

# Landmark ruling may lead to big change with parental leave rights

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On Wednesday, the High Court handed down a judgment indicating a significant change in parental leave rights.

In the groundbreaking case of *Van Wyk and Others v the Minister of Employment and Labour and Others*, the applicants advanced a gender-neutral interpretation of the term "employee" in the provisions of the Basic Conditions of Employment Act 75 of 1997 (BCEA) concerning parental leave.



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Their argument was simple: maternity leave, as currently provided for, should not be limited to those who have given birth. Instead, it should apply to all parents, regardless of gender or birthing status, providing them with the same right to share in the four months of parental leave.

## Legal interpretation

The case challenged not only the legal interpretation of maternity leave but also broader societal norms and expectations about parental roles. This case sparked intense debate and diverse opinions on its merits and will have a significant impact in the workplace.

The heart of the applicants' argument was to ensure the equal treatment of parents. They sought to eliminate the archaic distinction between birthing parents and non-birthing parents on maternity leave. By doing so, they aimed to secure a more inclusive and equitable approach towards family support, recognising the shared responsibilities and experiences of both parents.



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The section of the BCEA under scrutiny was section 25 and its subsequent amendments, which address maternity leave, parental leave, commissioning parental leave, adoption leave and their respective durations. This section provides the legal framework that the applicants aimed to reform. Their assertion was that these sections perpetuated an unequal system, favouring birthing parents and neglecting the rights of non-birthing parents.

The Court's decision departs from the conventional interpretation of these sections. It recognised the need to address the existing inequality and decided to modify section 25 to align with the Van Wyks' progressive vision. The Court said that a single parent or two parents are collectively entitled to at least four consecutive months of parental leave. It acknowledged the need to address inequality and decided that, in the interim, the appropriate means to do so is to extend the right to four consecutive months of parental leave. In other words, each pair of parents of a qualifying child should share the four months of leave as they see fit.

## Transformation

This landmark decision has the potential to transform the parental leave landscape in South Africa. While the judgment will require confirmation by the Constitutional Court, it sets a new precedent for parental rights and equality in the workplace.

Depending on the ultimate relief granted, this decision will allow, where they so choose, two parents dividing the four months of parental leave in different ways to care for their newborn children. Employers should take note of the operational and cost implications, particularly if they provide paid maternity leave. Employers would be expected to provide the paid parental leave to all individual employees or employees who are a pair of parents. As the legal landscape evolves to accommodate this expanded definition of parental leave, it is essential for employers to review their policies and practices to ensure compliance with the new legal framework.

The Van Wyk case represents a significant step toward achieving gender equality and shared parental responsibility. This court decision has set a precedent that may pave the way for a more inclusive and supportive work environment for all parents in South Africa, ultimately benefiting families, employees, and employers.

## ABOUT THE AUTHOR

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