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**THE NEW EQUAL PARENTAL LEAVE AND ITS IMPLICATIONS  
FOR EMPLOYERS: A DISCUSSION OF THE VAN WYK V  
MINISTER OF EMPLOYMENT AND LABOUR JUDGMENT**

## DISCUSSION POINTS:

- ❖ The legal position before *Van Wyk*
- ❖ The Facts in Van Wyk
- ❖ The High Court Decision
- ❖ The Constitutional Court Decision

- ❖ The Interim Measures by the Constitutional Court
- ❖ Implications for Employers
- ❖ The Labour Law Amendment Bill, 2025
- ❖ A philosophical discussion on legal positivism
- ❖ Conclusion

## INTRODUCTION

The world is changing, society's definition of mores and traditional roles that were apportioned along gender lines have changed, accordingly, our laws should change too. Laws should serve society, not the other way round.

## **THE LEGAL POSITION BEFORE *VAN WYK***

Section 25 of the BCEA Act provides:

“(1) An employee is entitled to at least four consecutive months’ maternity leave

## **Section 25A States (2020 Amendment):**

*“(1) An employee, who is a parent of a child, is entitled to at least ten consecutive days parental leave.”*

*(2) An employee may commence parental leave on -*

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*(a) the date the employee's child is born' or*

*(b) the date –*

*(i) That the adoption is granted; or*

*(ii) That a child is placed in the care of a prospective*

*adoptive parent by a competent court pending adoption*

This means therefore that for biological parents, section 25 provides for a total of 4 consecutive months' maternity leave for a birth mother and for fathers, 10 days leave from date of the birth of the birth.

## **ADOPTIVE LEAVE (S25B)**

*An employee who is an adoptive parent of a child under two years is entitled to ten consecutive days parental leave when the child is born or is placed in the care of the adoptive parent by a competent court*

## COMMISSIONING PARENTAL LEAVE (S25C)

*An employee who is a commissioning parent in a surrogate motherhood agreement is entitled to ten consecutive weeks commissioning parental leave or ten consecutive days parental leave when his or her child is born as a result of surrogacy.*

## THE FACTS IN VAN WYK

- ❖ Mr Werner van Wyk, an employee, approached his employer seeking 4 months consecutive maternity leave benefit. Mrs van Wyk is a business-woman.

- ❖ The couple agreed with each other before the birth of their son, that Mr van Wyk would assume primary responsibility for taking care of their son as soon as possible after the birth since Mrs van Wyk had two businesses to run

- ❖ When Mr van Wyk approached his employer with the request for paternity leave, he was informed that he was only eligible for 10 days' parental leave.

## THE HIGH COURT

- Unhappy with the scenario, Mr and Mrs van Wyk approached the High Court for an order declaring s25 of the BCEA to be invalid and inconsistent with the Constitution on the following grounds:

- The differentiation between mothers and fathers in S25 serves no legitimate governmental purpose and is irrational;
- If it indeed serves a legitimate purpose, it amounts to unfair discrimination

- S25 offends the dignity of parents as it prescribes the manner in which families may be legitimately structured and it deprives parents of fundamental choice of how they may nurture their own children.

## **THE HIGH COURT HELD:**

- ✓ There is a differentiation between mothers and fathers,  
and between a birth mother and other mothers or  
parents

- ✓ Held that it amounted to unfair discrimination
- ✓ The case should not focus on delinquent fathers but should determine whether fathers generally have an opportunity to participate in child-nurturing in the early stages of childhood.

- ✓ Held that the BCEA provisions fell foul of the rights to equality (s9) and dignity (s10)
- ✓ The provisions discriminate parents of children who were born of the mother, were adopted or were conceived through surrogacy

*”A father who chooses to share in this experience for his own wellbeing, no less than that of his children and of their mother, can indeed complain that the absence of equal recognition in the BCEA is unfair discrimination. A mother can on the same premise rightly complain that to assign..*

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*Her role as the primary caregiver who should bear the rigours of parenthood single handedly, is a choice that she and the father should make, not the Legislature, and in denying the parents the right to choose for themselves impairs her dignity.”*

- ✓ Held that all mothers in all parenting categories should be entitled to the same period of leave if inequality is to be avoided.

- ✓ The High Court declared s25 constitutionally invalid with a reading-in to safeguard the rights of parents and children during the two-year suspension period.

## THE CONSTITUTIONAL COURT

- ❑ The Applicants sought to confirm the order that s25 is inconsistent with the Constitution on the basis that they discriminate unfairly and are in violation of the equality and human rights as per s9 and 10

❑ **Approved the High Court's *dictum*:**

*“To accord a paltry 10 days’ leave to a father speaks to a mindset that regards the father’s involvement in early-parenting as marginal. In my view this is per se offensive to the norms of the Constitution in that it impairs a father’s*

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*Dignity. Long-standing cultural norms which exalt motherhood are not a legitimate platform for cantilever to distinguish mother's and father's roles."*

- ❑ The Court confirmed the High Court declaration of invalidity of s25 of the BCEA on the basis of unfair discrimination.

## The Court provided the reading-in of s25

*“25 Parental leave*

*(1) An Employee who is –*

*(a) A single parent; or*

*(b) The only employed party in a parental relationship...*

## INTERIM MEASURES PLACED BY THE CON COURT

- All parents – biological, adoptive and commissioning, are entitled to 4 months and ten days of parental leave to be shared as they choose.
- If both parents are employed, they must agree on how to divide the leave

## INTERIM MEASURES PLACED BY THE CON COURT

- Where only one parent is employed, that parent is entitled to a full period of four months parental leave
- Employees must inform their employers of their intended leave dates at least four weeks in advance.

## IMPLICATIONS FOR EMPLOYERS

- ❖ Employers must now extend parental leave benefits to all parents, regardless of gender or birthing status.
- ❖ This includes fathers and non-birthing parents, who are now entitled to share in the four months and ten days leave

## IMPLICATIONS FOR EMPLOYERS

- ❖ Employers should review and update their leave policies to ensure compliance and avoid discrimination.
- ❖ Where paid maternity leave is access of four months and ten days is offered to birthing mothers, these benefits should be extended equally to all parents

## THE LABOUR AMENDMENT BILL, 2025

- Aim to give legislative effect to Van Wyk
- Draft legislation aims to formalize new parental leave framework that was created by the Constitutional Court.
- Formalizes rules for disagreements between parents

## THE LABOUR AMENDMENT BILL, 2025

- Proposes adoption leave to extend from two years to six years.
- Submissions for public comment were opened until 28 March 2026.

## PHILOSOPHICAL DISCUSSION

- ✓ Do judges interpret the law or do they make law?
- ✓ Legal Positivism v Judicial Activism



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**THE END, THANK YOU.**