance for fathers to spend time with and bond with their newborn children? The paternity leave provisions are insufficient to have any impact on its intended purpose, which is the emotional wellbeing of, bonding with and nurturing the child.

In addition to the above, the lack of specific paternity leave provisions in legislation makes it difficult to adequately compare the protection afforded to fathers in situations where disputes arise such as the question raised above of a situation where the leave is already used and the employee does not want to or does not have sufficient annual leave to utilize for paternity leave.

Paternity leave provisions have not been challenged in court to date although the MIA case did challenge a father's right to utilize maternity leave benefits to care for his adopted child born through a surrogate. Hence the lack of jurisprudence regarding paternity leave specifically to guide disputes of fathers who do not have sufficient paternity leave provisions at the time of the birth or adoption of their children is severely lacking in the SADC region. This lack of jurisprudence and comparators further highlights the plight of fathers with regards to the gender inequality they are subjected to in the SADC countries.

MIA v State Information Technology Agency (Pty) Ltd:

Up until 2015 there has been no case law hence no development of jurisprudence dealing with fathers challenging their right to paternity leave as a stand-alone labour right nor as a right outside of the special leave/ family responsibility leave. Is it now possible for fathers to access maternity leave provisions to care for their newborn children, adopted children and children born through surrogacy? This question was dealt with in the MIA case although no definite answer has been formulated going forward.

The first groundbreaking case to raise this issue was the case of *MIA v State Information Technology Agency (Pty) Ltd*⁴³. The applicant was in a same sex union and together with his partner had had a child through a surrogate. His employer refused to give him the stipulated four months maternity leave as per the BCEA but instead offered him two months paid leave. He took the matter to the Labour Court challenging his right as a parent to have the right to be at home with the newborn, to care for the newborn the same way a birth mother would as well

⁴³ D 312/2012 [2015] ZALCD 20

as to bond with the child. The issue raised in this case was the company's maternity leave policy which naturally stems from the provisions of the BCEA. The employer argued that the maternity leave policy only applied to women and not men therefore the father in this case was not entitled to maternity leave as per the employers maternity leave policy.

Gush J referred to The Children's Act⁴⁴ and Section 28 of The Constitution when deciding that the best interests of the child is paramount. "*right to maternity leave as created in the BCEA.....is an entitlement not linked solely to the welfare and health of the child's mother but must of necessity be interpreted to take into account the best interests of the child.....every child has a right to family care or parental care*"⁴⁵

He further noted "*in all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance must be applied.*"⁴⁶

What is most interesting about this case is the platform it has given to the inequality faced by fathers as can be evidenced by the following comments:

*"the case shows how our South African labour legislation needs to be more progressive towards both men and women in the workplace that have children.....one has to ask whether 3 days is sufficient time to bond with your new born baby.....perhaps SA labour legislation needs to consider the option of parental leave"*⁴⁷

The above statement clearly illustrates how long past overdue the issue is as well as that there are options. The MIA case has finally brought that issue for adjudication before the courts for the first time in South Africa. This case will set a precedent as the flood gates finally open on the lack of recognition of the needs of fathers to be able to utilize legislated leave provisions to take time off from work to care for and bond with their children at the time of the birth of their newborn and adopted children. It throws the spotlight on the fact that there aren't sufficient paternity leave provisions in the labour legislation. Hence the father in this case attempted to enforce his right to be at home with his newborn child by challenging the provisions of the BCEA and the maternity leave policy of his employer.

⁴⁴ Children's Act no 38 of 2005

⁴⁵ *MIA v State Information Technology Agency (Pty) Ltd D 312/2012 [2015] ZALCD 20*

⁴⁶ ibid

⁴⁷ Olivia, T. 'Sir, Your Maternity Leave has been Granted' accessed September 2015 from <http://www.werksmans.com/wp-content/uploads/2015/06/043233-WERKSMANS-maternity-leave>

Perhaps the court should have also dealt with the lack of paternity provisions as well in the MIA case. Either way the case has highlighted the inadequacy of the paternity leave provisions in South Africa's labour legislation. Dancaster and Cohen⁴⁸ argue that the court failed by not distinguishing between leave for pregnant women and a "gender-neutral" leave for parents to utilize on the birth of their children. They refer to parental leave as they argue that the gender neutral parental leave would accommodate the needs of both mothers and fathers.

Dancaster and Cohen's⁴⁹ argument is based on the Australian model of parental leave where Australia provides leave for mothers in relation to their pregnancy and childbirth. The legislation also goes further in that it allows the parents to have a choice as to who the primary caregiver to the children will be. If fathers choose to be the primary caregiver, then they would be entitled to have access to the parental leave to take time off from work to care for their children. The other significance in the Australian model is the issue of children born through surrogacy. In the Australian model there is specific provision of legislated leave for a surrogate parent who adopts a child to be entitled to parental leave to be the primary caregiver of the child. Therefore Dancaster and Cohen argue that "a parental leave provision of this nature would accommodate the difficulties of unfair discrimination arising from the MIA case."⁵⁰

Therefore the argument of Dancaster and Cohen is that the BCEA should be amended to include this gender neutral parental leave instead of maternity leave (which is aimed at providing leave specifically for mothers). By doing so the rights of fathers to be with their children would be entrenched in the country's labour legislation.⁵¹

In their argument for the amendment of the BCEA Dancaster and Cohen⁵² propose that the amendment would have a threefold effect. It would "accommodate the difficulties of unfair discrimination arising from the MIA case....comply with the requirements of care in the Constitution and lastly create a greater opportunity for men to assume more equal family responsibilities".

⁴⁸ Dancaster, L. & Cohen, T. (2015) 'Leave for Working Fathers in the SADC Region' 36 ILJ 2492

⁴⁹ ibid

⁵⁰ ibid

⁵¹ ibid

⁵² ibid

Professor FN Zaal had this to say about the matter:

*"this judgment is to be welcomed as a step forward in promoting equality and is in accordance with section 9(3) of the Bill of Rights."*⁵³

Rycroft⁵⁴ is referred to in the Lewin's article where it is stated that he believes that the wording of the present BCEA provisions are unconstitutional because it discriminates against men therefore the BCEA in particular needs to be amended. What is of importance with this case is yet again the assertion that this case of MIA has "changed the landscape"⁵⁵ in that it has paved the way for fathers to challenge their right to adequate specific legislation for fathers at the time of the birth, adoption and now birth through surrogacy.

There is an urgent need globally to recognize that there is diversity in human relationships and the caregiving and support offered by fathers is no longer just the stereotypical 'heterosexual father figure' society has become used to. There are diverse family configurations⁵⁶ as proved by the MIA case and legislation needs to support this by providing legislative protection for all fathers. To not do so would be to perpetuate the gender inequality that has been so pervasive globally thus far.

⁵³ Lewin, IB. 'Spotlight on maternity' rights for men' LexisNexis June 2015

⁵⁴ ibid

⁵⁵ ibid

⁵⁶ Africa report: Van den Berg (editor) (2015) 'State of Africa's Fathers: A MenCare Advocacy Publication.' Adapted from Levlov, R., Van der Gaag, N., Greene, M., Kaufman, M. and Barker, G. (2015) 'State of the World's Fathers: Executive Summary: A MenCare Advocacy Publication.' Washington, DC: Promundo, Rutgers, Save the Children, Sonke Gender Justice and the MenEngage Alliance p. 14 http://sowf.s3.amazonaws.com/wp-content/uploads/2015/06/13192403/State-of-the-Worlds-Fathers_Executive-Summary_23June2015_web.pdf accessed November 2015

CHAPTER 4: EVIDENCE FROM SELECTED INTERNATIONAL COMPARATORS:

4.1 CHOICE OF COUNTRIES

The European Union countries mostly have leave provision for paternity leave with the exception of five countries.⁵⁷ What is interesting to note is the higher allocation of days or weeks off allowed as legislated work protected paternity leave to fathers on the birth of their children. There have been notable changes in the provision of paternity leave as well as favourable amendments to the parental leave policies in 2015 in **Sweden** and **United Kingdom** which are part of the EU. Whilst **Australia** is not part of the EU, there have been positive changes to its paternity and parental leave policies as well in 2015. All three countries are however a part of the ILO hence the use of all three as a comparator in a non- African context as its legislative changes is relevant to this dissertation. The inclusion of Australia is to illustrate that whilst Australia is not governed by the EU standards, it is governed by the ILO standards. Similarly South Africa and the SADC region are governed by the ILO standards hence the comparator to these countries.

ILO Recommendation No. 191 (accompanying Convention No. 183 on maternity protection) and Recommendation No. 165 (accompanying the Workers with Family Responsibilities Convention, 1981, No. 156) has provisions for parental leave whereby a period of parental leave should be available to either parent after maternity leave so that they do not have to leave their jobs as well as their employment rights are protected during this period.⁵⁸

⁵⁷ Ryder, G. (2014) '*Maternity and paternity at work. Law and practice across the world.*' ILO Policy Brief. Accessed August 2014 from ILO website

⁵⁸ ibid

4.1.1 Paternity Leave and Parental Leave in the European Union

Below is an overview of the leave provisions in the European Union countries.⁵⁹

PATERNITY LEAVE IN THE EUROPEAN UNION COUNTRIES	
Austria	No paternity leave although mothers and fathers are entitled to parental leave up until the child reaches the age of 24 months. The minimum period of the parental leave is two months. This provision of parental leave is unpaid parental leave
Belgium	Ten days paid paternity leave
Bulgaria	Fifteen days paid paternity leave
Croatia	Seven days paid leave
Republic of Cyprus	No paternity leave
Czech Republic	No paternity leave
Denmark	Two weeks paid paternity leave
Estonia	Ten working days paid paternity leave
Finland	Fifty four working days paid paternity leave
France	Eleven working days paid paternity leave
Germany	No paternity leave
Greece	Two days paid paternity leave
Hungary	Five days paid paternity leave
Ireland	No paternity leave
Italy	One day paid paternity leave
Latvia	Ten calendar days paid paternity leave
Lithuania	One month paid paternity leave from the child's birth to when the child is 1 month old
Luxembourg	Two days paid "extraordinary leave" for the birth of a child
Malta	No paternity leave
Netherlands	Two days paid paternity leave
Poland	Two days paid paternity leave
Portugal	Twenty days paid paternity leave. The first ten days are compulsory
Romania	Five working days paid paternity leave
Slovakia	No paternity leave
Slovenia	Ninety days paid paternity leave (15 to be taken before the child is 6 months old, the remainder to be taken before the child is 3 years old)
Spain	Fifteen consecutive days paid paternity leave

⁵⁹Ryder, G. (2014) 'Maternity and paternity at work. Law and practice across the world.' ILO Policy Brief. Accessed August 2014 from ILO website

Sweden	Ten days paid paternity leave, plus two months paid parental leave reserved for each parent
United Kingdom	Two weeks paid paternity leave ⁶⁰

Finland and Slovenia are the countries in the European Union offering the longest periods of paternity leave for fathers on the birth of their children. Interestingly as well Portugal, Lithuania and Iceland also seem to be leading the way for fathers to take work protected legislated paternity leave on the birth of their children. **Finland** offers 54 working days of paid paternity leave whilst **Iceland** (not yet an European Union member) has provision for three months of paid paternity leave for fathers. Most of the remaining countries have adopted the average of a two week allocation for fathers to take paternity leave on the birth of their children.

All countries in the European Union have policies in place that allow for fathers to take parental leave. However they differ in terms of the issue of who is liable to remunerate parents during parental leave as well as the time period or duration of parental leave and finally the issue of flexibility of the parental leave policies.⁶¹ These factors above are contributory factors to why there still is disparity between the take up rates in the various EUROPEAN UNION countries for parental leave by fathers.

In the Czech Republic men are entitled to take up to twenty two weeks of parental leave. Surprisingly the take up rate amongst these fathers “represents 1.8% of parental leave-takers.”⁶²

24% of fathers in the Netherlands had taken paternity leave. In Sweden the percentage is similarly high. 24.8% of fathers are reported to have taken their parental leave. What is also of significance in these countries is that the percentages had increased drastically in the last ten years or so.⁶³

The difference in the take up rates of parental leave in the European Countries has led to many conclusions. The perceived common factors as to why certain European Union Countries have

⁶⁰ Ryder, G. (2014) ‘Maternity and paternity at work. Law and practice across the world.’ ILO Policy Brief. Accessed August 2014 from ILO website

⁶¹ Paternity Leave in the European Union accessed from <http://one-europe.info/paternity-leave-in-the-eu>

⁶² ibid

⁶³ ibid

been more successful than others are the financial implications of paid or unpaid parental leave. It has been suggested that fathers need beneficial incentives such as cash bonuses or extra leave.⁶⁴

However paramount to the success of utilization of parental leave would be the remuneration of parents during this period of absence from work. If parents are compensated either in full or as high a percentage as possible with minimal financial losses, more fathers would be willing to take parental leave. As already stated the loss of income can be detrimental and counteractive during a time that is meant to be nurturing and building bonds. Financial stresses as a result of pay will be counterproductive to the above intended purpose of parental and paternity leave.

4.1.2 Parental Leave developments in Sweden:

Sweden was the first country to introduce paid parental leave policy for either parent in 1974 as it was not gender specific leave but rather gender neutral leave for parents allowing either parent six months paid parental leave. Therefore it is often regarded as the benchmark for other countries to refer to Sweden's policy when looking for direction in this regard because of its progressive stance and policies. Klinth⁶⁵ refers to Haas in his article when stating that in relation to international gender research, "Sweden has often been described as a pioneer in developing policies for men's involvement in childcare".⁶⁶

Previously the Swedish policy was a sixteen month allocation of parental leave which could be utilized by either the mother or the father. Of those sixteen months for parental leave, just two months were specifically allocated to fathers to take up to be involved in their children's lives. Initially following 1974 very few men took the parental leave therefore in 1995 Sweden introduced the non-transferable "daddy's month". This period was increased to the current position of two months in 2002 with fathers receiving remuneration at 80% of their income.⁶⁷

In Sweden there is change coming in 2016. In a bid to redress the gender equality debate and to adequately provide fathers with the paternity benefits that are more in line with societies

⁶⁴ Paternity Leave in the European Union accessed from <http://one-europe.info/paternity-leave-in-the-eu>

⁶⁵ Klinth, R. (2008) 'The Best of Both Worlds? Fatherhood and Gender Equality in Swedish Paternity Leave Campaigns 1976-2006' Vol.6, No. 1, *Fathering*, Winter p. 20-38

⁶⁶ ibid

⁶⁷ Ryder, G. (2014) 'Maternity and paternity at work. Law and practice across the world.' ILO Policy Brief. Accessed August 2014 from ILO website

changing perceptions of ‘more involved fathers’ and ‘hands-on dads’ the Swedish government announced its new policy of allowing fathers three months parental leave with effect from 2016. This leave for fathers will be fully paid which is also just as important as the allocation of the extra time for parental leave. This has now been changed to three months specifically for fathers. Therefore of the sixteen month allocation for parental leave, mothers and fathers would each now be entitled to three months each that is reserved specifically for them to utilize to be with their children. However should either parent not utilize the prescribed minimum then their specific minimum would be forfeited and cannot accrue to the other parent. The balance of the ten months can thereafter be utilized by either parent as they deem necessary at any time before the child turns eight.⁶⁸

Bittencourt refers to Lewis⁶⁹ ‘time to care’ policy which is to provide parents with time off from work to care for their newborn or adopted children. The Nordic countries were the first countries to develop policies that followed the ‘time to care’ principle thereby setting the stage for the involvement of fathers in their children’s lives from the start and a reflection of the global change on gender stereotypes.⁷⁰

Rostgaard⁷¹ does an analysis of the paternity and parental leave options available to fathers in the Scandinavian countries of Norway, Sweden and Denmark. Initially these policies were created with the interests of the child in mind. It is only in recent years that the focus has shifted to the issue of gender equality for fathers. There were benefits to children who had both parents available to take care of their needs from birth. Having fathers present from birth had a positive effect on the early childhood development of the children.⁷² The benefits extended beyond the benefits to the child only. Fathers are put in a position to build stronger relationships and bonds with their children as well as fathers themselves benefitting from the relationship as individuals.

⁶⁸ Swedish fathers to get third month of paid paternity leave accessed August from <http://www.theguardian.com/world/2015/may/28/swedish-fathers-paid-paternity-parental-leave>

⁶⁹ Bittencourt, M. ‘Evidence on Primary Education and Fertility Rates from Southern Africa’ p.19 accessed September 2015 from http://www.soc.uoc.gr/macro/docs/Year/2015/papers/paper_2_98.pdf

⁷⁰ ibid

⁷¹ Rostgaard, T. (2002) ‘Setting time aside for the father: father’s leave in Scandinavia. Community, Work & Family’ Vol. 5, No. 3, Carfax Publishing : Taylor & Francis Group

⁷² ibid

Rostgaard makes reference to Olsen(2000)⁷³ who states that “leave schemes contribute to the social construction of motherhood, fatherhood and parenthood.....help to determine our conception of what are ‘normal’ gender roles.”

These policies are influenced by factors such as the labour market traditions, politics, expectations of parenthood and gender roles.⁷⁴ Hence the factors are varied however these factors seem to be common threads globally.

4.1.3 Parental Leave developments in the United Kingdom:

Paternity leave was introduced in 2003 whereby fathers were entitled to two weeks leave at the time of the birth of their children. This period of leave was partially paid at a flat rate benefit per week (the amount has changed through the years) or paid at 90% of the fathers average weekly rate whichever is less.⁷⁵ It is apparent from the date when paternity leave provisions came into being in the United Kingdom that the change is fairly recent in a global context of fathers receiving paternity rights as provided for in the countries legislation.

Further developments allowed for parental leave provisions which are an entitlement of eighteen weeks unpaid leave per parent per child. It is individual leave and cannot be transferred to the other parent.⁷⁶ There was also the Additional Paternity Leave scheme whereby parents could take between two to twenty six weeks additional paternity leave. This additional leave would be paid leave but only if the mother, other parent or co-adopter returned to work and swapped the role of primary caregiver with the other parent now taking up that special leave.⁷⁷

Fox, Pascall and Warren⁷⁸ state that in the UK mothers receive 52 weeks maternity in comparison to fathers who receive 2 weeks paternity leave. Therefore they are of the opinion that there needs to be more gender equal policies in place for parents to reconcile their work

⁷³ Rostgaard, T. (2002) '*Setting time aside for the father: father's leave in Scandinavia*. Community, Work & Family' Vol. 5, No. 3, Carfax Publishing : Taylor & Francis Group

⁷⁴ ibid

⁷⁵ Moss, P. '10th International Review of Leave Policies and Related Research 2014' accessed December 2015 from http://www.leavenetwork.org/fileadmin/Leavenetwork/Annual_reviews/2014_annual_review_korr.pdf

⁷⁶ ibid

⁷⁷ www.gov.uk/paternity-pay-leave/overview accessed December 2015

⁷⁸ Fox, E., Pascall, G. & Warren, T. (2009_ 'Work-family policies, participation, and practices: fathers and childcare in Europe' Vol. 12, No. 3, Community, Work & Family p. 313-326

and family responsibilities. According to them this should be based on the Swedish model in order for both mothers and fathers to be able to share the childrearing responsibilities more equally.⁷⁹

In April 2015 the United Kingdom joined other countries in passing new parental leave legislation that allows for fifty weeks of shared parental leave for mothers and fathers. They would be financially compensated for a maximum period of thirty seven weeks of the parental leave.⁸⁰ This is in line with similar models in the European countries and a huge victory for fathers seeking gender equality redress. The leave can be taken once off or split over a period of time. The only qualification is that it is only available until the child turns one. If it is not utilized by that stage then it would naturally be forfeited by either or both parents who have not used the leave.

This was the longest legislated period globally recorded for parental leave until Sweden announced its revised parental leave policy for 2016. What is also important to note that the leave provisions prior to that were not as liberal. However the fact that the government recognized the need for fathers to have legislated paid leave off from work on the birth or adoption of their children is indicative of the changing times and the efforts realized from campaigns and programs globally as well as within the United Kingdom. Parties are coming to the realization, albeit slowly and slower in some countries as opposed to other countries, of the importance of gender equality in the home and workplace from the perspective of fathers.

These issues and concerns have to be at the forefront of any decision making process as well as when making suggestions for reforms, improvements, recommendations and inclusions into the laws of the SADC countries. This will be addressed in the next chapter.

4.1.4 Parental Leave developments in Australia:

In Australia there is no specific legislated leave provision for maternity or paternity leave. Instead leave for both mothers and fathers fall under parental leave. Therefore each parent is

⁷⁹ Fox, E., Pascall, G. & Warren, T. (2009) *'Work-family policies, participation, and practices: fathers and childcare in Europe'* Vol. 12, No. 3, *Community, Work & Family* p. 313-326

⁸⁰ <http://mq.co.za/article/2015-04-30-00-parental-leave-for-dads-is-on-the-cards> accessed November 2015

entitled to twelve months unpaid parental leave in terms of the Fair Work Act.⁸¹ The parental leave is an individual entitlement. Parental leave can be extended by a further 12 months if the employer agrees, provided the total leave taken by a couple does not exceed a total of 24 months between the two working parents per birth.⁸²

According to Moss⁸³ fathers are allowed to take up to 12 months unpaid Parental leave following the birth or adoption of a child for an unbroken period during which they take a ‘primary carer’ role. Fathers may also take up to eight weeks of this leave concurrently with their partner, within 12 months of the birth or adoption, with any concurrent leave taken deducted from their total 12 month entitlement to unpaid leave.

In 2013 the ‘Dad and Partner Pay’ was introduced. In terms of this a father or mothers partner may be entitled to receive up to two weeks Dad and Partner Pay for births or adoption occurring after January 2013.⁸⁴ They will be remunerated at the rate of the national minimum wage depending on what the current rate is at the time of utilizing the leave.

In terms of the Paid Parental Leave Act 2010 Australian parents are now entitled to 18 weeks of paid parental leave at the time of the birth or adoption of their children to care for their children. This marks an important change as the parental leave until that stage was unpaid hence a financial burden and a hindrance in the take up rates of the parental leave. It is now paid at the national minimum wage rate but paid leave nonetheless. Payment is usually made to the mother unless it is shown that she is not the primary caregiver. In that instance the primary caregiver is entitled to payment. The importance of this is the recognition that either parent can be the primary caregiver and not just mothers alone.

According to Dancaster and Cohen⁸⁵ in 2013 ‘dad and partner pay’ was introduced that entitles fathers or mothers partner (including same sex partners)⁸⁶ to receive two weeks pay at the

⁸¹ Moss, P. ‘International network on leave policies and research, 10th International Review of Leave Policies and Related Research 2014’ accessed November 2015 from

http://www.leavenetwork.org/fileadmin/Leavenetwork/Annual_reviews/2014_annual_review_korr

⁸² Dancaster, L. & Cohen, T. (2015) ‘Leave for Working Fathers in the SADC Region’ 36 ILJ 2487

⁸³ Moss, P. ‘10th International Review of Leave Policies and Related Research 2014’ accessed December 2015 from
http://www.leavenetwork.org/fileadmin/Leavenetwork/Annual_reviews/2014_annual_review_korr.pdf

⁸⁴ ibid

⁸⁵ Dancaster, L. & Cohen, T. (2015) ‘Leave for Working Fathers in the SADC Region’ 36 ILJ 2487

national minimum wage rate for these fathers or partners that utilize the unpaid parental leave provisions to care for their newborn or adopted children.

⁸⁶ <https://www.fairwork.gov.au/leave/maternity-and-parental-leave/paid-parental-leave> accessed November 2015

CHAPTER 5: IMPLEMENTATION CHALLENGES AND APPROACH – ANALYSIS and DISCUSSION:

5.1 THE NEED FOR SADC COUNTRIES TO IMPROVE LEGISLATED LEAVE FOR FATHERS

Smit⁸⁷ states many reasons why family related policies are not given the attention and importance on governments' agenda that it deserves. Smit⁸⁸ correctly points out that "limited financial resources, fragile infrastructures, challenged governments and competing needs...." are some of the many reasons why certain issues are not high on the agenda of government to create legislation to protect its citizens rights. There are various other factors which are perceived as greater in importance and need for development and resources such as the political climate, poverty, economic concerns including the global economic crisis, HIV/AIDS (with some of the SADC countries having the highest rates of HIV infections in the world), social development issues, welfare issues, unemployment issues, healthcare, housing shortages, education issues and payment of child support grants.

This statement was endorsed by Morrell and Richter in Smit's article⁸⁹ that were of the opinion that fatherhood related policies compete with other issues on an "over-stretched social agenda" for government. In addition to this as well as the nature of the patriarchal system in place, policy makers in the SADC region and South Africa have yet to place the issue of paternity high on its agenda of serious concerns for legislative reforms or promulgation.

Smit goes on further to state that despite the importance of the above factors, so too is the need for family related policies in the SADC region. Perhaps by supporting parents in this region and providing them with the legislation to protect their rights, the benefit would be that this would in turn help the economy.⁹⁰

In Smit's article reference is made to studies conducted in South Africa where there is a clear indication that more fathers are embracing the changes of being involved fathers in their

⁸⁷ Smit, R. (2010) 'Family-Related Policies in Southern African Countries: Are Working Parents Reaping Any Benefits?' p.32

⁸⁸ ibid

⁸⁹ ibid

⁹⁰ ibid

children's lives. More fathers appear to welcome the opportunity to take parental leave and would utilize the leave provisions to spend time with their children and care for them after their birth.⁹¹

Nagtegaal in Grobler's article⁹² postulates that in light of the MIA case companies need to look at employment laws in conjunction with the rights and principles of the Constitution when formulating workplace policies. One cannot be done in isolation of the other as society and the so called norms are changing. The best interests of children as raised in the MIA case would be ignored if the changes are not acknowledged nor accommodated by changes being made in the legislation and workplace policies. That would be a travesty of justice and defeat the purpose of the legislation and the Constitution.

Nagtegaal goes on further to state that parties should have a choice in how they raise and nurture their children and which parent is allowed to do so. By excluding fathers we are following the patriarchal system which is an 'out of date' system which discriminates against fathers on gender.⁹³ The legislation therefore would have to change to accommodate these new norms. In light of the MIA case there is a clear need for a gender neutral leave policy for parents. It is not merely a question of should fathers have access to maternity leave nor is it as simple as suggesting that there should be separate paternity leave. The best solution to accommodate the changes in society would be to create sufficient gender neutral leave policies for parents to use at the time of the birth, adoption or birth through surrogacy of their children. The SADC region and South Africa in particular could learn from and form a model based on the Australian model of childcare which is a gender neutral leave policy allowing parents longer periods of leave to be with their children and to care for their children.

The various SADC countries and South Africa in particular have not followed the EU example. To date there is no provision for, nor is there any imminent move towards the direction of passing legislation that would allow parents in the SADC countries to have access to parental leave during the course and scope of their employment to take time off from their employment care for their children. This is yet again another example of the inequality men in the SADC countries face, albeit a particular inequality that mothers are also subject to as parental leave would be in

⁹¹ Smit, R. (2010) 'Family-Related Policies in Southern African Countries: Are Working Parents Reaping Any Benefits?' p.25

⁹² Grobler K, 'A Dad Can Mother Too' p.3 <http://www.lipco.co.za/paternity-leave/> accessed November 2015

⁹³ ibid

addition to their labour legislated maternity leave provisions. Of equal importance in the advocacy of this benefit would be the need to ensure that such parental entitlements are provided with job protection guarantees that would afford parents the opportunity to return to their employment upon the expiry of the parental leave as well as financial protection during this period of parental leave. The financial protection could be in the form of the employer subsidizing the leave by remunerating the employee in full, during this period, alternatively the state subsidizing payments to the parents during this period of leave.

Should South Africa or any of the other SADC countries make changes to its paternity legislation, those changes in labour legislation will set a precedent and have a positive ripple effect on the other SADC countries to do the same. Be that as it may there have to date been many changes and provisions internationally for fathers that sets a precedent of international standards for paternity leave and parental leave for fathers in the SADC countries. This would give fathers a platform within which to challenge the inadequacy of the legislation and to pursue changes and reforms in labour legislation in their specific countries.

In addition countries should allow fathers to have access to maternity leave in instances where they are in a same sex union and there is no other leave provision available to them. Until such time the lack of sufficient paternity leave and parental leave policies are addressed and rectified, fathers who are in same sex unions and who do not qualify for any other leave provisions the way a mother would should not be excluded from legislated leave provisions to take time off from work to care for their newborn, adopted or children born through surrogacy.

The issue of who will be liable for remunerating the employee or covering the costs of parental leave is another major consideration by policy makers to take into account before implementing such policies. It is pointless allowing for such provisions if parents are going to suffer financial losses when they take up the parental leave. With the current economic climate, more often than not parents are not in a financial position to choose to be with their young children at the risk of losing out on a paycheck. More especially one has to look at the economic crisis in the various SADC countries to predict that even if parental leave provisions were legislated the financial burden of the loss of any income or subsidy would dissuade most, if not all, parents from utilizing the parental leave. This would then have a counteractive effect of the intention of the legislation. Children ultimately would be the losers in that battle as they would still not be in a position to reap the benefits of having present and actively involved fathers in their lives. The knock on effect would be that fathers are ultimately in a position of

disadvantage yet again as well. They would have to choose between being able to provide basic necessities for their family needs by being in paid employment against the choice to be present with their children but not being able to financially provide for them during this period of parental leave.

In Grobler's article⁹⁴ reference is made to the fact that South Africa is falling behind by not emulating examples of some European and even African countries. Sweden offers parents sixteen months parental leave and fathers will as of 2016 receive three months of that allocation as their entitlement to leave on the birth or adoption of their children. Whilst Kenya and Cameroon do not fall under the SADC countries, in Africa they are the countries to date with the most progressive paternity leave policies. Kenya offers fathers 14 days paid paternity leave whilst Cameroon offers fathers 10 days per annum. Ghana offers five days paternity leave provided fathers produce a medical certificate confirming the birth of their child. In an African context they are the leaders in providing legislated work protected leave policies for fathers by recognizing the need for change and trying to alleviate gender inequality for fathers. One can only hope that the SADC countries will follow suit.

Ray⁹⁵ sums up the gender inequality from a fathers perspective perfectly by stating "traditional gender roles and labour market outcomes work together to deprive men of the opportunity to participate actively in providing infant and child care."

Finn⁹⁶ states that women would not be placed in a position of greater disadvantage or inequality by providing legislated paternity leave for fathers. She goes on further to state that if anything, it will have the advantage of challenging previous gender stereotypes and roles thereby resulting in benefits to both men and women in the future. Also of importance is the reiteration that this would be in line with global trends hence it is necessary and time for the SADC countries to join the global community and for their paternity and parental policies to be reflective of the changes worldwide.

⁹⁴ Grobler, K. 'A Dad Can Mother Too' p. 4 accessed November 2015 from <http://www.lipco.co.za/paternity-leave/>

⁹⁵ Ray, R., Gornick, JC. & Schmitt, J. (2008) 'Parental Leave Policies in 21 Countries Assessing Generosity and Gender Equality' p.9 accessed August 2015 from http://www.cepr.net/documents/publications/parental_2008_09.pdf

⁹⁶ Finn, M. 'Farther still to go: paternity leave and the Labour Court's judgment in MIA v SITA' p.3 <http://africanlegalcentre.org/farther-still-to-go-paternity-leave-and-the-labour-courts-judgment-in-mia-v-sita/> accessed November 2015

The South African Department of Social Development released a white paper on Families in October 2012⁹⁷ that recommended specific paternity leave to be legislated into our labour laws. Under the Strategic Priority 1: Promotion of Healthy Family Life⁹⁸ it was stated that fathers should be encouraged to be involved in the upbringing of their children by introducing paternity leave. The recommendation to realize this objective was to get the Department of Labour to develop and implement paternity leave in South Africa. Unfortunately three years later and this objective is no closer to achieving that objective than in previous years.

5.2 COMPENSATION AND FUNDING ISSUES

In the ILO Maternity and Paternity at Work document⁹⁹ there are various funding mechanisms for paternity and parental leave policies. Employers fund paternity leave in 58% of the 79 countries which have paternity leave provisions. In 28% of the countries, which is 22 countries, paternity leave is funded through payment from social security systems in these countries. Interestingly the ILO document also makes mention of the statistic that funding through a social security system is found only amongst the Developed economies.¹⁰⁰ In Australia payment is made by the federal government. There are also some countries that make payments through collective bargaining agreements. Belgium, United Kingdom and Denmark utilize a system of mixed funding from the employer combined with collective funding.¹⁰¹

Dancaster and Cohen¹⁰² state that funding in the SADC countries for maternity and paternity benefits vary. For maternity benefits there is an “even spread” of funding between the employer and social security funds. “86% of countries in Africa (24 countries out of 28) funding paternity leave from employers rather than social security schemes.”¹⁰³ They further explained that in the so called developed economies the bulk of the paternity leave benefits were not paid for by the employer. In fact a mere 17% of these countries had paternity or parental leave being funded by the employer. In a SADC and more specifically South African context the preferable option would be to have the paternity leave funded by the employer. The reason for

⁹⁷ South African Department of Social Development White Paper on Families, 2012

http://www.dsd.gov.za/index.php?option=com_docman&task=cat_view&qid=33&Itemid=39 accessed November 2015

⁹⁸ ibid

⁹⁹ Ryder, G. (2014) ‘Maternity and paternity at work. Law and practice across the world.’ ILO Policy Brief. Accessed August 2014 from ILO website

¹⁰⁰ ibid

¹⁰¹ ibid

¹⁰² Dancaster, L. & Cohen, T. (2015) ‘Leave for Working Fathers in the SADC Region’ 36 ILJ 2474 p.2487

¹⁰³ ibid

this is the already strained economy and the burden of governments which could dissuade the legislators from promulgating labour legislation that would create more burdens on the present situation.

This sheds new light on the burden created by legislating this type of leave. As already mentioned earlier....who will bear the cost of this? It is quite apparent that the burden of the cost factor could be a major factor in this issue not being at the forefront of legislators nor policy makers' agendas when dealing with countries that are already in financial deficit or experiencing economic challenges. Dancaster and Cohen¹⁰⁴ argue that research has revealed that if fathers are not compensated during this period of absence from the workplace, the chances of them utilizing this leave will be unlikely as a result of the loss of income. They argue that the employer should not solely bear the cost of compensating the employee but rather the cost should be borne by the state and if that is not possible then it should be shared between the employer and the state to ease the burden for all parties.

The ideal in the SADC region would be to have a combined system of funding to ensure that neither the state nor the employers are overburdened whilst balancing the rights of parents to be entitled to compensation during this period. There are various social security systems already in place therefore there is a point of reference to run such a project.

5.3 PAID OR UNPAID LEAVE

Another critical issue raised repeatedly is the remuneration of fathers during this period of leave. Will the leave be paid or unpaid leave and if paid, who will be liable to compensate fathers? The sentiment globally is that it is pointless providing unpaid leave for the entire duration of the fathers stay at home or unpaid leave for the duration of both parents stay at home. For financial reason parents will not want to be in situation where both mother and father are home but not receiving any compensation, either from the employer or the state.

According to the ILO¹⁰⁵ take up of unpaid parental leave is low amongst men and women. It is also especially low amongst lower paid workers to take up this leave when they are not paid

¹⁰⁴ Dancaster, L. & Cohen, T. (2015) 'Leave for Working Fathers in the SADC Region' 36 ILJ 2487

¹⁰⁵ Ryder, G. (2014) 'Maternity and paternity at work. Law and practice across the world.' ILO Policy Brief. Accessed August 2014 from ILO website

whilst at home with their children. Interestingly high take up rates are said to be linked to remuneration whilst on leave and job protection during this period.¹⁰⁶ Therefore it stands to reason that the paternity and parental leave must be a period of paid leave in order to ensure more parents utilize this leave provision to be with and care for their children. Mansdotter, Fredlund, Hallqvist and Magnusson¹⁰⁷ state in their article that the take up of parental leave is higher in men in Sweden who have a higher level of education and are in ‘non-manual’ occupation who have a “stable labour market position”¹⁰⁸ They go on further to state that their “results indicate that gender equality in income between parents increases the chance of paternity leave uptake”¹⁰⁹

This is counterproductive and not an option as it defeats the intended purpose and benefits of providing a paternity or parental leave policy. As the evidence from the European Union countries model suggests, paternity leave must be paid leave. Parental leave should either be fully paid or partially paid leave that is either subsidized by the employer or the state to ensure that there is take up and utilization of this leave. The lack of payment is a dissuading factor in the take up rates of paternity and parental leave. The DOL policy brief¹¹⁰ goes on further to state that paid parental leave is on the radar of most fathers these days. Many fathers look at a company’s policy on paternity leave and whether such leave is paid or not when looking for employment.

5.4 GENDER STEREOTYPES IN A PATRIARCHAL SOCIETY

Another reason for the poor or non-implementation of family policies in many countries is the stereotypes surrounding the roles of men and women. For centuries men have been seen as the breadwinner whilst women have been seen as the nurturer, caregiver and the ones best able to take care of family, children and home. It is these very gender role assumptions that have been the driving force behind the national and corporate stance on policies concerning family and work.

¹⁰⁶ Ryder, G. (2014) ‘Maternity and paternity at work. Law and practice across the world.’ ILO Policy Brief. Accessed August 2014 from ILO website

¹⁰⁷ Mansdotter, A., Fredlund, P., Hallqvist, J. & Magnusson C (2010) ‘Who takes Paternity Leave? A cohort study on prior social and health characteristics among fathers in Stockholm’ Vol. 31,3, *Journal of Public Health Policy* p.324-341

¹⁰⁸ ibid

¹⁰⁹ ibid

¹¹⁰ DOL POLICY BRIEF: ‘Paternity Leave, Why Parental Leave for Fathers Is So Important For Working Families’ accessed from <http://www.dol.gov/asp/policy-development/PaternityBrief>

Chavoos¹¹¹ postulates an interesting reason for the lack of provision of specific paternity leave in South Africa.¹¹² He believes it is linked to the time during which the legislation was created. In South Africa family responsibility leave legislation was drafted in 1997. At that time there was still the gender stereotypes of a patriarchal society. Men and women were still following the ‘men are breadwinners and women are nurturers’ stereotype. It was not as common then as it is now, for men to be as involved in the lives of their children and certainly if they were involved it was not always from the time of birth but more often than not from later in the child’s life.

Chavoos¹¹³ goes on further to rightly point out that this ‘hands-on and involved’ father approach has been gaining momentum internationally since 1997 and more so in the latter part of the last decade. This paradigm shift has led to fathers speaking out against the inequality the legislation created for them and their children. Hence fathers across the globe have lent their voice to the fight for gender equality in parental legislation for time off from employment when a child is born or adopted.

Sonke Gender Justice has also weighed in on this issue repeatedly. In the Ellis article¹¹⁴ they state that South Africa’s labour policies are firstly discriminatory and secondly these same policies perpetuate the male female gender stereotypes of a patriarchal society. They argue that the starting point for now would be to make legislative provisions for paternity leave of ten days. Thereafter time and research will indicate the efficacy of the time period, whether it is being utilized by fathers, if it is being utilized properly and whether other fathers who previously may not have been involved in the birth and child rearing are now participating as a result of the statutory provisions. The data collected from studies would indicate if the gender inequality has improved as well as whether men actually use the leave for its intended purpose that is to be hands on fathers to their newborn children. Should the benefits and the take up percentages be high then that would also indicate a need for longer paternity leave or the creation of parental leave policies in line with international standards, more specifically the models being used by the European Union countries.

¹¹¹ Ellis, M. ‘An in-depth look at paternity leave’ accessed October 2015 from
<http://lifestyle.iafrica.com/parenting/956782.html>

¹¹² http://groundup.org.za/article/will-sa-have-more-parental-leave-soon_3295 accessed November 2015

¹¹³ Ellis, M. ‘An in-depth look at paternity leave’ accessed October 2015 from
<http://lifestyle.iafrica.com/parenting/956782.html>

¹¹⁴ ibid

However with the changing times there has been a trend globally amongst parents where there is a reversal of these gender stereotypes and the roles assigned to each parent. It is this very change in direction and thinking that has prompted much of the world stage to sit up and take notice of the call for change in the workplace to accommodate the change in mindset and to create enabling policies so that all parties can choose to participate more in their family life and can be more “hands-on” parents. This can only happen if the change is addressed through changes in legislation to give effect to this as well as changes in society so that people are more sensitized to the change when it happens. Gone are the days when it was frowned upon when a father stayed at home with the children and the mother was the one who returned to work after giving birth.

Fathers have marched along with this new beat of the drum and are in favour of the egalitarian relationship. They are advocating the principle of equality for all people hence their need to be treated equally when it comes to the issue of spending quality time with the children, to nurture them and to build strong bonds and relationships with them. Unfortunately the lack of legislative provisions to allow fathers this opportunity is seriously hindering the benefits of such quality time between fathers and their children. Jackson¹¹⁵ believes that when fathers take paternity leave, they tend to spend more time with their children thereafter. Further she goes on to say that the positive benefits of having more involved fathers is that these children are happier, healthier, do better at school, have greater self-esteem and fewer behavioral problems. Thus far it would appear that the SADC countries have been slower to take up this type of leave but as can be seen by the MIA case there is a change in the take up rates and it is starting to happen.

The Voice of Men Association in Botswana is one of the few organizations in the SADC region that highlighted the change of mindset of fathers in the SADC countries as well as their struggle to attain legislated work protected paternity leave or parental leave. It illustrates the shift in perceptions about fathers in the SADC region and the role they play in the lives of their children. Fathers want to be involved in the day to day lives of their children. Unfortunately the lack of legislative provisions in many of these countries makes it difficult for these fathers to exercise the right to be with their children. As the world stage changes daily regarding the roles of fathers, paternity and parental leave, so too are the fathers in SADC giving a voice to their dissatisfaction with the lack of legislation.

¹¹⁵ Jackson, G. 'Force men to take paternity leave. It will make the world a better place' p.3 accessed November 2015 from <http://www.theguardian.com/commentisfree/2015/apr/10/want-better-dads-happier-mums-and-healthier-kids-make-men-take-paternity-leave>

Another interesting voice that was lent to the predicament of fathers and the lack of paternity or the lack of sufficient paternity leave was that of Hendri Terblanche.¹¹⁶ He was a dad whose wife had given birth to premature twins. They were in hospital for many months and it was at this time that he realized the gap in the provision for paternity leave for fathers. Apart from the three days “paternity leave” that fathers in South Africa receive through their family responsibility leave, there are no other paid leave benefits available to fathers except their annual leave. Clearly in this instance he would not have had sufficient leave entitlement to be with his family for any extended period of time whilst his twins were in hospital. This inequality and gap prompted Mr Terblanche to start a petition. In his petition he has called for ten days paternity leave for fathers in South Africa. This petition was forwarded to various MPs and is expected to be presented to the relevant Councils at National Level during 2015. At the time of writing this paper there is no feedback from Parliament or new information regarding Mr Terblanche’s petition nor any indications of possible review, amendments to neither present legislation nor the enactment of any new legislation to address the issue or lack thereof of paternity leave in South Africa.

Whilst the ten days may not appear to be much, it is certainly a fair and reasonable recommendation in light of the current situation. The NGO Mosaic is of the opinion that the ten days is not enough however there is a need for a starting point. At this point in time it will address the needs of the mother post-birth, the needs of the father-child bonding as well as a reasonable and realistic expectation from Parliament.¹¹⁷

5.5 LEGISLATING LEAVE FOR FATHERS IN SADC – WHAT FORM SHOULD IT TAKE?

There needs to be an amendment of existing paternity legislation to ensure it is more in line with current global legislation and trends. This would entail an increase in the leave provisions to time periods that are more reasonable, fair and just for fathers to spend adequate time with their children in the first weeks of their lives. In countries where there are no legislative provisions, there needs to be promulgation of legislation to provide fathers with paternity leave. As suggested by writers and in line with international norms, a period of two weeks would be a reasonable time period for paternity leave at present. This could change after studies prove the outcomes and impact of that time period.

¹¹⁶ http://groundup.org.za/article/will-sa-have-more-parental-leave-soon_3295 accessed November 2015

¹¹⁷ ibid

However a better way forward would be the promulgation of parental leave or a gender-neutral leave policy that can be utilized by either the mother or father to care for their children. This gender neutral leave could be accessed by parents after they have each exhausted their minimum legislated paternity and maternity provisions. Alternatively there would only be the promulgation of the gender neutral leave provisions for parents, with each parent being entitled to a mandatory period per parent and the balance of the parental leave to be utilized by the primary caregiving parent. This policy would be guided by the international policy trends for parental leave policies.

In a South African context, the provisions of the BCEA relating to gender should be amended to reflect a more ‘gender neutral’ policy that can be utilized by either the mother or father on the birth, adoption or birth from through surrogacy. Very importantly the leave would need to be paid leave to ensure take up by fathers. The funding should ideally be a combined system of funding that will be shared by the government and the employer to avoid overburdening either party as well as ensuring fathers are not disadvantaged when utilizing this leave provision.

Jackson¹¹⁸ also makes compelling arguments for equality in the workplace by suggesting that if fathers are forced to take paternity leave, the compulsion in terms of the legislative provisions, will induce them to be more involved. However her argument for making paternity leave mandatory is based on the paternity leave provisions of Finland, Norway, Sweden and Germany. These countries offered paternity leave but the proviso was if fathers did not utilize their minimum allocation then the mother would also forfeit her additional parental leave entitlement that was provided in addition to her maternity leave. Therefore in order for both parents to benefit from the additional leave benefit, fathers were obliged to take the leave. This move saw the percentage of fathers taking paternity leave in Germany increasing from 3% to more than 20% in Germany over a period of two years.¹¹⁹

This drastically helped the plight of fathers to remove the previous stigma attached to fathers who wanted to create a greater balance between their work and family responsibilities. It was regarded as a negative to be away from the workplace for any length of time because this was perceived as a lack of commitment and status in the workplace. Fortunately with the changing times, there has been a mindset change along with the improvements in legislation. The change

¹¹⁸ http://groundup.org.za/article/will-sa-have-more-parental-leave-soon_3295 accessed November 2015

¹¹⁹ ibid

in legislation to accommodate the societal changes has culminated in a change in the mindset of society that it is acceptable to be a good, dedicated and responsible employee as well as a good, dedicated and responsible parent.

Genderlinks has also been lending a voice to the plight of fathers in the SADC countries and the lack of legislative provisions to assist them to attain equal gender rights in some arenas but more especially with regards to their fight to be involved in the lives of their children. One such issue raised by Genderlinks was that Botswana's Employment Act¹²⁰ does not make any provisions for paternity leave. As a result of which fathers in Botswana do not have access to work protected time off from work when their children are born therefore they are denied the opportunity to take time off from work to spend with their children.

Another organization, Voice of Men Association in Botswana, reiterates a similar sentiment.¹²¹ They are lending their support to fathers in their struggle to attain legislated work protected paternity leave or parental leave. However the founder, Kwapa T does acknowledge that there is a possibility of this particular type of leave provision not being used for its intended purpose and the challenges that might present. Having said that, they believe that should not be a primary factor when considering whether or not fathers should be entitled to paternity leave. Voice of Men believe that just as maternity leave provides benefits to children, likewise paternity leave and the presence of fathers will provide benefits to children in these countries.¹²²

Olivier¹²³ states that there is "a clear need in the [SADC] region to introduce appropriate paternity leave arrangements..." His intention in making this statement was in regards to the burden and subsequent inequality faced by women in going back to employment after giving birth as a result of the 'burden' of child care placed on the mothers of children. However the corollary is also true and of equal importance. What about the rights of fathers who want this right but are denied access to it because of its exclusion in the legislative policy of their country? Therefore it is a manifestation of gender inequality but from the fathers' perspective.

¹²⁰ Botswana Employment Act 1982, as amended

¹²¹ <http://www.genderlinks.org.za/article/fight-for-gender-equality-ignores-the-rights-of-fathers-2008-02-19>
accessed September 2015

¹²² ibid

¹²³ Olivier, M. 'International and SADC Standards and Comparative SADC Country Perspectives', *Maternity Protection Workshop paper*' April 2013 p.10

There will be benefits to both the mother and father if all the SADC countries were to all introduce appropriate, fair and reasonable paternity leave provisions in their respective labour legislation.

The paternity and parental policies were created with that emphasis in mind and has proven to be effective in its intended purpose. This is a good comparator to lobby for a similar position in the SADC countries. The established policies illustrates the view that both parents should be available to care for children thereby lending support to the view that there must be law reform especially in light of the guidelines advocated by the ILO for paternity and parental leave. The way forward to achieve this purpose would be to create law reform to allow for work protected parental leave especially with a focus on affording fathers the legislative right to exercise this option of balancing paid work and child care.

A relevant statement was made by the Equalities and Human Rights Commission on the issue of gender equality according to Forbes.¹²⁴ According to the Commission “extending maternity benefits without equivalent provision for fathers reinforces traditional patterns of care.....”¹²⁵ This is contradictory to all efforts of gender equality both in the workplace and the home.

Landau, Kalula and Fenwick¹²⁶ state that labour law has not been high on the list of priorities in the SADC countries as there have been other issues like political and economic factors higher on the list of priorities for government to deal with. As a result of which the situation continues in the region. Socio-economic factors, high levels of poverty, income inequality, unemployment and HIV/AIDS are all factors that continue to undermine the efficacy of labour law in the SADC region.¹²⁷

NGO Mosaic in partnership with Sonke Gender Justice has developed a campaign called **1000-100-10**.¹²⁸ It is a campaign for 10 days paternity leave and an additional 100 days of additional

¹²⁴ Forbes, K. (2008) ‘Paid Parental Leave Under (New) Labour’ Issue 34 *Social Policy Journal of New Zealand* p.17
¹²⁵ ibid

¹²⁶ Landau, I., Kalula., E & Fenwick, C., (2007) ‘Labour Law: A Southern African Perspective’ p.34 accessed August 2015 from http://www.ilo.org/wcmsp5/groups/public/---dqreports/---inst/documents/publication/wcms_193513.pdf

¹²⁷ ibid

¹²⁸ http://groundup.org.za/article/will-sa-have-more-parental-leave-soon_3295 accessed November 2015

leave for caregiving for each parent in the first 1000 days of a child's life all of which is in addition to the maternity benefits already available to mothers. . This innovative programme is exactly what is needed and is important in a labour and social context. It addresses the issue of lack of paternity leave and parental leave as well as recognition of the fact that fathers need to be present and involved in their children's lives whilst simultaneously dealing with the issue of gender inequality for fathers.

Interestingly this model was presented in the Netherlands at the first State of the World's Fathers in June 2015. It was well received, so much so that the Dutch government will increase paternity leave to five paid days of paternity leave in their next budget.¹²⁹ A win on two fronts as there is an increase in the leave as well as it will be paid for by the state.

Mosaic and Sonke will take the innovative campaign one step further¹³⁰. They will attempt to do a costing of their proposed parental leave 10-100-1000 model and will also engage with the workers unions in South Africa to attempt to get government to buy in and change the legislation as they are of the opinion that in a South African context the legislators are not addressing this matter sufficiently and with the kind of urgency it requires.

Whilst some may argue about the costs of a country offering paid paternity or parental leave, one thing is clear from the many proposals for the leave, the benefits of offering legislated paid leave far outweighs the costs. Levtof¹³¹ states the evidence proves the benefits for business when there is legislated paid family leave in a countries labour laws by the following: "improves employee retention and reduces turnover...increases productivity and morale...reduces absenteeism and training costs."¹³²

The benefits will ultimately have a positive effect on the economy. It is this argument that is causing the shift in acceptance for employers and governments worldwide. It is hoped that the

¹²⁹ http://groundup.org.za/article/will-sa-have-more-parental-leave-soon_3295 accessed November 2015

¹³⁰ ibid

¹³¹ Levtof, R., Van der Gaag, N., Greene, M., Kaufman, M. & Barker, G. (2015) 'State of the World's Fathers: Executive Summary: A MenCare Advocacy Publication' Washington, DC: Promundo, Rutgers, Save the Children, Sonke Gender Justice and the MenEngage Alliance p. 11 http://sowf.s3.amazonaws.com/wp-content/uploads/2015/06/13192403/State-of-the-Worlds-Fathers_Executive-Summary_23June2015_web.pdf accessed November 2015

¹³² ibid

SADC countries and especially South Africa will also embrace these changes and promulgate legislation that will entrench the protection of fathers by providing legislated, paid and work protected paternity and parental leave.¹³³

¹³³ Patel, C. 'Will SA have more parental leave soon?' 11 September 2015, p.3 http://groundup.org.za/article/will-sa-have-more-parental-leave-soon_3295 accessed November 2015

CHAPTER 6: CONCLUSION:

6.1 CONCLUSION

Whilst many factors have contributed to the current disparities in the labour legislation, this dissertation has proposed and motivated for a change in legislation to address the disparities. There has been a comparison with other countries to determine how they have dealt with this issue of legislated leave for fathers.

This dissertation highlights the fact that there is a lack of legislation providing fathers with paternity and parental leave or if there are provisions in the labour legislation, the provision of inadequate legislation in SADC countries especially when compared with international comparators such as the European Union, Australia and the United Kingdom.

A consistent argument amongst the writers has been the need for the amendment of existing legislation or in many cases, the promulgation of new legislation to protect fathers' right to equality in this arena and the criticism leveled against the various countries for their lack of or insufficient legislative protection for fathers with regards to paternity and parental leave policies. In the analysis of such arguments a clear need for the amendment of or promulgation of legislation has emerged which supports the argument that fathers in the SADC countries are subjected to gender inequality as a result of the lack of paternity leave provisions or the provision of inadequate paternity leave legislation.

The expected actions as per the ILO directives have not yet materialized as of the end of 2015. Legislators have failed to address this issue. This dissertation supports the insistence that legislators have failed to provide the necessary legislative protections to fathers in an attempt to reverse the gender inequality suffered by fathers in the SADC region. This dissertation agrees with the writers on the need for change, amendments to or the promulgation of new legislation.

It is imperative that there is change yet the situation in the SADC region remains unchanged. The issue of inequality remains unsolved. It is clear from the reasoning of the plethora of

writers that there must be change. This sentiment is articulated by the majority of the writers in their criticism for the lack of paternity leave and in some instances parental leave policies. Therefore there must be change to redress this issue and sooner rather than later so that equality as entrenched in legislation, and specifically in the Constitution in South Africa occurs.

This then brings us to the next issue of who will bear the costs of the duration of this leave period. The ILO Directive¹³⁴ suggests “risk pooling through social, insurance or public funds for leave benefits” as a means of addressing the issue of the cost of compensation during paternity, maternity or parental leave. The effect would be to reduce the burden on employers and thereby encouraging employers to introduce workplace policies in line with the envisaged changes to the labour legislation. This incentive of no cost to employers would need to be investigated and developed with the government.

Dancaster and Cohen¹³⁵ state that funding of these lengthy periods of leave is key to its implementation in the SADC region as many of these countries are already considered to be ‘economically weak regions’. In countries that already have parental leave policies the policy is funded by either the state, from public funding or by both the state and the employer sharing the costs. Therefore they suggest that there would need to be research conducted to explore the “feasibility of a separate social security scheme to fund leave.....outside of the current unemployment insurance provisions.” These sounds like a likely solution to the possible roadblock the issue of funding would create to derail the promulgation of paternity and/or parental leave policies in the SADC region and more specifically in South Africa.

Employers do have a choice and discretion to create workplace policies that would suit their individual workplace environment. Therefore there is no reason for employers not to create innovative workplace policies that would allow fathers to take paid reasonable paternity leave beyond the minimum prescribed three days in acknowledgement of the changes and needs of fathers in 2015 and beyond. After all the concept of equality is provide for in section 9 of the Constitution. Therefore the state, employers and Trade Unions need to find solutions to this issue.

¹³⁴ Ryder, G. (2014) *'Maternity and paternity at work. Law and practice across the world.'* ILO Policy Brief. Accessed August 2014 from ILO website

¹³⁵ Dancaster, L. & Cohen, T. (2015) *'Leave for Working Fathers in the SADC Region'* 36 ILJ 2489 and 2490

Having said that there are isolated pockets of good practice that do exist. The most interesting of all and in context to this paper, **Pick n Pay** has been found to have the best parental leave policies. Fathers are entitled to eight days paid paternity leave. The policy makes provisions for eleven months maternity leave for mothers of which the first nine months is paid leave. In addition if both parents have worked at Pick n Pay for more than eight months then fathers are entitled to share the extra maternity leave entitlement of mothers.¹³⁶

That is important on many fronts. Firstly, it is the highest allocation of paid paternity leave in any of the SADC countries (I have disregarded the fifteen days that Madagascar offers to fathers as it only applies to fathers employed in the public sector). Secondly, the importance of their policy is that Pick n Pay appears to have modelled their policy of the “parental leave” policy which is one of the recommendations of this research as a possible way to redress the inequality faced by fathers in the SADC countries.

Further afield to the SADC region earlier this year a new paternity leave policy was announced for fathers working at the Virgin Group. Richard Branson made a ground breaking announcement that as of 2015 all fathers employed in the Virgin Group will now be entitled to twelve months paternity leave that will be fully paid for by the employer.¹³⁷ Similarly Netflix now has a policy that allows for a year of paid maternity and paternity leave for its employees.¹³⁸

The benefit this new bold policy of the Virgin Group is the message it sends out globally in the fight for equal treatment of fathers of newborn, adopted and even in some cases surrogate children. Perhaps other countries and organizations will sit back and analyze the decision and use it to form reasonable policies of their own thereby finally closing the gap for fathers with regards to the provision of paid paternity leave. Having said that the SADC countries and certainly the majority of the countries globally are far from formulating a policy with similar time periods as the Virgin Group policy. However this can be used to create a more realistic and reasonable paternity leave policy worldwide.

¹³⁶ Thelwell, E. ‘Is 11 months maternity leave necessary?’ accessed November 2015 from http://www.parent24.com/Pregnant/Getting_Ready/think_about/Is-11-months-maternity-leave-necessary

¹³⁷ Linshi, J. ‘See How Much Paternity Leave New Dads Get By Country’ 10 June 2015 accessed August 2015 from <http://time.com/3916511/parental-leave-map/>

¹³⁸ http://groundup.org.za/article/will-sa-have-more-parental-leave-soon_3295 accessed November 2015

"The transformation of caregiving and fatherhood"¹³⁹ is a change that can only begin once there is a multiple concerted effort by all parties to educate the public, campaign by giving a voice to this cause in society), desensitize and challenge previous norms and perceptions (social measures). Therefore there has to be social, economic and political support and buy in between society and the government for both to collaborate on initiatives, develop policies to bring about reform and changes in economics systems thereby enabling this transformation.¹⁴⁰

Much has been said about Africa's women and girls and the negative impact of policies and legislation on these women and girls. Literature always refers to gender inequality in the female context. Very little on gender inequality is written from a male perspective. However fathers and men are also entitled to the same rights to equality as women. There is a gap in the provision for men with regards to paternity leave. The legislation does not afford them the opportunity to care for their children the way women are afforded that opportunity. Therefore when one talks of redressing the gender equality in Africa one has to take cognizance of the inequality of men in Africa and more especially fathers. One cannot assume that because men have never fulfilled these roles before that they would not participate actively now should they be given a chance to do so. Perhaps part of the reason for the previous non-participation for some men has been the very fact that there was no legislation that allowed them access to this type of leave. The lack of opportunity could have perpetuated the stereotype of men not being caregivers. Surely if they were meant to be caregivers, the legislation would reflect this in the countries policies? Hence the lack of legislation providing for compulsory paternity leave will continue to send the incorrect message to men who will go on with incorrect assumption that it is not their role to be the caregivers of their children.

As already asserted in this dissertation there are many benefits to be gained by fathers utilizing paternity leave or parental leave to be with their newborn children is the effect it has on a child's self-esteem, confidence and learning abilities (higher cognitive development and better achievement at school and academically), development in social skills, empathy and lower rates of delinquency in children.¹⁴¹ As a result of the bonding in the early stages fathers tend to continue to be more involved in the children's lives throughout their lives and they take an

¹³⁹ Africa report: Van den Berg (editor) (2015) '*State of Africa's Fathers: A MenCare Advocacy Publication.*' Adapted from Levlov, R., Van der Gaag, N., Greene, M., Kaufman, M. and Barker, G. (2015) '*State of the World's Fathers: Executive Summary: A MenCare Advocacy Publication.*' Washington, DC: Promundo, Rutgers, Save the Children, Sonke Gender Justice and the MenEngage Alliance p.50 <http://sowf.s3.amazonaws.com/wp-content/uploads/2015/08/19160621/State-of-Africas-Fathers-2015> accessed November 2015

¹⁴⁰ ibid

¹⁴¹ ibid

active role in everyday child-care tasks.¹⁴² In this article reference is made to a study conducted at the University of Oslo where the finding was that a child's performance at school improved as a result of the father having taken paternity leave to be with the child.¹⁴³ Fathers also benefit from this time with their children by demonstrating better mental health.

Lotkeff and Piercy¹⁴⁴ believe that the answer to the question of who cares for the children are diverse and influenced by the political, economic and cultural values of each country.¹⁴⁵ There is a connection between economic growth and stability in each country that is balanced with the needs of parents for workable child care policies. These policies would not be worth anything if the employers and the government cannot afford to have fathers away from work to attend to their childcare and family responsibilities.

Although the issues in the SADC region are complex and varied as there are other issues that are perceived to be bigger that compete against this issue for funding and policy reform, solutions for the region are imperative. If there is no change and nothing is done to remedy this issue then the effects of gender inequality, infant and maternal wellbeing will remain compromised. Just as importantly fathers will continue to be denied the right that they are demanding which is to be with their children at the time of their birth or adoption and to be allowed legislated work protected leave to be more present and actively participate in the caregiving of their children.

¹⁴² <http://www.economist.com/blogs/economist-explains/2015/05/economist-explains-18> accessed November 2015

¹⁴³ ibid

¹⁴⁴ Lokteff, M. and Piercy, K.W. (2011) 'Who Cares for the Children? Lessons from a Global Perspective of Child Care Policy' Springer Science + Business Media, LLC

¹⁴⁵ ibid

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