

Paternity leave: The benefits for South African fathers in comparison to those of fathers in foreign jurisdictions. How progressive the laws governing paternity leave are in South Africa.

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DECLARATION

This project is an original piece of work which is made available for photocopying and for inter-library loan.

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Thank you to my mom for funding this LLM. You have made countless sacrifices for my education and for that I cannot thank you enough. I am truly blessed to have you and dad as parents. Your unconditional love and support even when I do not deserve it can never be fully repaid but I will always strive to do my best to make you proud. I love and appreciate you more than I could ever express.

1 Thessalonians 5:18 “give thanks in all circumstances; for this is God’s will for you in Christ Jesus.” But for the grace of God, none of this would be possible... thank you Father.

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CHAPTER ONE

INTRODUCTION

1.1. THE TITLE

Paternity leave: The benefits for South African fathers in comparison to those of fathers in foreign jurisdictions. How progressive the laws governing paternity leave are in South Africa.

1.2. THE PURPOSE OF THE RESEARCH

The topic under investigation is paternity leave in South Africa. More specifically, the lack of paternity leave provisions in South African law and the implications thereof. In a country where a vast number of youth do not live with their fathers, the lack of paternity leave provisions is a major factor with fathers being absent from their children's lives.¹ Furthermore, in a Labour law context, the lack of paternity leave provisions creates unequal treatment of men and women in the workplace.² South Africa has a Constitution that guarantees fair labour practices as well as equality;³ therefore this is a topic that needs to be addressed. In order to investigate this topic, this paper will examine the laws governing paternity leave in South Africa and compare them to the laws in foreign jurisdictions, more specifically Kenya and the United Kingdom (UK). In other words the question to be answered is how far behind is South Africa in terms of the leave that it grants to new fathers when compared to international standards and how South Africa can go about introducing such provisions into its law.

¹C Patel 'Will SA have more parental leave soon?' 11 September 2015. Accessed from http://www.groundup.org.za/article/will-sa-have-more-parental-leave-soon_3295/ on April 2016.

² A Behari 'Daddy's Home: The Promotion of Paternity Leave and Family Responsibilities in the South African Workplace' (2016) 37 *Obiter* 346, 348.

³ S23 of the Constitution- "Labour relations.- (1) Everyone has the right to fair labour practices."

s9- "(1)Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2)Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3)The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4)No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5)Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

The main issues to be investigated in this study will therefore be the implications of the court decision in the *MIA v State Information Technology Agency*⁴ case, stating only *obiter* that the current legislation is ‘outdated’ and that it should be updated. Another issue will be whether all fathers would be entitled to four months or whether this could be restricted. If such restrictions are possible, the manner in which the restrictions can be introduced so as not to open the provisions up to abuse. South Africa is a country in which one of the fundamental rights is the right to equality. Therefore the effect of the lack of paternity leave provisions on the equality between men and women in the workplace will also be investigated. In terms of international standards, the question arises as to whether or not South Africa is on the same level as other countries that are perhaps in the same socio-economical position. This study therefore aims to be comparative in nature.

1.3. METHODOLOGY

In compiling this dissertation on paternity leave, various sources have been consulted. As this is a comparative study, cases and literature, from Kenya, South Africa and the UK will be examined. The information will primarily come from statutes and case law available on the issue to determine how paternity leave is governed in these jurisdictions. Further literature in the form of journal articles and other legal writings on the issue will be used to provide a more in-depth perspective. The envisaged research is not of an empirical nature but involves a literature study of books, journal articles, legislation as well as case law. Due to the methodology being desktop research, a number of online databases have been used. These databases include Lexis Nexis, Juta, Google Scholar, HeinOnline, SAFLII and Sabinet as well as other internet sources.

1.4. BACKGROUND

In modern times, there has been an attempt, by most jurisdictions, to create a balance between an employee’s work and family obligations.⁵ The degree of government interference in the regulation of employees’ family lives in the business sphere differs from state to state.⁶ Some favour the “self-regulatory” approach which merely suggests to or

⁴ (2015) 6 SA 250 (LC), hereinafter “MIA”

⁵ L Dancaster & T Cohen ‘Workers with family responsibilities: a comparative analysis to advocate for the legal right to request flexible working arrangements in South Africa’ (2010) 34 SA Journal of Labour Relations 31.

⁶ *Ibid* 32.

encourages companies to formulate their own regulations.⁷ Others act in accordance with their international obligations and make it mandatory for corporations create regulations aimed at achieving a balance in the work and family lives of employees.⁸

Traditionally, women have been seen as the care-givers and home-makers, as a result, many jurisdictions have adequate provisions, in their laws, for maternity leave.⁹ There are however, few jurisdictions which have provisions for new fathers.¹⁰ Of the 167 countries that have been recorded, 78 of them have a provision allowing for paternity leave.¹¹ This exacerbated the patriarchal view that men are “providers” and therefore do not require paternity leave.¹² Men have also as a result of these traditional views been regarded as “ideal” employees as they do not have as much family responsibility as women do.¹³ As a result, women have always had to choose between advancing their careers and starting and raising a family. This was greatly problematic as studies have shown that women being involved in the working force can greatly increase the Gross Domestic Product (GDP)¹⁴ of a country.¹⁵ Although the maternity leave provisions in the Basic Conditions of Employment Act (BCEA)¹⁶ offer security to women in that they no longer have to worry about losing their employment if they want to start a family¹⁷, the introduction of paternity leave

⁷ *Ibid.*

⁸ *Ibid.*

⁹ CG Field et al. ‘Parental leave rights: Have fathers been forgotten and does it matter?’ (2012) 36 SA Journal of Labour Relations 30.

¹⁰ Note 2 above, 347.

¹¹ G Ryder ‘*Maternity and paternity at work. Law and practice across the world*’ ILO Policy Brief. Accessed from

http://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms_242617.pdf on May 2016.

¹² Note 2 above, 348.

¹³ Note 5 above, 31.

¹⁴ Gross domestic product (GDP) is the monetary value of all the finished goods and services produced within a country's borders in a specific time period. Though GDP is usually calculated on an annual basis, it can be calculated on a quarterly basis as well. GDP includes all private and public consumption, government outlays, investments and exports minus imports that occur within a defined territory. Put simply, GDP is a broad measurement of a nation's overall economic activity. Accessed from <http://www.investopedia.com/terms/g/gdp.asp#ixzz4R6hL1avh> November 2016

¹⁵ W van den Berg ‘Why fathers (and mothers) need paternity leave in South Africa.’ City Press 17/06/2016 accessed from <http://city-press.news24.com/Voices/why-fathers-and-mothers-need-paternity-leave-in-south-africa-20160617> on November 2016

¹⁶ The Basic Conditions of Employment Act 75 of 1995, hereinafter “BCEA”

s25 “(1) An employee is entitled to at least four consecutive months’ maternity leave. (2) An employee may commence maternity leave— (a) at any time from four weeks before the expected date of birth, unless otherwise agreed; or (b) on a date from which a medical practitioner or a midwife certifies that it is necessary for the employee’s health or that of her unborn child.”

¹⁷ N Motsiri & O Timothy ‘Sir, your maternity leave has been granted... Some laws need to be updated for civil unions and same-sex couples’ (2015) Accessed from www.hr.future.net April 2016

provisions would perhaps be a starting point in correcting the imbalances that the lack of paternity leave provisions creates in the workplace with regards to the treatment of men and women.¹⁸

The view that women are the only ones capable of being care-givers is an outdated view as the paternal roles, in child-rearing are becoming more prevalent.¹⁹ Men are sharing the child-care responsibilities and assuming roles that have traditionally been those of women.²⁰ Fathers are starting to question the lack of opportunities that they are afforded to be more involved in their children's upbringing.²¹ An example of such opportunities includes things such as diaper changing facilities in shopping centres. A man argued that the lack of these facilities was discriminatory and sexist as was the response that he received when he brought this issue to the attention of the management of the shopping centre. The response that he received from the shopping centre in question was that "it's mostly women who change babies? It's a natural assumption..."²² Studies indicate however that children that have the opportunity to bond with their fathers in the early stages of life tend to mature better than those who do not.²³ As a result of the shift in the view of traditional family roles and structures, some countries have adapted their legislation to provide for paternity and paternal leave.²⁴

Sweden was the first country to introduce provisions that entitle either a mother or a father to take equal paid parental leave.²⁵ The reasoning behind the introduction of these provisions was gender equality.²⁶ The UK and other European countries have followed suit and introduced shared parental leave into their legal systems.²⁷ According to Deputy Prime Minister of the UK, mothers and the fathers should be able to share the responsibility of being the 'breadwinner' likewise; they should share the family responsibility, equally.²⁸ Historically, South Africa was a patriarchal society in which the primary function of women was to be child-bearers and home makers. This meant that there was very little in the way of

¹⁸ Note 2 above, 361.

¹⁹ Note 11 above, 6.

²⁰ K Pillay 'Man, mall spat over lack of nappy-changing spot for dads' The Natal Witness. 8 November 2016

²¹ *Ibid.*

²² *Ibid.*

²³ Note 2 above, 346.

²⁴ Note 9 above, 30.

²⁵ *Ibid* 35.

²⁶ *Ibid.*

²⁷ A Berman 'Parental leave for dads is on the cards' Mail & Guardian. 30 April 2015. Accessed from <http://mg.co.za/article/2015-04-30-00-parental-leave-for-dads-is-on-the-cards> on November 2016

²⁸ *Ibid.*

legislative benefits or protection for those women who did work. This led to a number of campaigns in the 1950s, by women who sought to achieve equality and this included the fight for maternity leave in the workplace.²⁹ However despite having such progressive labour legislation, South Africa has been slow to make provision for paternity leave.³⁰ The BCEA³¹ makes provision for three days of paid leave on the birth of an employee's child, where the employee's child is ill, or if there is a death of an employee's parent, child, adoptive parent, spouse or life partner, grandparent, grandchild, sibling or adoptive child.³² This provision is for family responsibility leave and it is currently the only provision available to fathers of new-borns.³³

There is nothing that prevents employers from providing additional paternity leave in their company policies.³⁴ One of the biggest grocery store chains in South Africa, Pick n Pay, has one of the most progressive leave policies. In terms of this policy, female employees are entitled to eleven (11) months of paid maternity leave and male employees are entitled to eight (8) days of paid paternity leave.³⁵ In addition to this, if both parents have been employees of Pick n Pay for eight months, they are entitled to share the supplemental maternity leave.³⁶ According to the director of Human Resources of this company, it is beneficial to retain good employees as opposed to having to constantly rehire new staff.³⁷ It is therefore evident that despite government not making formal legislation to provide for this leave, some private companies are aware of the need to have such provisions in their policies.³⁸

In the context of economics, countries with more developed economies tend to have more paternity leave than those that are still developing.³⁹ South Africa is a member of the Southern Africa Development Community (SADC) region and as such, is encouraged to

²⁹South African History Online 'History of Women's Struggle in South Africa'. Accessed from <http://www.sahistory.org.za/article/history-womens-struggle-south-africa> on November 2016; and note 17 above

³⁰ Note 9 above, 30.

³¹ Note 16 above.

³² S27(2) of the BCEA

³³ Note 2 above, 349.

³⁴ Note 27 above.

³⁵ Note 1 above.

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ Note 27 above.

³⁹ Note 11 above.

introduce paternity leave.⁴⁰ In the SADC region, of the fifteen countries, seven of them have some kind of provision that allows fathers to take time off on the birth of their children.⁴¹ The provisions mentioned are not always specifically for paternity leave⁴² as is the case in South Africa where, as discussed previously, the provision in question is that found in the BCEA under section 27.⁴³ There are a number of factors that have contributed to the lack of paternity leave legislation.⁴⁴ Some of these factors include the high HIV rates, lack of infrastructure and financial constraints.⁴⁵ Therefore governments in the SADC region place greater importance on some of these issues, in their agendas, than they do on the development of policies related to family.⁴⁶

1.5. SEQUENCE OF CHAPTERS

This dissertation consists of five chapters. Chapter one sets out the topic of this dissertation. It then discusses the topic and what the dissertation aims to achieve. The third part of this chapter sets out the methodology used in compiling the dissertation. Finally, it sets out the background and the purpose of this study.

Chapter two discusses the current legal position regarding paternity leave and how it is governed in South Africa. In order to do this, the *MIA v State Information Technology Agency*⁴⁷ case has been dissected and analysed. The reason for the analysis of this decision is that the case highlights a number of issues that are relevant to address if South Africa is to introduce paternity leave provisions into its legal system.

⁴⁰ Article 8.4 of the Code on Social Security in the SADC “Member States are encouraged to provide for paternity leave in order to ensure that child-rearing is a shared responsibility between father and mother.” Accessed from http://www.sadc.int/files/2513/5843/3198/Code_on_Social_Security_in_SADC.pdf on November 2016

⁴¹ M Govender ‘How SADC countries compare to selected non-African countries with regard to legislated leave for working fathers at or around the time of the birth of their children?’ (2015) UKZN ResearchSpace. p18

⁴² M Olivier ‘International and SADC Standards and Comparative SADC Country Perspectives’ Maternity Protection Workshop paper. April 2013. p8

⁴³ S27(2) of the BCEA “(2) 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”

⁴⁴ Note 41 above, 37.

⁴⁵ *Ibid*

⁴⁶ *Ibid*

⁴⁷ *MIA*.

Chapter three discusses the Constitutional rights that are possibly affected by the lack of paternity leave legislation in South Africa. The chapter also discusses the legislation that has been enacted to give effect to these constitutional rights and the effect that this legislation may have on the introduction of paternity leave.

Chapter four outlines the legal positions in the UK and Kenya respectively. The chapter then discusses the negatives and positives that may be beneficial to South Africa if it were to introduce paternity leave into its legal system.

Chapter five is the final chapter of the dissertation and it contains the conclusion to this study.

CHAPTER TWO

CURRENT LEGAL POSITION IN SOUTH AFRICA

2.1.INTRODUCTION

As stated in the previous chapter, fathers are currently only entitled to three days of family responsibility leave on the birth of their children. There have however been developments that may alter this position.⁴⁸ This chapter will discuss the current legal position regarding paternity leave in detail as well as the abovementioned developments. The chapter is divided into five sections. The first section will discuss the landmark decision of the *MIA*⁴⁹ case. This is necessary as this case is pivotal to this dissertation in that it is the first case in terms of South African law where a male has been granted four months of paid 'maternity leave'.⁵⁰ The first section, therefore, will firstly set out the facts and issues of the case. The court's reasoning with regards to the arguments of the parties will also be set out and examined, paying close attention to the manner in which the court attempts to develop labour legislation- more specifically the circumstances under which a father may be entitled to leave. Finally, the case will be critically analysed in its entirety, in order to attempt to clarify any potential confusion about the current status of the law following this decision.

The second section of this chapter will discuss the parental rights and responsibilities as provided for in legislation. This is important as it first needs to be established what rights the law confers upon parents before legislation (pertaining to leave to reflect those rights and responsibilities) can be drafted.

The third section will discuss the issue of surrogacy. This is important because since the recognition of surrogacy agreements in South African law, persons who are not the biological parents of a child have now become subject to the rights and responsibilities that are normally associated with parenthood. This section will therefore set out what these rights and responsibilities are and where they stem from. Finally, this section will discuss the requirements that must be satisfied in order for a surrogacy agreement to be valid. This is necessary because only valid surrogacy agreements can give rise to rights and responsibilities pertaining to children.

⁴⁸ See note 32 above.

⁴⁹ See note 4 above.

⁵⁰ A Bauling 'Maternity, Paternity and Parental Leave and the Best Interests of the Child. *Mia V State Information Technology Agency (Pty) Ltd* [2015] Jol 33060 (LC)' (2016) *Obiter* 158.

The fourth section will set out the implications of the ruling in the *MIA*⁵¹ case. Since this case is the first case that has awarded such a progressive judgement it will surely change the manner in which courts deal with these types of cases and will therefore be influential in the amendment of labour legislation.

2.2. THE MIA CASE

2.2.1. *The Facts*

The applicant was an employee of the respondent. In 2010, whilst employed by the respondent, the applicant entered into a Civil Union with his spouse in terms of the Civil Union Act.⁵² In July 2011, in accordance with section 292 of the Children's Act⁵³, the applicant and his spouse engaged a surrogate mother and concluded a surrogate agreement with her. The agreement was confirmed as an order of court in the same month.⁵⁴ The applicant and his spouse then decided that the applicant would assume the traditional role of a primary care giver.⁵⁵ In anticipation of the birth of their child, the applicant applied for maternity leave which was refused by the employer on the basis that the BCEA⁵⁶ and the employer's internal policy regarding "maternity leave" applied only to female employees. In addition to this, the employer's policies made no mention of leave for surrogate parents but allowed leave for employees that had adopted a child.⁵⁷ On these grounds the applicant was initially offered "family responsibility" leave or special unpaid leave. The employer eventually granted the applicant two months of unpaid leave as well as a further two months of adoption leave, as per the company policy.⁵⁸

The applicant then approached the court to have this refusal by the employer declared as unfair discrimination in terms of section 6 of the Employment Equity Act⁵⁹. The applicant sought an order by the court ordering the employer to have full regard of his rights as a

⁵¹ Note 4 above.

⁵² Civil Union Act 17 of 2006

⁵³ Children's Act 38 of 2005

⁵⁴ *MIA* par 5.

⁵⁵ *MIA* par 16.

⁵⁶ Note 16 above.

⁵⁷ *MIA* par 10.

⁵⁸ *MIA* par 2.

⁵⁹ S6(1) of Employment Equity Act 55 of 1998, hereinafter "EEA"- "6. Prohibition of unfair discrimination (1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground."

party to a same-sex union as well as to refrain from discriminating against him and “other similarly placed applicants”⁶⁰.

2.2.2. *Issues*

The first issue that had to be decided by the court was whether an employer’s refusal to grant a male employee “maternity leave” constituted unfair discrimination on the basis of gender, sex, sexual orientation and family responsibility in terms of section 6(1) of the EEA.⁶¹ The second issue was whether the provisions for “maternity leave” as provided for in the BCEA⁶² applied to employees who become parents by way of a surrogacy agreement. Finally, the court had to determine whether the sole purpose of the “maternity leave” provision is for the welfare and healthcare of the mother of the child.

2.2.3. *Ruling*

Gush J held that the respondent’s maternity leave policies were discriminatory and that the refusal of the respondent to grant the applicant maternity leave amounted to unfair discrimination.⁶³ Furthermore, the court stated that in applying its maternity leave policy, the respondent must give full recognition to the status of persons in a civil union and not discriminate against the commissioning parents’ rights, where they have entered into a surrogacy agreement.⁶⁴ The court finally ordered the respondent to pay the applicant the equivalent of two months’ salary.⁶⁵

2.2.4. *Court’s reasoning*

In determining whether the employer’s refusal to grant a male employee “maternity leave” constituted unfair discrimination, the court held that Civil Unions as well as surrogacy agreements, are now given full legal recognition in our law as a result of the Bill of Rights⁶⁶. Therefore the fact that there is legislation that recognises Civil Unions and regulates the rights of the parties to those unions, as parents, if they have entered into

⁶⁰ MIA par 1.

⁶¹ Note 59 above.

⁶² Note 16 above.

⁶³ MIA par 24.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ MIA par 18- “The legislation governing “civil unions” and surrogacy agreements is relatively recent. This legislation is a consequence of the adoption of the Bill of Rights in the Constitution. That our law recognises same-sex marriages and regulates the rights of parents who have entered into surrogacy agreements suggests that any policy adopted by an employer likewise should recognise or be interpreted or amended to adequately protect the rights that flow from the Civil Union Act and the Children’s Act.”

surrogacy agreements, indicates that employers should follow suit.⁶⁷ In other words, any policy adopted by employers should adequately reflect and protect the rights that stem from the Civil Union Act⁶⁸ as well as the Children's Act.⁶⁹

With regard to the issue of whether the provisions of "maternity leave" extended to persons who become parents by way of a surrogacy agreement, the court considered the fact that surrogacy agreements are regulated by the Children's Act.⁷⁰ As discussed in the previous chapter, in terms of these surrogacy agreements, the commissioning parents, for all intents and purposes, become the legal parents of the child, unless otherwise agreed and recorded in writing in the Surrogate Motherhood Agreement.⁷¹ As a general rule, in terms of the Children's Act once the surrogacy is made an order of the court, the birth mother relinquishes all rights to the child.⁷² This was the case with the applicant and his spouse which resulted in them assuming full responsibility for the child on its birth. The court took this into account in its judgement. In this case, the court examined the terms of the specific surrogacy agreement entered into by the applicant and the surrogate, and identified the following terms as being relevant:

- (a) The parents of the child born to the surrogate are the commissioning parents;
- (b) The child is born from artificial fertilisation using gametes from at least one of the commissioning parents
- (c) The surrogate hands over the child to the commissioning parents at birth and the surrogate has no further contact with the child thereafter; and

⁶⁷ *Ibid.*

⁶⁸ Note 52 above.

⁶⁹ Note 53 above.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² S 297- " (1) The effect of a valid surrogate motherhood agreement is that- (a) any child born of a surrogate mother in accordance with the agreement is for all purposes the child of the commissioning parent or parents from the moment of the birth of the child concerned; (b) the surrogate mother is obliged to hand the child over to the commissioning parent or parents as soon as is reasonably possible after the birth; (c) the surrogate mother or her husband, partner or relatives has no rights of (d) the surrogate mother or her husband, partner or relatives have no right of contact with the child unless provided for in the agreement between the parties; (e) subject to sections 292 and 293, the surrogate motherhood agreement may not be terminated after the artificial fertilisation of the surrogate mother has taken place; and the child will have no claim for maintenance or of succession against the surrogate mother, her husband or partner or any of their relatives. (2) Any surrogate motherhood agreement that does not comply with the provisions of this Act is invalid and any child born as a result of any action taken in execution of such an arrangement is for all purposes deemed to be the child of the woman that gave birth to that child."

(d) The commissioning parents from then onwards, in terms of the agreement, are deemed to be the parents of the child and are responsible for the child.⁷³

Based on the provisions of this agreement, which are important when examining the issue of whether or not the applicant should have been entitled to the prescribed period of “maternity leave”, the court held that there is no reason why an employee in the position of the applicant should not be entitled to “maternity leave” and for the same duration as a natural mother would be entitled.⁷⁴

In determining the issue of whether the purpose of the provision for “maternity leave” was solely for the wellbeing of the mother, the court considered the arguments raised by the respondent. According to the respondent its policy was not discriminatory. It contended that the word “maternity” indicated that this type of leave could only be utilised by female employees.⁷⁵ In its pleadings the respondent further stated that its policies were designed “to cater for employees who give birth...based on the understanding that pregnancy and childbirth create an undeniable physiological effect that prevents biological mothers from working during portions of the pregnancy and during the post-partem period”⁷⁶ and that the ten (10) week leave benefits were to ensure that birth mothers are protected financially during their period of incapacity.⁷⁷ The court rejected this argument on the basis that the respondent failed to take into account that the right to “maternity leave” as provided for in the BCEA⁷⁸, is not a right that is concerned solely with the welfare and health of the child’s mother but one that needs to be interpreted in a way that takes the best interests of the child into account.⁷⁹ The court further added that a failure to do this would be to ignore the Constitution⁸⁰ and the Children’s Act.⁸¹ In terms of Section 28 of the Constitution⁸²,

⁷³ MIA par 16.

⁷⁴ MIA par 17

⁷⁵ MIA par 12- “In argument the respondent denied that its policy was discriminatory and relied on the word “maternity” as being the defining character of the leave viz that it was only due to and a right to be enjoyed by female employees. The respondent in its pleadings averred that the maternity leave policy was specifically designed “... to cater for employees who give birth ... based on an understanding that pregnancy and childbirth create an undeniable physiological effect that prevents biological mothers from working during portions of the pregnancy and during the post-partum period. Thus at least 10 weeks of maternity leave benefits have been introduced to protect birth mothers from an earning interaction due to the physical incapacity to work immediately before and after childbirth.”

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ Note 16 above.

⁷⁹ MIA par 13.

⁸⁰ The Constitution of the Republic of South Africa Act 108 of 1996

⁸¹ Note 53 above. S9 states 9 that 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.

children have the right to family care or parental care.⁸³ Furthermore, the Children's Act⁸⁴ emphasises the fact that its purpose is to extend the rights of children as provided for in the Constitution.⁸⁵ Furthermore, the Act provides that "In all matters the care, protection and well-being of a child the standard that the child's best interest is of paramount importance must be applied"⁸⁶

2.2.5. *Obiter dictum*

Gush J stated in his judgement that often the problem, with dealing with issues of equality, was that the legislation itself is often drafted in a manner that is discriminatory. He stated that it is important to amend the legislation, particularly the provisions of the BCEA⁸⁷ in order to effectively deal with these types of matters.⁸⁸ It is important to note however that the court held that the provisions of the BCEA⁸⁹ were not under scrutiny as the respondent had relied on its own policies at the time that it discriminated against the applicant. Having stated that the provisions need to be amended, Gush J did not state which sections needed to be amended and in what way. However, one could assume that the obvious section would be s25.⁹⁰ This section is problematic as it provides for maternity leave only for females and is silent on the position of same-sex spouses who become parents. In addition to the BCEA⁹¹ the Unemployment Insurance Act⁹² (UIA) may also need to be amended. If one looks at the provisions of s24 of the UIA⁹³ for example, the wording is inherently discriminatory in that only women who give birth are entitled to claim from the fund. This section allows for maternity benefits, which a contributor is entitled to; during her

⁸² Note 80 above.

⁸³ S28(1)(b) states that every child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment

⁸⁴ Note 53 above.

⁸⁵ MIA par 14

⁸⁶ *Ibid.*

⁸⁷ Note 16 above.

⁸⁸ MIA par 19.

⁸⁹ Note 16 above.

⁹⁰ Note 16 above.

⁹¹ *Ibid.*

⁹² Unemployment Insurance Act 63 of 2001

⁹³ S24 "(1) Subject to section 14, a contributor who is pregnant is entitled to the maternity benefits contemplated in this Part for any period of pregnancy or delivery and the period thereafter, if application is made in accordance with prescribed requirements and the provisions of this Part. (2) [Deleted] (3) When taking into account any maternity leave paid to the contributor in terms of any other law or any collective agreement or contract of employment, the maternity benefit may not be more than the remuneration the contributor would have received if the contributor had not been on maternity leave. (4) For purposes of this section the maximum period of maternity leave is 17,32 weeks. (5) A contributor who has a miscarriage during the third trimester or bears a still-born child is entitled to a maximum maternity benefit of six weeks after the miscarriage or stillbirth."

pregnancy, delivery or any time after the delivery. This section is problematic in the sense that it provides that only a contributor who is pregnant is entitled to benefits therefore eliminating men. Section 27 of the same act makes provision for one of the contributors of the adoptive parents to receive the adoptive benefits.⁹⁴ The wording of this section is gender-free and it is inclusive of same-sex spouses who are adoptive parents. According to Rycroft⁹⁵, the reason for this could be the fact that neither one of the adoptive parents has given birth to the child and as a result, either one of them can assume the role of primary care-giver.⁹⁶ This would support the argument that the provisions under the BCEA⁹⁷ need to be amended. It can be argued that since neither one of the commissioning parents has given birth to the child, they too should enjoy the maternity leave benefits under the BCEA⁹⁸ because either one of them could assume the role of primary care-giver.

2.3.PARENTAL RIGHTS AND RESPONSIBILITIES

In terms of the Children's Act⁹⁹ (which is concerned with the protection and care of the child), the biological mother has full rights and responsibilities in respect of her minor child. This is regardless of whether she is married or unmarried. In terms of the same Act, biological fathers who are married or unmarried to the mother only acquire full rights and responsibilities to the minor child if they adhere to the requirements stipulated in s21(1)(a) and(b)¹⁰⁰. In terms of s21(1)(a) the biological father can acquire parental rights and responsibilities if at the time of the birth of the child, he is living with the mother of the child in a permanent life-partnership and if he has attempted *bona fide* to contribute to the upbringing of the child for a reasonable period of time. This includes contributing to the expenses and maintenance of the child for a reasonable period.

⁹⁴ S27 "(1) Subject to section 14, only one contributor of the adopting parties is entitled to the adoption benefits contemplated in this Part in respect of each adopted child and only if— (a) the child has been adopted in terms of the Child Care Act, 1983 (Act No. 74 of 1983); (b) the period that the contributor was not working was spent caring for the child; (c) the adopted child is below the age of two; and (d) the application is made in accordance with the prescribed requirements and the provisions of this Part. (2) The entitlement contemplated in subsection (1) commences on the date that a competent court grants an order for adoption in terms of the Child Care Act, 1983 (Act No. 74 of 1983). (3) [Deleted] (4) When taking into account any leave paid to the contributor in terms of any other law or any collective agreement or contract of employment, the benefit may not be more than the remuneration the employer would have paid the contributor if the contributor had been at work."

⁹⁵ Professor Alan Rycroft (BA LLB LLM). Professor of Commercial Law at the University of Cape Town.

⁹⁶ A Rycroft. 'Worklaw newsletter in Lewin, I. When Fathers are Mothers'. April 2015 Accessed from <http://www.iol.co.za/business/personal-finance/when-fathers-are-mothers-1941292> on April 2016.

⁹⁷ Note 16 above.

⁹⁸ *Ibid.*

⁹⁹ Note 53 above.

¹⁰⁰ *Ibid.*

Married fathers have full parental rights and responsibilities in respect of the child if:

- i. He is married to the mother of the child
- ii. He is married to the mother of the child at the time that the child is conceived
- iii. He is married to the mother of the child at the time that the child is conceived or is born.¹⁰¹

The Act places emphasis on the development and empowerment of the child and the family. The key importance of the Act is the preservation of family in order to ensure that children are raised and cared for in a caring family structure. The best interests of the child, is therefore the main focus of the Act. In the *MIA* case, the court had to decide whether the argument posed by the respondent that the purpose of maternity leave was for the mother to recuperate from the physiological and physical consequences of child birth were sufficient to deny the applicant the relief that he sought.¹⁰² The court, having regard to the best interests of the child rejected the argument and held that this argument was flawed. In his judgement; Gush J stated that the welfare of the mother is not the sole consideration to be made in this situation but rather the best interests of the child.¹⁰³

2.4.SURROGACY

Surrogacy by definition is a situation where a woman carries and delivers a child for someone else.¹⁰⁴ Prior to the enactment of the Children's Act¹⁰⁵, surrogacy was first governed by the Child Status Act¹⁰⁶, the Human Tissue Act¹⁰⁷ and the Child Care Act¹⁰⁸. This led to many problems as these pieces of legislation were enacted for other purposes and were thus ineffective in adequately addressing the issue of surrogacy.¹⁰⁹ In terms of the Children's Act¹¹⁰, before inseminating the surrogate mother, the doctor is required to have authorisation from a High Court. The High Court will require that there be a Surrogate Motherhood Agreement, which must be entered into by all of the relevant parties and

¹⁰¹ *Ibid.*

¹⁰² *MIA* par 13.

¹⁰³ *Ibid.*

¹⁰⁴ C Nicholson & A Bauling 'Surrogate motherhood agreements and their confirmation: A new challenge for Practitioners?' (2013) *De Jure* 510, 511.

¹⁰⁵ Note 53 above.

¹⁰⁶ Child Status Act 82 of 1987.

¹⁰⁷ Human Tissue Act 65 of 1983.

¹⁰⁸ Child Care Act 74 of 1983.

¹⁰⁹ Note 104 above. 512

¹¹⁰ Note 53 above.

confirmed in writing before it is made an order of the court.¹¹¹ In order for the agreement to be valid, the child must be conceived using the gametes of at least one of the commissioning parents. This means that either an ovum or a sperm must be obtained from at least one of the commissioning parents in the fertilisation of the surrogate.

The court will only confirm the surrogate agreement if the following requirements are met:

1. The commissioning parents must physically be unable to have their own children naturally due to a permanent and irreversible reason
2. The commissioning parents must be deemed to be competent and suitable as parents
3. The commissioning parents must understand the legal consequences, rights and responsibilities of the Surrogate Motherhood Agreement
4. The surrogate mother must be deemed to be a competent, suitable person who understands the legal consequences of the Surrogate Motherhood Agreement
5. The surrogate mother must not be using surrogacy as a source of income and must not have entered into the agreement for commercial gain
6. The commissioning parents must be able to pay, and have agreed to pay, for all of the medical expenses which relate to the artificial insemination and birth of the child. They are also responsible for the loss of earnings of the surrogate mother and ancillary costs in this regard
7. The surrogate mother must have a history of being pregnant and having successfully given birth

These requirements were confirmed in the *Ex Parte WH*¹¹² case where the court dealt with the constitutional issue of the best interests of the child, which often arises in cases of surrogacy. The court went on to state that one of the court's main duties, in surrogacy matters is to ensure that the constitutional rights of the commissioning parents as well as the surrogate mother, are upheld. This includes the right, of the commissioning parents, to be treated equally in the eyes of the law and not to have their rights in terms of the Promotion of Equality and Prevention from Discrimination Act¹¹³ (PEPUDA) violated.¹¹⁴

¹¹¹ *Ibid*, s292.

¹¹² *Ex Parte WH* 2011 6 SA 514 (GNP), hereinafter "*Ex Parte WH*"

¹¹³ Promotion of Equality and Prevention from Discrimination Act 4 of 2000

¹¹⁴ *Ex Parte WH* par 63

In the recent case of *AB & Surrogacy Advisory Group vs Minister of Social Development with Centre for Child Law as Amicus Curiae*¹¹⁵, the constitutional validity of s294 of the Act¹¹⁶ was challenged. According to this section, a surrogate agreement is invalid unless the gametes of both commissioning parents, or if that is not possible, the gametes of at least one of the commissioning parents are used during fertilisation. Briefly, the facts of this case were that the applicant had attempted to fall pregnant by means of invitro Fertilisation.¹¹⁷ She had been unsuccessful and therefore sought to make use of a surrogate. However the fact that she was a single female meant that she would have to have used the gametes of two donors.¹¹⁸ It was argued that according to the requirements as set out in the Act, surrogacy was an inappropriate solution for her as she would have no genetic link to the child. The court referred to the comparative research of Carnelley and Soni¹¹⁹ to determine what the position is in foreign jurisdictions and ultimately came to the conclusion that the provisions under s294 were invalid.¹²⁰ The court's reasoning was that the removal of this provision would not affect the rest of the section.¹²¹ Furthermore, this requirement had to be removed so as to bring Chapter 19 of the Act¹²² in line with the values of the Constitution of South Africa. The possible effect of this case is that when the requirement is removed, it opens the door to a larger group of persons being eligible for paternity leave.

In terms of s297 of the Children's Act¹²³, the effect of a valid surrogate motherhood agreement is that–

- (a) any child born of a surrogate mother in accordance with the agreement is for all purposes the child of the commissioning parent or parents from the moment of the birth of the child concerned;
- (b) the surrogate mother is obliged to hand the child over to the commissioning parent or parents as soon as is reasonably possible after the birth;
- (c) the surrogate mother or her husband, partner or relatives has no rights of parenthood or

¹¹⁵*AB & Surrogacy Advisory Group vs Minister of Social Development with Centre for Child Law as Amicus Curiae* 2016 (2) SA 27 (GP), hereinafter "AB"

¹¹⁶ S294 states "No surrogate motherhood agreement is valid unless the conception of the child contemplated in the agreement is to be effected by the use of the gametes of both commissioning parents or, if that is not possible due to biological, medical or other valid reasons, the gamete of at least one of the commissioning parents or, where the commissioning parent is a single person, the gamete of that person."

¹¹⁷ AB par 1

¹¹⁸ AB par 2

¹¹⁹ M Carnelley & S Soni. 'Surrogate motherhood agreements'(2008)Speculum Juris

¹²⁰ AB par 106.

¹²¹ AB par 105.

¹²² Note 53 above.

¹²³ *Ibid.*

care of the child;

(d) the surrogate mother or her husband, partner or relatives have no right of contact with the child unless provided for in the agreement between the parties;

(e) subject to sections 292 and 293, the surrogate motherhood agreement may not be terminated after the artificial fertilisation of the surrogate mother has taken place; and

(f) the child will have no claim for maintenance or of succession against the surrogate mother, her husband or partner or any of their relatives.

In the *MIA* case, the surrogacy agreement expressly stated that the commissioning parents would, for all intents and purposes, be the legal parents of the child after birth.¹²⁴ As a result the applicant had assumed the role traditionally fulfilled by the mother and therefore argued that he should have enjoyed the same benefits as any mother would have been entitled to.¹²⁵ The court agreed and held that there is no reason why the applicant should not be entitled to “maternity leave” and for the same period as other mothers.¹²⁶

It is therefore evident that where parties are the commissioning parents in a surrogacy agreement, they, in the eyes of the law, become the legal parents of the child. Therefore, there should be no reason to deprive them of the protection under the law which is enjoyed by people who become parents by way of naturally conceiving the child. The commissioning parents assume the rights and responsibilities that other parents would have and as such have the responsibility to ensure that the best interests of the child are fulfilled. The responsibility of care is arguably the most important consideration and if mothers are entitled to maternity leave in order to bond and care for their children, the same should apply to the commissioning parents in a surrogacy agreement.

2.5.IMPLICATIONS OF THE MIA CASE

This case is a landmark case in South African law in the sense that it has not only highlighted the discriminatory nature of South Africa’s maternity leave provisions but it has also highlighted how outdated our labour laws are with regards to the issue of paternity leave.¹²⁷ It also indicates the willingness of the Labour Court to protect employees from the

¹²⁴ *MIA* par 6.

¹²⁵ *MIA* par 7.

¹²⁶ *MIA* par 17.

¹²⁷ Note 17 above. 46

discriminatory policy provisions of employers.¹²⁸ This is the first case in which a father or male parent has been able to claim four months of paid “maternity leave”. Despite the progressive nature of this judgement, the fact that the court awarded four months of paid leave creates some uncertainty. The question arises as to whether the court is of the view that the entire period of maternity leave should be paid leave as opposed to unpaid leave. This is because in terms of the current legislation, the entire period of maternity leave need not be paid leave.¹²⁹

One of the implications of this case is that other persons, in similar positions as the applicant, now have a case that has paved the way for them. The courts will have to deal with these cases on a case by case basis but what this case has done is it has shown the circumstances under which the courts may be willing to grant paternity leave. The fact that the decision in the present case was limited to the specific circumstances of the applicant and did not fully engage with the provisions of the BCEA¹³⁰ means that it creates the opportunity for heterosexual males, who are primary caregivers of their children, to argue that they should also be entitled to the same benefits, in appropriate circumstances. Judging by this case, one could assume that the key question in determining who should be entitled to paternity leave would be what the best interests of the child are in that particular case

Another interesting feature of this case is the fact that Gush J does not refer to the applicants as a same-sex couple but rather as spouses in terms of a Civil Union. This is symbolic in the sense that both heterosexual and homosexual persons may be married in terms of this act.¹³¹ By referring to the applicant in this manner, his ruling becomes one which is based on the rights of parties to a Civil Union, rather than one that is based on the rights of a same-sex couple. The emphasis is therefore on the rights of any person who wants to be given “maternity leave” for the purposes of being the primary care giver, for the first four months of the child’s life, despite them not being the birthmother.

The question then arises as to what the situation would be where a heterosexual couple, who are the biological parents of the child, decide that it is the father who will be the primary caregiver. Alternatively, what the position would be where the biological parents decide to share the four months of maternity leave between them. In this instance, the provisions of

¹²⁸ Note 50 above. 165.

¹²⁹ Note 16 above.

¹³⁰ *Ibid.*

¹³¹ Note 96 above.

the BCEA¹³² would then surely be opened up to a constitutionality challenge based on the fact that they discriminate against the fathers on the basis of gender.¹³³ Where the latter question arises, the drafters would perhaps need to look at the European model, more specifically, the United Kingdom (UK) model, which allows for parents to share what, is referred to as “shared parental leave”. In the UK, there is provision for maternity, paternity and parental leave. For purposes of this dissertation, the paternity leave position in the UK will be discussed fully in a later chapter. The reason for this analysis is that the UK has a similar legal system to South Africa therefore investigating how the provisions are included in UK law may be beneficial to South African legislators.

This decision reflects that South Africa has been slow to adapt its legislation. However, an attempt, at least by this court, is being made to develop this area of law and bring it in line with constitutional values, other legislation as well as international standards. Prior to this decision there had already been a petition by a father in Cape Town, requesting that there be ten (10) days provided for in the BCEA¹³⁴ for paternity leave. This petition was submitted to the National Council of Provinces (NCOP) in 2014 and it was referred to parliament for discussion.¹³⁵ Furthermore, following this decision the labour portfolio committee in parliament heard from amongst others, COSATU¹³⁶, that fathers should be entitled to ten days in terms of the BCEA.¹³⁷

2.6.CONCLUSION

The lack of legislation and provisions in the existing legislation, governing paternity leave is clear. The fact that there is now other legislation in place such as the Children’s Act¹³⁸ as well as the Civil Unions Act¹³⁹ has emphasised the need for either the introduction of legislation to govern paternity leave or the amendment to the existing legislation for this purpose.

¹³² Note 16 above.

¹³³ Note 96 above.

¹³⁴ Note 16 above.

¹³⁵ R Jackman ‘SA man fights for paternity leave.’ (2014) Accessed from http://www.iol.co.za/news/crime-courts/sa-man-fights-for-paternity-leave-1719180#.VSGjL6Wv_wl on 20 July 2016

¹³⁶ Congress of South African Trade Unions

¹³⁷ P Herman, Fathers should get 10 days paternity leave, parliament told. (2016) Accessed from <http://www.news24.com/SouthAfrica/News/fathers-should-get-10-days-paternity-leave-parliament-told-20160922> on 25 September 2016

¹³⁸ Note 53 above.

¹³⁹ Note 52 above.

The *MIA* case has undoubtedly identified the willingness of the courts to make rulings that are consistent with the values of the constitution as well as those that will give full recognition to the rights created under newer legislation such as the Civil Unions Act¹⁴⁰. What the *MIA* case does not do however is create a rule or law of general application. What this means is that other parties wishing to claim paternity leave will have to do so in their personal capacity. The court would then have to determine whether, on the facts of that case, paternity leave should be granted. Furthermore as discussed in this chapter because the judge merely stated that amendments need to be made to the current labour legislation, the legislators will have the discretion to amend the provisions as they see fit. This means that after the amendments, there may still be categories of fathers that are not catered for. The case has however indicated that where there is legislation that affords certain persons rights, those rights must be given full recognition. The examples of these types of persons include, commissioning parents in terms of a surrogacy agreement as well as same-sex spouses in terms of a Civil Union. This could be useful to legislators. This is because the biggest problem that they will encounter, arguably, is the issue of making amendments or drafting paternity leave legislation that is not discriminatory in some way or another. In other words, the legislators will have to draft legislation that must be restrictive, so as not to open these provisions up to abuse, but at the same time not be so restrictive so as to constitute discrimination.

In light of the discussion in this chapter, the following chapter will aim to provide an overview of the constitutional rights as well as legislation which is directed at preventing discrimination, especially in the workplace.

¹⁴⁰ *Ibid.*

CHAPTER THREE

CONSTITUTIONAL RIGHTS AND LEGISLATION

3.1. INTRODUCTION

As discussed in the previous chapter, if new provisions are to be introduced, legislators are faced with the task of ensuring that the provisions are restrictive but not so that they infringe upon a constitutionally guaranteed right or in a manner that renders them in contravention of existing legislation. Therefore, this chapter is divided into two sections. The first section will discuss the constitutional rights that are either currently affected by the lack of paternity leave provisions or that could potentially be necessary to consider if paternity leave provisions were to be introduced. The second section will set out the legislation that is already in place and that needs to be considered in the introduction of paternity leave provisions or in the amendment of existing leave provisions. Finally, this chapter will conclude by setting out how the current leave provisions could be amended having due regard to the rights and statutes discussed in the first and second parts of this chapter.

3.2. THE CONSTITUTION

In terms of the Bill of Rights in the South African constitution¹⁴¹, the rights of all people living within the Republic have the purpose of promoting human dignity, equality and freedom.¹⁴² The Bill of Rights further states that the State has an obligation to respect, protect, promote and fulfil the rights contained herein.¹⁴³ For the purposes of this dissertation, the most important right is contained in section 9.¹⁴⁴ Section 9 of the Constitution provides that everyone has the right to equality.¹⁴⁵ This right is quite a broad right and therefore will be broken down into smaller segments.

In terms of section 9(1) everyone is equal before the law and as such has the right to the full protection and benefit of the law.¹⁴⁶ Section 9(2) provides that all persons have the right to full and equal enjoyment of freedoms and all rights.¹⁴⁷ This subsection also provides that legislative means or any other means may be taken to protect persons who may be

¹⁴¹ Note 80 above.

¹⁴² *Ibid.* S7(1).

¹⁴³ *Ibid.* S7(2).

¹⁴⁴ Note 80 above.

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

disadvantaged by unfair discrimination and this is important in order to promote the achievement of equality.¹⁴⁸ Subsection 3 then states that the State may not either directly or indirectly unfairly discriminate against anyone on a number of listed grounds. These grounds include race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.¹⁴⁹ Subsection 4 states that in addition to the state not being allowed to directly or indirectly unfairly discriminate against anyone, no other person may unfairly discriminate against another on one or more of the grounds listed in subsection 3.¹⁵⁰ Finally subsection 5 states that discrimination on one or more of the grounds contained in subsection 3 is unfair unless it is established that it is fair to discriminate in such a manner.¹⁵¹

Other important provisions in the Constitution are section 23 and section 28. Section 23 provides that everyone has the right to fair labour practices.¹⁵² Section 28 provides that every child has the right to family care or parental care.¹⁵³ The section further provides that the rights of children are of paramount importance when the matter in question concerns children.

The Constitutional Court has often adopted a two-step inquiry into discrimination cases.¹⁵⁴ The first step involves looking at whether there is a rational reason that the legislation was enacted. If there is a rational purpose, the second step would then be to determine whether the deviation from that legislation was unfair.¹⁵⁵ There has been a plethora of cases in South African law that have dealt with the alleged preference of women over men.

One example of this is the *President of the Republic of South Africa and Another v Hugo*¹⁵⁶ case. This case challenged a Presidential act (government measure) which preferred female prisoners over male prisoners.¹⁵⁷ Briefly, the facts of this case were that a male prisoner, who was a father, challenged the decision of the President to grant female prisoners, who were mothers, an early release from prison.¹⁵⁸ The basis of this challenge was that the early

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

¹⁵² Note 3 above.

¹⁵³ Note 83 above.

¹⁵⁴ Note 3 above. 32.

¹⁵⁵ *Ibid.*

¹⁵⁶ *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708 (CC), hereinafter "*Hugo*"

¹⁵⁷ *Hugo* par 4.

¹⁵⁸ *Hugo* par 2.

release of mothers but not fathers constituted discrimination on the ground of gender.¹⁵⁹ The President argued that the decision to grant early release to mothers with small children was made in an attempt to serve the best interests of the children. The reasoning of the President was that mothers were the primary care-givers of children therefore it would be beneficial to the children if the mothers were released because they could then provide the requisite care to those children.¹⁶⁰ The court mentioned, in assessing the consequences of women being the primary caregivers that it was tougher for women to compete in the labour market and this was a major factor in the inequalities that women experienced in employment.¹⁶¹ The court added that men played only secondary roles in the upbringing of children therefore if the President had decided to release males; this would not have contributed as much to the purpose that the President was trying to achieve as the release of the females would.¹⁶² Therefore in this case the discrimination on the ground of gender was found to be fair. The court reasoned that the discrimination against the fathers did not limit their rights or obligations as parents permanently. They were found to have merely been deprived of a benefit which they were not entitled to. This deprivation was also found not to have impaired their right to dignity and was therefore not unjustified.¹⁶³

Another example can be found in the *Jooste v Score Supermarket Trading (Pty) Ltd*¹⁶⁴ case. The constitutionality of section 35(1) of the Compensation for Occupational Injuries and Diseases Act¹⁶⁵ (COIDA) was challenged.¹⁶⁶ In terms of this section, any action by employees against their employers for workplace injury, death or illness is precluded except under the provisions of the Act. It was argued that the fact that this section limits the options of an employee for recourse; in the sense that employees are only entitled to claim in terms of the act whereas non-employees can sue in delict, unfairly discriminated against employees on the ground of equality.¹⁶⁷ It was also argued that this provision impinged on

¹⁵⁹ Constitution of the Republic of South Africa Act 200 of 1993

“s8(1) Every person shall have the right to equality before the law and to equal protection of the law. (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.”

¹⁶⁰ *Hugo* par 70.

¹⁶¹ *Hugo* par 110.

¹⁶² *Ibid*; and Note 9 above.

¹⁶³ Note 9 above. 32.

¹⁶⁴ *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 (2) BCLR 139 (CC), hereinafter “*Jooste*”.

¹⁶⁵ Compensation for Occupational Injuries and Diseases Act 130 of 1993.

¹⁶⁶ *Jooste* par 2.

¹⁶⁷ *Ibid*.

the employees' right to access the courts.¹⁶⁸ The Constitutional Court found that the purpose of the section was to regulate the compensation for injury that occurred during the course of the employee's employment.¹⁶⁹ Accordingly the court held that there was a rational link between the section and the purpose for which it was enacted and was thus not unconstitutional.¹⁷⁰

It is worth noting that although there has not been a constitutional case regarding the constitutionality of the provisions of the BCEA¹⁷¹ and UIA¹⁷² provisions, the decision in the *MIA* case (discussed in the previous chapter) sheds some light on the possible outcome if such a case were to come before the Constitutional Court. The Labour Court stated that the provisions of the respondent's leave policy, in the abovementioned case, were discriminatory.¹⁷³ The provisions mentioned were modelled on the provisions of the BCEA¹⁷⁴ therefore it can be argued that those provisions were discriminatory. However because the provisions of the BCEA¹⁷⁵ were not under scrutiny in this case, this remains to be seen.¹⁷⁶ The court also added that the problem in dealing with such cases is that the legislation in question is usually discriminatory itself and in an obiter statement, the court stated that amendments need to be made to the BCEA¹⁷⁷ and the UIA.¹⁷⁸ It seems almost certain that should a case for paternity leave come before the Constitutional Court on the basis that the provisions of the BCEA¹⁷⁹ and UIA¹⁸⁰ are discriminatory; the court would have regard to the judgment in this case.

3.3. LEGISLATION

In light of the rights entrenched in the provisions of the Constitution¹⁸¹, there have been a number of pieces of legislation that have been enacted to promote the values of the Constitution¹⁸². In the *Minister of Health and Another v New Clicks South Africa (Pty) Ltd*

¹⁶⁸ *Jooste* par 20.

¹⁶⁹ *Jooste* par 12.

¹⁷⁰ *Jooste* par 24.

¹⁷¹ Note 16 above.

¹⁷² Note 92 above.

¹⁷³ *MIA* par 12

¹⁷⁴ Note 16 above.

¹⁷⁵ *Ibid.*

¹⁷⁶ *MIA* par 19.

¹⁷⁷ Note 16 above.

¹⁷⁸ Note 92 above.

¹⁷⁹ Note 16 above.

¹⁸⁰ Note 92 above.

¹⁸¹ Note 80 above.

¹⁸² *Ibid.*

*and Others*¹⁸³ the court held that where there is legislation in place to give effect to a right contained in the Constitution, then the court cannot bypass the legislation and merely decide the matter on the constitutional provision.¹⁸⁴ Therefore it is important to consider the legislation that has been enacted to give effect to the rights mentioned in the previous section of this chapter.

The first piece of legislation that must be noted is the Promotion of Equality and Prevention of Unfair Discrimination Act¹⁸⁵ (PEPUDA). In terms of this Act, neither the State nor any person may unfairly discriminate against any person.¹⁸⁶ This act has clearly been enacted to promote the constitutionally guaranteed right to equality.¹⁸⁷ It is however quite broad and perhaps not the most appropriate in dealing with labour matters.

In the Labour context perhaps a more appropriate piece of legislation for the purposes of this dissertation is the EEA¹⁸⁸. This act states that no person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.¹⁸⁹ Therefore this act is helpful in that it defines the term discrimination and it also contains a proviso in section 6(2) which lists the situations under which the discrimination will not qualify as unfair. In terms of this proviso, if an employer can rationally justify a differentiation between employees on the basis of one of two grounds, he may have a complete defence against a claim of unfair discrimination. These grounds include taking affirmative action measures consistent with the purpose of the Act or excluding, distinguishing or preferring any person on the basis of an inherent job requirement. This Act is of utmost importance as the definition of “discrimination” is a lot narrower than it is in a constitutional context.¹⁹⁰ In the *HOSPERSA obo Venter v SA Nursing Council*¹⁹¹ case, the court held that in interpreting the EEA, regard must be had to Convention 111 of the International Labour Organisation

¹⁸³ *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC), hereinafter “*New Clicks*”.

¹⁸⁴ *New Clicks* par 437.

¹⁸⁵ Note 113 above.

¹⁸⁶ *Ibid*, s6.

¹⁸⁷ *Ibid*, s2(a)

¹⁸⁸ Note 59 above.

¹⁸⁹ *Ibid*.

¹⁹⁰ Note 9

¹⁹¹ *HOSPERSA obo Venter v SA Nursing Council* [2006]ZALC 29

concerning Discrimination In Respect of Employment and Occupation¹⁹². In terms of this convention, “discrimination” is defined as any “distinction, exclusion or preference” on various grounds; both listed and unlisted that have the effect of “impairing or nullifying equality of opportunity or treatment in employment or occupation”¹⁹³. The listed grounds in terms of this convention are race, colour, sex, religion, political opinion, national extraction or social origin. With regards to the unlisted grounds, the convention gives the member state the discretion to include any other ground which it deems necessary.¹⁹⁴

It is clear then that in determining whether the provisions of section 25 of the BCEA¹⁹⁵ unfairly discriminate against males by only allowing “maternity” leave to women, the question to be answered is on which grounds the differentiation has occurred. The grounds that are affected by the differentiation are therefore gender, sex, marital status, pregnancy and sexual orientation.¹⁹⁶ This is because the provision grants leave benefits to pregnant employees so naturally those employees who are not pregnant and that are males are precluded from claiming leave benefits in terms of this section. Others who are precluded from claiming leave benefits in terms of section 25 are those who become parents by way of adoption and surrogacy. The question of whether the differentiation is fair remains open. In the *MIA* case the court disregarded the notion that perhaps the differentiation was to enable the pregnant mother to recuperate from the physical and psychological effects of giving birth.¹⁹⁷ The court held that the purpose of these leave benefits should also take into account the best interests of the child.¹⁹⁸ Therefore if such a matter came before the Constitutional Court, it is likely that the differentiation would be found to be unjustifiable as it may in some cases be in the best interests of the child to have the father home for bonding.¹⁹⁹

3.4. CONCLUSION

¹⁹² Convention No. 111 Convention Concerning Discrimination in Respect of Employment and Occupation, 1958. Accessed from http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C111 on November 2016.

¹⁹³ *ibid.* Article 1- “ 1. For the purpose of this Convention the term discrimination includes--(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;”

¹⁹⁴ Article 1(b)- “(b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.

¹⁹⁵ Note 16 above.

¹⁹⁶ Note 3 above.

¹⁹⁷ Note 75 above.

¹⁹⁸ *ibid.*

¹⁹⁹ Note 23 above.

The key question that this chapter aims to answer is whether fathers seeking to claim paternity leave can rely on the constitutionally guaranteed right to equality to do so. It is evident that where the Constitutional Court has been faced with determining whether there has been unfair discrimination on one or more of the listed grounds under section 9 of the Constitution²⁰⁰, the court has first determined whether there has been a differentiation and whether such differentiation is justified by a rational link between the differentiation and a government purpose or a statute.²⁰¹ The courts have made a distinction between mere differentiation and differentiation that amounts to unfair discrimination.²⁰² Mere differentiation is valid under the constitution so long as it does not deny persons the protection and benefit of the law. Whereas a differentiation that is arbitrary and has no purpose will be deemed as unfair discrimination.²⁰³ For example, if one looks at the provisions that allow for affirmative action, there is a clear differentiation in the treatment of persons belonging to different race groups when it comes to employment. However this does not necessarily constitute unfair discrimination as the purpose of these provisions is to promote equality in post-Apartheid South Africa.²⁰⁴ Therefore for the purposes of this dissertation, if a case challenging the constitutionality of the BCEA²⁰⁵ provisions came before the Constitutional Court, it is likely that the court would first enquire whether there is a rational link in differentiating mothers from fathers for the purposes of leave benefits and some government purpose or statute. If the court determined that there was such a link then the challenge against the legislation would become more difficult.²⁰⁶ That is not to say that a differentiation is sufficient so long as it is linked to a legitimate government purpose or statute, a valid justification for that differentiation must be provided in order for it to be deemed fair.

The offending sections in the BCEA are section 25 and section 24 of the UIA which states “only a contributor who is pregnant is entitled to maternity benefits”. The best way to go about having these discriminatory provisions of the BCEA and UIA amended would be to bring a challenge in terms of the Constitution and the legislation that has been enacted to

²⁰⁰ Note 80 above.

²⁰¹ Note 9 above. 32.

²⁰² L Van Der Poll ‘Pornography as sex discrimination? A critical reflection on the constitutional court's interpretation of gender politics, differentiation and (unfair) discrimination’ (2010) 21 *Stellenbosch LR* 381,399.

²⁰³ Ibid

²⁰⁴ J Partington & A van der Walt ‘The Development of Defences In Unfair Discrimination Cases (Part 2)’ (2005)26 *Obiter* 595,605.

²⁰⁵ Note 16 above.

²⁰⁶ Note 9 above. 32-33.

give effect to the Constitution; more specifically the EEA. An application by an employee in terms of the provisions of section 6(1) of the EEA may lead to a gender-neutral approach being adopted in terms of the BCEA and UIA. In other jurisdictions such a change has already occurred. The most relevant example for the purposes of this dissertation is the United Kingdom model. In April 2015, the United Kingdom amended their laws to entitle parents to shared parental leave. In addition to this the rights of adopting parents and those who become parents by means of surrogacy have also been expressly recognised.

In light of the discussion in this chapter, the following chapter will discuss the position in foreign jurisdictions and how they have gone about modelling their parental and paternity leave legislation. The jurisdictions that will be discussed are the United Kingdom and Kenya.

CHAPTER FOUR

LEGAL POSITION IN FOREIGN JURISDICTIONS

4.1. INTRODUCTION

As stated in the previous chapter, this chapter will discuss the legal position pertaining to paternity leave in foreign jurisdictions. The jurisdictions that will be discussed are the United Kingdom and Kenya respectively. This chapter will therefore be divided into two sections; the first one dealing with the provisions in the UK and the second section dealing with the provisions in Kenya. The reason for discussing these jurisdictions is that the position in each of these states may offer some assistance to drafters of South African law. Kenyan law will be discussed because Kenya is in a similar socio-economic position to South Africa yet they have more progressive paternity leave provisions than those available to South African employees. The UK on the other hand has always been a legal system that South African legislators have looked at in the formation and development of South African law. Therefore with regards to the socio-economical aspects involved in introducing paternity leave provisions to South Africa, Kenya would be a good comparator. Likewise, the analysis of the UK position may be beneficial in the sense that much of South African law is mirrored on the UK position and the systems are very similar.

4.2. THE LEGAL POSITION IN THE UNITED KINGDOM

Paternity leave provisions in the UK are a fairly recent feature in their legislation. Previously Parental leave was governed by s13 of the Maternity and Parental Leave Regulations 1999.²⁰⁷In 2003, regulations permitting fathers to take one to two consecutive

²⁰⁷Maternity and Parental Leave Regulations 1999 SI 1999/3312. s13 “(1) An employee who— (a)has been continuously employed for a period of not less than a year; and (b)has, or expects to have, responsibility for a child, is entitled, in accordance with these Regulations, to be absent from work on parental leave for the purpose of caring for that child. (2) An employee has responsibility for a child, for the purposes of paragraph (1), if— (a)he has parental responsibility or, in Scotland, parental responsibilities for the child; or (b)he has been registered as the child’s father under any provision of section 10(1) or 10A(1) of the Births and Deaths Registration Act 1953(1) or of section 18(1) or (2) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965(2). (3) An employee is not entitled to parental leave in respect of a child born before 15th December 1999, except for a child who is adopted by the employee, or placed with the employee for adoption by him, on or after that date”

weeks of paternity leave were passed.²⁰⁸ In terms of these regulations, fathers are entitled to this leave, specifically for the purposes of caring for and spending time with their children.²⁰⁹ To be eligible for the leave, one must be the father of the child; the partner or husband; the adopter or the intended father (if one is to become a parent by way of a surrogacy agreement).²¹⁰ Additionally, in accordance with the maternity leave and pay provisions²¹¹ if by the 15th week, prior to the expected birth of the child, the father had worked for 26 weeks he is entitled to paternity pay.²¹² In 2010 further regulations were passed which entitled fathers to additional paternity leave.²¹³ In terms of the 2010 regulations, fathers are entitled to take up to 26 weeks, in addition to the two weeks already provided for in the 2003 regulations.²¹⁴ In order to be eligible for the additional leave however, the child must have been born on or after 3 April 2011. The requirements are that the mother of the child must have been entitled to statutory shared maternity leave²¹⁵ or statutory maternity pay²¹⁶ and she must have had already returned to work.²¹⁷ This additional leave is in terms of the shared parental leave. It is leave that the mother is entitled to transfer to her partner if she decides to go back to work.²¹⁸

In addition to these regulations and maternity leave provisions, parents are also entitled to 13 further weeks in terms of the parental leave provisions. This leave can be taken any time until the child is 5 years old however, unlike the shared parental leave; this leave is not transferable between the parents. A further requirement of this kind of parental leave is that the employee must have worked for a minimum of one year²¹⁹ These provisions will not be discussed for the purposes of this dissertation.

²⁰⁸ V Long 'Statutory Parental Leave and Pay in the UK: Stereotypes and Discrimination' (2012) 9 *The Equal Rights Review* 52, 55.

²⁰⁹ Paternity and Adoption Leave Regulations 2002; and Statutory Paternity Pay and Statutory Adoption Pay (General) Regulations 2002.

²¹⁰ D Beamont 'Paternity leave in the UK' accessed from <https://www.dad.info/work/paternity-leave/paternity-leave-in-the-uk> on November 2016.

²¹¹ Social Security Contributions and Benefits Act 1992, sections 171ZA-171ZE of Part XIIZA.

²¹² Section 80A(3) of the Employment Act of 2002

²¹³ Note 208 above.

²¹⁴ Additional Paternity Leave Regulations and Additional Statutory Paternity Pay (General) Regulations, 2010, No. 1056.

²¹⁵ Note 208 above.

²¹⁶ *Ibid.*

²¹⁷ *Ibid.*

²¹⁸ Note 210 above.

²¹⁹ Note 208 above.

The UK, as stated above, first introduced paternity leave provisions in 2003.²²⁰ Therefore it was much slower to introduce paternity leave provisions than other European states. The UK was opposed to the proposals that were made with regards to the directive that aimed to introduce parental leave into European countries.²²¹ The European Community laws are governed, amongst other sources, by directives. These directives are binding on the member states in that the objective that they aim to achieve must be achieved by the state. There is however discretion on the part of the member state on how to go about implementing the law that will achieve these objectives.²²²

The European Community Commission has attempted to introduce a directive on Parental Leave since 1983. This directive²²³ was finally concluded and introduced in June 1996.²²⁴ As stated in the Preamble of the directive, the purpose was “to set out minimum requirements on parental leave and time off from work on grounds of force majeure, as an important means of reconciling work and family life and promoting equal opportunities and treatment between men and women”²²⁵. This directive had to be implemented by member states by June 1998 and within another year if there were difficulties in the implementation that necessitated this additional time.²²⁶

The directive has four main objectives. The first is to encourage better and more flexible means to organise work responsibilities thereby reconciling work and family life. The second objective is to take into account the effects of the population’s aging, the participation by women in the workforce and demographic changes when viewing this family policy. The third objective is to encourage men to play a greater role in the division of family responsibilities. Finally, the last objective is to promote equality between men and women in the workplace by creating equal opportunities and treatment.²²⁷ Objective three and four are important for the purpose of this dissertation since they are directly linked to the reason paternity leave is required in South Africa.

²²⁰ *Ibid.*

²²¹ M Van Jaarsveld ‘Parental leave: For the sake of employees and their children: a comparative study’ (2002) 14 *SA Mercantile LJ* 399,410.

²²² *Ibid.*

²²³ Directive 96/34/EC on Parental Leave

²²⁴ Note 221 above

²²⁵ *Ibid.*

²²⁶ *Ibid.*412.

²²⁷ *Ibid.*

This directive is applicable to all private and public employees, both male and female, who are parties to employment contracts or relationships.²²⁸ Both male and female employees are entitled to at least three months of unpaid leave on the birth of a child, on adoption of a child and to take care of a child.²²⁹ The only restriction is that the leave must be taken before the child turns eight. The directive also provides that the employee is entitled to return to the same position or a similar one to that which the employee occupied before the leave was taken.²³⁰

With regards to the above mentioned discretion that the member state has in the implementation and the conditions of the parental leave, the following issues can be determined: the basis on which the leave is to be granted; part time or full time, whether there should be a qualification on the leave such as a period of service, the amount of notice to be given before leave is taken and circumstances under which an employer may be entitled to postpone the granting of the parental leave.²³¹

Prior to the introduction of these parental leave provisions there was some disensus and varying opinions regarding the effect that they would have. One of the arguments raised was that instead of regulating a flexible employment practice, it would be better just to encourage it. Another argument raised was that in terms of the financial implications, larger firms would be better equipped to cover the extra costs involved with the absences than the smaller firms. The Trades Union Congress welcomed the implementation of parental leave because according to the Congress, it was important for employees to be able to strike a balance between the demands of work and raising children. The Equalities Opportunities Commission²³² was sceptical about the fact that the directive made provision for unpaid leave. It stated that this would mean that many people would not be in a position to enjoy their right to this leave if it were to be implemented as unpaid leave. The deputy director of the British Chambers of Commerce voiced concern about the negative effects that the absences would have on small businesses and stated that these absences could have the effect of destroying small businesses. The Chambers of Commerce stated that the parental

²²⁸ *Ibid.*

²²⁹ *Ibid.* 413.

²³⁰ *Ibid.*

²³¹ *Ibid.*

²³² The Equal Opportunities Commission was established to tackle the issue of sex discrimination. The term "equal opportunities" upholds the idea that all workers within an organisation should be entitled to and have access to all of the organisations facilities at every stage of employment, including the pre-employment phase. See <http://www.eoc.org.uk>. Accessed November 2016.

rights would destroy competitiveness; they would result in cost increases and possibly endanger the flexibility of the working practices that already existed.²³³

Therefore taking into account the position in the UK, South Africa may be able to get an idea of how to go about implementing similar provisions into its legal system. The provisions in the UK are based on a directive that has objectives that are relevant to a South African context too. That is to say that South Africa needs legislation that firstly encourages men to play a greater role in family responsibilities and secondly that promotes equal treatment and opportunities of men and women in the workplace.²³⁴ The UK also makes provision for one to two consecutive weeks of leave.²³⁵ According to the directive, states have the discretion to determine whether the leave provided for will be taken part-time or full-time.²³⁶ South Africa could therefore consider specifying whether the leave is to be taken on a part-time or full-time basis so as to eliminate any confusion. The UK position also indicated that the leave is applicable to both private and public employees. This is important if South Africa is to provide paternity leave because as indicated in the *MIA* case²³⁷, where there is no specific legislation in place and an employee does take a matter to court the court is likely to make an order for that specific party as opposed to making a rule of general application. This would therefore see an influx of court cases which have the effect of congesting the court system further. Finally, the leave provided for in the UK guarantees the protection of the employee's job by specifying that the employee is to return to the same position that he occupied prior to the leave. This is important to specify if South Africa is to provide paternity leave.

4.3. THE LEGAL POSITION IN KENYA

In terms of section 29(8), under Chapter 226 of the Kenyan Employment Act²³⁸ a male employee shall be entitled to two weeks of paid paternity leave. Section 2 defines an employee as a person who is employed for wages or a salary including an apprentice and indentured learner.²³⁹ Therefore this provision for paternity leave appears to only be limited

²³³ *Ibid.*

²³⁴ Note 2 above. 350-351.

²³⁵ Note 209 above.

²³⁶ Note 224 above.

²³⁷ Note 4 above.

²³⁸ Employment Act 11 of 2007

²³⁹ *Ibid.*

to a male employee and does not seem to cover what is referred to as a casual employee.²⁴⁰ A casual employee in terms of section 2 is defined as a person, the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time.²⁴¹ Therefore it would appear as though drafters intended to exclude casual employees by defining them as separate entities.²⁴² It is important to note that the subsection makes use of the word ‘shall’ which indicates that an employer is obliged to allow the employee a full two weeks of leave on the birth of his child.²⁴³ This subsection has been included under the maternity leave section. There are no qualifications or restrictions which could be problematic in that it leaves room for abuse either by the employer or employee. An example of such abuse is where an employer introduces his own qualifications on the provision.²⁴⁴ An example of this can be found in the UK provisions where employees are entitled to this leave if they have worked for their employer for a certain amount of time. Where this amount of time is not specified, it is left to the employer to determine the amount of time to be allowed and whether the employee meets that requirement.

There seems to be an attempt by the Kenyan legislators to address some of the gaping holes found in the leave provisions. The Employment Amendment Bill²⁴⁵ seeks to make provision for adoptive leave. In terms of section 154 of the Children’s Act²⁴⁶ an order of adoption is provided for. Therefore the question arises as to what the position would be if an employee became a parent by way of adoption as provided for by this section. The Bill provides that in terms of Article 53 of the Constitution²⁴⁷, children have the right to parental care and protection. Therefore this Bill seeks to introduce provisions which extend those rights to children who have been adopted as well. This is important because by making this amendment it will become necessary to amend the subsection that deals with paternity leave. This is an indication of the importance that is placed on family unit by the Kenyan

²⁴⁰ Lawyer Kenya ‘Paternity leave under employment act of Kenya’ (2008). Accessed from http://lawyer-kenya.blogspot.co.za/2008/05/paternity-leave-under-employment-act-of_03.html November 2016.

²⁴¹ Note 238 above. S1

²⁴² Note 240 above.

²⁴³ *Ibid.*

²⁴⁴ E Ondieki. ‘The politics of paternity leave: do men deserve it?’ Lifestyle magazine Accessed from <http://www.nation.co.ke/lifestyle/lifestyle/KENYA-politics-of-paternity-leave-do-men-deserve-it/1214-3162200-7fgckm/index.html> on 10 November 2016.

An employer in this scenario refused to grant the employee paternity leave on the basis that he was unmarried. This is not a restriction provided for in the act.

²⁴⁵ Kenya Gazette Supplement Senate Bills 2015.

²⁴⁶ Children’s Act 8 of 2001

²⁴⁷ The Constitution of Kenya 2010

Government. The government is keen to have adequate protection of the right to family as enshrined in Article 45 of the Constitution.²⁴⁸

As stated in chapter one of this dissertation, Kenya is one of very few African countries to introduce paternity leave provisions into their legal system.²⁴⁹ This decision stems from the fact that Kenya has ratified a number of international treaties and conventions.²⁵⁰ Therefore the International instruments that Kenya has ratified will be discussed. The first of these is the Vienna Convention on the Law of Treaties.²⁵¹ This convention is necessary in that it provides guidelines for the interpretation of a treaty. In terms of Article 31 of this convention, when interpreting a treaty, the ordinary meaning is to be given to the provisions of the treaty. The article also states that the provisions must be interpreted in good faith to promote the objectives that they aim to achieve.²⁵²

The second instrument that is relevant is the Convention on the Elimination of All Forms of Discrimination against Women²⁵³ (CEDAW). With regard to this convention, although it does not make provision for paternity leave, it highlights the importance of both males and females having a role in the upbringing of children. This is important as the purpose for paternity leave provisions being introduced throughout the world is to encourage fathers to play an active role in the responsibilities involved in raising children. The preamble also emphasises that by moving away from the traditional roles that men and women have played in the past is necessary for the achievement of equality. In addition to this, article 5

²⁴⁸ Chigiti, J. 4 February 2015. Kenya: Why Law Protects Parents Who Take Maternity and Paternity Leave. All Africa. The Star. Accessed from <http://allafrica.com/stories/201502040720.html> on 10 November 2016.

²⁴⁹ Note 11 above.

²⁵⁰ M Momanyi 'An Analysis Of Paternity Leave As A Human Right: Is Kenya On The Right Track In Achieving Gender Equality?' (2015) accessed from http://www.academia.edu/23502701/Paternity_leave_in_kenya on November 2016.

²⁵¹ Vienna Convention on the Law of Treaties, 1969 (1969) 8 *ILM* 679.

²⁵² Article 31 General rule of interpretation 1. "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: a. Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; b. Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: a. Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; b. Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; c. Any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended."

²⁵³ Convention on the Elimination of All Forms of Discrimination against Women 1979.

makes the point that stereotyped sex roles should be abolished.²⁵⁴ Therefore an argument for paternity leave on the basis of the provisions of this convention would not be unacceptable.

The third international instrument to be discussed is the Charter of the United Nations.²⁵⁵ The main aims of this Charter, as contained in its preamble, include achieving equality between men and women, reaffirming human rights and dignity in all persons.²⁵⁶ The equality between men and women can be achieved in the workplace. Although maternity leave benefits are far more extensive than those for paternity leave, Kenya has at least taken a step in fulfilling the objectives of the charter. Article 56 of this Charter states that Member States must take steps to achieve the purposes set out in article 55.²⁵⁷ Article 55(c) provides that the United Nations has a role to play in promoting and observing human rights without distinctions including those based on sex.

The next international instrument that regard must be had to is the Universal Declaration of Human Rights.²⁵⁸ In terms of this declaration, in article 2, the basic principles of non-discrimination and equality are set out.²⁵⁹ The declaration states that no distinction shall be

²⁵⁴ Article 5 states "Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women; (b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases."

²⁵⁵ Charter of the United Nations, 24 October 1945

²⁵⁶ "WE THE PEOPLES OF THE UNITED NATIONS DETERMINED to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom"

²⁵⁷ Article 55- "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: a. higher standards of living, full employment, and conditions of economic and social progress and development; b. solutions of international economic, social, health, and related problems; and inter- 11 national cultural and educational cooperation; and c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

²⁵⁸ United Nations, Universal Declaration of Human Rights of 1948

²⁵⁹ Article 2 -"Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty"

made between persons in the realisation of the rights contained in this Declaration. This guarantee of equality without discrimination before the law is also contained in Article 7.²⁶⁰

The Convention on the Rights of the Child²⁶¹ article 9(3) states that children have the right of contact with both of their parents. This article is qualified in that the right can be limited if it is detrimental for the child to have this contact. Article 18(1) emphasises the sharing of responsibilities associated with raising a child between the parents. Article 18(2) read together with article 18(3) places an obligation on member states to make an effort to assist parents with their responsibilities by providing assistance in the form of child-care to working parents.

Another International instrument adopted by Kenya is the International Covenant on Economic, Social and Cultural Rights.²⁶² This covenant makes provision for the equal treatment of men and women in employment. The covenant further provides that in order for people to enjoy social, economic and cultural rights, it is vital that discrimination be eliminated. Article 9 further places an obligation on states to guarantee sufficient maternity leave to women, parental leave to both parents and paternity leave for fathers. It also provides that all persons are entitled to equal access to social services and security. South Africa ratified this instrument in January 2015. At present, South Africa has only made a declaration to give effect to the right to education contained in this instrument.²⁶³

Finally Kenya adopted the International Covenant on Civil and Political Rights.²⁶⁴ The relevant article in this covenant is article 26 which also guarantees equality before the law.²⁶⁵ Article 2(1) places an obligation on states to respect and ensure that all persons within their jurisdictions are able to enjoy the rights provided for in the covenant without

²⁶⁰ Article 7- "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

²⁶¹ The United Nations art. 15, Convention on the Rights of the Child of 1989.

²⁶² International Covenant on Economic, Social and Cultural Rights of 1978

²⁶³ Declaration under article 13 (2) (a) "The Government of the Republic of South Africa will give progressive effect to the right to education, as provided for in Article 13 (2) (a) and Article 14, within the framework of its National Education Policy and available resources." Accessed from

https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=IV-3&chapter=4&clang=en on November 2016.

²⁶⁴ International Covenant on Civil and Political Rights of 1976

²⁶⁵ Article 26- "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

discrimination.²⁶⁶ Discrimination for the purposes of this covenant was defined as any distinction, preference or exclusion that has the effect of impairing or nullifying the enjoyment or exercise, recognition of all rights and freedoms on an equal footing.²⁶⁷

These instruments do not expressly provide for paternity leave. They do however highlight the human rights that must be taken into account if a state is to introduce paternity leave provisions.²⁶⁸ Kenya being a signatory to these instruments has had regard to these instruments likewise South Africa should too.

4.4. CONCLUSION

This chapter aimed to set out the legal position in foreign jurisdictions. The position pertaining to paternity leave provisions in Kenya and the United Kingdom have therefore been discussed. Fathers in the UK are entitled to take one to two consecutive weeks of leave for each birth.²⁶⁹ With regards to whether this leave is paid or unpaid leave, there are a number of conditions that must be present for it to be paid. According to the regulations governing paternity leave, the employee must have been working for that employer for at least 26 weeks by the time that there are 15 weeks until the birth of his child.²⁷⁰ The UK has managed to limit the scope of employees that are eligible for paternity leave by adding these requirements. The UK having been a member of the European Union, was one of the last member states to implement the paternity leave provisions as per the directive discussed but they have nonetheless fulfilled their obligation.

The position regarding paternity leave provisions in Kenya is that fathers are entitled to two full weeks of leave on the birth of the employee's child.²⁷¹ The fact that Kenya allows for paternity leave is impressive as it is one of few African states that does. They have taken guidance from a number of international instruments in the implementation of the provisions however it can be argued that the legislation has not been adequately drafted. The provision is contained in a single subsection in a section that deals with maternity

²⁶⁶ Article 2- "1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

²⁶⁷ B Reinalda 'Routledge History of International Organizations: From 1815 to the Present Day' (2009) p509.

²⁶⁸ Note 250 above, 22.

²⁶⁹ Note 209 above.

²⁷⁰ Note 212 above.

²⁷¹ Note 238

leave.²⁷² The provision is therefore quite vague and is open to some criticism. The fact that it has been drafted in this manner means that there is a substantial amount of discretion vested in the employer which can be problematic. The act is silent on any restrictions or qualifications. There is no mention of formalities that must be met in the request for leave for example. The act is also silent on whether or not the two weeks is inclusive of weekends or whether it excludes the weekends.

South Africa can therefore take a few tips from both of these legal systems in the drafting and implementation of their paternity leave provisions. It is clear that merely adding a subsection to an existing section is not sufficient to adequately deal with the issue of paternity leave. In order to prevent abuse however from both employees and employers of the provisions, the drafters would have to include some restrictions and qualifications as is the case in the United Kingdom. In light of the discussion in this chapter, the next chapter will discuss recommendations.

²⁷² S29(8) - "male employee shall be entitled to two weeks paternity leave with full pay."

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1.INTRODUCTION

The *ILO Maternity and Paternity at Work: Law and Practice across the World*, after reviewing national laws of a large number of countries around the world, found that although many countries had sufficient maternity leave benefits, paternity leave seems to be neglected.²⁷³ South Africa is one such country, despite having very progressive labour laws.²⁷⁴ This dissertation has illustrated how far behind South Africa is with regard to paternity leave. This study has set out the current legal position with regards to paternity leave in South Africa.²⁷⁵ Having due regard to that position, the Constitutional rights that may be affected by the lack of paternity leave provisions or that may be useful in a Constitutionality challenge to bring about paternity leave were then discussed.²⁷⁶ The position in the UK and Kenya was then discussed for the purpose of determining how far behind South Africa is in comparison with other countries which have a similar legal system and a similar socio-economic position respectively.²⁷⁷

5.2.CONCLUSION AND RECOMMENDATIONS

South Africa fails to make any provision for paternity leave. In comparison to other states in the SADC region however, South Africa appears to be on par with the norm as very few of the other member states make provision.²⁷⁸ It is important to note however that these states may be failing to meet their obligations in terms of the Code on Social Security in SADC as they are encouraged to introduce paternity leave into their legal systems.²⁷⁹ Although many developing countries prioritise other issues above the implementation of policies aimed at the family, it could be argued that this is not a valid reason for neglecting to make provision for paternity leave.²⁸⁰ South Africa and Africa in general are in desperate need to eliminate all forms of inequality between men and women. As stated previously, the lack of paternity leave provisions means that women are either temporarily or for extended periods unable to

²⁷³ Note 11 above.

²⁷⁴ Note 9 above.

²⁷⁵ See Chapter 2.

²⁷⁶ See Chapter 3.

²⁷⁷ See Chapter 4.

²⁷⁸ Note 41 above.

²⁷⁹ Note 40 above.

²⁸⁰ Note 41 above.

be part of the work force. This hinders the growth of a country's economy in the sense that the GDP is lowered where women are not part of the labour force.²⁸¹ Since most of the countries in Africa have developing economies, these provisions would be helpful and worth implementing.

South Africa is a country that is still developing and perhaps the cost of implementing paternity leave at state expense is not feasible. Therefore it is proposed that in the implementation of paternity leave, the legislators should aim to make provisions similar to those contained in the BCEA that allow for maternity leave. That is to say that paternity leave may be subsidised by the state as and if it is able to do so. Alternatively South Africa could do what the UK has done and only oblige the employer to allow paid paternity leave to employees that have been employees for a certain amount of time. The financial burden associated with such a change should not hinder the introduction of paternity leave however. Paternity leave should be introduced in a manner that does not allow the employer full discretion on whether it should be paid or unpaid leave. As illustrated in the *MIA* case²⁸², if such cases do make their way to the courts, the courts appear to be prepared to order that the leave be paid. Therefore it is important that the provisions be clear to prevent a flurry of court cases that would further congest the already overloaded court system.

There are a number of pieces of legislation that are important to take into account if paternity leave is to be introduced. The first statute is the Children's Act²⁸³ which governs surrogacy in South Africa.²⁸⁴ Surrogacy is important in that persons who are commissioning parents in a surrogacy agreement acquire the same rights and responsibilities that biological parents would have.²⁸⁵ This means that in the introduction of paternity leave provisions, the same would have to apply. The second statute is the Civil Unions Act.²⁸⁶ In terms of this Act, the parties acquire the same rights that parties who enter into a union in terms of the Marriages Act²⁸⁷ would have. This means that in the introduction of paternity leave, parties to these unions must be given the same rights that spouses under a marriage would have. The *MIA* case²⁸⁸ also suggested that altering the existing legislation would perhaps be the

²⁸¹ Note 15 above.

²⁸² Note 4 above.

²⁸³ Note 53 above.

²⁸⁴ *Ibid*, s292.

²⁸⁵ Note 17 above.

²⁸⁶ Note 52 above.

²⁸⁷ Marriages Act 25 of 1961.

²⁸⁸ Note 4 above.

way to go about introducing paternity leave.²⁸⁹ In terms of the BCEA²⁹⁰ and the UIA²⁹¹ the wording makes specific reference to ‘maternity’, which is gender specific. Legislators would thus have the discretion to amend the existing sections to make them gender neutral or introduce additional sections to specifically cater for ‘paternity’. It is unlikely that they would amend the existing legislation by changing the wording to gender neutral wording however. Firstly by merely amending s25²⁹² in this manner would have the undesired effect of providing four months of paternity leave and this is not practical. The draft Bill²⁹³ that was submitted to Parliament earlier this year only calls for ten days which would be more appropriate if one looks at the two weeks provided for in most jurisdictions. Secondly there are qualifications that must be placed on paternity leave and this would be difficult to do if drafters were to merely insert a subsection into an existing provision. As stated in chapter two, it important for restrictions to be put on paternity leave provisions. This is to protect them from abuse by employees. It is also to protect employees from employers having too much discretion where the provisions are too ambiguous. The restrictions must be such that they do not amount to unfair discrimination however.

The most important consideration that must be had in the introduction of these provisions is the Constitution²⁹⁴ and the rights that it guarantees. More specifically, for the purposes of this dissertation the right to equality²⁹⁵ and the best interests of the child²⁹⁶ are relevant. The Constitutional Court has already dealt with a number of cases such as *Hugo*²⁹⁷, *SA Nursing Council*²⁹⁸ and *Jooste*²⁹⁹ where the issue has been unfair discrimination. As stated in Chapter three, the court will assess whether there is a rational link between the differentiation and a government purpose or statute. An example of which are the provisions that allow employers to differentiate between employees and prospective employees for the purposes of affirmative action.³⁰⁰ A distinction may be made between men that are entitled to paternity leave and those that are not because not all distinctions between persons amount

²⁸⁹ Note 88 above.

²⁹⁰ Note 16 above.

²⁹¹ Note 92 above.

²⁹² Note 16 above.

²⁹³ Note 15 above.

²⁹⁴ Note 80 above.

²⁹⁵ *Ibid*, s9.

²⁹⁶ *Ibid*, s28.

²⁹⁷ See chapter 3.

²⁹⁸ *Ibid*.

²⁹⁹ *Ibid*.

³⁰⁰ Note 204 above.

to unfair discrimination.³⁰¹ The discretion to determine this will have to be left to the drafters of the law. Therefore legislators will have to take into account that there must be a rational link between any restrictions they impose and the purpose that the provisions aim to achieve. When drafting paternity leave provisions it is important that they do not impose arbitrary restrictions on who can claim this leave. If the purpose of these provisions is to promote the best interests of the child and to promote equality in the workplace, then the distinction between males that are entitled to this leave and those that are not must reflect this.

The provisions of the BCEA³⁰² seem to be drafted in a manner that only takes into account the physiological well-being of the mother after child birth.³⁰³ They also appear to allow time for the mother to bond with her new-born. Therefore a Constitutional challenge against these provisions would likely be successful. On the grounds of equality, men should have the right to bond with their children as well.³⁰⁴ On the grounds of the best interests of the child, having time to bond with their fathers is in the best interests of the child as stated in Chapter one. With regard to the provisions of the UIA³⁰⁵ which only entitle a pregnant contributor to claim maternity benefits, a challenge against these provisions would most likely result in a gender neutral approach being taken. The fact that mothers are able to protect their salaries for up to four months and there is no such protection available to fathers is problematic. The legislators may need to amend the provisions of the UIA³⁰⁶ in a manner that allows men to have the same protection of their wages. With regards to the legislation (the EEA³⁰⁷ and PEPUDA³⁰⁸) which has been enacted to give effect to the constitutional values is also relevant in the introduction of paternity leave. The main objective of this legislation is to promote the equal treatment of employees. The legislation also seeks to promote fair labour practices as guaranteed in s23 of the Constitution.³⁰⁹ The introduction of paternity leave provisions is essential to achieving these objectives in that it

³⁰¹ See discussion in Chapter 3.

³⁰² Note 16 above.

³⁰³ See discussion of *MIA* in Chapter 2.

³⁰⁴ *Ibid.*

³⁰⁵ Note 92 above.

³⁰⁶ *Ibid.*

³⁰⁷ Note 59 above.

³⁰⁸ Note 113 above.

³⁰⁹ Note 3 above.

will correct the inequality that arises in the work place as a result of a lack of these provisions.³¹⁰

A number of states have international obligations, in terms of the international instruments that they have ratified, to implement legislation in their legal systems to promote a number of international objectives. Some of these objectives include the promotion of parental responsibilities and the promotion of equality. Chapter four of this dissertation discusses the position in the UK and Kenya. With regards to the position in the UK, fathers are entitled to two weeks of paternity leave.³¹¹ There are restrictions on whether the paternity leave will be paid or unpaid leave. In order for the leave to be paid, the employee must have been employed for 26 weeks by that employer by the time that there are 15 weeks until the birth of the child.³¹² By placing this restriction on paternity leave, the number of men that will take the leave is limited. The UK introduced paternity leave in accordance with its international obligation. The UK being a member of the EU; which has a directive for maternity and paternity leave, meant that the UK had the obligation of implementing provisions into its legal system, to give effect to the objectives of that directive.

In Kenya fathers are entitled to two weeks of paternity leave.³¹³ Kenya has taken a number of international instruments into consideration in providing this leave.³¹⁴ This right to paternity leave is provided for in a single subsection. Furthermore it is ambiguous in the sense that it does not specify any formalities that must be adhered to in the request of the leave. It also fails to specify whether the fourteen days which it provides for are inclusive of weekends or whether they exclude them. The leave provided for also fails to specify a time period in which the leave can be taken. It is important to note that paternity leave in Kenya is paid leave. This is to guarantee the financial security of the father during his leave period.

South Africa can therefore use both of these legal systems as a guideline in introducing paternity leave into its legal system. South Africa has like both of these countries ratified a number of international instruments which obligates it to make transformations to its legal system. The fact that it is a member of the African Union and the United Nations gives rise to its international obligations as is the case in the UK and Kenya. The UK has implemented a number of regulations to provide for additional leave and to provide for restrictions. This

³¹⁰ Note 2 above.

³¹¹ See discussion in Chapter 4.

³¹² *Ibid.*

³¹³ *Ibid.*

³¹⁴ *Ibid.*

may be helpful to South Africa in that it can implement similar restrictions in its provisions. South Africa can also use Kenya as a guide on not merely putting one subsection into an existing piece of legislation to provide for paternity leave. The provision of paternity leave must be included in a manner that is unambiguous and that addresses issues such as the formalities to be followed in the request of the leave, the period in which the leave is to be taken and they must also be specific in whether the days stated are inclusive or exclusive of weekends. The fact that the number of days requested in the draft Bill is ten days appears to indicate that the ten days refers to working days and is therefore exclusive of weekends. Therefore if South Africa were to introduce paternity leave, taking into account the UK and Kenyan provisions the provision could perhaps be something along the lines of: “A male employee shall be entitled to two weeks (working days) of paternity leave on the birth of a child if-

- (a) he is to be; the biological father, the adoptive father or the intended father (in cases of surrogacy) of the child;
- (b) he has given his employer a written request for leave at least 15 weeks before the expected due date; and
- (c) he has been employed for a period of at least 26 weeks by the time that there are 15 weeks until the due date.”

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