

EMPLOYMENT LAW OPINION

# Father's entitlement to parental leave and paid leave where an employer pays maternity leave



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A formal opinion on the post Van Wyk parental leave regime, the only employed parent scenario, and the treatment of paid maternity benefits as employment benefits.

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AT A GLANCE

**LEAVE RIGHT**

The father may take parental leave where he is the only employed party in the parental relationship.

**PAYMENT ISSUE**

The BCEA does not itself compel full salary payment, but paid maternity leave may create an equality based benefit claim.

**EMPLOYER RISK**

A paid benefit limited only to women is vulnerable unless it is narrowly and objectively tied to birth recovery.

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*Style note: this document is formatted as a corporate legal opinion for client circulation, with the full legal analysis preserved and presented in a publication style format.*

## 1. Instructions And Scope

1.1 I am instructed to provide a formal labour law opinion on whether an employed father may take parental leave where the mother of the child is not employed and is physically at home, and whether there is a sustainable basis upon which the father may seek paid leave where the employer already pays maternity leave.

1.2 The opinion is prepared against the background of the Constitutional Court judgment in Van Wyk and Others v Minister of Employment and Labour and the related Commission for Gender Equality matter, in which the Court substantially altered the interim position on maternity, parental, adoption and commissioning parental leave pending parliamentary remedial legislation.<sup>1</sup>

1.3 I am further instructed to deal with the practical payment difficulty, namely whether an employer may grant paid maternity leave to female employees but refuse an equivalent paid parental leave benefit to a father who is the only employed parent in the parental relationship.

1.4 This opinion is confined to South African labour law, employment equity law, the interim effect of the Constitutional Court order, and the legal risk arising from differential treatment in employment benefits. I have not been provided with the relevant employer's actual leave policy, collective agreement, contract of employment, or payroll rules. If such documents contain material provisions, the advice should be tested against those documents.

## 2. Factual Assumptions

2.1 I assume, for purposes of this opinion, that the father is an employee, that the child is his child, that he has assumed parental rights and responsibilities, and that he wishes to take parental leave for childcare and family responsibility purposes.

2.2 I further assume that the mother is not employed and therefore does not have an employer from whom statutory parental leave may be claimed.

2.3 I also assume that the employer pays maternity leave, either fully or partly, as a company benefit. I do not assume that the BCEA itself obliges the employer to pay the salary component, because the statutory minimum position and the employer funded benefit position must be separated.

## 3. Questions For Opinion

3.1 Is the father entitled to take parental leave where the mother is not working and is at home?

3.2 Can the employer refuse the leave on the basis that the mother is available at home?

3.3 Does the Constitutional Court judgment automatically require the employer to pay the father during parental leave?

3.4 If the company already pays maternity leave, is there a basis to argue that the father must receive paid parental leave on an equivalent basis?

3.5 What practical position should be adopted by an employer wishing to comply with the judgment and manage discrimination risk?

## 4. Executive Conclusion

4.1 The father's entitlement to take leave is strong. Under the interim reading in ordered by the Constitutional Court, an employee who is the only employed party in a parental relationship is entitled to at least four consecutive months' parental leave.<sup>2</sup>

4.2 The fact that the mother is not employed and is physically at home is not, in itself, a lawful basis to refuse the father parental leave. The operative legal enquiry is not whether the mother is present. The operative enquiry is whether the employee qualifies as a parent and, on these facts, whether he is the only employed party in the parental relationship.

4.3 The BCEA, as temporarily read by the Court, does not by itself create an automatic obligation that every employer must pay salary during the full period of parental leave. The Court expressly left parental benefits to be determined by the Minister subject to the UIF Act.<sup>3</sup>

4.4 The payment issue changes materially where the employer already provides paid maternity leave as an internal benefit. In that instance, the benefit becomes part of the employer's employment policy or practice, and differential treatment between mothers and fathers may attract scrutiny under the Employment Equity Act.<sup>4</sup>

4.5 In my view, a blanket rule that pays only a female employee during maternity leave, but denies any equivalent paid parental leave benefit to a qualifying father who is the only employed parent, is vulnerable to an unfair discrimination challenge based on sex, gender and family responsibility. The risk is especially acute where the paid benefit is not clearly confined to medical recovery from childbirth.

4.6 The prudent and legally defensible approach is to approve the leave and to align the paid benefit with the employer's paid maternity leave policy, subject to any objectively justifiable portion that is genuinely and narrowly connected to the birth mother's pregnancy, childbirth and medical recovery.

## 5. Current Legal Position After Van Wyk

5.1 The Constitutional Court confirmed that the previous BCEA and UIF provisions were constitutionally invalid to the extent that they unfairly differentiated between categories of parents regarding the length of leave and the related benefits available to them.<sup>5</sup>

5.2 The declaration of invalidity was suspended for 36 months to allow Parliament to remedy the defect. Pending remedial legislation, the Court ordered an interim reading in of the BCEA. That interim reading applies now and must be treated as the operative position until Parliament enacts a constitutionally compliant framework.<sup>6</sup>

5.3 For the present facts, the central wording is that an employee who is the only employed party in a parental relationship is entitled to at least four consecutive months' parental leave. The Court's wording is not gender specific and is not limited to a birth mother.

**CONTROLLING PHRASE**

**"the only employed party in a parental relationship"**

5.4 Where both parties to the parental relationship are employed, the interim position is different. They have an aggregate entitlement of four months and ten days' parental leave, subject to agreement between them and subject to the birth mother's preference in respect of the period connected to preparation for and recovery from birth.<sup>7</sup>

5.5 On the facts under consideration, the mother is not employed. The father is therefore not seeking to share the leave with another employed parent. He is the only employed party and falls directly within the portion of the Court's order that grants the full four months to the only employed parent.

## 6. Why The Mother Being At Home Does Not Defeat The Father'S Leave Right

6.1 The employer may be tempted to argue that the father does not need leave because the mother is at home. That argument is not aligned with the reasoning in Van Wyk.

6.2 The Constitutional Court's reasoning is grounded in equality, dignity, parental autonomy and the rejection of a rigid assumption that the mother must be the default caregiver. The Court recognised that the previous regime marginalised fathers and denied parents a meaningful choice in structuring their child nurturing responsibilities.<sup>8</sup>

6.3 The mother's unemployment does not legally erase the father's role. It also does not give the employer a discretion to decide that the mother must perform all care work because she is at home. The judgment moves the law away from precisely that type of gendered assumption.

6.4 The correct legal position is therefore that the father may take parental leave if he qualifies under the interim BCEA reading. The employer may ask for reasonable proof of parenthood and status as the only employed party, but it should not refuse leave merely because the mother is not employed.

## 7. Payment Of Leave: Statutory Minimum Versus Company Benefit

7.1 The first distinction is important. The right to be absent from work is a statutory leave entitlement. Salary during that absence is a separate question.

7.2 The Court did not impose a general employer funded salary obligation for the entire parental leave period. The interim wording of section 25(7) states that payment of parental benefits is to be determined by the Minister subject to the UIF Act.<sup>9</sup>

7.3 The Court was cautious about the UIF consequences and did not craft a complete interim UIF benefits regime. That means an employee cannot simply say that Van Wyk, by itself, compels full salary payment by the employer for the whole four months.

7.4 However, where the employer already pays maternity leave from its own policy or practice, the issue is no longer only whether the BCEA creates a salary obligation. The issue becomes whether the employer may lawfully provide a paid parental benefit to one sex or gender category while excluding another parent who is now statutorily recognised as entitled to parental leave.

## 8. Paid Maternity Leave As An Employment Benefit

8.1 The Employment Equity Act prohibits unfair discrimination, directly or indirectly, in any employment policy or practice. The Act expressly includes remuneration, employment benefits, and terms and conditions of employment within that concept.<sup>10</sup>

8.2 Paid maternity leave is therefore not merely a discretionary kindness once it is embedded in a contract, policy, benefit practice or payroll rule. It is an employment benefit. If that benefit is granted only to women because they are women, or withheld from men because they are men, the employer must be able to justify the differentiation in a manner consistent with equality law.

8.3 A distinction may be defensible to the extent that a benefit is genuinely directed at the physiological consequences of pregnancy and childbirth. The interim BCEA reading still recognises that a female employee expecting birth may commence parental leave before the birth and that a female employee who has given birth may not work for six weeks after the birth unless certified fit.<sup>11</sup>

8.4 That does not mean the employer may reserve all paid maternity leave for women if the substance of the benefit is broader than medical recovery. Many maternity policies pay employees for a period that serves

multiple purposes, including bonding, infant care, adjustment to parenthood, household care responsibilities and continuity of income after birth.

8.5 Once the benefit serves those broader parental purposes, exclusion of a father who is the only employed parent becomes difficult to justify. The employer's safest position is to convert the benefit into a gender neutral paid parental leave benefit, while preserving a specific birth recovery component for the employee who gives birth where that is objectively required.

## 9. Application To The Present Facts

9.1 On the assumed facts, the father is the only employed party in the parental relationship. He therefore qualifies for the full four months' parental leave under the interim position.

9.2 The employer should not refuse leave on the basis that the mother is at home. That reason would be legally vulnerable because it rests on the very assumption that childcare defaults to the mother when she is available.

9.3 If the employer does not pay any maternity leave to anyone, the father's claim to salary is more limited and may depend on UIF benefits, contract, policy, collective agreement or discretionary approval.

9.4 If, however, the employer pays maternity leave to female employees, the father has a credible equality based claim to paid parental leave on an equivalent basis. The claim is strongest where the policy provides paid leave for several months and is not expressly and narrowly limited to pregnancy related medical incapacity.

9.5 The employee's strongest formulation is not that he is taking maternity leave. The correct formulation is that he is taking parental leave, and that the employer must apply its paid maternity or childbirth related benefit in a constitutionally compliant and non discriminatory manner.

## 10. Recommended Employer Approach

10.1 The employer should approve the father's parental leave if he provides reasonable proof that he is the father or has parental rights and responsibilities, that the child has been or will be born, and that the mother is not employed.

10.2 If the employer has a paid maternity leave policy, the policy should be reviewed immediately. The terminology should be updated from a maternity only model to a parental leave model. A separate birth recovery rule may be retained for the employee who gives birth.

10.3 The preferred legal model is as follows:

- first, recognise parental leave as available to qualifying parents regardless of sex, gender, marital status, family structure or birthing status;

- second, allow the only employed parent to take the full four months;
- third, where the company pays maternity leave, extend the paid benefit to qualifying parental leave unless a particular portion is objectively and genuinely reserved for pregnancy or childbirth recovery;
- fourth, require a declaration or affidavit only for factual verification, not as a barrier to the exercise of the right; and
- fifth, avoid wording that suggests fathers receive paid leave only as a matter of discretion while mothers receive paid leave as of right.

10.4 A risk managed compromise, where the employer is concerned about medical recovery, would be to identify any six week recovery component for the birth mother and then treat the remaining paid period as a gender neutral paid parental benefit. The better approach, however, is full equalisation unless the policy can clearly justify a narrower medical distinction.

## 11. Proposed Wording For Employee Request

11.1 The father may place the request in the following terms:

### SUGGESTED EMPLOYEE WORDING

**I apply for parental leave in terms of the Constitutional Court judgment in Van Wyk and Others v Minister of Employment and Labour and the related CGE matter [2025] ZACC 20. I am the only employed party in the parental relationship and therefore fall within section 25(1)(b) as temporarily read into the BCEA by the Court. I request that the leave be treated as paid parental leave on the same basis as the company's paid maternity leave benefit, because the company already provides a paid childbirth or parental benefit and exclusion of a qualifying father may constitute unfair discrimination on the grounds of sex, gender and family responsibility.**

11.2 The request should be accompanied by the proposed leave dates, expected return date, proof of birth or expected birth, and a short declaration confirming that the mother is not employed.

## 12. Litigation And Compliance Risk

12.1 If the employer grants unpaid parental leave while continuing to pay maternity leave to women, the dispute is likely to be framed as unfair discrimination rather than a simple BCEA leave dispute.

12.2 The risk to the employer is that the paid benefit is found to be an employment benefit applied in a discriminatory manner. The most likely pleaded grounds are sex, gender, pregnancy related differentiation by proxy, marital status and family responsibility.

12.3 The employer's best defence would be a properly drafted policy proving that the paid component is limited to biological recovery from pregnancy and childbirth. Even then, the defence may justify only the recovery component, not the entire paid leave benefit if the policy in substance also supports childcare and bonding.

12.4 The practical risk is therefore medium to high for employers with paid maternity leave policies that have not been updated after Van Wyk. The risk is lower where the employer has already equalised paid parental leave or created a clear and proportionate birth recovery component.

### 13. Final Opinion

13.1 It is my considered opinion that the father is entitled to take parental leave where the mother is not working, provided he is the only employed party in the parental relationship and has assumed the relevant parental responsibilities.

13.2 The mother's physical presence at home is not a lawful standalone reason to refuse the father parental leave.

13.3 The BCEA as read with Van Wyk does not automatically compel the employer to pay full salary for the entire parental leave period. The salary question depends on UIF benefits, contract, collective agreement and the employer's own policy or practice.

13.4 Where the employer already pays maternity leave, the father has a strong and credible basis to request equivalent paid parental leave. Refusal of any paid benefit to him, while the employer pays female employees during maternity leave, is vulnerable to an unfair discrimination challenge unless the employer can justify the distinction on a narrow and objective medical recovery basis.

13.5 The prudent employer response is to approve the parental leave, apply paid leave benefits in an equal and gender neutral manner, and urgently amend the leave policy to reflect the post Van Wyk parental leave regime.

## 14. Authorities And References

1. Van Wyk and Others v Minister of Employment and Labour, Commission for Gender Equality and Another v Minister of Employment and Labour and Others [2025] ZACC 20, Constitutional Court, judgment of Tshiqi J, decided 3 October 2025.
2. Van Wyk, Order paragraph 5(a), interim reading of BCEA section 25(1)(b).
3. Van Wyk, Order paragraph 5(a), interim reading of BCEA section 25(7).
4. Employment Equity Act 55 of 1998, sections 5 and 6, read with the definition of employment policy or practice in section 1.
5. Van Wyk, Order paragraphs 2, 3 and 4.
6. Van Wyk, Order paragraph 4 and Order paragraph 5.
7. Van Wyk, Order paragraph 5(a), interim reading of BCEA section 25(4A) to section 25(4D).
8. Van Wyk, reasoning on equality, dignity and the marginalisation of fathers in early parenting.
9. Van Wyk, Order paragraph 5(a), interim reading of BCEA section 25(7).
10. Employment Equity Act 55 of 1998, section 1 definition of employment policy or practice, and section 6.
11. Van Wyk, Order paragraph 5(a), interim reading of BCEA section 25(2) and section 25(3).
12. Department of Employment and Labour, Labour Law Amendment Bill, 2025, Government Gazette No 54220, Notice 3801 of 2026, published 26 February 2026. As at the date of this opinion, the operative right addressed in this opinion remains the Constitutional Court interim reading pending enacted remedial legislation.

Yours faithfully



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