

**THE EFFECT OF THE AFRICAN CULTURAL PRACTICES ON FAMILY
RESPONSIBILITY LEAVE**

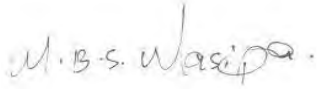
MOKGERE BUSISIWE SHAREEN MASIPA

Student number: 961087579

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

A handwritten signature in cursive script, appearing to read "M.B.S. Masipa".

Signed.

MOKGERE BUSISIWE SHAREEN MASIPA

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www.salgbc.co.za/mainagreement, Part B clause 3.4 (accessed on 30 October 2014)

LIST OF ABBREVIATIONS AND ACRONYMS

Constitution	The Constitution of the Republic of South Africa, 1996
BCEA or 1997 BCEA	Basic Conditions of Employment Act 75 of 1997
1983 BCEA	Basic Conditions of Employment Act 3 of 1983
CC	Constitutional Court
CCMA	Commission for Conciliation, Mediation and arbitration
EEA	Employment Equity Act 55 of 1998.
FR	Family Responsibility
FRL	Family Responsibility Leave
ICCPR	International Convention on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IDEA	Independent Employees Association
<i>ILJ</i>	Industrial Law Journal
ILO	International Labour Organisation
LC	Labour Court
LAC	Labour Appeal Court
LRA	Labour Relations Act 66 of 1995
NEHAWU	National Education Health and Allied Workers Union
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000
<i>SA Merc LJ</i>	South African Mercantile Law Journal
SCA	Supreme Court of Appeals
TGR	Total Guaranteed Remuneration

CHAPTER 1:

INTRODUCTION

1 INTRODUCTION

Family responsibility (FR) is an ideological social construct that relates to functions and roles that individuals play in a family. The interpretation of the concept may be influenced by cultural differentiation, particularly relating to role categorisation among family members. Whereas family responsibility leave (FRL) is a workplace entitlement in South Africa, provided for in the Basic Conditions of Employment Act¹ (the BCEA), time and time again employees find themselves differentiated against and having to justify their rights and entitlement to such leave to their employers, to fulfil family roles. In most cases these rights differ from the employers' policies resulting in workplace conflict. This is especially observable when employees belonging to 'extended families', and perceiving relatives in their families as equally important family members expect a 'fitting' treatment from their employer. For example, the only two cases which dealt with the concept family responsibility in the African context was that of *Public Servants Association on behalf of Jonase*² and *Fairy Tales Boutique t/a Baby City Centurion*³ where employees alleged that their brother-in-law and mother-in-law's funerals respectively constituted a family responsibility. In both instances employers found that the in laws did not fall within the category of family and refused to grant the employees the requested family responsibility leave.

Fitting treatment implies that FRL should be granted where familial assistance is required by any of the members of such family. On the contrary some employers rely on the list of family members provided by the BCEA⁴ and refuse to grant FRL outside the scope of the Act. Therefore, Bulpitt⁵ finds it difficult "explaining to emotionally distressed employees why FRL cannot be granted" because some employers simply place reliance on the provision of the BCEA

¹ Act 75 of 1997, Chapter three Section 19 to 27.

² *Public Servants Association on behalf of Jonase and Department of Justice & Constitutional Development* (2011) 32 ILJ 1271 (BCA).

³ *Fairy Tales Boutique t/a Baby City Centurion v Commission for Conciliation, Mediation and Arbitration and others* (JR469/09) [2010] ZALC 160 (20 August 2010).

⁴ Section 27 of the BCEA.

⁵ A Bulpitt www.synoconsulting.co.za/index/article/aid/=4:family-responsibility-leave accessed 16 November 2013

to decline such leave requests. Such a treatment, which may be in conflict with cultural and/or customary practices, is viewed by affected employees as prejudicial treatment amounting to discrimination on the basis of their culture and concept of family.

Meanwhile, the Constitution of the Republic of South Africa, 1996⁶ (“the Constitution”), guarantees amongst other rights; the right to equality⁷, the right to fair labour practices⁸ and the right to cultural practices⁹. This is in line with South Africa’s obligations as a member state to the United Nations and in recognition of the International Bill of Rights.¹⁰ Subsequent to the Constitution, the BCEA and the Employment Equity Act¹¹ (the EEA), were passed as subordinate legislation to give effect to the Constitution. These pieces of legislation promote and enforce the right to fair labour practices and focus on issues of discrimination respectively.¹² Both Acts comply with the Republic’s obligations as a member of the International Labour Organisation (ILO).¹³

The BCEA¹⁴ prescribes basic conditions of employment that regulates the workplace, setting out conditions of employment for all employees with the exception of those employees specifically excluded by the Act.¹⁵ These basic conditions exclude employees whose conditions of employment are regulated through their employment contracts, collective agreements and other legislation. For those employees falling within the ambit of the BCEA, it sets out their employment policies and procedures which employers rely on. One of the conditions set out in the BCEA is a provision for leave, which includes amongst others family responsibility leave.¹⁶ In providing for family responsibility leave, the BCEA qualifies family members that are the

⁶Constitution of the Republic of South Africa, 1996.

⁷ Section 9 of the Constitution.

⁸ Section 23 of the Constitution.

⁹Section 31 of the Constitution.

¹⁰Articles 7, 16, 23 and 27 of the Universal Declaration of Human Rights.

¹¹The Employment Equity Act 55 of 1998.

¹²Preamble of the BCEA and Section 2 of the BCEA read with the Preamble to the EEA.

¹³Forced Labour Convention, 1930(No. 29); Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); Right to Organise and Collective Bargaining Convention, 1949 (No. 98); Equal Remuneration Convention, 1951 (No. 100) Article 1, 2, 3 and 4; Discrimination (Employment and Occupation) Convention, 1958 (No. 111) Article 1, 2 and 5; Workers with Family Responsibility and Recommendation No. 165 Convention, 1981 (No. 156).

¹⁴ Act 75 of 1997.

¹⁵Section 3 of the BCEA.

¹⁶Section 27 of the BCEA.

responsibility of an employee and for whom leave may be used. In terms of the section dealing with FRL, family responsibility leave may be granted in instances where members of a family require familial assistance. The classification allowed from the BCEA restricts the application to a nuclear family. Notably, the BCEA does not define family responsibility nor does it provide a definition for family and this must be inferred.

The EEA¹⁷ on the other hand complements the Constitution in eliminating unfair discrimination and achieving a diverse workforce. Discrimination on any of the grounds listed in the Constitution¹⁸ and those in the EEA¹⁹ is unfair unless proven otherwise. The EEA prohibits discrimination on the ground of family responsibility.

Despite the stated provisions, employees still encounter difficulties in their workplaces. The encounter is common among African employees who belong to the indigenous communities in South Africa. The employees experience challenges and limitations when seeking to uphold family values and practice their culture. For example, restrictions are encountered when applying for family responsibility leave as a consequence of limitations in the categorisation of instances determining the awarding of such leave. Employees feel frustrated by failure to provide assistance or to even bury their 'loved ones' in some cases, who according to their cultural practices and family values are classified as members of their families.²⁰

The limitations in the categorisation of instances when FRL may be granted seem to be influenced by the different cultural description of the structure of a family which may be interpreted through sociological or anthropological ideologies. Therefore problems arise because of different impressions of family structures in South Africa as a result of the different races and cultures in the country.²¹ On the one hand, the Western definition of family is said to originate

¹⁷ Act 55 of 1998.

¹⁸ Section 9(3) of the Constitution lists the prohibited grounds.

¹⁹ Section 6 (1) of the EEA lists the prohibited grounds.

²⁰This was the case in *Jonase* (note 2 above) and *Fairy Tales Boutique* (Note 3 above).

²¹Guide to the 2014 South African Election, welections.wordpress.com

from the “traditional nuclear family”²² and on the other, the African understanding, which encompasses more categories of people and is classified as “extended family”.²³

The problem is seemingly common in countries with indigenous communities, in which the Western definition or classification does not represent the culture of the locals. Morphy refers to households as a prevalent feature for indigenous communities in Australia and argues the incommensurability of the nuclear definition and the definition of household in the indigenous sense. According to Morphy, households, “are often spread across more than one dwelling”, with “everyone related to everyone else”.²⁴ This is said to “conflate the ‘family’ with the usual residents of the dwelling.”²⁵

Although the discretion to grant leave rests with the employer,²⁶ solutions have to be found that enable informed decisions to avoid conflicts. This study investigates how the African family structure in South Africa is affected in the granting of FRL and establishes whether the awarding of leave without considering cultural differences constitute discrimination. This is done by establishing how the family structure provided by the BCEA conforms to African cultural practices in South Africa and whether or not the application of the provision does differentiate between employees.

2 PROBLEM STATEMENT

Section 27(2) of the BCEA sets out employees’ entitlement to family responsibility leave and circumstances under which the leave may be granted. The provision limits the definition of family to a nuclear family, thereby excluding other broader and cultural definitions and deprives African people of their entitlement. Although employers possess the discretion of awarding or not awarding leave related to family responsibility/compassion, choices to do so are not only

²²D Popenoe ‘American Family Decline, 1960 – 1990: A review and Appraisal’ (1993) 55 *Journal of Marriage and Family* (1993) 527-555 and F Morphy ‘Lost in Translation? Remote Indigenous households and definitions of the family’ (2006) 73 *Family Matters* 23-31.

²³SV Nzimande ‘Family Structure and Support Systems in Black Communities’ in AF Steyn, Strijdon HG, Viljoen S and Bosman FJ (eds) ‘*Marriage & Family Life in South Africa: Research Priorities*’ (1987) Pretoria: Human Science Research Council.

²⁴Morphy (note 22above) 28.

²⁵Ibid 31.

²⁶My Wage <http://www.mywage.co.za/main/decent-work/family-responsibilities>

influenced by productivity consequences of the employee's absence as some courts and tribunals may conclude but may also be indicative of compliance tendencies of other employers. That is, some employers may be misled by section 27(2) to waive their discretion. In contrast to this, the EEA provides a wide definition of family responsibility which is all encompassing. It is noteworthy to say that the BCEA was enacted prior to the EEA. This may explain the different definitions and the fact that the latter is more accommodating. A further factor may be because the EEA was passed specifically to address discrimination issues in the workplace. On the face of it, the definition in the BCEA appears to be violating the rights of Black employees.

3 RESEARCH QUESTION

Does the awarding of family responsibility leave as provided for in South African policies/legislation discriminate against cultural practices of Black/African employees?

3.1 Research sub-questions

3.1.1 Does the definition of family responsibility leave discriminate against the cultural notion of family responsibility of Black/African employees?

3.1.1.1 What is the definition of family and its consequent responsibilities in African/Black Culture?

3.1.1.2 What is the legal definition of family responsibility leave?

3.1.1.3 Does the legal definition of family responsibility leave include or exclude the cultural definition of family responsibility for Black/African employees?

3.1.1.4 How does the Constitution protect the rights of Black/African Employees to family and fair labour practices?

3.1.1.5 Is the awarding of family responsibility leave as provided for in legislation compliant with the constitutional rights of Black/African employees?

3.1.1.6 Does the legal definition of family responsibility leave amount to unfair discrimination on the basis of family status?

3.1.2. How have the courts interpreted the cultural family responsibility leave of Black/African Employees?

3.1.2.1 How have the South African courts interpreted cases relating to the awarding of family responsibility leave?

3.1.2.2 Is the courts' approach compliant with the Constitution?

3.1.3. If the South African legal position falls foul of the Constitution and the state's international law obligations towards the recognition of the cultural family responsibility of Black/African employees how can this be rectified?

4 THE RATIONALE

Whilst some literature has considered the situation of women (and men) in the workplace with regard to specifically child care as family responsibility,²⁷ there is no academic opinion in South Africa on the parameters of family responsibility in relation to extended family members of African employees. Yet, there appears to be a problem in awarding family responsibility leave with respect to African cultural practices. Whilst equalising the care responsibilities of the sexes has made some strides,²⁸ recognition of diverse family forms and care responsibilities have not featured but for an isolated case.²⁹ Frustrations encountered by African employees when employers decline their applications for FRL result in accusations of unfairness and cause

²⁷Dancaster L and Cohen T 'Workers with family responsibilities: a comparative analysis to advocate for the legal right to request flexible working arrangements in South Africa' (2010) 34(1) *South African Journal of Labour Relations* 31-45; Cohen T and Dancaster L 'Family responsibility discrimination litigation – a non-starter?' (2009) 20(2) *Stellenbosch Law Review* 221-240; Dancaster Land Baird M 'Workers with care responsibilities: is work-family integration adequately addressed in South African labour law?' (2008) 29 ILJ 22.

²⁸ K Padayachee 'Labour Court backs Family Responsibility' *IOL News* 13 June 2012 <http://www.iol.co.za/news/crime-courts/labour-court-backs-family-responsibility-1.1317812> (regarding the case of *Hugo v eThekweni Municipality and Others* settled in favour of flexible working arrangements for an employee, the mother of an autistic child); Holness W 'Family Responsibility in the Workplace' <http://realisingrights.wordpress.com/2012/10/18/family-responsibility-in-the-workplace/> See further: Brand H and Barreiro-Lucas J 'Return-to-work experiences of female employees following maternity leave' (2014) 38(1) *South African Journal of Labour Relations* 69-92; Field, CG, Bagraim JJ and Rycroft A 'Parental leave rights: have fathers been forgotten and does it matter?' 2012 36(2) *South African Journal of Labour Relations* 30-41.

²⁹*Jonase* (note 2 above).

workplace strain between employers and their employees.³⁰The employees, who feel that their rights are being desecrated and their families values compromised equate the refusal of FRL to an act of discrimination on the grounds of their culture. Employers on the other hand are led by legislation, which they rely on to avoid conflict, but end up with court judgments that are contrary to what was promulgated by the guiding document, the BCEA.

There are indications that some employers, if they use discretion, do so with limited understanding of what family means in some cultures. A study that reveals difficulties encountered by African employees when seeking to exercise their leave entitlement and which also highlights causes of such problems is pertinent to the situation. The examination of African cultural practices and values and the meaning of family within the African communities together with resulting responsibilities will contribute to better understanding of their expectations when they request for FRL.

Information on the legal definition and the provision of family responsibility leave as provided by law and policies including implications thereof are equally important. The purpose for the study is to explore the existence of discriminatory practices in the awarding of family responsibility leave and to establish if this is as a result of legislative/policy documents and if so, to recommend best practices.

The study is significant in that employers seek information on when and how to show “sensitivity and understanding of the cultural practices of employees”.³¹ The *Fairy Tales Boutique* judgment³², cited by Jordaan, reveals consequences of insensitivity. Jordaan alerts that the implications of requests for FRL related to culture may be so serious that considerations may even have to be made when FRL days are exhausted.³³

Although the structural classification is important to this study, the basis for the South African inclination towards the Eurocentric (or Western) definition of family structure in this regard is

³⁰Jonase (note 2 above) and *Fairy Tales Boutique* (note 3 above).

³¹B Jordaan ‘Accommodating Cultural Beliefs and Indigenous Customs’. <http://www.hrworks.co.za/articles/69-accommodating-cultural-beliefs-and-indigenous-customs> accessed on 12 November 2013

³²*Fairy Tales Boutique* (note 3 above).

³³Jordaan (note 31 above).

not established in this study. It is hoped that the study will influence contracts and policies regulating leave of those excluded by the BCEA take culture into consideration that results of this study will influence those responsible for such contracts and policies also.

5 RESEARCH METHODOLOGY

The study is a qualitative inquiry of non-interactive nature. It establishes the understanding of the concept 'family' in the labour market (workplaces) and in the African culture and determines to what extent there are similarities and differences between the two definitions. The study explores the effects of any differences in line with the legislation regulating the rights of employees as well as responsibilities of employers in the application of and the awarding of family responsibility leave.

The research studies a case of the South African FRL by utilising non-empirical desktop research. This is done this by reviewing various legislative documents, especially those that protect the right to fair labour practice, prohibit discrimination and regulate the workplace, in order to create knowledge in the workplace dealing with instances relating to the provision of FRL. The study also establishes the African definition and understanding of 'family' and makes a comparison between the two levels of understanding. The study then explores activities relating to FRL as defined by the law in workplaces and how this affects or is affected by culture of the African employees.

The design of the study comprises two aspects of the study of family, the cultural and then legislative definitions. These are followed by the recommendations for a non-discriminatory alternative definition of concept family and family responsibility to include the African employee.

Figure 1 below sketches the research design.

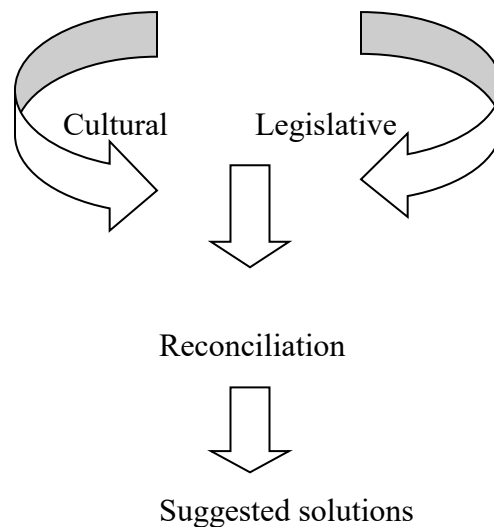


Figure 1. A framework of the study design

6 CHAPTER OUTLINE AND BREAK-DOWN

The remaining chapters in this study are as follows:

6.1 Chapter 2 The cultural definition of family responsibility leave

This chapter considers the definition of family as the starting point to defining the consequent family responsibility. It starts by considering the international definition and then deals with the South African definition. Included in the definition are the responsibilities arising from the two cultures.

6.2 Chapter 3 The legal definition of family responsibility leave

The legal definition of family is considered taking into account the international instruments ratified by South Africa, the regional commitments and then available national legislation. Relevant employment law statutes are then analysed with the Constitution of South Africa as the guiding document.

6.3 Chapter 4 Discrimination and Culture Practices

An understanding of these concepts will further assist in determining the existence of discrimination and other rights conferred by the Constitution relevant to the study.

6.4 Chapter 5 Interpretation of family responsibility leave by South African courts

Having dealt with the definitions and relevant South African legislation, a review of cases will be considered to establish how the Courts have interpreted and applied the concept.

6.5 Chapter 6 Conclusion and Recommendations

Chapter 6 analyses the legal interpretation embodied in several pieces of legislation and is intended to reveal whether there are discriminatory tendencies in the awarding of FRL. In order to answer this question, this will require a review of South African Constitution and the Employment Equity Act which deal with and prohibit unfair discrimination in the workplace. An understanding of discrimination supports the discussion and interpretation of practices relating to FRL. The application of FRL is to be reviewed in relation to the selected listed grounds. It will also include an analysis of the concept by South African courts.

Conclusions are made as to whether the legislation is discriminatory and necessary recommendations following from this are then presented.

CHAPTER 2:

THE CULTURAL DEFINITION OF FAMILY

2.1 *Introduction General Definition*

A family is defined differently by different dictionaries, which each provide different versions in accordance with different uses. For example, a family may be described in terms of relationship as “a group of people who are closely related by blood, as parents, children, uncles, aunts and cousins”.³⁴ Further classifications may be in terms of function, referring to parents rearing their children and to people who live together and operate as a single household or even through lineage (ancestry), bringing together all descendants of a common progenitor (ancestor).³⁵

The concept of immediate family is also used in legal documents. The concept is said to describe the family in its extended form of the one above to also include siblings, spouses, step-children and parents, foster children and parents, in-laws, siblings in-laws, grand and great-parents, step-grand and great-parent.³⁶ Foster parenting is regarded as a form of adoption wherein children are legally placed in places of shelter for their safety.³⁷

This section is divided into two sub-sections, the definition in relation to the Western culture and the African understanding of what a family is. Reasons for the inclusion of the two understandings are; 1) to acquire an understanding of the Western influence on law making in a previously colonised state, for the sake of this study and 2) to gain an understanding of what constitutes a family, by the African group said to be affected by possible discriminatory actions in the workplaces. In both cases, the definitions seem to be affected by changes in behaviour patterns of the group involved.

³⁴Dictionary Reference www.dictionary.reference.com accessed on 14 November 2014

³⁵Ibid.

³⁶Ibid.

³⁷Fostercare www.fostercare.com accessed on 9 December 2014

2.2 *The Western/Eurocentric Meaning of a Family*

Prior to the interrogation of any of the definitions alluded to by different authors, it is important to note the warning by Popenoe, that the term family “has been used in so many ambiguous ways in recent years that the explanation of its use has special importance” and that “the term has even become controversial”.³⁸ A broader understanding of what a family is may help unveil the African meaning of the word. Bengtson argues that a family is a “process” or system that is influenced by members of its group (in this sense group meaning constituency).³⁹ This explained dynamism of the process, which diminishes the idea of family as a structure, emphasises its functional behaviour in which members interact within a pattern of behaviour understood within parameters of relations among members of the group.

In its origin, an English family is said to have included the next of kin of the householder as well as servants⁴⁰. An historic analysis by Bengtson⁴¹ portrays the process of change as moving from an extended nuclear and social institution of the 19th century based on law and customs to a typical white modern family with just two generations, parents and their children. This traditional nuclear family is said to be characterised by lifelong marriages with well-defined division of labour. Men possessed and maintained authority in the family and females were restrained to housewife functions. The families were responsible for procreation, socialisation of children, care, affection, companionship, sharing of (economic) resources such as food, shelter and clothing and sexual regulation.⁴² In the latter instance, members would be expected to be responsible for the outcomes of their sexuality.⁴³

The process theory explains reasons why some authors agree on the evolution of a family, which others refer to as a family decline.⁴⁴ Later, family is said to have declined from being a social

³⁸Popenoe (note 22 above) 527-542.

³⁹ VL Bengtson ‘Beyond the Nuclear Family: The Increasing importance of Multigenerational Bonds’ (2001) 63*Journal of Marriage and Family* 1-16.

⁴⁰Merriam Webster Dictionary www.merriam-webster.dictionay.com accessed 14 November 2014

⁴¹Bengtson (note 39 above) 3

⁴²*Ibid.*

⁴³Dictionary Reference (note 34 above) defines sexuality as follows: 1. sexual character; possession of the structural and functional traits of sex. 2. recognition of or emphasis upon sexual matters.

⁴⁴Popenoe (note 22 above); J Stacey ‘Good Riddance to “The Family”’: A response to David Popenoe’ (1996) 55(3) *Journal of Marriage and Family* 545-547.

institution to that which provides emotional support. The modern family is referred to by Stacey⁴⁵ as the post-modern family, influenced by urbanisation, secularism⁴⁶ and the emancipation of women. This break-up of the nuclear family was observed in the 21st century, wherein the function of a family became; child bearing, affection and companionship. This type of family, it has been argued, provides legitimacy to individual needs over collective goals and is said to have weakened the family as an institution that is meant to nurture its members.⁴⁷

The changes in behaviour made way for heterogeneity in family forms. Whereas initially kinship was most important in the family institution, forms with “relations extending beyond biological and conjugal relations”⁴⁸ emerged. Several factors have been identified that led Popenoe⁴⁹ to restrict the definition of a 21st century to “a group of kin consisting of at least one adult and one dependent”. These are: the acceptability of divorce controls on family size (reduced fertility rate), working mothers, step-parenting, single-parenting, out-of-wedlock-births, cohabitation and a decline in marriages.⁵⁰ All these are viewed as posing a threat to and diminishing cultural values and the role of nurturance.

Observed consequences of these factors are the main reasons why the change is referred to as a decline of the institution of family in the Western culture. In the United States in particular, it is alleged that functions that were traditionally undertaken by families have been taken over by other institutions, making families less important and less motivated.⁵¹ Such institutions as those of religion, education and others, left families weaker, with no direct authority and function.

Popenoe acknowledges that his narrow western definition “is not broad enough to include many family forms prominent in other cultures, such as that consisting of several kin groups living in a single, complex household”, but indicated that a more inclusive definition “would be less

⁴⁵Stacey (note 44above) 546.

⁴⁶Britannica defines –secularism as movement in society directed away from other worldliness, for example, when people show interest in human cultural achievements and possibilities of their fulfillment in the world.
www.britannica.com accessed 14 November 2014

⁴⁷Popenoe (note 22 above) 528-529.

⁴⁸Bengtson (note 39 above) 1-2.

⁴⁹Popenoe (note 22 above) 529.

⁵⁰*Ibid.*

⁵¹Bengtson (note 39 above)3-4.

meaningful”.⁵² This acknowledgement of the existence of structures and functions in other cultures serve as a distinction of the Western definition from other cultures.

Bengtson⁵³ observes that Popenoe’s definition excludes family extensions beyond co-residence boundaries such as those involving multigenerational extensions recently resulting from prolonged existence due to improved health. The support provided by grand-parents in single-parent families such as in cases where there has been a divorce, out-of-wedlock births and the families with step-parents has become a pillar of strength in recent years. The involvement of a variety of kin⁵⁴ and non-kin relations is an extension beyond an extended family and the arrangement has become acceptable to communities in the 21st century. This is because, according to Stacey⁵⁵, arrangements such as divorce and step-parenting have been normalised since the 20th century, the era that Stacey refers to as a post-modern era, which allows “democratic forms of intimacy”.⁵⁶ Therefore, the traditional nuclear family is said to be ill-suited for the era. This diverse family form, resembles and accommodates the historic matriarchal⁵⁷ structures of the African American families.⁵⁸

Bengtson refers to Stacey as insinuating that these somewhat extended family forms,⁵⁹ are more common and significant among Blacks than they are among Whites in the United States. Bengtson alleges that:

“over the century, there have been significant changes in the family’s structure and function. Prominent among them has been the extension of family bonds of affection and affirmation, to

⁵²Popenoe (note 22 above) 529.

⁵³Bengstone (note 39 above) 4.

⁵⁴Merriam Webster dictionary (note 40 above) defines ‘kin’ as ‘a group of persons of common ancestry’.

⁵⁵Stacey (note 44 above) 546.

⁵⁶Postmodernism is a late-20th-century movement in the arts, architecture, and criticism that was a departure from modernism. Postmodernism includes skeptical interpretations of culture, literature, art, philosophy, history, economics, architecture, fiction, and literary criticism. It is often associated with deconstruction and post-structuralism because its usage as a term gained significant popularity at the same time as twentieth-century post-structural thought. Modernism is a philosophical movement that, along with cultural trends and changes, arose from wide-scale and far-reaching transformations in Western society in the late 19th and early 20th centuries.

⁵⁷A matriarchy is a social organisational form in which the mother or oldest female heads the family. Dictionary Reference (note 34 above)

⁵⁸Stacey (note 44 above) 546.

⁵⁹Bengtson (note 39 above) 13.

help and support members, across several generations, whether these be biological ties or the creation of kinlike relationship”.⁶⁰

The simplest way to avert the controversy of the definition seems to be the acceptance of the existence of partisan and cultural explanations and to align behaviour different races with their explanations.

2.3 *Family in the African/South African Context*

Debates on African family are said to be affected by the bias of literature, with Eurocentric descriptions and terminologies seemingly to undermine realities of the African tradition. Tembo⁶¹ advises that the biased Eurocentric perspective does not accurately reflect a traditional family and “portray[s] African relationships as being negative, rigid and miserable”. The absence of clear understanding of African practices by some authors is said to have resulted in an overlay of perceptions and practices of other countries in an attempt to create an understanding of the local situation. For example, a nuclear family is a Western concept, and its use as a base of understanding form and function of an African family is described as problematic by some authors⁶². Tembo alludes to an unfortunate situation in which he alleges that the African tradition has not been treated “as social phenomena (non) that was legitimate and workable in its own African social circumstances and environment. But rather as curiosities that were to succumb to superior European” practices.⁶³

Nyoka⁶⁴ comments that sociologists in South Africa take the easy way out by superimposing “preconceived schemata on local data” and base analyses on the findings rather than the real situation of an African family. That is, that reliance on some of the information in literature may introduce misconceptions that make the understanding of the African cultural practices difficult.

⁶⁰Bengtson (note 39 above) 14.

⁶¹ MS Tembo ‘The Traditional African family’<http://people.btidgewater.edu/~mtembo/menu/articles/TraditionalAfricanFamily.shtml> accessed on 13/10/13.

⁶² B Nyoka ‘Negation and Affirmation: a critique of sociology in South Africa’ (2013) 17(1) *African Sociological Review* 2-23; Tembo (note 61 above) 6.

⁶³ Tembo (note 61 above) 6.

⁶⁴ Nyoka (note 62 above) 11.

Some behaviour expectations occur that may result in unintended acts of discrimination, deter normal behaviour of others or even cause those that continue to practice their culture to feel disadvantaged. Discussions below may show some such effects as the African/South African⁶⁵ family is discussed.

For a clearer understanding of what a family implies in the South African context, especially to Africans, it is necessary to briefly review the historic setup of an African family. Bigombe and Khadiagala⁶⁶ refer to African families as stable, large, multigenerational, durable and socially reinforcing. This is despite the broad spectrum of African traditions creating variations in “tribal customs or culture” across geographic areas.⁶⁷ According to Nzimande, African (Black) families in South Africa have similar structures in substance (core functions) across the different ethnic groups, and that differences are only observed in detail (specific features).⁶⁸ The general African family would include the domestic family (mother, father and children) plus close relatives (maybe blood or non-blood, for example a polygamous mother is not necessarily a blood relative unless the traditional kin marriages are arranged) such as uncles, aunts and in some cases polygamous mothers. All of whom serve as other mothers and fathers in the family and who will assume responsibility of care in instances where the biological parents (mother, father) are not available.⁶⁹ Nzimande⁷⁰ also emphasises the care and support expected of members of a family and traditionally governed by rules in a society.

The difference between Black and White families in South Africa has been documented. Russell indicates that the Western practices limit relations only to people sharing parents and refer to other relatives as too remote.⁷¹ The difference is also emphasized by Ziehl who indicated that

⁶⁵Some of the authors generalise on the African culture in general while others only look at the local situation in South Africa. For the sake of this study, discussions refer to both situations at the same time.

⁶⁶Bigombe and GM Khadiagala ‘2001 Major Trends Affecting Families in Sub-Saharan Africa’
<http://www.undesadspd.org>.

⁶⁷Tembo (note 61 above) 7.

⁶⁸Nzimande (note 23 above) 28-45

⁶⁹ A Okon ‘Towards defining the ‘right to a family’ for the African child’ (2012) 12(2) *African Human Rights Law Journal* 373, 393.

⁷⁰Nzimande (note 23 above) 34.

⁷¹M Russell ‘Understanding Black Households: The Problem. Social Dynamics’ (2003) 29(2) *Journal of African Studies* 5-49.

the differences occur despite evolution.⁷² For the sake of simplifying discussions in this study, the African type of family will be referred to as an extended family (despite the fact that it is a Eurocentric term which may distort the real meaning of the African type of family) and the Western/Eurocentric type as nuclear despite the stated evolutionary processes.

The African family, according to Nzimande,⁷³ has a structural base for “helping behaviour” with a sense of obligation for mutual assistance and the provision of security for kinship members including orphans, widows and even the older generation. Therefore, any family member requiring assistance is the responsibility of an “able brother” in terms of roles. Of importance to this study, is the fact that “in death and other grievous misfortunes, group responsibility and sharing in the sadness (is) expected of all kinship members”.⁷⁴

Okon adds to the list, people excluding blood relatives, who may have carried the responsibility of care over a certain period of time, and “became psychologically and emotionally attached to the child without necessarily acquiring legal rights and responsibilities in respect of the child”.⁷⁵ This added dimension is very important in understanding relations that may exist between two people that are not blood relatives but carry with them emotional attachment that cannot be separated even by non-sympathetic laws in workplaces.

The dimension forms the crux of the family institution among Africans, which does not provide allowance to added classification such as “immediate family” and other constructions that deem to define degree of relationship or distance in family relations. Therefore, the term immediate family membership is a Western construction and suits the conditions of the type of family arrangement in the Western culture. If it has to be used in the African context, it will have to be defined by the parties concerned, in relation to psychological and emotional attachment and not only in accordance with blood relationship.

⁷²S Ziehl ‘Black South Africans do live in nuclear family households – a response to Russell.’(2002) 33(1) *Society in Transit* 26-49.

⁷³Nzimande (note 23 above) 34.

⁷⁴Nzimande (note 23 above) 39.

⁷⁵Okon (note 69 above) 389.

Tembo also explains that the strength and durability of African families did not require “a distinction between the biological and non-biological kin as far as primary parental obligations were concerned”.⁷⁶ It is in these types of families that family traditions are protected from external traditional ‘contamination’ and transferred from generation to generation. It is for this reason that Tembo accuses the Eurocentric description of the African family as biased and overshadowing important features that upheld the African families and that may incidentally still be existing and upholding the positive traditional aspect. Okon identify some such African family features as “the responsibility for the protection, upbringing and development of the child”.⁷⁷

The older generation formed the base of the family in the olden days as they played an important role in the ancestral line. Seniority has always been respected and the elderly “accorded a place of honour in the lineage hierarchy”, explains Nzimande.⁷⁸ This arrangement maintained their (the elderly) privileges for continued care. Their care has therefore always been non-formal but important and as Bigombe and Khadiagala⁷⁹ assert, there existed an essential mutual intergenerational care that placed the older generation in important positions, that is, not only at the receiving end but also undertaking important roles.

Unfortunately, the family forms and functions in South Africa are said to have been affected by external forces such as colonisation and industrialisation. Whereas colonisation emerged with its influential religious forces that seemed to undermine the majority of African practices, negating some of the activities and characterising others as ‘depraved’ (immoral/evil/wicked) industrialisation imposed economic burdens that created unavoidable situations of change in some instances⁸⁰. Mining and commercialised agriculture are said to have initiated the process of migration and are blamed for breaking bonds of goodwill that sustained African families.⁸¹

⁷⁶Tembo (note 61 above) 6.

⁷⁷Okon (note 69 above) 374.

⁷⁸Nzimande (note 23 above) 37.

⁷⁹Bigombe et al (note 66 above) 17.

⁸⁰Nzimande (note 23 above) 29; Russell (note 71 above) 17 and Tembo (note 61 above) 6-7.

⁸¹Bigombe et al (note 66 above) 2.

Families in the industrial areas became smaller, consisting of the father, the mother and children. These fitted the Eurocentric description of a nuclear family. The provision of small houses to migrants compelled families to reduce in size, forcing Africans to rearrange their family forms.⁸² At this stage Africans fitted themselves within what Russell refers to as the “oppressor’s culture” as they were compelled by circumstances.⁸³

Ziehl warns of the danger of thinking that a nuclear family is the “pre-eminent bourgeois’ institution” and explains that:

“a great deal of effort and energy has been expended on showing how wrong it is to treat other family structures as deviations from this norm and therefore to assume that the nuclear family is the only legitimate family structure”.⁸⁴

The author alludes to the ‘Western stereotype’ that alleges that ‘Western ways are better than African ways’⁸⁵ and that colonisation intended to improve the Black culture by making it like a Western one. It may be this ‘West is best’ phenomenon that may have initially diluted the African culture among some of the urban Africans. It may also have been the same phenomenon that might have given the oppressors an impression that their culture is applauded by the Africans when they (the Africans) had no choice but to succumb to the situations of the time. The laws of the country at the time would be expected to accommodate the oppressor’s way of life and Africans would be expected to abide.

In the initial stages of the migrant period children were brought up by their grandparents as their parents would have migrated. At this stage the grandparents were still able to enforce customary practices and the ethos of an African extended family, guaranteeing the wellbeing of a child throughout life.

⁸²Nzimande (note 23 above) 31; Russell (note 71 above) 5-7.

⁸³M Russell ‘Are Urban Black Families Nuclear? A comparative study of Black and White South African Family Norm. Social Dynamics’ (2003) 29(2) *Journal of African Studies* 153-176.

⁸⁴Ziehl (note 72 above) 32.

⁸⁵*Ibid* 33-34.

Changes in African families have been observed to occur differently in different regions, furthering diversity across the Continent over different periods of time. According to Okon, the complexity of a family has occurred from “era to era”.⁸⁶ Transformation processes have added another burden to the African tradition degeneration, further affecting the traditional “corporate kinship” and reducing families to the exclusion of other relatives. The ‘un-African’ exclusion of others is the result of the forces of economic burdens that disabled the existence of large families, forcing fertility rates to drop in both rural and urban areas. The arrangement, which Bigombe and Khadiagala⁸⁷ refers to as a modern urban arrangement, has negatively affected the care of the older generation, tarnishing the social aspect that provided for their support. This is especially observable in rural areas (where the majority of them were left behind) as these areas became more affected by poverty.

Despite the external forces of changes, Bigombe and Khadiagala⁸⁸ reported that there were no indications of African families completely abandoning traditional practices. What are observable are families that are a hybrid of traditional and modern norms. The authors agree with Russell in believing that African families adapt to new environments by adopting new practices and drawing solutions from the “traditional resources”, but further contend that the “process of social adaptation of family organizations has produced an uneasy amalgam that is yet to crystallize into a dominant pattern”.⁸⁹ The non-committal of Blacks (Africans) to the Eurocentric life is confirmed by Russell who observed that, despite all forces that influence changes of family structure including the economic forces and transformation, urban Blacks in South Africa are divided between adherence to Eurocentric standards and the African tradition which are still observable in rural life.⁹⁰

Russell⁹¹ accedes to the assumption that a complete nuclear arrangement among Black (African) South Africans cannot be ‘validated’ in the contemporary South Africa, because complete rejection of traditional practices cannot be guaranteed. Therefore, Black (African) nuclear

⁸⁶Okon (note 69 above) 374-381.

⁸⁷Bigombe et al (note 66 above) 19.

⁸⁸Bigombe (note 66 above) 12.

⁸⁹Bigombe (note 66 above) 2.

⁹⁰Russell (note 83 above) 153-155.

⁹¹Russell (note 71 above) 39.

family is different from that which defined by Eurocentric standards, as they continue to have relatives accommodated for the sake of support.⁹² This is because families are still bound by care obligations. Nzimande explains that irrespective of the nuclear arrangement, “the wide circle of relatives in Black family structure is still ... expected to lend a helping hand as a support measure in times of hardship and distress” as support always had its base in extended families.⁹³

The cycle of events experienced in the Western countries seem to be experienced in Africa too. Stacey⁹⁴ and Bengtson⁹⁵ alluded to the post-modern era in which the nuclear family is said to be deteriorating and multi-generational families are gaining ground. With the ‘collapse of the nuclear family’ and the rise of contemporary factors (such as female headed families, economic stresses, women involved in the labour market) there are emerging signs of a reverse action towards an extended family practices among Africans. The older generation is now seen to be fulfilling meaningful roles with their pensions and once more adding value by caring for their families.⁹⁶ It would be expected that the grandparents would assume the roles of creating family stability and harmony, and the promotion of family ethos of African extended families even in the urban areas. It is thus expected that with the new system in South Africa, which recognises all cultures in the country added to the secular effects of evolution, the African family will find its space in the laws of this country and areas in which such laws are applicable.

As discussed in 2.2 and 2.3 above, there is a contextual difference between families in Western and African cultures. Although Ziehl⁹⁷ warns of the confusion brought about by “conceptual ambiguity”, there are two indications that seem to protect the traditional form and function of the Africa family. The first is resistance staged by those who continue to adhere to corporate (group) kinship system of extended families. The second factor is evolution, mainly affected by transformation, which has swayed the rigid nuclear family more towards extended family form.

⁹²Nzimande (note 23 above) 34.

⁹³Nzimande (note 23 above) 34.

⁹⁴Stacey (note 44 above) 546.

⁹⁵Bengtson (note 39 above) 1.

⁹⁶Bigombe et al (note 66 above) 8-9.

⁹⁷Ziehl (note 72 above) 29.

2.4 *The Definition of Family in relation to Family Responsibilities*

The complexity of defining the African family is said to be exaggerated by the diverse traditional patterns on the African continent. Both Okon⁹⁸ and Tembo⁹⁹ refer to various family structures and patterns in different regions and suggest that a definition be based on functionality within societal condition. Therefore, a universally accepted definition of family, according to the authors, should be inclusive of families from different cultures and historic periods. Whereas the universality may result in furthering ambiguity resulting from the broad inclusivity, making it difficult to design legislative strategies, knowledge of the existence of the problems affecting the definition is a step in the right direction.

Some authors have attempts to produce more contemporary and less restrictive definitions. Murdock¹⁰⁰ defines family as adults related by blood or marriage or even affiliation, who cooperate economically, who may share a common dwelling and who may rear children. The definition may be broad enough but excludes those individuals who do not cooperate economically. Winch¹⁰¹ on the other hand, defines family as a group of related persons in different positions within the family who fulfil the functions necessary for the existence and survival of the family.

Nzimande¹⁰² refers to Steyn and Rip (1968, 500) and suggests that in South Africa, the use of some resemblances showing a marked degree of cultural cohesion ‘can help determine generally broad outlined patterns’ and characteristics of a family. The generalised patterns would be helpful in defining a family within the African context. For example, support among Africans, as stated earlier, is expected from all members of the family, “in terms of hardships and distress”.¹⁰³ Considering all blood and non-blood relatives that exist in a family, employers would require an understanding of the reason why such members would apply for a family

⁹⁸Okon (note 69 above) 388-389.

⁹⁹Tembo (note 61 above) 6-7.

¹⁰⁰ Murdock, GP ‘Social Structure’ in JL Roopnarine & UP Gielen (ed). *Families in a Global perspective* Boston: Pearson/Allyn and Bacon (1949/2005).

¹⁰¹ RF Winch ‘Towards a model of familial organisation’ W R Burr et al (eds) *Contemporary theories about family* (1979) 162-179.

¹⁰²Nzimande (note 23 above) 30-31.

¹⁰³Nzimande (note 23 above). 34

responsibility leave. Nzimande explains family by referring to roles and responsibilities when he refers to family as a “primary source of social support”.¹⁰⁴ He further explains expectations in family arrangement, which serve as guiding principles, stating that “through a set of prescriptions, values and socialization patterns a sense of social obligations is created and exercised.”¹⁰⁵ It is therefore expected that the laws of employment will provide a fairly accommodating definition that allows parties to further clarify relationships where they are not obvious.

The above statements promote the understanding of expected responsibilities that employees will not overlook. First, the family prescriptions should be expected when dealing with African employees. Secondly, such prescriptions cannot be undermined; and thirdly an understanding of binding social obligations and mutual support is necessary.

As stated, the term immediate family can be confusing when an African family is discussed, and this may need to be avoided. Subscription to the Eurocentric description of family, the nuclear family, excludes practices of others and thus consciously or unconsciously leads to acts of differentiation. For the sake of this study, it is therefore important to study legislative documents that influence and guide employer behaviour and operation in relation to family responsibility leave. If the documents are found to undermine some cultural practices, they will be regarded as violating the rights of some employees and therefore creating differentiation that may result in discrimination.

2.5 *Conclusion*

The definition of family in the Western culture is narrow, more structured and restricted to kinship. In its evolution, in the post-modern era, the definition extends beyond two generations to accommodate grand-parents. The extension includes also step-parents, out-of-wedlock children and cohabitation. This democratic form of a family also includes the matriarchal structures previously observed in the African cultures. Although the Western family moved from

¹⁰⁴*Ibid* 35.

¹⁰⁵*Ibid* 35.

nuclear to the extended type, and to the addition of help and support, the emphasis is still placed on biological ties and kinship relations.

There are indications that the family in the African culture cannot carry a Eurocentric description as this will introduce misconceptions that will deter understanding of the African cultural practices. African families are said to be large, stable, multigenerational and socially reinforcing. The latter conduct is explained by the presence of several mothers and fathers in the family that may be blood or non-blood with helping behaviour that creates psychological and emotional attachment with those receiving their care and support. The care and support marks the emphasis of functionality in the African family.

The inclusion of a foster relationship to the extended Western family, the concept mainly introduced to the definition of immediate family, brings to the definition the element of care and support, except that the foster relationship introduced cannot be compared to the psychological and emotional attachment created between non-blood persons in the African culture.

Family in the African culture has resisted forces of colonisation and industrialisation and even though small houses allocated to migrants have reduced family size, cultural practice have persisted. Therefore, even when new practices are adopted, solutions are continuously drawn from traditional resources especially when care and support are needed.

This chapter has clearly differentiated between the Western and African definitions of the concept family. It is concluded that the traditional kinship structure continues to shape the basic family form among Africans, even within the colonial influence. It is therefore important to note that the care and support portrayed in the African culture will always be expected from family members, especially in terms of hardship and distress. Therefore, the laws of employment have to be sensitive to this arrangement if the culture of the African people is to be recognised and their rights respected. In this way, international laws and the Constitution of the country will be upheld. Clear understanding of these responsibilities is important to both employers and employees to harmonise relations in the workplaces.

This chapter dealt with the definition of family in the Western and African Culture. Chapter 3 will focus on the legal definition of family as set out in various sources and legislation. The analysis will appear in Chapter 6.

CHAPTER 3:

THE LEGAL DEFINITION OF FAMILY RESPONSIBILITY

3.1 Introduction

In order to understand the concept of family responsibility, it is necessary to first understand the definition of family as contained in several legal documents. These include global/international conventions, regional documents/commitments and domestic legislation. The international instruments considered have been ratified by South Africa and are therefore applicable in the development, interpretation and application of South African law. However, in order for the instruments to be binding; they must be incorporated in South African legislation. Thus this chapter discusses, as a prelude, the legal definitions of family responsibility in the various documents, whilst the next chapter will elaborate on the potentially discriminatory impact of a narrow definition of family responsibility that neglects African cultural family responsibility and the relevant provisions in the domestic legislation.

3.2 International and Regional Instruments

The Universal Declaration of Human Rights and the International Convention on Civil and Political Rights (ICCPR) both define family as “the natural and fundamental group unit of society entitled to protection by society and the state”.¹⁰⁶ A similar definition is offered by the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR).¹⁰⁷ The Convention on the Rights of the Child, 1990¹⁰⁸ states that a family is a fundamental group of society and the natural environment for the growth and well-being of its members who should be afforded necessary protection and assistance to fully assume its responsibilities within the community. These international conventions have been incorporated in the Bill of Rights, Chapter 2, of the South African Constitution, 1996.¹⁰⁹

¹⁰⁶ Article 16,3 of the 1948 Declaration and Article 23,1 of the 1996 International Convention on Civil and Political Rights.

¹⁰⁷ Article 10(1).

¹⁰⁸ In the preamble.

¹⁰⁹PE Andrews ‘Incorporating Human Rights Law in National Constitution: The South African Experience’ www.parlemo.edu/archivos-content/derecho/pdf/international-human-rights.pdf (accessed 17 December 2014)

The International Conference on Population Development-Plan of Action, 1994¹¹⁰ and the World Summit for Social Development, Copenhagen, Denmark, March 1995 both define a family as a basic unit of society and recognise that there are various forms of families in different cultural, political and social systems.

The international instruments considered here reflect the definitions proffered in the instruments ratified or adopted by South Africa. What appears from these documents is that family is considered as a group or unit with responsibilities and that there are various forms which would be dependent on or defined by the circumstances including culture. In the definitions, the instruments have not provided it a restrictive or confined meaning. Most of them carry the same definition leading to a conclusion that family must be accepted to mean a group of person who are together for a specific purpose, this is wide and can refer to any group.

The relevant regional documents are discussed below. These include the African Charter on Human and People's Right (1981)¹¹¹ which define the family as the natural unit and basis for society. Meanwhile, the African Charter on the Rights and Welfare of the Child (1990)¹¹² and the African Youth Charter (2006) define family as a natural unit and basis for society. These definitions from the regional documents are identical and have some resemblance to the international instruments/documents. Article 18 of the African Charter on the Rights and Welfare of the Child provides that the family shall enjoy special protection through recognising the role that the family plays in society. According to Gose, the emphasis that the Charter places on the notion of the family is very much from the African perspective.¹¹³ As such, even distant relatives are recognised.¹¹⁴

Notably, neither the international instruments have sought to give the term a classification or restrictive meaning.

¹¹⁰ Chapter II Principle 9.

¹¹¹ Article 18.

¹¹² Article 18 of the African Charter on the Rights and Welfare of the Child (1990) and Article 8 of the African Youth Charter (2006).

¹¹³M Gose '*The African Charter on the Rights and Welfare of the Child* (2002) Children's Rights Project: Community Law Centre 97.

¹¹⁴*Ibid.*

3.3 *South African policy*

In South Africa, the definition of family in policy, particularly White Papers, has generally been inclusive of various family forms. The White Paper for Social Welfare¹¹⁵ defines family:

“as individuals who either by contract or agreement choose to live together intimately and function as a unit in a social and economic system. The family is primarily a social unit which ideally provide care, nurturing and socialisation for its members”.

There is no classification of who the members of the family are or should be. The draft White Paper on Families in South Africa¹¹⁶ in its glossary of terms defines family as:

“[a] societal group that is related by blood (kinship), adoption, foster care or the ties of marriage (civil, customary or religious), civil union or cohabitation and go beyond a particular physical residence.”

The 1977 Social Welfare White Paper offered a definition similar to the international instruments and regional documents in that it described the family as a unit but made this dependent on a choice to live together intimately. Notably, having defined family, the 2012 White Paper goes on to define a nuclear family and extended family. A nuclear family is defined as “a family group consisting of parents with their biological or adoptive children only” while an extended family is defined as “a multigenerational family that may or may not share the same household.”¹¹⁷

The Green Paper on Families¹¹⁸ acknowledged that there are different types of families in South Africa which are products of various cultures and social contexts. It is therefore crucial to recognise the country’s diverse nature in all initiatives to address their plight. In analysing the country’s challenges, the changing family structures and the history which shaped it must be taken into account. Colonisation and Apartheid played a major role in shaping families in South

¹¹⁵ Government Gazette 18166, Government Notice 1108 of 8 August 1977 at 93.

¹¹⁶ Draft White Paper on Families (October 2012) www.dsd.gov.za/index2.php? at 3 (accessed on 3 November 2014).

¹¹⁷ Ibid glossary of terms.

¹¹⁸ Item 1.8 of the Green Paper on Families: Promoting Family life and Strengthening Families in South Africa, 3 October 2011, www.thepresidency.gov.za/(accessed on 4 November 2014).

Africa.¹¹⁹ Indigenous African population with ethnic groups are in the majority followed by a significant number of Europeans and then Indians, Chinese and Coloureds.¹²⁰ Other than the policy documents (the Green and White Papers), there appears to be no legislation proffering a definition. This is supported by the White Paper on Families¹²¹ which records that following the new dispensation in 1994, the South African government implemented various policies and legislation aimed at transforming the country but the concept of family was not explicitly addressed in any of these documents.

An analysis of the white paper document leads to a clearer formulation of the definition of a family. It is argued therefore that South African legislation dealing with family must conform to this definition since it is derived from a combination of international instruments ratified and/or adopted by the country and regional commitments. The Green and the White Papers relating to family are a step towards providing legislation. It is therefore advisable to take them into account in interpreting the legal position or meaning of the concept.

3.4 *South African Law Employment law*

The South African legislative framework for family responsibility and the cases that have interpreted FR and FRL will be considered next. First, will be a discussion of the relevant provisions of FR and FRL in the South African Constitution, the Employment Equity Act (EEA), the Promotion of Equality and Prevention of Unfair Discrimination Act¹²² (PEPUDA), the BCEA and collective agreements. The intention is to compare the definitions with the descriptions in the cultural practices to study compatibility. Case law will then be reviewed to determine the application of the law.

¹¹⁹ Ibid at item 2.1.

¹²⁰ Ibid.

¹²¹ White Paper on Families (note above) Introduction.

¹²² Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA).

3.4.1. The Constitution

The South African Constitution¹²³ is the supreme law of the country providing a framework within which all other laws are formulated or changes. The supremacy of the Constitution may only be limited as provided for in the Constitution.¹²⁴ As the highest law of the land, all laws must conform to the standard set in the Constitution. Legislation passed prior to the Constitution must be amended to ensure conformity while successive legislation may not be passed unless it conforms¹²⁵ to the Constitution.

The Constitution confers the right to fair labour practices in section 23(1). This right emanates from a rich jurisprudence developed by the Industrial Court prior to 1995. As stated by Cheadle, this right is unique to South African Bill of Rights.¹²⁶ The unique inclusion of the right to fair labour practices in the South African Constitution was stressed by Ngcobo J in *National Education Health and Allied Workers Union v University of Cape Town (NEHAWU judgment)*.¹²⁷ The court found that legislature had left the interpretation of the right to the courts as fairness was depended upon the circumstances and the courts had to balance fairness taking into account the rights of the employees against the interests of employers. It was ultimately the role of the Constitutional Court to ensure that the right guaranteed in section 23(1) is honoured.¹²⁸ The court held that the right in section 23(1) was guaranteed to both the employer and the employee.¹²⁹

The Constitution prohibits unfair discrimination on a number of grounds, including culture.¹³⁰ Family responsibility, however, is not listed. Family responsibility may however be protected as an analogous ground associated with the rights of cultural, religious and linguistic

¹²³ Constitution of the Republic of South Africa Act, 1996.

¹²⁴ *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC), Section 2 of the Constitution.

¹²⁵ M Finnemore and R van Rensburg 'Contemporary Labour Relations' 2nded (2002) LexisNexis 203.

¹²⁶ H Cheadle 'Labour Relations' in Cheadle H, Davis D and N Haysom *South African Constitutional Law: The Bill of Rights* (2002) LexisNexis 365.

¹²⁷ *National Education Health and Allied Workers Union v University of Cape Town (NEHAWU judgment)* 2003 (3) SA 1 (CC).

¹²⁸ *Ibid* paras 33-35.

¹²⁹ *Ibid* para 39.

¹³⁰ Section 9(3) of the Constitution.

Communities.¹³¹ This is because the right has not been interpreted in the workplace context before.

3.4.2. *The BCEA*

Prior to the 1996 Constitution, various legislation regulated employment relations including the Basic Conditions of Employment Act 3 of 1983 (the 1983 BCEA). The 1983 BCEA regulated basic conditions of employment including working hours, leave entitlements and termination of contracts of employment. The leave provision did not provide for family responsibility leave as one of the entitlements. The 1983 BCEA was repealed and replaced with the Basic Conditions of Employment Act 75 of 1997 (the 1997 BCEA). This was following the promulgation of the new Constitution¹³² in South Africa. The passing of the new BCEA in 1997 was to ensure conformity with the Constitution especially the rights conferred in the Bill of Rights, international instruments and regional documents which recognise the importance of families and the need to accommodate workers with family responsibility.

In terms of the Explanatory Memorandum to the 1997 BCEA, one of its primary objects was to provide minimum working conditions for unorganised and vulnerable workers.¹³³ The 1997 BCEA, is the focus of this study. Its purpose is to establish and enforce basic conditions of employment and to regulate variations to such conditions.¹³⁴ The BCEA has broader scope of application as it protects employees from all sectors establishing what Basson¹³⁵ calls “a floor of basic conditions protecting all employees”. It can be concluded from a reading of the Explanatory Memorandum and the BCEA that the intention of the legislature was to assist parties to the employment relationship, the employer and the employee, to have a base upon which their relationship would be regulated. This conclusion runs parallel to the Constitutional Court’s interpretation of Section 23(1) of the Constitution in the *NEHAWU* judgment.

¹³¹Section 31 of the Constitution.

¹³² The Constitution of the Republic of South Africa, 1996.

¹³³ D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie ‘*Labour Relations Law – A Comprehensive Guide*’ 3rded (2000) Butterworths 514.

¹³⁴ Section 2 of the BCEA.

¹³⁵ A Basson, M Christianson, C Garbes, PAK le Roux, C Mischke and EML Strydom ‘*Essential Labour Law – Individual Labour Law Volume 1*’ 2nded(2000) Labour Law Publications 288.

Amongst other provisions, the BCEA sets out employees' entitlement to leave that are regulated within its own parameters.¹³⁶ FRL is amongst the leave entitlements conferred in the BCEA. It was the first time in South African law that family responsibility was dealt with as the concept did not exist prior to the 1997 BCEA.¹³⁷ The provision of section 27(2) of the BCEA relating to FRL provides as follows:

“27(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.”

There is no definition proffered for the concept of FRL in the BCEA, despite the existence of a definition section in the BCEA.¹³⁸ The meaning can therefore only be deduced from the wording on the relevant subsection. It is apparent from the above provisions of the section 27(2) that the definition that can be associated with the BCEA is that of a nuclear family as discussed in chapter 2 above. The concept of FRL was accordingly introduced by the 1997 Act for the first time in South African employment law.¹³⁹ There is no *travaux préparatoires* or academic opinion to explain how the legislature elected the use of the nuclear family as opposed to the broader concept.

According to Dancaster and Baird¹⁴⁰ the BCEA limits FRL to time off to attend to birth, sickness and death. The writers recommend for FRL to be expanded to include instances where care

¹³⁶ Section 19 to 27 of the BCEA.

¹³⁷ Du Toit (note 133 above) 533.

¹³⁸ Section 1 of the BCEA.

¹³⁹ Section 27 of the BCEA.

¹⁴⁰ L Dancaster & M Baird “Workers with care responsibilities: is work-family integration adequately addressed in South African labour law? (2008) 29 ILJ 22, 30.

giving is required.¹⁴¹ In terms of Section 27(2) FRL is only available for the birth or illness of a child. It is therefore not available for attending to a sick adult dependant whereas in the event of death, the category of persons for whom it may be utilised is wider.¹⁴² Another factor raised by Dancaster and Baird is the duration allowed for the leave ranging between three to five days depending on the type of work.¹⁴³

The drafters of the BCEA appear to have taken into account various eventualities by providing a variation of some of the terms and conditions of employment including the leave provision.¹⁴⁴ However, the discretion by employers and bargaining parties seems to comply with the classification set in section 27(2) of the BCEA. The effect of the BCEA on employers is apparent even in instances where employers have concluded collective agreements to regulate their sectors. A consideration of several collective agreements reveal that despite being accorded the powers to vary the provisions of the BCEA through collective bargaining, parties in different sectors still utilise the classification offered by the BCEA with no regard to other relevant legislation.

The FRL provision in the Motor Industry Bargaining Council¹⁴⁵, a private sector, is similar to that in the BCEA. In its main collective agreement, the Metal and Engineering Industry Bargaining Council, the MEIBC (also a private sector) fails to provide the definition of FRL.¹⁴⁶ The leave entitlement is similar to the one set out in the BCEA, with the deviation being in respect of allowing the FRL days to accumulate over a period of three years. The MEIBC in its FRL provision uses the term “compassionate leave” which appears to be used interchangeably with the word FRL. The term compassionate leave is also not defined leaving the parties to attach any meaning they deem necessary for their own purpose which in some instances may appear as breaking the law with and serious consequences.

¹⁴¹Ibid 31.

¹⁴²Ibid 31-32.

¹⁴³Ibid 32.

¹⁴⁴ Section 49 of the BCEA.

¹⁴⁵Government Gazette No. 37508 Part1, 4 April 2014 at 92

¹⁴⁶Clause 42 of the Main Collective Agreement published under Government Notices R.747 and R.748 in Government Gazette No 34613 dated 23 September 2011, substituted by R.1374 of 3 October 2003.

In the public sector, Resolution 7 of 2000 of the Public Service Coordinating Bargaining Council regulates employment conditions for all government departments and deal with the issue of FRL.¹⁴⁷ The Resolution categorises FRL entitlement similar to the BCEA deviating only in terms of the number of days allowed. It affords more days and even allows for some annual leave to be converted to FRL where necessary. The only distinction with regard to the South African Local Government Bargaining Council, Main Collective Agreement¹⁴⁸ regulating leave in the local government sector is that while the BCEA provides for three days FRL, a total number of five days is allowed. Just like the BCEA there is no definition proffered by the collective agreements.

Although not all collective agreements were considered, it is apparent that from the collective agreements listed above that there has been no deviation or variation of the concept of FRL from that which was determined in the BCEA even from organised bargaining. The only observable deviation is in respect of the number of days allocated to FRL and in some instances the ability to accumulate such leave. This being the case, it is argued that there would be little if any deviation in unorganised employment environment.

In 2014, the South African President established the Ministry for Small Business Development as a commitment to place economic growth and job creation at centre stage. This was due to the high unemployment rate faced by South Africa and to recognise the role players in small, medium and micro enterprises (SMMEs).¹⁴⁹ Research by Global Entrepreneurship Monitor revealed that SMMEs created more than 50% of employment in South Africa.¹⁵⁰ This research also views inflexible labour laws as contributing to the decline in the sector. SMMEs are mostly not unionised. They would therefore not have collective agreements regulating employment

¹⁴⁷ Clause 7.7.3 of Resolution 7 of 2000 of the Public Service Coordinating Bargaining Council, <http://www.pscbc.org.za/wp-content/uploads/Resolution-7-of-2000.pdf> accessed 30 October 2014.

¹⁴⁸ South African Local Government Bargaining Council, Main Collective Agreement www.salgbc.co.za/mainagreement, Part B clause 3.4 accessed 30 October 2014)

¹⁴⁹ This was part of a speech delivered by the Minister of Small Business Development, Lindiwe Zulu at the SMME Colloquium in Sandton on 1 October 2014 published in the Business Report 22 October 2014 on www.iol.co.za/business/opinopn/importance-of-smmes-is-big-business-for-country-1.1768670#.VGbTEZBvqD accessed 22 October 2014.

¹⁵⁰ M Herrington and D Kelley 'African Entrepreneurship: Sub-Saharan Africa Regional Report, 2012' *Global Entrepreneurship Monitor* (GEM) (2013) <http://www.gemconsortium.org/docs/2909/gem-2012-sub-saharan-africa-regional-report> accessed 15 November 2014.

conditions and would in most instances not have their own policies. They rely mainly on the provisions of the BCEA to provide them with employment terms and conditions to regulate their workplace.

Reliance on the provisions of the BCEA means that SMMEs would utilise the family responsibility provision as appears in the BCEA and are unlikely to deviate from the provisions of section 27(2) as allowed by section 49 of the BCEA. The attitude of non-conducive labour laws would mean that employers would comply with what is provided in the BCEA for compliance purposes and not go the extra mile to assist and accommodate employees. In view of this, it is crucial that the provisions of the BCEA are wide and accommodating to provide for guidance to employers and accommodation of employees in the workplace.

3.4.3. *The EEA*

The EEA was promulgated to achieve equity in the workplace by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination.¹⁵¹ It is a tool within which unfair discrimination is to be prevented and where it already exists, eliminated.¹⁵² It further prohibits unfair discrimination on listed grounds including the family responsibility and culture.¹⁵³ The EEA¹⁵⁴ enjoys supremacy to all other employment law legislation and takes precedence in instances of conflict in laws.¹⁵⁵ It is crucial to the transformation of the workplace.

Unlike the BCEA, the EEA provides a definition which is crucial to this study. The definition of family responsibility in the EEA is provided as meaning the responsibility of employees in relation to their spouse or partner, their dependent children or other members of their *immediate family* who need their care or support. The EEA does not tender a definition of immediate family and leaves that to the parties to the employment relationship and interpretation by courts and bargaining councils should a dispute arise.

¹⁵¹ Section 2 of the EEA.

¹⁵² Basson et al (note 135 above) 266.

¹⁵³ Section 6 of the EEA

¹⁵⁴ Section 1 of the EEA.

¹⁵⁵ Finnemore et al (note 125 above) 213.

Considering the definition of immediate family stated above,¹⁵⁶ one can conclude that this definition is wider and can be interpreted to be inclusive of the cultural definition of family responsibility leave discussed in this study. This accommodation takes cognisance of the right to equality conferred by the Constitution.¹⁵⁷ A better and complete understanding of the definition in the EEA requires consideration of the right to equality and the right to cultural practices¹⁵⁸ in the Bill of Rights.

An interpretation of the EEA, must be in compliance with the Constitution so as to give effect to its purpose taking into account any relevant code of good practice issued in terms of the EEA or any other employment law; and in compliance with the international law obligations of the Republic, in particular those contained in the International Labour Organisation Convention (111) concerning Discrimination in Respect of Employment and Occupation.¹⁵⁹ The obligation placed by this Convention is to eliminate discrimination in the workplace.

In addition to the general supremacy that the EEA enjoys over other employment law legislation, the EEA specifically prohibits discrimination in any employment policy or practice. In the definition section of the EEA, the import of employment policy is set out as including remuneration, employment benefits and terms and conditions of employment.¹⁶⁰ An analysis of the purpose of the BCEA discussed above places the BCEA in the category of employment policy since it sets out basic terms and conditions of employment. If the BCEA is an employment policy, it may not unfairly discriminate against any employee on any of the grounds listed in section 6 of the EEA.

In interpreting the BCEA, therefore, one must amongst other factors take into account the supremacy of the EEA over employment law legislation together with the fact that it is an employment policy, and it is specifically referred to and dealt with by the EEA under the prohibition of unfair discrimination. An interpretation of the BCEA can therefore not be isolated from the provisions of the EEA. It is important to note that the BCEA was passed before the

¹⁵⁶Dictionary reference www.dictionairy.reference.com accessed on 17 December 2014.

¹⁵⁷ Section 9 of the Constitution of the Republic of South Africa, 1996.

¹⁵⁸ Section 31(1) of the Constitution.

¹⁵⁹ Section 3 of the EEA.

¹⁶⁰ Section 1 of the EEA.

EEA. It may therefore be argued that legislature noticed the absence of the definition of FRL in the BCEA and then incorporated it in the EEA. This is doubtful since the BCEA was recently amended with no change in the categorisation/classification of instances when the leave may be taken. Had the legislature observed some deficiency in the provision of FRL, then the amendments would have been an opportune time to rectify this.

It may be argued that due to the supremacy of the EEA with regard to the BCEA, definition, it was not necessary to include definition in the amendments. This, however, does not help the parties to the employment relationship who place reliance on the provisions of the BCEA. Failure to do this suggests that, despite the provision in the Constitution, the EEA and other relevant legislation, together with a shift in the general definition of family, the legislature still confines itself to the nuclear family definition.

3.4.4. *PEPUDA*

Another piece of legislation dealing with discrimination, PEPUDA,¹⁶¹ gives effect to sections 9 and 23 of the Constitution. Similar to the EEA, it eliminates and prohibits unfair discrimination and promotes equality amongst others. It applies to employees who are not covered by the EEA.¹⁶² Since it applies to employees not covered by the EEA, it must by implication apply to those employees excluded by the BCEA.¹⁶³ PEPUDA was enacted sometime after the EEA with the teachings of and establishment of jurisprudence from the Courts relating to discrimination.¹⁶⁴ As Deane opines,¹⁶⁵ an interpretation of the EEA by the courts requires consideration of PEPUDA. This is because when PEPUDA was enacted, the Constitutional Court had already decided on numerous discrimination disputes some of which had arose from provisions of the EEA. Legislature would have had the opportunity to consider the shortfalls of the EEA and other legislation and correct them through PEPUDA.

¹⁶¹ Act 4 of 2000.

¹⁶² Section 5(3) of PEPUDA.

¹⁶³ The BCEA in Section 1 exclude from its application member of the State Security Agency and unpaid volunteers.

¹⁶⁴T Deane 'The Regulation of Affirmative Action and Discrimination in South Africa' Chapter 6 in *Affirmative Action: a Comparative Study* LLD Thesis (2005) UNISA

<http://uir.unisa.ac.za/bitstream/handle/10500/2012/07chapter6.pdf> accessed on 26 December 2014.

¹⁶⁵ Ibid.

Although PEPUDA does not apply in instances where the EEA is applicable, consideration of sections/clauses similar to those in the EEA would assist in arriving at a more reasonable alternatively fair decision. In defining family responsibility, PEPUDA does not confine itself to the concept of immediate family.¹⁶⁶ It defines family responsibility as a responsibility to a spouse, partner, dependant, child and other members of the family in respect of whom a person is liable for care and support.¹⁶⁷ Ultimately, an interpretation of the term ‘family responsibility’ must be in line with PEPUDA which clearly provide a broader definition of the concept. This is informed by the influence of jurisprudence in the drafting of PEPUDA

While acknowledging the provision of FR and the definition thereof as set out in the EEA i.e. that which takes cognisance of immediate family, employers place heavy reliance on the provisions FRL in the BCEA and in this respect may not take cognisance of the EEA definition.¹⁶⁸ The danger of the reliance on the provisions of section 27 of the BCEA was apparent in *Public Servants Association obo Jonase*¹⁶⁹ where the arbitrator relied on the BCEA provisions whilst disregarding the employer’s employment policy. Accordingly, the arbitrator disregarded the employee’s cultural practices despite the fact that the policy required that due regard be given to the employee’s cultural responsibilities. A similar conclusion was arrived at in the *Fairy Tales Boutique*.¹⁷⁰ Both of these decisions will be discussed in chapter 5.

The provisions of FRL set out in the BCEA were also considered by Jackson¹⁷¹ who stated that FRL may not be claimed for any other reason than those set out in section 27 of the BCEA. He relied on the entitlement to leave as set out in this section, i.e. the restrictive and narrow provision. Notwithstanding the breath of this definition, the entitlement of family responsibility leave conferred by the BCEA¹⁷² seems to be narrowing the meaning of immediate family as set

¹⁶⁶ Section 1 of PEPUDA.

¹⁶⁷ *Ibid.*

¹⁶⁸ NMMU ‘Transformation, Monitoring and Evaluation’ <http://tme.nmmu.ac.za/Gender-Equity/Definitions> accessed on 14 November 2013.

¹⁶⁹ *Jonase* (note 2 above).

¹⁷⁰ *Fairy Tales Boutique* (note 3 above).

¹⁷¹ D Jackson ‘Everything you need to know about leave’ www.Rowlay.co.za/home/Article/everything-you-need-to-know-about-leave Accessed on 14 November 2013.

¹⁷² Section 27(2) of the BCEA.

out in the EEA¹⁷³. The provision excludes some members of the African family structure creating disparity in the workplace. This results because the most employers rely on it as a condition of employment despite section 49 of the BCEA providing for variations.

Section 49 of the BCEA provides as follows:

“Variation by agreement

- (1) A collective agreement concluded in a bargaining council may alter, replace or exclude any basic condition of employment if the collective agreement is consistent with the purpose of this Act and the collective agreement does not-
 - (a) reduce the protection afforded to employees by sections 7, 9 and any regulation made in terms of section 13;
 - (b) reduce the protection afforded to employees who perform night work in terms of section 17 (3) and (4);
 - (c) reduce an employee’s annual leave in terms of section 20 to less than two weeks;
 - (d) reduce an employee’s entitlement to maternity leave in terms of section 25;
 - (e) reduce an employee’s entitlement to sick leave in terms of sections 22 to 24;
 - (f) conflict with the provisions of Chapter Six.
- (2) A collective agreement, other than an agreement contemplated in subsection (1), may replace or exclude a basic condition of employment, to the extent permitted by this Act or a sectoral determination.
- (3) An employer and an employee may agree to replace or exclude a basic condition of employment to the extent permitted by this Act or a sectoral determination.
- (4) No provision in this Act or a sectoral determination may be interpreted as permitting-
 - (a) a contract of employment or agreement between an employer and an employee contrary to the provisions of a collective agreement;
 - (b) a collective agreement contrary to the provisions of a collective agreement concluded in a bargaining council.”

¹⁷³ Section 1 of the EEA.

3.5 Conclusion

After a review of legal documents referred to above, the definition offered by PEPUDA appears to be more appropriate and accommodating, taking into account international and regional instruments ratified or adopted by South Africa, the South African Constitution and the diverse nature of the country. PEPUDA has a higher status than Acts of Parliament generally since section 9(5) of the Constitution mandated Parliament to enact anti-discrimination legislation. It could be said that the EEA, as anti-discrimination legislation in the workplace has a similar status, but was not mandated by the drafters of the Constitution. Although the definition in the EEA is wide, it is open to different interpretations and may be confusing since what may be immediate family in one culture may not be in another and the EEA did not define the concept of immediate family.

Despite the weight which is carried by PEPUDA in dealing with discrimination cases, it appears that must consideration has not been afforded to it. This probably because in its own provisions, it excludes its application in cases/instances where the EEA is applicable. In view of the fact that it was passed following numerous decisions from the Constitutional Court, legislators would have been better informed at the time of its passing to improve some of the shortfalls in the EEA. It is therefore imperative that when considering discrimination disputes in the workplace including in those instances where the EEA applies that PEPUDA be afforded cognisance. This study, confirms the influence of jurisprudence since there is a marked difference in the definition of family responsibility. PEPUDA being compliant with international, Regional and National instruments together with decisions of the Constitutional Court.

As the purpose of the study is to investigate the existence of discrimination related to cultural practice, Chapter 4 which follows from this chapter considers relevant discrimination laws in South Africa and how the Courts have applied them in respect of cultural and religious matter. A more comprehensive analysis appears in chapter 6.

CHAPTER4:

DISCRIMINATION AND CULTURAL PRACTICES

4.1 *Introduction*

The question which arises is whether the definition of family responsibility as provided in the South African legislative documents is inconsistent with the African cultural definition of family responsibility and if so, whether such violation amounts to discrimination. To understand the application of the concept of FRL and determine whether there has been a breach of the provisions of the Constitution, it is imperative to give consideration to the concept of discrimination. A brief study of the concept of discrimination is also necessary since the purpose of this study is amongst others to establish whether the concept of FRL as embodied in the provisions of section 27 of the BCEA are discriminatory in nature. The following section describes discrimination and studies instances when discrimination is said to arise.

4.2 *The International Labour Organisation*

In its preamble, the Convention 156¹⁷⁴ recognises the right of ‘all humans’ to pursue their well-being and spiritual development in conditions of freedom and dignity, of economic security and equal opportunity.¹⁷⁵ The objective of the Convention 156 is to deal with issues of discrimination in employment and occupation which were not expressly covered by the 1958 Convention relating to family responsibilities and to supplement the standards. The objective was to further review the terms of the Employment (Women with Family Responsibilities) Recommendation, 1965, and consider the changes since its adoption.

The Convention recognises the problems of workers with family responsibilities as aspects of wider issues regarding the family and society which have to be considered in national policies

¹⁷⁴ ILO Convention, Workers with Family Responsibilities Convention, 1981 (No. 156).

¹⁷⁵ ILO Convention 156 further acknowledges the Equal Remuneration Convention and Recommendation, 1951, the Discrimination (Employment and Occupation) Convention and Recommendation, 1958, and Part VIII of the Human Resources Development Recommendation, 1975.

and the need to create equal opportunities and treatment between male and female employees with family responsibilities and other workers. It also noted that in the workplace, employees with family responsibility face aggravated problems which need improvement.¹⁷⁶ In view of this, it was necessary to adopt certain proposals to create equal opportunities and equal treatment for men and women workers with family responsibilities.¹⁷⁷

Article 1 of Convention 156¹⁷⁸ applies to men and women workers with responsibilities in relation to their dependent children, where such responsibilities restrict their possibilities of preparing for, entering, participating in or advancing in economic activity. The provisions of this Convention similarly apply to men and women workers with responsibilities in relation to other members of their immediate family who clearly need their care or support.¹⁷⁹ It can be noted that the emphasis is on the 'immediate' family. It must be acknowledged that the move towards including family responsibility was of course spurred on by the feminist movement and as a result, the emphasis was on equality between the sexes, to the neglect of cultural ramifications of family responsibility.

4.3 *South African Discrimination law*

Section 9¹⁸⁰ of the Constitution provides for the right to equality and sets out this right as including the full and equal enjoyment of all rights and freedoms. It further prohibits unfair discrimination whether direct or indirect against any of enumerated grounds including culture.¹⁸¹ In this regard, it provides for national legislation to be enacted to prevent or prohibit unfair discrimination. Such legislation includes the EEA and PEPUDA amongst others. Discrimination on one or more of the listed grounds is unfair unless it is established that the discrimination is fair.

¹⁷⁶Preamble or particular provision of 156 Convention

¹⁷⁷Preamble or particular provision of 156 Convention.

¹⁷⁸*Ibid.*

¹⁷⁹*Ibid.*

¹⁸⁰ Section 9 of the Constitution of the Republic of South Africa, 1996.

¹⁸¹The listed grounds further include race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

From the Preamble and from section 9 of the Constitution¹⁸², it is clear that the right to equality is central to and inseparable from other rights. It is of fundamental importance to the restructuring of the South African society¹⁸³ and guarantees that freedom will be enjoyed equally by all the people. In giving a more mature interpretation of the Constitution, little purpose, if any, is served by creating a hierarchy of rights or an absolute assertion that of a particular right than other rights. The importance of a particular right will be determined by the context within which it is claimed.¹⁸⁴

The Constitutional Court in *Brink v Kitshoff*¹⁸⁵ has accepted that if the treatment complained of was substantially or materially based on the prohibited ground, then discrimination will be established irrespective of the presence of the non-prohibited considerations.¹⁸⁶ Once the onus is discharged, it shifts to the employer to prove the fairness of the employment policy and practice.

Section 23(1) the Constitution confers the right to fair labour practices as already discussed earlier. As stated above, the purpose of the BCEA is to give effect to, realise and regulate the right to fair labour practices conferred by section 23(1) of the Constitution.¹⁸⁷ It is therefore expected that the provisions of the BCEA must be fair in their application and must safeguard the rights conferred by the Constitution. They must therefore not differentiate between employees as this amount to discrimination. Fair labour practices require that employees are treated equally while their diverse cultures are recognised. In view of the narrow classification of the family structure in the conference of FRL, equal treatment would not be realised.

The EEA is the cornerstone of understanding unfair discrimination in South African workplace.¹⁸⁸ The equality and non-discrimination aimed at by the EEA is consonant with our

¹⁸²The Constitution of the Republic of South Africa, 1996.

¹⁸³ Govender K and Bernard R 'To exempt or not to exempt – Some Lesson for Educators and Administrators' (2009) 30(1) *Obiter* 4.

¹⁸⁴*Ibid* 3.

¹⁸⁵*Brink v Kitshoff NO* 1996 (4) SA 197 (CC).

¹⁸⁶ T Cohen and L Dancaster 'Flexible Working Arrangements for employees with Family Responsibilities – The Failings of the Employment Equity Act' O Dupper and C Garbes (eds) *Equality in the Workplace Reflections from South Africa and Beyond* 1st ed (2009) Juta 209.

¹⁸⁷ Section 2 of the BCEA.

¹⁸⁸ O Dupper and C Garbes 'The Prohibition of Unfair Discrimination' in *Essential Employment Discrimination Law* E Strydom (ed) (2004) Juta 31.

Constitution's vision of a concept of equality, which in the words of Moseneke J in *Minister of Finance & another v Van Heerden*¹⁸⁹ includes "a credible and abiding process of reparation for past exclusion, dispossession and indignity within the discipline of our Constitutional framework".

Chapter II of the EEA deals with prohibition of unfair discrimination. Section 5 requires every employer to take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice. The concept of employment policies and practice is defined in section 1 of the EEA as including, but is not limited to remuneration, employment benefits and terms and conditions of employment.

The existence of discrimination in employment policies and practices is problematic to prove. On a purely semantic level, reference to policy or practice seems wider than the phrase requirement or condition. The definition in section 1 eases the burden on applicants by grouping the various policies and practices under one heading. All the applicant needs to show is that the policy or practice has a disproportionate effect on a protected group i.e. even if the individual factors are capable of separation, the employee can argue that the entire system has a disproportionate impact on several listed grounds.¹⁹⁰ Since family responsibility and culture are both listed grounds the disproportionate impact on any one of these grounds would result in direct discrimination and would therefore be unfair.

In order to establish cultural discrimination, it is incumbent on the employees to show that through the enforcement of the policy, the employer interfered with their participation in or practice or expression of their culture. An intention to discriminate need not necessarily be present; the impact of the discriminatory practice is decisive. The practice must impact on the dignity of the affected individual, who must be a member of a group deemed worthy of protection¹⁹¹ for it to be discriminatory.

¹⁸⁹*Minister of Finance & another v Van Heerden* (2004) 25 ILJ 1593 (CC) 1193D.

¹⁹⁰Dupper et al (note 188 above) 56-57.

¹⁹¹J Grogan 'Workplace Law' 10th ed (2009) Juta 95.

In *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd & others*¹⁹² it was alleged that the company practised direct and indirect discrimination on racial grounds. A dispute regarding an alleged unfair labour practice was referred to the Labour Court in terms of item 2(1)(a) of schedule 7 to the Labour Relations Act (LRA) 1995.¹⁹³ The Court found that the failure of the employer to pay the same contribution to the pension and the provident fund as it did to the staff benefit fund discriminated against members. The Court found further that the monthly/weekly paid criterion was arbitrary and therefore discriminatory in terms of item 2(1)(c) of schedule 7 to the LRA. It found that the notion of permissible discrimination is in keeping with a substantive, rather than a formal approach to equality that permeates the Constitution of 1996 and from which item 2(1)(a) draws its inspiration.¹⁹⁴

The Court stated that discrimination is unfair if it is reprehensible in terms of the society's prevailing norms. Whether or not society will tolerate the discrimination depends on what the object is of the discrimination and the means used to achieve it.¹⁹⁵ The object must be legitimate and the means proportional and rational.¹⁹⁶ The Court accordingly found that the employer's interpretation and application of the rules of the retirement benefit funds involved unfair discrimination on arbitrary grounds on the basis of race. The employer also unfairly discriminated against its Black employees by making them weekly paid and by not requiring or inviting Black monthly paid employees to join the staff benefit fund.¹⁹⁷

Section 6 mirrors the prohibition of unfair discrimination as provided in the Constitution. The EEA however includes additional grounds. It prohibits unfair discrimination against an employee, in any employment policy or practice, on several grounds including family responsibility, ethnic or social origin, colour, sexual orientation, and culture among others.¹⁹⁸ The prohibition may however be justified through affirmative action or inherent requirements of a job.¹⁹⁹

¹⁹²*Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd & others* (1998) 19 ILJ 285 (LC).

¹⁹³ The provisions of item 2(1) of schedule 7 have been repealed and appear in exactly the same form in the EEA.

¹⁹⁴*Leonard Dingler* (note 192 above) 294.

¹⁹⁵*Leonard Dingler* (note 192 above) 301.

¹⁹⁶*Leonard Dingler* (note 192 above) 301.

¹⁹⁷*Leonard Dingler* (note 192 above) 301.

¹⁹⁸ Section 6(1) of the EEA.

¹⁹⁹ Section 6(2) of the EEA.

In *Woolworths v Whitehead*²⁰⁰ which related to discrimination on the grounds of pregnancy, Willis JA held that the decision of the employer in regard to a single employee could hardly be described as a policy or practice. The court found that the requirement of policy and practice laid down in Section 6(1) of the EEA was not met. Dupper²⁰¹ states that there are at least two problems with this approach - the first being that it seems to suggest that a prejudicial attitude is a requirement in our law which is not the case. Secondly, the implication of this approach is that an employer will be able to reject all female applicants for employment as long as each decision is taken separately. This would defeat the purpose of the legislation.

The approach by the court in the *Woolworths* decision does not give a clear guideline on what would constitute a workplace policy or practice. The categorisation in the EEA²⁰² appears broad especially since it includes workplace practices. In order for an employee to succeed in a discrimination dispute, they would have to show the existence of a workplace policy or practice.

In *Leonard Dingler*²⁰³ the Court surveyed the provisions of the EEA and the Constitution and came to the conclusion that the onus rested on the employer to show that the object of the practice or policy was legitimate and that the means used to achieve it was rational and proportional. The Court came to the conclusion that, once the applicant established that there was discrimination, the evidentiary burden shifted to the employer to show that there was no unfair discrimination.

As stated above, section 6(1) of the EEA prohibits direct or indirect unfair discrimination of employees on several grounds including FR and culture. Direct discrimination refers to situations in which some people are treated differently from others on the basis of a listed ground or on arbitrary grounds. Indirect discrimination is where an employer utilises an employment policy or practice which appears neutral but disproportionately affects members of disadvantaged groups

²⁰⁰*Woolworths v Whitehead* (2000) 21 ILJ 571 (LAC) 579.

²⁰¹Dupper (note 188 above) 57.

²⁰²Section 1 of the EEA.

²⁰³*Leonard Dingler* (note 192 above).

in circumstances where it is not justifiable²⁰⁴ as in the *Jonase* decision which will be discussed in chapter 5.²⁰⁵ If an employee is successful in linking differentiation with a listed ground, it is not only discrimination but discrimination is presumed to be unfair.²⁰⁶

4.4 Cultural Practices

Culture refers to the way of life of a specific group.²⁰⁷ It is not static but changes with generations. It includes rituals, norms of behaviour religion etc. Culture is the set of distinctive spiritual, material, intellectual and emotional features of society or a social group.²⁰⁸ It encompasses value systems, traditions and beliefs ways of living together and lifestyle. South Africa is made up of diverse cultures²⁰⁹ and African culture is one of them.

Culture is born with or learnt. Cultural practices in South Africa include how we behave, talk pray and the special things we do when we have births and deaths. The definition is not exhaustive.²¹⁰ As appears from the definition of FR and FRL, the main focus of this study is influenced by cultural practices. Further reference to the topic will be dealt with under prohibitions of unfair discriminations under the EEA below.

This study would be incomplete if the right to cultural practices was not considered. It is only necessary to illustrate the importance of this right. Before 1994, the white minority held power in South Africa and as part of foregoing such powers required for minority rights to be catered for in the final constitution.²¹¹ This resulted in the right to equality and the right to cultural, religious and linguistic communities being recognised. Culture is amongst the grounds of prohibited grounds of discrimination in the Constitution.²¹²

²⁰⁴Dupper (note 188 above) 39.

²⁰⁵*Jonase* (note 2 above).

²⁰⁶Dupper (note 188 above) 38.

²⁰⁷ SA History 'Defining culture, heritage and identity' www.Sahistory.org.za.

²⁰⁸United Nations Educational, scientific and cultural Organisation (UNESCO) World Education Report 2000 'The right to Education for all through life; www.unesco.org/education/information/wer/ accessed 31 December 2014.

²⁰⁹SA History (note 207 above).

²¹⁰ SA History (note 207 above).

²¹¹ I Currie and J de Waal *The Bill of Rights Handbook* 5thed (2005) Juta 622.

²¹² Section 9(3) of the Constitution.

The Constitution in section 31 provides that persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community, to enjoy their culture, practise their religion and use their language, and to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

The right to cultural practice is based on article 27 of the ICCPR. Article 27 of the Convention protects the right of minorities to use their own culture, although an individual right, can only be enjoyed when shared with a group. The protection accorded in article 27 is similar to that in section 31 of the South African Constitution. According to Currie, it expresses culture of a communal object and a means of expressing values and tradition.²¹³ He states further that one's right to participate in cultural life will be impugned if some harm comes to the cultural community in which the individual belongs. The right protects both individual and group interest which makes the scope of the protection to serve a dual purpose - for example in *MEC for Education: KwaZulu-Natal v Naveneethum Pillay*.²¹⁴ In that case, a school disciplinary code that prohibited the wearing of cultural and religious dress (a nose ring) was found to be discriminatory and the court recognised both the individual and group right attaching to her right to practice her culture. However, where the interest of the community restricts individual participation into that community, then these interests may conflict.

The Constitution does not list FR as a prohibited ground of discrimination. It however lists culture as one such ground. Clearly recognised cultural beliefs can be assessed and evaluated. A cultural practice is enjoyed in association with other people. The greater the number of people that engage in the practice, the more likely it is to be genuinely held.²¹⁵ Several cases have been decided in favour of cultural rights. In the *Pillay*²¹⁶ decision, the Court held that the voluntariness or otherwise of the cultural practice is irrelevant to the determination of whether it qualifies for protection.

²¹³Currie et al (note 211 above) 624.

²¹⁴*MEC for Education: KwaZulu-Natal v Naveneethum Pillay* 2008 (1) SA 474 (CC) para 67.

²¹⁵Govender et al (note 183 above) 7.

²¹⁶2008 (1) SA 474 (CC) at par 67.

An exercise of the cultural right may not be in conflict with other fundamental rights. As stated by Currie, the Bill of Rights mainly affords individual rights.²¹⁷ The protection of group rights must conform with and be placed in context with the rights aimed at guaranteeing 'individual freedom and equality. The right to culture is of course one of the rights protected in the equality section of the Bill of Rights.²¹⁸ In entertaining and interpreting any claim to cultural practice, one must ensure that it does not encroach upon other individual rights.

FR and culture are listed grounds in terms of the EEA,²¹⁹ therefore if an employee is able to show the differentiation in terms of these grounds, then it will be presumed that the employee is discriminated against. The onus then shifts to the employer to try and justify the discrimination.²²⁰ Reasonable accommodation is always an important factor in determining the fairness of the discrimination,²²¹ however, the Court in the *Pillay* decision cautioned against reducing fairness to reasonableness.²²²

The EEA²²³ defines reasonable accommodation as meaning any modification or adjustment to a job or working environment to enable a person from a designated group to have access to or participate or advance in employment. While in the Code of Good Practice²²⁴ reasonable accommodation is defined as providing an enabling environment for disabled workers and workers with family responsibilities to allow them to participate fully and improve productivity.

The case of *POPCRU*²²⁵ and *Kiewits*²²⁶ referred to below set out examples of instances where employers were expected to reasonably accommodate employees.

²¹⁷Currie (note 211 above) 623-624.

²¹⁸ Section 9(3) of the Constitution.

²¹⁹ Section 6(1) of the EEA.

²²⁰Dupper (note 188 above) 38.

²²¹ Govender et al (note 215 above) 8.

²²²*Pillay* (note 214) para 77.

²²³Section 1 of the EEA

²²⁴ Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans, Published under GN R1394 in *Government Gazette* 20626 of 23 November 1999.

²²⁵*POPCRU* (note 263 below).

²²⁶*Kiewits Kroon Country Estate (Pty) Ltd v Mmoledi and others*(2014) 35 ILJ 406(SCA).

In the same year as the *Pillay* decision, in a decision dealing with the test for reviews in the Constitutional Court, the Court moved from the fairness of the decision to reasonableness.²²⁷ It is likely that a similar approach may be followed in dealing with discrimination cases arising in the workplace. The Constitutional Court has however created confusion on the test to be followed since in a recent decision,²²⁸ Judges held different views by finding on the one hand that fairness and justifiability applied and on the other that fairness as a standard could not be sourced in the EEA as to do so would be to undermine section 9(2) of the Constitution. Instead of creating clarity, the Constitutional Court has left the issue more confusing to lower courts.

Diversity should be accommodated when there is a conflict between rights and applicable rules/laws.²²⁹ Balancing the conflicting rights becomes an option when the employer can establish that the employee's demands would create an undue hardship. It is at this point that it becomes justifiable to search for a compromise position that does not impose undue hardship and does not unjustly limit the employee's rights.²³⁰

The matter of *Kiewits Kroon Country Estate (Pty) Ltd v Mmoledi & others*²³¹ that culminated in the Supreme Court of Appeal decision that will be considered below, started as an arbitration proceeding in the CCMA, then was reviewed by the Labour Court,²³² and was heard by the Labour Appeal Court²³³ before ending at the SCA.

The employee, Mmoledi was employed as *chef de partie* at the applicant's country estate. She sought permission to take unpaid leave of absence from for a month in order to complete a course to become a traditional healer, a calling, but her request was refused. She went on leave without permission. On her return she was charged with several act of misconduct including gross insubordination, absence without leave for more than 3 days without authorisation and non-compliance with managerial instructions. She was found guilty and dismissed for being

²²⁷*Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC).

²²⁸*South African Police Service v Solidarity OBO Barnard* 2014 (6) SA 123 (CC).

²²⁹Govender and Barnard (note above) 9.

²³⁰*Ibid.*

²³¹*Kiewits* (note 226 above)

²³²*Kiewits Kroon Country Estate (Pty) Ltd v CCMA and others* (2011) 32 ILJ 923 (LC).

²³³*Kiewits Kroon Country Estate (Pty) Ltd v Mmoledi and others* (2012) 33 ILJ 2812 (LAC).

absent for more than three days without authorisation. She then referred an unfair dismissal dispute to the CCMA.

The court stated that the case was a sad example of what happened when cultures clash in the workplace since the employer was concerned about making money at all costs and the employee believed that her ancestors were calling her to become a sangoma. When the employer did not regard the calling to be a sangoma as an illness, the employee did.²³⁴ Ironically, when the employee first informed the employer of the visions she was having, she was allowed to work in the morning and attend her trainings to become a sangoma in the afternoon²³⁵. In this instance, the employer had balanced two conflicting rights and accommodated the employee reasonably.

The ultimate question to be decided by the court was whether her absence from work was justifiable. The factors considered by the court in this respect were: the reason for the absence, the duration, the employee's employment record, and the employer's treatment of such offences in the past. The onus rested on the employee to tender a reasonable explanation for her absence and in this instance, the commissioner found that while she had breached the employer's rule, this was justified.²³⁶

After considering the test for review, the court found the award to have been well reasoned and dismissed the application with costs.²³⁷

On appeal before the Labour Appeal Court 'the LAC', it was noted that the chairperson of the disciplinary enquiry noted the explanation tendered by the employee for her absence was firstly to undergo the sangoma training and graduation alternatively that she was ill since spirits of her forefathers were bothering her. The chairperson could not accept that an employee would attend unrelated courses with no economic benefit to the employer on company time. In respect of the sickness, he found that she had not provided a letter by a medical practitioner as required by the

²³⁴ *Kievits* (note 232 above) para 22.

²³⁵ *Kievits* (note 232 above) para 23.

²³⁶ *Kievits* (note 232 above) para 26.

²³⁷ *Kievits* (note 232 above) para 28-30.

BCEA to prove the alleged illness. As a result, the chairperson rejected explanations and recommended the sanction of dismissal.²³⁸

In the Labour Appeal Court, the appellant argued that the Labour Court should have found that the commissioner committed misconduct and arrived at a decision which a reasonable decision maker would not reach when finding that the employee had an excuse valid in law for her to be absent for several weeks without leave to attend a sangoma course; it argued that there court erred in several respect by failing to find that when enacting the LRA and the BCEA the legislature opted for standards more akin to western standards than to African culture, examples of which were section 23(1) and 23(2) of the BCEA; failing to find that the commissioner assumed the function of the legislature elevating the role of traditional healers to medical practitioners; failing to find that the commissioner disregarded decisions stating that a certificate issued by a traditional healer was not a proper certificate to be seriously considered when determining an employee's reasons for absence; failing to find that the effect of the award would open the floodgates to malpractices turning the work environment into total disarray, contrary to labour legislation by allowing employees who believe in and subscribe to the African traditions and culture to diagnose themselves as suffering from some disorder or illness and then expect employers to be bullied into accepting sick notes from traditional healers on the same footing as medical certificates for unspecified periods of absence.²³⁹

The LAC, per Tlaletsi J²⁴⁰ noted that it was unfortunate that much emphasis was placed on the fact that the employee claimed to be sick and that the certificate from her traditional healer was not valid as required by section 23 of the BCEA.²⁴¹ This was because she was not sick or ill in the conventional sense and her case was that, based on her cultural and/or traditional belief, she had to undergo sessions to qualify her to be a sangoma as she obtained a calling from her ancestors. The employer understood this initially and when she first took time off, he accommodated her without asking whether she was sick in the conventional sense and required

²³⁸ *Kiewits* (note 233 above) para 11.

²³⁹ *Kiewits* (note 233 above) para 18.

²⁴⁰ Ndlovu JA and Murphy AJA concurred in the judgment of Tlaletsi JA.

²⁴¹ *Kiewits* (note 233 above) para 22.

no medical certificate.²⁴² The problem only arose when the employee required a full month to conclude her sangoma sessions and it was found that she did not have sufficient leave days. The employer took the view that she could only be accommodated if she produced a “medical certificate” as proof of her “medical condition”. In an attempt to comply with this requirement, the employee obtained a certificate from her traditional healer that she was treating her for her ‘condition’.²⁴³

In the LAC’s view, section 23 of the BCEA found no application. The employee was not seeking remuneration for the period when she would be away due to ill health; she wished to be accommodated by being given a month’s unpaid leave to complete a process she had already begun. The Court found that the employer’s argument that by enacting section 23 the legislature expressly opted for standards in line with Western standards as opposed to African culture was misplaced and the Commissioner had not usurped the functions of the legislature by elevating the role of traditional healers to that of medical practitioners.²⁴⁴

The Court also rejected the employer’s argument that the Commissioner’s findings would open the ‘floodgates’ to malpractices in the workplace.²⁴⁵ The Constitution recognises traditional beliefs and practices and some of them are strongly held by those who subscribe to them and regard them as part of their lives. Those who do not subscribe to others’ cultural beliefs should not trivialise them. What is required is reasonable accommodation of each other to ensure harmony and to achieve a united society.²⁴⁶ This is supported by Jordaan in his analysis of the decision.²⁴⁷

In the SCA, the appellant argued that the Commissioner committed a gross irregularity within the meaning of section 145(2)(a)(ii) of the Labour Relations Act 66 of 1995 by misconceiving the true nature of the inquiry in that he asked the incorrect question, i.e. whether the respondent

²⁴²*Kiewits* (note 233 above) para 23.

²⁴³*Kiewits* (note 233 above) para 24

²⁴⁴*Kiewits* (note 233 above) para 25.

²⁴⁵*Kiewits* (note 233 above) para 26

²⁴⁶*Kiewits* (note 233 above) para 26.

²⁴⁷Jordaan (note 31 above); A Rycroft ‘Accommodating religious or cultural beliefs in the workplace: *Kiewits Kroon Country Estate v CCMA; Dlamini v Green Four Security; POPCRU v Department of Correctional Services*’ (2011) 23 *SA Merc LJ* 106-113.

was justified in not reporting for work.²⁴⁸ Further, that the commissioner failed to appreciate the true nature of the inquiry, i.e. whether or not the appellant had properly applied the principles applicable to a request for unpaid leave. Had he done so, the appellant submitted, the commissioner would have concluded that the dismissal was substantively fair.²⁴⁹

The SCA, per Cachalia J²⁵⁰ found it apparent from the employee's evidence, both at the disciplinary hearing and before the CCMA, that she believed that she was ill.²⁵¹ Her employer seemed to have understood that her experiences bore some cultural significance, but he did not understand this as some form of illness.²⁵² The chairman of the disciplinary enquiry also did not accept that she was ill without proof from a medical practitioner. In contrast the commissioner accepted that the employee genuinely believed that she was ill, and that her belief stemmed from deeply held cultural convictions.²⁵³

The SCA found it to be beyond dispute that such belief systems are part of the culture of significant sections of the country's people. The courts had acknowledged this. Also beyond dispute, the SCA held, was that as part of these belief systems people resort to traditional healers for their physical, spiritual and emotional well-being.²⁵⁴ After reference to the findings of the World Health Organization on the issue, the court noted that in contrast to the approach of conventional medicine, which uses 'material causation' to treat illness, traditional medicine generally looks towards the 'spiritual' origin, which includes communication with the ancestors.²⁵⁵

In the court's view, South African courts are equipped to deal with disputes arising from conventional medicine which are governed by objective standards, whereas religious doctrine or cultural practices are not.²⁵⁶ They are not permitted to evaluate the acceptability, logic,

²⁴⁸*Kiewits* (note 226 above) para 19.

²⁴⁹*Kiewits* (note 226 above) para 19.

²⁵⁰Brand, Leach, Willis JJA and Zondi AJA concurred in the judgment of Cachalia JA.

²⁵¹*Kiewits* (note 226 above) para 21.

²⁵²*Kiewits* (note 226 above) para 21.

²⁵³*Kiewits* Note 226 above) para 22.

²⁵⁴*Kiewits* (note 226 above) para 24.

²⁵⁵*Kiewits* (note 226 above) paras 24-26.

²⁵⁶*Kiewits* (note 226 above) para 27.

consistency or comprehensibility of such beliefs, and are concerned only with the sincerity of the adherent's belief and whether it was being invoked for an ulterior purpose.

Once the commissioner correctly found that the employee's beliefs were sincere he was required to determine whether her failure to obey the employer's instruction was justified or reasonable.²⁵⁷ The court rejected the employer's contention that the employee had not been honest in relying on the certificate, and noted that had the employer understood the certificate to be equivalent to a medical certificate, or tried to understand its import, it might have accommodated her request.²⁵⁸ The court was satisfied that the commissioner's conclusion that the employee was justified in disobeying the employer's instruction was supported by the evidence and dismissed the appeal with costs.²⁵⁹

Rycroft J, in commenting on this case, argues that a key principle to be taken from this case is the following:

“[W]here an employee, giving adequate notice to the employer of the circumstances and reasons, finds that it is a necessity (to the point that it is beyond control) not to render services because of religious or cultural beliefs, it may be unreasonable to dismiss the employee where unauthorised leave is taken because of those beliefs.”²⁶⁰

Because the respondent requested unpaid leave, the LAC did not consider the application of section 23 of the BCEA. At the time of the judgment, and currently, traditional healers are not yet regulated. The lack of regulation creates a legal vacuum, as Phooko and Mnyongani argues, which requires urgent attention.²⁶¹ Similarly, Chenia has argued that the recognition of Traditional Healers as health care practitioners in the Traditional Health Care Act of 27 of 2008, and the establishment and implementation of regulations of the Traditional Healers Practitioners Interim Council signals the protection of the social and cultural diversity in South Africa. In the

²⁵⁷ *Kiewits* (note 226 above) para 28.

²⁵⁸ *Kiewits* (note 226 above) para 30.

²⁵⁹ *Kiewits* (note 226 above) para 32.

²⁶⁰ A Rycroft (note 247 above).

²⁶¹ MR Phooko and F Mnyongani 'When ancestors call an employee: *Kiewits Kroon Country Estate (Pty) Ltd v Johanna Mmoledi and Others*' (2013) 25 *SA Merc LJ* 606-618, 618.

workplace, she argues, the establishment of the council may settle “the issue of certificates issued by THPs” and obviate “the need for the constitutional challenge to the BCEA”, thus providing more clarity for the employers as to their obligations in accommodating religious and cultural diversity.²⁶²

In *POPCRU v Department of Correctional Services*²⁶³, five male correctional officers were employed by the respondent. Whilst in the respondent’s employment, they wore dreadlocks. In 2007, the Area Commissioner issued instructions on the dress code which included hairstyles. Employees were requested correctional officers to furnish reasons why they should not be disciplined for noncompliance. All but the five employees complied with the instruction and cut their hair. Of the five employees, two advanced cultural reasons/practices relating to their training as traditional healers, as the reason for wearing dreadlocks. They were to shave off their hair on completing the training they were undergoing. The other three provided a reason that they wore dreadlocks for religious purposes being that they were Rastafarians.

When the employees were disciplined, they raised a defence that female employees were allowed to wear dreadlocks. They argued that the policy of the respondent was not in line with the Constitution of South Africa because it contained elements of discrimination. In response to the suggestion that correctional officers smuggled drugs into the correctional centre, it was stated that the respondent’s employees were subject to random searches. The evidence of the union in support of the dismissed employee was that there had never been a case of Rastafarian charged for smuggling drug. Further that the rule in respect of the wearing of dreadlocks was not consistently applied with reference being made to other employee at regional and head office. Evidence was also led from a traditional healer who testified as to the rituals which had to be performed in respect of the calling.

The respondent’s case was that there had been lack of discipline and dagga was a drug of choice at the facility. Evidence was led of several deviations from other policies including the leave policy, vehicle use policy and smoking policy. Employees were expected to execute all

²⁶²M Chenia ‘Traditional healers and sick leave’ (September 2013) *Without Prejudice* 18-19, 18.

²⁶³*POPCRU v Department of Correctional Services* (2010) 31 ILJ 2433(LC).

instruction which were in compliance with the provisions of the Constitution. The respondent refuted any allegations of inconsistency and led evidence to the contrary.

After considering the evidence and the provisions of section 6 of the EEA, the Court found that the applicants had been treated differently to female colleagues and therefore that their claim for discrimination was a direct one based on gender.²⁶⁴ The court found further that the second instance of discrimination relied on by the applicants was indirect and related to the respondent's use of an employment practice in the form of an instruction to remove dreadlocks which appeared neutral but affected members of disadvantaged groups disproportionately without justification.²⁶⁵ The court found that it was not the applicant's case that they were directly prohibited from their Rastafarian and/or cultural belief.²⁶⁶ In instances of indirect discrimination, the onus was on the applicants to prove the existence of discrimination. Once this is done, discrimination will be presumed unfair until the respondent proves otherwise.²⁶⁷

The Court accepted that the applicant employees kept their dreadlocks for religious and cultural reasons.²⁶⁸ After considering several Constitutional Court decisions, the court stated that the employees had never brought to the respondent's attention that the instruction issued by the employer was in conflict with their religious and cultural practices.²⁶⁹ The employees knew their rights to religious and cultural practices but failed to assert them at a critical time.²⁷⁰ The Court found that the employees failed to prove direct discrimination in respect of right to religion and cultural practices. They had the onus to prove that their belief was a '*sine qua non*' for their dismissal.²⁷¹ In view of this, the Court found that the presumption of unfairness was negated by the failure of the employees to assert their right.²⁷²

²⁶⁴POPCRU (note 263 above) para 214.

²⁶⁵POPCRU (note 263 above) para 215.

²⁶⁶POPCRU (note 263 above) para 215.

²⁶⁷POPCRU (note 263 above) para 216.

²⁶⁸POPCRU (note 263 above) para 220.

²⁶⁹POPCRU (note 263 above) para 226.

²⁷⁰POPCRU (note 263 above) para 227.

²⁷¹POPCRU (note 263 above) para 229.

²⁷²POPCRU (note 263 above) para 232.

Having considered the provisions of section 9(1) and (2) of the Constitution, the Court found that the employees were discriminated against on the basis of gender since there were insufficient reasons advanced as to the differential treatment between male and female employees.²⁷³ Further, that there was no evidence to sustain an argument that Rastafarian correctional officers were likely to be manipulated by prisoners for purposes of sneaking in drugs.²⁷⁴

On appeal²⁷⁵, the Labour Appeal Court stated that in determining whether employees have been unfairly discriminated, on the listed grounds, in the context of a dismissal, it must be proven that there was differentiation between employees or groups of employees ‘which impose a burden or disadvantage or withholds benefit, opportunities or advantages from certain employees’ on one or more of the prohibited grounds.²⁷⁶ The court found further that the employees wore their dreadlocks for religious and cultural beliefs. In considering equality or religious/cultural freedom, the authenticity of the belief is irrelevant. Consideration is to be given to whether the belief is sincere and made in good faith.²⁷⁷ The court found the decision of the Labour Court that there was no religious or cultural discrimination ‘erroneous’. It found that the failure to assert the rights did not render discriminatory action non-discriminatory.²⁷⁸ It found that the discrimination relating to culture and religion was direct.²⁷⁹ The court found that there was an overlap between gender and religious/cultural beliefs. It then had to determine whether such discrimination was fair.²⁸⁰

The court accepted the application of the normal applicable determinant of fairness under the EEA and PEPUDA to the LRA.²⁸¹ The test for fairness is:

“the nature and extent of the limitation of the Respondent’s rights; the impact of the discrimination on the complainants; the social position of the complainants; whether the discrimination impairs the dignity of the complainants; whether the discrimination has a

²⁷³ *POPCRU* (note 263 above) para 236.

²⁷⁴ *POPCRU* (note 263 above) para 236-239.

²⁷⁵ (2011) 32 ILJ 2629 (LAC).

²⁷⁶ *POPCRU* (note 275 above) para 23.

²⁷⁷ *POPCRU* (note 275 above) para 26.

²⁷⁸ *POPCRU* (note 275 above) para 27.

²⁷⁹ *POPCRU* (note 275 above) para 28.

²⁸⁰ *POPCRU* (note 275 above) para 30.

²⁸¹ *POPCRU* (note 275 above) para 37.

legitimate purpose and whether reasonable steps have been taken to accommodate diversity sought to be advanced and protected by the principle of non-discrimination.”²⁸²

In exercising the test, the court had to consider the obligation of the state as the employer to accommodate diversity by evaluating the impairment of dignity, if any, to the employees, its impact and whether a lesser restrictive and prejudicial way existed to achieve the purpose. The court held that ‘there must be a rational and proportional relationship between the measure and the purpose it seeks to achieve. Reasonable accommodation of diversity is an exercise of proportionality bearing upon the rationality of the means of achieving the legitimate purpose of the prohibition’.²⁸³

It found that the refusal was justifiable to address the issue of discipline amongst the officers and for security reason in light of their duties. The court set the test for limiting the rights as including amongst others, whether reasonable steps have been taken to reasonably accommodate the diversity sought to be advanced and protected by the principle of non-discrimination. The court was required to determine the obligations placed on organs of state to accommodate diversity. In doing this, the court took into account the impairment of dignity, the impact and whether there is a less restrictive and less disadvantageous means of achieving the purpose.²⁸⁴

The LAC noted dicta by the Constitutional Court to reasonably accommodate matters of culture.²⁸⁵ Employers should therefore not burden religious and cultural believers on their choice at the expense of respecting the authority and prerogative of their employers.²⁸⁶ The LAC found that it must be proved that wearing short hair was an inherent requirement of the job which the employer had failed to prove.²⁸⁷ The LAC found that the employees had been discriminated upon on the basis of religion/culture and race.²⁸⁸

²⁸²*POPCRU* (note 275 above) Para 37.

²⁸³*POPCRU* (note 275 above) para 43.

²⁸⁴*POPCRU* (note 275 above) para 43.

²⁸⁵*Pillay* (note 214 above) 73.

²⁸⁶*POPCRU* (note 275 above) para 44.

²⁸⁷*POPCRU* (note 275 above) LAC para 45.

²⁸⁸*POPCRU* (note 275 above) para 53.

On a further appeal to the Supreme Court of Appeal (the SCA),²⁸⁹ the court noted that the employer's case was changed to being that the discrimination was justifiable since it was intended at eliminating security risk placed arising from placing employees which subscribed to a religion or culture which promotes criminality in the form of dagga in control of a quasi-military institution in the form of a prison. In view of this, it was argued that the employer's problem was no longer with the hairstyle.²⁹⁰ Dreadlocks were said to render Rastafari Officials conspicuous and susceptible to manipulation for inmates of their faith and other inmates to smuggle dagga.²⁹¹ The distinction between males and females was said to be because it was usual for women to wear long hair.²⁹²

The court stated that the already established *dicta* that "once discrimination has been established on a listed ground, unfairness is presumed".²⁹³ The onus shifts to the employer to prove the contrary. The court will consider the position of the victim in society, the purpose sought to be achieved by the discrimination, the extent to which the discrimination has affected the victim's rights, whether the victim's human rights were impaired and the existence of a less restrictive means to achieve the purpose of the discrimination. The court found that the policy degraded and devalued followers of the religion and cultural practices and was a substantial invasion of their dignity saying that their religion and culture were unworthy of protection.²⁹⁴

Dismissal could be fair if it was based on the inherent requirements of a job being an essential and indispensable attribute relating to an inescapable way of performing a job.²⁹⁵ The court held that it was not established that short hair and not dreadlocks was an inherent requirement of the job. Further that a policy restricting religious and cultural belief where such did not detract or jeopardise the employee's performance of his duties or public safety or cause undue hardship to the employer was not justifiable. There was no rational connection between the purported

²⁸⁹*Department of Correctional Services & another v Police & Prisons Civil Rights Union & others* (2013) 34 ILJ 1375 (SCA).

²⁹⁰*Department of Correctional Services* (note 289 above) para 19.

²⁹¹*Department of Correctional Services* (note 289 above) para 20.

²⁹²*Department of Correctional Services* (note 289 above) para 21.

²⁹³*Department of Correctional Services* (note 289 above) para 21.

²⁹⁴*Department of Correctional Services* SCA At para 22.

²⁹⁵*Department of Correctional Services* SCA At para 23.

purpose of discrimination and the measure taken nor was an unreasonable burden on the employer established. The appeal was therefore dismissed.²⁹⁶

McGregor has listed a number of principles to be deduced from a decade of employment law cases on accommodation of the right to religion and these may find application for accommodation of cultural understanding of family in FRL as well.²⁹⁷ For example:

(xii) It is important for an employer to take reasonable steps to accommodate diversity, which is to be advanced or protected by the principle of non-discrimination (*POPCRU II* supra).

4.5 Conclusion

South Africa is made up of diverse cultures as discussed above. In recognition of this diversity and to protect cultural practices, the section 31 of the Constitution was included in the Bill of Rights. Culture relates to the way of life by a specific group. The concept is wide and includes value system, traditions, beliefs, ways of living together and lifestyle. Culture influences behaviour, communication and how a community deals with births and deaths. Article 27 of the ICCPR was incorporated in the Bill of Rights and protects the rights of minorities to enjoy their own culture.

Although the right to cultural practice is an individual right, in order to be enjoyed, one must belong to a group. The protection of cultural rights must not encroach upon other individual rights. Culture is a listed ground in terms of section 9 of the Constitution. Therefore discrimination on the basis of culture is presumed to be unfair. The Courts have held that in considering cultural freedom, the authenticity of the belief is irrelevant. Consideration must be given on whether the belief is sincerely held and made in good faith. The onus would then shift to the employer to justify the discrimination. One of the justifications that the employer can rely on is to prove that it is the inherent requirements of a job i.e. the indispensable attribute linked to the inescapable way of performing a job.

²⁹⁶B Grant 'When men wear dreadlocks to work – *Department of Correctional Services v POPCRU* [2012] 2 BCLR 110 (LAC)' (2012) 33(1) *Obiter* 179-185.

²⁹⁷M McGregor 'Employees' Right To Freedom of Religion Versus Employers' Commercial Interests: A Balancing Act In Favour Of Religious Diversity: A Decade Of Cases' (2013) 25 *SA Merc LJ* 223-244, 243.

The Constitutional Court has set out *dicta* for employers to reasonable accommodate matter of culture. Reasonable accommodation must be exercised proportionately taking into account the rationality of the means to achieve a legitimate purpose of the prohibition. Reasonable accommodation must not cause undue hardship on the employer.

According to the Labour Appeal Court, the failure to assert one's rights does not render what would ordinarily be discriminatory non-discriminatory. The test set by the Labour Appeal Court to determine unfair discrimination on a listed ground. As set out in Chapter 2, the definition of family and consequent responsibilities in the African tradition are much wider than the Western definition. The definition of family in the African culture includes in laws and other persons involved in raising members of the family. In view of this certain obligations flow due to the nature of the relationship which must be protected as envisaged by the Constitution.

The Employer's argument in the Kiewits decision echoes the essence of this paper since it was to the effect that the legislature in enacting the BCEA followed Western culture and tradition. Although this issue was not specifically addressed by the Court, the fact that the Court found that the employer had an obligation to accommodate the employee in that case confirms the reasonable accommodation approach adopted by the Court in both the Kiewits and the POPCRU decisions at the LAC and the SCA. In POPCRU, the Court emphasised the fact that employers may not burden religious and cultural believers on their choice at the expense of respecting authority and the employer's prerogative.

The SCA in POPCRU took the matter a further finding that the policy degraded and devalued the religious and cultural employees and that it was an invasion of their dignity suggesting that their religion and culture were unworthy of protection.

The Family responsibilities carried by African employees set out in Chapter 2 flow from belonging in a particular group and is established as a cultural practice. As a result and in view of cases discussed in this chapter, this is protected by the Constitution. The provisions of Section 27 of the BCEA clearly exclude the African definition/classification of family and therefore limits

persons for whom FRL may be awarded to the Western nuclear definition. The result is that employers complying with the provisions of the BCEA fail to consider diversity and/or cultural practices. This is the case despite the BCEA providing for deviations. This appears in the Kiewits decision although that case dealt with sick and annual leave and not with FRL. Discrimination on the narrow classification of FRL constitutes discrimination of the basis of culture and therefore unfair.

This chapter focussed more on the application of discrimination laws and court decisions without considering the court's application of cases specifically relating to FRL. Chapter 5 which is the next chapter considers decisions specifically relating to FRL and the link if any to discrimination cases. Although some analysis appears in this chapter, a further and fuller analysis appears in chapter 6 of this paper.

Chapter 5:

Interpretation of Family Responsibility Leave by South African courts

5.1. Introduction

The judgments considered hereinafter deal specifically with the interpretation and application of various legislation by the Courts and other statutory dispute resolution mechanisms/institutions in dealing with issues relating to FRL. The FRL entitlement sets out in the BCEA fails to take cognisance of the provisions of section 9 of the Constitution read with section 31 together with the provisions of section 6 of the EEA which prohibit unfair discrimination on the basis of culture. Five decisions will be discussed.

5.2. *Masondo* decision

In *Masondo v Crossway*²⁹⁸ the employee was employed to clean, cook and serve customers between 7:00 to 16:30. During September 1996, she went on maternity leave and returned on 1 February 1997. During early April she was instructed to work night shift starting from 13:00 to 21:00. Since she had a new born baby, she considered this impossible and as a result resigned from employment on 15 April. She referred a constructive dismissal dispute to the CCMA and also alleged that the employer had unfairly discriminated against her in terms of gender and family responsibility and sought compensation. Although the allegation of unfair discrimination fell outside the jurisdiction of the CCMA, the parties consented to it being arbitrated.²⁹⁹

The commissioner found it intolerable to expect the mother of a newborn child to work night shift and that the employee had satisfied the onus in terms of section 192(1) of the LRA. The commissioner found further that the employer had failed to show that there were compelling reasons for choosing the employee to work the night shift. The employer's case was that the 'just refused to work' claiming that she could have changed shifts or made alternative arrangements.

²⁹⁸*Masondo v Crossway* (1998) 19 ILJ 171 (CCMA).

²⁹⁹In terms of section 141(1) of the LRA.

It was conceded that alternatives had never been canvassed with the employee. During the end of his cross-examination Mr de Sousa, the employer's witness, admitted that the employee's request to work the day shift was not unreasonable. Having considered this and other evidence, the Commissioner found the dismissal unfair.³⁰⁰

In terms of section 187(1)(f) of the LRA, where unfair discrimination is proven, the dismissal is automatically unfair. The Commissioner found that there was a lack of jurisprudence in South Africa on the on the interpretation of 'family responsibility' and relied on ILO Convention 156 (to which South Africa is a signatory) which aims to ensure equal treatment of all sexes and prohibit discrimination on the basis of family responsibility.³⁰¹ Reliance was also placed on other jurisdictions, including the USA, Canada and the United Kingdom.³⁰² The commissioner considered international and foreign jurisdiction required for all measures to be taken to enable workers with family responsibility exercise their right to free choice of employment and classifies as invalid termination of employment on the basis of family responsibility.³⁰³ Notably, the Commissioner found that the language used in the Convention 156 was too wide to provide sufficient guidance.³⁰⁴

It is trite law that an employee need not prove the employer's intention to discriminate and must simply show the disparate impact of the employer's practice on minorities and women. Once this is done, the burden shifts to the employer to show that the practice was established through business necessity by showing that these relate to the successful performance of the job in question. The Commissioner accepted the test as being the removal of artificial, arbitrary and unnecessary barriers to employment when these barriers operate invidiously to discriminate on the basis of impermissible classification.³⁰⁵

³⁰⁰*Masondo* (note 298 above) page 178.

³⁰¹*Masondo* (note 298 above) page 178-181.

³⁰²*Masondo* (note 298 above) page 181.

³⁰³*Masondo* (note 298 above) page 178.

³⁰⁴*Masondo* (note 298 above) page 178.

³⁰⁵*Masondo* (note 298 above) page 181.

The commissioner found that by requiring the employee to work night shift despite her family responsibility the respondent discriminated against the employee.³⁰⁶ This was irrespective of the employer's intention. The finding was based on the fact that another employee without children was not asked to work night shift and that no other employee with newly born children was asked to work the night shift.³⁰⁷ He found that the selection of the applicant employee was for personal preference and not a business necessity. The requirement caused disadvantage since the employee was being deprived of the opportunity to raise her child in the best circumstances available.³⁰⁸

The Commissioner stated that it could be argued that the discrimination was indirect since the treatment was neutral on the face of it but had a discriminatory impact on the employee.³⁰⁹ This was based on the fact that requiring an employee to work night shift could be regarded as reasonable but this would not be so where the requirement relates of a mother of a newly born child. The Commissioner found that the employee succeeded in establishing a prima facie case of discrimination on the basis of family responsibility; consequently, he found that the employer had failed to establish the required defence that placing the employee on night shift related to a business necessity.³¹⁰

While foreign jurisdiction has a persuasive value only, in view of a lack of South African decisions on the matter, foreign authority would become highly persuasive. The dismissal was found to have been automatically unfair and the employee awarded 12 months' salary as compensation.³¹¹ This case did not deal with discrimination relating to family responsibility associated to cultural practices, but it clearly displayed in taking decisions affecting employees in the workplace, their family responsibilities must be considered. The decision must be a reasonable one accommodating such a responsibility especially in light of the Constitution, the provisions of the BCEA and international instruments. The Commissioner found that there was little if any help from the international instruments.

³⁰⁶*Masondo* (note 298 above) page 180.

³⁰⁷*Masondo* (note 298 above) page 180.

³⁰⁸*Masondo* (note 298 above) page 180.

³⁰⁹*Masondo* (note 298 above) page 180.

³¹⁰*Masondo* (note 298 above) page 181.

³¹¹*Masondo* (note 298 above) page 181.

5.3. *Cooperative Workers Association* decision

The Labour Court *Co-operative Workers Association & another v Petroleum Oil & Gas Co-operative of SA & others*³¹² per Pillay J considered a case in respect of FRL relating to discrimination. This case however did not deal with cultural issues. The case involved a discrimination claim brought by a trade union, Independent Employees Association (IDEA). During or about 2003, the respondent, Petro SA, was formed following a merger of several organisations. A collective agreement was thereafter concluded at the Commission for Conciliation, Mediation and arbitration (the CCMA) between Petro SA and several trade unions which standardised terms and conditions of employment. One of the terms related to the actual cost of the employees' medical aid which was consolidated into the employees' total guaranteed remuneration (TGR). The effect was that employees with dependent spouses and children benefited significantly more since the TGR of employees with family responsibilities increased substantially.

Most of the members of (IDEA), a minority trade union constituting only 2.5% of the workforce had no family responsibilities. These members had no quarrel with this but objected to the inadvertent consequences of consolidating the medical aid contributions into the TGR. This was because the calculation of other benefits was based on the TGR.

Employees with family responsibilities received greater benefits. IDEA contended that the differentiation based on family responsibility amounted to unfair and unjust discrimination which violated the principle of equal pay for equal work or work of equal value.³¹³ After considering arguments on several preliminary points raised by the respondents, the court was satisfied that the matter was properly before it in terms of the EEA³¹⁴ and dismissed the objections.³¹⁵

³¹²*Co-operative Workers Association & another v Petroleum Oil & Gas Co-operative of SA & others* (2007) 28 ILJ 627 (LC).

³¹³*Co-operative Workers Association* (note 312 above) para 8.

³¹⁴ Section 10(6)(a) of the EEA.

³¹⁵*Co-operative Workers Association* (note 312 above) para 9-26.

IDEA referred to a two stage test for unfair discrimination developed in *Harksen v Lane*.³¹⁶ It argued that the remuneration policy adversely affected single and unmarried employees with no dependants and affected their dignity as they were financially not valued the same as employees with dependants.³¹⁷ The Labour Court stated that since family responsibility was a listed ground, fairness is presumed.³¹⁸ The pejorative element of the differentiation is that unequal treatment is based on personal attributes and characteristics. The measure affected the interest of employees in their professional lives. A negotiated outcome was not a defence to discrimination and an assessment of unfairness is based on its impact to the person allegedly discriminated on.³¹⁹

IDEA argued that the employer had shown that it differentiated and that this amounted to discrimination. Further that even if this was for commercial reasons, these did not outweigh the discrimination against employees without dependants.³²⁰

The court examined international instruments dealing with the value of the family and the need to protect workers with family responsibilities as a vulnerable category of people.³²¹ It also considered the Constitutional Court's emphasis on the important status of the family in several of its decisions,³²² that the EEA definition of 'family responsibility' is similar to that of the ILO;³²³ and that the EEA protects workers with family responsibilities as a disadvantaged category who must be reasonably accommodated.³²⁴ Further, the court considered that a measure challenged as violating the principle of equality would be valid if it promoted the achievement of equality and was designed to protect and advance the disadvantaged against unfair discrimination.³²⁵ The court also referred to articles 16(1) and (3) and 23 of the United Nation Declaration of Human Rights, article 16 of the European Social Charter 1996, article 5 of the Convention 111

³¹⁶*Harksen v Lane* 1998 (1) SA 300 (CC).

³¹⁷*Cooperative Workers Association* (note 312 above) para 23.

³¹⁸*Cooperative Workers Association* (note 312 above) para 33.

³¹⁹*Cooperative Workers Association* (note 312 above) para 33-34.

³²⁰*Cooperative Workers Association* (note 312 above) para 35.

³²¹*Cooperative Workers Association* (note 312 above) para 36.

³²²*Dawood v Minister of Home Affairs & other; Shalabi & another v Minister of Home Affairs & others; Thomas & another v Minister of Home Affairs & others* 2000 (1) SA 997 E (CC); *Daniels v Campbell NO & others* 2004 (5) SA 331 (CC); *Minister of Home Affairs v Fourie (Doctors for Life International & others Amici Curiae); Lesbian & Gay Equality Project & others v Minister of Home Affairs* 2006 (1) SA 524 (CC); *National Coalition for Gay & Lesbian Equality & others v Minister of Justice & others* 1999 (1) SA 6 (CC) .

³²³ Article 1 of Convention 156 of 1981.

³²⁴*Cooperative Workers Association* (note 312 above) para 36, 40 and 42

³²⁵*Cooperative Workers Association* (note 312 above) para 36.

Discrimination in respect of Employment and Occupation Convention of 1958 and Recommendation 123 of 1965 on Employment and concluded that they were pertinent. Although the court relied and was guided by the principles in the international instrument, it did not deal with the status of these instruments in South African law. However, the fact that the court relied on them can only mean that they are applicable.

The employer's argument was that the EEA reinforced the aim to protect workers with family responsibility as a disadvantaged group by declaring its purpose to achieve equality in the workplace.³²⁶ It indicated that it was common cause that South African courts pursued substantive equality.³²⁷ The court concluded that special measures are applied to workers with family responsibilities to adjust for the hardships of such responsibilities since in the absence of an affirmation of their special status, there can be no equality amongst the workforce.³²⁸

The court found that paying more to employees with dependants was not a reward for performance nor an accolade for special achievement but a legal and moral response to the social needs of a vulnerable group of employees.³²⁹ Further that having dependants had no impact on their intrinsic value and dignity as human beings i.e. that their remuneration, based on the number of dependants, could not impact on their dignity.³³⁰ The court compared the impact of the differentiation on the dignity of employees without family responsibilities with that of a municipality levying higher utility charges on property owners in areas that were predominantly white as decided by the Constitutional Court in *Pretoria City Council* decision.³³¹

The court found that the collective agreement did not discriminate unfairly and that there was therefore no need to intervene.³³² It further found that intervention would also be unwise as it would upset the balance struck by the bargaining partners in the course of the merger.³³³ The union's members had not been disadvantaged when compared to their position prior to the

³²⁶*Cooperative Workers Association* (note 312 above) para 47.

³²⁷*Cooperative Workers Association* (note 312 above) para 47-48.

³²⁸*Cooperative Workers Association* (note 312 above) para 50.

³²⁹*Cooperative Workers Association* (note 312 above) para 52.

³³⁰*Co-operative Workers Association* (note 312 above) para 52.

³³¹*Pretoria City Council v Walker* 1998 (2) SA 363 (CC).

³³²*Co-operative Workers Association* (note 312 above) para 53.

³³³*Cooperative Workers Association* (note 312 above) para 53.

merger. Any attempt to remove benefits which employees had prior to the merger purely for the sake of achieving formal equality would be unlawful and counterproductive to the purpose of collective bargaining to secure the best deal for a greater number of the workforce.³³⁴

The court found that more employees benefited from the new remuneration scheme and the union could not advance a more credible formula or method of calculating remuneration.³³⁵ The court accordingly dismissed the claim and ordered IDEA to pay 30% of Petrol SA's legal costs. The judge found that in determining the matter, persons with family responsibility were categorised as a vulnerable group which required protection hence the protection in the Constitution, the EEA and the international instruments. In arriving at this decision, a distinction was made between formal and substantive equality. The judge correctly pointed out that South Africa applied substantive equality to redress the imbalances and protect vulnerable groups.

The case was referred as a discrimination dispute relating to family responsibility. The court accepted that family responsibility was a listed ground and therefore discrimination on this ground was unfair. The court considered definitions of FRL as appears in several international instruments and noted that workers with FRL were a special group which deserved protection. Applying the principle of substantive equality, it found that workers without family responsibility were not discriminated against. The Court found it to be 'pertinent'. The court made no did not consider the classification of FRL as appears in the BCEA or consider the link, if any, of the definition in the BCEA to that in the international instruments.

The international instruments classifies workers with FRL as a special group deserving protection which is similar to the protection afforded to cultural practices i.e. person exercising this right are a protected minority. Therefore workers with seeking to exercise their FRL on the basis of culture have dual protection.

³³⁴*Cooperative Workers Association* (note 312 above) para 54-55.

³³⁵*Cooperative Workers Association* (note 312 above) para 55.

5.4. *Public Servants Association on behalf of Jonase* decision

*Public Servants Association on behalf of Jonase and Department of Justice & Constitutional Development*³³⁶, dealt with an application of the concept of family responsibility leave relating to cultural definition of family in the public service sector. The applicant (the employee) was employed by the respondent as the Deputy State Attorney. The employee applied for three days' family responsibility leave in terms of Resolution 7 of 2000, a collective agreement regulating leave in the public service following the death of his brother-in-law. He understood the leave to have been granted initially but was subsequently advised that it was rejected and the three leave days debited with from his three days' vacation leave. He referred a dispute to arbitration in terms of section 24 of the LRA for the interpretation and application of the Resolution 7 of 2000 read with clause 7.7.3 of the Public Service Leave policy.

The employee claimed that by Xhosa customary law his brother-in-law was regarded as a full member of his family and that he was therefore entitled to family responsibility leave in terms of clause 22.4 of the Resolution read with the Public Service Leave Policy. The employee's leave application was recommended by his supervisor and according to him approved by the HOD. He claimed that this applied equally to the interpretation of section 27(2) of the BCEA.³³⁷ He contended that the respondent failed to execute its duty with due care considering 'the employee's cultural responsibilities' and/or failed to afford him the opportunity to make a proper representation/motivation in this regard. He sought for an order reversing the decision taken by the respondent.³³⁸

It was contended for the applicant that the Resolution was vague in the sense that the provisions are silent on the question whether a direct family member/immediate family member includes natural members and/or family members by operation of law, by marriage (custom/civil) and thus also includes brothers-/sisters-in-law.³³⁹ According to the argument, the provisions should

³³⁶*Jonase* (note 2 above) page 1273.

³³⁷*Jonase* (note 2 above) page 1273.

³³⁸*Jonase* (note 2 above) page 1274.

³³⁹*Jonase* (note 2 above) page 1274.

be interpreted broadly to include a ‘sibling’ as brother-/sister-in-law.³⁴⁰ The arbitrator stated that in questions like this, the general principle to be applied was to give meaning in the ordinary/literal sense.

Having recorded the evidence and argument from both parties, the arbitrator noted that clause 22.4 defined ‘immediate family’ for the purposes of family responsibility leave as ‘parent, adoptive parent, grandparent, child, adopted child, grandchild or sibling’. He stated that if the drafters had intended to include other members by operation of law they would have expressly stated so.³⁴¹ Notably, the BCEA, being the statutory source informing the collective agreement did not proffer the definition of family responsibility leave.

The applicant further contended that the Resolution required that in the granting of family responsibility leave due consideration of the employee’s cultural responsibilities must be taken and that the respondent failed to consider this properly.³⁴² The arbitrator stated that the Resolution allowed for leave in respect of immediate family and that if the parties to the agreement intended to include members by operation of law, they would have stated so explicitly.³⁴³ The provision in the Resolution was thus narrowly tailored. The arbitrator found that it did not make sense to apply a wider definition. He asked where the line would be drawn if the definition was to be extended “by operation of law (marriage/and possible separation)” and concluded that extending the definition would interfere with that line.³⁴⁴

The Respondent relied on the pre-constitutional case law³⁴⁵ that indicates a ‘brother-in-law’ is not per se part of the “immediate family”.³⁴⁶ It was submitted on behalf of the respondent that the applicant was seeking the Bargaining Council to step into the shoes of the parties to the collective agreement and offer an alternative definition of immediate family who may benefit

³⁴⁰*Jonase* (note 2 above) page 1275.

³⁴¹*Jonase* (note 2 above) page 1275.

³⁴²*Jonase* (note 2 above) page 1275.

³⁴³*Jonase* (note 2 above) page 1275.

³⁴⁴*Jonase* (note 2 above) page 1275.

³⁴⁵*R v Muller* 1943 CPD 236; *R v Black* 1914 EDL 549.

³⁴⁶*Jonase* (note 2 above) page 1275D-F.

from the definition.³⁴⁷ The arbitrator indicated that this was instead an issue which should be addressed at the negotiating table.

The arbitrator did not accept that it was the responsibility of the respondent to approach the employee to enquire whether the leave application contained cultural issues.³⁴⁸ Lastly, it appeared that the application for leave had never initially been approved. The arbitrator found that the applicant was not entitled to family responsibility leave in terms of the Resolution in circumstances of a non-direct/immediate family member (e.g. brother-/sister-in-law) with no order as to costs.³⁴⁹

The arbitrator limited himself to the ‘supremacy’ of the Collective agreement and did not consider other definitions available beyond this.³⁵⁰ The dispute was referred as an interpretation and application of a collective agreement. The arbitrator was therefore required to do no more than merely accepting the definition of immediate family provided in the collective agreement. The arbitrator’s decision was clearly influenced by the classification provided by the BCEA being the law that provided for FRL.

The collective agreement to be interpreted in this case was a clear example of the reliance placed by employers on the provisions of the BCEA. This is because even in defining immediate family, the parties limited the definition to the BCEA classification despite the existence of other legislation suggesting a wider definition. This case demonstrates the need for a clearer classification by the BCEA.

While section 39(2) of the Constitution enjoins courts and relevant tribunals and forums to promote the spirit, purport and objects of the Bill of Rights, the arbitrator failed to do so. If he had done this, he would have had to take cognisance of the protection afforded to the right to culture in the Bill of Rights. He also failed to take into account the definitions in the EEA and PEPUDA. The arbitrator’s failure to consider relevant legislation led him to arrive at an incorrect

³⁴⁷ *Jonase* (note 2 above) page 1275.

³⁴⁸ *Jonase* (note 2 above) page 1275-1276.

³⁴⁹ *Jonase* (note 2 above) 1276.

³⁵⁰ *Jonase* (note 2 above) 1276.

decision. If relevant legislation was taken into account, the arbitrator would have accepted the employee's argument that the definition of "immediate family" was wider than suggested by the collective agreement with the result that the concept of FRL was wider than stated in that agreement. He would have accepted taking into account the African culture that in laws are members of a family.

5.5. *Mogorosi* decision

In *Mogorosi v SA Reserve Bank*,³⁵¹ a decision regarding an alleged constructive dismissal, the applicant was unhappy with amongst others, the level of empathy shown to him when his mother died. He testified that his manager did not express condolences and that the respondent granted him only the three days' compulsory family responsibility leave when other persons were given up to a maximum of seven days' leave. The Commissioner found there was insufficient evidence regarding condolences.³⁵² He found further that the employee had failed to show why he should get more leave days than the family responsibility leave provided for in the BCEA.³⁵³

The Commissioner found that there was no evidence of the type of leave other persons had taken or that the applicant had applied for additional leave.³⁵⁴ Having considered this and other factors, the Commissioner found that the employee had failed to prove that the employer had conducted itself in a manner which rendered the continuation of the employment relationship intolerable.³⁵⁵ The application was dismissed with costs.

The decision deals with alleged dismissal for constructive dismissal. The issue of family responsibility was raised as one of the issues to prove that the employee was treated in a manner which made continued relationship intolerable. The employee in this instance argued that when he had to attend his mother's funeral, he was not afforded more days like other employees and this showed that he was treated in an accommodating manner as compared to other employees.

³⁵¹*Mogorosi v SA Reserve Bank* (2008) 29 ILJ 439 (CCMA).

³⁵²*Mogorosi* (note 351 above) page 453.

³⁵³*Mogorosi* (note 351 above) page 453.

³⁵⁴*Mogorosi* (note 351 above) 453 F-I.

³⁵⁵*Mogorosi* (note 351 above) 453.

This case is a clear display of the confusion caused by the definition proffered in the BCEA. Even trained Commissioners find themselves bound by the provisions of the BCEA and do not consider the provisions of section 49 which allow for a deviation. It also shows the expectation that workers with FRL have on their employer when their ‘loved ones’ pass away. It exemplified the inconsistency on the part of the employer when granting FRL as other employees were given days in excess of the BCEA while the Applicant was not.

5.6. *Fairy Tales Boutique* decision

*Fairy Tales Boutique t/a Baby City Centurion v Commission for Conciliation, Mediation and Arbitration and Others*³⁵⁶ was another decision where the court considered the issue of family responsibility leave. The issue came before court as a review in respect of a dismissal and not a discrimination dispute. The court did not therefore consider whether the refusal of FRL would amount to an unfair dismissal. An illustration of how the matter was decided is however necessary to display how the court dealt with the matter.

The applicant sought a review in the Labour Court for the review and setting aside of a rescission ruling and an arbitration award issued under the auspices of the CCMA. The rescission application is irrelevant for purposes of this study and will therefore not be dealt with. The facts of the case were briefly that the third respondent Winnie Sithole was employed by the applicant as a cashier. Her mother-in-law passed away and she approached her immediate superior requesting for leave to arrange the funeral. The request was denied on the basis that she had exhausted her family responsibility leave and that in terms of the BCEA, family responsibility did not extend to parents-in-law. She was therefore required to be present at work and participate in the stock take which was scheduled for that weekend.

The third respondent informed the superior that she would not be at work for a few days despite the refusal of her leave request. She had been responsible for the care of her mother-in-law and proceeded to make arrangements for the funeral and also conducted post funeral rituals on Sunday. When she returned to work on Monday she was issued a notice for a disciplinary

³⁵⁶*Fairy Tales Boutique* (note 3 above).

hearing and was following the hearing dismissed for gross insubordination. She had some history of ill-discipline, the last and valid one being a final written warning in respect of late coming. Following the dismissal, the third respondent referred a dispute to the CCMA and was awarded compensation.

After considering the evidence led, the Commissioner rejected evidence that the third respondent was dismissed for disobeying instructions, and noted that employees are entitled to disregard an unreasonable instruction.³⁵⁷ This would be the case where there was a family emergency. In this case, the Commissioner found that the applicant was required by her custom to make arrangements associated with the funeral:

*“This was particularly so in circumstances where ‘there was a family emergency and the applicant was needed, according to her custom, to make the myriad of arrangements associated with an African funeral.’”*³⁵⁸

The Commissioner concluded that the dismissal was in fact for taking unauthorised leave and found that the third respondent’s conduct was justifiable as she was the one primarily responsible to make funeral arrangements.³⁵⁹ While the third respondent’s family responsibility leave was exhausted, the Commissioner found that there was nothing preventing the respondent from allowing her to take annual or unpaid leave.³⁶⁰

The Commissioner found it unreasonable for the applicant to reject the third respondent’s leave despite the explanation from her husband. She also found that the applicant would not have been inconvenienced with the stocktaking since employees from other stores were there to assist and the third respondent had timeously made her request which allowed the applicant to make arrangements for further assistance. It was found further that the applicant’s displayed a “callous disregard for the cultural practices of black employees and the family circumstances of the Applicant” (the third respondent in the Labour Court).³⁶¹ The commissioner found that the

³⁵⁷*Fairy Tales Boutique* (note 3 above) para 13.

³⁵⁸*Fairy Tales Boutique* (note 3 above) para 13. Emphasis added by the Labour Court in the judgment.

³⁵⁹*Fairy Tales Boutique* (note 3 above) para 13

³⁶⁰*Fairy Tales Boutique* (note 3 above) para 13.

³⁶¹*Fairy Tales Boutique* (note 3 above) para 14, 19.

applicant had considered the applicant's disciplinary record dismissal was inappropriate and unfair under the circumstances.³⁶² In view of the fact that the applicant had failed to ensure that the third respondent was represented, her dismissal was found to have been both substantively and procedurally unfair.³⁶³

Although the commissioner made no specific reference to the Constitution or the EEA, she applied the principles contained in the two statutes. She took into account the employee's right to culture and then found that the employer should have taken steps to reasonably accommodate the employee by allowing her to take annual leave or unpaid leave in the place of FRL. Finally, she found that the employer would not have been inconvenienced by the employee's absence.

Bhoola J, in the Labour Court, found that the Commissioner's award met the requirements of reasonableness and in view of that found it was not reviewable.³⁶⁴ The court held that the Commissioner was justified in finding that the applicant should have made attempts to accommodate the needs of the third respondent and a failure to do so amounted to a callous disregard for her personal circumstances.³⁶⁵ It was never suggested that the request for leave was disingenuous or an abuse of the applicant's sick leave and the submission that she was indispensable at the stock take was unsubstantiated. The review was dismissed with costs.³⁶⁶

While the matter did not directly deal with discrimination relating to family responsibility leave but was rather related to dismissal, the court confirmed the Commissioner's finding that the dismissal related to family responsibility leave. Both the Commissioner and the judge found the employer's conduct in refusing the employee family responsibility leave and then dismissing her when she absented herself from work unreasonable. They also found that there was a duty on the employer to accommodate the employee.

According to the Labour Court, the employer had an obligation to reasonably accommodate the employee. This confirmed the commissioner's award to the extent that the employee should have

³⁶²*Fairy Tales Boutique* (note 3 above) para 14.

³⁶³*Fairy Tales Boutique* (note 3 above) paras 14.

³⁶⁴*Fairy Tales Boutique* (note 3 above) para 20.

³⁶⁵*Fairy Tales Boutique* (note 3 above) para 19.

³⁶⁶*Fairy Tales Boutique* (note 3 above) paras 20-21.

been allowed to utilise her annual leave to fulfil her family responsibility alternatively be allowed to take unpaid leave.³⁶⁷ In doing so, although not specifically spelt out, the judge enforced the protection afforded to the employee by the EEA. Further, the fact that both the Commissioner and the Court found that she was responsible for her mother-in law despite the provisions of the BCEA extends the definition/classification of family as provided for in the BCEA. They both overruled the employer's argument in this regard.

5.7. Conclusion

There appears to be no case which has dealt with all aspects of this study being discrimination in respect of cultural practices relating to family responsibility leave in the workplace.

What appears from the cases discussed, particularly those considered 'discrimination' cases³⁶⁸ is that the courts and CCMA, in addition to considering South African legislation, also considered international instruments and in some instances international and foreign law. This was because of the lack of jurisprudence in South African law dealing with discrimination in respect of FRL. Notably, while some decisions found that the provision of FRL in the international instruments were not helpful, others found them to be of assistance. It was accepted in these decisions that FRL was a listed ground and therefore a prohibited ground of discrimination. Cognisance was taken of the protection afforded by the EEA to persons with FRL as a vulnerable group. What clearly came out is the fact that in dealing with discrimination cases, it must always be recognised that South Africa applied substantive equality to redress the imbalances of the past. In view of that, employers are expected to accommodate employees with FRL unless the inherent requirements of a job do not permit such accommodation. In these cases the definition of FRL was not considered as this was not an issue.

However, in cases which were not discrimination cases per se,³⁶⁹ it was only in rare instances that decision considered applicable legislation. The courts found themselves bound by the provisions of the BCEA and other applicable documents which did not take into account the

³⁶⁷*Fairy Tales Boutique* (note 3 above) para 13.

³⁶⁸*Masondo* (note 298 above) and *Co-operative Workers Association* (Note 312 above) 'discrimination cases'.

³⁶⁹*Jonase* (note 2 above) and *Fairy Tales Boutique* (note 3 above).

provisions of the Constitution and other relevant legislation. These cases dealt with the classification of FRL. Reliance was clearly based on the available classification without questioning its meaning or constitutionality. Consideration of the Constitution and other relevant legislation would have revealed that the classification was narrow and failed to take into account African culture and tradition. Acceptance of existing classification led to outcomes which were discriminatory in nature.

The difference between *Jonase*³⁷⁰ and *Fairy Tales Boutique*³⁷¹ decisions is factually that in *Jonase*³⁷² the leave was required for attending the funeral of a brother-in-law on the basis that in terms of custom that person is now a ‘member of the family’, whilst in *Fairy Tales* the leave was requested because she was actually responsible for the day-to-day care of her mother-in-law, in other words, she was a ‘dependent’ in the usual sense. The FR obligation arising in both instances is due to cultural obligations and values that arise from a broader definition of family.

In one case, the classification in the BCEA was disregarded in favour of the right to cultural practice, the duty to reasonably accommodate employees with FRL and a consideration of the possible inconvenience which could result in accommodating employees.³⁷³ A wider classification of FRL was applied by the Commissioner and confirmed by the Labour Court which resulted in a reasonable decision being arrived at.

What appears from the cases is that in most instances, despite the requirement by section 39 of the Constitution, decision makers disregard the provisions of the Constitution and other relevant legislation while relying on other legislation which conflicts with the spirit and purport of the Constitution thereby arriving at decisions which are constitutionally unsound. In the absence of clarity in those statutes, people in the workplace will continue to suffer prejudice and be discriminated against.

³⁷⁰ *Jonase* (note 2 above).

³⁷¹ *Fairy Tales Boutique* (note 3 above).

³⁷² *Jonase* (note 2 above).

³⁷³ *Fairy Tales Boutique* (note 3 above).

It is not what we understand by the definition of family but the responsibilities associated with the definition in terms of the cultural. Since South Africa follows substantive equality, people are not treated the same hence the requirement/need to accommodate diversity.

In chapter 6, earlier chapters are analysed to arrive at the recommendations and conclusions.

Chapter 6:

Conclusion and Recommendations

6.1 *Introduction*

The previous chapters provide information on the definitions of the concept family, the use of the concept in the South African legislative documents and a review of pertinent cases that have directly or indirectly been affected by the use of the concept. This chapter analyses the information in line the objectives of this study, first by synthesising information from the previous chapters and then making explicit interpretations and submissions in that regard. Conclusions are then drawn, that lead to the recommendations.

6.2 *Family as it should be understood*

The research cited in this study reveal the concept family to be perceived as a social construct meant to explain relationships of people in terms of agreed upon norms of a given society/culture. Although different meanings are attached to the concept and this impacts on the ultimate responsibilities associated with it, a central definition is essential that will guide legislative documents, professionals, judicial officers, employers and employees. Employers and employees, the groups who are of interest in this study, attach significance to the definition and guidance entailed in the legislative documents together with the meaning usable in explaining family responsibility in workplaces. A clear understanding is crucial in the application of family responsibility leave, to enable employers to regulate the exercise of their discretion and for employees to adjust their leave requests.

Scholars agree that a universally acceptable definition of the concept does not seem to exist³⁷⁴ and advise that a broader definition that considers context in relation to culture(s) and trend(s) would be acceptable. In South Africa, the diversity of cultures is said to be further complicated

³⁷⁴Popenoe (note 22 above) 529; Bigombe and Khadiagal (note 66 above) 2-3; Russell (note 71 above) and Nzimande (note 23 above) 42-43.

by ethnic differences although similarities of structure have been reported³⁷⁵ especially among Blacks (Africans). Thus, clarifications of the concept require explanation of cultural affiliation by the affected parties. In this way, the cultural behaviour of the party defining it will not be overlooked. The threat to [this ideology] is abuse by those who may extend clarifications beyond reality, in order to serve their needs.

Some define the concept in terms of close blood relations that includes parents, children, aunts and cousins while others refer to a group of people who live together and operate as a single household or dependents of common ancestors. Some dictionaries use the term “immediate family” to describe a close blood relationship arrangement, with some expanding the composition of the members beyond the popularly known nuclear family. The phrase “immediate family” is also used in the provisions of the EEA in the context of defining FRL without a definition being offered. When it is related to descriptions in the dictionaries, what is observable is as a set of relations usable able to be used to determine which members of a person’s family may be affected by rules within the term’s confines. There must therefore be a connection by blood, adoption, marriage, civil partnership, cohabitation, and step parents and children. Responsibilities associated with the family relate to amongst other compensation on death or being granted leave to attend a funeral.

What becomes apparent in this study is that the Western culture and African culture define the concept of family differently. Because of colonisation, Western culture has influenced law making in the previously colonised countries including South Africa. The influence may result in an unintended outcome and may in some instances be discriminatory.

As explained in chapter 2, sociologists have formulated what is called the process theory to explain the evolution of a family. In the 19th century in Western culture, family evolved from an extended nuclear family to just two generations. Responsibilities were limited to procreation, raising children affection, companionship and sharing economic resources. In the 21st century, the era of the post-modern (post-industrial) theory, family declined from being a social institution to that which provided emotional support. The decline altered the family composition

³⁷⁵Nzimande (note 23 above) 30-31 and 44.

further. Urbanisation was the influencing factor. Literature reveals that other factors which played a role were acceptability of divorce, working mothers, step parenting, single parenting and out of wedlock births. Despite the changes, the Western definition still confine the classification of family members to blood or legally obtained relations such as in the form of adoption. The decline has also resulted in institutions performing the roles and functions traditionally performed by families.

This Western definition is viewed by Tembo³⁷⁶ as undermining the African tradition. Researchers are blamed for superimposing perceptions and practices from other countries in an attempt to understand the local situation, which created misconceptions about the African cultural practices. The Western definition is said to be too narrow to accommodate family forms in other cultures. In recent years, grand-parents and other kin members provide the necessary care and support and this makes the traditional nuclear families ill-suited for this era.

The African classification of a family is that it is large, multigenerational and socially reinforcing and is said to be common among all Africans. Therefore a general African family includes a mother, father, children and relatives related by blood or marriage. Listed as belonging to such a family are uncles, aunts, polygamous mothers (who play the role of being other mothers and fathers) and their children. Accordingly, care and support is expected from members of such family, which includes caring for widows, orphans and older generations.

The list also includes other person not related by blood, who may have carried the responsibility of care and became psychologically attached to the child. This relationship, based on care (outside blood connections) is unique to Africans and has to be respected and acknowledged even in workplaces as an important cultural milestone. It is this kind of relationship that may not be documented in the legislative literature, leading to unintended acts of discrimination. Culture dictates that any member requiring care and assistance is the responsibility of the capable one. In the event of a death or a misfortune occurring, group responsibility and sharing in the sadness is expected from all persons classified by the family as members.

³⁷⁶Tembo (note 61 above) 6-7.

The distinction between the Western definition and the African definition is therefore that the West, mainly White people, restrict the concept too narrow while clearly appearing from the above, the African culture broadens it. When considering the African definition, the use of the phrase “immediate family” may become problematic. Similarly to other colonised African countries, South African families were influenced by industrialisation and policies of Apartheid. Among some of the influential factors are Christianity and the introduction of the migrant labour system and other factors introduced and compel Africans to conform to the concept of a nuclear family. This resulted from the provision of small houses to the migrant labourer.

There appeared an unfortunate and misleading perception that the only legitimate structure is that of a nuclear family and that other forms of family structure were regarded as wrong.³⁷⁷ The oppressive idea that Western practices are the best diluted the African culture among some of the urbanised Africans, giving the Apartheid regime the wrong impression that their culture was applauded by Africans when in fact Africans had no choice at the time but to succumb to the prevailing situation. During the era, laws of the country would have understandably/expectedly taken the shape of the applicable force. Despite this, there was no indication that African families completely abandoned their traditional practices. It would therefore have been expected that laws which were passed after 1994 starting from the South African Constitution would consider all the necessary practices and would be aimed at addressing diversity and the imbalances of the past. This however does not appear to be clearly visible from a reading of the Constitution although group rights and individual rights are protected.

Reference by Okon³⁷⁸ and Tembo³⁷⁹ to various family structures and patterns and suggest that the definition be based on functionality within society accommodates the African arrangement. The authors suggest a universally accepted definition of family that is inclusive of different cultures and historic periods. Although this inclusion could make it difficult to design legislative strategies, knowledge of the existing problem relating to the definition would be the right step. The marked resemblances in various cultures in South Africa,³⁸⁰ can help determine a general

³⁷⁷Zeihl (note 72 above) 32.

³⁷⁸Okon (note 69 above) 17.

³⁷⁹Tembo (note 61 above) 2.

³⁸⁰Nzimande (note 23 above) 31.

broad outlined pattern of family which would be helpful in defining a family within the African context. The roles and responsibility of family members are that of a primary source of social support.

For both blood and non-blood relatives to be accommodated, employers are expected to be considerate when dealing with applications for family responsibility leave, guided by the reasons provided by the employees. It is expected that employment laws would provide an all-encompassing definition which allowed parties to clarify their relationships where such are not obvious.

6.3 The influence of international and regional treaties

Meanwhile, international instruments define family as a group/unit of society and recognise the need to protect it. Some go so far as accepting that it takes various forms influenced by culture, politics and social systems. South Africa ratified and adopted some of these instruments and must therefore comply with them. Compliance may mean alignment of government with the instruments' definition of family. Incidentally, the definition in regional documents proffers a definition that resembles the international instruments. An analysis of these documents reveals that the concept of family is wide and is influenced by several factors. Interestingly, none of these documents have sought to classify members of the groups that make up a family and no mention is made of immediate or nuclear family as is done by sociologists or other sources such as dictionaries.

6.4 Lessons from the South Africa jurisprudence, policy and legislation

This study reveals that when the Commissioner, in the *Masondo*³⁸¹ case attempted to use the international instruments, the ILO definition was too wide to provide any assistance. In the *Co-operative Workers Association* case, on the other hand, the judge considered these instruments and others dealing with the concept of family responsibility read with the South African Constitution and found them to be helpful. Subsequently to this observation, the judge found it

³⁸¹Masondo (note 298 above).

necessary to protect the group with family responsibilities. The Court did this without the consideration of the definitions of family or family responsibility.

While the Constitution of South Africa does not specifically deal with the concept of family, it can be read from the provisions of sections 9 and 31 (on analogous grounds) that this is a group that needs to be protected on the grounds of culture as it was read from the decision of the *Co-operative Worker's Association*.³⁸² Therefore although no direct definition of family and family responsibility leave appear in the Constitution, unfair discrimination against this group is prohibited. The introduction of the BCEA, which was presented to deal with the concepts in South Africa would have brought about direction on how the family responsibility matters would be dealt with. Unfortunately, little, if any consideration gave attention to the African culture in classifying family. The BCEA acceded to the definition that responded to negative influences of colonisation, industrialisation and Apartheid and not on the resultant effects on this important social group.

The Social Welfare White Paper³⁸³ aligns its definition of family to that stated by authors as an African definition³⁸⁴ both stating functionality of the 'social unit' as important although the White Paper adds economic factors to the equation. The elements of care, nurturing and socialisation are typical of family responsibilities in an African family. Interestingly, the White Paper was conceived simultaneous with the BCEA and yet no sign of alignment exists between the two. Unfortunately, the White Paper does not classify members of the family and is thus not serving much purpose to this study.

The problem with the BCEA is the restricted classification of family members to a nuclear type family when explaining the FRL. Instead of recognising the imbalances of the past and addressing diversity, the BCEA seem to perpetuate the oppression of the African Cultures by colonisation and Apartheid while promoting industrialisation. It continues to resonate the notion that legislation in South Africa is influenced by the 'oppressors' while there is a new government

³⁸²Co-operative Worker's Association (note 312 above).

³⁸³Social Welfare White Paper (note 116 above).

³⁸⁴Okon (note 69 above) and Nzimande (note 23 above) 34.

system in place, denouncing the fact that it has as its objectives as the advancement of social justice and to give effect to the Constitution and the ILO.

The neglect of culture negates the primary objectives of the BCEA stated by Du Toit³⁸⁵ and Basson³⁸⁶ as the provision of working conditions for unorganised and vulnerable workers. The introduction of the concept FRL serves this purpose amongst others. In the absence of cultural inclusivity and the narrow classification, the Commissioner in the *Masondo*³⁸⁷ matter and the Court in the *Co-operative Worker's Association*³⁸⁸ sought recourse from the international instruments in order to achieve fair labour practices as envisaged in section 23 of the Constitution.

Application of the BCEA classification is traceable in organised areas such as sector Collective Agreements and workplaces to regulate the FRL, as appears in the *Jonase*³⁸⁹ case, in which in-laws were not classified as family. However, in the *Fairy Tales Boutique*³⁹⁰ decision, the employer challenged the Commissioner's decision which found that the classification extended to in-laws which finding was confirmed by the Labour Court on review. The employer in this case inadvertently found themselves bound by the BCEA classification. The commissioner had found that the employer had a callous disregard for cultural practices. The legal consequences are a sign of an existing problem requiring urgent intervention strategies. It is therefore crucial that the classification clearly echoes the essence of the Constitution. This is because even persons conferred with the powers and responsibilities of interpreting and applying labour legislations find themselves bound by the restrictive classification/categorisation set out in the BCEA.

The introduction of the EEA was to bring about clarity on matters of discrimination in employment law, listing FRL and culture as a prohibited grounds of discrimination. The EEA defines FRL as relating to "immediate family", the concept of which sociologist avoided using

³⁸⁵ Du Toit et al (note 133 above) 533.

³⁸⁶ Basson et al (note 135 above) 288.

³⁸⁷ *Masondo* (note 298 above).

³⁸⁸ *Co-operative Worker's Association* (note 312 above).

³⁸⁹ *Jonase* (note 2 above).

³⁹⁰ *Fairy Tales Boutique* (note 3 above).

and those using it warned against the conflicted interpretation it may introduce. Meanwhile, the EEA lists foster children as members of a family. The definition obtained from the dictionary describes a foster child as ‘a child looked after temporarily or brought up by people other than its natural or adoptive parents’ without legally adopting a child’.³⁹¹ If the description is accepted as accommodating non-blood parents, it is safe to say that the EEA definition encompasses both the blood and the non-blood relatives and is therefore compliant with the African definition of family. Unfortunately, the EEA does not classify members of a family and therefore does not provide the necessary guidance on who qualifies for FRL. Considering that the BCEA is used to set out employment policies for most of the unorganised workplaces leaves its classification leaves much to be desired.

In using the term immediate family, it can be argued that legislature’s intention was to introduce an all-encompassing phrase which allowed various interpretations. Considering the definition of “immediate family”, and regarding the prohibition of discrimination by the EEA, the ruling in the *Jonase* matter by the Commissioner is herewith regarded as unfair in that the exclusion of the in-laws is discriminatory. The phrase “immediate family” was included in this instance in a collective agreement. In this instance, the collective agreement must be applauded for taking cognisance of the provision of the EEA and deviating from the classification in the EEA. Other decisions did not interrogate the definition set out in the EEA but simply focused on the prohibition against unfair discrimination in the EEA.

In recognition of the prohibition against unfair discrimination in the EEA, regard must also be had to the protection of cultural practices which emanates from the Constitution and carried out in the employment field through the EEA. Just like family being defined as a group, culture is a way of life of a specific group and evolves with generations. As already stated above, culture is one of the factors which influence the family form and function, encompassing traditions, beliefs and ways of living together. South Africa is made up of diverse cultures including the African culture. Furthermore, just like the influence that Apartheid had on family forms, it was recognised in the Constitution that the White minority had, during their time in government, used its powers to undermine African culture. How this behaviour diffused into the new system of

³⁹¹ Free Dictionary www.the-freedictionary.com accessed on 17 December 2014

government to continue disregarding the African culture could not be established in this study. The right to cultural practices is therefore as protected as protection to minority rights.

As appears from the Constitution and from international instruments, the right to cultural practices is an individual right which can only be enjoyed when shared with a group. The right therefore protects group and individual interests. The enjoyment of cultural practice may not be in conflict with other fundamental rights. In this study, the protection of FRL is in conjunction with that of culture. Therefore in respect of the rights protected by the EEA, employees with FR require understanding when seeking protection based on FRL and culture. An exercise of these rights in the workplace relates to the right to fair labour practices. Therefore, in the *Kiewits*³⁹² case, the court found that the employer's argument was more inclined to Western standards as opposed to African culture. The provisions of the BCEA may therefore be misleading as far as fair labour practice in the workplace is concerned and is discriminatory.

The prohibition of unfair discrimination by the Constitution and the EEA is important and surpasses all workplace legislation on differentiation. According to international instruments, the introduction of FR in the workplace and the protection thereof was intended to create equal opportunities and equal treatment for workers with FR. In terms of the EEA, FRL and culture are among listed ground of prohibited discrimination. Therefore, discrimination of any one or more of the listed grounds is unfair unless the employer proves otherwise and established that it is fair.³⁹³

With the present classification, the BCEA makes it difficult for employees to prove discrimination or that the policy has a disproportionate effect on a protected group. Once the employee establishes the existence of discrimination, the onus to prove that in the case of a workplace policy that the policy was legitimate and that the means to achieve it were rational. This was also applied in the *POPCRU*³⁹⁴ decision. In the *Masondo*³⁹⁵ decision, the commissioner stated a well-established principle that it was not necessary for the employee to prove the

³⁹²Kiewits (note 233 above).

³⁹³*POPCRU* (note 275 above)

³⁹⁴*POPCRU* (note 275 above) and *Department of Correctional Services* (note 289 above).

³⁹⁵Masondo (note 298) above.

employer's intention to discriminate and must show the disparate impact of the employer's practice on minorities. Once this is established, the employer must show that these relate to the successful performance of the job in question.

In view of the cases considered relating to employees requesting for FRL for in-laws who are their family in respect of their culture, it is argued that there is no way that an employer or legislators can show that restricting the classification of FRL to a nuclear family can relate to the successful performance (or inherent requirement) of any job.

In order to succeed in proving cultural discrimination, the employee must show that the employer's enforcement of the policy interfered with the participation in or practice or expression of their culture. This was dealt with in the *POPCRU* decision. An act of discrimination which would ordinarily be unfair may be justified through affirmative action or the inherent requirements of a job. In the *POPCRU* decision, the Court found that the employer had failed to prove that the policy requiring employees to keep short hair was related to an inherent requirement of a job since female employees were allowed to keep long dreadlocks.

A consideration of the issue would be incomplete if further definitions which succeeded the EEA were not considered. PEPUDA like the EEA prohibits unfair discrimination and applies to employees not covered by the BCEA. It enjoys supremacy over the EEA which means that in interpreting discrimination cases in the workplace, it must be taken into account. Family responsibility in terms of PEPUDA includes the responsibility to a spouse, partner, dependent, child and any other member of the family in respect of whom he is entitled to care and support. The definition is not as broad as that offered by the international, regional instruments and the 1997 White Paper into family. This is probably because of the acknowledgement of the problem created by the wide definition in the workplace and an attempt to accommodate the rights conferred in the Constitution. None of the decisions in the employment law field considered and applied the provisions of PEPUDA in dealing with cases.

The Labour Appeal Court in the *POPCRU* decision dealing with culture considered the provisions of both the EEA and of PEPUDA. However this case had nothing to do with FRL.

Therefore the different definitions offered in the two statutes was not considered. The Court further considered whether the limitation of the right to culture was justifiable and considered in full the test applicable in terms of the limitation clause.

Further regard made to the 2011 Green Paper on families acknowledged the different types of families in South Africa influenced by various cultures and social context. It recognises diversity in the country and the challenges of the changing family structures influenced by colonization and apartheid. While the 2012 White Papersought to provide a cleared definition including blood relation, marriage (which includes customary marriage), and cohabitation. Clearly apparent from this is the fact that it recognises relations through culture. It also recognises that within the wide definition of family, exists narrow or smaller groups in the form of nuclear families.

When the rights in the Constitution, the provisions of the EEA, PEPUDA, international and regional documents are considered, the classification in the BCEA seem to differentiate and exclude members of the African culture.

Courts, in dealing with cases of family leave responsibility, should consider the benefit of following a purposive and teleological approach to interpretation. With regard to the former, the purpose of the legislation and Constitution in promoting cultural diversity, protecting equality and human dignity should inform the interpretation of each case before it. With regard to the latter, the values in the Constitution, equality, freedom and dignity; as well as the unstated but recognised value of *'ubuntu'*³⁹⁶ can also assist courts in interpretation of the legislative provisions before it.³⁹⁷ Mokgoro J in the seminal judgment of *Makwanyane* noted the importance of value-laden interpretation:

“With the entrenchment of the Bill of Fundamental Rights and Freedoms in a supreme Constitution, however, the interpretive task frequently involves making constitutional choices by balancing competing fundamental rights and freedoms. This can often only be done by reference to a system of values extraneous to the constitutional text itself, where these principles constitute

³⁹⁶ *S v Makwanyane* 1995 (3) SA 391 (CC) 198H-I.

³⁹⁷ See TW Bennett 'Ubuntu: An African Equity' (2011) 14(4) *PER* 30-61 for an overview of the use of 'ubuntu' in jurisprudence.

the historical context in which the text was adopted and which help to explain the meaning of the text...The Constitution makes it particularly imperative for courts to develop the entrenched fundamental rights in terms of a cohesive set of values, ideal to an open and democratic society. To this end common values of human rights protection the world over and foreign precedent may be instructive.”

Mokgoro J explained her understanding of ‘ubuntu’ as follows:

“Metaphorically, [ubuntu] expresses itself in *umuntungumuntungabantu* describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation.”³⁹⁸

The collective unity of humanity is thus recognised. Langa J further explained the concept of ‘ubuntu’ as follows:

“It is a culture, which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person’s status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community [that] such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.”³⁹⁹

This recognition of “co-responsibility” is important for a generous conception of ‘family responsibility leave’ that includes not just “immediate family” as recognised by our legislation, but the African concept of family obligation beyond the nuclear family.

³⁹⁸ *Makwanyane* (note 396 above) para 308.

³⁹⁹ *Makwanyane* (note 396 above) para 224.

6.5 Concluding Remarks

The following conclusions have been drawn from the analysis above:

The definition of the concept family is influenced by culture with the classification of family members following the cultural connotation as described by members of the group. This situation is observable in South Africa as a country with diverse cultures. Although the Western culture dominated during the colonial period with the addition of other secular factors such as industrialisation, the African culture has resisted the effects and defied all other influences imposed on it. Family in the African culture is based on care and support and includes blood and non-blood relatives, beyond legal boundaries, provided that care giving and support are provided. It is concluded that any exclusion of family members acquired from this care and support conduct will be perceived as some form of differentiation.

International instruments, the Constitution and legislative documents protect cultural practices and therefore any classification defining cultural behaviour of a group. Only, the documents do not directly classify members of the African group that make up a family. Omission of this classification opened the definition of family and the classification of members to different interpretations and conclusions. For example, in one case (*Masondo*) no guidance could be obtained from the documents while in another (*Co-operate Workers' Union*) the documents were said to be helpful. The situation is confusing, especially if no other guiding document is available to accommodate the diverse cultures.

In respect of the classification in the BCEA, some decision makers have applied the classification narrowly while others found it necessary to deviate from the classification. This and the observation of collective agreements by organised workplaces evidence the challenges and problems caused by the classification in its current form.

Definitions of family and family responsibility obtained from the EEA and PEPUDA are embrasive and inclusive of the blood and non-blood classification of the African culture, except that the members of a family are not fully classified. For example, the EEA refers to the

“immediate family”, classification which may be obtained from dictionaries. The EEA’s role is to clarify matters of discrimination. When it falls short of providing the necessary guidance, it leaves FRL vulnerable to differentiation and the African culture undermined.

It is concluded that the Western culture influenced law-making in South Africa as far as FRL is concerned, raising issues of differentiation. For example, the BCEA definition of family is narrow and is inclined to the nuclear-type family, exclusive of the African culture, while the classification of members excludes members who would be regarded as part of the family in the African culture. With the concept of FRL being relatively new in the country (introduced in 1997), the BCEA classification has not been helpful and is seen as discriminatory especially to some members (care-givers) of the African culture, misleading applications of the FRL. The influence comes because the BCEA is an important legislative document to regulate and provide working conditions in the workplace. The *Jonase* case, in which in-laws were excluded as members, serves as a typical example. The discriminatory activities are worsened by the tendencies of employers to rely on the classification despite the discretion afforded to them. The misleading classification also makes it difficult for employees to prove cultural discrimination in instances where FRL is denied.

The incommensurability of the nuclear definition and the definition of household in the indigenous sense means that conflating ‘family’ with the residents of a household or dwelling is not helpful as stated earlier.⁴⁰⁰ Accordingly, the United Kingdom’s Employment Rights Act definition of a dependant, including the employee’s spouse/civil partner, child, parent ‘or a person who lives in the same household’ will not assist.⁴⁰¹ This does not conceive of in-laws, for example, that are likely not to live in the same household. The UK’s definition may, however, be helpful in that it also includes:

“any person who reasonably relies on the employee

- a) for assistance on an occasion when the person falls ill or is injured or assaulted, or

⁴⁰⁰Morphy (note 22 above) 28.

⁴⁰¹ Section 57A(3) of the United Kingdom’s Employment Rights Act 1996. This section further qualifies members of a household by excluding a resident who is an employee, tenant, lodger or boarder.

- b) to make arrangements for the provision of care in the event of illness or injury”.⁴⁰²

Further, the reasonable reliance of such dependant also includes “any person who reasonably relies on the employee to make arrangements for the provision of care”.⁴⁰³ This definition on the face of it appears wider than its South African counterpart, but does not include attending the funeral of an in-law, however.⁴⁰⁴

6.6 Recommendations

The following recommendations are made in this study:

Prohibition of unfair discrimination in workplaces espoused by the EEA and the Constitution has to be upheld at all costs. As FRL and culture are among the listed grounds, any discrimination on such grounds has to be prohibited.

In order for the grounds to be protected, there is a need for a definition of family and family responsibility and classification of members of a family in South Africa that is inclusive of the African culture. For the definition(s) to be inclusive and accommodative of the African culture both blood and non-blood (care-giving) relatives have to be classified as family members. The definitions will assist in the application of the family responsibility leave. It is recommended that the definitions take into account the influence of colonisation, industrialisation and Apartheid on the African tradition and to note the level of resistance of the culture within such influence.

⁴⁰²Section 57A(4)(a) and (b) of the Employment Rights Act.

⁴⁰³Section 57A(5) of the Employment Rights Act.

⁴⁰⁴The categories of instances in which an employee is permitted to take reasonable time off during working hours includes the following in terms of section 57A(1):

- (a) to provide assistance on an occasion when a dependant falls ill, gives birth or is injured or assaulted,
- (b) to make arrangements for the provision of care for a dependant who is ill or injured,
- (c) in consequence of the death of a dependant,
- (d) because of the unexpected disruption or termination of arrangements for the care of a dependant, or
- (e) to deal with an incident which involves a child of the employee and which occurs unexpectedly in a period during which an educational establishment which the child attends is responsible for him.’

To avoid abuse of a broader definition in the application of FRL, other strategies such as the restriction of the number of leave days for family responsibility and the application of the provision of section 27 of the BCEA for employers to require proof may be used. Culturally, sincerity and good faith are important elements in the classification, and to assist the employer to make informed decisions.

In view of the complexity of the definition of family and to safeguard employers from fear of abuse and that of not complying with the law, it is recommended that the provision of section 27(2) of the BCEA be amended in order to be consistent with ratified international instruments more specifically the ILO Convention 156 read with the South African Constitution and other legislation. In particular the amended definition should be in line with both the EEA and most importantly, the PEPUDA, which has since the promulgation of the BCEA provided a reasonably acceptable definition that is in line with and takes into account the diverse nature of the country. This will have an effect of influencing decision makers in unorganised workplaces and organised sectors and will have the result of removing the discrimination identified.

