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Van Wyk and Others v Minister of Employment and Labour: A Constitutional Reset for Parental Leave

The Constitutional Court's judgment in *Van Wyk and Others v Minister of Employment and Labour* is not just a technical fix to South Africa's leave laws. It is a reset of how we understand work, care and family. It moves parenting out of the shadows of "women's issues" and into the centre of workplace design.

The facts of the case are simple but powerful. Before their son was born, Werner and Ika van Wyk agreed that Werner would be the primary caregiver so that Ika could continue running her businesses. When he asked his employer for four months' leave, he was told that as a father, the law allowed him only ten days. He ultimately took six months of unpaid leave, with serious financial and career consequences, while the law shielded the income and job security of birth mothers far more than that of other parents. Supported by Sonke Gender Justice and the Commission for Gender Equality, the Van Wyks challenged the Basic Conditions of Employment Act (BCEA) and the Unemployment Insurance Act (UIF Act). The Constitutional Court agreed that the framework unfairly discriminated between different kinds of parents and even between adopted children based on age, violating the rights to equality and dignity.

At the heart of the judgment is a rejection of an old script. Birth mothers have previously been treated as default caregivers, with maternity leave privileges, while fathers and other parents were reduced to ten days of "helping out". Adoptive and commissioning parents were given shorter leave, and only in some adoption cases. The Court found no convincing constitutional basis for these distinctions. All children need care and bonding when they join a family, and all parents deserve a legal framework that recognises that reality.

The Court has now confirmed that key maternity and parental leave provisions in the BCEA, and related UIF provisions, are unconstitutional. It has suspended that invalidity for 36 months to allow Parliament to amend the law, but it has also put an interim arrangement in place that applies immediately. Under this regime, parents share a combined entitlement of four months and ten days of leave, regardless of gender, biology, adoption or surrogacy. Where only one parent is employed, that parent may take the full allocation. Where both are employed and cannot agree on how to split it, the employers must divide the leave as close as possible to half-half. Birth mothers still have a protected period for preparation and recovery, including the compulsory six weeks after birth, but this sits inside a broader, gender-neutral parental-leave framework.

This neat model on paper quickly turns into difficult questions in real workplaces. One of the most obvious is this: who gets leave when both parents work for the same employer and both want to take parental leave? Put differently: if both parents work for the same organisation and both want parental leave, who gets to go on leave when? The Court's answer is that the total pool of four months and ten days belongs to the parents together. They must decide how to share it. If they cannot, the employer(s) must split it as evenly as possible. That gives a constitutional starting point, but not an automatic timetable. In practice, it will require negotiation: can one parent shift their portion slightly earlier or later, can the leave be staggered, can flexible work soften the impact on a small team? The law insists that both parents must have a real opportunity to care; it does not promise that both will be on leave at the same time, regardless of operational needs.

Other scenarios will test how seriously we take the link between leave and actual caregiving. What happens when the parents are no longer together, or when one parent is not involved in the child's life at all? It would distort the spirit of the judgment if an absent parent could claim parental leave on paper while not providing care in reality. The logic of Van Wyk is that leave exists to support real caregiving relationships, not abstract biological status. Similarly, if the other parent is incarcerated or subject to a protection order for violence, insisting on a "shared" allocation makes little sense. In those cases, the interim framework already points to the answer: where effectively only one parent can exercise the right, that parent may take the full pool of leave. It would be constitutionally incoherent to pretend that two equal caregivers exist where there is only one.

Employers now have detailed work to do. Policies must shift from narrow "maternity" and "paternity" categories to inclusive, gender-neutral "parental leave" that covers biological, adoptive and commissioning parents. HR and payroll systems will need to track shared leave arrangements even where parents work for different organisations and managers will need to handle more complex patterns of absence. There will be a messy interim period where the right to leave and how UIF benefits apply will hopefully become clearer, and HR teams and employees will have to navigate that gap in real time.

The judgment raises the question whose time really counts in the workplace. The old system pushed women to carry the long-term career cost of care, while men were squeezed into a ten-day window, reinforcing pay gaps and unequal leadership pipelines. A shared, gender-neutral regime opens the door to more balanced caregiving, where employers can no longer assume that only mothers will be away for long stretches. This matters across the economy, including agriculture, where many women and seasonal workers already face low wages and patchy benefits. Implementing shared parental leave there will require support from industry bodies and larger agribusinesses, but it also offers a chance to make rural workplaces more attractive and chip away at entrenched gender inequality.

Cost and capacity questions won't disappear: employers who top up maternity leave will worry about extending similar support to all parents, and small businesses will feel the admin and staffing strain. But Van Wyk's constitutional message is clear: care is not a private indulgence, and equality at work is hollow if it ignores the right to form and nurture a family. The organisations that respond best will combine pragmatism and imagination updating policies and training managers, while treating parental leave as an investment in a more committed, stable and diverse workforce. The judgment gives South Africa a framework that better

reflects how families actually live; it is now up to employers, lawmakers and workers to turn that into everyday reality.

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