



**A father's right to paternity leave in the South African workplace.**

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## DECLARATION

I hereby declare that this minor dissertation is my own original work except where otherwise stated and expressly acknowledge that it has not been previously presented in part or in its entirety at any other university for the award of a degree. Where I have made use of books, articles, journals and internet sources I have referenced the sources accordingly. I am aware of the plagiarism policy at the University of KwaZulu-Natal.



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## LIST OF ACRONYMS

ACRWC	African Charter on the Rights and Welfare of the Child
AU	African Union
BCEA	Basic Conditions of Employment NO. OF YEAR
CEDAW	Convention on the Elimination of All forms of Discrimination against Women
EEA	Employment Equity Act NO. OF YEAR
ILC	International Labour Commission
ILO	International Labour Organisation
LAB	Labour Laws Amendment Bill NO.OF YEAR
LLAA	Labour Law Amendment Act NO.OF YEAR
LRA	Labour Relations Act NO. OF YEAR
NGO	Non-Government Organisation
UIA	Unemployment Insurance Act NO.OF YEAR
UIAA	Unemployment Insurance Amendment Act NO.OF YEAR
UICA	Unemployment Insurance Contributions Act NO. OF YEAR
UIF	Unemployment Insurance Fund
UK	United Kingdom
UN	United Nations
UNCRC	United Nations Convention on the Rights of the Child
USA	United States of America

## **ABSTRACT**

This minor dissertation examines the legal position of the working father and paternity leave in South Africa. The Labour Law Amendment Act No. 10 of 2018 came into effect on 1 January 2020. Section 25A of the BCEA provides for 'parental leave' which will allow a male or female parent ten days leave upon the birth or adoption of a child. The dissertation will discuss whether the proposed changes were required in South Africa and will look at the law before the amendments were effected. Further the dissertation looks at whether the 10 days provided for working fathers is sufficient. This dissertation will provide a comparison of certain developed and developing countries in order to show whether South Africa has now caught up,

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# CHAPTER 1

## INTRODUCTION

### 1.1 Introduction and background

“A mere 20 years ago, gender roles in society dictated that women should cater to the needs of their families while husbands acted as breadwinners, who actively participated in the South African economy”.<sup>1</sup> Women were regarded as superior to men in their duty as primary caretakers. Men assumed more financial responsibilities and in fact, preferred these duties as opposed to chores at home.<sup>2</sup>

Recently, there has been a demonstrable shift in the traditional gender roles of parents resulting in a change in parental relationships. The shift is as a result of many factors including the feminist movement, equal opportunities legislation and the rise in inflation and ever increasing cost of living. The mother in a family no longer fulfills the role of primary caregiver as she is also expected to work in order to financially support her dependents.<sup>3</sup> Traditional family models with the male as breadwinner and female as homemaker and caregiver no longer dominates.<sup>4</sup> Parental responsibilities have changed dramatically due to changes in socio-economic positions, where the state of the economy makes it near impossible for families to survive on a single income. As a result women were forced to enter the workplace and there has been a growing number of women in the workplace over the last 60 years in order to supplement the male earning capacity.<sup>5</sup>

Paternity leave for fathers has received increased attention in the last few decades - in both scholarly writings and public forums, yet men are still viewed as mere child care assistants.<sup>6</sup> Paternity leave is leave which allows employed fathers to take time off work following the birth of his child. Men are starting to view paternity leave as more essential than optional. Paternity leave provides the groundwork for co-parenting and family stability.

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<sup>1</sup> K Grobler (2015).

<sup>2</sup> Ibid.

<sup>3</sup> A Behari (2018).

<sup>4</sup> CG Field et al. (2012).

<sup>5</sup> T Hind (2015).

<sup>6</sup> R Smit (2004).

Paternity leave has also been demonstrated to be beneficial for the entire family and is becoming common in many countries.<sup>7</sup> However, men have been unable to take paternity leave because of various reasons.<sup>8</sup> Two stereotypes contribute to this; the role of a man is deemed to be that of the main breadwinner while the role of caregivers is that of women.<sup>9</sup> It is perceived that men are not interested in taking care of their children and are not well-prepared when it comes to parenting.<sup>10</sup>

In South Africa motherhood and fatherhood are also influenced by work arrangements and leave entitlements. The right to maternity leave has always been recognised however paternity leave was not. The Labour Relations Act (LRA) 66 of 1995 and the Basic Conditions of Employment Act (BCEA) 75 of 1997 are the primary legislation that provide mothers with maternity leave rights. Section 25 of the BCEA states that "an employee is entitled to at least four consecutive months' maternity leave."<sup>11</sup> Previously no such provision was made for fathers.

Previously a father who applied for leave following the birth of his child would have to apply for family responsibility leave under section 27 of the BCEA as there were no provisions for paternity leave. This section stipulated that employees could apply for three days paid family responsibility leave per annum. This leave could be taken when the employee's child was born or was sick or when the employee's spouse or life partner or the employee's parent, adoptive parent, grandparent, child, adopted child, grandchild or sibling died.<sup>12</sup> Family responsibility leave applies to all employees (male and female) who are in employment for a "period of 4 months or longer and who worked for at least 4 days a week for the employer."<sup>13</sup> An employee should be able to furnish adequate, acceptable reasons that warrants taking family responsibility leave when such information is requested by the employer.

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<sup>7</sup> R Rogers (2019).

<sup>8</sup> J Anderson (2018).

<sup>9</sup> Ibid.

<sup>10</sup> L Richter & R Morrell (2006).

<sup>11</sup> Section 25(1) of the BCEA.

<sup>12</sup> Section 27 of the BCEA.

<sup>13</sup> Ibid

Prior to the enactment of the Labour Law Amendment Act No. 10 of 2018 (LLAA) the labour laws in South Africa omitted to provide paternity leave for fathers.<sup>14</sup> The position regarding paternity leave has now evolved. Men are now granted paternity leave of ten consecutive days after a child is born.<sup>15</sup> This is now regulated in terms of the LLAA which came into effect on the 1 January 2020 when sections 25A, 25B and 25C of the BCEA became effective in line with the amendments to the LLAA and the Unemployment Insurance Amendment Act No 10 of 2016. (UIAA) Section 25A of the BCEA deals with parental leave and provides for 10 consecutive days of unpaid leave to a parent if he or she is an employee.<sup>16</sup> Section 25B deals with adoption leave<sup>17</sup> and Section 25C provides for commissioning parental leave<sup>18</sup>.

A detailed analysis of the pre- and post-amendments will follow later in this dissertation.

## **1.2 Rationale**

The critical question that arises is whether South African labour law has adequately addressed the issue of paternity leave? Paternity leave provides fathers with time to care and bond with their new born child, it also promotes the mental and intellectual growth of the child, promotes their confidence, and offers men quality time with their family.<sup>19</sup> Paternity leave allows fathers to engage in and assist with regular household chores and build sustainable relationships with both the mother and new born child.<sup>20</sup> Also, mothers acknowledge the benefits of having a child's father at home for an extended period.<sup>21</sup> Fathers are more likely to assist with household chores, engage in sustainable relationships and there is less likelihood of violence and conflict in marriages due to extended paternity leave.<sup>22</sup> It is submitted that the ten days of paternity leave is an improvement on the three days of family responsibility leave that working fathers were previously entitled to on the birth of his child.

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<sup>14</sup> A Behari (2016).

<sup>15</sup> E Mabuza (2018).

<sup>16</sup> Section 25 (A) of the BCEA.

<sup>17</sup> Section 25 (B) of the BCEA.

<sup>18</sup> Section 25 (C) of the BCEA.

<sup>19</sup> W Van den Berg (2016).

<sup>20</sup> RJ Petts (2018).

<sup>21</sup> P Herman (2016).

<sup>22</sup> Ibid.

Paternity leave is not only related to being a parent or an issue in society, but it is a labour issue as well. In *MIA v State Information Technology Agency (Pty) Ltd* (D 312/2012) [2015] ZALCD 20; 2015 (6) SA 250 (LC); [2015] 7 BLLR 694 (LC); (2015) 36 ILJ 1905 (LC) (26 March 2015)(*MIA*), the Labour Court conceded that “maternity leave is meant to give biological mothers an opportunity to recover from the physiological effects of childbirth; but it went further by emphasising that maternity leave for primary caregivers must also take into consideration the best interests of the child.”<sup>23</sup> This illustrates the importance of maternity leave to a mother and child. Previously no such consideration was extended to fathers.

“There seems to be a global trend towards the introduction of a shared parental leave policy which allows fathers time off with their partners after the birth of their child.”<sup>24</sup> The need to address this situation was dealt with by the Labour Court in *MIA*. It was held in *MIA* that, “in order to properly deal with matters such as this, it is necessary to amend the legislation and in particular the Basic Conditions of Employment Act.”<sup>25</sup>

The amendments to the BCEA<sup>26</sup> and UIA<sup>27</sup> were promulgated in order that children whose parents worked or children who were adopted, would ultimately benefit. Children reap the benefits for having a committed father in their lives.<sup>28</sup> They stay in school and perform better at school, get into less trouble, get arrested less and even have better health to name a few benefits.<sup>29</sup>

Paternity leave benefits for the mother include health and economic benefits, more equitable division of household chores and also increased child bonding.<sup>30</sup>

Paternity leave benefits were required to factor in the quality time required for bonding between fathers and their newborns.<sup>31</sup>

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<sup>23</sup> *MIA v State Information Technology Agency (Pty) Ltd* (2015) 6 SA 250 (LC).

<sup>24</sup> News 24 (2014).

<sup>25</sup> *MIA v State Information Technology Agency (Pty) Ltd* (2015) 6 SA 250 (LC)

<sup>26</sup> Act No 75 of 1997.

<sup>27</sup> Act No 63 of 2001.

<sup>28</sup> S Behson (2017).

<sup>29</sup> Ibid.

<sup>30</sup> K Shulz(2020).

<sup>31</sup> HR Smart (2019).

Bonding between parent and child takes place as soon as a child is born (within days to a few weeks).<sup>32</sup> This is a crucial time for bonding to occur. Fathers need to spend quality time with their newborns, develop a bond, and the tactile response with their child helps develop and nurture this bond.<sup>33</sup> Previously mothers were more involved in the nurturing of the child than the father, this has changed considerably where fathers are now more involved in the caring and nurturing of the new born.<sup>34</sup> Both parents are very important in the nurturing process. The new amendments are welcomed and therefore fundamental to the recognition of the rights of fathers to paternity leave.

### **1.3 Research questions**

The main research question to be addressed in this dissertation is:

Do the new amendments as set out under the LLAA provide adequately for the right to paternity leave in the South African workplace?

In answering the above question, the following secondary questions will be discussed:

1.3.1 What is the current legal framework on paternity leave in South Africa?

1.3.2 Are the amendments to the BCEA a step in the right direction?

1.3.3 How does the South African legal framework compare to foreign jurisdiction?

### **1.4 Objectives**

The primary objectives of this dissertation are to:

1.4.1 Identify and discuss the legal framework regarding paternity leave in South Africa.

1.4.2 Determine whether the amendments to the BCEA are adequate.

1.4.3 Compare and contrast South Africa's legal framework on paternity leave with other foreign jurisdictions.

### **1.5 Terminology**

The following needs to be distinguished as the LLAA refers to parental leave and not paternity leave. I shall further look at the definition of maternity leave.

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<sup>32</sup> Ibid.

<sup>33</sup> HR Smart (2019).

<sup>34</sup> D\_Spetter (2018).

“Paternity leave is the terminology commonly associated with a specific entitlement to leave for fathers at the time of the birth of their child. In a number of countries paternity leave is recognised as a distinct ‘stand-alone’, gender specific period of leave available only to fathers.”<sup>35</sup> In terms of Section 25A (1) of the BCEA fathers are now entitled to 10 days of paternity leave.<sup>36</sup>

“Parental leave is leave available to either parent or both parents at the expiry of maternity and ‘paternity leave’ is usually termed parental leave and is intended as a period of leave for the purposes of parental bonding and the early developmental needs of the child.”<sup>37</sup> In terms of the LLAA an employee is entitled to 10 days parental leave upon the birth of the employee’s child. Both male and female employees qualify for parental leave as the LLAA is not gender specific.

“Maternity leave is universally recognised as a break from employment, related to maternal and infant health and welfare, and therefore available to women.”<sup>38</sup> Maternity leave in South Africa is regulated by the BCEA. Section 25 (1) of the BCEA explicitly provides for maternity leave, however payment for maternity leave is not prescribed; meaning that maternity leave is unpaid leave.<sup>39</sup>

## **1.6 Methodology**

The research conducted is not of an empirical nature and is a documentary analysis which involves a descriptive study and a detailed review of existing documents, without having to conduct interviews, questionnaires or observe behaviour.

Analysis of secondary data includes textbooks, journal articles, legislation and policies. The databases utilised are amongst others, Lexis Nexis, Google scholar, Hein Online, Juta and Sabinet. The existing material will be analysed to determine the situation concerning paternity leave as it exists in the South African workplace.

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<sup>35</sup> L Dancaster & T Cohen(2015)

<sup>36</sup> Section 25A(1) of the BCEA

<sup>37</sup> L Dancaster & T Cohen(2015).

<sup>38</sup> Ibid

<sup>39</sup> T Mphapuli (2015).

## **1.7 Ethical clearance**

The topic for research was submitted to the Research Ethics Committee for approval and complied with their requirements. A copy of the ethical clearance certificate is attached herewith.

## **1.8 Limitations**

The researcher has answered the research questions adequately, however there are some limitations to this dissertation which were unavoidable. The changes to the BCEA were effected on 1 January 2020 which is very recent. Determining extensively whether the new amendments as set out under the LLAA provides adequately for the right to paternity leave in the South African workplace will be limited. Further there is a lack of data to provide a detailed discussion on the adequacy of the ten days. In respect of comparisons with foreign jurisdictions there is limited evidence as to how the 10 days of paternity fares however the legislation will be analysed and compared to determine if there are lessons to be learnt.

## **1.9 Sequence of Chapters**

This dissertation comprises of five chapters.

Chapter 1 details the topic and framework of this dissertation. It provides an introduction and background of the topic. The rationale and research questions posed for the dissertation are also discussed. This chapter also details the methodology used in compiling the dissertation.

Chapter 2 provides an overview of paternity leave in South Africa.

Chapter 3, deals with the legislative framework on paternity leave in South Africa. Sections 25 to 27 of the BCEA as amended, the LLAA, the UIA, the Constitution of South Africa Act 108 of 1996 and other relevant legislation are analysed.

In Chapter 4 parental leave in Sweden, the United Kingdom and Kenya will be discussed. This is done to firstly determine whether the amendments are adequate and whether there are lessons for South Africa.

Chapter 5 will provide a conclusion of the study conducted.

### **1.10 Conclusion**

Chapter 1 provides an introduction to the research topic. The rationale, research questions and objectives of this paper are set out in this chapter. The methodology and sequence of chapters are also provided. The LLAA brought changes to the BCEA which became effective in January 2020. Prior to the LLAA a father in South Africa was entitled to 3 days of family responsibility leave. Whether the new amendments as set out under the LLAA provide adequately for the right to paternity leave in the South African workplace will be discussed in subsequent chapters.

The next chapter will aim to furnish an outline of paternity leave in the workplace as well as a historical overview of paternity leave in South Africa.

## CHAPTER 2

### AN OVERVIEW OF PATERNITY LEAVE IN SOUTH AFRICA

#### 2.1 Introduction

South Africa is a country which has an advanced and developed legal system. The rights contained in the Bill of Rights are amplified in the respective Acts that govern employment and afford employees numerous rights. Fathers were previously entitled to apply for family responsibility leave upon the birth of their child.<sup>40</sup> This provision allowing an employee to apply for family responsibility leave when their child was born has now been repealed as fathers are now entitled to paternity leave.

Despite the amendment to the section, the remainder of section 27 of the BCEA remains intact. South African working fathers, including those who adopt children, are now entitled to ten consecutive days of paternity leave. This leave is however unpaid and employees are required to apply to the UIF.<sup>41</sup>

There are advantages to paternity leave as some scholars indicate that when fathers become involved in the lives of their children, it significantly helps in reducing crime rates in future generations, improves performance in the fields of science and mathematics and lowers the rate of imprisonment.<sup>42</sup> Additionally, by taking paternity leave fathers have been found to nurture their own caregiving skills.<sup>43</sup> Fathers are able to assist their spouses/partners when their child is born or adopted.

This chapter will provide an overview of paternity leave in South Africa. The concept of paternity leave will be discussed as well as its importance and the need to recognise the right in South Africa. A historical overview of paternity leave focusing on the position prior to the amendments to the BCEA will be discussed which will include a brief discussion of the *MIA* judgment.

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<sup>40</sup> Section 27 of the BCEA.

<sup>41</sup> H Kasselmann (2019).

<sup>42</sup> V Rogers (2019)

<sup>43</sup> S Magnúsdóttir (2016).

Further insight will be provided as to the role of the paternal father, children's rights and the rights of surrogate parents. A brief overview of the current position pertaining to the amendments to the BCEA will be looked at, as this will be discussed in detail in Chapter 3.

## **2.2 Background to paternity leave in South Africa**

Fathers in South Africa were not exclusively accommodated for in labour legislation and were not entitled to paternity leave. This created a gender divide. Prior to the LLAA paternity leave did not exist in South African law. Section 27 of the BCEA allowed a father to take family responsibility leave when his child was born.<sup>44</sup> The BCEA regulates parental leave in South Africa.<sup>45</sup> Expectant mothers are provided with four months' unpaid maternity leave by their employer.<sup>46</sup> No provision for paternity leave was expressly provided for by the BCEA. The Act referred to paternity leave in a sub-leave category under the 'family responsibility' leave provision<sup>47</sup> which provided a three-day leave period.<sup>48</sup> Companies could, "at their own discretion, provide for additions to these basic standards, which is the exception and not the norm".<sup>49</sup>

It is possible to utilise this leave as a fraction of a day or an entire day,<sup>50</sup> however, the employer is allowed to ask for proof such as a death certificate or medical certificate or a certificate issued by the hospital.<sup>51</sup> Family responsibility leave is in addition to any other leave entitlement, which means that it is over and above regular annual leave days. Family responsibility leave does not accumulate meaning that it cannot be carried over to the following years.<sup>52</sup> A collective agreement can alter the number of days and the circumstances under which the employer can grant leave.<sup>53</sup>

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<sup>44</sup> Section 27 of the BCEA.

<sup>45</sup> Section of the BCEA.

<sup>46</sup> Section 25(1) of the BCEA.

<sup>47</sup> Section 27 of the BCEA.

<sup>48</sup> Section 27 (2)(a) of the BCEA.

<sup>49</sup> D Visser(2018)

<sup>50</sup> Section 27(4) of the BCEA.

<sup>51</sup> Section 27(5) of the BCEA.

<sup>52</sup> Section 27(6) of the BCEA

<sup>53</sup> Section 27(7) of the BCEA.

“Family responsibility leave as provided for under the BCEA is not a form of paternity or parental leave.”<sup>54</sup> Prior to the amendments of the BCEA family responsibility leave was applied for when a child was born. The leave provision was criticised as it dealt with “other needs besides just the need of the father to spend time with his newborn”.<sup>55</sup>

Family responsibility leave was very restrictive, and did not factor circumstances where fathers may be the primary caregivers of the child, or instances where the mother passes away during or shortly after childbirth leaving the child in the care of someone else, or the adoption of an infant.<sup>56</sup> The three days paid statutory leave fell short when compared to the four months’ maternity leave that is available to female employees.

“The lack of maternity leave or adoption leave to adoptive parents placed those parents and the children at a disadvantage, as they also required the opportunity to develop an attachment with each other and it may even discourage adoption.”<sup>57</sup> Similarly, a father or same-sex partner who was the primary caregiver of the child would require an opportunity to connect with the child and were placed at a disadvantage given the very short leave period that was statutorily available to these employees.<sup>58</sup> Fathers or partners who wanted to be involved in the parental responsibilities were also disadvantaged by the lack of parental or paternity leave providing them an opportunity to bond with their child, and unfairly placed the responsibility solely on the birth mother.<sup>59</sup>

### **2.3 What is paternity leave?**

Paternity leave applies to working fathers. It is leave that is prescribed for fathers exclusively and cannot be ceded to the partner, even if the father chooses to decline his right.<sup>60</sup> “Paternity leave refers to short term leave available to fathers in the period subsequent to the delivery or adoption of a child, affording men the opportunity to devote additional time to their families, while retaining

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<sup>54</sup> A Behari (2016).

<sup>55</sup> M Govender (2015).

<sup>56</sup> L Scheepers(2018).

<sup>57</sup> Ibid

<sup>58</sup> Ibid

<sup>59</sup> Ibid

<sup>60</sup> S Magnusdottir (2016).

job security.”<sup>61</sup> The leave is gender specific and available only to fathers however most countries do not provide a separate legislative right to paternity leave. Paternity leave policies should include employment protection which will ensure that the father is able to resume employment upon expiry of the leave period.<sup>62</sup> Paternity leave enables the “break-down of gender assumptions in the workplace and in society by recognising the accountability of men towards family responsibilities.”<sup>63</sup> Policies pertaining to paternity leave have now been adopted by many countries across the world.<sup>64</sup> In South Africa paternity leave has now been recognised.<sup>65</sup> The LLAA does not refer to the leave as paternity leave but rather parental leave. The term parental leave is a gender neutral provision offering fathers as well as mothers time off to care for their children.

#### **2.4 Why is paternity leave important?**

Over the years the role of the father has been changing, particularly in relation to the care of their children after birth.<sup>66</sup> With the changing dynamics of the family, the perception that mothers are the primary caregivers will soon change.<sup>67</sup> The father’s role is no longer solely as a breadwinner but rather one of collective responsibility related to child care as well.

During pregnancy and the birth of a child, the father plays an active participatory role right from the start.<sup>68</sup> When a father is available at the onset of postnatal development, his presence “positively impacts on the maturity of the child through the bonding process.”<sup>69</sup> Allowing a father to commence with leave after the birth of his child comes with many benefits when he spends time with his child.<sup>70</sup> It enhances the self-confidence of the child, develops his/her social skills, and contributes to reducing the delinquency rate later on in life.

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<sup>61</sup> Ibid.

<sup>62</sup> A Behari(2018).

<sup>63</sup> Ibid.

<sup>64</sup> D Visser(2018)

<sup>65</sup> Section 25(A) of the BCEA.

<sup>66</sup> S Magnusdottir (2016).

<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

<sup>69</sup> J Richter & R Morrell (2006).

<sup>70</sup> Ibid.

<sup>71</sup> M Govender(2015).

A child has added security when there is a positive and meaningful attachment with both parents.<sup>72</sup> This also influences the development of the child which can impact on adulthood.<sup>73</sup> The adjustment of children, as well as their development, is both directly and indirectly affected by the role of men as fathers. A father bonds well with a child when involved in the changing of nappies and feeding of the baby.<sup>74</sup>

A father's involvement in childrearing has positive contributions towards child outcomes.<sup>75</sup> It is linked to better educational accolades, positive personal development and a reduction in behavioural and psychological problems.<sup>76</sup> Additionally, parental leave provides the time for partners to support each other. Having a partner who is supportive is very helpful because parenting can be stressful.<sup>77</sup> A father's presence is beneficial to children as well as the parents.<sup>78</sup> When fathers are given paternity leave they help mothers take care of the child and therefore the mother can return to work earlier.<sup>79</sup> It also helps in strengthening the bond between parents and in turn helps in creating a happy family.<sup>80</sup>

## **2.5 Recognising the right to paternity leave**

There was a need to acknowledge the working father's role in child rearing in South Africa, to advocate for the caregiving duties of fathers and change the gender inequalities emanating from limited legal regulation of after birth child care.<sup>81</sup> South African labour laws did not adequately address the dual role of men. This was apparent from the limited leave provisions available to a father upon the birth of his child. A statutory right to paternity leave was required to promote fatherhood in South Africa as well as to promote gender equality in the workplace.

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<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

<sup>74</sup> HR Smart (2019).

<sup>75</sup> W Tshiamo et al(2013).

<sup>76</sup> Ibid.

<sup>77</sup> HR Smart (2019).

<sup>78</sup> Ibid.

<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

<sup>81</sup> Van Jaarsveld (2002).

The case of *MIA* dealt with the issue of providing same sex couples with benefits similar to that of heterosexual couples.<sup>82</sup> The case is significant as it pointed out the shortcomings of paternity leave provisions in South African labour law.

In *MIA* the Labour Court had to consider whether a policy issued by the employer unfairly discriminated against the employee on the grounds listed in section 6 of the Employment Equity Act No 58 of 1998 (EEA). The employment policy of the workplace in which the applicant was employed indicated that the biological mother of a child would be granted 4 months' paid maternity leave and offered 2 months' paid leave to a permanent employee who was an adoptive mother to a child who was below 24 months of age.<sup>83</sup>

The applicant in the case was employed by the respondent. Based on the Civil Union Act No 17 of 2006 the applicant had entered into a civil union with a partner of the same sex.<sup>84</sup> During July 2011 the applicant together with his spouse commissioned a surrogate mother and finalised a surrogate agreement with her. This was in accordance with section 292 of the Children's Act.<sup>85</sup> The High Court confirmed the surrogacy agreement a year after the marriage. The surrogacy agreement indicated that at birth the child was to be handed over to the couple and therefore the mother would lose contact with the baby. The applicant, together with his partner, agreed that the role of primary caregiver will be assumed by the applicant.<sup>86</sup>

The applicant made an application to the respondent for four months paid maternity leave.<sup>87</sup> The application was rejected by the respondent, who cited the BCEA.

It was argued by the respondent that the BCEA only directed that maternity leave be provided to female employees and could not understand how the policies of the company were discriminatory when employment laws did not address the issues of surrogate parents.<sup>88</sup>

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<sup>82</sup> T Mphahli (2015).

<sup>83</sup> *MIA v State Information Technology Agency (Pty) Ltd* (2015) 6 SA 250 (LC), paragraph 2.

<sup>84</sup> Civil Union Act 17 of 2006

<sup>85</sup> Children's Act 38 of 2005

<sup>86</sup> *MIA v State Information Technology Agency (Pty) Ltd* (2015) 6 SA 250 (LC), paragraph 6.

<sup>87</sup> A Behari (2016).

<sup>88</sup> K Grobler (2015).

According to the applicant, the refusal by the respondent to grant his request for four months of maternity amounted to unfair discrimination based on “section 6 of the EEA on the grounds of sex, gender, sexual orientation, and family responsibility.”<sup>89</sup> The applicant petitioned the court to order the respondent to recognise his rights as those of same sex parents, to prevent the respondent from discriminating against him and others with similar applications.<sup>90</sup>

The applicant claimed that his maternity leave application was denied on the grounds that he was not the “biological mother” of his child which, according to Section 6 (1) of the EEA, amounted to unfair discrimination.<sup>91</sup> The court noted that for the issues to be adequately considered, changes would have to be made to the BCEA.<sup>92</sup>

Judge Gush’s decision indicated that the “employment policies of the respondent were discriminatory and the refusal of the company to give the applicant maternity leave as applied constituted unfair discrimination.”<sup>93</sup> Additionally, the court noted that in the application of its leave policy, the company had to fully recognise parents in a civil union, and not engage in acts of discrimination against the rights of the commissioning parents where they were under a surrogacy agreement.<sup>94</sup>

According to Judge Gush, the approach by the employer regarding maternity leave did not take into consideration that maternity leave was not solely associated with the welfare of the mother of the child and should also have considered the best interests of the child.<sup>95</sup> When interpreting the right of an employee to maternity leave, the best interests of a child must be taken into account. <sup>96</sup> The court was told by the applicant that he and his spouse had reached an agreement that immediately after the birth of their child he would assume the role of primary caregiver and take

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<sup>89</sup> N Zuma (2016).

<sup>90</sup> *MIA v State Information Technology Agency (Pty) Ltd* (2015) 6 SA 250 (LC), paragraph 18.

<sup>91</sup> A Behari (2016).

<sup>92</sup> *MIA v State Information Technology Agency (Pty) Ltd* (2015) 6 SA 250 (LC), paragraph 19.

<sup>93</sup> *MIA v State Information Technology Agency (Pty) Ltd* (2015) 6 SA 250 (LC), paragraph 63.

<sup>94</sup> N Zuma (2016).

<sup>95</sup> *MIA v State Information Technology Agency (Pty) Ltd* (2015) 6 SA 250 (LC).

<sup>96</sup> *MIA v State Information Technology Agency (Pty) Ltd* (2015) 6 SA 250 (LC), paragraphs 13-15.

care of the child.<sup>97</sup> In *MIA* the court found that the “right to maternity leave is not an entitlement linked solely to the health and welfare of the mother, but must of necessity be interpreted to and take into account the best interest of the child.”<sup>98</sup>

The best interests of the child therefore extends far beyond the health and welfare of the mother. The findings in *MIA* is progressive and highlights that childcare is not only relevant and applicable to a mother. Maternity leave can no longer be an entitlement to women employees only. The *MIA* judgment brings the best interests of the child to the forefront as an important consideration for maternity leave in certain circumstances, and allows for a wider interpretation of section 25 of the BCEA. This judgment paved the way for fathers, adoptive parents or same-sex partners who are the primary caregivers of the child to argue that they too should be allowed to take maternity leave. The judge also called for the need to amend legislation, particularly the BCEA, to properly address such matters in the future.<sup>99</sup> Judge Gush also noted that male employees who became parents as a result of a surrogacy agreement had the right to paternity leave that was equivalent to the maternity leave granted to a biological mother of a child.”<sup>100</sup> The Labour Court’s findings are important in having established a way forward for similar applications by same sex partners or fathers.

## **2.6 The role of the paternal father**

Although a newborn is mainly dependent on the mother for several months, the additional role of a father as a caregiver is critical. Many benefits are achieved through sharing of parental responsibilities.<sup>101</sup> Fathers who are present at birth positively influences early childhood development of children.<sup>102</sup> A child’s intellectual and social development benefits from a father’s involvement in raising the child.<sup>103</sup> Increased involvement by fathers has been shown to have a positive impact on a child’s social maturity, IQ and achievement.<sup>104</sup>

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<sup>97</sup> E Mabuza (2015).

<sup>98</sup> *MIA v State Information Technology Agency (Pty) Ltd* (2015) 6 SA 250 (LC), paragraph 13

<sup>99</sup> *MIA v State Information Technology Agency (Pty) Ltd* (2015) 6 SA 250 (LC), paragraph 19.

<sup>100</sup> K Grobler (2015).

<sup>101</sup> HR Smart (2019).

<sup>102</sup> M Govender(2016).

<sup>103</sup> D Visser(2018).

<sup>104</sup> Ibid.

Modern fathers play two main roles; they act as a father as well as employee.<sup>105</sup> It is therefore important for the father to maintain a balance between home life and working life.<sup>106</sup> The increased role of men in domestic duties is attributed to various factors that include the employment of more females, the change in society's attitude towards work and care, development of more diverse family households, and the availability of policies that are friendly to the family.<sup>107</sup>

Men are certainly more active in their children's lives than in the past. And many men declare a desire to be more actively engaged in the upbringing of their children.<sup>108</sup> "The promotion of fatherhood may encourage gender equality by decreasing the responsibility of care on women solely and creating equal expectations and roles for both parents in child care."<sup>109</sup> New ideals regarding fathering are being developed and encouraged among men for them to become more engaged in nurturing the lives of their children and men seem to be responding by developing father identities associated with higher involvement with child care.<sup>110</sup>

## **2.7 The best interests of the child**

The Children's Act 38 of 2005 aims at defining the responsibilities and rights of parents, with parental responsibility being considered as the right to "provide the child with care, making and maintaining contact with the child, acting as a guardian to the child, and paying for the maintenance of the child."<sup>111</sup> Total parental responsibilities are given to the biological mother of the child whether she is married or not.<sup>112</sup> On the other hand, the father gets full parental rights and responsibilities to a child if at the time of conception of the child or birth or the time between conception and birth he was married to the mother of the child.<sup>113</sup>

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<sup>105</sup> S Magnusdottir (2016).

<sup>106</sup> Ibid.

<sup>107</sup> Ibid.

<sup>108</sup> L Richter & R Morrell (2006).

<sup>109</sup> Ibid.

<sup>110</sup> RJ Petts et al (2018).

<sup>111</sup> L Richter & R Morrell (2006).

<sup>112</sup> Section 19(1) of the Children's Act No.38 OF 2005.

<sup>113</sup> Section 20 of the Children's Act No. 38 of 2005.

For unmarried biological fathers, “full rights and responsibilities as the father of the child are provided for if at the time of the birth of the child he was living on a permanent basis with the mother of the child or if he agrees to be acknowledged as the child’s father regardless of whether he is staying with the mother or not.”<sup>114</sup>

The quality of the relationship that a parent develops with a child is not affected by gender; the bond is built by the individual who takes care of the child, regardless of whether it is the father or the mother.<sup>115</sup> “Children also have a right to family care and parental care, as stipulated in Section 28 of the Children’s Act.”<sup>116</sup> The “best interests of a child” are considered to be of high importance in providing a child with care and protection, as well as ensuring the well-being of a child.<sup>117</sup> Therefore in interpreting maternity leave, the best interests of a child must be considered first.<sup>118</sup> It was noted by the court in *MIA* that “an employee in the same position as that of the applicant should not be denied maternity leave for any reason and that maternity leave should be as long as that of a natural mother.”<sup>119</sup> The *MIA* judgment provides that commissioning parents should be granted maternity/paternity leave regardless of their sex, gender or marital status.<sup>120</sup>

The *MIA* judgment has created a precedent for similar matters, as the case confirmed that people in same sex unions who acquire parental rights through surrogacy agreements are also entitled to maternal leave.<sup>121</sup>

## 2.8 Conclusion

The perspective of society on the role of fathers has changed significantly with fathers taking a more active participatory roles in raising their children.<sup>122</sup> Fathers are now more involved in the care of their children than ever before.<sup>123</sup>

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<sup>114</sup> Section 21 of the Children’s Act No 38 of 2005.

<sup>115</sup> S Magnusdottir (2016).

<sup>116</sup> Ibid.

<sup>117</sup> Section 9 of the Children’s Act 38 of 2005.

<sup>118</sup> CG Field et al. (2012).

<sup>119</sup> *MIA v State Information Technology Agency (Pty) Ltd* (2015) 6 SA 250 (LC), paragraph 17.

<sup>120</sup> SB Kamerman (2005).

<sup>121</sup> M Finn (2016).

<sup>122</sup> K Grobler (2015).

<sup>123</sup> Ibid.

Additionally, human relationships are also evolving, with fathers playing a more significant role than the traditional stereo-typical heterosexual figure.<sup>124</sup> Research from countries that provide paternity leave supports the idea that the emotional connection that is usually developed during infancy is key in encouraging parents to be more involved in the care of their children, and that more ownership is assumed by fathers in the development of their children.<sup>125</sup> With paternity leave, fathers will be able to spend quality time with their newborns and develop a critical bond without having to rush to return to work and back to their normal daily schedules.<sup>126</sup>

In *MIA* the decision by the court was based on the rights of both the parent and the child, which were protected by the Constitution and illustrated the inseparable nature of these rights.<sup>127</sup> The *MIA* judgment shows that a child has a right to parental care or family care, regardless of the gender of the caregiver. A child's best interests must always be considered and failure thereof will be considered a breach of the Constitution and the Children's Act.<sup>128</sup> The Labour Court noted that there was a need for the BCEA to be amended. The facts in the *MIA* matter showed that family configurations are evolving and becoming more diverse, and there was a need for legislation to be updated to protect the role of fathers.<sup>129</sup> *M I A v State Information Technology Agency (Pty) Ltd* (D 312/2012) [2015] ZALCD 20 constituted a landmark judgment in South African law.

The following chapter will discuss the legislative framework for paternity leave in South Africa.

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<sup>124</sup> M Govender (2015).

<sup>125</sup> R Grobler (2018).

<sup>126</sup> Ibid.

<sup>127</sup> SB Kamerman (2005).

<sup>128</sup> South African Constitution, Children's Act 38 of 2005.

<sup>129</sup> M Govender (2016).

## **CHAPTER 3**

### **LEGISLATIVE FRAMEWORK ON PATERNITY LEAVE IN SOUTH AFRICA**

#### **3.1 Introduction**

Employees who seek to remain away from work are required to apply for leave.<sup>130</sup> In South African labour law maternity leave is acknowledged.<sup>131</sup> The LRA and the BCEA explicitly provides for maternity leave.<sup>132</sup>

As discussed in chapter two above previously paternity leave was not recognised, working fathers were required to utilise family responsibility leave when his child was born. The position has changed as South African legislation now specifically provides for paternity leave.<sup>133</sup> In this chapter the current legislation on paternity leave in terms of the LLAA will be analysed. In particular Sections 25 A, B and C of the BCEA will be discussed in detail. Further the UIF and the amendments that were implemented to the Act when the LLAA was signed into law will be discussed. Lastly this chapter looks at whether the amendments to the BCEA is a step in the right direction for South Africa.

#### **3.2 International framework**

Specific Conventions and Recommendations on maternity, paternity and parental leave have been adopted by the International Labour Organisation (ILO).<sup>134</sup> “The ILO is a United Nations (UN) agency which has been mandated to develop labour policies and standards that promote appropriate working conditions.”<sup>135</sup> The ILO has put in place international standards for supporting fathers with family responsibilities in the South African work environment.<sup>136</sup>

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<sup>130</sup> P Moss & F Deven (2006).

<sup>131</sup> M Van Jaarsveld (2002).

<sup>132</sup> Ibid.

<sup>133</sup> M Kirsten (2012).

<sup>134</sup> G Ryder(2014)

<sup>135</sup> Ibid.

<sup>136</sup> Ibid.

Both the ILO and the UN have acknowledged the need for “equal child care rights to be awarded to women and men with the aim of encouraging work/life balance and shared parental responsibility.”<sup>137</sup>

As a member state of the ILO South Africa has obligations to adopt social policies which promote social justice and equality between men and women concerning child care rights, parental responsibilities and employment security rights.<sup>138</sup> Even though “paternity leave is mentioned in the *Resolution Concerning Gender Equality at the Heart of Decent Work* the ILO has not adopted any standards to provide employees with paternity leave.”<sup>139</sup> Paternity and parental leave as espoused by the ILO Recommendations which are non-binding and act merely as a guideline. The 2009 International Law Commission (ILC) Resolution concerning gender quality “recognises that work-family reconciliation measures concern not only women but also men and a variety of new measures (such as provision of paternity leave and/or parental leave) have succeeded in permitting working fathers to be more involved in the sharing of parental responsibilities.”<sup>140</sup> The Resolution requires government together with social partners to develop suitable policies incorporating a better balance of work and family responsibilities between men and women in order to promote a more equal sharing of these responsibilities.<sup>141</sup> Recognition to the role of fathers with regard to family responsibilities is provided by the *Workers with Family Responsibilities Convention*<sup>142</sup>. “Recommendations No. 156 and 191 refer to the need to extend leave provisions to both mothers and fathers”.<sup>143</sup> The *Workers with Family Responsibilities Convention* is complemented by the *Recommendation concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities Convention*<sup>144</sup> which provides that through gradual introduction of this measure “either parent should have the possibility, within a period immediately following maternity leave, of obtaining leave of absence (parental leave) without relinquishing employment with the rights resulting from employment being safeguarded.”<sup>145</sup>

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<sup>137</sup> Ibid.

<sup>138</sup> Ibid.

<sup>139</sup> Ibid.

<sup>140</sup> Ibid.

<sup>141</sup> Ibid.

<sup>142</sup> No 156 of 1981.

<sup>143</sup> Ibid

<sup>144</sup> Ibid.

<sup>145</sup> Ibid.

Several countries in the world have provided for parental leave with the sole purpose of encouraging both the father and the mother to participate in the lives of their children.<sup>146</sup> A report by the ILO entitled “*Maternity and Paternity at Work-Law and Practice across the World*” found that out of the 169 countries it studied, 66 countries provided parental leave and that at least 79 of the 167 countries for which data was available provided some form of paternity leave.<sup>147</sup> South Africa is a signatory to policies that invoke an international obligation to provide paternity and parental leave.

“*The Convention on the Elimination of All forms of Discrimination against Women (CEDAW)* was adopted by the UN General Assembly in 1979 and was ratified by South Africa in 1995.”<sup>148</sup> Further implied reference to state obligations to address gender stereotypes is made in the CEDAW preamble.<sup>149</sup> “The CEDAW preamble recognises the need to change the traditional role of men as well as the role of women in society and in the family in order to achieve true equality.”<sup>150</sup> South Africa adopted the *United Nations Convention on the Rights of the Child (UNCRC)* in 1995. This Convention recognises the need to extend particular attention to children.<sup>151</sup> Article 18 of the UNCRC provides that “state parties need to ensure that recognition is given to the principle that both parents have common responsibilities for raising the child and the best interests of the child is at the forefront.”<sup>152</sup> The participation in the care-giving duties of the child must be promoted with fathers.<sup>153</sup>

Minimum standards of human rights throughout Africa are established by the African Union (AU), which is an international regional organisation.<sup>154</sup> The AU consists of 53 African states.<sup>155</sup>

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<sup>146</sup> CG Field et al. (2012).

<sup>147</sup> G Ryder(2014)

<sup>148</sup> CEDAW(1979)

<sup>149</sup> Ibid.

<sup>150</sup> Ibid.

<sup>151</sup> UNCRC(1989).

<sup>152</sup> Ibid.

<sup>153</sup> Ibid.

<sup>154</sup> A Behari(2018).

<sup>155</sup> Ibid.

“*The African Charter on the Rights and Welfare of the Child (ACRWC)* looks at protecting the needs of the African child.”<sup>156</sup> The primary responsibility when it comes to the raising and development of the child lies with the parents or other persons responsible for the child.<sup>157</sup> This is contained in Article 20(1) of the ACRWC.<sup>158</sup> The best interests of the child are also the main concern of the parents. The inclusion of both parents when caring for a child is thus reinforced by this international standard. The CEDAW, the UNCRC and the ACRWC all have binding provisions which “encourage the shared parental responsibility of child care between the mother and the father of a household.”<sup>159</sup>

South Africa has given effect to its obligations by amending its legislation to grant working fathers parental leave of 10 days. Below is an analysis of the recent amendments and its effect.

### **3.3 Basic Conditions of Employment Act 75 of 1997**

The BCEA applies to all employers and employees and regulates leave entitlement, working hours, employment contracts, pay slips, deductions and terminations in South Africa.<sup>160</sup> An employee is defined in the Act “as any person besides an independent contractor who works for another person or the State and who receives or is entitled to receive remuneration.”<sup>161</sup> Most employees and employers are covered by the BCEA. Categories which are excluded are members of the South African National Defence Force, National Intelligence Agency and the South African Secret Service.<sup>162</sup> “Unpaid volunteers working for an organisation serving a charitable purpose as well as persons employed on a vessel on the sea” where the Merchant Shipping Act No 57 of 1951 applies, are also excluded.<sup>163</sup>

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<sup>156</sup> ACRWC(1990).

<sup>157</sup> Ibid.

<sup>158</sup> Ibid.

<sup>159</sup> A Behari(2016).

<sup>160</sup> Labour Guide (2019).

<sup>161</sup> Section 1 of the BCEA.

<sup>162</sup> Section 3(1)(a) of the BCEA.

<sup>163</sup> Section 3(1)(b) and (d) of the BCEA.

In respect of leave Chapter 3 of the BCEA excludes employees who work for less than 24 hours a month for an employer.<sup>164</sup> The BCEA sets out the hours of work as well as the minimum conditions of employment. The employer can offer the employee more favourable conditions than those stipulated in the BCEA in a collective agreement however the employer cannot offer less favourable conditions.

### **3.3.1 Amendment to the BCEA in relation to parental leave**

More recently, the position with regards to fathers and paternity leave has been introduced as a right by the LLAA. Paternity leave has now been recognised and allows working fathers' leave days to spend with their new-borns.

Leave pertaining to family responsibility remains part of the BCEA in terms of Section 27. Section 27(2) (a) of the BCEA has been partially repealed. The three days family responsibility leave that employees were entitled to when a child is born has been replaced with parental leave in terms of the LLAA.<sup>165</sup> Sections 25A, 25B and 25C of the BCEA became effective on 1 January 2020 in line with the amendments to the LLAA and the Unemployment Insurance Amendment Act (UIA). The remainder of Section 27 of the BCEA remains in force and can still be relied upon.

### **3.4 The Labour Laws Amendment Act 10 of 2018**

The LLAA has introduced Section 25A (1) into the BCEA and provides for 'parental leave'.<sup>166</sup> This section enables a male or female parent to apply for "ten days' of leave upon the birth or adoption of a child."<sup>167</sup> The LLAA has introduced three new leave types to the BCEA, Section 25A, 25B and 25C which are parental, adoption, and commissioning parental leave.<sup>168</sup> All three leave types are unpaid.

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<sup>164</sup> Section 19(1) of the BCEA.

<sup>165</sup> Section 25A of the BCEA

<sup>166</sup> Section 3 of the LLAA , Section 25 A(1) of the BCEA.

<sup>167</sup> Ibid.

<sup>168</sup> Section 3 of the LLAA.

### 3.4.1 Parental leave

The first category of leave is parental leave.<sup>169</sup> Parental leave is a wide, all-embracing term including maternity and/or paternity leave allowing for child-care and is of a longer duration.<sup>170</sup>

Parental leave is to ostensibly grant working fathers and mothers the opportunity to be with their child, to care for them and to develop a bond with them. Parental leave is also available to both parents, which enables parents to look after their infant or child.<sup>171</sup> The concept of dual career and dual-carer are increasingly being witnessed today. It is more common for working fathers and the mothers to share family responsibilities.<sup>172</sup>

“The act of taking parental leave can be viewed as an embodiment of both motherhood and fatherhood through the physical experience of bonding with the baby and for mothers, the experience of breastfeeding.”<sup>173</sup>

The decision to take parental leave becomes a way in which the body reacts to and seeks to define motherhood and fatherhood.<sup>174</sup> Parental leave policies are beneficial for guiding parental behaviour as they are initiated at a very important juncture in the life of children especially at the time when they are born at birth.<sup>175</sup> Parental leave affords parents the opportunity to allocate the leave in a way that is best suitable for them.<sup>176</sup>

Section 25A (1) provides for 10 consecutive days of unpaid leave to a parent if he or she is an employee.<sup>177</sup> This leave can be taken from the day when the child is born or when the adoption order is granted.<sup>178</sup> “The 10 consecutive days leave are calendar days and not working days.”<sup>179</sup>

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<sup>169</sup> Section 25A of the BCEA.

<sup>170</sup> A Parr (2012).

<sup>171</sup> T Mphahli (2015).

<sup>172</sup> L Dancaster & T Cohen (2010).

<sup>173</sup> A Parr (2012).

<sup>174</sup> A Parr (2012).

<sup>175</sup> MDC Huerta et al. (2013).

<sup>176</sup> S Magnusdottir (2016).

<sup>177</sup> Section 25A (1) of the BCEA.

<sup>178</sup> Section 25 A (2) of the BCEA.

<sup>179</sup> G Strandvik (2020)

The employer must be informed in writing by the employee when he intends to take the parental leave and when he will resume work again.<sup>180</sup>

Notification as required must be provided at least one month prior to the expected arrival of the new born<sup>181</sup> or in respect of adoption “when the adoption order is granted or date when the child is placed in the care of the adoptive parent”.<sup>182</sup> Section 25A (5) states that payment for parental leave will be paid from the UIF.<sup>183</sup> This will be in lieu of the three days’ paternity leave which is provided in the BCEA, however the maternity leave provisions will remain the same.<sup>184</sup>

### **3.4.2 Adoption leave**

The second category of leave deals with adoption leave. Section 3 of the LLAA provides for adoption leave to be added to the BCEA, section 25(B).<sup>185</sup> The provisions apply to married couples, couples in a civil union, unmarried couples (same and opposite sex) as well as single people who adopt a child. Partners who are involved in a same sex relationship have equal protection as couples in a heterosexual marriage under the Civil Unions Act 17 of 2006. An employee can take time off when adopting a child.

The employee is eligible for ten consecutive weeks<sup>186</sup> if he has adopted a child under the age of two.<sup>187</sup> The employee may commence adoption leave on the day the order is granted<sup>188</sup> or when the child is placed in the care of the adoptive parent; whichever comes first.<sup>189</sup> The employer must be informed in writing by the employee of the date when adoption commences<sup>190</sup> and when the employee will resume work after the adoption leave.<sup>191</sup> Notification must be provided at least one

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<sup>180</sup> Section 25A (3) of the BCEA.

<sup>181</sup> Section 25 A (4)(a) (i) of the BCEA.

<sup>182</sup> Section 25 A (4) (a) (ii) of the BCEA.

<sup>183</sup> Section 25A (5) of the BCEA.

<sup>184</sup> Truter, J. (2019).

<sup>185</sup> Section 3 of the LLAA.

<sup>186</sup> Section 25(B) (1)(a) of the BCEA.

<sup>187</sup> Section 25(B)(1) of the BCEA.

<sup>188</sup> Section 25(B) (2)(a) of the BCEA

<sup>189</sup> Section 25(B) (2)(b) of the BCEA.

<sup>190</sup> Section 25(B) (3) (a) of the BCEA.

<sup>191</sup> Section 25(B) (3) (b) of the BCEA.

month prior to the adoption order being granted or when the child is placed in the care of the adoptive parent.<sup>192</sup> If this is not possible reasonable notice must be provided to the employer.<sup>193</sup>

“If there are two adoptive parents only one of them will be allowed 10 consecutive weeks leave.”<sup>194</sup> The other parent can take 10 consecutive days leave.<sup>195</sup> The selection of choice must be exercised at the option of the two adoptive parents.<sup>196</sup> “A contributor who is the parent of a child is entitled to parental benefits if the contributor is the parent of a child below the age of two in terms of an adoption order or the prospective adoptive parent of a child below the age of two in terms of an adoption order which placed the child in the care of the prospective adoptive parent pending finalisation of the adoption order for that child.”<sup>197</sup>

The payment of parental leave will be determined by the Minister subject to the provisions of the UIA.<sup>198</sup> Section 8 (c) of the LLAA states that “adoptive benefits be paid at a rate of 66 percent of the beneficiary’s earnings at the date of application.”<sup>199</sup>

### **3.4.3 Commissioning parent leave**

The LLAA has further introduced parental leave for commissioning parents. This category of leave relates to surrogate parenthood. The Children’s Act 38 of 2005 which deals with surrogacy states that “a surrogate motherhood agreement is an arrangement whereby an adult female is fertilised for the purpose of bearing a child for a parent and hands over the child when born, with the intention that the child be the legitimate child of the parent.”<sup>200</sup>

Section 3 of the LLAA provides for adding Section 25(C) to the BCEA. The amendment allows ten consecutive weeks of commissioning parental leave<sup>201</sup> together with ten consecutive days of

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<sup>192</sup> Section 25(B) (4) (a) of the BCEA.

<sup>193</sup> Section 25(B) (4) (b) of the BCEA.

<sup>194</sup> Section 25(B)(6) of the BCEA.

<sup>195</sup> Ibid.

<sup>196</sup> Ibid.

<sup>197</sup> Section 26 A(1)(b) of the LLAA.

<sup>198</sup> Section 25(B)(5) of the BCEA.

<sup>199</sup> Section 8(c) of the LLAA.

<sup>200</sup> Section 1 of the Children’s Act No 38 of 2005.

<sup>201</sup> Section 25C(1)(a) of the BCEA.

parental leave to an employee who is a commissioning parent in a surrogacy agreement.<sup>202</sup> Commissioning parental leave is available when a child is born.<sup>203</sup> In the instance where two commissioning parents are involved, the one parent can make an application for commissioning parental leave whilst the other parent can apply for parental leave.<sup>204</sup> Section 8(c) of the LLAA provides for “commissioning parental leave to be paid at a rate of 66 percent of the beneficiary’s earning at the date of the application.”<sup>205</sup>

### **3.5 The Unemployment Insurance Act 63 of 2001 (UIA)**

The Unemployment Insurance Fund (UIF) provides short term relief to employees when they become unemployed, go on maternity leave or adoption leave or due to illness are unable to work.<sup>206</sup> The Unemployment Insurance Act of 2001 (UIA) and the Unemployment Insurance Contributions Act of 2001(UICA) govern the unemployment insurance system in South Africa. Generally a person who is required to contribute in terms of the UIC Act would be entitled to claim benefits under the UIA.

There have been significant changes to the UIC Act which came into effect in March 2018. Certain categories of individuals were excluded from contributing to the UIF in terms of section 4 of the UIA Act.<sup>207</sup> In 2018 the Tax Law Amendment Act No 17 deleted some of the exclusion clauses in the UIC Act.<sup>208</sup> “Learners employed in terms of section 18(2) of the Skills Development Act<sup>209</sup> were deleted.”<sup>210</sup> These learners are unemployed people who are required to sign both the learner-ship agreement as well as the contract of employment with the employer. <sup>211</sup>

The contract of employment is only for the period of learner-ship. Learner-ships can be undertaken either by employed staff or offered to unemployed people as a means of helping them gain skills and work experience. “The category of employees who intend to repatriate at the conclusion of

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<sup>202</sup> Section 25 C (1)(b) of the BCEA.

<sup>203</sup> Polity(2018b).

<sup>204</sup> Section 25 C (6) of the BCEA.

<sup>205</sup> Section 8( C) of the LLAA.

<sup>206</sup> C Gaul (2018).

<sup>207</sup> Ibid.

<sup>208</sup> KPMG (2018).

<sup>209</sup> No 9 of 1999.

<sup>210</sup> KPMG (2018).

<sup>211</sup> Ibid.

their working stint in South Africa are also deleted.”<sup>212</sup> Foreign nationals are not South African citizens and do not have a permanent residence permit issued in terms of the Immigration Act No 13 of 2002.<sup>213</sup> They require a valid work visa to work in South Africa. Both employees on learnerships and foreign nationals are no longer excluded from the application of the UIA and can contribute to the UIF from 1 March 2018<sup>214</sup>

These employees and their employers are required to contribute 1% of their remuneration paid by the employer to the employee. This therefore implies that they would be entitled to all benefits under the Act.<sup>215</sup> The Unemployment Insurance Amendment Act (UIAA) was published in the Government Gazette in January 2017.<sup>216</sup> In January 2019 when the LLAA was signed into law it paved the way for the implementation of the UIAA.<sup>217</sup> The UIAA defines an employee as any “natural person who receives remuneration and to whom remuneration accrues in respect of services rendered or to be rendered by that person but excludes independent contractors.”<sup>218</sup> Employees working less than 24 hours a month are excluded from the Act.<sup>219</sup> Further exclusions from the Act include “members of parliament, cabinet ministers, deputy ministers, members of provincial executive councils and provincial legislatures and municipal councils”.<sup>220</sup>

Contributing employees undergoing learnership training in terms of the Skills Development Act<sup>221</sup> will be eligible for unemployment insurance benefits upon the expiry of their learnership contracts.<sup>222</sup> Foreign nationals as contributing employees will also be eligible for benefits. <sup>223</sup>

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<sup>212</sup> Ibid.

<sup>213</sup> Section 1(1)(xvii) of the Immigration Act No 13 of 2002.

<sup>214</sup> C Gaul(2018)

<sup>215</sup> KPMG(2018)

<sup>216</sup> Ibid.

<sup>217</sup> News24(2019).

<sup>218</sup> Section 1 of the UIAA.

<sup>219</sup> Section 3(1) of the UIAA.

<sup>220</sup> Section 3(2) of the UIAA.

<sup>221</sup> No.97 of 1998.

<sup>222</sup> News24(2019).

<sup>223</sup> Ibid.

A contributor who is the parent of a child is entitled to the parental benefits.<sup>224</sup> In order to access the benefits the contributor must be “registered as the father of the child in terms of the Births and Deaths Registration Act, 1992 (Act No. 51 of 1992),<sup>225</sup> is the parent of a child below the age of two in an adoption order,<sup>226</sup> or prospective adoptive parent of a child below the age of two, in terms of a court order that placed the child in the care of the prospective adoptive parent, pending the finalisation of the adoption order in respect of that child,<sup>227</sup> is the parent of a child who has been born as a result of a surrogate motherhood agreement referred to in the Children’s Act, 2005 (Act No. 38 of 2005).”<sup>228</sup> The maximum period of parental leave is ten consecutive days.<sup>229</sup> A contributor will not be eligible for benefits unless he or she was employed, whether as a contributor or not, for at least 13 weeks before the date of application for parental benefits.<sup>230</sup> “The application for parental benefits must be made within 12 months after the date of childbirth; or the date that a competent court grants the adoption order; or a child is placed in the care of a prospective adoptive parent by a competent court, pending the finalisation of an adoption order in respect of that child, whichever date occurs first.”<sup>231</sup>

In terms of the BCEA amendments parental leave, adoption leave and commissioning parental leave are unpaid.<sup>232</sup> It is in the employer’s discretion to make all or a portion of the leave paid as is most often the case with maternity leave.<sup>233</sup>

Despite the fact that parental leave is unpaid “employees who are granted parental, adoption or commissioning parental leave, provided that the father is registered on the birth certificate, is a parent of a child below 2 years old on an adoption order or is the parent of a child born as a result

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<sup>224</sup> Section 26A(1) of the UIAA.

<sup>225</sup> Section 26A(1)(a) of the UIAA.

<sup>226</sup> Section 26A(1)(b)(i) of the UIAA.

<sup>227</sup> Section 26A(1)(b)(ii) of the UIAA.

<sup>228</sup> Section 26A(1)(c) of the UIAA.

<sup>229</sup> Section 26A(4) of the UIAA.

<sup>230</sup> Section 26A (5) of the UIAA.

<sup>231</sup> Section 26B (2) of the UIAA.

<sup>232</sup> Labourwise(2020)

<sup>233</sup> Ibid.

of a surrogate motherhood agreement, are entitled to be remunerated with unemployment benefits.”<sup>234</sup>

The LLAA amends the UIA and provides for the payment from the Fund of unemployment benefits for certain employees and for the payment due to illness, maternity, parental, commissioning parental and dependent’s benefits relating to the unemployment of such employees.<sup>235</sup> Section 8(c) of the LLAA provides that “parental benefits, adoption benefits and commissioning parental leave benefits be paid at a rate of 66 percent of the earnings of the beneficiary at the date of the application.”<sup>236</sup> The benefits are only available to the employee if he or she was in employment for at least 13 weeks prior to the date of application for parental benefits.<sup>237</sup>

Unemployment benefits are benefits for employees who lose their jobs due to dismissal, retrenchment or their contracts have expired. The employee must have been contributing to the fund and deductions were made in respect of same from his bank account. Section 16 of the UIAA deals with the right to unemployment benefits. An employed contributor is entitled to unemployment benefits “if the reason for the unemployment is the termination of the contributor’s contract of employment by the employer of that contributor or the end of a fixed term contract; the dismissal of the contributor, as defined by section 186 of the Labour Relations Act, 1995 (Act 66 of 1995) or insolvency in terms of the provisions of the Insolvency Act, 1936 (Act 24 of 1936).”<sup>238</sup>

In respect of parental leave the UIF pays parents including fathers up to 10 days which accords with the provisions of the BCEA. The payment of parental benefits, adoption benefits and commissioning parental benefits does not “reduce an employee’s claim to other unemployment benefits.”<sup>239</sup> So for example if a father loses his job he will still be entitled to all other unemployment benefits that he has

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<sup>234</sup> Section 26A of the LLAA.

<sup>235</sup> Section 16 of the LLAA.

<sup>236</sup> Section 8(c) of the LLAA.

<sup>237</sup> Section 26C (6) of the UIA.

<sup>238</sup> Section 16(1) of the UIAA.

<sup>239</sup> Section 13(5) A(b) of the UIAA.

accrued. The father can claim for the 10 consecutive days of parental leave from the UIF.

The above sets out the amendments that have been made to the relevant legislation in respect of parental leave.

An analysis of the relevant provisions is undertaken below in an attempt to address the critical question of whether these amendments are a step in the right direction.

### **3.6 Are the amendments a step in the right direction?**

The LLAA has introduced Section 25A (1) into the BCEA and provides for ‘parental leave’.<sup>240</sup> This section enables a male or female parent to apply for ten days’ leave upon the birth or adoption of a child.<sup>241</sup> The ten days’ afforded to working fathers means that fathers are now at the disposal of their spouse or partner when their child is adopted or born and are in a position to develop a bond with the newborn. However, can the ten days of parental leave under the BCEA as amended be considered adequate in order to make a substantial difference to children, mothers and fathers themselves?

The father provides huge support and relief to both the mother and the child. Extended parental leave will be beneficial for the father if he wants to be actively involved in the initial months of the baby’s life. The ten days’ parental leave commences when the child is born.

Paid paternity leave is offered by many companies today.<sup>242</sup> This includes international media companies such as Google, Facebook, Netflix, and Apple that have formulated policies that promote the work-life balance of their employees.<sup>243</sup> Longer paternity leave has been found to promote interaction between the child and their father, as well as benefiting the organisations that they work for.<sup>244</sup> When fathers are supported by the work culture they are more likely to take leave

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<sup>240</sup>Section 3 of the LLAA , Section 25 A(1) of the BCEA.

<sup>241</sup> Ibid.

<sup>242</sup> S Behson (2013).

<sup>243</sup> P Mthembu (2016).

<sup>244</sup> Ibid.

and for longer periods.<sup>245</sup> Paid leave programs increase worker retention and reduce turnover.<sup>246</sup> Employers are aware that introducing supportive parental leave programs strengthens worker production.<sup>247</sup> Progressive companies are vocal concerning their support for fathers in the workplace.<sup>248</sup> They implement father-friendly programs to attract and retain talented employees.<sup>249</sup> Companies want to ensure that where they invested in staff by way of training and development these employees remain with them.<sup>250</sup> Companies estimate the cost of replacing staff to be about two and a half times the employee's annual salary.<sup>251</sup> There is also a link between fatherhood policies and a company's social corporate responsibilities.<sup>252</sup> According to Harvard Business Review it was found in a high percentage of successful companies that employee loyalty and morale is increased with exemplary parental benefit programs.<sup>253</sup>

In South Africa, an example of a company that provides parental leave is Pick 'n Pay.<sup>254</sup> The leave policy of the company provides paid maternity leave for up to 11 months and paid paternity leave for 8 days.<sup>255</sup> Pick 'n Pay also offers supplementary maternity leave and fathers are "entitled to share this leave provided both parents have worked for Pick 'n Pay in excess of 8 months."<sup>256</sup>

Ackerman's also made modifications to its paternal leave policy and grants all working fathers with ten days of paid leave per year.<sup>257</sup> Volvo Car South Africa took the unprecedented step in 2019 by introducing "a paid gender-neutral parental leave policy offering mothers and fathers a total of six months leave with 80 percent pay; the policy also extends to same sex parents and

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<sup>245</sup> Ibid.

<sup>246</sup> P Wolf(2016)

<sup>247</sup> Ibid.

<sup>248</sup> L Richter(2006)

<sup>249</sup> Ibid.

<sup>250</sup> Ibid.

<sup>251</sup> Ibid.

<sup>252</sup> Ibid.

<sup>253</sup> Ibid.

<sup>254</sup> M Govender(2016).

<sup>255</sup> Ibid.

<sup>256</sup> Ibid.

<sup>257</sup> Ackermans (2019).

parents of adopted parents.”<sup>258</sup> Hewlett Packard Enterprise has introduced 26 weeks of paid parental leave for new parents (mothers and fathers).<sup>259</sup>

New parents with at least one year service at Hewlett Packard Enterprise are entitled to benefit from 26 weeks of paid leave within the first 12 months after the birth or adoption of the child.<sup>260</sup> The company has further introduced “Parental Transitional Support a flexible work arrangement policy that allows new parents to work part time for up to 36 months following the birth or adoption of a child.”<sup>261</sup> Their aim is to enhance personal well-being as well as work/life balance.<sup>262</sup> Hewlett Packard Enterprise made a statement on the 6 January 2020 that “it is introducing the initiatives in recognition of the importance of equal parenting and the role that workplace culture can play in supporting it.”<sup>263</sup> For the most part Volvo and Hewlett Packard Enterprise have largely answered the question whether paternity leave will be a discussion between employers and employees based on what an individual can negotiate, or a more generic agreement.

Fathers who are supported by their employer through social support, financial support, and flexible work schedules have been reported to have high levels of engagement with their jobs and stayed longer with their employers.<sup>264</sup>

The granting of paternity leave which is opposed by some companies argue that when their employees do not report to work there are losses in production, as well as financial costs for the company.<sup>265</sup> In numerous countries there is currently insufficient research on parental leave and information concerning company practices remains limited and for some countries virtually non-existent. “The European Establishment Survey on Working Time and Work–Life Balance (ESWT) 2004–2005 is the first study that allows for a systematic comparison of company practices across

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<sup>258</sup> M Naidoo(2019)

<sup>259</sup> Business Tech(2020)

<sup>260</sup> Business Tech(2020)

<sup>261</sup> Ibid.

<sup>262</sup> Ibid.

<sup>263</sup> Ibid.

<sup>264</sup> P Mthembu(2016).

<sup>265</sup> Ibid.

countries and workplaces.”<sup>266</sup> This analytical report addresses the issue of parental leave.<sup>267</sup> The report indicates that “companies with experience of parental leave reported most problems in finding staff to replace absent workers, a lack of continuity of work and uncertainty if or when employees on parental leave will return to work.”<sup>268</sup> The reports by managers also reflect a high percentage of absenteeism by employees as a result of parental leave and reintegrating the staff resuming work after a period of leave posed a problem.<sup>269</sup>

In most sectors, the main problems associated with parental leave are “finding replacement staff, continuity of cover and uncertainty about when and if those employees on leave will return.”<sup>270</sup>

The main criticism surrounding the LLAA being conservative and inadequate related to the ten-day period offered to the fathers of new-borns. It is difficult at this point to determine the efficacy of the 10 days of parental leave. Now that legislation has been implemented only time and research can determine whether the ten days are effective. Further situations like whether fathers will utilise the leave, if the leave will be utilised effectively and if the statutory provisions will encourage fathers who were previously not involved in the birth and rearing of the child to now participate, will be answered in time.

Research will also show if fathers will use the leave for its intended purpose, that is to develop their caregiving skills as well as bond with the child and if gender equality will improve. If the results indicate that the 10 days has provided a positive impact there will be a need to lengthen the period of parental leave or adapt policies in line with international models.

Section 25A (5) of the BCEA states that payment for parental leave will be paid from the UIF. Section 8(c) of the LLAA provides that “parental benefits, adoption benefits and commissioning parental leave benefits be paid at a rate of 66 percent of the earnings of the beneficiary at the date of the application.”<sup>271</sup> In South Africa paternity leave is subsidised by the UIF. Although the UIF

<sup>266</sup> D Anxo, et al (2007)

<sup>267</sup> Ibid.

<sup>268</sup> Ibid.

<sup>269</sup> Ibid.

<sup>270</sup> Ibid.

<sup>271</sup> Section 8(c) of the LLAA.

does financially safeguard the employee to some extent, the benefits provided are limited. This is as a result of the restriction on the amount of benefits payable (a maximum of 66% of income). The ILO recommends “risk pooling through social, insurance or public funds for leave benefits in respect of the issue of compensation for paternity, parental and maternity benefits.”<sup>272</sup> South African policies should provide fathers, adoptive parents and commissioning parents with different options to accessing benefits during such leave. A possible solution could be for a 50/50 split between the state and employers. Employers bearing no cost will need to be looked at and developed with the government.

If South Africa were to provide more leave days in respect of parental leave the issue of funding will have to be determined. Where countries have “lengthy parental leave policies in place the policy is funded by either the state, public funding or both the state and the employer.”<sup>273</sup> Research will need to be conducted to determine the practicality of introducing a separate social security scheme to fund paternity leave instead of the UIF.<sup>274</sup>

Whilst the cost of providing paid parental or paternity leave is a contentious factor the benefits are found to outweigh the costs.<sup>275</sup> In countries like Sweden and the UK with established legislated paid leave programs there is an increase in productivity, employee morale is heightened, employee retention and turnover is improved and absenteeism as well as training costs are reduced.<sup>276</sup> In South Africa which is still relatively new to paternity leave the effects of the amendments introduced by the LLAA will be determined in time.

There is however a disparity between the leave provided for mothers and that provided for fathers.<sup>277</sup> Maternity leave in South Africa is regulated by the BCEA. Section 25(1) of the BCEA explicitly provides for maternity leave , however payment for maternity leave is not prescribed;

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<sup>272</sup> G Ryder(2014).

<sup>273</sup> M Govender(2015)

<sup>274</sup> L Dancaster & T Cohen(2015)

<sup>275</sup> Ibid

<sup>276</sup> Ibid.

<sup>277</sup> M Govender (2015).

meaning that maternity leave is unpaid leave.<sup>278</sup> The employee is allowed 4 months unpaid leave which commences one month prior to the expected date of birth of the child.<sup>279</sup> One of the reasons is that women give birth to children and are therefore entitled to more time off for recovery.<sup>280</sup>

In terms of Section 25(B) of the BCEA an employee is eligible for ten consecutive weeks<sup>281</sup> if he has adopted a child under the age of two.<sup>282</sup> Section 25(C) of the BCEA provides for ten consecutive weeks of commissioning parental leave together with ten consecutive days of parental leave to an employee who is a commissioning parent in a surrogacy agreement.<sup>283</sup> It is not apparent what the basis is for not providing the same leave period for adoption, surrogacy and maternity leave. Acknowledging the fact that the birth mother requires time to recover, when it comes to bondage and care of the child however the time period should not differ.

The UIAA requires the father of the child to be registered on the birth certificate in terms of the Births and Deaths Registration Act, 1992 (Act No. 51 of 1992).<sup>284</sup> While the employer can grant the 10 days of parental leave to the father without requiring a birth certificate, the UIF will not finalise payment if the father's name is not on the birth certificate. This means that the leave is either treated as unpaid or the employer remunerates the employee. This highlights a weakness in the legislation given the fact that there is a high percentage of babies born in South Africa where the identity of the father is not revealed on the birth certificate for unknown reasons.

The BCEA does not limit the frequency that a male can be granted parental leave or the total number of times he can apply annually. If a male employee fathers 10 children in a year and his name is revealed on the birth certificate he will be entitled to 10 parental leave periods of 10 days each. This will pose problems to the employer. There is a need for restrictions to be imposed on provisions to avoid abuse from employees.

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<sup>278</sup> T Mphapuli (2015).

<sup>279</sup> Section 25(1) and (6) (a) of the BCEA; Labour Guide 2019

<sup>280</sup> Ibid.

<sup>281</sup> Section 25(B) (1)(a) of the BCEA.

<sup>282</sup> Section 25(B)(1) of the BCEA.

<sup>283</sup> Section 25(C) of the BCEA.

<sup>284</sup> Section 26A(1)(a) of the UIAA.

Parental leave policies need to be carefully thought out and planned to appeal to parents, and also need to be supplemented by family-oriented practices in the workplace.<sup>285</sup> The LLAA act is progressive and a step in the right direction. The 10 days is fair and reasonable and provides a start to parental leave provisions in South Africa.

### **3.7 Conclusion**

The sections of the LLAA dealing with parental, adoption and commissioning of parental leave came into effect from 1 November 2019. As from 1 January 2020 employees are now legally entitled to parental leave, adoption leave and commissioning parental leave in terms of the amendments to the BCEA. Section 25A, 25B and 25C of the BCEA provides for parental, adoption and commissioning parental leave respectively. The current provision of the BCEA regarding 4 month's maternity leave remains intact.

The LLAA has introduced Section 25A (1) into the BCEA and provides for 'parental leave'<sup>286</sup> which allows an employee who is a parent of child to 10 days of parental leave. The second category of leave deals with adoption leave. Section 3 of the LLAA provides for adoption leave to be added to the BCEA.<sup>287</sup> A single adoptive parent is entitled to 10 consecutive weeks' adoption leave.

If there are two parents only one will be able to apply for 10 weeks whilst the other is allowed 10 consecutive days of adoption leave. Section 3 of the LLAA provides for the inclusion of Section 25(C) to the BCEA which provides for commissioning parental leave. Employees who are parents to a child as a result of a surrogate motherhood agreement are entitled to either 10 consecutive weeks or 10 consecutive days per parent.

As with maternity leave all 3 categories of leave are unpaid. However employees are entitled to claim from the UIF. The benefits are only available to the employee if he or she was in employment for at least 13 weeks prior to the date of application for parental benefits.

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<sup>285</sup> MDC Huerta et al. (2013).

<sup>286</sup> Section 3 of the LLAA , Section 25 A(1) of the BCEA.

<sup>287</sup> Section 3 of the LLAA.

The amendments to the BCEA confirms South Africa's commitment to advancing its progressive labour laws and should be applauded. In the future, it is expected that the ten days will be extended but should be coupled with the requisite externalities and considerations.<sup>288</sup>

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<sup>288</sup> E Makumbi (2018).

# CHAPTER 4

## AN ANALYSIS OF PATERNITY LEAVE IN SWEDEN, UK AND KENYA: LESSONS FOR SA

### 4.1 Introduction

Paternity leave has progressively been appreciated as an important factor in family life and hence many countries are altering their legislation to acknowledge and allow for parental leave.<sup>289</sup> Continuous development to increase the participation of fathers in their children's lives has been observed in the country and globally as well.<sup>290</sup> Worldwide, the provision for parental leave to employees has been accepted and many countries are gradually making that an aim to work towards.<sup>291</sup> This chapter pursues the legal situations of some selected countries on paternity leave. The aim is to borrow on a few lessons for South Africa. Even though many countries have put this motion in action, the selected countries have a benefit to this dissertation.

These countries have been recognised as important to this study. Sweden because it leads to the provision of paternity leave. The UK is next to where laws were passed to allow fathers leave days to devote time for their children either after birth or adoption, and it also outlines the subsequent benefits of paternity leave for the family.<sup>292</sup> Paternity leave laws for Kenya will also be discussed.

The legislative framework for parental leave in South Africa has been discussed in chapter 3. South Africa is a middle-wage developing country with social democracy.<sup>293</sup> Despite South Africa's advanced infrastructure, it is classified as a developing country.<sup>294</sup> It is plagued by social and economic problems.<sup>295</sup>

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<sup>289</sup> L Dancaster & T Cohen (2010).

<sup>290</sup> L Ritcher & R Morrell (2006).

<sup>291</sup> T Mphapuhli (2015).

<sup>292</sup> Ibid.

<sup>293</sup> C Maradza (2018).

<sup>294</sup> Ibid.

<sup>295</sup> Ibid.

On the other hand, Sweden is a developed country and it sets the pace as the leader in paternity leave.<sup>296</sup> Sweden is the leading country when it comes to paternity leave provisions and it has realised a high standard of living under a system that exploits its modern capitalism and in-depth welfare benefits.<sup>297</sup> The main reason for choosing and discussing Sweden's family policy is because the policy has been in place for the past 46 years and thus it is the best option to borrow from when it comes to the enactment, response, and expected results of a similar policy. <sup>298</sup>

The UK, which is also a developed country and one that South Africa heavily borrows from since the SA legal system is similar to that of the UK, is another viable example. The South African legal system adopts aspects of the English law. South African legislators always turn to the UK legal system during the formation and development of South African laws. In the UK, gender discrimination and discrimination grounded on sexual orientation is outlawed and the same applies to South African laws.<sup>299</sup> Paternity and parental leave remunerations in the UK will be analysed to determine whether South Africa can adopt some features. Kenya, being a developing country like South Africa, has a similar socio-economic status which is what makes it a good country for direct comparison.<sup>300</sup> Additionally, just like South Africa, Kenya has greatly borrowed from international policies in the development of its paternity leave provisions.

Identifying the variances between developed and developing countries together with the economic disparities of the three countries, that is Sweden, the UK, and Kenya, will provide a platform for comparison of the countries' jurisdictions mainly policies and laws. The purpose of analysing and discussing these three countries is to identify if there are any valuable lessons to be learnt.

#### **4.2 Paternity/ Parental Leave in Sweden**

Regarding paid parental leave policy, Sweden has constantly been the leading country globally by setting very high standards.<sup>301</sup> Sweden has set the benchmark by promoting and maintaining

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<sup>296</sup> T Mphapuhli (2015).

<sup>297</sup> [GlobalTenders.com](https://www.globaltenders.com) (2020).

<sup>298</sup> D Visser (2018).

<sup>299</sup> Ibid.

<sup>300</sup> N Zuma (2016).

<sup>301</sup> M Gnewski (2019).

equality between both parents when it comes to equal parental leave allocations which in turn promotes gender equality to leave privileges.<sup>302</sup> Notably, Sweden was the pioneer country to put in place a paid parental leave policy for both parents. The policy was not defined by gender but instead it was gender-neutral thus giving each parent 6 months of paid leave. This remarkable accomplishment is why Sweden became the first country to develop paternal policies.<sup>303</sup>

The Parental Leave Act 1995: 584 administrates leave for family purposes in Sweden.<sup>304</sup> All workers in Sweden inclusive of those in the military are covered by the policy.<sup>305</sup> Parental rights are the same for fathers and mothers.<sup>306</sup> Parents that have adopted children are also included in the leave policy and they have the same rights as traditional parents.<sup>307</sup> Parental leave is an allowed right by the law for all parents in Sweden and therefore no employer can deny this right to their employees. The provisions for parental leave and parental leave benefits are outlined in the Parental Leave Act 1995:584 and Social Insurance Administration Code (2010:110). The financial impact of parental leave benefits is covered by the Swedish Social Insurance Administration.<sup>308</sup> The Swedish Social Insurance Administration governs the provisions of social insurance that encompass security with regard to diseases, disabilities, and families with children.

### *History of Sweden's Parental Leave System*

During the 1960s and 70s, the father's role as the only provider for the family began to change in Sweden.<sup>309</sup> More employment openings were created for women when the Swedish public sector expanded. Likewise, this new trend created a new role for fathers also geared towards equal gender roles.<sup>310</sup>

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<sup>302</sup> CG Field et al. (2012).

<sup>303</sup> J Van Belle (2016).

<sup>304</sup> E Hofverberg (2014).

<sup>305</sup> Ibid.

<sup>306</sup> Ibid.

<sup>307</sup> Ibid.

<sup>308</sup> Ibid.

<sup>309</sup> A Chronholm (2007).

<sup>310</sup> Ibid.

In 1970, Sweden tried to create a gender-equal society where men's inclusion and participation in child care was championed as they took up more responsibility for the family.<sup>311</sup>

The father's new compassionate role is equivalent to the respective responsibilities of the household assumed by the mother.<sup>312</sup> However, Sweden disregarded the approach that influenced men to assist their wives in child care and instead adopted an alternative approach that asserted on shared responsibilities between both parents as pertains to work and household issues.<sup>313</sup>

Swedish maternal leave was converted to a system of parental insurance in 1974.<sup>314</sup> Sweden's "implementation of a shared-parental leave policy was double edged."<sup>315</sup> The implementation of the policy was originally in reaction to the increased number of women in the workplace, and this was a calculated move to boost the continued shift of women into employment.<sup>316</sup> Sweden also adopted the shared-parental leave policy to safeguard parental obligations to children, and to check that both parents took up equal responsibilities gender notwithstanding.<sup>317</sup> Sweden's rationale for the enactment of a "shared-parental leave policy was to enable the advancement of the dual-earner model for families".<sup>318</sup>

Parental insurance was part of the Swedish welfare system and was bankrolled by the federal government.<sup>319</sup> At first, the insurance catered for the six months of parental leave and parents were given compensation that made up for 90% of their regular salaries.<sup>320</sup> Changes made in 1974 arranged for fathers to have ten days paid leave within the first month after the baby came and to go on paternity leave too just like the mother did.<sup>321</sup> Parents had to arrange on how they were going to share the six months parental leave between themselves and share this information with their employees.<sup>322</sup> The shared-parental policy implemented in 1974 in Sweden made it the

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<sup>311</sup> T Johansson (2011).

<sup>312</sup> A Chronholm (2007).

<sup>313</sup> S Magnusdottir (2016).

<sup>314</sup> A Chronholm (2007).

<sup>315</sup> D Visser (2018).

<sup>316</sup> Ibid.

<sup>317</sup> Ibid.

<sup>318</sup> Ibid.

<sup>319</sup> M Govender (2015).

<sup>320</sup> Ibid.

<sup>321</sup> A Chronholm (2007).

<sup>322</sup> Ibid.

first country to include fathers in its parental leave policy model.<sup>323</sup> Progressively, the father's role has been expanding since the inception of the parental leave policy in 1974.<sup>324</sup>

In 1995, Sweden announced the “non-transferable daddy month”.<sup>325</sup> The ‘daddy month’ was introduced by government as mothers were still taking the vast majority of parental leave.<sup>326</sup> Fathers were given 30 days leave for themselves exclusively. The second ‘daddy month’ was introduced in 2002. Parental leave was prolonged to 16 months which could be used by any of the two parents.<sup>327</sup> Two months were exclusively set aside from the 16 months for fathers to spend time with their children.<sup>328</sup> The father's benefits for those two months compensated at 80% of their regular income.<sup>329</sup>

### *The New Parental Leave System*

In 2016, the government of Sweden effected a new parental leave policy, the “third daddy month” which allocated three months of parental leave to fathers.<sup>330</sup> This father's leave was fully compensated unlike the previous one.<sup>331</sup> What this means is that out of the 16 months assigned for parental leave, each parent had to take three months.<sup>332</sup> The remaining 10 months were to be used by either parent before the child gets to eight years.<sup>333</sup> Parents are permitted to 480 days of parental leave for every single child that they bear, and are asked to share these days equally between themselves.<sup>334</sup> Furthermore, both parents are allowed to take their leave concurrently.<sup>335</sup> For the first ten days of the first three months after the baby is born, the father is permitted to stay at home.<sup>336</sup>

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<sup>323</sup> D Visser (2018).

<sup>324</sup> A Chronholm (2007).

<sup>325</sup> Ibid.

<sup>326</sup> Ibid.

<sup>327</sup> M Govender (2015).

<sup>328</sup> Ibid.

<sup>329</sup> Ibid.

<sup>330</sup> M Erikson (2020).

<sup>331</sup> Ibid.

<sup>332</sup> Ibid.

<sup>333</sup> Ibid.

<sup>334</sup> Ibid.

<sup>335</sup> Ibid.

<sup>336</sup> Ibid.

Parental leave payment hinges on the personal situation of the parents, immigration status, the number of days the parents have been working or living in Sweden, and the remuneration and employment status for the previous 240 days.<sup>337</sup> In the case of a legal Swedish resident who has been working for the last 240 days before the baby arrives, they get an 80% recompense of their salary for 420 days out of the 480 days allocated for parental leave.<sup>338</sup>

The family policy in Sweden is admired for realising a “relatively effortless shift from a traditional, gender divided family structured model to the gender neutral, dual-earner model.”<sup>339</sup> The dual-earner model permits for earnings-related remunerations together with official gender-neutral leave payments, and is designed to accomplish equality.<sup>340</sup>

#### **4.3 Paternity/ Parental Leave in the United Kingdom (UK)**

##### *Paternity Leave*

Before 2003, parental leave was controlled by Section 13 of the Maternity and Paternity Leave Regulation of 1999.<sup>341</sup> Paternity leave was first effected in the UK in 2003.<sup>342</sup> “Fathers are allowed to two succeeding weeks of paid paternity leave in accordance with the Paternity and Adoption Leave Regulation 2002<sup>343</sup> (PAL), and the Statutory Paternity Pay and Adoption Paternity Pay (General) Regulations of 2002.”<sup>344</sup> According to the Statutory Paternity Pay and Statutory Adoption Pay (General) Regulations of 2002, employees are eligible to get statutory paternity remuneration for the entirety of their leave at the approved rate after the employees pass the eligibility criteria, and submit the obligatory notice. Statutory paternity pay is considered as standard remuneration and is subject to tax and national insurance.

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<sup>337</sup> D Visser (2018).

<sup>338</sup> Ibid.

<sup>339</sup> A Z Duvander et al. (2005).

<sup>340</sup> Ibid.

<sup>341</sup> Maternity & Paternity Leave Regulation of 1999.

<sup>342</sup> N Zuma (2016).

<sup>343</sup> No.2788

<sup>344</sup> Regulation 4 of the PAL.

The leave is on a weekly arrangement and not as distinct days unless otherwise stated by the employer. A week is equivalent to the cumulative time that an employee works for within seven days. If an employee is qualified, they have the free will to go on paid leave either for a week or the two weeks that are permitted.<sup>345</sup> Regarding the PAL, for a male worker to qualify for paternity leave, he must be the natural father of the child, the mother's husband, a spouse or a civil companion who is taking up child care responsibilities for the child in question.<sup>346</sup> Further, the male employee is expected to have worked nonstop for their employer for the past 26 weeks before the child is born. Also, by the 14<sup>th</sup> week before the child is born, the male employee remains in employment until the birth of the child takes place.<sup>347</sup> There is also a requirement for employees applying for paternity leave to give notice to their employer before and not after the 15<sup>th</sup> week preceding the expected week of the child's delivery.<sup>348</sup> The Additional Paternity Leave Regulations, and Additional Statutory Paternity Pay (General) Regulations<sup>349</sup> were implemented in 2010 bringing forth general rights to take leave and recommence work after their child is born.

These regulations permit fathers of children born on or after 3 April, 2011 to get a maximum of 26 weeks of paternity leave, separate from the two weeks provided for every child.<sup>350</sup> "Men are also allowed the Additional Paternity Leave (APL) but only if they have been employed for the past 26 weeks by the 14<sup>th</sup> week before the expected delivery date of their child."<sup>351</sup> Employees are directed to use their paternity leave days within a span of 56 days after the birth of their child.<sup>352</sup> Paternity leave can only begin after the baby is born.<sup>353</sup> Adoptive parents are also eligible for paternity leave. A worker is permitted to be "absent from work for the reason of child care or to support the child's mother."<sup>354</sup>

Paternity leave issues are controlled by Section 80A-80E of the Employment Act of 2002(EA). The EA introduced some provisions into the Employment s Right Act of 1996(ERA) during its

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345 Regulation 5 of the PAL.

346 Regulation 4 of the PAL.

347 Ibid.

348 Regulation 6(2)(a) of the PAL.

349 2010 No. 1056.

350 Regulation 3 of the APL Regulations

351 Regulation 4(3) of the APL Regulations.

352 Regulation 9(2) of the PAL.

353 Regulation 7(2)(b) of the PAL.

354 Regulation 8(1) of the PAL.

endeavors to recognise the benefits of legal paternity leave. In terms of Section 80(1) (c) of the EA and Regulation 13(1) of the PAL, a worker is assured the right to return to work after the end of paternity leave.<sup>355</sup> Regulation 29(1) (a) and 3(a) of the PAL outline that if a worker is dismissed from work as a consequence for going on paternity leave, such a case will be considered unfair with reference to Section 99 of the ERA.<sup>356</sup>

Regulation 12(1) of the PAL guidelines provides employees going on paternity leave with remunerations as long as he or she meets all the conditions of employment, and has not been absent from work.<sup>357</sup> Paternity leave is not limited to the father of the child alone.<sup>358</sup> The companion of the baby's mother or the adoptive parent of the same sex who is anticipated to have an obligation for the nurturing of the child is also eligible for paternity leave.<sup>359</sup> The worker required to get a weekly sum which is not lesser than what is recommended by the National Insurance Contributions to be authorised to statutory pay all through paternity leave.<sup>360</sup> These protocols have been effected with the intention of permitting fathers to take a break from work and devote time at home to help in caring for their young kids.<sup>361</sup>

### *Shared Parental Leave*

Employees planning to take extended leave after the birth or adoption of a youngster can request for shared parental leave which can be given either simultaneously or after the parental leave of the child's mother or principal adoptive parent.<sup>362</sup> Shared parental leave is a new right permitting authorised mother, fathers, partners and adoptive parents to agree how to share their parental leave days subsequently after the birth of their child or placement of their adoptive kid.<sup>363</sup> Turning to the Children's and Family Act 2014, and the Shared Parental Leave Regulation (SPL) 2014, the UK announced the law on shared parental leave permitting parents of a newly born child or an adopted child not older than 50 weeks to take time off work, together with 37 weeks of recompense that is

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<sup>355</sup> Section 80(1)(c) of EA & Regulation 13(1) of the PAL.

<sup>356</sup> Regulation 29(1)(a) and 3(a) of the PAL.

<sup>357</sup> Regulation 12(1) of the PAL.

<sup>358</sup> Regulation 4(2)(c) (i) of the PAL Regulations.

<sup>359</sup> Regulation 4(2)(c) (ii) of the PAL Regulations.

<sup>360</sup> L Scheepers(2018).

<sup>361</sup> N Zuma (2016).

<sup>362</sup> L Scheepers (2018).

<sup>363</sup> Ibid.

shared between both parents.<sup>364</sup> The parents will be remunerated for a maximum of 37 weeks out of the 50 weeks set aside for leave. The 37 weeks' financial benefit can be compared to other European countries and is viewed as a success for fathers pursuing gender equality.<sup>365</sup> Shared parental leave can be taken alongside or as a substitute for customary maternity or adoption leave with the permission of the mother or adopter.<sup>366</sup>

Chapter 1, Regulation 4 of the SPL Regulations outlines the circumstances under which a birth mother is eligible for shared parental leave. The mother must be eligible to statutory paternity leave and must have the primary obligation to care for the child. Section 5 of the Regulations outlines the circumstances when the father or significant other can have a share of the parental leave. The father or spouse is required to give notice to the employer and proof of the birth or adoption of a child. This proof must include the child's birth certificate,<sup>367</sup> and information about their companion's place of work. Only then are the parents allowed to share leave and they can both be off from work at the same time or one can take their leave after the other comes back. Parents can also take the leave once as a whole or they can use the leave at their own convenience up to the time when the baby turns one year old.<sup>368</sup> Shared parental leave requirements allow parents to share in childcare duties. The requirements concentrate on childcare and not on gender of the parents thus sanctioning for equal sharing of family obligations which is advantageous for the child.

#### **4.4 Paternity Leave in Kenya**

Kenya has also been liberal when it comes to paternity leave issues.<sup>369</sup> Kenya has endorsed a few international treaties and conventions that champion numerous human rights and has taken direction from many international instruments in the enactment of the guidelines for paternity leave.<sup>370</sup> Kenya incorporated paternity leave requirements into their legal system under the Employment Act No. 7 of 2007. The right to paternity leave was announced after maternity leave for pregnant female employees was catered for in the repealed Employment Act.

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<sup>364</sup> A Berman (2015).

<sup>365</sup> M Govender (2015).

<sup>366</sup> L Scheepers(2018).

<sup>367</sup> Chapter 1, Regulation 10 of the SPL Regulation.

<sup>368</sup> Ibid.

<sup>369</sup> M Govender (2015).

<sup>370</sup> N Zuma(2015).

Chapter 22 of the Employment Act No.7 of 2007 caters to paternity leave. With reference to Section 29(8) of the Act, a male employee is permitted 14 days paid paternity leave subsequent to the birth of his child.<sup>371</sup> Section 29(1) of the Act<sup>372</sup> outlines that female employees are guaranteed three months maternity leave. This brings to the fore front the issue of gender inequality when looking at the variance in periods given for maternity leave and paternity leave for the female and male employees correspondingly. Turning to Section 29(3), female employees are allowed an extension on maternity leave as long as the employer was given notice. This can happen after the completion of the 3 months maternity leave and before female employees get back to work where they are permitted to go on sick leave, compassionate leave, annual leave or any other preferred kind of leave provided by their employer.<sup>373</sup> The Act however does not stipulate a time frame in respect of the duration of the extension period permitted. On the contrary, male employees are not eligible for an extension after their official paternity leave ends. The guideline is also restricted as there are no additional privileges provided to the right. The Act does not postulate that the two weeks of paternity leave comprise of working days which leaves an opening for weekends and public holidays to be included as the leave is counted as calendar days. Section 29(8) does not specify when the leave should be taken. It does not state whether the leave should be applied for straightaway after the birth of the child or several days before the actual birth occurs. It is, however presumed the employer may need that the leave be applied for in a timely fashion after the child has been born. The Act is additionally vague when it comes to which parent has the right to paternity leave; whether it is the natural father of the child or the spouse of the mother. The Act also does not specify if workers are permitted to one or more applications for the leave per year. When polygamy is being considered, the guideline has not made rules for a father taking paternity leave following the sequential births of his children from more than one mother.

To qualify for paternity leave in Kenya, one must be a male individual that is employed. Section 2 of the Act<sup>374</sup> explains a worker as a person whose services have been engaged for earnings or a

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<sup>371</sup> Section 29(8) of EA No. 7 of 2007.

<sup>372</sup> Kenyan Employment Act No 7 of 2007.

<sup>373</sup> Section 29(3)(b) of the Kenyan Employment Act.

<sup>374</sup> Kenyan Employment Act No. 7 of 2007.

salary and it also covers a trainee and indentured laborer.<sup>375</sup> Casual labourers are seemingly not covered by the Act.<sup>376</sup> An ‘employee’ and ‘casual employee’ are explained individually by the Act. As a consequence, the characterisation seems to be limited to male employees under a contract of service. Therefore, a temporary employee is left out. The Act authorises the employer and employee to enter into their own agreement for paternity leave. Nevertheless, the stipulations must be more advantageous than the conditions provided for in the Act.<sup>377</sup> Such an agreement could contribute in safeguarding male workers working on temporary terms to be granted the right to paternity leave. Section 9 does not yet provide an assurance that an employer will make promising deliberations with regard to male casual employees. The company can consequently have its own paternity law guidelines in the contract of employment. However, the guidelines cannot interfere with the right to paternity leave, and should there be an intrusion the worker is permitted to select the right under the organisation or the statutory Act.<sup>378</sup>

Paternity leave is further limited to male employees, and does not accommodate for circumstances where the significant other of the child’s mother or the adoptive parent is of the same sex, and is anticipated to have an obligation towards the child’s upbringing. Paternity leave in terms of Section 29(8) of the Act<sup>379</sup> further does not accommodate fathers in the case of adoption and surrogacy arrangements.

There are no requirements or limitations enforced.<sup>380</sup> Complications could arise as a consequence, and could result to exploitation by whichever party- the employer or employee. An example of such abuse is where the employer devices his own requirements on the provision.<sup>381</sup>

The worker is not obligated to provide the employer with notice, but the employer may need the employee to give him notice either way.<sup>382</sup> The provision does not give guidelines on what proof

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<sup>375</sup> Section 2 of the EA No.7 of 2007

<sup>376</sup> Ibid.

<sup>377</sup> Section 9 of the Kenyan Employment Act No 7.of 2007.

<sup>378</sup> P Musyimi(2008).

<sup>379</sup> Kenyan Employment Act No.7 of 2007.

<sup>380</sup> Ibid.

<sup>381</sup> Ibid.

<sup>382</sup> N Waweru (2018).

is needed from the male employee applying for leave.<sup>383</sup> The information provided will distinguish that the applicant is the father to the newborn or the companion or the spouse of the mother.<sup>384</sup> This information can be a certificate or any medical papers showing the status of the worker's wife and signed by a competent medical expert.<sup>385</sup> Also, Section 29(8) does not outline whether the right to paternity leave encompasses circumstances of still births or death of the child after birth.<sup>386</sup> "Such a situation could be traumatic to both parents and hence the male employee should still be eligible to paternity leave and be fully paid too."<sup>387</sup> Section 29(8) allows for two weeks of paternity leave which is paid in full however the Act does not stipulate who is responsible for payment. It is assumed the employer has to pay the employee for the two weeks of leave.

The Act additionally does not allow for an extension to the paternity leave in situations where the mother of the new born becomes sick after delivery, goes through delivery complications, or when the child is born too early. Two weeks are not enough for the father to connect with the child when the mother is not around. Conversely, the worker is allowed two weeks of paternity leave with full compensation.<sup>388</sup> The Act does not have any provision for parental leave.

Section 29(8) of the Employment Act is riddled with ambiguity and the provision gives room for concern on the requirements and rights that make up the two weeks paternity leave. The uncertainties should be looked into to guarantee that fathers receive the full right to paternity leave.

#### **4.6 Comparative analysis**

The comparison provided with South Africa, Sweden, the UK and Kenya is focused on which policies and methods are most suitable and if there is any new insight that can be learnt by South Africa. When drafting parental leave systems, the objective should revolve around easing the burden of childrearing. In respect of paternity leave the aim would be to promote the father's participation in raising and bonding with his children as well as to promote gender equality in the

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<sup>383</sup> Ibid.

<sup>384</sup> Ibid.

<sup>385</sup> Ibid.

<sup>386</sup> M Momanyi (2015)

<sup>387</sup> Ibid.

<sup>388</sup> Section 29(8) of the Kenyan Employment of 2007.

labour force. Factors that affect the provision of parental leave include the duration of the leave, the flexibility of the provision and the nature of remuneration.

Sweden is the first country to have introduced paid paternity and maternity leave and is considered a model country for implementing policies that involve men in childrearing and care. Swedish citizens find it okay for men to stay at home on paid leave while mothers continue with their careers or stay with the husband.<sup>389</sup> Children have benefited from this system since they bond easily with parents. The legal framework behind paternity leave in Sweden is very advanced. It provides longer paternity leaves as compared to South Africa. It also has a very flexible parental plan. More importantly, single parents are able to apply for the entire proposed period that should have been shared by both parents.<sup>390</sup> The duration of parental leave in Sweden indicates that legislators have taken into consideration various aspects that occur during child birth. Fathers are given 3 months of paid leave while in South Africa, parental leave provisions are less flexible and are given for a shorter period of time.

Sweden's family policy has not however been perfect thus providing a good lesson for South Africa. The Swedish policy allows for the transferability of leave which has benefited women more than men since they negotiate for more time at home with the child. There have been important outcomes from the national discussions on transferability of parental leave. Fathers end up using the part of the leave that is non-transferable.<sup>391</sup> Employing a 'one-third' structure where one third of the parental leave is for mothers and one third to fathers and the final third to be divided voluntarily amongst themselves has been suggested.<sup>392</sup> The shared-parental leave model debate surrounding gendered leave allocation shows how freedom of choice may seem restrictive despite the pursuit of shared and equal parental leave, gender equality, and sufficient provisions.<sup>393</sup> In South Africa a lesson for parental leave provisions would be to accommodate a 'shared-leave' approach. This approach could help in removing gender stereotypes and also give families a fair

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<sup>389</sup> J Carlson (2013)

<sup>390</sup> D Visser(2018)

<sup>391</sup> Ibid.

<sup>392</sup> Ibid.

<sup>393</sup> Ibid.

choice of which parent should be the primary-caretaker of the new-born. Taking from the experience of Sweden, South Africa can also incorporate a ‘one-third’ model into their shared-parental leave policy. Parents can choose on whether to stay at home and care for the child or go to work and let their partner stay at home. South Africa can adopt a very conservative version of the Swedish shared-parental leave policy.

Another important factor of the “Swedish shared-parental leave model relates to the earnings-related benefits offered.”<sup>394</sup>The Swedish debate regarding the disbursement of earnings-related benefits has shown that it delays mothers from childbearing at the expected age.<sup>395</sup> South Africa can learn from such a benefit and include an earnings-related benefit structure in their parental leave plan. Choosing to delay first time motherhood has proved beneficial to the economy in a variety of ways.<sup>396</sup> The average age of first-time mothers in South Africa is 22.5 years.<sup>397</sup> “In Sweden the average age of first-time mothers is 29.15 years.”<sup>398</sup> In South Africa the allocation of earnings-related benefits for parental leave could drastically improve the economic growth and also increase women’s economic participation.

Sweden is a social democratic welfare state which means that it protects and promotes the economic and social wellbeing of citizens. Swedish citizens are given the same access to social amenities which are not based on income. South Africa cannot mimic the Swedish model and be successful without undergoing essential cultural shifts like gender equality advocacy and further what occurs when there is higher focus by feminists on men than on women.<sup>399</sup> Sweden’s parental leave legislations appears to have been created with regard to improving child care and not increasing barriers. Essentially, Swedish parental leave policy is very progressive compared to South Africa’s.

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<sup>394</sup> Ibid.

<sup>395</sup> A Z Duvander et al(2005)

<sup>396</sup> M.Y.M Leung et al(2016)

<sup>397</sup> Indexmundi (2015).

<sup>398</sup> TT/The Local(2017)

<sup>399</sup> J Carlson (2013)

The Swedish policy proves that equal rights to maternity and paternity leave can be achieved in the pursuit of gender equality. Sweden has worked for a long time toward improving the parental leave model and has come to enjoy its benefits. This implementation can be tied to the start of the campaign in 1975 as it was commenced by the State. Thereafter maternal leave was changed to parental leave providing both parents with an equal right with paid time off to take care of the child. When it became clear that men were not taking their equal time about two decades later, the policy was regulated to give fathers 30 days of ‘use it or lose it’ leave.

Duplicating this model is not the only hope that South Africa has in remodeling parental leave. Each country has different needs and capacities that should be considered before such change. The uniqueness of South Africa may render the Swedish policies useless when applied practically in communities of South Africa. Nonetheless, some lessons can be learnt from the progress made by Sweden today. Such lessons include a high female labour force rate, increased paternal participation, gender equality, dual-earner family models and ensuring the best childbearing practices between the parents.

The UK leave policy is also progressive and caters for different parental circumstances whilst being gender neutral. The UK has longer periods of paternity leave when compared to South Africa. The LLAA does not cater for different family arrangements for instance where the mother resumes work earlier or passes away. South Africa can benefit from the provisions placed for different and varied family arrangements following the birth of the child that are stipulated in the UK by way of the Additional Paternity Leave Regulations and Additional Statutory Paternity Pay (General) Regulations.<sup>400</sup> In the UK the Regulation on the right to additional paternity gives male employees a chance at having a longer paternity leave for two weeks if needed. Evidently, the legislation in the UK is striving towards gender equality through provision of flexible family policies. This program can also be emulated in South Africa to reduce discrimination faced by male employees in labour practices. Employees must use their leave in 56 days but the LLAA does not make any stipulation regarding the end of the leave. The leave is however expected to start when the child is placed in the care of the parents or when the child has just been born.

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<sup>400</sup> Ibid.

The UK policy requires the “employee to have worked continuously for the employer for 26 weeks by the 14<sup>th</sup> week before the child is born and to remain employed at the time of the child’s birth.”<sup>401</sup> The LLAA does not have such provision aside from certain benefits which one is not eligible for if they were not employed 13 weeks before applying for the paternal leave.<sup>402</sup> In the UK the employee is guaranteed the right to resume employment after the paternity leave.<sup>403</sup> The LLAA only requires an employee to notify the employer in writing when he intends resuming work after parental leave.<sup>404</sup>

In the UK paternity leave is for both parents of the child. It incorporates the husband of the child’s mother or the partner to the mother even if she is of the same sex. This makes the provision gender neutral and not biased toward either gender. South Africa has failed to provide similar leave periods and regulations for maternity, adoption and surrogacy.<sup>405</sup> The fact that women can only become pregnant and bear a child and require time to recover is not disregarded. However, the time given for bonding and play time with the parents should be similar for the birth mother and the primary care giver of the child.<sup>406</sup>

The UK further provides a shared parental leave system for males and females and same sex partners. This helps both care-givers have time to bond with the child and give general child care. If one parent does not use their leave, the other parent can get that leave instead as long as both employees are notified in advance.<sup>407</sup> In an attempt to address the gender inequalities and the leave imbalances and unequal treatment of different categories of parents, South Africa can also borrow from UK’s policy which provides similar and equal terms to parents irrespective of their gender. South Africa can learn more from the UK in that their leave system is not only gender neutral but also very open-minded and allocated for different circumstances that may occur in child birth.

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<sup>401</sup> Ibid.

<sup>402</sup> Section 26A (5) of the UIAA.

<sup>403</sup> Section 80(1)(c) of EA & Regulation 13(1) of the PAL.

<sup>404</sup> Section 25A(3)(b).

<sup>405</sup> L Scheepers(2018)

<sup>406</sup> Ibid.

<sup>407</sup> Ibid.

Shared parental leave is ideal for ensuring both parents are involved in upbringing and general care during the first days. This can help eliminate discrimination against various parents.

In Kenya fathers are given two weeks off of paid leave after childbirth.<sup>408</sup> Paternity leave is exclusive to male employees and does not offer any other provisions for scenarios like surrogacy or adoption. In comparison, Kenya and South Africa portray gender inequality with minimal paternity leave periods for male employees.

In pursuing paternity leave rights, Kenya has been led by a number of international instruments. However, the legislation is still a bit vague on a number of issues. Paternity leave is provided in a subsection under maternity leave. There are further no restrictions provided making the Act less practical in its application. The Act also does not stipulate whether the two weeks' male employees get of paternity leave are inclusive of public holidays and weekends or not.<sup>409</sup> Paternity leave in Kenya can be seen as progressive on the one hand where it provides fully paid leave for 2 weeks for male employees. However, this stipulation is only applicable to male employees which confines the progress of the policy since it is discriminatory and has no specifications for different parental circumstances. Kenya's provisions show strength in duration and remuneration however in as much as Section 29(8) recognises the right to paternity leave, there are no further entitlements provided for thus making the policy inflexible.

Section 25 A (1) of the LLAA provides for 10 consecutive days of parental leave. Section 25A (3) and (4) further stipulates that the employee must notify the employer before then.<sup>410</sup> The employee must tell their employer in writing about their interest in taking leave at least one month before the start of the leave period.<sup>411</sup> The Act also requires that "the parent be noted boldly as the father on the child's birth certificate, as a parent on an adoption order or as a parent on a motherhood agreement."<sup>412</sup> This would prevent parents who are not responsible for the child to miss out on the

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<sup>408</sup> Section 29(8) of the EA of 2007

<sup>409</sup> Section 25A(1) of the LLAA.

<sup>410</sup> Section 25 A (3)(4) of the LLAA.

<sup>411</sup> Ibid.

<sup>412</sup> Section 25A(1) of the LLAA.

allowances of paid parental leave. The LLAA requests for a formal application in order for an individual to get the benefits of parental leave.<sup>413</sup> “The application must be submitted to an employment office and is subject to investigation.”<sup>414</sup> The latter ensures individuals do not abuse or go against regulations in order to benefit from the benefits stipulated. The LLAA has been drafted clearly and provisions provided are not ambiguous. The provisions are clear and concise when compared to Kenya which displays ambiguity. By comparing South Africa and Kenya, South Africa has emulated Kenya’s policy advocating for between 5 and 14 days of paternity by stipulating a minimum of 10 days’ paternity leave that is similar to that of the global level.

When comparing South Africa with other jurisdictions like Sweden, the UK and Kenya, South Africa appears to be on track. The country has made significant progress despite being a developing country however, there is a lot more to learn for them to emulate gender equality in all spheres of public service.

#### **4.7 Conclusion**

This chapter provides the legal position in foreign jurisdictions. Paternity leave in South Africa, Sweden, the UK and Kenya is discussed. Sweden’s shared-parental leave policy was adopted in 1974 making Sweden the first country to place fathers as part of the beneficiaries of a parental leave system.<sup>415</sup> “Sweden’s motivation behind the implementation of a shared-parental leave policy was to assist the progression of the dual-earner family model.”<sup>416</sup> Fathers in the UK are given one or two consecutive weeks of leave after birth of their child. Kenya on the other hand provides two full weeks of paid paternity leave to start on the day the child is born.<sup>417</sup>

In South Africa the LLAA has made very significant changes to the BCEA and has introduced parental leave, adoption leave and commissioning parental leave in relation to surrogacy agreements. These changes have allowed for parents to arrange and plan better for their leave.

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<sup>413</sup> Section 26B (1) of the LLAA.

<sup>414</sup> Section 26B(3) of the LLAA.

<sup>415</sup> D Visser(2018)

<sup>416</sup> Ibid.

<sup>417</sup> Section 29(8) of the EA of 2007

While the change is welcomed and long overdue, most people perceive the provisions as limited and restrictive since they do not cater for all parental arrangements.

Kenya has made progress by providing 14 days of paid paternity leave but is still nowhere on par with Sweden in terms of family policy. The goal is to ensure all genders enjoy equal periods of paternity and maternity leave.

“In Kenya female employees are entitled to three months’ maternity leave while male employees have to do with the two weeks’ paternity leave.”<sup>418</sup> The same policies are enacted in South Africa. Paternity leave in Kenya is secluded for men which gives the impression that the law is discriminatory to certain parenting arrangements. While Kenya has benefited a lot from international support of gender equality, the legislation for the policy has not been successfully implemented.

It has been established that both Sweden and the UK provide valuable lessons for South Africa. South Africa’s economy is still developing and so it cannot match the Swedish or UK level of development. Paternity leave in Sweden, the UK and Kenya is paid leave. In South Africa paternity leave is unpaid and subsidised by the government. If the country chose to extend paternity leave or take up paid leave, it may end up being a burden to an already strained economy. Over time however, this could change given the resolution for 10 days of paternity leave given by the government.

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<sup>418</sup> M Momanyi(2015).

## **CHAPTER 5**

### **SUMMARY AND CONCLUSION**

#### **5.1 Introduction:**

The BCEA benefits were only available to mothers, whilst fathers and parents of the same sex were denied paid benefits as well as parental leave. This was seen as discriminatory and unfair since some parents were given equal benefits regardless of their sex, gender or sexual orientation. This chapter focuses on summarising the research questions posed in the first chapter of the dissertation.

The main research question to be addressed in this dissertation is:

Do the new amendments as set out under the LLAA provide adequately for the right to paternity leave in the South African workplace?

In answering the above question the following secondary questions were asked:

5.1.1 What is the current legal framework on paternity leave in South Africa?

5.1.2 Are the amendments to the BCEA a step in the right direction?

5.1.3 How does the South African legal framework compare to foreign jurisdiction?

Below is a summary of the above research questions.

#### **5.2 What is the current legal framework on paternity leave in South Africa?**

The LLAA was signed into law by President Cyril Ramaphosa on the 23<sup>rd</sup> of November 2018. The amendments to the BCEA were implemented in January 2020. The Act now allows surrogate and adoptive parents to take up leave for at least ten weeks as long as the child is below 2 years. More importantly, working fathers in South Africa can now get ten days of paternity leave after the birth of their child.

The three categories of leave is unpaid, however individuals can claim benefits from the UIF where they will receive up to “66% of their income which is subject to the maximum threshold in terms

of the UIA”.<sup>419</sup> While the ten days may not be considered sufficient, the legislation can build on it slowly to give parents more time for childrearing. According to the NGO Mosaic, they state that “while ten days is insufficient, it is a starting point to more days in the future.”<sup>420</sup> Post-birth needs of the mother, plus the necessary bonding between father and child will have to be planned into the ten days of paternity leave while being a realistic expectation from Parliament.<sup>421</sup>

Evidence from global research indicates that “parental leave provisions are ideal in addressing societal gender equality issues and are providing working fathers with a chance to participate in parental responsibilities.”<sup>422</sup>

Better relationships between children and their fathers are developed when a father takes longer leave, compared to fathers who take shorter leave.<sup>423</sup> Growing the relationship between father and child can be influenced by the length of paternity leave given.<sup>424</sup>

The LLAA has introduced parental leave and now fathers are able to spend time with their new born children with the 10 days of paternity leave that they are entitled to. Over time, the legal system will focus on better durations for paternity leave. South Africa is the first country in Sub-Saharan Africa to avail parental leave benefits to surrogate and adoptive parents allowing for convenience for all family types.<sup>425</sup> More support needs to be provided to men to address the challenges faced during the approach to fatherhood.

### **5.3 Are the amendments to the BCEA a step in the right direction?**

The LLAA is a progressive Act given that it focuses on strengthening the family unit through adoption leave and parental benefits.<sup>426</sup> The Act also seeks to increase harmony and equity in the

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<sup>419</sup> Section 8(c) of the LLAA.

<sup>420</sup> M Govender (2015).

<sup>421</sup> Ibid.

<sup>422</sup> CG Field et al. (2012).

<sup>423</sup> Ibid.

<sup>424</sup> Ibid.

<sup>425</sup> E Makumbi(2018)

<sup>426</sup> N Cloete (2018).

family level as it embraces gender neutral values.<sup>427</sup> The changes made in South African law are also seen as advanced in that most countries in Africa only allocate 3 or 5 days of paternity leave to fathers.<sup>428</sup>

South African employees have heralded the new laws. Trade Union COSATU has also supported the changes made claiming that “this was a long-fought victory for workers, parents, children and families across South Africa.”<sup>429</sup> The Union encourages eligible parents to exercise the right and apply for the parental leave while insisting that individuals should use it for the expected purpose which is allowing for the mother’s recovery and caring for the new born.<sup>430</sup>

#### **5.4 How does the South African legal framework compare to foreign jurisdiction?**

In spite of the guidelines provided by regional and international organisations on parental leave, different countries still hold personalised and cultural stands on the matter. Looking at the nature of parental leave in developed countries like Sweden one can note that policies that increase father involvement in the child’s life are good for the family and the society in general. This dissertation was focused on analysing legislated leave in South Africa as compared to Sweden, the UK, and Kenya. Sweden can be said to be the leader in efficiency of paternity leave provisions. Shared-parental leave policy has greatly improved the Swedish society through introducing a higher female workforce participation, more father-child engagement, a destruction of gender stereotypes and improved equality across the country.<sup>431</sup>

The UK introduced laws that grant fathers time off work for them to spend time with their children on birth or adoption, and elaborate the benefits of parental leave to the entire family.<sup>432</sup> Specialised systems are needed to ensure employees and employers agree on parental leave with regard to the stipulated duration in the constitution. Such systems are in place in the UK and in Sweden thus promoting gender equality in parental leave systems. These systems also help in increasing father-child time which is crucial in the growth and normal development of all children. This allows for

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<sup>427</sup> Ibid.

<sup>428</sup> [Skillsportal.co.za](http://Skillsportal.co.za) (2018).

<sup>429</sup> S Mtshali (2019).

<sup>430</sup> Ibid.

<sup>431</sup> D Visser(2018).

<sup>432</sup> Ibid.

the new born to enjoy care from both parents and does not suffer from poor parental care in the event of a deceased or ill parent. South Africa and Kenya are quite far from achieving the ideal parental leave models that have been emulated by both Sweden and the UK.

The changes to South African legislation in terms of the LLAA has been influenced by the “changes in the contemporary society, and the need for fathers to interact and spend time with their children.”<sup>433</sup> Companies can be active participants in reducing employees’ working hours, offering flexible hours and/or providing options on working from home.<sup>434</sup>

More importantly, the Constitution in South Africa should always be taken into consideration when addressing family concerns. The right to equality and the child’s best interests should be placed first in deciding the appropriate hours of paternity leave. Paternity leave for fathers is very critical in creating the bond between them and their children while also meeting the needs of the child that are key in growth and development. Paid paternity leave can reassure South African fathers that the State appreciates and values their role in raising their children.<sup>435</sup> The LLAA will assist South Africa in adhering to national and international regulations stipulating the elimination of gender stereotypes, promotion of the child’s best interests, advocating for equality and nondiscrimination and protection of the family unit.

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<sup>433</sup> T Head (2018).

<sup>434</sup> E Makumbi (2018).

<sup>435</sup> Polity (2018c).

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