

***Parental Leave Reimagined:  
What the Van Wyk Judgment Means for employers and employees***

## Lessons for Employers and Employees from the *Van Wyk* Judgment

Employers and employees across South Africa have, for many years, operated under a parental leave framework that distinguished sharply between different categories of parents. Birth mothers enjoyed extended leave, while fathers, adoptive parents, and commissioning parents were afforded significantly less time off.

The Constitutional Court has now addressed this imbalance in *Van Wyk and Others v Minister of Employment and Labour*, (2025) 46 ILJ 2811 (CC); 2026 (1) SA 38 (CC) (3 October 2025) bringing clarity to how parental leave should be understood in a modern workplace.

### The Legal Framework

South Africa's parental leave regime is primarily regulated by the Basic Conditions of Employment Act (BCEA) and the Unemployment Insurance Act (UIF Act). These statutes historically provided different forms and durations of leave depending on whether a parent was a birth mother, father, adoptive parent, or commissioning parent.

The Court was asked to determine whether this differentiated approach was constitutionally permissible.

### The Issue Before the Court

The applicants challenged the parental leave provisions on the basis that they:

- Unfairly favoured birth mothers over other parents;
- Discriminated against fathers, adoptive parents, and commissioning parents;
- Failed to recognise that caregiving responsibilities can be shared; and
- Limited adoption leave based on the age of the adopted child.

The central question was whether these distinctions were consistent with the constitutional rights to equality, dignity, and the best interests of the child.

## What the Court Decided

The Constitutional Court found that the existing parental leave framework was unconstitutional, as it unfairly discriminated between parents and reinforced outdated assumptions about caregiving roles.

While Parliament has been given 36 months to amend the legislation, the Court introduced interim measures that apply in the meantime. These measures move the law towards a more equal and flexible parental leave system, recognising that parenting and caregiving are not limited to one parent or one family structure.

## Practical Meaning of the Judgment

The Court made it clear that:

- Parental leave should not be determined solely by biology;
- All parents should have a meaningful opportunity to bond with and care for their children; and
- Workplace policies must reflect fairness and equality rather than rigid categories.

Although the statutory wording has not yet been amended, the principles set out by the Court already apply.

## Key Lessons from the Judgment

- Parental leave must be approached in a more inclusive and flexible manner;
- Employers should avoid policies that automatically favour one parent over another;
- Public sector employers, municipalities, and SOEs must act consistently with constitutional principles of equality and fairness;
- Employees now have stronger grounds to challenge unfair parental leave practices; and
- Waiting for legislative amendments may expose employers to legal risk.

## What Employers Should Do

Employers are advised to:

- Review and update parental leave policies;
- Train HR practitioners and managers on the implications of the judgment;
- Avoid blanket refusals of parental leave requests; and
- Seek legal advice when dealing with complex parental leave arrangements.

## Conclusion

The *Van Wyk* judgment represents a significant step towards aligning South African labour law with contemporary family realities. It confirms that parental leave is not only about time off work, but about equality, dignity, and the best interests of children.

At Majang Attorneys, we advise employers and employees on navigating these developments, updating workplace policies, and managing compliance risks in an evolving labour law environment.

