

The protection of paternity leave and related rights for employed fathers under the Labour Laws Amendment Act 10 of 2018

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SOLEMN DECLARATION

I **Elfas Torerai**, hereby declare that the dissertation entitled: **The protection of paternity leave and related rights for employed fathers under the Labour Laws Amendment Act 10 of 2018**, is submitted in partial fulfilment of the requirements for the Master of Laws (LLM) degree at North West University (NWU). The dissertation is the product of my research and opinion except where otherwise it is stated and expressly acknowledged and I have not previously, in its entirety or in part, submitted it to any other university for any qualification.

Signature of Candidate:

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Signed aton this day of 2019

Declared before me on this day of

Signature of Supervisor.....

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Glory and honour go to God for His never failing grace. He gave me life, health, strength, and courage to see this dissertation through. May He continue to guide and direct the script of my life and all that I find myself doing.

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It is better to hear the rebuke of the wise than for a man to hear the song of fools

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Above all, I thank my family for the invaluable support received through it all. We will always win together. God bless!

DEDICATION

To my wife

And

Our children

Rutendo, Rukudzo and Ruponeso

ABSTRACT

South Africa's employment history has very little written about employed fathers compared to records about working mothers. However, fathers have been out in the workplace, away from home, longer than mothers have. During the apartheid era, the migrant labour system forced fathers to work in areas far away from homes. They only visited their families once a year. The migrant labour system entrenched a perception that fathers are breadwinners while mothers look after the home and care for the children. The system forced fathers to put careers ahead of parental inclinations. When mothers began joining the workplace, policy makers quickly came up with leave entitlements like maternity leave. However, there is no paternity leave for fathers. It is argued that leave entitlements extended to fathers are inadequate. The *Basic Conditions of Employment Act* introduced the family responsibility leave that gave fathers a paltry three days off to care for their families. The *Labour Laws Amendment Act* repeals the family responsibility leave and provides parental leave. Parental leave extends leave days available to fathers from three to ten. Family responsibility leave and parental leave and their respective benefits are incomparable to those of maternity leave. Fathers and mothers are now present in the workplace, yet fathers are absent at home. Some families are dual-earners with a father and mother both employed and sharing economic contribution to the home. The *Constitution of the Republic of South Africa*, the *Labour Relations Act*, the *Employment Equity Act*, and the two laws mentioned above seek to establish fair labour practices in South Africa. They promote equal pay for work of equal value, and equal opportunity for the same qualification for employed fathers and mothers. However, the researcher submits that there is reluctance in relation to equal leave entitlements for fathers and mothers so that they complement each other in meeting their parental obligations. The researcher argues that employed fathers in South Africa are a neglected group that does not have policy protection to care for their families while keeping their jobs.

Key-words: Paternity leave, migrant labour, dual-earners, employed fathers, parental obligations

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CHAPTER ONE

RESEARCH OUTLINE

1.1 Introduction

The *Labour Laws Amendment Act*¹ provides new leave policies and related benefits to both male and female employees in the South African workplace. The *Amendment Act* amends the *Basic Conditions of Employment Act*² to, *Inter alia*, provide parental leave, adoption leave, and commissioning parental leave to employees. The *Amendment Act* also amends the *Unemployment Insurance Act*³ to, amongst others, regulate parental leave benefits and commissioning parental leave benefits paid through the Unemployment Insurance Fund (UIF). The *Amendment Act* was promulgated in 2018, and it commenced operation on 1 March 2019.⁴

Some lawyers and the media in South Africa have generally presented the *Amendment Act* as the paternity leave provision that recognises the care needs of employed fathers.⁵ Consequently, a perception has been created that South Africa has a paternity leave policy. As such, this research sets out to investigate whether the *Amendment Act* provides protection of paternity leave and related rights. Paternity leave can be defined as a specific leave entitlement available to an employed father at the birth of his baby or adoption of a child.⁶ Paternity leave enables a working father to take time off work to bond with a newly born baby and

¹ 10 of 2018 (*Amendment Act*) sections 3 and 11.

² 75 of 1997 (*BCEA*) sections 25A-25C.

³ 63 of 2001 (*UIA*) sections 29A-29C.

⁴ Item 1 of GN R509 in GG 42345 of 28 March 2019.

⁵ Mphaphuli T and Bhengu V 2019 *South African Dads Are Finally Getting Paid Paternity Leave* <https://bothacopo.co.za/wp-content/uploads/2019/01/South-African-Dads-Are-Finally-Getting-Paid-Paternity-Leave.pdf> accessed 20 May 2019.

⁶ Lancaster L and Cohen T "Leave for Working Fathers in the SADC Region" 2015 *Industrial Law Journal* 2474, 2476; see also International Labour Organisation (ILO) *Maternity and Paternity at Work: Law and Practice Across the World* (International Labour Office, Geneva 2014) 52.

assist his wife while she recovers from the physiological effects of birth.⁷ The father's presence at the time of birth is crucial in encouraging breastfeeding, helping with birth registration, and taking care of other children in the family.⁸ Often, the law seems to have downplayed the evolving role of fathers in the home and has not kept abreast with the reality that fathers are staying at home to take care of their young children.⁹ Halverson¹⁰ argues that fathers who participate in child-care establish closer and more satisfying relationships with their children. A father has a huge role in bonding and shaping the development of his child or children, which in turn helps sharpen the father's parental skills.¹¹

In addition, paternity leave potentially improves job prospects for women. Amin, Islam, and Sakhonchik¹² submit that where paternity leave is enforced, employers are likely to change attitudes on upskilling women employees. The reason for the change in attitudes is that men can equally be away doing child-care duties, freeing women to be in the workplace.¹³ One argues that paternity leave is a necessity for the achievement of equality between men and women, both at home and at the workplace. However, in South Africa, women have largely assumed the role of caregivers while men have the responsibility to fend for their families economically.¹⁴

⁷ Dancaster L "State Measures Towards Work-Care Integration in South Africa" in Mokomane Z (ed) *Work-Family Interface in Sub-Saharan Africa: International Perspectives on Social Policy, Administration and Practice* (Springer International Publishing Switzerland 2014) 185.

⁸ ILO *Maternity and Paternity at Work: Law and Practice Across the World* 52; Dancaster and Cohen 2015 *Industrial Law Journal* 2476.

⁹ Smit R "The Changing Role of the Husband/Father in the Dual-Earner Family in South Africa" 2002 *Journal of Comparative Family Studies* 401, 403-404; Karr JE "Where's My Dad: A Feminist Approach to Incentivized Paternity Leave" 2017 *Hastings Women's Law Journal* 225, 225-226.

¹⁰ Halverson C "From Here to Paternity: Why Men Are Not Taking Paternity Leave under the Family and Medical Leave Act" 2003 *Wisconsin Women's Law Journal* 257, 257-258.

 Morrell R and Richter L "Introduction" in Richter L and Morrell R (eds) *baba: Men and Fatherhood in South Africa* (HSRC Press Cape Town, 2006) 6; Halverson 2003 *Wisconsin Women's Law Journal* 257-258.

¹² Amin M, Islam A and Sakhonchik A "Does Paternity Leave Matter for Female Employment in Developing Economies? Evidence from Firm-Level Data" 2016 *Applied Economics Letters* 1145, 1145-1146.

¹³ Smit 2002 *Journal of Comparative Family Studies* 403; see further Amin, Islam and Sakhonchik 2016 *Applied Economics Letters* 1147-1148.

¹⁴ Hosking A "Men, Work and Parenting" in Richter L and Morrell R (eds) *Baba: Men and Fatherhood in South Africa* (HSRC Press, Cape Town 2006) 216; Dancaster L and Cohen T "Workers With Family Responsibilities: A Comparative Analysis to Advocate for the Right to Request Flexible Working Arrangements in South Africa" 2010 *South African Journal of Labour Relations* 31, 31-32.

Given the above, the researcher seeks to evaluate if the *Amendment Act* accords reasonable protection of paternity leave and attendant rights for employed fathers in South Africa.

1.2 Background of study

In November 2018, President Cyril Ramaphosa signed the *Amendment Act* into law. The *Amendment Act* provides ten consecutive days parental leave to an employed parent who is not the primary caregiver of a newborn baby or adopted child.¹⁵ The parental leave provision is expressed in gender-neutral terms, and it amends section 27 of the *BCEA*, so that family responsibility leave no longer applies.¹⁶ The *Amendment Act* also amends the *UIA* to provide for the right to claim parental and commissioning parental benefits from the Unemployment Insurance Fund (UIF).¹⁷ Nonetheless, there is no express provision for paternity leave in the *Amendment Act*, and this potentially highlights the fact that South Africa still has a long way to go in recognising the care roles of fathers. For the purposes of this research, the background on the protection of paternity leave and related rights was traced from 1994 to 2019. The chosen period covers the time when South Africa became a democracy. It is important to investigate how leave policies relevant to fathers have developed since then.

The *Amendment Act* came at a time when the South African society is facing a care crisis.¹⁸ The crisis emanates from the fact that employed parents hardly have enough time to take care of their children. Put differently, there is an imbalance in the demands of work and parenting for employees with children. Yet the concept of work-life balance has transcended its narrow origin of the 1970s, where it was only

¹⁵ Section 3 of the *Amendment Act*; section 25A of the *BCEA*; Rycroft A and Duffy CG "Parental Rights: Progress but Some Puzzles" 2019 *Industrial Law Journal* 12.

¹⁶ Section 4 of the *Amendment Act*, section 27 of the *BCEA*; Rycroft and Duffy 2019 *Industrial Law Journal* 12.

¹⁷ Section 11 of the *Amendment Act*; sections 29A-29C of the *UIA*; Rycroft and Duffy 2019 *Industrial Law Journal* 17-18.

¹⁸ Dancaster "State Measures Towards Work-Care Integration in South Africa" 177; Dancaster and Cohen 2010 *South African Journal of Labour Relations* 32-33.

relevant for women with children, to cover both employed fathers and mothers.¹⁹ Cohen and Gosai²⁰ describe work-life balance as the ability of an employee to sufficiently control how, where, and when he or she works in meeting family responsibilities and paid work obligations. Striking a balance between remunerated work and care responsibilities has become an international priority due to the realisation that work and family domains do not operate in isolation.²¹ South Africa labour laws governing the reconciliation of work and care duties for employed parents have largely excluded sufficient leave for fathers of newly born babies and newly adopted children.²²

The *Labour Relations Act*²³ and the *BCEA*²⁴ are explicit in their provision for maternity leave and related rights, but there is no distinct paternity leave.²⁵ The *BCEA* compels employers to consider working time for each employee who has family responsibilities.²⁶ It also grants a fully paid three days of family responsibility leave once in an annual cycle.²⁷ For the first time in South Africa, an employed father could take three days off at the birth of a child, when the child is sick or when a close family member dies.²⁸ However, the family responsibility leave is subject to such a father working at least four days a week and having been employed for more

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- ¹⁹ Cohen T and Gosai N "Making a Case for Work-Life Balance for the South African Employee" 2016 *Industrial Law Journal* 2237, 2239-2240.
- ²⁰ Cohen and Gosai 2016 *Industrial Law Journal* 2237; see also Waumsley JA, Houston DM and Marks G "What About Us? Measuring the Work-Life Balance of People Who do not Have Children" 2010 *Review of European Studies* 3, 3-4.
- ²¹ Dancaster and Cohen 2010 *South African Journal of Labour Relations* 31-32.
- ²² Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 31; Behari A "The effects of the Labour Laws Amendment Bill 2017 on Shared Parental Responsibilities" 2018 *Industrial Law Journal* 2148, 2149.
- ²³ 66 of 1995 (*LRA*), see sections 186 and 187; Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 31.
- ²⁴ Section 25 of the *BCEA*; Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 31.
- ²⁵ Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 31; Dancaster "State Measures Towards Work-Care Integration in South Africa" 185.
- ²⁶ Section 7(d) of the *BCEA*; Cohen and Dancaster 2009 *Stellenbosch Law Review* 232.
- ²⁷ Section 27 of the *BCEA*; Collier D, Fergus E, Cohen T, Du Plessis M, Godfrey S, Le Roux R and Singlee S *Labour Law in South Africa: Context and Principles* (Oxford University Press Southern Africa (Pty) Limited Cape Town 2018) 155; Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 31.
- ²⁸ Section 27(2) of the *BCEA*; Collier *et al Labour Law in South Africa: Context and Principles* 155.

than four months.²⁹ The employer could also request proof of birth before granting the employed father family responsibility leave.³⁰ The family responsibility leave lapses once the annual leave cycle ends.³¹ Yet, this provision was the biggest step South Africa took in providing for paternity leave. Notwithstanding this, the provision is not mandatory, and it provides too short a period for an employed father to care for a newborn baby or a recovering mother.³²

The *Employment Equity Act*³³ was enacted to give effect to the equality clause in the *Constitution*.³⁴ Its purpose is to promote affirmative action, equal access to opportunities, and fair treatment of all employees.³⁵ The *EEA* bars direct or indirect unfair discrimination by any person on listed grounds, including gender, pregnancy and family responsibilities.³⁶ The *EEA* empowers working fathers to demand equal treatment with working mothers when it comes to family leave entitlements. However, such equality claim will not suffice where there is a justifiable cause in differentiating fathers and mothers through legislation and a legitimate government purpose.³⁷ There are grounds for disparate treatment of employed fathers and mothers, but the question remains whether incomparable care-related leave entitlements for men and women is one such reason.

²⁹ section 27(1) of the *BCEA*; Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 31; Collier *et al Labour Law in South Africa: Context and Principles* 155.

³⁰ Section 27(5) of the *BCEA*; Collier *et al Labour Law in South Africa: Context and Principles* 155.

³¹ Section 27(6) of the *BCEA*; Collier *et al Labour Law in South Africa: Context and Principles* 155.

³² Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 31; Dancaster and Cohen 2010 *South African Journal of Labour Relations* 33.

³³ Section 2 of the *EEA*.

³⁴ Section 9 of the *Constitution*; Cohen T and Dancaster L "Family Responsibility Discrimination Litigation – A Non-Starter? 2009 *Stellenbosch Law Review* 221, 225.

³⁵ Section 2(a) and (b) of the *EEA*; see also section 5 of the *EEA*.

³⁶ section 6 of the *EEA*; Huysamen E "Women and Maternity: Is there Truly Equality in the Workplace Between Men and Women, and Between Women Themselves?" in Malherbe K and Sloth-Nielsen J *Labour Law Into the Future: Essays in Honour of D'Arcy du Toit* (Juta Claremont 2012) 59.

³⁷ Section 6 of the *EEA*; Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 32-33.

1.3 Statement of the problem

This research sets out to investigate whether the existing South African labour law framework provides equitable protection of paternity leave and related rights for employed fathers. Many countries across the world have taken steps to amend their labour law provisions to specifically provide for paternity or paternal leave and related rights.³⁸ Employed fathers in South Africa face increasing demands to meet family care responsibilities, and the perception of a male worker who is available to work long hours without nurturing duties to distract him is changing.³⁹ A number of economic, social and demographic factors affecting the home and the workplace require employed fathers and mothers to strike a balance between remunerated work and unpaid family care duties.⁴⁰

Many women have joined men in paid work, challenging the assumption that South African households have a male breadwinner and a female housemaker.⁴¹ The lived reality in South Africa suggests dual-career and dual-earner models, where both a father and a mother are employed and bring income into the home.⁴² The prevailing labour law leave provisions seem to fall short of reflecting the need for balanced work and care duties, particularly for employed fathers in South Africa. It seems that fathers have neither been given an equitable opportunity to participate in homemaking and child-care nor accorded legal protection to do so.⁴³ Granting maternity leave without the corresponding paternity leave serves to perpetuate

³⁸ Field CG, Bagraim JJ and Rycroft A "Parental Leave Rights: Have Fathers Been Forgotten and Does it Matter?" 2012 *South African Journal of Labour Relations* 30, 30-31; Dancaster L and Baird M "Workers with Care Responsibilities: Is Work-Family Integration Adequately Addressed in South African Labour Law?" 2008 *Industrial Law Journal* 22, 22-23.

³⁹ Cohen and Dancaster 2009 *Stellenbosch Law Review* 221, 221-222; Smith B "Not the Baby and the Bathwater: Regulatory Reform for Equality Laws to Address Work-Family Conflict" 2006 *Sydney Law Review* 689, 694.

⁴⁰ Dancaster and Baird 2008 *Industrial Law Journal* 22-23; Dancaster and Cohen 2010 *South African Journal of Labour Relations* 31-32.

⁴¹ Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 30, 30-31; Cohen and Dancaster 2009 *Stellenbosch Law Review* 228.

⁴² Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 30-31; Dancaster and Cohen 2010 *South African Journal of Labour Relations* 31.

⁴³ Behari A "Daddy's Home: The Promotion of Paternity Leave and Family Responsibilities in the South African Workplace" 2016 *Obiter* 346, 348; Dancaster and Baird 2008 *Industrial Law Journal* 22; Martin N "Fathers and Families: Expanding the Familial Rights of Men" 1986 *Syracuse Law Review* 1265, 1266.

family imbalances created by gender assumptions and stereotypes.⁴⁴ The existing leave framework needs reform lest it renders academic ideals the *Amendment Act*⁴⁵ attempts to achieve.

1.4 Research question

Does the current labour law statutory framework provide equitable protection of paternity leave and related rights for employed fathers in South Africa?

1.5 Rationale and justification

The *Amendment Act*⁴⁶ is premised on the idea that the existing leave policies in the South African workplace do not adequately cover the rights of parents who are not primary carers of newly born or adopted children. The *Amendment Act* seeks to give an entitlement of at least ten consecutive days' parental leave and related benefits to an employed parent.⁴⁷ The new leave provisions and attendant rights are meant to give employees time off to be with their children. In particular, the *Amendment Act* seeks to close the gap in South African labour laws that have failed to provide sufficient leave for fathers of newly born or adopted children.⁴⁸ The researcher discusses the strengths and shortcomings of the *Amendment Act* in regulating paternity leave and related rights. Recommendations on how the South African labour law framework can enhance the protection of paternity leave for working fathers are discussed.

⁴⁴ Behari 2016 *Obiter* 346-347; Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 38.

⁴⁵ Sections 3 and 11 of the *Amendment Act*; sections 25A-25C of the *BCEA*; sections 29A-29C of the *UIA*.

⁴⁶ Section 3 of the *Amendment Act*; section 25A of the *BCEA*; see further Rycroft and Duffy 2019 *Industrial Law Journal* 12; Behari 2018 *Industrial Law Journal* 2148-2149.

⁴⁷ Section 3 of the *Amendment Act*; section 25A of the *BCEA*; see also Rycroft and Duffy 2019 *Industrial Law Journal* 12-13; Behari 2018 *Industrial Law Journal* 2152.

⁴⁸ Behari 2018 *Industrial Law Journal* 2149; see also Rycroft and Duffy 2019 *Industrial Law Journal* 12-13.

1.6 Literature review

Burkstrand-Reid⁴⁹ argues that central to the issue of paternity leave is the ability of working fathers to redefine the concept of masculinity, resist societal pressure, and adapt to change. Burkstrand-Reid⁵⁰ posits that most families have dual earners, and employed fathers need not just pay bills but get involved in parenting too. The researcher shares these sentiments and argues that there is need for employed fathers to adapt to the changing economic and social realities for them to be effective both at work and at home.

Van Jaarsveld⁵¹ argues that the roles of men and women are changing at the workplace and at home, raising the need for both men and women to take leave for childcare purposes. Van Jaarsveld⁵² further calls for laws that provide equal treatment of men and women in the workplace, and give additional cover for women with infants while upholding the child-rearing roles of working fathers. The researcher argues that such laws need to provide for longer paternity leave for employed fathers in South Africa.

Van Jaarsveld⁵³ said the three days paid family responsibility leave and even the ten days parental leave available to working fathers in South Africa in an annual cycle is not enough. A short leave for fathers projects the stereotype that it is the duty of women to care for small children. Van Jaarsveld⁵⁴ points out that parents should be left to choose who does care work. In addition, they should be assured that they can return to the same or similar position at work when their leave ends. While this is

⁴⁹ Burkstrand-Reid BA "Dirty Harry Meets Dirty Diapers: Masculinities, At-Home Fathers, and Making the Law Work for Families" 2012 *Texas Journal for Women & Law* 1, 3-4.

⁵⁰ Burkstrand-Reid 2012 *Texas Journal for Women & Law* 4; Behari 2016 *Obiter* 348; Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 38.

⁵¹ Van Jaarsveld MI "Parental Leave: For the Sake of Employees and Their Children: A Comparative Study" 2002 *South African Mercantile Law Journal* 399, 399-400; Meier CG "Protecting Parental Leave: A Fundamental Rights Model" 1997 *Willamette Law Review* 177.

⁵² Van Jaarsveld 2002 *South African Mercantile Law Journal* 418; Meier 1997 *Willamette Law Review* 177.

⁵³ Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 31; Van Jaarsveld 2002 *South African Mercantile Law Journal* 418.

⁵⁴ Van Jaarsveld 2002 *South African Mercantile Law Journal* 418-419; Behari 2016 *Obiter* 347.

noble, the researcher argues that there is a danger in that the majority of fathers may choose to remain at work than do unpaid care work. A law that makes it mandatory for working fathers to take care-related leave is a better option.

Rycroft and Duffy⁵⁵ are of the view that the ten days parental leave in the *Amendment Act* is necessary because working fathers are becoming aware of the supportive roles beyond financial provision to the family. According to Rycroft and Duffy,⁵⁶ the changing mind-set of working fathers improves father-mother and father-child relationships, encourages gender equality, and extends many benefits to the workplace. The researcher shares this view and argues that while the *Amendment Act* provides ten days parental leave, the time is too short for society to benefit fully from a longer leave provision for working fathers.

Dancaster⁵⁷ submits that there is need for a distinct paternity leave to clearly give its purpose and encourage employed fathers to use it. Smit⁵⁸ suggests that fathers who use paternity leave take more responsibilities in domestic chores, child-care and are more emotionally present in their marriages. Behari⁵⁹ is of the view that maternity leave without a corresponding paternity leave entrenches the stereotype that women are caregivers while fathers/men are breadwinners. The researcher argues that in advocating for paternity leave, the idea is not to transpose maternity leave to working fathers. The experience of women and men differ, and the differences should inform the nature of the maternity or paternity leave. The researcher

⁵⁵ Rycroft and Duffy 2019 *Industrial Law Journal* 14; Johannsson T "Fatherhood in Transition: Paternity Leave and Changing Masculinities" 2011 *Journal of Family Communication* 165, 176-178.

⁵⁶ Rycroft and Duffy 2019 *Industrial Law Journal* 14; Cools S, Fira J and Kirkebøen "Causal Effects of Paternity Leave on Children and Parents" 2015 *Scandinavian Journal of Economics* 801, 802; Miyajima T and Yamaguchi H "I Want to but I Won't: Pluralistic Ignorance Inhibits Intentions to Take Paternity Leave in Japan" 2017 *Frontiers in Psychology* 1, 10; Bauling A "Maternity, Paternity and Parental Leave and the Best Interests of the Child *MIA v State Information Technology Agency (Pty) Ltd* [2015] JOL 33060 (LC) cases" 2016 *Obiter* 158, 166; Behari 2018 (39) *Industrial Law Journal* 2151, 2151-2152.

⁵⁷ Dancaster "State Measures Towards Work-Care Integration in South Africa" 178; Dancaster and Cohen 2010 *South African Journal of Labour Relations* 34.

⁵⁸ Smit 2002 *Journal of Comparative Family Studies* 36(1) 401-415 401; Dancaster "State Measures Towards Work-Care Integration in South Africa" 186.

⁵⁹ Behari (2016) *Obiter* 346; Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 39.

suggests that there should be equity in leave provisions so that working fathers can balance employment demands and care responsibilities.

1.7 Scope and limitation of study

The focus of this research is to examine the protection of paternity leave and related rights for employed fathers in South Africa in terms of provisions in the *Amendment Act*. The *Amendment Act* is the latest law that regulates leave policies for employees in the South African workplace. Where necessary, reference was made to other South African laws that provide for paternity leave rights since 1994. The provision of paternity leave is a labour issue affecting many countries across the world, but this research focuses on South Africa only. This is a mini-dissertation, and the decision to focus only on South Africa is to give a comprehensive picture of how paternity leave is regulated. Therefore, the research is not a comparative study.

The focus of this research is on working men who are either biological or adoptive fathers of their children. The idea is to examine the impact of paternity leave on working fathers with a family where there is a wife and a child or children. A family, comprising a father, mother, and biological or adopted children remains the natural and fundamental unit upon which an orderly home, community, and society is built on, and it should be protected both by the society and the state.⁶⁰ The South African family structure has suffered enormous pressure and setbacks during the apartheid era, and this research elicits on what the state has or is doing for the family institution since 1994.

1.8 Research methodology

This research is a qualitative study based on literature review. The researcher used legislation, journal articles, case law and books that are relevant to the topic under discussion. Where applicable, reference was made to relevant websites for

⁶⁰ Article 16(3) of the Universal Declaration of Human Rights; also see Article 15 of the Code on Social Security in the SADC.

information. For purposes of this research, the North West University *Potchefstroom Electronic Law Journal Referencing* (PER) style was used.

1.9 Relevance to research unit theme

This is a mini-dissertation under the Labour Law ancillary module that falls under the Finance, Trade, and Investment Research Unit of the Faculty Law. It is hoped that the final research findings will be contained in an LLM mini-dissertation and/or some parts of this research will be published as book chapters or journal articles.

1.10 Statement regarding ethics

This research uses a qualitative research method. All primary and secondary sources that are used are referenced and acknowledged fully. No individual or group interviews or questionnaires were used to hold discussions concerning any topics or issues that might be sensitive, embarrassing or upsetting. No criminal or other disclosures requiring legal action and having potential adverse effects, risk, or hazards for research participants were made in the course of the study. Therefore, there is no need for arrangements to be made in respect of insurance and/or indemnity to meet the potential legal liability of the North West University (NWU) for harm to participants arising from the conduct of the research. This research does not affect any person's rights directly or indirectly.

1.11 Framework (structure) of the mini dissertation

This mini dissertation comprises five chapters. Chapter One provides an outline of the research. Chapter Two lays out the historical background. Chapter Three discusses the South African statutory regulatory framework on leave for workers with family responsibilities. Chapter Four discusses the advantages and disadvantages affecting the protection of paternity leave and related rights for employed fathers in South Africa. Chapter Five provides recommendations and conclusions.

CHAPTER TWO

HISTORICAL ASPECTS OF PATERNITY LEAVE IN SOUTH AFRICA

2.1 Introduction

The provision of paternity leave rights to employed fathers can assist working fathers in South Africa to meet both remunerated work and family care responsibilities.⁶¹ For the purposes of this research, the term employed fathers refers to working fathers who are either biological or adoptive parents of children under the age of two years. The presence of a father in the family is crucial in fostering the needs for the economic and emotional wellbeing of the family.⁶² Makusha and Richter⁶³ argue that fathers' involvement from the time of conception up to age two of a child has far-reaching benefits in the development of the foetus and baby even in later years. The presence of a father during the first one thousand days equally brings a pillar of emotional, material and logistical support to a pregnant and nursing wife.⁶⁴ One way to assist working fathers to fulfil family care roles is to enact labour laws that offer paid paternity leave and care leave in cases where they have to care for their children.⁶⁵ This chapter examines the protection of paternity leave and related rights for employed fathers in South Africa from 1994 to 2019. South Africa

⁶¹ Feldman K, Gran BK "Is What's Best for Dads Best for Families: Paternity Leave Policies and Equity across Forty-Four Nations" 2016 *Journal of Sociology and Social Welfare* 95, 95-96; Dancaster and Cohen 2010 *South African Journal of Labour Relations* 31, 31-32; Van Jaarsveld 2002 *South African Mercantile Law Journal* 399, 399-400.

⁶² Richter L "The Importance of Fathering for Children" in Richter L and Morrell R (eds) *Baba: Men and Fatherhood in South Africa* (HSRC Press Cape Town 2006) 61-63; Ratele K and Nduna M "An Overview of Fatherhood in South Africa" in Van den Berg W and Makusha T *State of South Africa's Fathers 2018* (Sonke Gender Justice & Human Sciences and Research Council 2018) 33-35; Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 30, 30-31.

⁶³ Makusha T and Richter L "Father Involvement in the First 1,000 Days" in in Van den Berg W and Makusha T *State of South Africa's Fathers 2018* (Sonke Gender Justice & Human Sciences and Research Council 2018) 49-52; Field, Bagraim and Rycroft 2010 *South African Journal of Labour Relations* 34-35.

⁶⁴ ILO *Maternity and Paternity at Work: Law and Practice Across the World* 52; Makusha and Richter "Father Involvement in the First 1,000 Days" 53-54.

⁶⁵ Makusha and Richter "Father Involvement in the First 1,000 Days" 54-55; Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 38-39; Dancaster and Cohen 2012 *South African Journal of Labour Relations* 33-34.

became a democracy in 1994, and it is important to investigate how labour laws have protected paternity leave up to 2019.

2.2 Cultural influences on paternity leave

There are cultural aspects that continue to prevent the effective involvement of fathers in domestic care duties.⁶⁶ Some of the cultural aspects emanate from entrenched practices that keep fathers away from the presence of their wives during pregnancy and even a few months after birth.⁶⁷ The perceived or real violent behaviour of fathers and failure by men to meet their culturally assigned roles are cited as some of the reasons why fathers are not entrusted with care responsibilities.⁶⁸ Equally, socially accepted patriarchal norms that portray women as caregivers and men as breadwinners stand in the way of fathers enjoying parental duties.⁶⁹ There are institutional barriers too. For instance, there is little to none campaigns focusing on men's roles from the period of conception to the early years of a child's life.⁷⁰ As a result, it is assumed that beyond providing for the family economically, fathers have no real impact on the wellbeing of the family institution.

The case of *President of the Republic of South Africa and Another v Hugo*⁷¹ illustrates that even the South African government and courts accept that fathers do not raise children. The facts of the case are that the President invoked the *Presidential Act* to release all mothers who had children under the age of 12 from

⁶⁶ Dancaster and Cohen 2010 *South African Journal of Labour Relations* 32-33; Smith 2006 *Sydney Law Review* 697-698; Makusha and Richter "Father Involvement in the First 1,000 Days" 55; Hosking A "Men, Work and Parenting" 216-217.

⁶⁷ Ramphele M and Richter L "Migrancy, Family Dissolution and Fatherhood" in in Richter L and Morrell R (eds) *Baba: Men and Fatherhood in South Africa* (HSRC Press, Cape Town 2006) 74-76; Makusha and Richter "Father Involvement in the First 1,000 Days" 55; Hosking "Men, Work and Parenting" 216-217.

⁶⁸ Ramphele and Richter "Migrancy, Family Dissolution and Fatherhood" 78-79; Makusha and Richter "Father Involvement in the First 1,000 Days" 55.

⁶⁹ Makusha and Richter "Father Involvement in the First 1,000 Days" 55; Cunningham M "Changing Attitudes toward the Male Breadwinner, Female Homemaker Family Model: Influences of Women's Employment and Education over the Lifecourse" 2008 *Social Forces* 299, 299-300.

⁷⁰ Ramphele and Richter "Migrancy, Family Dissolution and Fatherhood" 79-80; Makusha and Richter "Father Involvement in the First 1,000 Days" 55.

⁷¹ 1997 (6) BCLR 708 (CC)(*Hugo* case) para 2; Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 30, 32-35.

South African prisons.⁷² One prisoner, a father to a son under the age of 12, applied to be released to care for the son since the mother had died. However, the prisoner failed on his bid on the grounds that he was a man. The prisoner then challenged the decision to release of mothers alleging that it discriminated against fathers. The Constitutional Court held that the discrimination was fair since it was for a legitimate government purpose. The court further indicated that the release of mothers with children under the age of 12 was to promote mothers' primary function as care-givers.⁷³ The *Hugo* case shows the deep-seated perception that mothers are primary care-givers in families.

2.3 Effects of migrant labour on paternity leave

Upon attaining political freedom in 1994, South Africa inherited a migrant labour system that separated fathers from their wives and children, particularly in black African families.⁷⁴ The migrant labour system is the root of absent fathers that society still struggles with to date.⁷⁵ In turn, absent fatherhood has far-reaching implications on the psychological and economic wellbeing of children.⁷⁶ The period from 1994 posed a challenge on South Africa to acknowledge and develop policies to allow employed fathers and mothers to meet work and family care obligations.⁷⁷ The need arose for new gender-equitable labour policies that encouraged both working

⁷² *Hugo* case, para 2; Behari 2016 *Obiter* 346, 355-356.

⁷³ *Hugo* case, para 70; Behari 2016 *Obiter* 355-356; Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 32-33.

⁷⁴ Posel D and Devey R "The Demographics of Fathers in South Africa: An Analysis of Survey Data, 1993-2002" in Richter L and Morrell R (eds) *Baba: Men and Fatherhood in South Africa* (HSRC Press Cape Town 2006) 44-45; Ramphele and Richter "Migrancy, Family Dissolution and Fatherhood" 73-76; Rabe M "A Historical Overview of Fatherhood in South Africa" in Van den Berg W and Makusha T *State of South Africa's fathers 2018* (Sonke Gender Justice and HSRC 2018) 18-23.

⁷⁵ Ratele K "An Overview of Fatherhood in South Africa" in Van den Berg W and Makusha T *State of South Africa's fathers 2018* (Sonke Gender Justice and HSRC 2018) 18-23; Richter "The Importance of Fathering for Children" 57-58.

⁷⁶ Richter "The Importance of Fathering for Children" 53-55; Ramphele and Richter "Migrancy, Family Dissolution and Fatherhood" 74-75; Ratele "An Overview of Fatherhood in South Africa" 42-43.

⁷⁷ Cohen and Gosai 2016 *Industrial Law Journal* 2240; Eikhof DR, Warhust C and Haunschild A "Introduction: What Work? What Life? What Balance? Critical Reflections on the Work-Life Balance Debate" 2007 *Employee Relations* 325, 325-326.

fathers and mothers to be involved parents.⁷⁸ It follows that the changing profile of the South African workplace necessitated the protection of both men and women employees. Therefore, the provision of paternity leave as a direct and deliberate policy to assist fathers in meeting family care needs became more relevant after 1994.⁷⁹ The changing political circumstances in South Africa needed to transform the nature and image of fatherhood, bringing about a crop of men who are more involved in the welfare of their families.⁸⁰

Nonetheless, very little in terms of legislative provisions shows that South Africa had the appetite to align new laws with the demands of a changing workplace.⁸¹ The *Constitution*⁸² rightly contains the Bill of Rights that guarantees gender equality and fair labour practices. The Bill of Rights provides a framework to shape new labour laws under the democratic era. However, the researcher argues that no obligation was placed on policy formulators to prioritise the integration of work and family responsibilities for employed fathers and mothers. The absence of an express obligation to regulate work-family dynamics perpetuated traditional norms that it is acceptable to grant maternity leave to working mothers without a corresponding paternity leave because fathers do not provide care to children.⁸³ In addition, the apartheid workplace inequalities on family care duties for working parents largely remained intact, creating gender inequalities.⁸⁴

⁷⁸ Feldman and Gran 2016 *Journal of Sociology and Social Welfare* 95-96; Makusha and Richter "Fatherhood Involvement in the First 1,000 Days" 49-52.

⁷⁹ Feldman and Gran 2016 *Journal of Sociology and Social Welfare* 96; Rabe "A Historical Overview of Fatherhood in South Africa" 21-23; Ramphele and Richter "Migrancy, Family Dissolution and Fatherhood" 74-75.

⁸⁰ Richter "The Importance of Fathering for Children" 63-64; Morrell R and Richter L "Introduction" in Richter L and Morrell R (eds) *Baba: Men and Fatherhood in South Africa* (HSRC Press, Cape Town 2006) 8-9.

⁸¹ Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 30; Cohen and Dancaster 2009 *Stellenbosch Law Review* 222.

⁸² Sections 9(3) and 23 of the *Constitution*; Behari 2016 *Obiter* 348.

⁸³ Dupper O "Maternity Protection in South Africa: An International and Comparative Analysis (Part Two)" 2002 *Stellenbosch Law Review* 83, 90-91; Behari 2016 *Obiter* 348; Cohen and Gosai 2016 *Industrial Law Journal* 2243-2245.

⁸⁴ Richter "The Importance of Fathering for Children" 57-58; Behari 2016 *Obiter* 348; Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 37-38.

2.4 Paternity Leave in the period women joined the workplace

After 1994, the number of women who joined paid work in South Africa increased.⁸⁵ Although men had traditionally been assumed to be family breadwinners and were expected to work fulltime, the involvement of women in the workplace challenged this conception. The definition of a worker, who was usually a male without family care duties, no longer applied.⁸⁶ The long-held assumption of a breadwinner father and a homemaker mother started to change, and the need arose for both men and women to be able to meet the demands of paid work and care responsibilities.⁸⁷

Changes in the profile of the workplace necessitated changes in labour laws too. The need arose for policies that are friendly to workers, both men, and women. The coming of women to the workplace meant that married men and working fathers had to take up care work at home too. As a necessity, the new labour policies were supposed to factor in this new reality and make it possible for employed fathers and mothers to thrive both at work and home.⁸⁸ Some families had a father and a mother both employed. The changing workplace profile required a national debate leading to a policy framework that promotes family time for both fathers and mothers.⁸⁹ However, it appears that legislation developed in South Africa focused more on employed women than it did on working fathers.⁹⁰ Consequently, the focus on employed mothers resulted in little or no recognition and protection of paternity leave and related rights for employed fathers in South Africa.

⁸⁵ Cohen and Gosai 2016 *Industrial Law Journal* 2237, 2239-2240; Cohen and Dancaster 2009 *Stellenbosch Law Review* 221-222.

⁸⁶ Cohen and Gosai 2016 *Industrial Law Journal* 2243; Dancaster and Cohen 2010 *South African Journal of Labour Relations* 31-32; Smith 2006 *Sydney Law Review* 697.

⁸⁷ Cunningham M "Changing Attitudes toward the Male Breadwinner, Female Homemaker Family Model: Influences of Women's Employment and Education over the Lifecourse" 2008 *Social Forces* 299, 299-301; Cohen and Gosai 2016 *Industrial Law Journal* 2243-2244.

⁸⁸ Cohen and Gosai 2016 *Industrial Law Journal* 2239-2240; Dex S and Scheibl F "Business Performance and Family-Friendly Policies" 2000 *Journal of General Management* 22.

⁸⁹ Dancaster and Baird 2008 *Industrial Law Journal* 22, 24; Dancaster and Cohen 2010 *South African Journal of Labour Relations* 40-41.

⁹⁰ Behari 2016 *Obiter* 348; Dupper 2002 *Stellenbosch Law Review* 83, 90-91; Morrell R "Fathers, Fatherhood and Masculinities in South Africa" in Richter L and Morrell R (eds) *Baba: Men and Fatherhood in South Africa* (HSRC Press, Cape Town 2006) 18-21.

2.5 Legal developments and paternity leave 1994-2019

Since 1994, South Africa has provided limited care-related leave for employed fathers. Nonetheless, the *Constitution of the Republic of South Africa*⁹¹ clearly provides for gender equality and guarantees fair labour practices in the workplace. Inherent in the rights to gender equality and fair labour practices is the recognition of working fathers having equal rights to working mothers. Legislation like the *Labour Relations Act*,⁹² the *BCEA*⁹³ and the *employment Equity Act*⁹⁴ give expression to fair labour practices and equal treatment of employees in line with the *Constitution*. The *LRA* and the *BCEA* clearly state that their purpose is to promote fair labour practices while the *EEA* seeks to advance the equal and fair treatment of all employees and employers.⁹⁵ The *LRA*⁹⁶ is South Africa's primary labour law enacted to give effect to provisions in the *Constitution*. While it provides for the rights to equality, freedom of association and fair labour practices, the *LRA* is silent on the regulation of work-care responsibilities.⁹⁷ The *EEA* gives effect to the rights to fair labour practices and to promote equal opportunities and eliminate unfair discrimination in the workplace respectively.⁹⁸ Essentially, the *Constitution* and the *EEA* acknowledge that inequalities exist in the South African workplace.⁹⁹ However, among these inequalities, the imbalance in leave policies for working fathers and mothers is not one of them. Despite the political and socio-economic changes since 1994, the provision of leave for working fathers did not feature as a priority. One can argue that the legislature's attention seems to have been on redressing workplace racial imbalances and elevating women in managerial positions.

⁹¹ Sections 9(3) and 23 of the *Constitution of the Republic of South Africa* 1996 (the *Constitution*); Behari 2016 *Obiter* 348.

⁹² 66 Of 1995 (*LRA*), sections 1 and 3.

⁹³ Section 2 of the *BCEA*.

⁹⁴ 55 of 1998 (*EEA*), sections 2 and 3.

⁹⁵ Section 1(a) and (b) of the *LRA*; section 2(a) and (b) of the *BCEA*; section 2(a) of the *EEA*; Behari 2016 *Obiter* 348.

⁹⁶ Sections 1 of the *LRA*; section 23 of the *Constitution*; Collier *et al Labour Law in South Africa: Context and Principles* 28.

⁹⁷ Sections 8, 17 and 27 of the *LRA*; Collier *et al Labour Law in South Africa: Context and Principles* 29; Behari 2016 *Obiter* 349.

⁹⁸ Section 2(a) of the *EEA*; Behari 2016 *Obiter* 348.

⁹⁹ Section 9 of the *Constitution*; section 6 of the *EEA*.

2.6 Family responsibility leave and what it provides

Since 1997, the *BCEA*¹⁰⁰ provided the now repealed three days family responsibility leave that both fathers and mothers of newly born or adopted children could claim. This was the closest working fathers in South Africa had to paternity leave at the time. The family responsibility leave allowed an employed father to apply for three days off at the birth or adoption of a child, sickness of a child, death of a spouse or life partner, parent, grandparent, child or adopted child, grandchild, and sibling.¹⁰¹ Besides the three days family responsibility leave, a working father could use his annual leave to care for a newborn or adopted child.¹⁰² Behari¹⁰³ argues that family responsibility leave is too broad in its scope that it cannot be described as a form of paternity leave. Field, Bagraim, and Rycroft¹⁰⁴ submit that the family responsibility leave was available only once in an annual cycle regardless of family care related matters that may require a working father's presence. Moreover, the three days leave was too short for a working father to establish a relationship with a new child and attend to the needs of the family around the time of birth or adoption of a baby.¹⁰⁵ An employee also qualified for family responsibility leave after having worked for an employer for a minimum of four days a week for more than four months, and many other conditions curtailed its availability to working fathers.¹⁰⁶ As

¹⁰⁰ Section 27(1) of the *BCEA*; Behari 2016 *Obiter* 349; Van Jaarsfeld MI "Parental Leave: For the Sake of Employees and Their Children: A Comparative Study" 2002 *South African Mercantile Law Journal* 399, 400; Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 31.

¹⁰¹ Section 27(2)(a), (b) and (c) of the *BCEA*; Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 37-38; Dancaster "State Measures Towards Work-Care Integration in South Africa" 185; Behari 2016 *Obiter* 349.

¹⁰² Huysamen "Women and Maternity: Is there Truly Equality in the Workplace Between Men and Women, and Between Women Themselves?" 73-74; Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 31; Behari 2016 *Obiter* 349.

¹⁰³ Behari 2016 *Obiter* 349; Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 31; Dancaster "State Measures Towards Work-Care Integration in South Africa" 185-186.

¹⁰⁴ Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 31; Dancaster "State Measures Towards Work-Care Integration in South Africa" 185-186; Dancaster and Baird 2008 *Industrial Law Journal* 35-36.

¹⁰⁵ Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 31; Behari 2016 *Obiter* 349-350; Dancaster "State Measures Towards Work-Care Integration in South Africa" 185-186; Dancaster and Baird 2008 *Industrial Law Journal* 35-36.

¹⁰⁶ Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 31; Huysamen "Women and Maternity: Is there Truly Equality in the Workplace Between Men and Women, and Between Women Themselves?" 66-67; Behari 2016 *Obiter* 349; Dancaster "State Measures Towards Work-Care Integration in South Africa" 186.

a result, family responsibility leave did not promote family care responsibilities for working fathers in South Africa.

Meanwhile, the *Unemployment Insurance Act*¹⁰⁷ accords adoption leave benefits to adoptive employees, but only one parent is eligible to claim. The condition for a successful claim is that the adoption process must be done in line with requirements set out in the *Child Care Act*.¹⁰⁸ The requirements are that the period for which the adopting parent was not at work is spent caring for the child, the adopted child is below the age of two and that the application for adoption benefits meets *UIA* provisions.¹⁰⁹ The adopting parent only gets adoption leave after a competent court grants an adoption order.¹¹⁰ However, Dancaster¹¹¹ argues that the *BCEA*, which is supposed to provide for adoption leave, is silent both in its maternity and family responsibility leave provisions. Therefore, it is argued that before the 2018 amendments, the *UIA* and the *BCEA* functioned at cross purpose. The *BCEA* did not give effect to the adoption leave as provided for in the *UIA*. Consequently, adoption leave did not enhance caring roles for working fathers because it was ineffectual.

2.7 The White Paper on Families in South Africa and paternity leave

In 2012, the Department of Social Development¹¹² published the *White Paper on Families in South Africa* to advance the socio-economic wellbeing of families. The *White Paper on Families* openly called for the introduction of paternity leave for

¹⁰⁷ 63 of 2001 (*UIA*) section 27(1); Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 31-32; Behari 2016 *Obiter* 350-351; Dancaster "State Measures Towards Work-Care Integration in South Africa 180-181.

¹⁰⁸ 74 of 1983 (*Child Care Act*) section 21; Behari 2016 *Obiter* 350-351; Dancaster "State Measures Towards Work-Care Integration in South Africa 180-181.

¹⁰⁹ Section 27(1)(a)-(d) of the *UIA*; section 21 of the *Child Care Act*; Dancaster "State Measures Towards Work-Care Integration in South Africa 180-181; Behari 2016 *Obiter* 350-351.

¹¹⁰ Section 27(2) of the *UIA*; Behari 2016 *Obiter* 350-351; Dancaster "State Measures Towards Work-Care Integration in South Africa 180-181.

¹¹¹ Sections 25 and 27 of the *BCEA*; Dancaster "State Measures Towards Work-Care Integration in South Africa 180-181; Rycroft and Duffy 2019 *Industrial Law Journal* 17-18.

¹¹² Department of Social Development, 2012 *White Paper on Families in South Africa (White Paper on Families)* <http://www.dsd.gov.za/index> accessed 3 April 2019 39-40; Behari 2016 *Obiter* 360; Behari 2018 *Industrial Law Journal* 2148, 2150-2151.

working fathers to enhance the stability of families in South Africa.¹¹³ At policy level, the *White Paper on Families* is the first government instrument to push for paternity leave as one way South Africa can stimulate shared parental responsibilities for employed fathers and mothers.¹¹⁴ Once fathers and mothers establish gender equality in the household, chances of gender equality at the workplace are enhanced. Behari¹¹⁵ argues that paternity leave, as proposed in the *White Paper on Families*, would evenly spread parental care duties between fathers and mothers. Furthermore, the *White Paper on Families* advocates for policies and laws that make it possible for fathers to balance their breadwinning and caring roles.¹¹⁶ It further proposes the inclusion of paternity leave as an amendment to the *BCEA*, and for more rigorous enforcement of parental support in South African workplaces.¹¹⁷ Field, Bagraim and Rycroft¹¹⁸ submit that there is evidence to show that countries that have changed their parental leave entitlements have witnessed improved gender equality as fathers get more involved in family care duties. Therefore, the *White Paper on Families* proposes equal parenting and paid work opportunities for employed fathers and mothers.

2.8 Parental leave and its provisions

In 2018, the *Amendment Act* was enacted to amend the *BCEA* and the *UIA*. The *Amendment Act* does not provide for paternity leave but parental leave.¹¹⁹ The new

¹¹³ Department of Social Development <http://www.dsd.gov.za/index> 39-40; Behari 2016 *Obiter* 360; Behari 2018 *Industrial Law Journal* 2150-2151.

¹¹⁴ Department of Social Development <http://www.dsd.gov.za/index> 40-41; Behari 2016 *Obiter* 360-361; Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 39.

¹¹⁵ Behari 2016 *Obiter* 360-361; Dancaster and Cohen 2015 *Industrial Law Journal* 2476-2477; Behari 2018 *Industrial Law Journal* 2150-2151.

¹¹⁶ Department of Social Development <http://www.dsd.gov.za/index> 39-41; Behari 2016 *Obiter* 360-361, Rycroft and Duffy 2019 *Industrial Law Journal* 13-15, Behari 2018 *Industrial Law Journal* 2150; International Labour Organisation (ILO) *Maternity and Paternity at Work: Law and Practice Across the World* (International Labour Office, Geneva 2014) 52.

¹¹⁷ Department of Social Development <http://www.dsd.gov.za/index> 41-43; Behari 2016 *Obiter* 360; Rycroft and Duffy 2019 *Industrial Law Journal* 13-15; Behari 2018 *Industrial Law Journal* 2150-2151.

¹¹⁸ Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 39; Rycroft and Duffy 2019 *Industrial Law Journal* 13-15; O'Brien M and Wall K "Fathers on Leave Alone: Setting the Scene" in O'Brien M and Wall K (eds) *Comparative Perspectives on Work-Life Balance and Gender Equality: Fathers on Leave Alone* (Springer Open 2017) 1-3.

¹¹⁹ Section 3 of the *Amendment Act*; section 25A of the *BCEA*; Rycroft and Duffy 2019 *Industrial Law Journal* 12, 12-13; Behari 2018 *Industrial Law Journal* 2148, 2152-2153.

leave policy grants ten consecutive days off to an employed parent of a newly born baby or adopted child.¹²⁰ The parental leave provision repeals the three days family responsibility leave that no longer applies.¹²¹ Parental leave is gender-neutral, and can be made available to either an employed father or mother who is not the primary nurturer of a newborn baby or adopted child.¹²² Parental leave appears to be the biggest step taken by South African lawmakers to provide care-related leave for working fathers, but it is not paternity leave. Behari¹²³ argues that parental leave differs from paternity leave in that paternity leave exclusively applies to working fathers. However, the *Amendment Act* implies that parental leave is available to a parent who is not a primary care-giver.¹²⁴ This potentially perpetuates the perception that mothers remain primary nurturers of children, and fathers can only be a second layer of support. It is this gendered perception that has placed value in fathers' roles as breadwinners than as parents.¹²⁵ Among new leave policies it introduces, the *Amendment Act* adds adoption leave to the *BCEA*.¹²⁶ Parental leave and adoption leave provisions are designed to help working fathers meet their paid work and family care responsibilities.¹²⁷

2.9 Conclusion

The discussion above demonstrates that South Africa does not have paternity leave despite attempts to promote the rights of working fathers since 1997. The exclusive provision of maternity leave to working mothers without a corresponding paternity leave for working fathers has created an imbalance on employees with family

¹²⁰ Section 3 of the *Amendment Act*; section 25A of the *BCEA*; Rycroft and Duffy 2019 *Industrial Law Journal* 12-13; Behari 2018 *Industrial Law Journal* 2152-2153.

¹²¹ Section 3 of the *Amendment Act*; sections 25A and 27 of the *BCEA*; Rycroft and Duffy 2019 *Industrial Law Journal* 12; Behari 2018 *Industrial Law Journal* 2152-2153.

¹²² Section 3 of the *Amendment Act*; section 25A of the *BCEA*; Rycroft and Duffy 2019 *Industrial Law Journal* 17; Behari 2018 *Industrial Law Journal* 2152-2153.

¹²³ Behari 2018 *Industrial Law Journal* 2152-2153; Behari 2016 *Obiter* 347; Dancaster and Baird 2008 *Industrial Law Journal* 34.

¹²⁴ Section 3 of the *Amendment Act*; sections 25A and 25 of the *BCEA*; Rycroft and Duffy 2019 *Industrial Law Journal* 17; Behari 2018 *Industrial Law Journal* 2152-2153.

¹²⁵ Behari 2018 *Industrial Law Journal* 2150-2151; ILO *Maternity and Paternity at Work: Law and Practice Across the World* 52.

¹²⁶ Section 3 of the *Amendment Act*; sections 25A(2) and 25B of the *BCEA*; Behari 2018 *Industrial Law Journal* 2153-2155; Rycroft and Duffy 2019 *Industrial Law Journal* 19-21.

¹²⁷ Behari 2018 *Industrial Law Journal* 2160-2161; Rycroft and Duffy 2019 *Industrial Law Journal* 25; ILO *Maternity and Paternity at Work: Law and Practice Across the World* 116.

responsibilities.¹²⁸ As a result, current leave policies seem to lessen the role of fathers as carers, yet they appear to magnify fathers' breadwinning functions. The dominant expectation present in society and the legislation seems to project that working fathers are inclined more to their paid vocation than caring for their families. The *Amendment Act* provides parental leave that at least accords fathers a chance to request ten consecutive days away from work to be with their newly born babies or adopted children. However, the ten days leave pales insignificantly when compared to at least four consecutive months maternity leave for working mothers. The following chapters further examine the current leave provisions on the regulation of paternity leave in South Africa.

¹²⁸ Behari 2018 *Industrial Law Journal* 2150; Rycroft and Duffy 2019 *Industrial Law Journal* 23-25.

CHAPTER THREE

STATUTORY REGULATORY FRAMEWORK FOR PATERNITY LEAVE IN SOUTH AFRICA

3.1 Introduction

Paternity leave is a brief period of leave for an employed father soon after the birth of his baby or adoption of a child.¹²⁹ Paternity leave allows a working father time off from work to be of service to his spouse, the newly born child, and to invest in the emotional, social, and moral duties of parenting to his family.¹³⁰ Cools, Fiva and Kirkebøen,¹³¹ describe paternity leave as a catalyst to enable gender equality both at home and at the workplace. Paternity leave allows fathers to be there for mothers who will be recovering from physiological effects of childbirth, help in encouraging breastfeeding, attend to the newborn babies and other children, and be there to register the birth or adoption of a child, amongst other family-related duties.¹³² Paternity leave is provided either as a separate entitlement for fathers only or can be included in leave policies like parental leave.¹³³ South Africa does not have a separate provision for paternity leave.¹³⁴ The first leave entitlement ascribed to working fathers is the repealed three days family responsibility leave provided in

¹²⁹ Dancaster and Baird 2008 *Industrial Law Journal* 34-36; Motaung LL, Bussin MHR and Joseph RM "Maternity and Paternity Leave and Career Progression of Black African Women in Dual-Career Couples" 2017 *South African Journal of Human Resource Management* 1, 4-5; International Labour Organisation (ILO) "Maternity and Paternity at Work: Law and Practice Across the World" 52-60.

¹³⁰ Wall K "Fathers on leave alone: Does it make a difference to their lives?" 2014 *Fathering: A Journal of Theory, Research, & Practice about Men as Fathers* 196, 198; Moss P (ed) *International Review of Leave Policies and Related Research 2013* (International Network on Leave Policies and Related Research, London 2013) 2 and 12.

¹³¹ Cools S, Fiva JH and Kirkebøen LJ "Causal effects of paternity leave on children and parents." 2015 *The Scandinavian Journal of Economics* 801, 801-802; also see Wall 2014 *Fathering: A Journal of Theory, Research, & Practice about Men as Fathers* 198.

¹³² Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 30, 30-31; ILO www.ilo.org/maternityprotection 52; Dancaster "State Measures Towards Work-Care Integration in South Africa" 185.

¹³³ Dancaster and Cohen 2010 *South African Journal of Labour Relations* 31, 33-34; Dancaster and Baird 2008 *Industrial Law Journal* 34-35; ILO *Maternity and Paternity at Work* 52.

¹³⁴ Dancaster and Cohen 2010 *South African Journal of Labour Relations* 33-34; see Dancaster "State Measures Towards Work-Care Integration in South Africa" 185-186.

terms of the *BCEA*.¹³⁵ Despite the 2018 amendment to the *BCEA*, South Africa still does not have paternity leave. Instead, the *Amendment Act*¹³⁶ entitles working fathers to ten consecutive days of parental leave available to employees who are not primary caregivers of their children. Unlike the family responsibility leave that was fully paid by the employer, parental leave comes with parental benefits that are paid through the *Unemployment Insurance Act*¹³⁷ subject to a successful application.

The Minister of Labour determines the amount paid out as parental benefits in terms of the *UIA*.¹³⁸ However, a father can only claim parental benefits if he is not claiming adoption or commissioning parental benefits. Moreover, for a working father to qualify for parental benefits, he ought to have been employed for a period of not less than 13 weeks on the date of application.¹³⁹ The cap on the benefits is that the amount received cannot exceed that which a father would normally receive if he was not on parental leave.¹⁴⁰ In addition, a father only has access to parental benefits if he is registered on the child's birth certificate in line with the *Births and Deaths Registration Act*.¹⁴¹ While the requirements may deter working fathers from applying for parental benefits, it appears to ensure that fathers who claim do so genuinely because they are parents and they care for their children's welfare.

Employers have generally accepted to grant maternity leave to women. However, the same employers seem reluctant to accord paternity leave to working fathers. It appears there is an assumption embedded in the South African workplace that fathers are available to an employer on a fulltime basis making them better suited

¹³⁵ Section 27 of the *BCEA*, section 27; see Dancaster "State Measures Towards Work-Care Integration in South Africa" 185-186; Motaung, Bussin and Joseph 2017 *South African Journal of Human Resource Management* 4.

¹³⁶ Section 3 of the *Amendment Act*; section 25A of the *BCEA*; see Behari 2018 *Industrial Law Journal* 2148, 2152-2153.

¹³⁷ 63 of 2001 (hereafter the *UIA*), see section 27(1); Rycroft and Duffy 2019 *Industrial Law Journal* 12, 17-18.

¹³⁸ Section 11 of the *Amendment Act*; section 26A of the *UIA*; Rycroft and Duffy 2019 *Industrial Law Journal* 17-19.

¹³⁹ Section 11 of the *Amendment Act*; section 26A(5) of the *UIA*; Rycroft and Duffy 2019 *Industrial Law Journal* 17-19.

¹⁴⁰ Section 11 of the *Amendment Act*; section 23A(3) of the *UIA*; Rycroft and Duffy 2019 *Industrial Law Journal* 18-19.

¹⁴¹ 51 of 1992; Rycroft and Duffy 2019 *Industrial Law Journal* 18-19.

for paid work than women.¹⁴² Gender-based assumptions ascribe to women the principal carer role resulting in poor social acceptance and development of fathers as capable caregivers for their families.¹⁴³ However, the South African workplace gender composition has considerably changed as many women continue to join the paid labour force, posing a challenge to the gender assumptions mentioned above.¹⁴⁴ Women have become part of the workplace that used to be a preserve for men, and they play a significant role in the economic welfare of the family.

After 1994, government and employers focused more on redressing racial and employment equity demands with no priority given to working fathers' caring roles.¹⁴⁵ Despite the absence of legislation that provides paternity leave, the reality is that a growing number of employed fathers in South Africa are significantly involved in family care duties and that cannot continue to be ignored.¹⁴⁶ This chapter discusses how the *Constitution of the Republic of South Africa*,¹⁴⁷ the *LRA*,¹⁴⁸ the *BCEA*,¹⁴⁹ the *EEA*,¹⁵⁰ and the *Amendment Act*¹⁵¹ influence the provision of leave policies for working fathers in South Africa.

¹⁴² Smith 2006 *Sydney Law Review* 689-690; Huysamen "Women and Maternity: Is there Truly Equality in the Workplace Between Men and Women, and Between Women Themselves?" 46.

¹⁴³ Behari 2018 *Industrial Law Journal* 2150; McGlynn C "Reclaiming a Feminist Vision: The Reconciliation of Paid Work and Family Life in European Union Law and Policy" 2001 *Columbia Journal of European Law* 241, 241-242; Smith 2006 *Sydney Law Review* 690.

¹⁴⁴ Dancaster and Cohen 2010 *South African Journal of Labour Relations* 31, 32-33; Smith 2006 *Sydney Law Review* 690; Cohen and Dancaster 2009 *Stellenbosch Law Review* 221-222.

¹⁴⁵ Budlender D and Lund F "South Africa: A legacy of family disruption" 2011 *Development and Change* 925, 928-930; Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 31-33; Cohen and Dancaster 2009 *Stellenbosch Law Review* 221-222.

¹⁴⁶ Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 30-31; Karr JE "Where's My Dad: A Feminist Approach to Incentivized Paternity Leave" 2017 *Hastings Women's Law Journal* 225, 226-227; McGinley AC "Work, Caregiving, and Masculinities" 2011 *Seattle University Law Review* 703, 704-705.

¹⁴⁷ *Constitution of the Republic of South Africa*, 1996 (the *Constitution*), see sections 9 and 23, 231, 233.

¹⁴⁸ Section 2(2)(b) of the *LRA*.

¹⁴⁹ Sections 2, 25, 25A and 27 of the *BCEA*.

¹⁵⁰ Sections 2 and 6 of the *EEA*.

¹⁵¹ sections 3 and 4 of the *Amendment Act*.

3.2 Constitutional aspects of paternity leave

The *Constitution* is the supreme law in South Africa. It underpins labour law by guaranteeing equal treatment of all people, including workers who previously suffered unfair discrimination.¹⁵² Although paternity leave is not mentioned in the *Constitution*, one argues that it forms part of the equality vision that seeks to correct the structural and material disadvantages suffered by working fathers in the past.¹⁵³ The *Constitution*¹⁵⁴ also grants the right to fair labour practices to employees and employers to make sure the workplace protects the rights of workers and employers, even the rights to leave. The unfair discrimination emanated in labour policies and practices that disparately treated workers on the grounds of race, sex, and gender. Unfortunately, working fathers, particularly African men, appear to have been at a disadvantage when it comes to legal protection on grounds of family responsibility. Prior to 1994, the migrant labour system separated African fathers from their families for eleven months and restricted their family care duties to less than four weeks per annum.¹⁵⁵ On the other hand, white men largely remained with their families and maintained the family unity as seen even to date.¹⁵⁶ One can argue that there could be room for paternity leave in recognition of working fathers' roles as parents within the constitutional vision of fair labour practices.

The researcher argues that the same way the constitutional vision has given room for leave policies like maternity leave, family responsibility leave, and parental leave, it can also accommodate paternity leave. It is important to have legislation that provides paternity leave to restore the damages caused by the migrant labour

¹⁵² Section 9(3) of the *Constitution*; also see Rycroft A "Obstacles to Employment Equity: The Role of Judges and Arbitrators in the Interpretation and Implementation of Affirmative Action Policies" 1999 *Industrial Law Journal* 1411, 1411-1412.

¹⁵³ Phooko MR and Radebe SB "Twenty-Three Years of Gender Transformation in the Constitutional Court of South Africa: Progress and Regression" 2016 *Constitutional Court Review* 306, 308-311.

¹⁵⁴ Section 23(1) of the *Constitution*; Collier *et al Labour Law in South Africa: Context and Principles* 32.

¹⁵⁵ Budlender and Lund 2011 *Development and Change* 928-929; Ramphele and Richter "Migrancy, Family Dissolution and Fatherhood" 74-76.

¹⁵⁶ Bosch A, De Bruin GP, Kgaladi B and De Bruin K "Life role salience among black African dual-career couples in the South African context" 2012 *The International Journal of Human Resource Management* 2835, 2836-2837.

system during the apartheid years. Democracy has not changed family patterns much, for the majority of African fathers remain distant in their relationship with their wives and children.¹⁵⁷ Paternity leave could be part of the solution to encourage fathers to be emotionally attached to their families and re-establish family values.

3.3 The LRA and paternity leave

The *LRA*¹⁵⁸ is South Africa's principal labour law that seeks, amongst others, to democratise the workplace. The *LRA* does not explicitly provide for paternity leave. Nonetheless, the Act protects the rights of employees who have family responsibilities.¹⁵⁹ The *LRA* says it is automatically unfair dismissal if an employer terminates the employment of an employee for reasons related to gender, sex, family responsibilities, among other reasons.¹⁶⁰ It seems that the preferred interpretation of *LRA* provisions is the one that guards against the exploitation of female employees.¹⁶¹ However, the same provisions can reasonably be interpreted to cover the unfair dismissal of both male and female employees.¹⁶² Therefore, it follows that the *LRA* equally protects working fathers against unfair discrimination in the workplace on the grounds of gender, sex and family responsibilities. As was argued above, before 1994, most of the African fathers in South Africa did not have the liberty to exercise their family responsibilities due to the migrant labour system,

¹⁵⁷ Budlender and Lund 2011 *Development and Change* 928-929; Ramphela and Richter "Migrancy, Family Dissolution and Fatherhood" 74-76.

¹⁵⁸ Section 1 of the *LRA*; also see Basson AC, Christianson MA, Garbers C, Le Roux PAK and Strydom EML *The New Essential Labour Law Handbook* 6thed (Labour Law Publications CC Centurion 2017) 269; Collier *et al Labour Law in South Africa: Context and Principles* 33-35.

¹⁵⁹ Section 187(1)(f) of the *LRA*; Huysamen "Women and Maternity: Is there Truly Equality in the Workplace Between Men and Women, and Between Women Themselves?" 58-59; Basson *et al The New Essential Labour Law Handbook* 109-110.

¹⁶⁰ Section 187(1)(f) of the *LRA*; Collier *et al Labour Law in South Africa: Context and Principles* 33-34; Huysamen "Women and Maternity: Is there Truly Equality in the Workplace Between Men and Women, and Between Women Themselves?" 58-59; Basson *et al The New Essential Labour Law Handbook* 109-110.

¹⁶¹ Section 187 of the *LRA*; Dancaster and Baird 2008 *Industrial Law Journal* 22; Huysamen "Women and Maternity: Is there Truly Equality in the Workplace Between Men and Women, and Between Women Themselves?" 48.

¹⁶² Section 187 of the *LRA*; Huysamen "Women and Maternity: Is there Truly Equality in the Workplace Between Men and Women, and Between Women Themselves?" 48-49.

and the *LRA* is one vehicle to redress this anomaly.¹⁶³ One submits that the *LRA* provisions on automatically unfair dismissal fit into the constitutional imperative to promote equality, dignity and the right to fair labour practices.¹⁶⁴ Basson *et al*¹⁶⁵ argue that the rights to dignity and equality are central to the full realisation of equal protection, benefits and enjoyment of rights and freedom by both male and female employees. Therefore, the researcher argues that the *LRA* may not explicitly provide for the protection of paternity leave and related rights, but it caters for the welfare of working fathers. The *LRA* provides a framework for other labour laws to follow its guidelines in developing specific provisions that regulate leave policies for working fathers and mothers.

3.4 The BCEA and paternity leave

The *BCEA* regulates minimum conditions of employment in line with the aspirations of the *Constitution*.¹⁶⁶ The *BCEA*¹⁶⁷ provides for maternity leave and parental leave but does not mention paternity leave. In addition, the *BCEA*¹⁶⁸ provides for the right to maternity leave for employed mothers but does not have corresponding paternity leave for employed fathers. Consequently, the exclusion of paternity leave creates an imbalance in leave entitlements available to employees in the South African workplace. The absence of paternity leave poses questions on equal treatment of

¹⁶³ Section 2(2)(b) of schedule 7 of the *LRA*; Rycroft 1999 *Industrial Law Journal* 1411-1412; Collier *et al Labour Law in South Africa: Context and Principles* 33-34; Budlender and Lund 2011 *Development and Change* 928-929; Ramphela and Richter "Migrancy, Family Dissolution and Fatherhood" 74-76.

¹⁶⁴ Section 187 of the *LRA*; also see sections 9, 10 and 23 of the *Constitution*; Basson *et al The New Essential Labour Law Handbook* 109.

¹⁶⁵ Basson *et al The New Essential Labour Law Handbook* 109; also see Huysamen "Women and Maternity: Is there Truly Equality in the Workplace Between Men and Women, and Between Women Themselves?" 48-49.

¹⁶⁶ Section 2 of the *BCEA*; section 23 of the *Constitution*; also see Collier *et al Labour Law in South Africa: Context and Principles* 36-39; Behari A "Daddy's Home: The Promotion of Paternity Leave and Family Responsibilities in the South African Workplace" 2016 *Obiter* 346, 348-351.

¹⁶⁷ Sections 25 and 25A of the *BCEA*; see further Basson *et al The New Essential Labour Law Handbook* 85.

¹⁶⁸ Section 27 of the *BCEA*; Behari 2016 *Obiter* 348; Huysamen "Women and Maternity: Is there Truly Equality in the Workplace Between Men and Women, and Between Women Themselves?" 59-65.

male and female employees in South Africa.¹⁶⁹ For the sake of this research, discussion on the *BCEA* was done in two parts. The first part focuses on the Act before the 2018 amendments while the second part examines the *BCEA* after the amendments. This is done because the *Amendment Act* is discussed separately as a key focus of this research.

Before the 2018 amendments, the *BCEA* provided for the family responsibility leave that allows both men and women to apply for three days off to care for their families.¹⁷⁰ It is argued that the three days are not enough for a working father to meaningfully assist the birth mother and newly born baby or babies or adopted child. Moreover, an employed father could rely on this three days leave at the birth or death of a child, death of a partner, or any other close family member.¹⁷¹ The leave entitlement was too broad to be useful to a father who wants to bond with a newly born or adopted child. The three days were also available to an employed father once in an annual leave cycle subject to such father working four or more days per week.¹⁷² This restriction closed out fathers who were in part-time and atypical employment, making family responsibility leave available only to those in formal employment. The employed father should also have worked for at least four months for the same employer, and may be requested to provide proof to support his claim.¹⁷³ This was another restriction that left out fathers who had just been employed from the benefits of family responsibility leave. If a father had already claimed family responsibility leave, or if his application was unsuccessful, such a father could only rely on annual leave or unpaid leave to have time off for family

¹⁶⁹ Behari 2016 *Obiter* 348-349; Dancaster and Cohen 2010 *South African Journal of Labour Relations* 33-34; Huysamen "Women and Maternity: Is there Truly Equality in the Workplace Between Men and Women, and Between Women Themselves?" 48-49.

¹⁷⁰ Section 27 of the *BCEA*; Dancaster and Cohen 2010 *South African Journal of Labour Relations* 33-35; Dancaster "State Measures Towards Work-Care Integration in South Africa" 185-186.

¹⁷¹ Section 27 of the *BCEA*; Dancaster and Cohen 2010 *South African Journal of Labour Relations* 33; Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 30-31; Basson *et al The New Essential Labour Law Handbook* 85.

¹⁷² Section 27 of the *BCEA*; Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 30-31; Dancaster and Cohen 2010 *South African Journal of Labour Relations* 33.

¹⁷³ Section 27 of the *BCEA*; Dancaster and Cohen 2010 *South African Journal of Labour Relations* 33; Basson *et al The New Essential Labour Law Handbook* 85; Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 30-31.

care duties.¹⁷⁴ One submits that family responsibility leave unjustly limited the rights of working fathers to exercise their responsibilities as parents.

The *BCEA* also obligated employers to grant three days leave to an employee once in a year subject to a request from such an employee requesting the leave.¹⁷⁵ One feels that the requirement that a working father should request for family responsibility leave became a convenient scapegoat for some, leading to low take-up of the leave. Ideally, a father was supposed to give a notice on the day he takes the leave and the day of return to work as long as he supplies the relevant details. The *BCEA* permitted collective agreements to be reached between an employer and a trade union to vary the number of days from the stipulated three depending on the circumstances upon which the leave is requested.¹⁷⁶ For instance, a working father could negotiate with a trade union that he needed an elongated leave on the grounds that he needs to be there for a birth mother or baby who is hospitalised.

Furthermore, the *BCEA* compels employers to regulate the working time of employees who have family responsibilities.¹⁷⁷ This provision makes a case for employers to appreciate that fathers are parents too, and just like female employees, they need to be given time to meet family obligations. The Code of Good Practice on the Arrangement of Working Time¹⁷⁸ supports the *BCEA* in that it calls for shift rosters that accommodate the needs of employees who are pregnant, who breastfeed, or have family responsibility duties. Fathers may not fall pregnant or breastfeed, but they are a crucial part of the pregnancy and breastfeeding matrix; hence, they are covered under family responsibilities. The Code of Good Practice on

¹⁷⁴ Behari 2016 *Obiter* 349-350; Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 31.

¹⁷⁵ Section 27(2) of the *BCEA*; Behari 2016 *Obiter* 349-50; Dancaster and Cohen 2010 *South African Journal of Labour Relations* 33.

¹⁷⁶ Section 27(7) of the *BCEA* that states "A collective agreement may vary the number of days and the circumstances under which the leave is to be granted in terms of this section"; Behari 2016 *Obiter* 349-350.

¹⁷⁷ Section 7(d) of the *BCEA*; Dancaster and Cohen 2010 *South African Journal of Labour Relations* 33-35; Behari 2016 *Obiter* 350-351.

¹⁷⁸ Section 87(2) of the *BCEA*; Items 4.1, 4.2.6 and 5.6 of the Code of Good Practice on the Arrangement of Working Time; Behari 2016 *Obiter* 350-351.

the Integration of Employment Equity into Human Resource Policies and Practices¹⁷⁹ also provides that employers should grant adequate family responsibility leave to both male and female employees.

Nonetheless, the provision of family responsibility leave in the *BCEA* should not be misconstrued for paternity leave. In the way it was structured, family responsibility leave was too broad. The birth or adoption of a child was part of many components that did not necessarily require a working father to be there for his family.¹⁸⁰ The family responsibility leave was crucial in that although it did not specifically mention fathers, it opened the first real avenue for employed fathers to claim time off for family care. The shortcomings were that it was too short; it had stringent requirements like the fact that fathers had to provide proof of fatherhood. These and many other factors led to a low uptake of family responsibility leave. However, it set the tone for fathers to realise they can lay claim to better leave entitlements in the frame of maternity leave.

3.5 The Employment Equity Act and paternity leave

The *EEA*¹⁸¹ seeks to achieve equitable treatment of workers through correcting past disparities that disadvantaged black employees, women, and the disabled. One argues that while there is no express mention of paternity leave, employed fathers are covered under the black people category.¹⁸² Critical for this research is the *EEA*'s prohibition of workplace discrimination against any employee on the basis of family responsibility.¹⁸³ Family responsibility applies to both a working mother and an employed father in almost equal measure. The Act aptly describes family

¹⁷⁹ section 54(1) of the *EEA*; Item 4.2.6 of GN 1358 in GG 27866 of 4 August 2005; Behari 2016 *Obiter* 350-351.

¹⁸⁰ Dupper 2002 *Stellenbosch Law Review* 83, 89-92; see Van Jaarsveld "Parental Leave: For the Sake of Employees and Their Children: A Comparative Study" 2002 *South African Mercantile Law Journal* 401; Behari 2016 *Obiter* 349-350.

¹⁸¹ Section 2(1) and (2) of the *EEA*; Basson *et al* *The New Essential Labour Law Handbook* 231-232.

¹⁸² Section 1 of the *EEA*; Cohen and Dancaster 2009 *Stellenbosch Law Review* 223; Behari 2016 *Obiter* 351.

¹⁸³ Section 6 of the *EEA*; see also Behari 2016 *Obiter* 351; Cohen and Dancaster 2009 *Stellenbosch Law Review* 223.

responsibility as duties an employed father or mother has to a spouse, partner, dependent children, or members of the immediate family.¹⁸⁴ The tendency has been that the *EEA* seeks to ensure women have the same representation as that of men in the workplace.¹⁸⁵ However, that does not exclude the idea that working fathers can lay claim to provisions that address the parental matter.

Ideally, employers are compelled to accord flexible working conditions to employed fathers and mothers so that they could have time for their families.¹⁸⁶ Unfortunately, employed fathers and mothers who want to have time with their families can only do that through litigation.¹⁸⁷ The burden of financing litigation and the attendant strain in relations with employers deter employed fathers from seeking to be there for their families. Gender stereotypes that project women as caregivers add to this challenge and working fathers are left on their own. Dancaster and Cohen¹⁸⁸ argue that the *EEA*'s shortcomings are evident in that since its promulgation, not a single family responsibility case has gone to the labour courts.

Ironically, in *Co-operative Workers Association v Petroleum Oil and Gas Co-operative SA*¹⁸⁹ a group of workers who did not have family responsibilities claimed that their employer discriminated against them by affording them a smaller contribution towards medical-aid benefits while fellow employees who had dependants received more benefits.¹⁹⁰ The Labour Court held that employees with family responsibilities are classified as a vulnerable group in society that needs assistance in meeting their

¹⁸⁴ Section 1 of the *EEA*; Behari 2016 *Obiter* 351-352; see Cohen and Dancaster 2009 *Stellenbosch Law Review* 223-224; Dancaster and Cohen 2010 *South African Journal of Labour Relations* 34.

¹⁸⁵ Section 6(1) of the *EEA*; Dancaster and Cohen 2010 *South African Journal of Labour Relations* 34; Behari 2016 *Obiter* 351.

¹⁸⁶ Section 5 of the *EEA*; Basson *et al* *The New Essential Labour Law Handbook* 232; Dancaster and Cohen 2010 *South African Journal of Labour Relations* 34.

¹⁸⁷ Cohen and Dancaster 2009 *Stellenbosch Law Review* 223; Dancaster and Cohen 2010 *South African Journal of Labour Relations* 34.

¹⁸⁸ Dancaster and Cohen 2010 *South African Journal of Labour Relations* 34; see also Cohen and Dancaster 2009 *Stellenbosch Law Review* 223.

¹⁸⁹ (2007) 28 *ILJ* 627 (LC) (*Co-operative Workers Association*); see also Behari 2016 *Obiter* 352.

¹⁹⁰ Cohen and Dancaster 2009 *Stellenbosch Law Review* 227; see further Behari 2016 *Obiter* 352.

obligations.¹⁹¹ The court held further that employers should take deliberate steps to facilitate that workers with family responsibilities meet their family needs and duties.¹⁹² The court dismissed the claim in *Co-operative Workers Association* and held that differential treatment was necessary, as workers with dependants need more resources compared to those who do not have family responsibilities.¹⁹³ One submits that the court's decision in *Co-operative Workers Association* affirms family responsibility as a special ground that warrants acknowledgement of employed fathers as parents.

Dancaster and Cohen¹⁹⁴ further argue that the absence of litigation on grounds set in the *EEA* represents a gross under-utilisation or complete failure by the law to secure flexible working arrangements for employees with care responsibilities. It follows that something has to be done to enhance the usage of the *EEA* for the benefit of employed fathers and mothers in South Africa. Facts in the *Co-operative Workers Association* case are a direct challenge to the protection of employees with family responsibilities.

The *EEA* provisions seem at variance with culturally rooted beliefs that were given court approval in *President of South Africa v Hugo*.¹⁹⁵ In *Hugo*, the President decided to pardon and grant amnesty to chosen groups of prisoners that included all mothers with children under the age of 12. The pardoning of mothers with minor children was borne from society's gender assigned roles that mothers are primary caregivers.¹⁹⁶ Hugo, a single parent who was a prisoner at the time, challenged the decision on the basis that it unfairly discriminated against him because he was a man. The court held that it was for a legitimate government purpose that women

¹⁹¹ *Co-operative Worker Association* para 42; see also Behari 2016 *Obiter* 352.

¹⁹² *Co-operative Worker Association* para 50; see further Behari 2016 *Obiter* 352.

¹⁹³ *Co-operative Worker Association* paras 20, 28, 30, 36 and 52; see also Cohen and Dancaster 2009 *Stellenbosch Law Review* 227; Collier *et al Labour Law in South Africa: Context and Principles* 40-41.

¹⁹⁴ Dancaster and Cohen 2010 *South African Journal of Labour Relations* 34; see also Cohen and Dancaster 2009 *Stellenbosch Law Review* 223, 229; Collier *et al Labour Law in South Africa: Context and Principles* 40-41; Behari 2016 *Obiter* 352; Dancaster "State Measures Towards Work-Care Integration in South Africa" 192.

¹⁹⁵ 1997 (6) BCLR 708 (CC) (*Hugo*).

¹⁹⁶ *Hugo* para 70.

prisoners and men were pardoned and that where there is a public policy, one cannot claim unfair discrimination. One feels that *Hugo* set a wrong precedent because it seems to approve of the gender assigned roles that fail to recognise fathers as carers.

The *EEA* also seeks to achieve equity in the workplace by giving all employees equal treatment irrespective of their race, gender, or sex.¹⁹⁷ Affirmative action is directed at designated groups of employees of African, Coloured, Indian race groups, women and people with disabilities.¹⁹⁸ The mentioned categories represent people who suffered discrimination during the apartheid era. It is common cause that employed fathers, especially from the African, Coloured and Indian descent, did not enjoy certain rights that their white counterparts had. Family responsibility is one right that black fathers were deprived of that the *EEA* seeks to restore. The researcher argues that the *EEA* sets grounds that employed fathers can claim so that they exercise parental duties.¹⁹⁹ However, as has been argued above, the effectiveness of the *EEA* is under scrutiny given the absence of litigation cases where employees seek to enforce the right to family responsibility.²⁰⁰

3.6 The Amendment Act and paternity leave

The *Amendment Act*²⁰¹ is the most recent piece of law promulgated to amend the *BCEA* and the *UIA*. The amendment brings changes to leave policies for working parents. The *Amendment Act* inserts, amongst others, parental leave, adoption leave, and related benefits into the *BCEA*.²⁰² All the mentioned are new leave provisions that were not previously in South African labour laws. The *Amendment*

¹⁹⁷ Sections 5 and 6 of the *EEA*; Cohen and Dancaster 2009 *Stellenbosch Law Review* 227; Collier *et al Labour Law in South Africa: Context and Principles* 40-41.

¹⁹⁸ Section 1 of the *EEA*, see subheading 27.2.2; Collier *et al Labour Law in South Africa: Context and Principles* 40-41.

¹⁹⁹ Sections 5 and 6 of the *EEA*; see further Behari 2016 *Obiter* 351.

²⁰⁰ Cohen and Dancaster 2009 *Stellenbosch Law Review* 238-239; see also Dancaster and Cohen 2010 *South African Journal of Labour Relations* 34-35.

²⁰¹ Section 3 of the *Amendment Act*; section 25A of the *BCEA*; Rycroft and Duffy 2019 *Industrial Law Journal* 12-13.

²⁰² Sections 1-3 of the *Amendment Act*; sections 1, 25A, 25B and 25C of the *BCEA*; see also Rycroft and Duffy 2019 *Industrial Law Journal* 12-14; Behari 2018 *Industrial Law Journal* 2148-2151.

Act also amends the *UIA* inserting provisions that give parental leave applicants the right to claim parental benefits from the Unemployment Insurance Fund (UIF).²⁰³ This means working fathers can go on parental leave and claim parental benefits from the UIF. The *UIA*²⁰⁴ provided adoption benefits although no separate adoption leave existed prior to the *Amendment Act*. Parental leave provides ten consecutive days off to an employed parent who is not the primary caregiver of a newborn baby or adopted child.²⁰⁵ A primary caregiver gets either maternity leave or adoption leave, which are relatively longer.²⁰⁶ The fact that parental leave somehow comes as a secondary leave in terms of lengthy when compared to maternity leave and adoption leave presents an equality problem. It means that by taking parental leave for paternity leave, the assumption that fathers are not equal carers to mothers is perpetuated.

Moreover, parental leave is silent on whether or not it is meant for employed father or mothers. However, it comes as a direct replacement of family responsibility leave that was ascribed to working fathers.²⁰⁷ It follows that parental leave is meant for working fathers. Parental leave provides ten consecutive days off to a working father,²⁰⁸ a marked improvement from the three days family responsibility leave provided. Ten days appear to be a positive development but certainly not enough for working fathers to bond with the newly born or adopted child and care for the family. Parental leave can be taken on the day the employed father's baby is born, on the day an adoption order is granted or when the adopted child is placed under the care of an adopting parent by a court of law while the adoption process is

²⁰³ Sections 7-9 of the *Amendment Act*; sections 1, 12 and 13 of the *UIA*; see further Behari 2018 *Industrial Law Journal* 2157-2158; Rycroft and Duffy 2019 *Industrial Law Journal* 16-18.

²⁰⁴ Section 27 of the *UIA*; Behari 2018 *Industrial Law Journal* 2149; Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 34; Dancaster "State Measures Towards Work-Care Integration in South Africa" 180.

²⁰⁵ Section 3 of the *Amendment Act*; section 25A of the *BCEA*; see further Rycroft and Duffy 2019 *Industrial Law Journal* 17-18; Behari 2018 *Industrial Law Journal* 2149-2150.

²⁰⁶ Section 3 of the *Amendment Act*; section 25B of the *BCEA*; see further Behari 2018 *Industrial Law Journal* 2151-2153; Rycroft and Duffy 2019 *Industrial Law Journal* 15-17.

²⁰⁷ Section 3 of the *Amendment Act*; sections 25A and 27 of the *BCEA*; see also Rycroft and Duffy 2019 *Industrial Law Journal* 17-18; Behari 2018 *Industrial Law Journal* 2152-2153.

²⁰⁸ Section 3 of the *Amendment Act*; section 25A of the *BCEA*; see further Behari 2018 *Industrial Law Journal* 2152-2153; Rycroft and Duffy 2019 *Industrial Law Journal* 17-18.

finalised.²⁰⁹ Ideally, the leave should be treated in the same way maternity leave is. Maternity leave does not start on the day of birth but weeks before. A father may need to be there days before the wife gives birth to be of assistance to the pregnant wife or for adoption processes in cases of adoption. All that a father intending to go on parental leave should do is to inform the employer, in writing, of the impending birth or adoption of a child.²¹⁰ The employee would further inform the employer of the day he intends to go on leave and when he is expected back. The reason is that birth or adoption is a process, not an event. A father does not bond or learn to care upon birth or adoption of a child, caring starts before birth or adoption.

The *Amendment Act*²¹¹ provides that the Minister of Labour determines the payment of parental leave benefits. Unlike family responsibility leave that was fully paid for by an employer,²¹² parental leave is unpaid. However, the state pays parental benefits through the UIF.²¹³ The *Amendment Act* specifies that payment of parental benefits is subject to, among other requirements, the registration of the working father on the birth certificate of the newly born or adopted child.²¹⁴ The fact that parental leave is unpaid may adversely affect the willingness of fathers to claim it. In most cases, working fathers feel obliged to provide for their families financially. As a result, there is a risk that an unpaid parental leave may be taken as a financial setback to the family. Therefore, in its current form, parental leave appears to be unattractive and may be a deterrent to working fathers who may want to take up the leave.

²⁰⁹ Section 3 of the *Amendment Act*; section 25A(2)(a)(b) of the *BCEA*; see further Rycroft and Duffy 2019 *Industrial Law Journal* 18-19; Behari 2018 *Industrial Law Journal* 2154-2154.

²¹⁰ Section 3 of the *Amendment Act*; section 25A(3)(4) of the *BCEA*; see also Behari 2018 *Industrial Law Journal* 2152-2153; Rycroft and Duffy 2019 *Industrial Law Journal* 17-19.

²¹¹ Section 11 of the *Amendment Act*; section 26A of the *UIA*; see further Rycroft and Duffy 2019 *Industrial Law Journal* 18-19; Behari 2018 *Industrial Law Journal* 2157-2158.

²¹² Section 27 of the *BCEA*; see also Dancaster "State Measures Towards Work-Care Integration in South Africa" 186; Behari 2018 *Industrial Law Journal* 2152-2153; Rycroft and Duffy 2019 *Industrial Law Journal* 18-19.

²¹³ Section 11 of the *Amendment Act*; sections 26A-26C and 29A-29C of the *UIA*; see further Rycroft and Duffy 2019 *Industrial Law Journal* 17-18; Behari 2018 *Industrial Law Journal* 2157-2158.

²¹⁴ Section 11 of the *Amendment Act*; sections 26A, 26B and 26C of the *UIA*; section 21 of the *Children's Act* 38 of 2005; see further Rycroft and Duffy 2019 *Industrial Law Journal* 18-19.

3.7 Conclusion

Parental leave and benefits for working fathers represent positive steps towards the protection of paternity leave in South Africa. Parental leave provides for two weeks leave for fathers to be away from work at the birth or adoption of their children. The leave comes with parental benefits that are paid through the UIF. All these are noted improvements compared to family responsibility leave that only provided three days leave to working fathers. However, parental leave still falls short in the time it accords working fathers when compared to time available for maternity leave. Like other laws before it, the *Amendment Act*²¹⁵ seems to assert long-held assumptions that women are primary caregivers. The perception that women are better nurturers fails to give fathers a chance to develop strong bonds with their children.

The researcher submits that the absence of an express provision for paternity leave in the *Amendment Act* potentially entrenches the perception that fathers are not as important parents as mothers are. Nonetheless, the *Amendment Act* represents the closest step South Africa has taken in protecting paternity rights in the workplace. Parental leave, adoption leave and related rights are a step closer to the achievement of an express paternity leave in South Africa. Chapter Four discusses challenges that affect the full recognition and implementation of paternity leave in South Africa.

²¹⁵ Section 3 of the *Amendment Act*; section 25A of the *BCEA*; see further Rycroft and Duffy 2019 *Industrial Law Journal* 17-18; Behari 2018 *Industrial Law Journal* 2149-2150.

CHAPTER FOUR

ADVANTAGES AND CHALLENGES AFFECTING THE PROTECTION OF PATERNITY LEAVE IN SOUTH AFRICA

4.1 Introduction

South Africa's leave policies since 1994 have fallen short in addressing apartheid distortions that continue to afflict the proper welfare of employees' families.²¹⁶ Leave policies largely fail to reflect the changing work and family roles of fathers. However, the leave policies project long-held assumptions that fathers' role is to provide for their families economically while mothers are housemakers, child bearers and minders.²¹⁷ As illustrated in Chapter One, South Africa has a growing number of dual-earner families where the father and mother are both employed.²¹⁸ In such families, fathers and mothers play a complementary role in economically providing for the household. It is argued that fathers ought to share in household care duties and even take leave to stay at home with their children while mothers go to work.

The absence of an equitable paternity leave hinders the development of nurturing fathers. Often, employed fathers and mothers are under pressure to meet work and care responsibilities. Therefore, it is imperative for the legislature to revise leave policies to relieve pressure on employed fathers and mothers who have to juggle work and care duties at the same time.²¹⁹ Available leave entitlements even in the *Amendment Act* fail to address the care needs of working fathers adequately. Among

²¹⁶ Behari 2018 *Industrial Law Journal* 2148, 2149-2150; Rycroft and Duffy 2019 *Industrial Law Journal* 12-14.

²¹⁷ Cohen and Gosai 2016 *Industrial Law Journal* 2239-2240; Behari 2018 *Industrial Law Journal* 2149; Department of Social Development, 2012 *White Paper on Families in South Africa* <http://www.dsd.gov.za/index> (*White Paper on Families in South Africa*) accessed 3 April 2019 7-8.

²¹⁸ Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 30-31; Dancaster and Cohen 2010 *South African Journal of Labour Relations* 31.

²¹⁹ Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 30, 30-31; Richter L "The Importance of Fathering for Children" in Richter L and Morrell R (eds) *Baba: Men and Fatherhood in South Africa* (HSRC Press Cape Town 2006) 57-58; Behari 2018 *Industrial Law Journal* 2149.

others, the *Amendment Act*²²⁰ provides for at least ten days parental leave to an employed parent who has a newly born or adopted baby. However, parental leave does not specifically apply to an employed father but to an employed parent.²²¹ Reference to a parent makes the provision vague and open to the possibility that a mother can apply for it too. Considering that women are covered in terms of maternity leave, it stands to reason that an explicit reference to employed fathers would make better sense.

It is further argued that the *Amendment Act*²²² seems to imply that the beneficiary parent may not be the primary care-giver to the newly born or adopted child. By indicating that parental leave is available to a parent who is not a primary care-giver, it means there is a parent who is a primary nurturer. Assuming that parental leave is meant for employed fathers, it means fathers are secondary care-givers to their children, which is wrong. It is submitted that classifying parents as primary and non-primary elevates one parent above the other. It appears that the law has classified maternity leave and adoption leave as entitlements available to primary care-givers.²²³ The argument is supported by the fact that the two leave policies are longer in terms of duration when compared to parental leave.

To illustrate the above argument, employed mothers have up to four consecutive months of maternity leave.²²⁴ Parental leave pales in significance when compared to maternity leave, and this appears to show a preference to mothers as nurturers. The *BCEA* and the *Amendment Act* are very clear that maternity leave is meant for a woman, not a parent.²²⁵ The disparity between maternity leave and parental leave

²²⁰ section 3 of the *Amendment Act*; section 25A of the *BCEA*; Rycroft and Duffy 2019 *Industrial Law Journal* 12, 17-19; Bauling 2016 *Obiter* 163-164.

²²¹ Section 3 of the *Amendment Act*; section 25A of the *BCEA*; Rycroft and Duffy 2019 *Industrial Law Journal* 12; Behari 2018 *Industrial Law Journal* 2152-2153.

²²² Section 3 of the *Amendment Act*; section 25A of the *BCEA*; Rycroft and Duffy 2019 *Industrial Law Journal* 17-19; Behari 2018 *Industrial Law Journal* 2152-2153.

²²³ Section 3 of the *Amendment Act*; section 25B(1) of the *BCEA*; section 25 of the *BCEA*; Behari 2018 *Industrial Law Journal* 2153-2154; Rycroft and Duffy 2019 *Industrial Law Journal* 17-20.

²²⁴ Section 25(1) of the *BCEA*.

²²⁵ Sections 25(2)(b), 25(3) and 25(4) of the *BCEA*; section 2 of the *Amendment Act*.

mirrors the social order where mothers and women, in general, bear more parenting responsibilities than fathers in South Africa.²²⁶

Nonetheless, parental leave represents a positive step in recognition of the need for employed fathers to have family care leave entitlement. Before parental leave came into operation, working fathers relied on family responsibility leave if they wanted time off for care duties. The family responsibility leave provided three days off to an employee at the birth, sickness, or death of a child or at the adoption of a baby.²²⁷ Family responsibility leave was too short for a working father to spend reasonable time with the newly born or adopted child. Furthermore, there is nothing in both the parental leave and family responsibility leave provisions that directly mentions working fathers.²²⁸ Parental leave is directed at an employed parent while family responsibility leave is meant for an employee.²²⁹ Therefore, it is argued that it is wrong to ascribe paternity leave to either parental leave or family responsibility leave. Rather, parental leave and family responsibility leave are gender-neutral leave entitlements that can be available to a male or female employee who has a newborn or has just adopted a child.²³⁰

4.2 Possible advantages of paternity leave and related rights

The protection of a family care leave entitlement for employed fathers potentially has a significant impact on the development of the South African workplaces and homes. For instance, paternity leave can help strengthen women's place in the workplace, reduce the gender wage gap and promote bonding between fathers and their children.²³¹ Paternity leave allows fathers to take time off from work to be with

²²⁶ Felicity K and Christina M "Law and Women's Rights in South Africa: An Overview," 1994 *Acta Juridica* 1, 5-8; Dancaster and Cohen 2010 *South Africa Journal of Labour Relations* 32-33; Hall SS and MacDermid SM "A Typology of Dual Earner Marriages Based on Work and Family Arrangements" 2009 *Journal of Family and Economic Issues* 215, 222-223.

²²⁷ Section 27(2)(a) of the *BCEA*.

²²⁸ Section 3 of the *Amendment Act*; sections 25A and 27(2) of the *BCEA*.

²²⁹ Sections 25A and 27 of the *BCEA*; section 3 of the *Amendment Act*.

²³⁰ Section 3 of the *Amendment Act*; sections 25A and 27(3) of the *BCEA*.

²³¹ Cools S, Fiva JH and Kirkebøen LJ "Causal effects of paternity leave on children and parents." 2015 *The Scandinavian Journal of Economics* 801, 801-803; Porter M "Combating Gender Inequality at Home and at Work: Why the International Labour Organisation Should Provide for Mandatory Paid Paternity Leave" 2015 *George Washington International Law Review* 203;

children, allowing mothers to be at work. Once women spend more time at work than at home, equal treatment with their men counterparts on aspects like pay can be achieved. In addition, paternity leave affords time for fathers to establish lasting relationships with their children. South Africa has experienced a shift in the composition of workers from an exclusive male workplace to one with a mixture of men and women. The new set up brings about the dual-earner model affecting both the workplace and the home where workers come from. The dual-earner model is where both a father and mother are involved in remunerated employment.²³² In families where both a father and mother are employed, there is little time available for the welfare of the children. The dual-earner model changes the perception that fathers are the sole economic providers in the home and the view that mothers' responsibility is to manage the household and bring up children.²³³ In dual-earner families, there is need for shared responsibilities when it comes to raising children. It becomes untenable and unfair for mothers to continue shouldering care responsibilities while contributing to the economic welfare of the family too. Paternity leave is one avenue that can bring relief to mothers in dual-earner families as it allows fathers to be present, care for children and share in the household duties.²³⁴

Rycroft and Duffy²³⁵ submit that paternity leave has a number of proven advantages where it is adequately provided. The advantages include improved presence and involvement of fathers in the home, and the availability of fathers result in mothers likely to breastfeed newly born babies.²³⁶ Paternity leave also gives time for fathers to emotionally bond with their families resulting in better well-being of their

204-205; International Labour Organisation *Maternity and Paternity at Work: Law and Practice Across the World* (International Labour Office, Geneva 2014) 52.

²³² Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 30-31; Behari 2016 *Obiter* 346-349.

²³³ Behari 2016 *Obiter* 347; Dupper O "Maternity Protection in South Africa: An International and Comparative Analysis (Part 2) 2002 *Stellenbosch Law Review* 83, 90.

²³⁴ Rycroft and Duffy 2019 *Industrial Law Journal* 13-14; Johansson T "Fatherhood in transition: Paternity leave and changing masculinities" 2011 *Journal of family communication* 165, 165-167.

²³⁵ Richter L "The Importance of Fathering for Children" in Richter L and Morrell R (eds) *Baba: Men and Fatherhood in South Africa* (HSRC Press, Cape Town 2006) 2-3; Rycroft and Duffy 2019 *Industrial Law Journal* 13-15; Behari 2016 *Obiter* 346-347.

²³⁶ Behari 2016 *Obiter* 347-348; Rycroft and Duffy 2019 *Industrial Law Journal* 14; Richter "The Importance of Fathering for Children" 57-58.

families.²³⁷ Feldman and Gran²³⁸ support the above argument as they submit that fathers who take up paternity leave in other jurisdictions are significantly more involved in child-care and household chores compared to fathers who do not. Moreover, fathers who are involved in their children's lives from birth can positively shape the future of their children.²³⁹ According to Field, Bagraim and Rycroft,²⁴⁰ research shows that South African fathers who care for their families are more likely to take up household chores, care for their children and experience stable home relationships. Children who establish bonds with their fathers early in life are likely to show positive cognitive development and do well at school and life in general.²⁴¹ However, good performance at school is not only a product of paternity leave but of an ongoing father-child relationship that was established early in life.²⁴²

It appears that workplaces that allow employees with family responsibilities to have flexible working arrangements and time off can retain a motivated staff. Cohen and Dancaster²⁴³ argue that workplaces with a slow and an unorganised pace towards caregiving flexibility risk employing people who work below their potential. In the era when employed fathers know the value of family care, granting them paternity leave keeps them motivated and in the employment sector. Keeping motivated fathers in the employment sector helps retain skills and human capital the South African economy desperately needs. Van Jaarsveld²⁴⁴ submits that it may be necessary that employed parents and employers reach an agreement in instances that permit, employees to do some of the work at home and some at the workplace. Allowing employees with family responsibilities to have flexible working arrangements

²³⁷ Smit 2002 *Journal of Comparative Family Studies* 36(1) 401-415 401; Dancaster "State Measures Towards Work-Care Integration in South Africa" 186.

²³⁸ Feldman and Gran 2016 *Journal of Sociology & Social Welfare* 97-99; Dancaster and Cohen 2015 *Industrial Law Journal* 2489-2490.

²³⁹ Engle P, Beardshaw T and Loftin CR "The Child's Right to Shared Parenting" in Richter Land Morrell R (eds) *Baba: Men and Fatherhood in South Africa* (HSRC Press, Cape Town 2006) 293-294; Feldman and Gran 2016 *Journal of Sociology & Social Welfare* 98-99; Dancaster and Cohen 2015 *Industrial Law Journal* 2489.

²⁴⁰ Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 30, 34-35; see also Rycroft and Duffy 2019 *Industrial Law Journal* 15.

²⁴¹ Cools, Fiva and Kirkebøen 2015 *The Scandinavian Journal of Economics* 818-820; Engle, Beardshaw and Loftin "The Child's Right to Shared Parenting" 294.

²⁴² Engle, Beardshaw and Loftin "The Child's Right to Shared Parenting" 294.

²⁴³ Cohen and Dancaster 2009 *Stellenbosch Law Review* 239.

²⁴⁴ Van Jaarsveld 2002 *South African Mercantile Law Journal* 419.

potentially leads to improved outputs for both the employee and the employer.²⁴⁵ Employers who grant working fathers relaxed working arrangements give a sense of worth to employees' families, and that potentially motivates fathers to discharge their work duties in the best way possible.²⁴⁶ Once there are flexible working arrangements for fathers, there is potential for more women joining the workplace.²⁴⁷ As pointed out earlier that where paternity leave is actively enforced, fathers are more available in families, and that allows women to also participate in a remunerated work environment. Rycroft and Duffy²⁴⁸ note that paternity leave strengthens the position of women in the workplace. The researcher agrees with this argument because parenting becomes a shared responsibility and women can get more established in the workplace. Ultimately, women's bargaining power in the workplace increases and improves the chances of South Africa to achieve gender equity.²⁴⁹

4.3 Challenges affecting protection of paternity leave

At the time of writing this research, there was no clear provision for paternity leave in South Africa's leave policies. However, as stated above, an employed father can claim ten consecutive days of parental leave at the birth of his baby or the adoption of a child.²⁵⁰ The problem with parental leave is that it is available to any employee who is a parent, not just a father, so it cannot be paternity leave. The *Amendment Act*²⁵¹ is silent on how many times parental leave is available to an employee in an

²⁴⁵ Rycroft and Duffy 2019 *Industrial Law Journal* 14; Miyajima T and Yamaguchi H "I Want to but I Won't: Pluralistic Ignorance Inhibits Intentions to Take Paternity Leave in Japan" 2017 *Frontiers in Psychology* 1, 2-3.

²⁴⁶ Porter M "Combating Gender Inequality at Home and at Work: Why the International Labour Organization Should Provide for Mandatory Paid Paternity Leave" 2015 *George Washington International Law Review* 203, 207-208.

²⁴⁷ Rycroft and Duffy 2019 *Industrial Law Journal* 14-15; Amin M, Asif I and Alena S "Does Paternity Leave Matter for Female Employment in Developing Economies? Evidence from Firm-level Data" 2016 *Applied Economics Letters* 1145, 1146-1147.

²⁴⁸ Rycroft and Duffy 2019 *Industrial Law Journal* 14-15; see also Cools, Fiva and Kirkeboen 2015 *The Scandinavian Journal of Economics* 801-802.

²⁴⁹ Tamara Cohen, "The Efficacy of International Standards in Countering Gender Inequality in the Workplace," 2012 *Industrial Law Journal* 29-31; Feldman and Gran 2016 *Journal of Sociology & Social Welfare* 96-97.

²⁵⁰ Section 3 of the *Amendment Act*; section 25A(1)-(2)(a)(b) of the *BCEA*.

²⁵¹ Section 3 of the *Amendment Act*; also see section 25A(1)-(2)(a)(b) of the *BCEA*; Rycroft and Duffy 2019 *Industrial Law Journal* 117-18.

annual cycle. Before parental leave was enacted, employed fathers relied on the three-day family responsibility leave that was available once in an annual cycle.²⁵² If parental leave is also available once a year, then working fathers are at a disadvantage. A father may be compelled to be available before birth or adoption of a baby due to circumstances outside his control. If such a father uses the ten days available under parental leave, he can only rely on annual leave days or unpaid leave if there is a need for him to be available for his child.

Against this backdrop, questions also arise on whether parental leave is long enough to promote parity in parental responsibilities between fathers and mothers.²⁵³ Equal parenting is important in developing well-balanced children who will value the presence of a father and mother in their lives.²⁵⁴ Porter²⁵⁵ argues that fathers who take up family care leave are more likely to influence a mother's decision to breastfeed to the advantage of both the mother and the child. However, if the presence of a father is only for a few days, the health welfare of a mother and baby may suffer. At least a month-long leave entitlement for employed fathers could make a difference. A longer paternity leave helps to establish gender equality in the home, leading to gender equality at the workplace.²⁵⁶ If working fathers are given more time for care duties, they get more involved in household duties, and they can also be at home while mothers are at work. Such a scenario is not possible in South Africa currently because leave entitlements available to employed fathers are too short.

²⁵² Section 27 of the *BCEA*; Rycroft and Duffy 2019 *Industrial Law Journal* 118-19; Behari 2016 *Obiter* 349-350; Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 31.

²⁵³ Section 4.3 of the *White Paper on Families in South Africa* 41-42, Bauling 2016 *Obiter* 164; Behari 2016 *Obiter* 348; Morrell R "Fathers, Fatherhood and Masculinities in South Africa" in Richter L and Morrell R (eds) *Baba: Men and Fatherhood in South Africa* (HSRC Press, Cape Town 2006) 18-21.

²⁵⁴ Section 4.3 of the *White Paper on Families in South Africa* 41-42, Bauling 2016 *Obiter* 164;; Morrell "Fathers, Fatherhood and Masculinities in South Africa" 18-21; Dancaster and Cohen 2015 *Industrial Law Journal* 2474.

²⁵⁵ Porter 2015 *George Washington International Law Review* 207-210; International Labour Organisation *Maternity and Paternity at Work: Law and Practice Across the World* (ILO Office, Geneva 2014) 52; Makusha T and Richter L "Father Involvement in the First 1,000 Days" in Van den Berg W and Makusha T (eds) *State of South Africa's Fathers 2018* (Sonke Gender Justice and HSRC 2018) 50-51.

²⁵⁶ Behari 2016 *Obiter* 348; Porter 2015 *George Washington International Law Review* 207-208; International Labour Organisation *Maternity and Paternity at Work: Law and Practice Across the World* 52.

4.3.1 Absence of political will to promote paternity leave

Dancaster and Cohen²⁵⁷ argue that there is no state intervention in developing leave policies that provide South African employees with opportunities to care for their children. The challenge in South Africa is that the state seems to assume parental responsibilities instead of capacitating parents to raise their own children. Unlike in countries like Britain, Australia, and the United States of America where work-family policies like paternity leave are prominent political matters, work and care policy debates do not seem to feature prominently in South Africa.²⁵⁸ It appears that land reform, race, crime, the economy, and environmental matters receive more priority than an issue like paternity leave. As a result, the full realisation of the potential fathers have in shaping their families remains untapped.²⁵⁹

Cohen and Dancaster²⁶⁰ note that there is a global acknowledgement on the importance of policies that regulate paid work and care responsibilities, but the South Africa government and local employers hardly consider employed fathers as care-givers. However, the South African government swiftly moved in to try and root out the apartheid legacy through policies that redress racial inequalities at the workplace.²⁶¹ There was need to redress the damages inflicted on the family institution too. For instance, the government has set employment equity targets and broad-based black economic empowerment conditions but has not prioritised the welfare of families.²⁶² Generally, fathers have been portrayed as absent from their

²⁵⁷ Dancaster and Cohen 2010 *South African Journal of Labour Relations* 40-42; Dancaster and Baird 2008 *Industrial Law Journal* 23-24.

²⁵⁸ Dancaster and Cohen 2010 *South African Journal of Labour Relations* 40-41; Dancaster and Baird 2008 *Industrial Law Journal* 24-25.

²⁵⁹ Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 31; Dancaster and Cohen 2010 *South African Journal of Labour Relations* 42.

²⁶⁰ Cohen and Dancaster 2009 *Stellenbosch Law Review* 222-223; Dancaster and Cohen 2010 *South African Journal of Labour Relations* 31-32.

²⁶¹ Cohen and Dancaster 2009 *Stellenbosch Law Review* 222; see also Gambles R, Lewis S and Rapoport R *The Myth of Work-Life Balance: the Challenge of our time for Men, Women and Societies* (John Wiley & Sons Ltd 2006) 16.

²⁶² Section 2 of the *BCEA*; section 2 of the *Broad-Based Black Economic Empowerment Act* 53 of 2003 (*Empowerment Act*); section 2 of the *Skills Development Act* 97 of 1998 (*SDA*); Cohen and Dancaster 2009 *Stellenbosch Law Review* 222.

families, uncaring and brutal. There is need for work and care issues to be part of South Africa's political agenda before the protection of paternity leave is realised.

4.3.2 Limited understanding of paternity leave in society

One of the major impediments to the success of paternity leave in South Africa can be attributed to fathers themselves. Motaung, Bussin, and Joseph²⁶³ argue that there is little understanding of what paternity leave entails among black South African fathers. This view is understandable given the impact of the migrant labour system that took fathers away from families. The migrant labour system made the father to believe that work was more important than families. In most cases, working fathers consider taking care-related leave as career limiting.²⁶⁴ Their focus is on impressing employers and peers; hence, taking leave to be with the family is a waste of time. In the past, the majority of black African fathers in South Africa thought that the measure of a man was realised in keeping women as housewives and children bearers.²⁶⁵ In fact, women were not supposed to be career competitors. There could still be such men, and for them, claiming paternity leave is akin to emasculation and embarrassment. However, there is a sense of optimism that the majority of African fathers are beginning to appreciate the positive change their supportive role plays in the lives of their families.²⁶⁶ It remains imperative that the South African government and employers support and encourage working fathers that taking care-related leave is good for both their careers and families.²⁶⁷ As such,

²⁶³ Motaung L, Bussin M and Joseph R "Maternity and Paternity Leave and Progression of Black African Women in Dual-Career Couples" 2017 *South African Journal of Human Resources Management* 1, 4-5; Rycroft and Duffy 2019 *Industrial Law Journal* 24.

²⁶⁴ Rycroft and Duffy 2019 *Industrial Law Journal* 24; Halverson C "From here to paternity: Why men are not taking paternity leave under the family and medical leave act" 2003 *Wisconsin Women's Law Journal* 257, 261-270.

²⁶⁵ Motaung, Bussin and Joseph 2017 *South African Journal of Human Resources Management* 4-7; Bosch A, de Bruin GP, Kgaladi B and de Bruin K "Life Role Saliency Among Black African Dual-Career Couples in the South African Context" 2012 *The International Journal of Human Resource Management* 2835, 2838-2841.

²⁶⁶ Wall K "Fathers on Leave Alone: Does it Make a Difference to their Lives?" 2014 *Fathering: A Journal of Theory, Research and Practice about Men as Fathers* 196, 207-208; Motaung, Bussin and Joseph 2017 *South African Journal of Human Resources Management* 4-7.

²⁶⁷ Dancaster and Cohen 2010 *South African Journal of Labour Relations* 31-32; Rycroft and Duffy 2019 *Industrial Law Journal* 25; Dancaster and Baird 2008 *Industrial Law Journal* 22-23.

overcoming limited understanding of the importance of paternity leave remains a challenge in South Africa.

4.3.3 Paternity leave and the quest for equality

A constitutional question arises whether the achievement of equality and the requirement for fair labour practices envisage that the well-established maternity leave be available to working fathers too.²⁶⁸ This question warrants a detailed look at provisions in South Africa's labour laws to understand the reasoning of the legislature. In its provisions on maternity leave, the *BCEA*²⁶⁹ uses the words "her" and "she", explicitly projecting that maternity leave and protection of employees before and after the birth of a child is meant for women. Furthermore, the *UIA*²⁷⁰ points out that only a pregnant contributor can claim maternity benefits. Maternity provisions in the *BCEA* and *UIA* are clear in ascribing maternity leave and related rights to women. The fact that the *BCEA* retains maternity leave and related benefits means that only a mother can be the primary care-giver for children.²⁷¹ Fathers cannot fall pregnant and give birth, but they can take the primary care role once the child is born. The *BCEA* and the *UIA* close the opportunity for equal parenting between fathers and mothers. As a result, the only option available for fathers is to claim parental leave.²⁷² The challenge is that those who claim parental leave are assumed to be secondary nurturers of their children. This bodes ill for the achievement of equal treatment and protection for employed fathers and mothers.

Nonetheless, one has to bear in mind that maternity leave goes beyond the safeguarding of the health wellbeing of the mother and her baby. There is no claim for equality between fathers and mothers in this aspect. However, the long period of maternity leave allows a mother time to learn parenting skills and bond with the

²⁶⁸ Sections 9 and 23 of the *Constitution of the Republic of South Africa, 1996* (the *Constitution*); Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 31-32.

²⁶⁹ Sections 25 and 26 of the *BCEA*; Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 31-32.

²⁷⁰ Section 24 of the *Unemployment Insurance Act 63 of 2001 (UIA)*; Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 31-32.

²⁷¹ Section 25 of the *BCEA*; Rycroft and Duffy 2019 *Industrial Law Journal* 19.

²⁷² Section 3 of the *Amendment Act*; section 25A(1) of the *BCEA*.

child.²⁷³ Developing parental skills and bonding with the newly born or adopted child can be extended to fathers. One can argue that the *Amendment Act*²⁷⁴ somehow shows that adoption leave sets the example of equal parenting between fathers and mothers. Adoption leave is expressed in gender-neutral terms allowing either a father or mother to claim at least ten consecutive weeks off to care for the newly adopted child who is under the age of two.²⁷⁵ The implication is that both a father and a mother can play adequate parental roles in bringing up the newly adopted child. There is a possibility that adopting parents can choose either a father or a mother to look after the child as long as the chosen parent spends time caring for the child.²⁷⁶

Field, Bagraim and Rycroft²⁷⁷ argue that if an adoptive father can claim at least ten consecutive weeks adoption leave, is there a legitimate government purpose barring a biological father from equitable maternity leave. It is argued that a legitimate government purpose to protect women with newly born babies can still exist because falling pregnant is a special characteristic available only to women. However, reasonable steps need to be taken to give fathers an equitable share of parenting. As the law currently stands, it excludes fathers from the entitlement to care, deepening the misconception that only women can nurture children. Accordingly, it is submitted that biological fathers seem to receive less preference compared to women in South Africa's leave policies.

4.5 Shortcomings in the Amendment Act's thrust on paternity leave

The first major challenge is that the *Amendment Act*²⁷⁸ provides for parental leave, not explicit paternity leave. It has been argued above that the two leave entitlements are different and cannot be used interchangeably. Ideally, the

²⁷³ Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 31-33;Dancaster and Baird 2008 *Industrial Law Journal* 22-23.

²⁷⁴ Section 3 of the *Amendment Act*; section 25B(1)(a) of the *BCEA*.

²⁷⁵ Section 3 of the *Amendment Act*; section 25B(6)-(7) of the *BCEA*.

²⁷⁶ Section 27(1)(b) of the *UIA*; section 25B of the *BCEA*; Behari 2018 *Industrial Law Journal* 2154.

²⁷⁷ Section 3 of the *Amendment Act*; section 25B of the *BCEA*; Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 34-35.

²⁷⁸ Section 3 of the *Amendment Act*; see further section 25A of the *BCEA*.

Amendment Act could have included paternity leave as a "fathers' quota" or "fathers only" allocation within its parental leave provisions.²⁷⁹ The idea is to make it as clear as possible to fathers that the law recognises their worth and that there is need to take leave provisions meant for them seriously. According to Dancaaster and Baird,²⁸⁰ parental leave works better if used as a provision available for ongoing care after parents would have used up maternity leave and paternity leave allocations. It is submitted that parental leave seems to work best when parents claim it after their paternity and maternity leave are used up.

The fact that parental leave is gender-neutral and fails to specifically mention that fathers practically makes it available to both men and women. Working fathers may be less inclined to take up the leave because it does not specifically mention them. Moreover, parental leave almost runs at the same time as maternity leave, and this makes the former more available to working fathers.²⁸¹ The ten consecutive days parental leave is incomparable to four months maternity leave. The difference between the two leave policies also magnifies the imbalance in the way the law deals with working fathers and mothers. It is argued that the uneven leave entitlements are against the grain of equality and fair labour practices the *Constitution* envisages.²⁸²

The *BCEA* made it a part of South African leave policy that only one parent, almost always a mother, is eligible for four consecutive months of maternity leave.²⁸³ There is nothing so far that suggests that maternity leave can be shared with or accorded to employed fathers too. Maternity leave remains written in an effeminate language, making it available exclusively to women. The provision on adoption leave gives a hint that either a father or a mother could be the primary caregiver. However, the

²⁷⁹ Section 3 of the *Amendment Act*; section 25A of the *BCEA*; Dancaaster and Baird 2008 *Industrial Law Journal* 22, 34-36.

²⁸⁰ Dancaaster and Baird 2008 *Industrial Law Journal* 34; see also Moss P (ed) *International review of leave policies and related research 2013* (International Network on Leave Policies and Related Research, London 2013) 2.

²⁸¹ Section 25(1), (2) and (3) of the *BCEA*.

²⁸² Sections 1(a), 9 and 23 of the *Constitution*.

²⁸³ Section 25 of the *BCEA*; Rycroft and Duffy 2019 *Industrial Law Journal* 23; Dancaaster "State Measures Towards Work-Care Integration in South Africa" 179-181.

problem comes when the other adoptive parent resorts to apply for parental leave because both parents cannot apply for adoption leave at the same time. The *Amendment Act*²⁸⁴ provides ten weeks leave to a primary adoptive parent and ten days parental leave to the perceived secondary adoptive parent. By varying leave durations for primary and secondary caregivers, the *Amendment Act* seems to divide instead of uniting parents, and it closes room for equal participation in parenting.²⁸⁵ The shorter leave provision, parental leave, is ascribed to fathers because they are perceived as secondary parents. Therefore, it can be argued that the law has become an enabler of unequal distribution of parental responsibilities between fathers and mothers. Rycroft and Duffy²⁸⁶ argue that where leave allocations are evenly distributed and shared, domestic chores and childcare roles are equitably shared between parents, and fathers are more involved in their families. It is submitted that responsibilities are shared because both fathers and mothers feel equally entitled and obliged to share duties in the home.

4.5 The courts' approach to aspects of fathers' role in families

The role of fathers as caregivers is discussed in the *President of the Republic of South Africa v Hugo*²⁸⁷ and the *MIA v State Information Technology Agency (Pty) Ltd.*²⁸⁸ In *Hugo*, the Constitutional Court was called to decide on the constitutionality of the then President, Nelson Mandela's action in pardoning only women inmates on the grounds that they care for children. The President invoked the *Presidential Act*²⁸⁹ to release all mothers who had children under the age of 12 from South African prisons.²⁹⁰ Hugo, a prisoner and father to a son under the age of 12 applied to be released to care for his son since the mother had died. However, the prisoner failed

²⁸⁴ Sections 25B and 25C of the *Amendment Act*; Rycroft and Duffy 2019 *Industrial Law Journal* 23-24; Behari 2018 *Industrial Law Journal* 2152-2154.

²⁸⁵ Behari 2016 *Obiter* 355-356; ILO *Maternity and Paternity at Work* 118; Dancaster "State Measures Towards Work-Care Integration in South Africa" 181.

²⁸⁶ Porter 2015 *George Washington International Law Review* 207-208; Rycroft and Duffy 2019 *Industrial Law Journal* 23-24; Behari 2016 *Obiter* 360-361; Dancaster "State Measures Towards Work-Care Integration in South Africa" 181.

²⁸⁷ 1997 (6) BCLR 708 (CC) (*Hugo*).

²⁸⁸ [2015] JOL 33060 (LC) (*MIA*).

²⁸⁹ Section 82(1)(k) of the *Constitution of the Republic of South Africa* 1993 (interim *Constitution*).

²⁹⁰ *Hugo* case, para 2; Behari 2016 *Obiter* 355.

on his bid on grounds that he was a man. The prisoner then challenged the decision to release of mothers alleging that it discriminated against fathers. The Constitutional Court held that the discrimination was fair since it was for a legitimate government purpose. The purpose was to pardon mothers in the best interests of children. The pardon was noble, but the unintended consequence was that it gave authority to society's perception that family care duties are for mothers, not fathers.

The Constitutional Court held that the release of mothers with children under the age of 12 was to promote mothers' primary function as caregivers.²⁹¹ Goldstone J mentioned in the judgment that fathers are secondary caregivers who are not as emotionally attached to young children as mothers are.²⁹² Consequently, the Constitutional Court held that the release of fathers with young children would have defeated the legitimate government purpose. Moreover, women, children, and people with disabilities were perceived as groups that had suffered the worst forms of discrimination and deserved protection.²⁹³ The fact that the respondent, Hugo, was a white man and considered to be from a previously advantaged background seems to have clouded the rational leading to the majority judgment. Perhaps, Hugo was seen as a privileged white man who wanted to abuse the President's act of mercy. He was not perceived as a father who wanted to raise his young child. It is submitted that perhaps; if Hugo was an African man, the outcome could possibly have been different. Nonetheless, the minority judgment of Kriegler J is persuasive in that it finds the actions of the President objectionable and discriminatory. Kriegler argues that accepting the release of mothers at the expense of fathers with children under the age of 12 as fair discrimination only worked to entrench gender stereotypes that subjugate women.²⁹⁴ The decision made it official and became a point of reference that mothers are the primary caregivers and that it did not matter if fathers are away from their young children. The minority judgment also bemoaned the fact that fathers are perceived as second-class and distant parents to their

²⁹¹ *Hugo* para 70; Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 32-33; Behari 2016 *Obiter* 355-356.

²⁹² *Hugo* para 46.

²⁹³ *Hugo*, para 47.

²⁹⁴ *Hugo* paras 78-82.

children even in the era when long-held traditional gender roles are changing.²⁹⁵ The *Hugo* case seems to have caused the absence of active political voices calling for policies that encourage fathers to be both breadwinners and co-parents in their families.

In *MIA*, the Labour Court had to decide whether a male same-sex parent was eligible for maternity leave. The applicant, a senior business executive, worked for the respondent. The applicant, his civil union partner, and a surrogate mother reached a surrogate-motherhood agreement that was made an order of the High Court.²⁹⁶ The commissioning parents agreed that the applicant would take up the role of primary caregiver to the child from birth.²⁹⁷ Soon after birth, the applicant applied for four months maternity leave, in line with the respondent's leave policy. However, the respondent objected to granting maternity leave arguing that since the applicant was not the biological mother of the child, the requested leave entitlement did not apply.²⁹⁸ The respondent granted the applicant two months paid adoption leave and an additional two months unpaid leave instead.²⁹⁹ The applicant argued that the respondent's refusal to grant him four months maternity leave amounted to unfair discrimination on the grounds of gender, sex, family responsibility, and sexual orientation.³⁰⁰ The respondent's argument that maternity leave only applied to biological mothers became a clear test on the gender-specific nature of leave provisions in South Africa. It is argued that if there was an equitable paternity leave, the respondent may have acceded to the leave application.

The respondent argued further that its refusal to grant the applicant maternity leave was based on the understanding that maternity leave only applied to biological mothers who need time to recuperate from the physiological effects of birth.³⁰¹ The *LRA*³⁰² also expresses maternity leave in a way that makes it applicable only to

²⁹⁵ *Hugo* paras 83 and 92.

²⁹⁶ *MIA* para 5.

²⁹⁷ *MIA* para 16.

²⁹⁸ *MIA* para 1.

²⁹⁹ *MIA* para 2.

³⁰⁰ *MIA* para 1.

³⁰¹ *MIA* para 12.

³⁰² Sections 186(1)(c)(i) and 187(1)(e) of the *LRA*.

mothers. The respondent relied on the words "her" and "she" in the *BCEA*.³⁰³ However, the court ruled that the respondent's refusal to grant the applicant maternity leave amounted to unfair discrimination.³⁰⁴

The court held that the respondent used a narrow and unacceptable approach in interpreting the *BCEA*. The court pointed out that the right to maternity leave in the *BCEA* is not only for the welfare and health of the birth mother but for the best interests of the child as well.³⁰⁵ It is submitted that the best interests of the child are better served when both a father and a mother provide parental guidance and support. Best interests of the child demand that in any action taken, the care, protection and well-being of a child comes first.³⁰⁶ It is argued that care, protection and general welfare of a child are best achieved when both parents complement each other. The court further ruled that there was no point denying the applicant or a person in the position of the applicant maternity leave in the same way it is accorded to a biological mother.³⁰⁷ The court appeared to have looked at the good intentions and willingness of the applicant and it follows that fathers too can perform the duty of primary caregivers.

The key issue that emerges from *MIA* is that discrimination based on gender, sex, parental responsibility, and sexual orientation is against the *Constitution*.³⁰⁸ One's gender or sexuality is no qualification for a good or bad parent. What is required is a system that encourages parents to equitably share responsibilities in raising their children. Parental responsibility is a subject of equality and cannot be unjustifiably limited. It follows that a father and a mother should have equal opportunity and protection to exercise the right to parent their children fully. Besides, the best interest of the child, as held in *MIA*, means the care, protection, and welfare of a child calls for both a father and a mother to play their roles in raising children.³⁰⁹

³⁰³ Section 25(2)(b) and (3) of the *BCEA*; see further sections 186(1)(c)(i) and 187(1)(e) of the *LRA*; *MIA* para 12.

³⁰⁴ Section 6(1) of the *EEA*; also see Section 187(1)(f) of the *LRA*; *MIA* para 21.

³⁰⁵ Section 28(1)(b) of the *Constitution*; *MIA* para 13.

³⁰⁶ Section 9 of the *Children's Act* 38 of 2005 (*Children's Act*).

³⁰⁷ *MIA* para 17.

³⁰⁸ Section 9(4) and (5) of the *Constitution*; section 6(1) of the *EEA*; *MIA* para 13.

³⁰⁹ *MIA* paras 13-14; Bauling 2016 *Obiter* 163; Behari 2016 *Obiter* 354-355.

Granting of maternity leave to a male parent willing to be the primary care-giver in a same-sex marriage has implications for heterosexual fathers. Care responsibilities should not be confined to a particular gender. Beyond encouraging fathers and mothers to be parents to their children, there should be no reason why a father willing to be a primary caregiver should be denied maternity leave or at least leave equivalent to maternity leave.³¹⁰ Therefore, it is argued that there is need to extend maternity leave benefits to fathers through an equitable paternity leave entitlement.

4.6 Conclusion

South Africa has made progress in the provision of family care-related leave for working fathers. However, challenges still exist because of the absence of full protection of paternity leave. The current leave entitlement for working fathers is parental leave, which has many shortcomings when compared to leave available for mothers. The ten consecutive days parental leave from the three days family responsibility leave is a statement of intent towards gender equity at home and at the workplace.³¹¹ Parental leave is an indication that the South African government acknowledges that employed fathers need time off to be with their families. However, in its current form, parental leave is too short to create an environment for meaningful care time for working fathers. Ten days are not enough for a father to be of sufficient help to the family especially around the time of birth or adoption of a child. The ten days are incomparable to four months maternity leave available to working mothers. The disparity raises a key constitutional question on the right to equality between fathers and mothers when it comes to parental responsibilities.³¹² Furthermore, the absence of a specific reference to men or fathers makes parental leave in its current form available to both male and female employees.³¹³

³¹⁰ *MIA* paras 20-21; Behari 2016 *Obiter* 354; Bauling 2016 *Obiter* 162-163.

³¹¹ Section 3 of the *Amendment Act*, section 25A of the *BCEA*; section 27 of the *BCEA*; Bauling 2016 *Obiter* 165-166; ILO *Maternity and Paternity at Work* 51; Porter 2015 *George Washington International Law Review* 207.

³¹² Sections 9 and 23 of the *Constitution*; section 6 of the *EEA*. Parental responsibility should not be used as a ground for discrimination in the way workers are treated in South Africa.

³¹³ Section 3 of the *Amendment Act*, section 25A of the *BCEA*. Parental leave provides ten consecutive days off for a parent who is not a primary caregiver to the newly born or adopted child.

It is submitted that the changing nature of the workplace requires that working fathers be specifically mentioned in care-related leave provisions. Consequently, the interpretation could be that parental leave is for every employee and may lead to few working fathers claiming it. Ultimately, there is need to rethink on South Africa's leave policies in a way to introduce a distinct paternity leave. Parental leave provides a limited duration for working fathers to have a reasonable time to bond with the newly born or adopted child.³¹⁴ Given the effects of migrant labour on South African families, it is submitted that employed fathers should be given time comparable to maternity leave to care for their families.

³¹⁴ Rycroft and Duffy 2019 *Industrial Law Journal* 13;Dancaster "State Measures Towards Work-Care Integration in South Africa" 177.

CHAPTER FIVE

RECOMMENDATIONS AND CONCLUSIONS

5.1 Introduction

The migrant labour system in South Africa disintegrated and tore apart families³¹⁵ in ways felt to this day. The system removed fathers from care roles in families and made them channel all their energy in work.³¹⁶ The system created a "one-career-for-life" generation of fathers, and because there was no care-related leave, men were forced to put professional ambitions ahead of parental responsibilities.³¹⁷ As a result, working fathers had a serious disconnection with their families to the extent that upon retrenchment, most of them appeared like strangers in their own homes. However, Hosking³¹⁸ argues that the new generation of fathers largely operates on a "work-to-live" philosophy where family needs influence occupational demands. The new crop of fathers needs an environment and legislation that make a clear departure from the conditions experienced during the apartheid period. In addition, mothers have joined remunerated employment and fathers have to work and help care for the family as well.³¹⁹

Family care-related leave policies in South Africa create an unreasonable disparity in the way employed fathers and mothers are treated. For instance, mothers are entitled to four months maternity leave, but fathers rely on ten days of parental leave if they want time off to care for their families.³²⁰ In addition, South Africa does not have a clear paternity leave policy and most fathers are caught between choosing between to commit their time to career activities or spend time with

³¹⁵ Ramphele and Richter "Migrancy, Family Dissolution and Fatherhood" 78; see further Makusha and Richter "Father Involvement in the First 1,000 Days" 52-53.

³¹⁶ Ramphele and Richter "Migrancy, Family Dissolution and Fatherhood" 78-79; also see Hosking "Men, Work and Parenting" 218.

³¹⁷ Hosking "Men, Work and Parenting" 219; Ramphele and Richter "Migrancy, Family Dissolution and Fatherhood" 78.

³¹⁸ Hosking "Men, Work and Parenting" 219.

³¹⁹ Hosking "Men, Work and Parenting" 219.

³²⁰ Sections 25 and 25A of the *BCEA*; section 3 of the *Amendment Act*.

children.³²¹ Fathers often choose the former. Rycroft and Duffy³²² submit that the *Amendment Act*³²³ provides for an elongated paternity leave in acknowledgement of fathers' caring roles. The assertion is wrong. The researcher submits that the *Amendment Act*³²⁴ provides for parental leave, a leave policy that is materially different to paternity leave. Dancaster³²⁵ defines parental leave as a secondary leave available to fathers and mothers to continue caring for their young children after paternity leave and maternity leave. At times, policy formulators can make paternity leave part of parental leave by putting specific provisions that cater for fathers only.³²⁶ That is not the case with the *Amendment Act*. Therefore, it is submitted that there is limited protection of paternity leave and related rights in the South African workplace.

5.2 Recommendations

The researcher submits that South Africa should enhance the protection of paternity leave and related rights for employed fathers. Below is a discussion on the recommendations. Accordingly, it is recommended that:

(a) a distinct paternity leave with a duration comparable to maternity leave must be introduced

The *Amendment Act*³²⁷ does not provide for an equitable paternity leave and related rights to working fathers in South Africa. Rather, the *Amendment Act*³²⁸ provides for a gender-neutral parental leave that seeks to grant both men and women time off

³²¹ Rycroft and Duffy 2019 *Industrial Law Journal* 25; Dancaster "State Measures Towards Work-Care Integration in South Africa" 185-186; Behari 2016 *Obiter* 347-348.

³²² Section 3 of the *Amendment Act*; section 25A of the *BCEA*.

³²³ section 3 of the *Amendment Act*; section 25A of the *BCEA*; Rycroft and Duffy 2019 *Industrial Law Journal* 12-13.

³²⁴ Section 3 of the *Amendment Act*; section 25A of the *BCEA*; Rycroft and Duffy 2019 *Industrial Law Journal* 13-14; Behari 2018 *Industrial Law Journal* 2152-2153.

³²⁵ Dancaster and Cohen 2010 *South African Journal of Labour Relations* 33-34; Dancaster "State Measures Towards Work-Care Integration in South Africa" 186-187.

³²⁶ Dancaster and Cohen 2015 *Industrial Law Journal* 2474, 2483-2484; Dancaster "State Measures Towards Work-Care Integration in South Africa" 187.

³²⁷ Section 3 of the *Amendment Act*; section 25A of the *BCEA* as amended; Rycroft and Duffy 2019 *Industrial Law Journal* 25; Behari 2018 *Industrial Law Journal* 2160.

³²⁸ Section 3 of the *Amendment Act*; section 25A(1) of the *BCEA* as amended; Behari 2018 *Industrial Law Journal* 2160.

the workplace to care for their children. It is submitted that the availability of maternity leave without a corresponding paternity leave seems to work against achieving gender equality in the workplace and at home. Employed women end up doing most of the childcare work, and their careers suffer because there is no relief from fathers who are supposed to share in care duties. Furthermore, the absence of a distinct paternity leave or "father's quota" or "fathers only" provisions in South Africa's leave policies apparently lessens the importance of fathers in care responsibilities.³²⁹ The ILO³³⁰ notes that providing statutory protection of paternity leave and related rights enjoins government, employers, workers, and society to value care duties for both working fathers and mothers. Statutory protection of paternity leave is the first crucial step in promoting gender equality at home and work.³³¹ Paternity leave allows working fathers time to be present during one of the most delicate phases of their families' lives. The birth or adoption of a child needs the presence of a father to share in the joys and agonies of the family. Sometimes, a mother falls ill after delivering a child, and the presence of the father provides the required comfort and closes the parental gap.

Parental leave in its current form provides ten consecutive days for a parent of a newly born baby or adopted child.³³² The time allocation is too short for a working father to bond with the newborn or adopted child. It is argued that lasting relationships require time and effort to establish, and ten days are not enough. A better model is a longer parental leave period that ideally comes after paternity and maternity leave to assist both a father and a mother to continue providing care to the baby or young child.³³³ Ultimately, the researcher submits that there is need for a separate paternity leave in South Africa. History points to South African fathers

³²⁹ Feldman and Gran 2016 *Journal of Sociology and Social Welfare* 95-96; Dancaster and Baird 2008 *Industrial Law Journal* 34-35.

³³⁰ International Labour Organisation (ILO) *Maternity and Paternity at Work: Law and Practice Across the World* (International Labour Office, Geneva 2014) 59-60; Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 30, 35-36.

³³¹ ILO *Maternity and Paternity at Work: Law and Practice Across the World* 60; Behari 2016 *Obiter* 360-361.

³³² Section 3 of the *Amendment Act*, section 25A(1) of the *BCEA*; Rycroft and Duffy 2019 *Industrial Law Journal* 17-18, Behari 2018 *Industrial Law Journal* 2152-2145.

³³³ Dancaster "State Measures Towards Work-Care Integration in South Africa" 186-188; ILO *Maternity and Paternity at Work: Law and Practice Across the World* 60; Behari 2016 *Obiter* 360-361.

who were forced to leave their families, and they need time to learn how to live with their wives and children. A leave specifically meant for fathers may assist in this regard. Alternatively, parental leave needs expansion to provide a separate leave entitlement for working fathers with more days than the current provision. It is underscored that the current parental leave is not long enough to benefit working fathers and their families.

(b) there must be political will to change long held perceptions that fathers and breadwinners while mothers and homemakers

As highlighted in Chapter Four, South African political leaders should lead in making conversations about the family wellbeing as part of everyday national discourse.³³⁴ To mention an example, a 2019 survey done in the United States of America shows that almost half of all Americans discuss matters about family welfare.³³⁵ Open and honest engagement in matters that affect the lives of fathers, mothers, and children help to identify weaknesses and find solutions to improve the welfare of families. In the context of South Africa, a national discourse is likely to highlight that the state is duty-bound to recognise the need for the legal protection of fathers as parents and workers.³³⁶ Some elements of the migrant labour system still exist in South Africa. For instance, fathers still leave their families to work far away, and that affects the stability of families. Some fathers who are physically present with their families but are absent in their emotional attachment because their minds are preoccupied with meeting occupational obligations. It is submitted that the highlighted challenges point to the need for open and honest debate on the status of families in order to help bring solutions.

Open dialogue can also demystify perceptions that the role of fathers is to economically provide for the family while mothers manage the household and care

³³⁴ Dancaster and Baird 2008 *Industrial Law Journal* 25-25; Dancaster and Cohen 2010 *South African Journal of Labour Relations* 40-41.

³³⁵ Jones JM "Americans Converse More About Family Matters Than Politics" 2019 <https://news.gallup.com/poll/262166/americans-converse-family-matters-politics.aspx> page unknown accessed on 20 October 2019.

³³⁶ Dancaster and Cohen 2010 *South African Journal of Labour Relations* 42; Cohen and Gosai 2016 *Industrial Law Journal* 2238-2239.

for children.³³⁷ The world of work has changed over the years, and so has the home. Mothers have joined paid work, and in some homes, they contribute to the economic welfare of the family more than fathers. The movement of women into the workplace has left a void at home. Fathers need to step up and cover the gap by helping mothers care for children. It is incumbent on the state to help employed parents manage demands at their workplaces and those from home.³³⁸ The trend in the South African workplace shows that the number of employed fathers is less than that of women.³³⁹ This implies that more women have left the home domain and there is need for labour policies to be adapted to the new set-up. Policy-makers should appreciate that there is need for a reasonably long paternity leave so that fathers can have time off to be with their families.³⁴⁰ Maternity leave in its current form seems to worsen the plight of women because, for four months, mothers are left to raise children while fathers are at work. It is submitted that paternity leave that is reasonably comparable or equal to maternity leave is desirable so that both fathers and mothers share responsibilities at the birth or adoption of children.

(c) protection of paternity leave should be a policy priority because it has a number of advantages to families, society and business

The South African government has acknowledged that violence, drug abuse, and many other social challenges emanate from a broken family system in the country.³⁴¹ The brokenness of the family emanates from the lack of unity and cooperation required between fathers and mothers on one hand, and parents and children on the other. Fathers are often absent physically and emotionally due to work or other personal reasons. The absence of fathers removes the glue that binds

³³⁷ Cohen and Gosai 2016 *Industrial Law Journal* 2242-2243; Cohen and Dancaster 2009 *Stellenbosch Law Review* 221-222.

³³⁸ Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 30-31; Cunningham M "Changing Attitudes toward the Male Breadwinner, Female Homemaker Family Model: Influences of Women's Employment and Education over the Lifecourse" 2008 *Social Forces* 299, 299-300.

³³⁹ Cohen and Dancaster 2009 *Stellenbosch Law Review* 221-222; Cohen and Gosai 2016 *Industrial Law Journal* 2243-2244.

³⁴⁰ Cohen and Gosai 2016 *Industrial Law Journal* 2244-2245; Dancaster and Cohen 2010 *South African Journal of Labour Relations* 34; Cohen and Dancaster 2009 *Stellenbosch Law Review* 227-228.

³⁴¹ Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 39; Bauling 2016 *Obiter* 163-165.

families resulting in social ills like indiscipline in children, drug abuse and general delinquency. Engle, Beardshaw, and Loftin³⁴² argue that the presence of fathers and their contribution to the wellbeing of their families is perhaps the greatest but most underused support system for South African children. Therefore, policy formulators are urged to formulate leave policies that facilitate the presence of fathers in families.³⁴³ Society stands to benefit from well-ordered families.

The protection of paternity leave and related rights has advantages to business too. Cohen and Gosai³⁴⁴ argue that paternity leave helps reduce staff absenteeism, boosts wellness, improves staff retention, enhances the corporate image, enhances productivity, and promotes a flexible workforce. Where employees know that they are allowed time off to care for their families, there is no need to feign sickness or lie. Rather, they feel confident and valued. In return, they do their best for their employers. Employers who allow working fathers and mothers time off for care duties are likely to recruit the best candidates.³⁴⁵ Dancaaster and Cohen³⁴⁶ warn that employers who do not grant family care leave to working fathers run the risk of recruiting employees who work below their potential and they will ultimately leave their jobs. It was argued earlier that the present crop of fathers values employment as far as it does not affect the welfare of their families. When despondent employees leave their jobs, the cost for such human capital loss goes beyond individual employers and affects the entire economy.³⁴⁷ Skills and experience cannot be easily replaced, and it becomes costly for the employers and economy to train new personnel. Therefore, it is imperative that policy-makers appreciate the immense benefits the protection of paternity leave can bring to the South African

³⁴² Engle P, Beardshaw T and Loftin CR "The Child's Right to Shared Parenting" in Richter L and Morrell R (eds) *Baba: Men and Fatherhood in South Africa* (HSRC Press, Cape Town 2006) 302.

³⁴³ Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 39; Bauling 2016 *Obiter* 164-165.

³⁴⁴ Cohen and Gosai 2016 *Industrial Law Journal* 2246-2247; Eaton SC "If You Can Use Them: Flexibility Policies, Organizational Commitment, and Perceived Performance" 2003 *Industrial Relations: A Journal of Economy and Society* 145, 162-163.

³⁴⁵ Cohen and Gosai 2016 *Industrial Law Journal* 2246; Eaton 2003 *Industrial Relations: A Journal of Economy and Society* 164.

³⁴⁶ Dancaaster and Cohen 2010 *South African Journal of Labour Relations* 42; Cohen and Dancaaster 2009 *Stellenbosch Law Review* 239.

³⁴⁷ Cohen and Dancaaster 2009 *Stellenbosch Law Review* 239; Dancaaster and Cohen 2010 *South African Journal of Labour Relations* 42.

society and economy. Once policy-makers operate from a point of knowing what is at stake, expectations are that they would push for leave policies that benefit fathers, their families, society, and business.

(d) paternity leave is not a competitor to maternity leave but a complementary entitlement for fathers to meet work and family care duties

Paternity leave and maternity leave are not competitors. Rather, the two leave entitlements should go hand in hand so that employed fathers and mothers can meet their work and care obligations.³⁴⁸ It is submitted that if the two leave entitlements are used in supportive roles, there are greater chances of achieving equality for fathers and mothers both at home and at work. The equality means equal opportunities or equity realised through the diverse but complementary roles fathers and mothers play.³⁴⁹ It becomes wrong when equality is taken to imply that whatever one gender does, the other should do as well. Fathers and mothers play distinct roles because of their physiological differences. However, what fathers do should support and complement the actions of mothers. This is true for the home and the workplace. Leave policies in South Africa should encourage stronger bonding between working fathers and their children so that society has healthier families.³⁵⁰ As was demonstrated above, fathers who come from well-functioning homes are less likely to be absent from work. It is further argued that the provision of paternity leave can show that fathers can also engage in unremunerated care work just like mothers.³⁵¹ Therefore, fathers can also experience the frustrations faced by working mothers in balancing the demands of paid work and household duties. Dancaster

³⁴⁸ Armstrong J, Walby S and Strid S "The Gendered Division of Labour: How Can We Assess the Quality of Employment and Care Policy from a Gender Equality Perspective?" 2009 *Benefits* 263, 264-267.

³⁴⁹ Müller KU, Neumann M and Wrohlich K "The Family Working-Time Model: Towards More Gender Equality in Work and Care" 2018 *Journal of European Social Policy* 471, 474-475.

³⁵⁰ Rycroft and Duffy 2019 *Industrial Law Journal* 12-13; para 1.1 of the Memorandum of Objectives of the Labour Laws Amendment Bill 29 of 2017; Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 30, 37-38.

³⁵¹ Cohen and Dancaster 2009 *Stellenbosch Law Review* 221-222; Dancaster "State Measures Towards Work-Care Integration in South Africa" 187.

and Cohen³⁵² argue that women find themselves in a time squeeze due to the pressure of fulfilling work and domestic care responsibilities. For a long time, women have put up with the loss of employment because of maternity responsibilities. It is important to change the current leave policies so that fathers take a reasonable share of duties that have kept women under constant pressure in balancing career and family duties.

(e) further analysis should be done to establish the cost of on-the-job-absenteeism of fathers in the South African workplace

Hosking³⁵³ argues that there is need to assess and quantify the level of on-the-job-absenteeism focusing on employed fathers who cannot concentrate on their duties because of family-related worries. A study into this absenteeism is likely to highlight the need to support working fathers so that they have time for their families. The help can come through policy makers developing legislation, or because of market forces responding to a gap identified. Future research on this and many other aspects affecting the South African workplace is encouraged.

5.3 Conclusions

It is argued that South Africa's leave policies have a gender imbalance that need to be addressed. Working fathers do not enjoy the same care leave benefits as employed mothers. To illustrate the above argument, mothers are entitled to four consecutive months of maternity leave, while fathers can only claim ten days of parental leave. Maternity leave is expressed in clear gender terms to show that it is meant for women.³⁵⁴ However, parental leave is in gender-neutral terms.³⁵⁵ It is submitted that both a father and a mother can claim parental leave. Therefore, there is inadequate protection of paternity leave and related rights for employed fathers in

³⁵² Dancaster and Cohen 2010 *South African Journal of Labour Relations* 31, 31-32; Cohen and Gosai 2016 *Industrial Law Journal* 2237, 2243-2244; Cohen and Dancaster 2009 *Stellenbosch Law Review* 221.

³⁵³ Hosking "Men, Work and Parenting" 224.

³⁵⁴ Section 25(2)(b) and (3) of the *BCEA*; see further sections 186(1)(c)(i) and 187(1)(e) of the *LRA*.

³⁵⁵ Section 3 of the *Amendment Act*; also see section 25 A of the *BCEA*.

South Africa. Policy-makers have several ways to address the imbalance in the existing leave policies to establish gender parity at home and at the workplace.

It is submitted that there is need to acknowledge that fathers can equally discharge caring roles at home so as to change the perception that fathers' only duty is to be breadwinners.³⁵⁶ Women have joined the workplace and are helping to support the family economically. In some instances, mothers earn more money than fathers. In addition, there is need to relook at the laws, particularly on care-related leave provisions, to make them equitable.³⁵⁷ It is to the advantage of families, employers and the economy for employed fathers to be able to meet their work obligations while keeping their families going. Above all, there is need for a specific and mandatory leave entitlement for working fathers in South Africa. The leave entitlement should be comparable or equal to maternity leave so that employed fathers and mothers can balance care demands at home while fulfilling paid work obligations.

³⁵⁶ Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 30, 30-31; Dancaster and Baird 2008 *Industrial Law Journal* 22, 23-24; Cohen and Gosai 2016 *Industrial Law Journal* 2242-2245; ILO *Maternity and Paternity at Work: Law and Practices Across the World* 52.

³⁵⁷ Dancaster and Baird 2008 *Industrial Law Journal* 23-24; ILO *Maternity and Paternity at Work: Law and Practices Across the World* 52.

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LIST OF ABBREVIATIONS

BCEA	Basic Conditions of Employment Act
CC	Constitutional Court
EEA	Employment Equity Act
HRSC	Human Sciences Research Council
ILJ	Industrial Law Journal
ILO	International Labour Organisation
LC	Labour Court
LLM	Masters of Laws
LRA	Labour Relations Act
NWU	North West University
PER	Potchefstroom Electronic Law Journal
SADC	Southern Africa Development Community
UIA	Unemployment Insurance Act
UIF	Unemployment Insurance Fund