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By Nick Kadima

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On a continent where almost two-thirds of countries legally consider same-sex relations or marriage as a crime, South Africa has stood out as a beacon of hope and a trailblazer since 2006 when same-sex marriage was legalized. South Africa was one of the first countries in the world to safeguard sexual orientation as a constitutional right.

The legal recognition of same-sex relations or marriage affects the entitlements of employees (and of their dependents) to mandatory employment benefits such as medical, survivors, or leave benefits.

In particular, family-related leave legislation determines whether an employee can take leave to care for their spouse or partner, or to bond with their child while sharing child-rearing responsibilities.

Statutory definitions of spouse, partner, mother, father, or parent can be narrow, only recognizing legally-defined relationships, or they can be more comprehensive, i.e., including individuals who are not in a legally-recognized relationship.

Barriers to legal recognition for same-sex couples, typically translate into one or both parents lacking the required statutory relationship to the child or children they are raising. This in turn often results in one or both parents being denied family-related leaves (i.e., maternity, paternity, parental, adoption, and/or fostering leaves) and any related social benefits, unless the jurisdiction recognizes parents *in loco parentis* – an individual who is in the role of a parent, without any biological or statutory relationship with the child.

South Africa continues to make commendable advances towards equality in general. Most recently, on 25 October 2023, in a landmark ruling, the Gauteng High Court ruled the maternity leave sections of the Basic Conditions of Employment Act, 1997 (BCEA) and their corresponding provisions under the Unemployment Insurance Fund Act, 2001 (UIF ACT) which determine entitlement to social benefits during maternity leave as unconstitutional and invalid.

The High Court ordered interim changes that subject to confirmation by the Constitutional

Court, would apply until the underlying legislation is amended by Parliament.

Specifically, the High Court ruled that by reason of inconsistency with sections 9 and 10 of the Constitution, Sections 25, 25A, 25B and 25C of the BCEA unfairly discriminate between mothers and fathers; and between one set of parents and another based on whether their child/children were born of the mother, conceived by surrogacy, or adopted.

Similarly, and for the same reason of inconsistency with sections 9 and 10 of the Constitution, the High Court found the corresponding sections of the UIF ACT (i.e., sections 24, 26A, 27 and 29A) to be invalid.

Interim provisions pending Constitutional Court confirmation

The High Court ordered interim changes that subject to confirmation by the Constitutional Court, would apply until the underlying legislation is amended by Parliament to reflect the High Court's ruling. The interim provisions are to ensure that a gender-blind approach to parental leave and related social benefits applies – one that would entitle all categories of parents to the same leave benefits.

Under the interim provisions:

- Parents of a natural birth can agree on which parent would take the entire four months of parental leave or split the four-month entitlement period between themselves. Meaning all employees, irrespective of gender would be entitled to up to four months of maternity leave, provided that the combined leave taken by both parents does not exceed four months in total; and
- Adoptive parents of a child who is under the age of two years, as well as parents a child born via surrogacy would jointly be entitled to four months of paid maternity leave. Under current legislation, when a child is adopted or born via surrogacy, the parents are together entitled to 10 weeks of leave.

The interim provisions would effectively treat all parents equally in terms of leave entitlements and related UIF benefits (with the exception of parents adopting a child older than two years).

The High Court's ruling remains to be confirmed by the Constitutional Court. The High Court's ruling of invalidity of sections of the of the BCEA and the UIF ACT is suspended for two years to allow Parliament to amend the current underlying legislation.

Should the Constitutional Court approve the High Court's ruling, employers would have to align their family leave policies with the interim provisions, until legislation amending the BCEA is passed by Parliament.

Employers typically top up social security maternity benefits to ensure the employee continues to receive full pay during their leave. Employers need to evaluate, decide, and prepare should fathers also become entitled to four months of paid parental leave.

Case details

The case involved a married couple, applying to declare sections 25, 25A, 25B and 25C of the BCEA, and the corresponding sections of the UIF ACT unconstitutional and invalid based on the fact that they discriminate between the mother and father in terms of leave duration; and between one set of parents and another depending on whether their child/children were born of the mother, conceived by surrogacy, or adopted.

The couple's preference was that the father be the child's primary caretaker while the mother would resume work in a family business. However, (per section 25 of the BCEA) the mother is entitled to four months of paid maternity leave, while (per provisions of the UIF Act) the father to a maximum of 10 days of unpaid paternity leave. The parents held they should be equally entitled to and be able to share the statutory paid leave.

The other applicants in this case (i.e., The Gender Commission, and Sonke Gender Justice – a women's rights organization) had the Minister of Labor as their respondent. They held that parents should each be entitled to four months of leave.

Underlying court ruling

Van Wyk and Others v Minister of Employment and Labour (2022-017842) [2023] ZAGPJHC 1213 (25 October 2023)

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Nick oversees the management of clients' international benefits programs in various regions. With over a decade of experience in the insurance industry, Nick has served as a business development manager for various specialty insurance companies in South Africa. He has an extensive international background, having collaborated with global brokers and clients from Europe, Asia, North America, and Africa. Before joining Alliant, Nick held the position of Country Manager at International SOS.

Nick Holds a bachelor's degree with honors in Insurance and Risk Management from Wits University in South Africa and a Master's in Entrepreneurship & Innovation from HEC Paris in France. He is fluent in English and French.