# A Long Walk to Gender Equality in South African Employment Law –

*Van Wyk v Minister of Employment and Labour* [2023] ZAGPJHC 1213

## 1 Introduction

As a point of departure, it is recognised that in past decades, society prescribed gender roles for men and women. In accordance with such roles, the duty of women in a family was limited to primary caregiving. In contrast, traditionally, men have been assigned the role of taking the financial burden of the family as a breadwinner. In principle, the Bible, in 1 Timothy 5:8 ("But if any provideth not for his own, and especially his household, he hath denied the faith, and is worse than an unbeliever") also prescribes the duty of a man to his family. However, the dramatic shift in the socio-economic status of women, the adoption of the Constitution of the Republic of South Africa, 1996 (the Constitution) and modern employment legislation have diminished the traditional roles assigned to fathers and mothers in a family. In modern society, the role of women is no longer confined to primary caregiving; a majority of women have joined the working class to support their families, and they are positively contributing to the economy of South Africa.

With the advent of the Constitution and of labour legislation, women and men in society have been guaranteed equal opportunities and fair treatment in employment through the elimination of unfair discrimination (s 23 of the Constitution and s 2 of the Employment Equity Act 55 of 1998 (EEA)). However, in the past decades, female employees have been afforded maternity leave, which is excluded for male employees (s 25 of the Basic Conditions of Employment Act 75 of 1997 (BCEA)). Section 25 of the BCEA allocates four months' maternity leave to a birth mother employee and section 25A grants 10 days of parental leave to the father. Dupper contends that the exclusion of paternity leave fuels the stigmatised notion of women as homemakers and caregivers ("Maternity Protection in South Africa: An International and Comparative Analysis (Part Two)" 2002 13(1) *Stell LR* 90). The argument is that it leads to the perception that women are provided with maternity leave because the primary responsibility of women is to care for children, whereas men need not be afforded equivalent paternity leave because their primary responsibility is to be breadwinners (Dupper 2002 *Stell LR* 90).

Remarkably, the questionable status of the different duration of employees' leave period for a birth mother and father remained unchallenged until recently when the Van Wyk family raised the issue (*Van Wyk v Minister of Employment and Labour* [2023] ZAGPJHC 1213). The

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landmark judgment by Sutherland DJP may be welcomed by many as a milestone in eradicating the demarcation of gender roles between female and male employees. In pursuit of equality in the workplace, both parents can equally share in the burden of childcare without the mother being deemed and doomed to be the primary caregiver (*Van Wyk v Minister of Employment and Labour supra* par 27). In essence, the landmark judgment can be viewed as a positive step towards achieving a more egalitarian society where the responsibility for childcare is equally shared between parents.

Without a doubt, the judgment by Sutherland DJP has triggered divergent viewpoints on parental leave. Be that as it may, the significance of employment law in advancing equality cannot be taken for granted. Accordingly, this case note calls for a critical analysis of the judgment in *Van Wyk*, its significance and its importance in South African employment law. The authors discuss equality as a constitutional obligation or mandate, the legislative framework on equality and pertinent facts, as well as the judgment and commentary. Finally, the authors endeavour to determine whether Sutherland DJP's judgment leads in the right direction in achieving equality in employment law.

## 2 Equality as a constitutional obligation

When it comes to the right to equality, a distinction should be drawn between formal and substantive equality on the one hand, and fair and unfair discrimination on the other. Formal equality entails the sameness and likeness of treatment. It merely requires that all people have equal rights. Formal equality extends the same rights and entitlements to all following the same neutral norm and standard or measurement (Currie and De Waal *The Bill of Rights Handbook* (2013) 6ed 262). Formal equality does not take into account actual social and economic disparities between groups and individuals (s 9(1) provides for the right to be treated equally, to be afforded equal protection of the law, and to enjoy equally the benefit of the law).

Substantive equality, on the other hand, requires the law to assure equality of results and is willing to tolerate disparities in treatment to achieve this aim. It is necessary to examine the real social and economic situations of groups and people to establish if the Constitution's promise of equality is being respected. The preferred approach to understanding gender equality is substantive equality. Smith says that substantive equality calls for a consideration of the impact of measures and policies aimed at attaining gender equality, which are said to manifest through legal mechanisms such as affirmative action (Smith "Equality Constitutional Adjudication in South Africa" 2014 14 *African Human Rights Law Journal* 612). It has been submitted that the idea of creating substantive equality in the workplace is based on an understanding that inequality stems from long-established political, social and economic differences between men and women. Consequently, Albertyn and Fredman have described the four aims of substantive equality as follows:

i) redress social and economic disadvantage;

ii) counter stereotyping, stigma, prejudice, humiliation and violence based on protected characteristics;
iii) enhance voice and participation countering political and social exclusion and accommodating and affirming differences, diversity and identity; and
iv) achieve structural changes (Albertyn and Fredman "Equality Beyond Dignity: Multidimensional Equality and Justice Langa's Judgments" 2015 *Acta Juridica* 434).

Fredman states that the above-mentioned four-dimensional framework provides aims and objectives that can be used to assess and assist in modifying policies and initiatives to attain substantive equality (Fredman "Substantive Equality Revisited: A Rejoinder to Catharine MacKinnon" 2016 14 *International Journal of Constitutional Law* 728). In addition, all four dimensions are to be addressed in an interactive manner in order for substantive equality to be attained (Fredman 2016 *International Journal of Constitutional Law* 749).

In the workplace context, it is submitted that the principle of substantive equality is not just about avoiding overt discrimination. In essence, it is about creating an environment where all employees, regardless of gender, race or other factors, have equal opportunities to thrive and advance. This includes *inter alia* addressing patriarchal policies that may implicitly disadvantage women or other marginalised groups, and ensuring that recruitment, retention and promotion practices are fair and inclusive. As Albertyn opines, for equality jurisprudence to be truly transformative, rather than merely inclusionary, the legal application of substantive equality needs to be more conceptually consistent (Albertyn "Substantive Equality and Transformation in South Africa" 2007 *SAHJR* 254).

For instance, patriarchal workplace norms can create challenges for women in balancing professional and family responsibilities, often resulting in higher attrition rates. Achieving substantive equality requires that these norms be addressed, possibly through the implementation of flexible work arrangements or gender-neutral parental-leave policies, thereby ensuring equal opportunities for success. A similar issue is at the core of the case under discussion.

In contrast, unfair discrimination principally means treating people differently in a way that impairs their fundamental dignity. What makes discrimination unfair is the impact of the discrimination on its victims. Unfair discrimination is differential treatment that is hurtful and demeaning. The Constitution provides listed grounds of discrimination such as race, gender, sex, disability, religion, conscience, belief, culture, language and birth. To prove discrimination, an applicant must establish discrimination on a specified ground listed in section 9(3) of the Constitution or an analogous ground (meaning a ground based on characteristics that have the potential to impair the dignity of a person as a human being or to affect them in a comparably serious manner). Different treatment on one or more of these listed grounds is discrimination and will be presumed to be unfair unless it is

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shown that the discrimination is fair (*Pretoria City Council v Walker* 1998 (3) BCLR 257 (CC)). It is, however, worth noting that laws may sometimes justifiably classify people and treat them differently, but there should be a legitimate reason (Currie and De Waal *The Bill of Rights Handbook* 219).

## 3 Legislative framework on gender equality in the workplace

The Preamble of the EEA clearly states its main objective as follows:

> "To promote the constitutional right to equality and the exercise of true democracy; eliminate unfair discrimination in employment ... to redress the effects of discrimination; and ... give effect to the obligations of the Republic as a member of the International Labour Organisation."

The EEA requires that the Act must be interpreted to give effect to the purpose of the Constitution (s 3 of the EEA provides that the Act must be interpreted: "*(a)* in compliance with the Constitution; *(b)* so as to give effect to its purpose; *(c)* taking into account any relevant code of good practice issued in terms of this Act or any other employment law; and *(d)* in compliance with the international law obligations of the Republic, in particular those contained in the International Labour Organisation Convention (No 111) concerning Discrimination in respect of Employment and Occupation").

The EEA expressly prohibits unfair discrimination in the workplace. Section 6(1) provides:

> "No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or any other arbitrary ground."

From a reading of section 6(1), it can be deduced that HIV status, family responsibilities and political opinion have been added to the 17 grounds listed in section 9 of the Constitution.

The EEA thus imposes a statutory obligation on all employers to take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice (s 5 of the EEA). Henrico contends that while the LRA refers specifically to an employer who is prohibited from unfairly discriminating against an employee, the net of liability cast by the EEA is broadened by the term "no person", thereby giving effect to the duty imposed upon the employer to take steps to promote equal opportunity in the workplace by eliminating unfair discrimination (Henrico "South African Constitutional and Legislative Framework on Equality: How Effective Is It in Addressing Religious Discrimination in the Workplace?" 2015 36(2) *Obiter* 281). He further contends that an employer can be held liable for the conduct of one employee against another if it constitutes unfair discrimination (Henrico 2015 *Obiter* 281).

In the event of an unfair discrimination allegation, the burden of proof to refute such allegation rests with the employer on a balance of probabilities

(s 6(11) of the EEA). The employer may rely on the implementation of affirmative action (s 6(2)(*a*) of the EEA), inherent requirements of a job (s 6(2)(*b*) of the EEA), rationality or fairness of the action to disprove a claim for unfair discrimination.

To determine unfair discrimination, our courts have relied on the test in *Harksen v Lane* (1998 (1) SA 300 (CC)). Goldstone J formulated a three-stage enquiry to determine unfair discrimination as follows:

a) Does the legislative provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.
b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:
    i First, does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics that have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
    ii If the differentiation amounts to "discrimination", does it amount to "unfair discrimination"? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

    If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2).
c) If the discrimination is found to be unfair, then a determination will have to be made as to whether the provision can be justified under the limitations clause (*Harksen v Lane supra* par 54).

Remarkably, the case under consideration was also subjected to the *Harksen Lane* test in determining whether section 25 of the BCEA unfairly discriminates between mothers and fathers. How the court applied the *Harksen Lane* test is discussed below. The next section briefly considers pertinent facts and the judgment by Sutherland DJP.

## 4 Pertinent facts and judgment

This case concerns a constitutional challenge to:

a) section 25 (the right to at least four consecutive months' maternity leave for a birth mother);
b) section 25A (a father's right to 10 days' parental leave from the date of birth of the child);

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c) section 25B (adoption leave for the adoption of a child under the age of two; the section recognises both adoptive parents: one parent is entitled to 10 consecutive weeks' leave and the other to the 10 days' parental leave referred to in s 25A); and

d) section 25C of the BCEA and the corresponding provisions of sections 24, 26A, 27, 29A of the Unemployment Insurance Fund Act (63 of 2001) (UIF Act).

In this case, the applicant contended that these provisions were unconstitutional because they failed to provide valid grounds to distinguish one parent employee from another (*Van Wyk v Minister of Employment and Labour supra* par 13). Secondly, the applicant contended that both parents should be entitled to parental leave in equal measure and the failure to provide equal parental leave amounts to unfair discrimination and violates the dignity of all parents (par 13).

In this case, the applicant, Mr Van Wyk, was a salaried employee, while his wife, Mrs Van Wyk, was in business for her own account (*Van Wyk v Minister of Employment and Labour supra* par 28). When they had a new baby, they chose that Mrs Van Wyk should return to trade as soon as possible because the business might fail were she not to be active (par 28). In turn, Mr Van Wyk would be the primary caregiver during the early infancy of their child (par 28). However, Mr Van Wyk was ineligible for any more than 10 days' paternity leave. In an ad hoc agreement with the employer, he was granted partly unpaid leave (par 28).

In dissecting the issue of paternity leave for fathers, Sutherland DJP reasoned that to grant a paltry 10 days' leave speaks to a mindset that regards a father's involvement in early parenting as marginal (*Van Wyk v Minister of Employment and Labour supra* par 26). The court thus found that the provisions of the BCEA were offensive to the norms of the Constitution as they impaired a father's dignity (par 26). The court further found that a father who chooses to share in the demanding, yet rewarding experience of early child nurturing can indeed complain that the absence of equal recognition in the BCEA is unfair discrimination (par 27). In addition, the court reasoned that a mother can rightly equally complain that assigning her the role of 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 parents the right to choose for themselves, impairs her dignity (par 27).

Addressing the issue of commissioning and adoptive mothers, the court found that they ought to be entitled to the same period of leave as birth mothers for child nurture, if inequality, as proscribed by section 9 of the Constitution, is to be avoided (*Van Wyk v Minister of Employment and Labour supra* par 24). The court reasoned that an honourable explanation was absent for why six weeks were subtracted from commissioning and adoptive mothers (par 24). The court reasoned that although they may not have experienced physical childbirth, this was not an acceptable justification for the discrimination (par 24).

## 5 Commentary

Nationally and globally, there is a constant fight to eradicate and address conduct that results in unequal treatment of human beings in general, and workers or employees specifically (Henrico 2015 *Obiter* 285). Henrico contends that the nexus between notions of equality and discrimination is unavoidable since *prima facie* discrimination is a denunciation of equality (285). He further contends that cross-stitched into this is also the close association between equality and human dignity (285). He argues that every human being has an absolute inner worth, and all human beings are equal concerning this absolute worth, which is dignity (285).

In advocating for equality and dignity in the workplace, Sutherland DJP correctly premised his judgment on the nurture of the child, a factor that both parents can provide, with the exception of breastfeeding (*Van Wyk v Minister of Employment and Labour supra* par 18).

Sutherland DJP remarked:

> "The proper location of the controversial policy choices evident in the BCEA is in respect of child-nurture, not merely a birthmother's experience of pregnancy and childbirth per se and her need for a physiological recovery period. In respect of nurture, save for breast-feeding, both parents can provide comprehensive nurture to their child." *(Van Wyk v Minister of Employment and Labour supra* 18)

The court did not expressly make any pronouncements on the best interests of the child. However, by virtue of highlighting the importance of child nurture, one may safely argue that the court endorsed the spirit and purport of the Constitution. To be more precise, section 28 of the Constitution makes provision for the best interests of the child.

In turn, the court can also be commended for restoring the dignity of fathers. Historically, it remains undisputed that South Africans emerged from a period during which they were denied the right to human dignity. In the case of *Prinsloo v Van der Linde* (1997 3 SA 1012 (CC)), the court recognised that the majority of citizens had not been treated as having inherent worth – but as objects whose identities could be arbitrarily defined by those in power rather than as persons of infinite worth (*Prinsloo v Van der Linde supra* par 32). Unfair discrimination impairs the fundamental dignity of human beings, who are inherently equal in dignity (par 32).

In protecting the dignity of fathers, Sutherland DJP remarked as follows:

> "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 dignity. Long-standing cultural norms which exalt motherhood are not a legitimate platform for a cantilever to distinguish mothers' and fathers' roles." (*Van Wyk v Minister of Employment and Labour supra* par 18)

The judgment can also be lauded for upholding the autonomy of parents, as Sutherland DJP did not prescribe a formula for shared parental leave (*Van Wyk v Minister of Employment and Labour supra* par 18). Notwithstanding that autonomy is not enshrined in the Constitution as a right, it may be

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argued that autonomy is implicated in a number of constitutional rights, including the right to freedom of choice. O'Regan J stated that autonomy is a constitutional value that underlies human dignity, freedom and privacy (*NM v Smith* 2007 (5) SA 250 (CC) par 145–146).

On the downside, it may also be argued that the *Van Wyk* judgment has left employers in limbo as the court did not provide any guidelines to assist them with leave provisions on how to facilitate the integration of fathers into the care of newborn children.

In addition, the judgment created uncertainty on whether a spouse in a civil union (who in terms of a surrogate-motherhood agreement would not be the child's primary caregiver from the moment of birth) would be eligible to be entitled to the shared parental leave. The court in *MIA v State Information Technology Agency (Pty) Ltd* (2015 (6) SA 250 (LC)) granted one commissioning parent in a civil union four months of paid maternity leave. By implication, Sutherland DJP's judgment did not exclude the other commissioning parent from shared parental leave. An interpretation that excludes the other commissioning parent in a civil union from a shared parental leave entitlement would be a major setback to the milestones achieved by the *Van Wyk* and *MIA* cases. It may be tantamount to unfair discrimination between fathers and fathers in a civil union.

Lastly, although it may be new in South African employment law, shared parental leave is not a new phenomenon in international and continental employment law. Sweden has unquestionably already achieved a milestone by promoting and maintaining equality between parents when it comes to equal parental-leave allocations; this in turn promotes gender equality in relation to leave privileges (Field, Bagraim and Rycroft "Parental Leave Rights: Have Fathers Been Forgotten and Does It Matter?" 2012 36(2) *South African Journal of Labour Relations* 30–41). Sweden was in 1974 the first country to introduce paid parental leave for fathers, and this legislation has since been continuously reformed to bring about more equal rights in relation to parenthood. There are two reasons for Sweden's adoption of a shared parental-leave policy. First, it came in response to the increase in the number of women within the workplace and to encourage such continued participation. Secondly, Sweden introduced the shared parental-leave policy to ensure that child-caring responsibilities were equally distributed between parents regardless of sex. In essence, Sweden's motivation behind the implementation of a shared parental-leave policy was to aid the progression of the dual-earner family model (Earles "Swedish Family Policy-Continuity and Change in the Nordic Welfare State Model" 2011 45 *Social Policy and Administration Journal* 180).

Currently, Sweden's parental-leave policy entitles parents to 480 days of paid parental leave when a child is born or adopted. Accordingly, each parent (should there be two) is entitled to 240 of those days. If the child was born in 2016 or later, each parent is entitled to 90 days reserved exclusively for each of them. However, should the parent decide not to take these days, they cannot be transferred to the partner. A single parent is entitled to a full 480 days (Swedish Institute "Sweden Has Made It Easier to Combine Career With Family Life. Here's How" (2015) https://sweden.se/work-business/working-in-sweden/work-life-balance (accessed 2024-01-12)).

Within the African continent, Kenya has been progressive, although there is still more room to improve their legislation. Section 29(8) of the Kenyan Employment Act (7 of 2007) provides fathers with a minimum of two weeks of paid leave after childbirth. However, the Act is ambiguous, as it does not stipulate whether the two-week period is inclusive of public holidays and weekends. Arguably, Kenya's parental leave may be deemed to promote gender inequality, as it is exclusively available to male employees and excludes surrogate and adoptive parents.

## 6 Is the judgment a step in the right direction?

Although a newborn child is dependent on maternal care for several months, the inclusion of the father as caregiver is also essential (Richter "The Importance of Fathering for Children" in Richter and Morrell (eds) *Baba: Men and Fatherhood in South Africa* (2006) 58). The need to recognise a father's role during the birth and raising of a child in South African employment law is arguably long overdue and has been advocated by academic legal scholars. Such recognition has the potential to promote the caregiving responsibilities of fathers and to address the gender inequalities that exist in the workplace owing to limited legal regulation of postnatal childcare (Richter and Morrell *Baba: Men and Fatherhood in South Africa* 58). Arguably, where leave allocations are evenly distributed and shared, domestic chores and childcare roles are equitably shared between parents, and fathers are more involved in their families (Rycroft and Duffy "Parental Rights: Progress but Some Puzzles" 2019 *Industrial Law Journal* 23–24).

If the judgment of the court stands, it may be argued that this decision has progressively recognised a father's entitlement to equal treatment in employment law. In essence, the judgment of the court has breached the grey area in section 25 of the BCEA that resulted in fathers being afforded a limited opportunity to share the caregiving responsibility of their children. As stated earlier, the landmark judgment can be viewed as a positive step towards achieving a more egalitarian society in which responsibility for childcare is equally shared between parents. The judgment can be commended for eliminating the gender stereotype that sees women as primary caregivers of their child; at the same time, it upholds the need of newborn children for care by both parents. Even though it was not expressly pronounced by Sutherland DJP, it may be argued that the judgment is consonant with protecting the best interests of the child.

Interestingly, the plight of fathers as caregivers has been judicially recognised in two separate cases. First, in the minority judgment of Kriegler J and Mokgoro J in *President of the Republic of South Africa v Hugo* (1997 (6) BCLR 708 (CC)), Kriegler J persuasively contended that accepting as fair discrimination the release from prison of mothers at the expense of fathers with children under the age of 12 only worked to entrench gender stereotypes that subjugate women (*President of the Republic of South Africa v Hugo supra* par 78–82). The Justice remarked:

> "The notion relied upon by the President, namely that women are to be regarded as the primary caregivers of young children, is a root cause of women's inequality in our society. It is both a result and a cause of prejudice;

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> a societal attitude which relegates women to a subservient, occupationally inferior yet unceasingly onerous role." (*President of the Republic of South Africa v Hugo supra* par 80)

Mokgoro J condemned the societal notion that allocates gender stereotypes between men and women:

> "Society should no longer be bound by the notions that a woman's place is in the home, (and conversely, not in the public sphere) and that fathers do not have a significant role to play in the rearing of their young children. Those notions have for too long deprived women of a fair opportunity to participate in public life and deprived society of the valuable contribution women can make. Women have been prevented from gaining economic self-sufficiency or forging identities for themselves independent of their roles as wives and mothers. By the same token, society has denied fathers the opportunity to participate in child rearing, which is detrimental both to fathers and their children." (*President of the Republic of South Africa v Hugo supra* par 93)

Secondly, the case under scrutiny can be compared to the *MIA* case (*supra*) insofar as it concerns eliminating gender stereotypes that perceive women as primary caregivers of a child. In the *MIA* case, the court had to determine whether a policy adopted by an employer had unfairly discriminated against an employee on the grounds listed in section 6 of the EEA. The said policy granted a biological mother of a child four months' paid maternity leave, and two months' paid leave to a permanent employee who was an adoptive mother to a child below 24 months of age (*MIA v State Information Technology Agency (Pty) Ltd supra* par 83). The applicant employee challenged the employer's refusal to grant him maternity leave because he was not the biological mother of his child under a surrogacy agreement; he claimed unfair discrimination on the grounds of gender, sex, family responsibility and sexual orientation, as provided for in section 61 of the EEA (par 6).

In this case, the applicant employee, his spouse and a surrogate mother had concluded a surrogate-motherhood agreement in terms of which the applicant would be the child's primary caregiver from the moment of birth. (*MIA v State Information Technology Agency (Pty) Ltd supra* par 16). In line with the employer's leave policy and anticipation of the birth child, the applicant unsuccessfully applied for four months of paid maternity leave (par 7). The employer rejected the applicant employee's application, citing the fact that he was not the biological mother of the child, and as a result, no maternity leave could be granted. The employer averred that the maternity-leave policy was specifically designed:

> "to cater for employees who give birth … based on an understanding that pregnancy and childbirth create an undeniable physiological effect that prevents biological mothers from working during portions of the pregnancy and the post-partum period". *(MIA v State Information Technology Agency (Pty) Ltd supra* par 12*)*

Consequently, the applicant employee was granted two months' paid adoption leave and two months' unpaid leave (*MIA v State Information Technology Agency (Pty) Ltd supra* par 2). It may be argued that the employer ignored the spirit of the law in applying the maternity-leave policy. In denouncing the employer's approach and upholding the spirit of the law, Gush J expressly remarked as follows:

> "This approach ignores the fact that the right to maternity leave as created in the Basic Conditions of Employment Act … is an entitlement not linked solely to the welfare and health of the child's mother but must of necessity be interpreted to and take into account the best interests of the child. Not to do so would be to ignore the Bill of Rights in the Constitution of the Republic of South Africa and the Children's Act." *(MIA v State Information Technology Agency (Pty) Ltd supra* par 13*)*

Both cases are commended for paving the way towards achieving equality in the workplace by providing adequate leave provisions for fathers and surrogate parents to care for their newborn children. It may also be argued that both cases have reiterated that the best interests of the child are of paramount importance, and as such, must prevail.

## 7 Conclusion

This landmark case is laudable because both parents, regardless of gender, sex or colour, will now be entitled to equal parental leave. It is no longer only about a birth mother who must heal physiologically. However, it is also about both parents who are capable of nurturing the newborn child. The court's judgment is consistent with section 28(2) of the Constitution, which stipulates that the best interests of the child are of paramount importance in all matters concerning the child.

Sutherland DJP's decision is welcomed because it serves as a wake-up call to the legislature that fathers and gender-binary caregivers of their children should be given the same rights and opportunities to participate in their children's development and growth (*Van Wyk v Minister of Employment and Labour supra* par 45–47). Altering legislative provisions as indicated by the court will arguably allow the South African labour law system to align itself with International Labour Organisation standards (R111 Discrimination (Employment and Occupation) Recommendation, 1958).

It remains to be seen whether Sutherland DJP's judgment will be taken on review, but the prospects of success for such a challenge are next to zero. Arguably, the court elevated the norms of the Constitution by stretching the provisions of the BCEA to accommodate unique, if not all, family models in South Africa. Ideally, the judgment has the potential to transform the conventional allocation of roles between fathers and mothers by redressing gender inequality at home as well as in the workplace.

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