Does Section 25 of the Basic Conditions of Employment Act discriminate unfairly against fathers in South Africa?

By

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Declaration

I am aware of the plagiarism policy in the University of Johannesburg. I declare that this minor dissertation is my own original work and where reference is made other's work, this has been properly acknowledged and referenced in accordance with departmental requirements. I declare that the minor dissertation, which I hereby submit for the degree LLM (Labour Law) at the University of Johannesburg, is my own work and has not previously been submitted by me for a degree at this or other tertiary institution.

Abbreviations

BCEA	Basic Conditions of Employment Act
LRA	Labour Relations Act
EEA	Employment Equity Act
UIA	Unemployment Insurance Act
UIF	Unemployment Insurance Fund
SADC	South African Development Community
SDA	Sex Discrimination Act 1975 (UK)
EPA	Equal Pay Act 1970 (UK)
EA	Employment Act (UK)
ERA	Employment Rights Act (UK)
PAL	Paternity Adoption Leave (UK)
NIC	National Insurance Contributions (UK)
APL	Additional Paternity Leave (UK)
OML	Ordinary Maternity Leave (UK)
AML	Additional Maternity Leave (UK)
EU	European Union
ILO	International Labour Organisation
ILC	International Labour Conference

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1. Introduction

1.1 Background and overview

In accordance with the labour legislation in South Africa[1] mothers are entitled to four months maternity leave, which may commence at any time from four weeks before the expected date of birth. Section 25 of the Basic Conditions of Employment Act, No 75 of 1997 (BCEA) provides for this right. With the provision that the employee notifies the employer in writing of the date that the employee intends to commence maternity leave and expected date of return.[2] The BCEA further provides for six weeks of maternity leave, in the event of any complications that may arise before or after birth, such as a miscarriage or a still born child, in order for the mother to recuperate.[3] The employer may not modify the provisions contained in the BCEA, unless the new terms are more favourable to the employee, which will be contained in a collective agreement.[4] Maternity benefits for mothers that are on maternity leave are provided for in the Unemployment Insurance Act 63 of 2001 (UIA) in sections 24 to 26.

Comparatively fathers are not exclusively accommodated for in South African labour legislation regarding maternity leave, or rather paternity leave. Generally employees are entitled to three days of family responsibility leave[5], which should be exhausted in the event of a funeral, birth of a child or urgent family matters. The BCEA regulates the circumstances under which an employee may apply for family responsibility leave. This particular provision in the BCEA is gender neutral. Thus, fathers may use family responsibility leave as a form of paternity leave, upon the birth of their babies.

The content contained in section 25 of the BCEA is rigid in the sense that it is read to be understood that the provisions are meant to be enjoyed by women only. Based on the wording, one can assume that the provisions made by the Act are only relevant

[1] Basic Conditions of Employment Act, No 75 of 1997.

[2] S 25 (5) of the BCEA.

[3] S 25 (4) of the BCEA.

[4] Grogan, *Employment Rights* (2010) 6.

[5] S 27 of the BCEA.

to women, as they physically give birth. Although this is not explicitly stated. The Act uses the word 'employee'.

Employers have also used the BCEA as a guideline when drafting their internal maternity leave policies and have also adopted the assumption from the wording of section 25, that it is a provision only applicable to women.

This notion has also been mirrored by employer in the *MIA v SITA*[6] case, where the employer's maternity leave policy was alleged to be discriminatory and challenged on this ground. The employer's defence was that the policy was not discriminatory, and relied on the word 'maternity' as being the defining character of the leave, as it was only due and a right to be enjoyed by female employees. The employers pleadings sustained that *' the maternity leave policy was designed to cater for employees who physically give birth, this was 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 during the post-partum period'.*[7]

It seems that the labour legislation, particularly the BCEA has unintentionally echoed the traditional approach of gender dynamics in the workplace and society at large, while trying to eliminate the gender inequality in the workplace. Traditionally women are the home makers and care givers while men are breadwinners who are expected to venture into the labour market.[8] Fathers thus experience shortcomings from the beginning of parenthood because society as well as labour legislation dictates that fathers are unable to provide the same amount of care to a child as women.

The Labour Relations Act 66 of 1995 (LRA) also makes its stance clear on the issue regarding the discrimination of pregnant women. In terms of section 187(1) (e) of the LRA, the dismissal of an employee on the basis of her pregnancy, intended pregnancy, or any reason related to her pregnancy, is automatically unfair.

[6] *MIA v State Information Technology Agency (Pty) Ltd [2015] JOL 33060 (LC),* at paragraph 12.

[7] Ibid, at paragraph 12.

[8] Huysamen, Women and maternity: Is there truly equality in the workplace between men and women, and between women themselves? [Labour Law into the future, essays in honour of D'Arcy du Toit] 2012, 46. "Traditional work-care regimes were in fact premised on the notion that women were assigned the responsibility of caring and domestic work, whereas the standard and ideal worker was thought to be full time and male".

According to Van Niekerk and Smit[9] the purpose of this section 187 (1) is to 'ensure that women are not disadvantaged by virtue of their being women and the child bearing member of the human race'. The provision ensures that a pregnant woman cannot suffer any detriment at the hands of the employer regarding her pregnancy and any matter related to her pregnancy, which also extends to maternity leave.

1.2 The Constitutional Courts jurisprudence and same-sex couples rights

The jurisprudence of the Constitution Court has adequately encompassed the values and goals of the Constitution.[10] One of which being the right to equality enshrined in section 9 of the Constitution. Subsection (3) and (4) state that no one including the state may discriminate against any person on the basis of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. These are referred to as listed grounds.

The issue of same-sex couples receiving the same benefits as heterosexual couples has been reflected in the judgements of the Constitutional Court. For example *Satchwell v President of Republic of South Africa*[11] dealt with the unconstitutionality of sections 8 and 9 of the Judges Remuneration and Conditions of Employment Act 88 of 1989 due to the fact that benefits were afforded through this Act to spouses and not same-sex life partners. The word 'spouse' was inconsistent with the equality provisions of section 9 of the Constitution, the Act provided for benefits of a surviving spouse while the applicant had been in a permanent same-sex relationship with a female judge. The unconstitutionality order was based on section 9(3) that prohibits unfair discrimination on the grounds of sexual orientation. In this court the government accepted that people are entitled to establish their relationships based on compatibility regardless of their sexual orientation.

In another ground breaking judgement, the Constitutional Court in *Minister of Home Affairs v Fourie*[12] the court declared that the common law definition of marriage was

[9] *Law @ work* (3rd ed) 261.

[10] Constitution of the Republic of South Africa (RSA), 1996.

[11] 2002 (6) SA 1 (CC).

[12] *(Doctor for Life International and Others, Amici Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs 2006 (1) SA 524 (CC).*

inconsistent with the Constitution and invalid to the extent that it does not permit same-sex couples to enjoy the status and the benefits coupled with responsibilities it accords to heterosexual couples. Parliament was given 12 months to change this stance and correct the defect in the common law definition to extend marriage to same-sex partners. The Civil Union Act[13] was enacted shortly after this judgement, which formally recognised the civil union of same-sex partners.

Although same-sex rights are protected and have developed over the years, as per the jurisprudence and legislation there are still unanswered questions as to why homosexual couples are not afforded the same rights as heterosexual couples regarding maternal benefits and maternity leave.

The need to recognise homosexual relationships has been adequately recognised in our constitutional dispensation, in turn the need to start families is generally a natural part of a relationship between two people regardless of their sex and gender. Thus both heterosexual and homosexual couples should be afforded the same maternity benefits. In *Prinsloo v Van der Linde & Another*[14] the court stated that "a law may differentiate between classes of persons if the differentiation is rationally linked to the achievement of a legitimate government purpose".[15] Failure to afford everyone the same benefits results in unfair discrimination, unless the discrimination can be justified in terms of section 36 of the Constitution. [16]

[13] 17 of 2006.

[14] 1997 (6) BCLR 759 (CC).

[15] *Ibid,* at paragraph 25 page 19.

[16] S 36 (1) of the Constitution provides that: "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".

1.3 Equality test

Not all discrimination is unfair, the courts have thus distinguished between plain differentiation, which is reasonable and acceptable and unfair discrimination.[17] The constitutional test for unfairness is found in *Harksen v Lane NO & others*[18] where a three stage enquiry was set out in order to determine whether differentiation constitutes unfair discrimination. This would have to be applied to section 25 of the BCEA in order to determine whether the provision is discriminatory against fathers as well as same sex partners. The three stage enquiry is set out as follows;

a. Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose?
b. Does the differentiation amount to unfair discrimination?
   (This requires a two stage analysis :)
   (b)(i) 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 which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
   (b)(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) (of the interim Constitution, and section 9 of the current Constitution) .If the discrimination is found to be unfair then a determination will have to be

[17] Van Nierkerk and Smit *Law @ work* (3rd Ed) 115.

[18] 1997 (11) BCLR 1489 (CC).

made as to whether the provision can be justified under the limitations clause (section 33 .of the interim Constitution).[19]

Section 25 of BCEA extends its scope of coverage to birth mothers who are employees. Therefore a differentiation is created between birthmothers and fathers who are primary care givers, adoptive parents, same-sex couples who have had a child through a surrogate and informal workers who do not fall under the ambit of an employee. According to the test in *Harksen v Lane*,[20] the differentiation should bear a rational connection to a legitimate government purpose. Section 9(2) of the Constitution states that equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.[21] Therefore it can be submitted that the rational connection of the differentiation created by section 25 of the BCEA is to protect the vulnerability of pregnant woman in the workplace, in turn also advancing gender equality in the workplace, as women are categorised as previously disadvantaged persons.

The second leg of the test requires for it to be determined whether the discrimination amounts to unfair discrimination, through a two stage enquiry. In the first case, if the differentiation is based on a listed ground as per section 9 (3) of the Constitution, then discrimination would be established. Secondly if the discrimination is found to be on a listed ground, then unfairness will be presumed. The discrimination in this case is based on the grounds of gender, sex and sexual orientation. The test mainly focuses on the impact of the discrimination on the complainant and others in a similar situation. The negative impact conferred by the BCEA on the categories of

[19] *Ibid*, at paragraph 53.

[20] Fn 18.

[21] See *Minister of Finance & others v Van Heerden 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC),*at paragraph 31.The court submitted that equality before the law in terms of section 9 (1) of the Constitution and the measures to promote equality contained in section 9 (2) are 'both necessary and mutually reinforcing'. This flows from the recognition of restitutionary measures by section 9 (2) that may be taken to promote the achievement of equality, equality in South Africa must therefore be understood to include remedial or restitution equality.

persons[22] that are not included in its scope of coverage is the restriction that is created in terms of the access to maternity benefits to parents in the wider sense. In that parents who are primary care-givers to their children are not equally recognised by the BCEA, and are thus differentiated on based on their gender, sex and sexual orientation.

Therefore it can provisionally be submitted at this stage that the differentiation established by section 25 of the BCEA is unfairly discriminatory against fathers who are primary care givers, adoptive parents, same-sex couples who have had a child through a surrogate and informal workers who do not fall under the ambit of an employee. The BCEA does not place parents on an equal standing before the law.

1.4 Problem statement

South Africa does not currently extend maternity leave and benefits to fathers, as previously stated fathers often exhaust their family responsibility leave at the birth of their babies. Three days will also not suffice in a scenario where the father is the primary care giver of the child, or where the mother of the child passes away after the birth of the child. Research also suggests that fathers who assume paternity leave, particularly those that take two weeks or more immediately after the birth, are more likely to be involved in their children's lives.[23] This could also produce positive results in respect of gender equality both at home and at work.[24]

Three days will also not suffice in an instance where a baby is born prematurely. The mother of the child needs the support of the father in the time, and generally after the birth of a baby, a father should be granted more time to spend with the baby. Benefits in terms of the Unemployment Insurance Act (UIA)[25] should also be extended to fathers, in order for them to receive remuneration of some sort while staying home with the mother and baby. In order to avoid the harsh consequences of temporary unemployment.

[22] Mainly fathers who are primary care givers, adoptive parents, same-sex couples who have had a child through a surrogate and informal workers who do not fall under the ambit of an employee.

[23] Huerta et al, Fathers leave, fathers involvement and child development. (2013) 140.

[24] Ryder, Maternity and paternity at work (2014) 6.

[25] 63 of 2001.

Although women are afforded maternity benefits in South Africa, the scope of coverage does not extend to those women working in the informal sector because they are not regarded as employees. Normally formal employment relationships are regulated by way of employment contract that will regulate the terms and conditions of employment.[26] Social security benefits are provided for those falling under the ambit of an employee. The assumption extracted from the wording of regulatory instruments is that you must be employed formally in order to receive adequate social security benefits, therefore placing those working in the informal economy in a vulnerable position, exposed to risk.

Comparatively fathers working in the informal sector as flexible workers are also placed at a disadvantage, because they receive no coverage for the 3 day paternity leave under the BCEA in the event of the birth of a child. Nor are fathers provided more favourable conditions or benefits in this regard because no formal contract of employment or collective agree exists.

There is growing need for legislative intervention to safe-guard the interests of vulnerable workers who do not fall into the ambit of an employee

Furthermore since the constitutional dispensation, same-sex marriages and relationships have been given recognition, however maternity benefits are not equally afforded to same-sex persons and heterosexual persons. Male same-sex couples who are considering starting a family through a surrogate are placed at a great disadvantage. Particularly in light of the fact that family responsibility leave is the only form of parental leave that is currently available to males. Parents who have adopted a baby are placed at a slightly better advantage than fathers and same sex couples, however the benefits are still not equal to those available to birth mothers.[27]

Individuals who adopt a child are entitled to claim for adoption benefits in terms of the UIA[28], companies often provide for adoption leave through their employment contracts, collective agreements or internal policies.[29] Although the position of adoptive parents is less favourable than that of birth mothers in that the South

[26] Fn 9, 58.

[27] See the Children's Act 38 2005.

[28] Section 27 of the Unemployment Insurance Act 63 of 2001.

[29] Fn 6.

African labour legislation does not prescribe for exclusive adoption leave. Adoptive parents are also thus subjected to section 27 of the BCEA that provides for family responsibility leave in the event of an adoption. Their position is more favourable to that of fathers because most companies have recognised the need for adoptive leave through their internal policies, furthermore they are entitled to adoption benefits in terms of the UIA.

Same sex couples should equally be afforded maternity benefits in terms of the UIA, the laws regarding same-sex couples should adequately reflect the equality goals and values that are embedded in the Constitution.

The purpose of this study is to undertake a literature review of the legal challenges that fathers and same-sex partners encounter in the application of section 25 of the BCEA. Furthermore it will attempt to determine how maternity benefits should be extended to all relevant persons that contemplate starting a family in South Africa. Additionally it will draw on the experiences from Belgium, United Kingdom and Germany on their application of paternity laws and benefits, as well as the relevant International Labour Organizations (ILO) conventions that have been ratified by South Africa which should thus be consistent with our domestic laws. While finally providing recommendations for the challenge that has been identified in our law.

1.5 Methodology and procedure

This minor dissertation will examine the current domestic laws, articles, international legislation and jurisprudence governing maternity benefits as well as the constitutional jurisprudence including Labour Court judgements in this respect. In light of the fact that there is no legislation in South Africa exclusively governing paternity rights to person regardless of their sex and gender, there is a prospective risk of the infringement of the fundamental rights of fathers and parents as entrenched in the Bill of Rights and labour related legislation.[30]

[30] Mothibe, Challenges in the polygraph testing of workers in South Africa (2013 Thesis SA) 10.

2. Current legislative framework

2.1 Supremacy of the Constitution

The Constitution is the supreme law of the country, this is enshrined in section 2 of the Constitution. Thus the domestic law must be consistent with it, otherwise it is invalid.[31] Section 39 (2) also states that 'when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'. The Constitution can thus be seen as the main instrument that regulates all other laws.

Section 8(1) of the Constitution further emphasizes the binding nature of the Constitution which states that: 'The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state'. According to Van Niekerk and Smit constitutional rights are to be used to:[32]

Test the validity of legislation that seeks to give effect to fundamental rights

- Interpret legislation enacted to give effect to fundamental rights
- To develop the common law

Section 23 (1) provides that everyone has the right to fair labour practices. This right has been given effect by various labour legislation that has been enacted in accordance with the Constitution. Once a law in any of the labour legislation is alleged to infringe upon a constitutional provision, the matter becomes a constitutional matter in accordance with section 167(3).Save in the instance where legislation has been enacted to regulate a certain matter, then such legislation may not be bypassed, as it is also a constitutional statute.[33] Therefore where labour legislation is enacted to regulate labour provisions, litigants shouldn't be permitted to bypass it.[34] Section 172(1) (a) of the Constitution provides that when the Constitutional Court is deciding on a constitutional matter within its power, a 'court

[31] See section 2 of the Constitution of the RSA, 1996.

[32] *Law @ work* (3rd Ed) 33.

[33] *SA National Defence Union v Minister of Defence and others [2007] 9 BLRR 785 (CC).* At paragraph 37.

[34] *Ibid.*

must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency'.

One such remedy that may be explored in extending paternity benefits to fathers and partners in same-sex relationships is the reading down of missing words into the BCEA. This is a form of a method of statutory interpretation, which is required by section 39(2) .The purpose of reading down is to circumvent inconsistency that may exist between any law and the supreme law of the Republic.[35]

2.2. Legislation providing for maternity benefits and relevant legislation

2.2.1. The Constitution of the Republic of South Africa, 1996

Section 28(2) of the Constitution provides that a child's best interests are of paramount importance in every matter concerning the child. The importance of a child's best interests being taken into consideration regarding a parent taking a form of parental leave in order to care for the child was highlighted in *MIA v SITA*.[36] In paragraph 13 Gush J stated that 'the right to maternity leave as provided for in the BCEA is not only aimed at protecting the birth mother from the physical effects of birth, but also to take into account the best interests of the child. Failure to do so will be contrary to the Constitution as well as the Children's Act'.[37]

Therefore the best interests of the child must be taken into account when a parent applies for maternity/ paternity leave, regardless of the sex and gender of the parent.

2.2.2. The Civil Union Act, No. 17 of 2006

Our legal system recognises civil unions of people of the same sex, and defines a civil union to be: 'A voluntary union of two persons who are both 18 years and older, which is solemnised and registered by way of marriage or civil partnership.'

The Civil Union Act thus confers the same and equal protection to partners in a same-sex relationship as those in a heterosexual marriage. Gush J[38] emphasised

[35] Currie and de Waal, The Bill of Rights Handbook (6th Ed) 187.

[36] Fn 6, at paragraph 13.

[37] 38 of 2005.

[38] Fn 6, at paragraph 21.

that that our law recognises same sex marriages. Company policies should thus protect and acknowledge the rights from the Civil Union Act.

2.2.3. Basic Conditions of Employment Act, No. 75 of 1997

The BCEA serves as an instrument of minimum standards in the workplace. The employer may offer the employee more favourable conditions than those stipulated in the BCEA in a collective agreement, but an employer cannot offer an employee less favourable working conditions or standards.

The purpose of the Act is to:

'advance the economic development and social justice by fulfilling the primary objectives of the Act which are, to give effect to and regulate the right to fair labour practices conferred by section 23(1) of the Constitution'.[39]

Section 25(1) of the BCEA provides that: an employee is entitled to at least four consecutive months of maternity leave. Section 25 (2) further goes on to state that: 'An employee may commence maternity leave

a) At any time from four weeks before the expected date of birth, unless otherwise agreed or
b) On a date from which a medical practitioner or a midwife certifies that it is necessary for the employees' health or that of her unborn child.'

Section 25 (4) further states that ' An employee who has a miscarriage during the third trimester of pregnancy or bears a stillborn child is entitled to maternity leave for six weeks after the miscarriage or stillbirth, whether or not the employee had commenced maternity leave at the time of the miscarriage or stillbirth.

Section 27 provides for paid family responsibility leave. Subsection 2 states that: an employer must grant an employee, during each annual leave cycle, at request of the employee, three days' paid leave, which the employee is entitled to take:

a) When the employee's child is born
b) When the employee's child is sick or
c) In the event of the death of
    i) The employees spouse or life partner, or

[39] Section 2 (a) of the BCEA.

ii) The employee's parent, adoptive parent, grandparent, child, adopted child, grandchild or sibling.

The BCEA does not prescribe payment for maternity leave, meaning that maternity leave is unpaid leave. However employees who contribute towards the Unemployment Insurance Fund (UIF) may claim maternity benefits from this fund. Unless an agreement stating otherwise is concluded in terms of a collective agreement with the employer that provides for maternity leave payment.[40]

The BCEA is also silent on the issue of exclusive paternity leave in South Africa, just as labour legislation provides for exclusive maternity leave as per section 25 of the BCEA. Section 27 of the BCEA is gender neutral, although academics sometimes refer to the leave granted in section 27 as paternal leave.[41] Which is simultaneously available to same-sex couples.

The silence on the issue of exclusive paternity leave creates an inconsistency regarding the purpose of the Act that is stipulated in section 2 of the Act. Which is to give effect to section 23(1) of the Constitution on the right to fair labour practices. A clear imbalance is created in the statute.

2.2.4. Unemployment Insurance Act 63 of 2001

The Act prescribes for payment benefits in the event of unemployment, illness, maternity leave and adoption as well as benefits to the dependants of a deceased contributor.[42] The purpose of the Act is set out in section 2, and reads as follows;

'The purpose of this Act is to establish an unemployment insurance fund to which employers and employees contribute and from which employees who become unemployed or their beneficiaries, as the case may be, are entitled to benefits and in doing so to alleviate the harmful and social effects of unemployment'.

The UIA thus according to Laubscher and MacDonald[43] allows an employee to supplement their UIF maternity benefits with those from the employer to the extent

[40] Du Plessis and Fouche, *A practical guide to Labour Law* 42 (6th Ed).

[41] Venter and Levy, *Labour Relations in South Africa* 178 (3rd Ed).

[42] See the Unemployment Insurance Act 63 of 2001.

[43] Laubscher and MacDonald, *Labour Law (A Practical Global Guide),* (2011) 549.

that the total amount that is received by the employee does not exceed 100% of the employers monthly earnings.

The right to maternity benefits is contained in section 24 of the UIA. Section 24 (1) reads that:

'A contributor who is pregnant is entitled to the maternity benefits as contemplated in this part for any period of pregnancy or delivery and the period thereafter, if the application is made in accordance with the prescribed requirements and provisions of part D'

It is clear from the wording of section 24(1) that maternity benefits are prescribed for an employee who is pregnant. A male will thus not be permitted to benefit from the UIF. He would then be left with the option of applying for special unpaid leave because the UIF does not accommodate him. The purpose of the Act is to alleviate the effects of a harmful and social effects of unemployment.[44] A parent who is expected to care for his baby after birth will be directly affected by the harmful social effects of unemployment. As neither partner was pregnant, neither of partner will be eligible to benefit from the UIF, nor does legislation prescribe for him to receive paid leave from the employer.[45]

The UIA however does make provision for adoption benefits in terms of section 27 of the Act. Some companies provide for adoption leave in their internal policies. Adoption leave is however still shorter and less favourable than maternity leave.

2.2.5. Employment Equity Act, No 55 of 1998

The purpose of the Act, is set out in section 2 and reads as follows;

'The purpose of the Act is to achieve equality in the workplace by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination. And in implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupation categories and levels in the workforce'

[44] Section 2 of the UIA.

[45] See *MIA v State Information Technology Agency (Pty) Ltd [2015] JOL 33060.*

Section 6 of the EEA, which is similar to that of the equality clause in section 9 (3) of the Constitution contains listed grounds on which a person may not be discriminated against in the workplace. These grounds include race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscious, belief, opinion, culture, language and birth.

Additionally the employer is required to take reasonable steps to promote equal opportunity in the workplace in accordance with section 5 of the Act. Therefore an employee can bring about an action in terms of section 6 of the EEA if he has been discriminated against by the employer directly or indirectly as the Act applies to both employer and employee.[46] Because this statute regulates unfair discrimination, litigants cannot bypass the EEA in a claim of unfair discrimination in the workplace to bring an action in accordance with section 9 of the Constitution.

The equality test that has been adopted by the labour courts as previously stated is found in *Harksen v Lane NO and Others.*[47] Where it must be determined whether the differentiation alleged amounts to discrimination, and then determining whether the discrimination is on a listed ground or not.[48] He who alleges discrimination on an unlisted ground bears the onus of proof.[49]

2.2.6. Case law

The action in *MIA v SITA*[50] was brought forth in terms of section 6 of the EEA, the respondents maternity leave policy was challenged on the basis of it being discriminatory. The applicant registered into a civil union, and entered into a surrogacy agreement, which would deem them parents of the child after birth. The respondent denied the applicant 4 months of paid maternity leave, after the birth of the applicant's baby by their surrogate. The refusal was challenged by the applicant as an act which constitutes an act of unfair discrimination, on the basis of gender, sex, family responsibility and sexual orientation.

[46] S 4 (1) of the EEA.

[47] Fn 18.

[48] Mphela *Religious dress code in the workplace* 2014 (Thesis SA) 9.

[49] Fn 17, at page 79.

[50] Fn 6.

The respondent's argument was that the applicant was denied maternity leave because maternity leave in accordance with its policies which mirrored the BCEA, and that the BCEA was only applicable to female employees. Because the BCEA is silent on the issue of leave for surrogate parents. The applicant was initially offered family responsibility leave or special unpaid leave, however the respondent ended granting the applicant two months paid adoption leave and two months unpaid leave. The court found that the respondents maternity leave policy discriminated unfairly against the applicant, and that he was entitled to four months paid maternity leave.

2.2.6.1. Ratio Decidendi

The court held that the right to maternity leave as entrenched in the BCEA was not just aimed at protecting the mother from the physical effects of birth, but also that the interests of the child must be advanced. The court further made reference to the Children's Act in this regard, which places great emphasis on the best interests of the child.

The Court also went on to state that same-sex marriages are legally recognised in South Africa, and the rights of parents who have entered into surrogate agreements are regulated accordingly by law, therefore the rights and interests of parents who have entered into civil unions must also be advanced when companies are drafting their internal policies.

In paragraph 19 Gush J stated that "it is clear that in order to properly deal with such matters, it necessary to amend the legislation, and in particular in the BCEA".

Professor Frederick Noel Zaal, a Family Law expert at the University of Kwa-Zulu Natal commented on the judgement by saying that "this judgment is to be welcomed as a step forward in promoting equality and is in accordance with section 9(3) of the Constitution."[51]

This decision has paved the path for heterosexual fathers, that are the primary caregivers of their children that they too should be entitled to paid maternity leave.

[51] http://www.werksmans.com/wp-content/2015/06/043233-werksmans-paternity leave[accessed on 19 Oct 2015]

2.2.7 Summary

Since the constitutional dispensation, it is evident from the legislation that has been enacted that previously disadvantaged persons now have their interest's advanced in the workplace in accordance by the provisions made by the legislation.

Section 9(2) of the Constitution states that, 'equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken'. Furthermore subsection 4 reads that no person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection 3, and National legislation may be enacted to prevent or prohibit unfair discrimination.

Women in South Africa have been party to various campaigns to contest for their rights to maternity benefits in the work place. The legislation enacted to give effect to these rights has overlooked the need for fathers to equally enjoy paternal benefits and paternity leave Same-sex couples need in this very same regard has also been overlooked, in the advancement of women's rights in the workplace.

The Constitution explicitly prohibits discrimination, however the legislation enacted to give effect to fair labour practices does not extend its protection to fathers who are primary care givers and partners in same-sex relationships with regards to maternity benefits. Or benefits are partly extended, i.e. family responsibility leave in terms of the BCEA.

One would then argue that the application of the equality provisions in the labour legislation are not fully consistent with the objectives and goals of the Constitution. Labour legislation must be developed to promote the values that underlie an open and democratic society based on human dignity, equality and freedom.[52]

[52] S39 (1) (a) of the Constitution of the RSA, 1996.

3. Comparative analysis

Section 39(1) (b) of the Constitution encourages the courts to consider international law when interpreting the Bill of Rights. When we are unable to resolve legal questions in our jurisprudence, it is imperative that we look to other countries who have encountered similar difficulties. Countries with a similar legal system to ours, who have resolved similar matters in the spirit of giving effect to section 39(1) (b). According to Bamber, Potchet *et al*[53] the comparison of paid maternity or parental leave is challenging because there are two different factors to consider that vary from one country to another. Mainly being the level of the maternity benefit and the length of the paid leave. Although many countries have recognised the need for transformation regarding the accessibility of parental leave for fathers globally, and is thus becoming available. However fathers globally are reported to be reluctant to take advantage of these benefits.[54]

However sometimes drawing a comparison between two different legal systems may be challenging.[55] Freund noted that the challenges arise mainly because of the difference in the legal systems from a cultural and legal stand point, therefore comparisons that are not fittingly contextualised may be deceptive.[56] Therefore the purpose of the comparison would be futile, leading to the same dead end that required a comparison.[57]

When South African judges consider international and foreign law, they mainly look the jurisprudence of countries which share a historical link with South Africa.[58] Smithey encourages judges not to rely on foreign precedent as a mere formality and compliance but to use foreign precedent as a tool that cuts on information costs and increases legal certainty.

[53] Bamber, Pochet et al*, Regulating Employment Relations, Work and Labour Laws* (2010), 65.

[54] *Ibid,* 66.

[55] O'Kahn Freund, *the Modern Law Review* 37 1974 1.

[56] Fn 47, at page 29.

[57] *Ibid.*

[58] Smithey," A tool, not a master: the use of foreign case law in Canada and South Africa" 34 2001.

3.1. The United Kingdom

3.1.1. Legislation prohibiting discrimination

Gender discrimination is prohibited in the United Kingdom in terms of the Sex Discrimination Act 1975 (SDA), men and women are equally protected by this Act.[59] The Employment Equality (Sexual Orientation) Regulations 2003, prohibits discrimination on the basis of sexual orientation. The regulations protect workers against any discriminatory action on the basis of the perception that they are gay, lesbian, bisexual or heterosexual.[60] The Employment Equality (Sexual Orientation) Regulations 2003 together with the Equal Pay Act 1970 (EPA), together provide for substantial protection to all workers under its umbrella against any form of gender discrimination.

Like the EEA in South Africa, the SDA and the Employment Equity (Sexual Orientation) Regulations prohibits both the direct and indirect discrimination against males and females in the workplace. The South African jurisprudence has went as far as establishing an equality test enquiry that is contained in *Harksen v Lane.*[61]This creates legal certainty and uniformity, in that courts use the same three stage enquiry in order to determine whether an Act of discrimination is unfair and discriminatory, which is known and identifiable to the public. The Constitution is at the forefront of protecting and prohibiting gender discrimination.

3.1.2. Paternity leave in the UK

As of April 2003, the right to two weeks paid paternity leave was introduced in accordance with the Employment Act of 2002 as well as the paternity and Adoption Leave Regulations 2002.[62] Paternity leave is available to both men and women, provided that the employee will parent the child as the partner to the child's mother or the adopter.[63]

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[59] Macdonald, *Equality, Diversity and Discrimination* (2004) 196.

[60] *Ibid*.

[61] Fn 18.

[62] Regulation 10 of the Maternity Regulations.

[63] Callaghan and Kent *(United Kingdom), Labour Law (A Practical Global Guide)*, 2011 634.

The purpose of the introduction of this right was to simultaneously assist in caring for the mother and the child, after the birth of the child or after the placement for adoption.[64] This right to two weeks paid paternity leave is accompanied by the right to take up to thirteen weeks unpaid parental leave.[65] The right to paternity leave is thus regulated by subsection 80A-80E of the Employment Act.

The effect of the Employment Act (EA) was that it also inserted several provisions into the Employment Rights Act of 1996 (ERA), in its bid to give effect to statutory paternity leave.[66]

3.1.3 Who is entitled to paternity leave?

The word paternity suggests that reference is made to males as fathers. However this is not necessarily the case in the UK because in some circumstances a woman will be entitled take paternity leave. In an instance where a civil partner, the partner of the birth mother or finally where the adoptive mother is a woman who is expected to have the main responsibility in raising the child.[67] Then such eligible person will be entitled to take paternity leave. Civil partnerships are legally recognised in the UK, in accordance with the Civil Partnership Act of 2004.

The UK provides an umbrella protection, and extends benefits to parents in general, through the extension of paternity leave. Therefore a parent is not prejudiced on the basis of their sexual orientation, the legislation in UK is more concerned with responsibilities, and identifying a parent, (to be discussed below) and not the sexual orientation of a parent. By providing paternity leave to parents irrespective of gender, a healthy culture of gender equality is being created, and being introduced to society at large. While simultaneously attempting to eradicating societies stereotypes on the expected dynamics in a house hold. South African legislation lacks greatly in this regard. An Act that contains gender neutral provisions that provides for leave that is explicitly meant for parents to exhaust while caring for their infants or young children is yet to be enacted. What South Africa has in common with the UK is the enactment of an Act that gives recognition to Civil Unions and partnerships. The application and

[64] Income Data Services*, Maternity and Parental Rights (Employment Law Handbook)*, (2009), 233.

[65] *Ibid*.

[66] *Ibid*.

[67] *Ibid*,at page 234.

proportion of rights however in South Africa to the intended parties is not as sophisticated as that in the UK.

3.1.4. Requirements

In accordance with regulation 4 (1) of the Paternity Adoption Leave Regulation of 2002 (PAL), an employee is entitled to paternity leave, where the purpose of the leave is to:

- Care for a new born child or,
- To support the child's mother

Additionally according to regulation 4(2) the employee must;

- Have been continuously employed for at least 26 weeks before the expected birth
- Is the father of the child, or is the mother's husband, civil partner or partner but not the child's father
- And expects to have, if he is the child's father, responsibility for the upbringing of the child. If he is the mother's husband, civil partner or partner, but not the child's father, he (or she) must have, or expect to have the main responsibility (apart from any responsibility of the mother) for the upbringing of the child.

3.1.5. Paternity benefits

Regulation 12 (1) of the PAL provides that an employee who is on paternity leave, is entitled to the benefits of all of the terms and conditions of employment that would have applied had he/ she not been absent from work. Therefore the employee's contract of employment does not cease to exist upon their absence, benefits will accrue as per usual.

In order to be eligible for statutory paternity pay, employee must comply with the requirement of earning a weekly amount that is not lower than that which is prescribed by the National Insurance Contributions (NIC).

3.1.6. Additional paternity leave (APL)

The government in the UK has introduced the right to additional paternity leave, under the Additional Paternity Leave Regulations 2010.[68] Fathers (and other eligible employees) may take before their child reaches their first birthday, in the event that the mother returns to work earlier than anticipated.[69] In other words the mothers remaining leave days are transferred to the other parent. Therefore employees may now benefit up to 25 weeks of paid paternity leave.

The requirements to the entitlement of additional paternity leave are identical to those required for ordinary paternity leave.[70] This new right will enable fathers and partners to spend more time with their child, instead of the main carer that is usually the mother of the child.[71]

3.1.7 The right to return to work after paternity leave

Section 80C (1) (c) of the EA and regulation 13 (1) of the Paternity Adoption Leave Regulation (PAL), guarantees the right to return to work after paternity leave. Section 47C of the EA protects employees from any detriment by the employer for any reason that relates to paternity leave. Regulation 28 (1) (a) of the PAL provides further detail on this stance.

Additionally an employee may not be dismissed for any reason connected with paternity leave, otherwise this amounts to unfair discrimination. Regulation 29 (1)(a) and(3)(a) of the PAL provide that any employee who is dismissed, and the reason or principal reason for the dismissal is connected with the fact that he/she took paternity leave will amount to unfair dismissal in accordance with section 99 of the ERA. Which provides that such form of dismissal is automatically unfair.

The UK goes as far as allowing mothers to transfer their remaining leave days to their partners, and return to work. In the time that parents are on additional paternity leave (APL), financial pressure is alleviated from the employer. The NIC pays the partners who are at home assuming paternity leave. If the right to

[68] SI 2010/1055.

[69] *Ibid*, 248.

[70] See Reg. 4(2) of PAL.

[71] *Ibid*, 250.

paternity leave were to be extended to parents in South Africa, the same pressure should be alleviated from the employer by establishing social insurance pools that employees should contribute towards when parents are on paternity leave. As the UIF provides for mothers.

Furthermore like there is a right to return to work after maternity leave in South Africa, the protection is the same and extended to paternity leave in the UK. This right also includes the protection against any discrimination or detriment on the part of the employer against any employee for any reason related to maternity, paternity or pregnancy respectively. Where it will be automatically unfair to dismiss anyone on a matter that is connected to paternity leave. Protection of this nature cements job security and certainty. Case law both in the UK and South Africa have both heard matters relating to this right.

3.1.8. Case law

3.1.8.1. The *'Connected with'* requirement (UK)

As per regulation 29 (1) (a) and 3(a) of the PAL, the dismissal of an employee, based on any reason that is connected with paternity leave, amounts to unfair dismissal. The court scrutinized the meaning of 'connected with' in a unfair dismissal claim in *Atkins v Coyle Personeel plc* .[72]

The facts are briefly as follows;

Atkins commenced his paternity leave whilst maintaining contact at the office. Atkins later exchanged unpleasant phone calls and emails with his employer regarding work matters. Atkins was later dismissed.

Atkins alleged that his dismissal was unfair based on regulation 29 of the PAL .The employment tribunal was not of a similar mind, finding that the dismissal was not connected to Atkins taking paternity leave but rather because of the argument between the employer and Atkins.

On appeal the EAT upheld the decision of the employment tribunal. The EAT further went on to elaborate that the meaning of 'connected with' does not mean that a causal connection between dismissal and the paternity leave is

[72] 2008 IRLR 420.

unnecessary. However it is not sufficient that the dismissal was associated with the paternity leave, because it is a vague concept and so wide that it would be enough for the employee to merely establish that he was on paternity leave when he was dismissed. Such interpretation was not intended. Connected with thus means casually connected with rather than a vague, less stringent connection.

Comparatively in *Jackson v Instant Installations Ltd*[73], Jackson asked for two weeks paternity leave, the employer refused the request, while cursing at Jackson, explaining why no man in his company shall be permitted to take paternity leave. Jackson later resigned, and brought forth a claim of constructive dismissal.

The tribunal held that under Section 99 of the ERA the treatment amounted to a breach of the implied terms of trust and confidence, entitling Jackson to treat himself as constructively dismissed. The dismissal was thus automatically unfair because the reason for it was that Jackson sought paternity leave.

[73] ET case no, 2801865/07.

3.1.8.2 The '*Connected with'* requirement (SA)

In a South African case *Wardlaw v Supreme Mouldings (Pty) Ltd [2004] 6 BLLR 613 (LC),* the issue of a connection to a dismissal and a relation to pregnancy was dealt with, the facts are briefly as follows;

The employer dismissed an employee on her return from maternity leave on the grounds of negligence. The employee challenged the dismissal stating that, the employer dismissed her because she had taken maternity leave.

The court found that the employee had been grossly negligent, and therefore the real reason for her dismissal was her misconduct. Therefore the dismissal was not automatically unfair.

Courts are adamant in determining the real reason of a dismissal must be in finding whether a dismissal is connected to the pregnancy, or any reason that is related to the pregnancy. Which shall be deemed to be automatically unfair in accordance with section 187 (1) (f) of the LRA.

The flaw in this regard however in South Africa, is that this protection is not extended to fathers and other eligible persons.

3.2.1 Maternity leave

A female employee in the UK is entitled to 52 continuous weeks of maternity leave. Which is to be divided into 26 weeks, this first half is referred to as ordinary maternity leave (OML), and the other half is additional maternity leave (AML).[74] An employee may not be dismissed for any reason that is related to her pregnancy or having taken maternity leave as this constitutes an act of automatic unfair dismissal.

Dismissal and/ or treatment that is regarded as detrimental due to an employee's pregnancy or maternity leave may also result in a claim of sex discrimination.[75] An employee who notifies her employer of her intention to take OML, she will

[74] Callaghan and Kent *(United Kingdom), Labour Law (A Practical Global Guide)*, 2011 632.

[75] *Ibid*, 634.

simultaneously have satisfied the notification requirements for statutory maternity pay (SMP). [76]

3.3. Belgium

3.3.1. The Anti-Discrimination Law of May 2007

The Anti-Discrimination law of 2007 in Belgium replaces the former Anti-Discrimination Law of 2003 which aims at combating discrimination between men and women, and to ensure equal treatment in the workplace.[77]The law prohibits discrimination based on several grounds which include; age, sexual orientation, disability, faith or personal belief, civil status, birth, wealth, political belief, language, current or future health condition, a physical or genetic characteristic and social origin.

3.3.2. The principle of equal treatment

Accordingly women and men must treated equally, thus the discrimination on the basis of gender is forbidden including discrimination on the basis of pregnancy, birth, maternity or the change of gender. Blanpain differentiates between direct and indirect discrimination: 'direct discrimination occurs when a difference of treatment is based directly on the grounds of gender, which cannot be justified. Indirect discrimination occurs when there is a *prima facie* neutral stipulation, measure or manner of treatment that affects a greater portion of a given group of the same gender except that when the difference can be justified by objective factors which do not relate to the gender of the person involved'.[78]

The Framework Agreement on Parental Leave,[79] sets out a clear stance on the issue of equality regarding the granting of leave equally to both men and women. Clause 2 of the Agreement reads as follows:

'Leave shall be granted for a period of at least four months, and to promote equal opportunities and equal treatment between men and women, should in principle be provided on a non-transferable basis. To encourage a more equal take on leave by

[76] *Ibid*, 632.

[77] Blanpain, *Labour Law in Belgium* (2012) 77.

[78] *Ibid*, on paragraph 97.

[79] 18 June 2009.

both parties, at least one of the four months shall be provided on a non-transferable basis. The modalities of application of the non-transferable period shall be set down at national level though legislation and/ or collective agreements taking into account existing leave arrangements in the Member States'.

Belgium has incorporated and implemented the Framework Agreement on Parental Leave that was concluded by the European Union into its domestic law. Which has been revised accordingly to extend wider benefits to parents who have assumed parental leave. South Africa can learn from this by incorporating and implementing the International Labour Organisation's conventions on non-discrimination and by taking cognisance of the Resolution that concerns gender equality at the heart of decent work that has been adopted by the International Labour Conference.

3.3.3 Paternity Leave

The father of the child is entitled to a period of 10 days, which is chosen by him within a period of 30 days from the day of birth. The first three days salary is to be paid by his employer, while the remaining 7 days are paid by health insurance.[80]This right is simultaneously extended to co-parents in a same sex relationship.

3.3.4 Parental leave

Parental leave is an individual right which enables parents to assume leave on the time of the birth or placement of adoption. This form of leave in Belgium is wide enough to extend to step parents, and couples in same- sex partnerships.[81] While an employee is on parental leave, the employee does not receive a salary from the employer. An allowance must be requested from the National Employment Office.[82]

Parental leave was introduced by the Royal Decree, [83]and is included in the Collective Agreement no. 64 of 29 April 1997, which has recently been amended by the Collective Agreement no. 64bis of 24 February 2015 (CBA). Parental leave in accordance with the CBA 64, as amended by the CBA 64bis has been extended

[80] S 2 of Employment Act of 3 July 1978.

[81] Blanpain, *Labour Law in Belgium* (2012) 198.

[82] Francois and Colenberghe *(Belgium) Labour Law (A Practical Global Guide)* (2011) 43.

[83] Of 29 October 1997.

from three months to four months, as per the European Union (EU) Parental Leave Directive,

The right to parental leave is afforded upon the birth of a child, until the child reaches the age of 8[84] or upon the adoption of a child during the period of 8 years. The CBA also makes provision cases where the mother is hospitalised or passes away during maternity leave. The father of the child can take paternity leave to tend and care for the child.[85] Where the father will take the remainder of the mothers maternity leave days.[86]

In order to be eligible for parental leave an employee must have worked for the employer for a period of 12 months during a 15 month period before submitting a request for leave. If an employer unfairly terminates the employment of someone who has returned from parental leave, the employer may be obliged to compensate the worker compensation of up to 6 months' pay.

3.3.5 Maternity leave

Women may take up to 15 weeks of maternity leave. The employer cannot refuse the employee leave 6 weeks before the expected date of delivery, and may thus request a medical certificate from the employee confirming the date of confinement. During the time that an employee is on maternity leave, a special allowance is paid to her by the National Insurance Service.[87]

3.4 Germany

The principle of non-discrimination is enshrined in the German Constitution,[88] also known as the Basic Law (*Grundgesetz).*[89] Article 3 of the Basic Law is set out to read that:

Article 3: (1) All persons shall be equal before the law

[84] Amended by the CBA 64bis from the age of 4 to the age of 8.

[85] Royal Decree of 17 October 1994.

[86] The leave is transferred to the father, also see clause 2 of the Revised Framework Agreement on Parental Leave (18 June 2009).

[87] Fn 65 on paragraph 61.

[88] The Basic Law (*Grundgesetz*): The Constitution of the Federal Republic of Germany (May 23rd 1949).

[89] (GG).

(2) Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.

(3) No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No persons shall be disfavoured because of disability

The General Equal Treatment Act[90] has also been enacted to prevent or eliminate discrimination on the grounds of face, or ethnic origin, gender, religion or secular belief, disability, age or sexual identity.[91]

3.4.1 Parental leave

Mothers leave was replaced by parental leave[92] in 1985, where parental leave became accessible to both mothers and fathers.[93] Germany does not have legislation that prescribes for paternal leave.[94] Therefore either parent is entitled to take leave until such a time that the child is 3 years old. The parent on parental leave does not receive a salary from the employer, however a benefit for the child care is paid by health insurance until the child turns 2 years old. [95] Both parents are eligible to be paid by the health insurance at a 67% rate of their net income.[96]The Federal Childcare Payment and Parental Leave Act,[97]regulates parental allowance, the amount of the allowance depends on the parents household income.

During the period which the employee is on parental leave, he may continue to work for his employer for 19 hours a week. Alternatively he may work for another employer with the permission of his original employer. His contract of employment does not cease under these circumstances.

[90] *Antidiskriminierugsstelle (AGG).*

[91] Section 1 of General Equal Treatment Act 14 August 2006.

[92] *Elternzeit*.

[93] Weiss and Schmidt*, Labour Law and Industrial Relations in Germany* (2000) 104.

[94] *Ibid,* 87.

[95] Ostner, Reif, Turba, *Family Policies in Germany* 20.

[96] Fn 39, page 67.

[97] *Bundeselterngeldund Elternzeitgestez.*

The employee is also protected from unfair dismissal for any reason relating to parental leave, and may not be dismissed save for extraordinary circumstances where the Labour Inspection is in agreement with the decision.[98]

Studies have shown that more than 95% of male parents are eligible for parental leave, but do not take it.[99] Women are the ones exhausting parental leave although it is available to either parent. 2 to 3 % of males take parental leave.[100] The main reason for this, is societies perception of parental leave, it has not been readily accepted that men can stay home and be caregivers. Secondly men still earn more than women, so the man's salary is the one that is in most preserved in the event of the birth of a child.[101]

4. Germany in the European Union

Germany is a member of the European Union (EU), and must comply with the activities and treaties of the EU. One of the purposes of the EU is to support as well as to complement the activities of its member states, while providing a benchmark in regulation for the member states, through the binding treaties that have been agreed on by member states.[102] Germany must therefore align its domestic laws with the directives, goals of the EU. One of the shared competences between the member states of the EU, is the 'equality between and women with regard to labour market opportunities and treatment at work'. Regarding parental leave, the EU has negotiated the Parental Leave Directive which provides for a minimum of three months parental leave. Member states retain some legal autonomy, the requirements and eligibility of such parental leave is to be directed by law of the member states, which is subject to the minimum requirements of the directive. Member States may not prescribe for less favourable conditions than those that are prescribed in the EU Parental Leave Directive. Germany has aligned its laws on parental leave with the EU Parental Leave Directive in that parents my take up to three years paternity leave. Furthermore the law ensures job security in the time that parents are on parental leave. Therefore the provisions contained in the Federal

[98] *Ibid*, 88.

[99] Ostner, Reif and Turba, *Family Policies in Germany* 18.

[100] *Ibid.*

[101] *Ibid,* 88.

[102] *Ibid*, 59.

Childcare Payment and Parental Leave Act provide for more favourable conditions than those contained in the Parental Leave Directive as minimum requirements.[103]

4.1 Minimum requirements of the Parental Leave Directive

The minimum requirements of the directive include that; employees have an individual entitlement to parental leave in the event of a birth or adoption of a child, for up to four months. Employees are protected from termination of employment on the basis of requesting parental leave, and must thus return to the same conditions of employment.

The Parental Leave Directive recognises the different family structures as well promotes the need to the sharing of family responsibility equally.[104]

5. Summary

The need for parental leave to be accessible globally has been recognised and most countries are slowly moving towards that goal. Where countries don't provide for paternity leave, parental leave is prescribed, where both parents of the child, regardless of their sexual orientation are accommodated in legislation prescribing for parental rights. In turn working towards slowly eradicating gender inequality in the workplace regarding leave, particularly leave that relates to family responsibility in the widest sense.

South African legislation is silent on a number of practical situations that are most likely to arise, i.e. the CBA[105] prescribes that the father of the child may assume the rest of the mother's maternity leave in an event that she is hospitalised or passes away during her maternity leave.

The main problem that arises when legislation fails to address practical situation in its provisions, is that the judiciary is left to indirectly assume the role the legislature in its judgements when a matter is brought before it. Employers will not readily be accepting to granting leave to employees that is not explicitly provided for in legislation, leaving more room for employees to challenge these inconsistencies that should have initially been addressed in the legislature.

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[103] Fn 96.

[104] Ibid, 66.

[105] 64 of 29 April 1997.

What South Africa shares in common with Germany, Belgium and the UK, is that discrimination in the workplace on listed or unlisted grounds is strictly prohibited. However the application in eradicating such discrimination is still relaxed in South Africa. The laws in Germany, Belgium and the UK on parental leave are sensitive and wide enough to extend to the primary care-giver of a child/ren, regardless of the sex, gender or sexual orientation of the parent. For example regulation 4 (1) of the Paternity Adoption Leave Regulation of 2002 in the UK sets out that an employee is entitled to paternity leave where the purpose of the leave is to care for a new born child or to support the child's mother. The wording leaves little room for differentiation of categories of persons based on their gender or sexual orientation, as it can be read to include a parent of a child in a wide sense. The application of eradicating gender discrimination in South Africa regarding parental rights and responsibilities is still relaxed, in the sense that legislation is gender specific in the provisions relating to family and household responsibilities. Which provides more of a restriction as opposed to balancing gender inequality in the workplace.

Therefore it is submitted that there is a need for integration in the international community, to learn from the developments in other countries from a labour perspective that we can integrate into our own domestic laws.

4. International Labour Standards

4.1 The significance of International law

International labour standards are created by several international organisations, particularly the International Labour Organisation (ILO). The fundamental role of international law became recognised upon the constitutional dispensation in 1994 as entrenched in section 39(2)[106] of the Constitution. Section 232 further states that 'Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament'. The application of international law is provided for in section 233, which provides that:

'When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law'.

The court in *NUMSA & others v Bader Bop*[107] stated that the court in *SA National Defence Union v Minister of Defence & Another*[108] has already acknowledged that while interpreting section 23 of the Constitution, important sources of international law are ILO recommendations and conventions. [109]

In taking note of international labour standards, it is also paramount that we also take cognizance of regional labour standards, in order to note what our neighbouring countries and the contribution that their laws can make to our law. The South African Development Community (SADC), has a significant influence on regional labour standards, and has gone as far as encouraging member states to ratify and implement all ILO core conventions, namely:

- Freedom of Association and the Right to Organise Convention, 1948 (No 87);
- Worst Forms of Child Labour Convention, 1999 (No 184);
- Minimum Age Convention, 1973 (No 29);

[106] When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

[107] (Pty) Ltd & another [2003] 2 BLLR 103 CC.

[108] (1990) 20 ILJ 2265 (CC).

[109] *Ibid*, at paragraph 117.

- Right to Organise and Collective Bargaining Convention, 1949 (No 98);
- Forced Labour Convention, 1930 (No 29);
- Discrimination (Employment and Occupation) Convention, 1958 (No 111);
- Abolition of Forced Labour Convention, 1973 (No 105); and
- Equal Remuneration Convention 1951 (No 100).

Core conventions aim to promote collective bargaining by providing for minimum standards for the relevant parties in the workplace. Another key convention in this context is the Maternity Protection Convention, 2000 (No 183) which provides for the minimum protection that should be afforded to pregnant women in the workplace globally.

4.2 The International Labour Organization (ILO)

South Africa has been a member of the ILO from the year 1919 as a founder member, and was later requested to withdraw from the ILO because of the Apartheid policies that were rooted in South Africa at the time. South Africa re-joined the ILO in 1994 upon the Constitutional dispensation, and has since ratified the ILO's core conventions.[110] The effect of ratification of conventions is that they became binding on member states. The effect of a binding convention is that member states thus have a duty to implement the standings of the convention into their domestic law.[111] The ILO has assisted South Africa in developing labour legislation that is consistent with international standards.[112]

The ILO is encompassed by three bodies, mainly being; the International Labour Conference (ILC), that is tasked with adopting standards in the form of conventions. Conventions are noted to be the most important form of standards. The ILO also consists of the Governing Body and the International Labour Office.

4.3 Discrimination (Employment and Occupation) Convention (No.111)

The Discrimination (Employment and Occupation) Convention is a core convention of the ILO, and has accordingly been ratified by South Africa, and aims to eradicate any form of discrimination in the workplace.

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[110] Fn 9,22.

[111] Ibid, 23.

[112] Fenwick, Kalula and Landau*, Labour law: A South African perspective* 2007 7.

Article 1 of the Convention defines discrimination as:

'any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation'[113] and goes further to state that;

'such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in the employment or occupation as may be determined by the Member concerned after consultation with representative employers and workers organisations, where such exist, and with other appropriate bodies'.[114]

The effect of binding conventions is that the conventions must be encompassed into our domestic laws. The effect that the Discrimination (Employment and Occupation) Convention should have on our domestic labour laws should be to align our laws on maternity leave with the convention. By extending the scope of protection against discrimination on the grounds sex, in the context of paternity benefits. The same way that the EEA and section 9 of the Constitution has the effect of eradicating all forms of unfair discrimination, legislation and work policies must be enacted that are directly aligned with the Discrimination Convention.

4.4 Maternity protection

The provision for safe maternity and health care for mothers has been a fundamental to the advancement of decent work and gender equality in the workplace globally. The ILO has made maternity protection one of its key goals since the commencement of the ILO in 1919. Currently 34% of the 186 member states meet the requirements of the ILO Maternity Protection Convention,[115] which mainly provides for at least 14 weeks of leave. The leave should be accompanied by a minimum rate of 2/3 of previous earnings that is paid by social insurance.[116]

[113] Section 1 (a).

[114] Section 1 (b).

[115] 2000 (No. 183).

[116] Ryder, Maternity and paternity leave at work. (2004) 1.

The ILO Maternity Protection Convention provides for *inter alia* the safety of a pregnant woman before, during and after birth. The Convention also prescribes the right to paid maternity leave and the protection from any form of discrimination and dismissal in the workplace bas ed on any reason that is related and connected to maternity. This includes the right to return to work after maternity leave[117]

The Maternity Protection Convention has been ratified by at least 66 countries, where some of the countries have extended the scope of maternity protection to extend to fathers in the form of paternity or parental leave. The ILO Convention No.103 on Maternity Protection has stressed that employers should not be bear the individual burden of paying for maternity benefits, they should be paid by social insurance.

4.4.1 Paternity and parental leave

Due to the influence of the ILO on maternal benefits, rights and protection thereof, paternity leave provisions are becoming more common in various countries. Currently 78 of 167 countries prescribe for paternity leave in legislation, of which the majority of these countries provide for paid paternity leave.[118] Some of the countries provide for maternity and paternity leave, however some countries provide for parental leave as an addition to maternity and paternity leave. 66 countries provide for statutory parental leave.[119]

Currently there are no ILO standards that exist which prescribe for paternity leave, however a Resolution that concerns gender equality at the heart of decent work was adopted by the ILC.[120] This Resolution recognises that the dynamics of a family and the responsibility thereof concern both men and women, while calling for member states to incorporate a fair balance in the work place policies and legislation that encompass family responsibility. As well as to include paternity and parental leave

[117] See Article 4, 6 and Article 8.

[118] Fn 116 at page 6.

[119] *Ibid*.

[120] Resolution concerning gender equality at the heart of decent work. Adopted by the ILC in 2009, at paragraph 6, 42.

and incentives for the men who take advantage of the opportunity.[121] Paragraph 6 of the Resolution reads as follows:

Work-family reconciliation measures are not just about women but also about men. A variety of new measures (such as the provision of paternity leave and/ or parental leave) have succeeded in permitting working fathers to be more involved in the sharing of family responsibilities and could be replicated. This applies to caring for children and dependent family members. There is evidence that when the participation of women in the workforce increases, more men take parental leave. The birth rate has also been seen to improve; and men's long working hours can alleviated. In some societies, today's fathers take paternity leave and share more in more family responsibilities, showing a gradual attitudinal shift and breaking down of gender stereotypes.[122] Innovative legislation and proactive policies, as well as awareness raising on 'paternity' as a social value and responsibility, could enhance this shift'.

Parental leave is available to both parents, which enables them to look after their infant or child. Parental leave is gender neutral, as it speaks of it being available to both parents. Parents usually exhaust parental leave after maternity and/or paternity leave (if applicable) is exhausted. The payment rate of parental leave is usually lower than that which is offered for maternity leave. The duration and payment of the leave is prescribed for in national legislation.[123]

Provisions providing for parental leave are contained in Recommendation No. 191 which is accompanied with Convention No. 183, including Recommendation No. 165, accompanied by Convention No. 156.

As a core convention, South Africa should look to it when developing the law, as per section 39 (2) of the Constitution.

[121] Fn 116, 5.

[122] *Ibid.*

[123] *Ibid.*7.

5. Conclusion

The conclusion to be drawn following the discussion, it is clear that South Africa does not provide adequate social legislative protection to fathers, same-sex partners, adoptive parents and informal workers.

The only provision in the BCEA[124] that affords fathers paid time off to care for their children is insufficient. It is also gender neutral, meaning that the legislation is completely silent on the exclusive accommodation of fathers and same-sex partners on any form of parental leave and benefits many countries have started moving towards a gender inclusive society for paid leave.[125] Furthermore the labour legislation fails to address a number of practical issues, which are adequately addressed in other countries.

The need for the amendment of the BCEA has already been noted by the Labour Court in the *MIA v SITA* case The court has stated that "it is clear that in order to properly deal with such matters, it necessary to amend the legislation, and in particular in the BCEA". Notably the BCEA is not the only statute that requires to be amended, the LRA, UIA and the EEA overlap because they provide for the protection of pregnant women from discrimination, their right to return to work and not be dismissed upon returning from maternity leave. The African Christian Democratic Party (ACDP)[126] has recognized the need for the amendment of laws in this regard, by submitting notice that declares the intention to submit a private members bill in the National Assembly. The bill seeks to address a number of issues relating to parental leave in general and the benefits that should be afforded accordingly.

The bill seeks to amend the BCEA, to *inter alia*:

- Provide for parental and adoption leave respectively to employees.

[124] S 27 of the BCEA.

[125] Ryder, *Maternity and paternity at work (2014) 56.*

[126] Ndenze.SA's 'baby step' to paternity leave. (Sunday Times Newspaper) 25 October 2015 (7).

- To amend the UIA in order to include parental and adoption benefits in its scope of coverage, and to be permitted to claim from the UIF.
- To provide for the application and payment benefits from the UIF.
- To include a provision that prohibits employers from offering employees less favourable conditions to employees in collective agreements, regarding their right to parental and adoption leave.
- To correct an obsolete reference to an Act.[127]

Commentary on the draft bill from the public is open until the 25th of December 2015, before the draft bill can be finalized and presented in the National Assembly. Which could materialize in the much needed amendment of labour legislation regarding parental benefits and rights, that are consistent with the provisions of the Bill of Rights that further echo the values of an open and democratic country.

The draft bill by the ACPD further calls for the prohibition of collective agreements from reducing an employee's entitlement to parental or adoption leave. Collective agreements have a major impact on the employment relationship and should be regulated accordingly as to safe-guard the conditions of employment. Employers should take the initiative of negotiating for paternity, parental and adoption leave with employees and safe-guard the agreements through collective agreements while the law is still being developed. Trade unions can equally take the same initiative to promote the interests of its members, by negotiating for favourable conditions of employments and benefits and even those benefits and conditions that are not stipulated in labour legislation, particularly regarding parental leave given the immense influence that trade unions hold

In the event that fathers are afforded paternity leave, legislation must protect workers from discrimination and any form of detriment, by the employer for any reason that is related and connected to paternity leave. The legislature must note that it is possible for a father to be the primary caregiver of the child, and must afford protection and benefits in that regard. South African labour legislation currently affords fathers a secondary care giving status.

[127] https://pmg.org.za/call-for-comment/389/?utm_medium=email&utm_source=transactional&utm_campaign=request-for-comment-from-parliament. [last accessed on 24 December 2015]

Legislation should also adequately address all issues and complications surrounding pregnancy maternity and paternity leave. An example of a country that has attempted to address the possible issues surrounding the birthing process is Belgium.

The CBA makes provision for cases where the mother is hospitalised or passes away during maternity leave. The father of the child can take the remainder of the mother's maternity leave and assume it as paternity leave, in order to assume the role of a care giver. The UK also recognises that a transfer of leave between parents is necessary in some circumstances, hence the introduction of additional paternity leave.

Due to ratification of the Discrimination (Employment and Occupation) Convention, as well as the influence of the ILO, domestic law should be gender and sex sensitive. And should afford everyone the same equal benefits without the differentiation of sex or gender that is contained in the wording it should be sufficient to use the word 'employee'. And not 'mother and father'. The introduction of parental leave, such as that in Germany, and is afforded as an individual right, where parents have the luxury of choice as to which parent takes time off and when.

One problem associated with parental leave in developed countries is that a very small number of fathers actually take parental leave, and 80% mothers are the ones who exhaust parental leave. The statistics show that a lot more work is required in the promotion of gender equality in the work place, and the stereotypes of gender roles.[128] Studies show that a father's early interaction in their child's life, is directly related to the successful child development. [129]

The exclusion of fathers and same sex partners from the scope of the BCEA from parental leave and paid benefits is discriminatory against the said parties. The discrimination is unfair because it does not afford all parents, regardless of their sex, gender and sexual orientation, equal benefits. Unless the exclusion can be justified in terms of section 36 of the Constitution. Legislation should be developed to the

[128] Fn 103.
[129] Fn 116, 6.

extent of giving effect to section 9 of the Constitution, or accordingly the existing legislation can be the reading down of missing words into the BCEA.[130]

In advancing women's rights in the workplace, it also important that gender equality as a whole is not overlooked. In the development of gender equality we should look to ILO conventions, and developments in other countries, to guide the development of our law, in the mists of globalization and a developing world, we should not be left behind. Tanner[131] stated that "There is a negative impact on the effect of reinforcing gendered job segregation where men who do not make use of parental leave, have access to more lucrative challenging and prestigious jobs which require longer working hours, while women remain in relatively routine, menial and low paying jobs"

The effect of insufficient paternity leave arrangements is that women are continuously left in a weaker position in the labour market because they are required to leave the market temporarily to tend to the child's needs.[132] The minority judgement in *President of the Republic of South Africa & Another v Hugo*[133] asserted that "the reliance on the generalisation that women are the primary care-givers is harmful in its tendency and stunts efforts of both men and women to form identities". The focus on maternity leave through labour laws echoes the traditional stereotypes that women are care-givers, and men are the breadwinners. Initiatives by employers to offer compulsory parental leave to both parents ensures a balance at home where both parents are visibly present through the child's development. Furthermore a woman's temporary exit in the labour market does not prejudice her development and possible promotions in the workplace, as the men in the company will equally be required to exit the labour market temporarily through compulsory parental leave.

In the inclusion of parental rights and benefits to all primary caregivers of a child, informal workers are still greatly disadvantaged. The nature of their employment does not permit them to formally be regarded as employers and are thus not covered by labour legislation. Structures need to be put in place in order to afford these kinds of parent's basic benefits to care for their children efficiently.

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[130] Currie and de Waal, The Bill of Rights Handbook (6th Ed) 187.

[131] Tanner, Social Justice and Equal Treatment for Pregnant Woman in the workplace (2010 Thesis).

[132] Olivier, *Gender discrimination in the labour law social security perspective from SADC*. 226

[133] 1997(4) SA 1(CC), at paragraph 37.

What is required in South Africa is a system that recognises the need for shared family responsibility between partners in a household that recognises individual needs of working parents, as well as the recognition of parental benefits for all parents in the widest sense.

6. Recommendations

- Some companies have already recognised the need for internal policies that provide for forms of leave that are not prescribed for in labour legislation. Such as adoption leave, companies must align their internal policies with the constitutional equality provision, and draft policies accordingly that recognise the need for shared family responsibly in the household. By prescribing for paid paternity leave for a parent who is going to care for the child or support the birth mother after birth. The development of labour law paternity provisions should not only be left to the legislature.
- Trade unions, during collective bargaining must advocate for the recognition of gender-neutral rights and benefits in terms of paternity leave.
- The legislature must develop the law accordingly, and in line with international instruments and regional standards as benchmarks have been set by international standards which we are member states of. Therefore the development of South African labour law, should be directly aligned with that of the ILO and the international community as a whole. Furthermore the legislature must be mindful when redressing the past inequalities and disadvantages, not to unintentionally discriminate unfairly against other categories of persons.
- Parental leave must be provided to include a parent in the wider sense as a care-giver, and adopted into national legislation.
- Where parental leave is provided for, it should be provided as a single, compulsory and non-transferable entitlement between parents. In order to ascertain that fathers exhaust their parental leave.
- In order to alleviate the financial burden on employees, a form of compulsory paternity leave scheme should be established where equal contributions from the employer and employee are provided. In the event of a father going on paternity leave he could receive remuneration from the scheme, similar to the UIF.
- The meaning of an employee must be extended in such a way as to include informal workers in benefiting from social security, and not prejudiced on the basis of the type of worker they are categorised as.

- Coverage needs to be extended to informal sector workers through social assistance in the form of grants, levied through the tax-payer, and provided after a means test is conducted.
- Separate family benefits can be established for informal sector workers. Where social benefits will be afforded to informal sector workers regardless of their work status.

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