



Promoting gender equality in the workplace: A quest for paternity leave in South Africa

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SOLEMN DECLARATION

I hereby declare that the dissertation entitled: **Promoting gender equality in the workplace: A quest for paternity leave in South Africa**, 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 with the exception of references of the sources acknowledged herein and that I have not at any prior time submitted it to any other university for any qualification.

Signature of Candidate:

Signed aton this day of 2023

Declared before me on this day of

Signature of Supervisor.....

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First and foremost, praises and appreciation to God the Almighty, for his blessings throughout my research, which enabled me to accomplish the project.

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To my beloved parents, Mr Givemore Vimoni and Mrs Pumula Vimoni, thank you very much for your love, prayers, care and sacrifices. I would also like to thank my friends and everyone who helped during this difficult time.

DEDICATION

To my mother and father, who never stopped believing in me.

ABSTRACT

The history of South Africa is characterised by gender stereotypes and inequalities that have influenced the development of laws. Migrant labour systems which always place fathers away from their families and caregiving responsibilities have contributed to the perception that regards fathers as breadwinners and mothers as caregivers. This follows that fathers were forced to prioritise their careers over their family and parental responsibilities. These views fail to take into account the changing dynamics of modern families where both parents actively participate in the labour markets. Consequently, to date, there has not been any statute that expressly regulates paternity leave rights in South Africa.

This research is premised on the submission that the lack of paternity leave rights under the South African labour laws is inconsistent with the rights to equality and dignity provided under the Constitution. Notwithstanding that section 25A *Basic Conditions of Employment Act* makes provision for a ten-day parental leave which can be claimed by fathers at the birth of their child, this research argues that ten days is too short a period for a parent to bond with their children. This submission is cemented on the views that a father's presence in their child's life for the first 1000 days has far-reaching effects on the development of the child. Accordingly, the researcher hopes that the recommendations made in this research can be used by policymakers to promote the recognition and regulation of paternity leave rights in South Africa.

Keywords: Workplace; Paternity leave; Fathers; Newborn; Parental leave, child.

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CHAPTER ONE

RESEARCH OUTLINE

1.1 Introduction

The promotion of gender equality in South African workplaces raises the discourse of the introduction of paternity leave in South Africa's labour laws and policies. Currently, there are no laws relating to paternity leave in South Africa. The *Basic Conditions of Employment Act*,¹ regulates the right to maternity leave, without a corresponding paternity leave. Instead, the *Labour Law Amendment Act*² provides for parental leave which is the only leave available for working fathers to fulfil their family responsibilities. Throughout this research, the researcher argues that this position was influenced by the migrant labour system which forced fathers to live far from their families for them to earn a living and gender stereotypes that regard mothers as caregivers, and fathers as the breadwinners.³

In the post-apartheid era and present constitutional dispensation, the promotion of gender equality has resulted in the active participation of women in the workplace.⁴ However, fathers remain absent in the home to fulfil family responsibilities even though some families comprise of dual-earners. The Constitution of the Republic of South Africa, in section 23, provides for fair labour practices, which include equal opportunities and pay values. Nonetheless, the reluctance towards the establishment of paternity leave rights in South Africa remains a challenge. This research establishes the need for regulated paternity leave to eradicate gender imbalances and stereotypes. It has been contended that paternity leave enables fathers to bond with their children during their first days and research shows that this is essential for the development of children.⁵

¹ *Basic Conditions of Employment Act* 75 of 1997 (BCEA), section 25.

² *Labour Law Amendment Act* 10 of 2018 (LLAA); also see section 27A of the BCEA.

³ Dancaster and Baird 2008 *Industrial Law Journal* 22, 25.

⁴ Constitution of the Republic of South Africa, 1996, section 9.

⁵ Makusha and Richter "Father Involvement in the First 1,000 Days" 51; Hall and MacDermid 2009 *Journal of Family and Economic Issues* 215, 221.

Accordingly, there is a need for regulated paternity leave to promote gender equality and the rights of employed fathers in South Africa.

1.2 Problem statement

1.2.1 Background

Richter *et al*,⁶ assert that students with fathers who were present from an early stage in their lives perform better in school. Another study also proves that women who are consistently supported in stable bonds with a partner have a low probability of experiencing mental health problems and stress.⁷ These findings show that it is essential for fathers to be physically present and support their families, especially immediately after the child's birth.⁸ The evolution of the socio-economic status in South Africa, which requires both women and men to enter the workplace and provide for their families saw the dissolution of the traditional family set-up which regarded women as caregivers and homemakers.⁹ This meant that the involvement of women in socio-economic activities and workplaces increased. Consequently, feminist movements which advocated for equal opportunities and the eradication of social barriers gained momentum and emphasised the regulation of paternity leave as they promoted the importance of co-parenting and family stability.¹⁰

Prior to the Labour Laws Amendment Act (herein referred to as *LLAA*), and the Basic Conditions of Employment Act (herein referred to as the *BCEA*) provided for family responsibility leave which was not a form of paternity or parental leave.¹¹ Fathers in South African workplaces applied for family responsibility leave when a child was born since it was the only leave that could be used for this purpose.¹² The provision for family

⁶ Richter, Chikovore, Makusha, Bhana, Mokomane, Swartz and Makiwane *Men in Families and Family Policy in a Changing World* 51.

⁷ Richter *et al* "Fatherhood and Families" 51.

⁸ Bauling 2016 *Obiter* 163; also see Behari 2018 *Industrial Law Journal* 2150.

⁹ Behari 2016 *Obiter* 348; Lindegger G "The Father in the Mind" 121, 125.

¹⁰ Naidoo SL *A Father's Right to Paternity Leave in the South African Workplace* 8; Bosch *et al* 2012 *The International Journal of Human Resource Management* 2840.

¹¹ Budlender and Lund 2011 *Development and Change* 931.

¹² Dancaster and Cohen 2015 *International Labour Journal* 2475; Dancaster 2010 *SALJ* 31, 33.

responsibility leave instead of paternity leave was often criticised for failing to address the need for fathers to spend time with their newborns as well as provide support to the mothers.¹³ Family responsibility leave was very restrictive and failed to take into consideration instances when fathers may be the primary caregiver of the child, when the mother of the child passes away during or shortly after childbirth or when fathers adopt an infant.¹⁴ Accordingly, the three days of family responsibility leave failed to cater to the needs of fathers in South African workplaces, especially those who were the primary caregivers as compared to the four months of maternity leave awarded to mothers. In some instances, this position was argued on the grounds of gender inequality and unfair discrimination.¹⁵ The right to maternity leave has always been legally provided in South African labour laws.¹⁶ However, there were no provisions that granted fathers paternity leave, except for the family responsibility leave under the *BCEA*.¹⁷

It is interesting to note that family responsibility leave applies to both mothers and fathers in South African workplaces. Consequently, there were no specific provisions that enabled fathers to play a fatherly role to their newborn children.¹⁸ This position raised difficulties as far as equality is concerned and it exacerbated the regulation of paternity leave in the South African labour laws.

In 2020, the *LLAA* was enacted to, *inter alia*, provide for parental responsibility leave which also serves the purpose of paternity leave in South Africa. As such, fathers in South African workplaces are entitled to paternity leave in a sub-leave category named parental responsibility leave. Fathers are now entitled to a ten days parental leave when their

¹³ Dancaster and Cohen 2015 *International Labour Law* 2475; Dancaster and Cohen 2010 *SALJ* 34.

¹⁴ Scheepers L *Maternity Leave Provisions in South Africa and the need for Legislative Reform* 14.

¹⁵ See section 6(2) of the *EEA*; Visser D *Parental Leave in South Africa: Bridging the Gap between Gender Roles and the Right to Equality* 25.

¹⁶ Section 25 of the *BCEA*; *Labour Relations Act* 66 of 1995 (*LRA*), see section 186(1)(c)(i).

¹⁷ See sections 25 and 27 of the *BCEA*.

¹⁸ Madhavan and Roy 2011 *Journal of Family Issues* 805.

children are born.¹⁹ It should also be noted that this does not only apply to biological fathers as the *LLAA* also provides for adoption leave and commissioning parental leave.²⁰

1.2.2 Rationale/Justification of the Study

The attempt at regulation of paternity leave in South Africa is a fairly new aspect that was introduced by the *LLA*.²¹ Prior to the *LLAA*, fathers in South African workplaces were not granted paternity leave, they were only entitled to a three days' family responsibility leave.²² The family responsibility leave did not specifically address the need and purpose of paternity leave such that the regulatory gap remained in existence as it could be granted for several other purposes.²³ The move towards the regulation of paternity leave in South African workplaces can be said to be directly influenced by feminist movements which advocate for equality rights between men and women.²⁴ The earlier position that failed to provide for paternity leave unfairly discriminated against fathers who wanted to participate in the upbringing of their infants and fathers who become primary caregivers of their children when the mother passes away during childbirth. It also failed to take into consideration the needs of males in same-sex relationships, who required time to bond with their newly born infants. Failure to provide for paternity leave limited the active participation of women in workplaces by not enabling both parents to share the responsibility of raising and bonding with their infants. As such, it can be said that the subject of paternity leave raises gender inequality concerns.²⁵

When one looks closely at the promulgation of the *LLAA*, despite its efforts to close the regulatory gap relating to paternity leave in South Africa, it is inadequate. For example, the father is only granted ten (10) days of parental leave whereas mothers are granted

¹⁹ Section 25A of the *BCEA*.

²⁰ Section 25B-C of the *BCEA*.

²¹ *Labour Law Amendment Act 10 of 2018 (LLAA)*.

²² *Basic Conditions of Employment Act 75 of 1997 (BCEA)*, section 27; Richter L *et al* "Fathers and other Men in the Lives of Children and Families 3.

²³ Richter "The Importance of Fathering for Children" 58.

²⁴ Behari 2016 *Obiter* 346, 347; see also Constitution of the Republic of South Africa, 1996 section 9.

²⁵ Constitution of the Republic of South Africa, 1996, Section 9(3); *Employment Equity Act 55 of 1998 (EEA)*, section 6(1).

at least three (3) months for maternity leave. This shows that gender stereotypes still exist, women are still regarded as homemakers and caregivers whereas their male counterparts are regarded as the 'breadwinners' who should actively participate in the labour markets. Accordingly, the stigmatisation of fathers through labour laws remains problematic in South African workplaces and such practices constitute unfair discrimination under the Constitution.²⁶

The Constitution of the Republic of South Africa, 1996 prohibits unfair discrimination of any person on the grounds of, *inter alia*, sex, gender and pregnancy.²⁷ On the same note, the *Employment Equity Act* also provides that it is unfair to discriminate against an employee on the basis of sex, pregnancy and family responsibility.²⁸ What is certain about these provisions is that it is *prima facie* unfair to discriminate against an employee based on these grounds. In the case of maternity and paternity leave, the South African labour laws easily resorted to the conclusion that mothers require more time for maternity leave to nurse the newborn child as well as recover from the childbirth experience. What the legislature and policymakers failed to take into consideration are situations whereby mothers die during child birth and leave the responsibility to nurture the newborn baby with their fathers. Regardless of the circumstances, the *BCEA* only grants a ten-days paternity leave to fathers of newborn babies.²⁹ The *BCEA* fails to provide for circumstances whereby fathers require more time after the birth of their children simply because they are 'fathers' and they automatically do not qualify for four months paternity leave as in the case of mothers.³⁰ This position can be regarded as discriminatory and unfair to fathers.

The *BCEA* provides for an employee's right to parental leave for at least ten consecutive days.³¹ It should be noted that the *BCEA* does not make specific provisions for paternity

²⁶ Richter "The Importance of Fathering for Children" 58.

²⁷ Section 9(3) of the Constitution.

²⁸ Section 6(1)-(2) of the *EEA*.

²⁹ See section 25A of the *BCEA*.

³⁰ See related comments by Dancaaster and Cohen 2010 *South African Journal of Labour Relations* 39; also see Richter "The Importance of Fathering for Children" 58.

³¹ Section 25A of the *BCEA*.

leave, instead, it is referred to as parental leave, which applies to both fathers and mothers. Despite being granted the right to maternity leave, mothers are also entitled to parental leave.³² The concept of paternity leave is not expressly provided for in South African legislation, it is rather parental leave which fathers in workplaces are entitled to when their children are born.³³ It should be noted that the main purpose of the *LLAA* was to address the regulatory gaps that existed in South African labour laws, thus the failure to provide fathers with paternity leave means the gap still exists as no reference to paternity leave was made throughout the Act.³⁴ The parental responsibility leave was not specifically provided to address the needs of fathers, instead, it is at the disposal of any parent. Paternity leave is still not expressly regulated in South Africa.³⁵ Nonetheless, the International Labour Organisation (ILO) provides that the purpose of paternity leave is to, *inter alia*, enable fathers to care for their newborn children, have an early interaction with their children, contribute to their successful development and promote equality between men and women both in the workplaces and at home.³⁶

The court in *MIA v State Information Technology Agency (Pty) Ltd* emphasised the importance of taking into consideration the best interests of the child.³⁷ The availability of fathers for their newborns creates the groundwork for the father-child relationship, which according to Behson and Robbins is crucial for the development of the child.³⁸ However, a period of ten days may not be reasonably enough for fathers to establish relationships with their newborns and also bond with them.³⁹ Fathers may not bond with their children and provide the required support to the mothers in ten days, as awarded by the *BCEA*.⁴⁰ Therefore, it is important to investigate how paternity leave can recognise

³² Section 25A of the *BCEA*.

³³ Section 25A(1) of the *BCEA*.

³⁴ Behari 2018 *Industrial Law Journal* 2155.

³⁵ See section 25A of the *BCEA*.

³⁶ International Labour Organisation *Maternity and Paternity at Work: Law and Practice across the World* (Geneva ILO 2014) 56.

³⁷ *MIA v State Information Technology Agency (Pty) Ltd* para 87.

³⁸ Behson and Robbins "The Effects of Involved Fatherhood on Families, and How Fathers can be Supported both at the Workplace and in the Home" 4.

³⁹ See related comments by Dancaaster and Baird 2008 *Industrial Law Journal* 30.

⁴⁰ Section 25A of the *BCEA*.

the best interests of the child⁴¹ and also the needs of fathers in South African workplaces. The purpose of prolonged paternity leave in this instance is to ensure that both parents can share the responsibility of upbringing their infants and the active participation of women in the labour market by sharing responsibilities with the fathers.⁴² It, therefore, becomes reasonable to allude that the provisions of paternity leave in South Africa are not adequate to promote gender equality in workplaces and for fathers to contribute to the upbringing of their newborn infants.

The amendments to the *BCEA* can be said to have been promulgated to benefit employed fathers and their children. As stated already, children mentally benefit from committed and present fathers to the extent that they tend to perform better in school, and health-wise and have fewer chances of engaging in criminal activities.⁴³ Accordingly, the researcher seeks to determine whether the regulation of paternity leave in South Africa is adequate for this purpose and if the provisions under the *BCEA* address the gender inequalities emanating from this subject.

1.2.3 Research question

How can the implementation of paternity leave regulations and policies in South African workplaces be improved to promote work-family balance?

1.3 Research Aim and Objectives

1.3.1 Aim

For the purposes of this research, aims are the main overall goals or targets that are generally expected to be achieved by the researcher at the end of the research. In this regard, this research seeks to examine the protection of paternity rights in South African workplaces to determine its effectiveness in promoting workplace gender equality.

⁴¹ Section 28 of the Constitution.

⁴² Arnarson and Mitra 2010 *Applied Economics Letter* 678.

⁴³ Behari 2016 *Obiter* 355; also see Behari 2018 *Industrial Law Journal* 2156.

1.3.2 Objectives

For the purposes of this research, objectives refer to any measures or specific stages that are undertaken by the researcher to achieve the overall goals and aims of the research.

In order to achieve the aforesaid aims, the research:

- a. examine whether the parental leave provisions under the *BCEA*⁴⁴ are robust enough to support equality in South African workplaces;
- b. investigate the flaws and shortcomings of the current regulatory framework; and
- c. recommend measures that can be implemented to ensure that paternity leave provides the support required by fathers in South African workplaces.

1.4 Research method(s)

This research is a qualitative study based on literature review and the following research methods are used:

a) Primary and secondary sources

The researcher makes use of the library to access relevant books, case law, journals, statutes and other relevant materials. Reference is made to relevant websites for information. This is important because it provides the researcher with more access to the opinions of various renowned commentators and authors. The dates referred to are the dates on which the websites were accessed by the researcher. For purposes of this research, the North-West University *Potchefstroom Electronic Law Journal Referencing* style was utilised.

b) Relevant case law

The researcher examines and analyses case law that is relevant to paternity leave in South African workplaces.

c) Relevant legislation

⁴⁴ Section 25A of the *BCEA*.

This research focuses on the *LLAA* and the *BCEA*. Other relevant statutes are referred to for historical purposes.

1.5 Framework

This research consists of five chapters including this chapter.

Chapter One provides the introduction and background of the research. It outlines the aims, objectives, research questions, literature review, scope and limitations of the research, statement of the problem, rationale of the study and the research methodology.

Chapter Two is a historical analysis of paternity leave in South Africa. The history is traced from 1983 when the *BCEA* was enacted till the enactment of the *LLAA* in 2018. The chapter focuses on how paternity leave has been addressed in South Africa.

Chapter Three is an analysis of the current regulatory framework of paternity leave in South Africa. The researcher focuses on the *LLAA* and the *BCEA* to analyse how the concept of paternity leave is regulated in South Africa. This enables the researcher to determine whether the current regulatory framework is robust enough to promote workplace equality and is consistently enforced.

Chapter Four investigates the flaws and regulatory gaps that exist in the current regulatory framework. Thus, the researcher provides an analysis of the adequacy and effectiveness of paternity leave in South Africa. The problems thereof are also discussed.

Chapter Five is the concluding chapter. In this chapter, the researcher recommends measures that can be implemented to address the flaws and problems discussed in Chapter Four. The researcher hopes that policymakers consider these recommendations to amend the regulatory gaps.

1.6 Limitations of the Study

This study is not a comparative study. Therefore, the researcher only centres the discussion on the regulation of paternity leave in South Africa.

1.7 Relevance for the research unit

This research focuses on the statutory regulation of paternity leave in South Africa. As such, the research falls under the Justice in Practice project of the Faculty of Law. As stated earlier under the rationale of the study, the research exposes the shortcomings in the current paternity leave regulatory statutory framework in a bid to recommend some measures that could be employed to support the needs of fathers in South African workplaces. It is hoped that some findings of this thesis will be published as journal articles or book chapters.

1.8 Statement regarding ethics

This work is qualitative research in which all primary and secondary sources used are referenced. No individual or group interviews and questionnaires are used as instruments of research 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, risks or hazards for research participants are 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 North West University for harm to participants arising from the conduct of the research. An application for ethics was made by the researcher to ensure compliance with the North-West University clearance standards.

CHAPTER TWO

HISTORICAL ANALYSIS OF THE REGULATION OF PARENTAL LEAVE IN SOUTH AFRICA

2.1 Introduction

South Africa currently provides no express regulations for paternity leave.⁴⁵ Instead, the current legislation regulates the provision of parental responsibility leave.⁴⁶ It should be noted that the regulation of parental leave in the *BCEA* was a recent development to close the gap that existed in South African labour laws. This follows that the amendments made to the *BCEA* which resulted in the provision of a ten (10) consecutive days leave were introduced to enable fathers to care for and bond with their new born babies.⁴⁷ Prior to these amendments, there were no provisions enabling fathers in South African workplaces to leave work and care for their new born children and/or their mothers.⁴⁸ In this regard, several criticisms were raised on the basis of gender inequality on the basis that South African labour laws place women as the primary caregivers as compared to their male counterparts.⁴⁹ This follows that fathers were only allowed three (3) days of parental responsibility leave.⁵⁰ This chapter traces the history of the statutory regulation of parental leave in South African workplaces. This is done to determine the progress that has been made to date and identify the gaps and flaws in the current regulatory framework in relation to paternity leave.

⁴⁵ Behari 2016 *Obiter* 347; also see Behari 2020 *Obiter* 789; Eikhof, Warhust and Haunschild 2007 *Employee Relations* 327.

⁴⁶ *Basic Conditions of Employment Act* 75 of 1997, section 25B-C; see discussion by Budlender and Lund 2011 *Development and Change* 931.

⁴⁷ Section 25B-C of the *BCEA*; also see Dancaster and Baird 2008 *Industrial Law Journal* 35; Van den Berg and Makusha *State of South Africa's Fathers* 2018 15.

⁴⁸ Van Jaarsveld 2002 *SA Merc LJ* 403; Ramphela and Richter "Migrancy, Family Dissolution and Fatherhood" 74-75; Ratele "An Overview of Fatherhood in South Africa" 42-43.

⁴⁹ Dancaster and Baird 2008 *Industrial Law Journal* 35; Ratele "An Overview of Fatherhood in South Africa" 44.

⁵⁰ Section 27(2)(a) - (c) of the *BCEA*; see related discussion by Dancaster and Cohen 2010 *SALJ* 34; Behari 2020 *Obiter* 785.

2.2 Early Recognition of Paternity Leave Rights in South Africa

The concept of paternity leave has gained considerable attention in recent decades. This has been influenced by both international and domestic factors which have established formal entitlements for fathers in the upbringing of their children.⁵¹ Initially, the primary focus was centred on maternity leave and the need for working mothers to get support during the postnatal period.⁵² On an international level, maternity leave was established as early as the 1950s under the Maternity Protection Convention (No 103) of 1952 and granted women paid leave for childbirth and recovery.⁵³

On a national level, specifically in South Africa, maternity leave was first regulated under the now-repealed *Basic Conditions of Employment Act (BCEA of 1983)*.⁵⁴ The purpose of maternity leave was to protect the health of women after childbirth and bonding time for the newborn and their mother.⁵⁵ However, the same cannot be said about fathers in South African workplaces at the time. The regulation of maternity leave without a corresponding paternity or parental leave caused gender imbalances in the workplace.⁵⁶ In essence, it meant that women were better as caregivers and not as full-time employees. Accordingly, the regulation of maternity leave, without provision of paternity or parental leave was always questioned based on equality, especially after the enactment of the Constitution in South Africa.⁵⁷

One of the goals during the transition to democracy in the 1990s in South Africa was eradicating discrimination based on sex and gender by fostering gender equality and

⁵¹ Haas 2003 *Review of Policy Research* 94; Smit 2002 *Journal of Comparative Family Studies* 401; Makusha and Richter "Father Involvement in the First 1,000 Days" 51.

⁵² Kagnas and Murray 1994 *Acta Juridica* 30; Van Jaarsveld 2002 *South African Mercantile Law Journal* 399-400.

⁵³ Kagnas and Murray 1994 *Acta Juridica* 31; Van Jaarsveld 2002 *South African Mercantile Law Journal* 399-400.

⁵⁴ *Basic Conditions of Employment Act* 3 of 1983 (*BCEA of 1983*), section 17(b); Grogan *Workplace Law* 65.

⁵⁵ Haas 2003 *Review of Policy Research* 91; Nduna "An Overview of Fatherhood in South Africa" 36.

⁵⁶ Behari 2016 *Obiter* 360; Dancaster and Baird 2008 *Industrial Law Journal* 35; see comments by Cunningham 2008 *Social Forces* 302.

⁵⁷ Constitution of the Republic of South Africa, 1996, section 9; Dancaster and Cohen 2012 *South African Journal of Labour Relations* 35.

addressing the imbalances caused by gender-based discrimination.⁵⁸ The constitutional dispensation, adopted in 1996, expressly protected the rights of parents and children, thus paving the way for future regulatory developments in parental leave.⁵⁹ The *BCEA* of 1983 failed to protect the rights of parents and children by making no provision for paternity leave or parental leave. The researcher submits that this gap under the *BCEA* of 1983 constituted a broad limitation of rights. The *BCEA* failed to promote the guaranteed equality rights between mothers and fathers in South African workplaces and was later repealed by the *Basic Conditions of Employment Act 75* of 1997 (*BCEA* of 1997).⁶⁰

Despite these challenges, different employment legislations were enacted bringing a lot of changes in employment relations. For example, the *Labour Relations Act 66* of 1995 (*LRA*) was enacted to regulate and foster equal treatment of employees in South African workplaces in line with constitutional provisions.⁶¹ Moreover, the *BCEA* was enacted in 1997 to promote fair labour practices and give effect to the constitutional right to fair labour practices.⁶² More so, the *Employment Equity Act 55* of 1998 (*EEA*) was enacted in 1998 to enhance the equal treatment of all workplace stakeholders in South Africa.⁶³

Looking at this, the researcher submits that the enactment of the *EEA* can be regarded as an acknowledgement of workplace inequalities and the *EEA* was enacted to, *inter alia*, redress such inequalities and promote the rights provided under the Bill of Rights.⁶⁴ Be that as it may, prior to 2019, no efforts were made to address the unfair treatment that emanated from the imbalances of leave policies and regulations in South Africa. According

⁵⁸ Cohen 2012 *International Labour Journal* 24.

⁵⁹ Sections 9 and 23 of the Constitution.

⁶⁰ Section 27(1) of the *Basic Conditions of Employment Act 75* of 1997 (*BCEA* of 1997); see comments by Feldman and Gran 2016 *Journal of Sociology and Social Welfare* 96.

⁶¹ See sections 1-3 of the *Labour Relations Act 66* of 1995 (*LRA*).

⁶² Section 2 of the *BCEA*; section 23 of the Constitution; Dancaster and Cohen 2012 *South African Journal of Labour Relations* 35.

⁶³ *Employment Equity Act 55* of 1998 (*EEA*), section 3.

⁶⁴ See for example how Section 6 of the *EEA* opens an arena to cater for the prohibition of unfair discrimination in the workplace.

to Torerai,⁶⁵ it seems that the legislature was more concerned with redressing racial inequalities in workplaces, neglecting the sexual imbalances caused by the leave policies in South African workplaces. This follows that several measures have been implemented to correct racial imbalances in South African workplaces, for example, the Black Economic Empowerment (BEE), but little has been done to promote paternity leave rights.

The *BCEA* provided for three (3) days of family responsibility leave.⁶⁶ The regulation of family responsibility leave under the *BCEA* was a non-gendered provision which applied to both fathers and mothers.⁶⁷ Accordingly, the scope of family responsibility leave was too broad to be regarded as paternity leave.⁶⁸ This follows that family responsibility leave was not solely available for child care purposes, but could be used for any other family-related responsibilities.⁶⁹ In addition, family responsibility leave could also be used to promote the well-being of the child through bonding with their father during their early developmental stages.⁷⁰ However, the researcher argues that the family responsibility leave that was provided for under the *BCEA* was insufficient to promote the care-giving role of men.⁷¹ More so, three (3) days were not enough for fathers to adequately bond with their newborn babies.

The regulation of maternity leave without a corresponding paternity leave under the *BCEA* was a reflection of family dynamics imbalances in South African societies.⁷² This regulatory gap in South African law inclines the stigmatisation that women are caregivers and homemakers who do not belong in workplaces.⁷³ The researcher submits that,

⁶⁵ Torerai *The Protection of Paternity Leave and Related Rights for Employed Fathers under the Labour Laws Amendment Act 10 of 2018* 17.

⁶⁶ Section 27(1) of the *BCEA*; Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 32; also see Van Jaarsveld 2002 *South African Mercantile Law Journal* 401.

⁶⁷ See Haas 2003 *Review of Policy Research* 91; also see Dancaster and Cohen 2010 *SALJ* 29.

⁶⁸ 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" 187.

⁶⁹ Huysamen "Women and Maternity: Is there Truly Equality in the Workplace between Men and Women, and Between Women Themselves?" 66; Behari 2016 *Obiter* 348.

⁷⁰ Dancaster and Baird 2008 *International Labour Journal* 32; Haas 2003 *Review of Policy Research* 91; also see Dancaster and Cohen 2010 *SALJ* 29.

⁷¹ Section 27 of the *BCEA*.

⁷² Buhari 2016 *Obiter* 348.

⁷³ Torerai *The Protection of Paternity Leave and Related Rights for Employed Fathers under the Labour Laws Amendment Act 10 of 2018* 17.

despite the fact that a child depends on maternal care during their early months, the participation of fathers in caregiving is also essential. Accordingly, the lack of express regulations relating to the postnatal care duty for fathers under the *BCEA* constituted unfair discrimination and inequality in South African workplaces. The *BCEA* also failed to take into consideration the right of adopted children to be cared for.⁷⁴ Although the *Unemployment Insurance Act* awards adoption leave benefits to one parent, the *BCEA* failed to provide for adoption leave. In this regard, the researcher submits that the exclusion of fathers from the duty to care for their children under the *BCEA*, prior to the recent amendments, unjustifiably limited employed fathers' caring responsibilities.

The Department of Social Services published the White Paper on Families in South Africa first in 2012 and a revised version in 2021 as a measure to promote the socio-economic well-being of families.⁷⁵ The White Paper also aimed at strengthening family relationships by widening access to parenting support and advice.⁷⁶ The researcher opines that strengthening family relationships should also include breaking the barriers that hinder fathers from fully participating in caregiving. Accordingly, the express regulation of paternity leave in South Africa could be a relevant measure to strengthen family relationships in South Africa.⁷⁷ The White Paper was the first policy document to recommend the regulation of paternity leave and acknowledge the family responsibility of fathers as caregivers.⁷⁸ The researcher submits that the White Paper inclined the even distribution of care-giving responsibilities between fathers and mothers and promoted gender equality.⁷⁹ The regulation of paternity leave under the *BCEA* could enhance parental support and family relationships. In this regard, the researcher submits that developments to regulate paternity leave in South Africa started much earlier and the

⁷⁴ *Child Care Act* 74 of 1983, section 21; sections 25 and 27 of the *BCEA*.

⁷⁵ Department of Social Development "White Paper on Families in South Africa" 2012 <http://www.dsd.gov.za/index> accessed 3 July 2023 39-40.

⁷⁶ Department of Social Development White Paper on Families in South Africa" 28.

⁷⁷ See related comments by Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 39; Rycroft and Duffy 2019 *Industrial Law Journal* 15.

⁷⁸ Department of Social Development White Paper on Families in South Africa" 48; O'Brien and Wall "Fathers on Leave Alone: Setting the Scene" 4.

⁷⁹ Behari 2016 *Obiter* 361, Rycroft and Duffy 2019 *Industrial Law Journal* 12, Behari 2018 *Industrial Law Journal* 2150.

current regulation of parental leave under the *BCEA* is a step closer to the express regulation of paternity leave.⁸⁰

2.3 The Effects of Cultural Beliefs on Paternity Rights in South Africa

Many African societies believe that the primary caregiving duty is for mothers and not fathers.⁸¹ This follows that there are socially accepted practices that position men as breadwinners and women as homemakers.⁸² The role of fathers as caregivers is not well projected in African societies. This is also evidenced by the lack of support campaigns directed at fathers from conception till the early stages of a child's life.⁸³ The role of fathers is perceived to be financial providers only.⁸⁴ Consequently, no effort is being put into supporting the role of fathers as caregivers to their children. Despite the increase in women's participation in the South African labour force, the role of fathers in relation to the care of children remains debatable.⁸⁵ There has been an increase in the participation of women in the work force in South Africa. Simultaneously, an increase in households with women as breadwinners exacerbated the need for fathers to actively participate in caregiving roles.⁸⁶ Nonetheless, the regulation of paternity leave in South Africa has not been regarded with urgency. In this regard, the researcher argues the reluctance to regulate paternity leave in South Africa could be a result of cultural beliefs that do not regard fathers as caregivers, nor women as breadwinners.

In *President of the Republic of South Africa and Another v Hugo*,⁸⁷ the role of fathers as caregivers was dismissed. The Court held that the release of mothers from prison was to enable them to fulfil their role as primary caregivers and such discrimination was fair and

⁸⁰ Section 25A of the *BCEA*; Rycroft and Duffy 2019 *Industrial Law Journal* 18; Behari 2018 *Industrial Law Journal* 2154; O'Brien and Wall "Fathers on Leave Alone: Setting the Scene" 5.

⁸¹ Makusha and Richter "Father Involvement in the First 1,000 Days" 52.

⁸² Cunningham 2008 *Social Forces* 300; Behari 2020 *Obiter* 789; Smit 2002 *Journal of Comparative Family Studies* 402.

⁸³ Cunningham 2008 *Social Forces* 300; Behari 2020 *Obiter* 789; Smit 2002 *Journal of Comparative Family Studies* 402.

⁸⁴ Makusha and Richter "Father Involvement in the First 1,000 Days" 55; Behari 2020 *Obiter* 790.

⁸⁵ See discussion by Cohen and Gosai 2016 *International Labour Journal* 2237; also see Cohen 2012 *International Labour Journal* 30.

⁸⁶ Cohen 2008 *Social Forces* 303; Cohen and Gosai 2016 *Industrial Law Journal* 2246.

⁸⁷ *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708 (CC).

justified.⁸⁸ In this case, the President employed the *Presidential Act* and authorised the release of female prisoners who had children under the age of 12. Consequently, a male prisoner who was the father to a 12-year-old also made an application to be released from prison on the grounds that the mother of the child had died. The application was dismissed on the basis that he was a male and the presidential pardon was only applicable to females. The prisoner challenged this decision on the grounds of gender discrimination. However, the Constitutional Court held that the discrimination was fair because it served a legitimate government purpose. It was held further that the release of mothers was to promote the primary role of mothers, which is caregiving. The researcher submits that the ruling of this case reflects the rooted perception that the role of fathers as caregivers is limited in African societies. Accordingly, the effects of societal beliefs have also played a significant role in the recognition of the fathers' duty to care and the regulation of paternity leave in South Africa.

2.4 The Effects of Women's Involvement in the Workforce on Paternity Leave Rights

The post-apartheid era was characterised by the realisation of women's rights and the promotion of equality in South Africa, including the labour force.⁸⁹ This entailed that the labour laws had to be amended to cater for the needs of working mothers and fathers. For example, the definition of a worker which is related to males without caregiving responsibilities was repealed.⁹⁰ The participation of women in the work force also entailed the need for fathers to take up caregiving responsibilities. Consequently, the labour laws and policies also had to accommodate this new reality and ensure that fathers and mothers effectively carry out their responsibilities both at home and at work.⁹¹ However, the legislature was more focused on protecting the rights of working mothers than

⁸⁸ *President of the Republic of South Africa and Another v Hugo* para 70; Posel and Devey "The Demographics of Fathers in South Africa: An Analysis of Survey Data, 1993-2002" 47.

⁸⁹ Section 9(3) of the Constitution; Morrell "Fathers, Fatherhood and Masculinity in South Africa" 24; Cohen and Dancaster 2009 *Stellenbosch Law Review* 223.

⁹⁰ Cunningham 2008 *Social Forces* 305; Dancaster and Cohen 2010 *South African Journal of Labour Relations* 35.

⁹¹ Morrell "Fathers, Fatherhood and Masculinity in South Africa" 24; Cohen and Dancaster 2009 *Stellenbosch Law Review* 223; Behari 2016 *Obiter* 350.

working fathers. This is evidenced by the provision of maternity leave in the *BCEA* without a corresponding paternity leave to promote the rights of working fathers in South African workplaces.⁹² The researcher argues that the unfair treatment of working mothers and fathers in relation to their caregiving roles requires regulatory reform to ensure equal treatment in workplaces.

The now-repealed family responsibility leave that was regulated under the *BCEA* also failed to protect the rights of adopting parents, same-sex partners or fathers who had to assume the primary caregiving role should the mother die during childbirth. Three days was not a sufficient period for a single father or adopting parent to bond with their children and adapt to caregiving responsibilities.⁹³ Although the *Unemployment Insurance Act* provided the right for adopting parents to get leave to fulfil their caregiving responsibilities, only one adopting parent was entitled to adoption benefits.⁹⁴ The UIF claimable benefits depend on the duration the employee has been working for that particular employer.⁹⁵ Accordingly, there was a need for new laws to be enacted to equally provide for the rights of men and women in the labour force. Instead, the involvement of women in the labour force projected the unfair discrimination that working fathers were subjected to through imbalances in the regulation of leave rights.

2.5 The Effects of Migrant Labour System on Paternity Leave in South Africa

During the apartheid era, black African workers were forced to migrate from one place to another to seek employment opportunities.⁹⁶ At this time, the workplace was dominated by male employees who were the supposed breadwinners. As such, this forced most black-African fathers to live far from their families and only be able to support their

⁹² Behari 2016 *Obiter* 350.

⁹³ Behari 2016 *Obiter* 350; Torerai *The Protection of Paternity Leave and Related Rights for Employed Fathers under the Labour Laws Amendment Act 10 of 2018* 16.

⁹⁴ Section 27 of the *Unemployment Insurance Act*.

⁹⁵ See discussion by Torerai *The Protection of Paternity Leave and Related Rights for Employed Fathers under the Labour Laws Amendment Act 10 of 2018* 16.

⁹⁶ Posel and Devey "The Demographics of Fathers in South Africa: An Analysis of Survey Data, 1993-2002" 45; Ramphele and Richter "Migrancy, Family Dissolution and Fatherhood" 74.

families financially.⁹⁷ More so, migrant labour migration patterns entrenched the perception that fathers are breadwinners and mothers are caregivers. Consequently, the migrant-labour system forced fathers to pursue their careers more than their family responsibilities. Post-apartheid, the political reforms that occurred in South Africa necessitated the promotion of equal opportunities for both men and women in South Africa.⁹⁸ This resulted in the participation of women in the labour force and exacerbated the need to promote fair labour practices in the workplace. Be that as it may, apartheid inequalities in family-care responsibilities remained intact as policymakers were quick to implement maternity leave rights without corresponding paternity leave rights.

Since 1994, policymakers have struggled to acknowledge the importance of a father's presence during his child's first days and fulfilment of his family responsibilities.⁹⁹ Despite several reforms which allowed women in workplaces and the labour market, there have not been regulatory measures to balance family responsibilities for working fathers and mothers in South Africa.¹⁰⁰ The Constitution only provides for fair labour practices and places no obligation on policymakers to regulate the evolving work-family dynamics.¹⁰¹ The researcher submits that the migrant labour system greatly contributed to this current position in South Africa. Accordingly, the establishment of a regulated paternity leave could be an essential measure to redress the effects of migrant labour in South Africa.

2.6 Conclusion

Since the enactment of the *BCEA* in 1983, South African labour laws have failed to expressly regulate paternity leave rights. This has caused workplace imbalances as working fathers are deprived of the right to fulfil their family responsibilities. From the discussion above, the researcher concludes that this position has been influenced by

⁹⁷ Rabe M "A Historical Overview of Fatherhood in South Africa" 19.

⁹⁸ Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 32; Cohen and Dancaster 2009 *Stellenbosch Law Review* 223.

⁹⁹ Rabe "A Historical Overview of Fatherhood in South Africa" 21-23; Ramphele and Richter "Migrancy, Family Dissolution and Fatherhood" 74; Richter "The Importance of Fathering for Children" 66.

¹⁰⁰ Ramphele and Richter "Migrancy, Family Dissolution and Fatherhood" 75; Phooko and Radebe 2016 *Constitutional Court Review* 306, 309.

¹⁰¹ Section 27 of the Constitution.

social and cultural beliefs which position women as caregivers and men as breadwinners. There is a need for regulatory reform to transform the status quo and embrace the participation of women in the labour force, as well as the role of men as capable caregivers. This chapter has shown that fathers are deprived of an opportunity to fulfil caregiving roles due to labour laws and workplace policies which are not accommodative in this regard. Although developments have been made to promote the rights of working fathers, which are discussed in detail in the next chapter, South Africa lags in the regulation of paternity leave. The researcher concludes that there is a need for a robust regulatory framework to regulate paternity leave in South Africa.

The next chapter presents a discussion on the current regulatory framework relating to a father's right to paternity leave in South Africa. This is done to determine whether the father's right to paternity leave is adequately regulated in South Africa.

CHAPTER THREE

THE CURRENT REGULATORY FRAMEWORK FOR PATERNITY LEAVE RIGHTS IN SOUTH AFRICA

3.1 Introduction

South Africa recently introduced parental leave, adoption leave and commissioning parental leave to the *Basic Conditions of Employment Act*¹⁰², through the *Labour Laws Amendment Act*.¹⁰³ This recent development follows the criticisms that advocated for leave entitlements for fathers in South African workplaces.¹⁰⁴ The purpose of these amendments is to, *inter alia*, enable fathers to bond with their newborn babies by being actively present during the first days and to provide support to mothers who will be recovering from child birth.¹⁰⁵ Although the South African labour legislation previously regulated the now repealed right to family responsibility leave, the right was couched in gender-neutral terms which were not robust enough to promote paternity rights in workplaces.¹⁰⁶ Nonetheless, the current regulatory framework does not provide for paternity leave rights. The *BCEA* regulates the provision of parental leave which, like the now repealed family responsibility leave, remains gender-neutral and insufficient for fathers to fulfil the caregiving role.¹⁰⁷ This research presents an investigation into why the legislature seems reluctant to expressly grant paternity leave rights in South Africa. This follows that there is considerable academic literature that denotes how the lack of express paternity leave rights provisions is inconsistent with equality rights and fair labour practices.¹⁰⁸ This chapter analyses the regulatory framework of paternity leave rights in

¹⁰² Section 27A of the *Basic Conditions of Employment Act* 75 of 1997 (*BCEA*).

¹⁰³ *Labour Laws Amendment Act* 10 of 2018 (*LLAA*).

¹⁰⁴ Dancaster "State Measures Towards Work-Care Integration in South Africa" 186.

¹⁰⁵ Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 30-31; Cools, Fiva and Kirkeboen 2015 *The Scandinavian Journal of Economics* 803.

¹⁰⁶ See related comments by Behari 2020 *Obiter* 788; Conaghan "Work, Family and the Discipline of Labour Law" 27.

¹⁰⁷ See section 27A of the *BCEA*; Van Jaarsveld 2002 *South African Mercantile Law Journal* 401; Motaung, Bussin and Joseph 2017 *South African Journal of Human Resource Management* 4.

¹⁰⁸ Rycroft and Duffy 2019 *Industrial Law Journal* 20; Behari 2020 *Obiter* 788; Motaung, Bussin and Joseph 2017 *South African Journal of Human Resource Management* 5.

South Africa. This is done to identify its flaws in order to recommend plausible measures to promote paternity leave rights in South Africa.

3.2 Understanding Paternity Leave Rights

Paternity leave refers to a period granted to fathers soon after the birth or adoption of a child.¹⁰⁹ The purpose of paternity leave is to enable fathers to provide support to the mother of their child as they recover from childbirth and to bond with their new babies.¹¹⁰ Currently, no legislation expressly regulates the right to paternity leave in South Africa. The first leave entitlement that was regulated and accommodated the caregiving role of working fathers was only for three (3) days.¹¹¹ The recent amendments to the *BCEA* also fail to expressly provide for paternity leave rights for working fathers.¹¹² The researcher submits that despite the several court battles relating to paternity leave rights, the legislature remains reluctant to regulate paternity leave rights for working fathers.

The significant changes in South Africa's matrimonial regime which recognises same-sex marriages call for reform in the regulation of paternity rights. In *Mia v State Information Technology Agency (Pty) Ltd*, the lack of provisions on paternity leave rights was found to infringe on the child's right to family and parental care.¹¹³ In this case, the applicant was a partner to a civil union who entered into a surrogate agreement in which he assumed the primary caregiving role of their child from birth. The applicant, therefore, applied for four months maternity leave which was denied by the defendant on the grounds that he was not the biological mother of the child. Instead, the applicant was granted two months of paid adoption leave and two months of unpaid leave. In this regard, the applicant argued that the defendant's refusal to grant paid maternity leave

¹⁰⁹ Dancaster and Baird 2008 *Industrial Law Journal* 35; Cools S, Fiva and Kirkebøen 2015 *The Scandinavian Journal of Economics* 803.

¹¹⁰ Motaung, Bussin and Joseph 2017 *South African Journal of Human Resource Management* 5; Moss (ed) *International Review of Leave Policies and Related Research* 11.

¹¹¹ Section 27 of the *BCEA*; Dancaster "State Measures Towards Work-Care Integration in South Africa" 185.

¹¹² Section 27A of the *BCEA*.

¹¹³ *Mia v State Information Technology Agency (Pty) Ltd* [2015] 7 BLLR 694 (LC); section 28(1)(b) of the Constitution.

constituted unfair discrimination on the grounds of gender, sexual orientation, sex and family responsibility.¹¹⁴ The court held that a male surrogate parent was entitled to “maternity leave” in line with the provisions of the *BCEA*. However, the researcher argues that the decision in *Mia v State Information Technology Agency* cannot be blindly applied to all cases relating to paternity leave.¹¹⁵ This follows that in this matter, it was not the *BCEA* that was the issue but the employer’s maternity leave policies which differ from one employer to another. As such, there remains a need for legislation that expressly regulates paternity leave rights to ensure the equal recognition of labour rights and the protection of the children’s rights. Also, there is a need for consideration of the position of heterosexual fathers, who are primary caregivers in this context.

The case of *Werner van Wyk and 2 others v Minister of Employment and Labour* also shows that mothers are not the only caregivers.¹¹⁶ In this case, a couple challenged the constitutionality of sections 25 and 26 of the *BCEA* on the grounds that they unfairly discriminate against fathers of newborn babies. The applicants call for an amendment of the *BCEA* to allow parents, regardless of sex, to be afforded adequate time to care for their newborn babies. However, at the time of writing this research, the application is still pending. Accordingly, the researcher submits that the lack of express regulations on paternity leave rights in South Africa deprives fathers, same-sex male parents and non-binary parents an opportunity to perform their caregiving role. This position should be revisited to ensure an equal realisation of equality and fair labour practices rights.¹¹⁷

Contrary to paternity leave is maternity leave which is directly claimable by female employees shortly before childbirth.¹¹⁸ As the name implies, maternity leave accrues to the maternal parent, the mother, for four months.¹¹⁹ The *BCEA* further provides that an employee may not work six weeks after giving birth unless certified to do so by a medical

¹¹⁴ Section 9(3) of the Constitution; *Mia v State Information Technology Agency (Pty) Ltd* para 1.

¹¹⁵ *Mia v State Information Technology Agency (Pty) Ltd* para 71.

¹¹⁶ *Werner van Wyk and 2 others v Minister of Employment and Labour* [2022] Case No: 2022/017842. The decision of this case is still pending.

¹¹⁷ Sections 9(3), 28 and 23(1) of the Constitution; Taylor “The New Order for South African Fathers” 3.

¹¹⁸ Section 186-187 of the *LRA*; section 25 of the *BCEA*.

¹¹⁹ Section 186-187 of the *LRA*; section 25 of the *BCEA*; Boswell and Boswell 2009 *Agenda* 76.

practitioner.¹²⁰ Although this is done to award women adequate time to recover from childbirth health-wise, it should also be taken into consideration that women also need support from their male counterparts during their time of recovery. The regulation of maternity leave without corresponding paternity leave rights inclines to gender stereotypes and assumptions entrenched in South African cultural and societal beliefs.¹²¹ The researcher argues that, whilst advocating for paternity leave rights, the goal is not to solely apply it to working fathers. Rather, there should be equal opportunities for parents to fulfil their family responsibilities regardless of their gender. Paternity leave rights should be informed by the needs of working fathers and their family responsibilities.

3.3 The Regulation of Paternity Leave Rights in South Africa

3.3.1 International Labour Organization on maternity and paternity leave

During the course of its history. The International Labor Organization (ILO) continues to have the following concerns regarding maternity protection: protecting the health of the mother and her infant; empowering women to effectively combine their roles as producers and mothers; and advancing the idea of equal opportunity and treatment for men and women. Three conventions on maternity protection have been accepted by the ILO: the 1919, 1952, and most recently, the 2000 Convention on Maternity Protection, Convention No. 183. They include safety precautions for expectant mothers and new mothers, such as preventing exposure to health and safety risks and granting the right to take leave. However, studies indicate a connection between fathers' leave, Gender equality in the workplace and at home may benefit from this, and it may also signal changes in relationships, parenting duties, and popular prejudices. As for paternity leave, there is no ILO regulation in place. However, the 2009 National Labor Conference Resolution on Gender Equality at the Heart of Decent Work acknowledges that work-family reconciliation initiatives benefit both men and women. In order to balance work and family obligations, the resolution asks the government to create appropriate laws,

¹²⁰ Section 25 of the *BCEA*; also see Boswell and Boswell 2009 *Agenda* 80.

¹²¹ Behari (2016) *Obiter* 346; Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 39.

such as paternity and/or parental leave, and to provide incentives for men to take use of them. men's adoption of home obligations, and the growth of children. Fathers who go on leave, in particular.

3.3.2 *The Constitution*

The founding principles of the South African Constitution are human dignity, equality and the progressive realisation of constitutional rights.¹²² Accordingly, equality in South African workplaces should be prioritised through legislation and internal policies. The Constitution provides for the equal treatment and enjoyment of rights and freedoms for all persons.¹²³ Such rights include the right not to be unfairly discriminated on the grounds of, *inter alia*, gender, sex and sexual orientation.¹²⁴ Nonetheless, the lack of paternity leave rights in South Africa is an unjustifiable differentiation between working mothers and fathers. There is a need for a corresponding paternity leave to create a balance of work-care responsibilities between mothers and fathers in South African workplaces.

The Constitution also provides for fair labour practices in South African workplaces.¹²⁵ However, the Constitution does not expressly provide for paternity leave rights in South Africa. The researcher argues that the regulation of fair labour practices under the Constitution underpins the equal treatment of both fathers and mothers in the workplace.¹²⁶ The right to fair labour practices extends to the protection of leave rights for all workers.¹²⁷ However, the discourse around the regulation of paternity leave in South Africa suggests that South Africa still lags behind in realising the right to fair labour

¹²² Section 2 of the Constitution; Langa 2006 *Systematic Law Review* 353.

¹²³ Section 9 of the Constitution; Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 29, 33.

¹²⁴ Section 9 of the Constitution.

¹²⁵ Section 23 of the Constitution.

¹²⁶ Phooko and Radebe 2016 *Constitutional Court Review* 312; Karr 2017 *Hastings Women's Law Journal* 225.

¹²⁷ Torerai *The Protection of Paternity Leave and Related Rights for Employed Fathers under the Laws Amendment Act 10 of 2018* 26; Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 31.

practices as far as paternity leave rights are concerned.¹²⁸ This follows that the labour laws still favour maternal parents over paternal parents. In *President of the Republic of South Africa and Another v Hugo*, the Constitutional Court had to determine whether the gender discrimination was unfair.¹²⁹ Justice Goldstone in the majority judgement found that fathers generally carry an unequal burden of child care.¹³⁰ Accordingly, the researcher submits that the constitutional goal for equality can be better realised if the caregiving responsibilities between fathers and mothers are shared equally. As such, there is a need for a symbolic reform of the societal beliefs in relation to caregiving roles and responsibilities to fully promote paternity rights and fair labour practices in South Africa.

3.3.3 *The Labour Relations Act*

The *Labour Relations Act* 66 of 1995 (LRA) is the primary legislation that regulates employment and workplace relationships in South Africa. The *LRA* does not expressly regulate paternity leave rights. However, the *LRA* prohibits unfair dismissals on the grounds of, *inter alia*, sex, gender and family responsibilities.¹³¹ The researcher submits that this provision protects both mothers and fathers who have family responsibilities. This follows that the provision is gender-neutral and can be interpreted as a protection of the rights of working men and women in South African workplaces. Accordingly, it is submitted that the *LRA* protects the rights of fathers with family responsibilities so that they may not be unfairly dismissed as a result of carrying out their family

¹²⁸ Matera *A Legal Evaluation of Paternity Leave in South Africa* 18; *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC).

¹²⁹ *President of the Republic of South Africa and Another v Hugo* para 76; Huysamen "Women and Maternity: Is there Truly Equality in the Workplace between Men and Women, and Between Women Themselves?" 45.

¹³⁰ *President of the Republic of South Africa and Another v Hugo* para 67; see related comments by Gaibie and Shamima *Industrial Law Journal* 14.

¹³¹ Section 187(1)(f) of the *LRA*; also see Van Niekerk *et al Law @ Work* 261; Huysamen "Women and Maternity: Is there Truly Equality in the Workplace Between Men and Women, and Between Women Themselves?" 48.

responsibilities.¹³² To fully realise this provision, employers should establish workplace policies that equally protect the rights of mothers and fathers to this effect.

In addition, the researcher submits that fathers have been deprived of their family responsibility role since time immemorial due to the migrant labour system which always demanded them to leave their families and seek employment elsewhere.¹³³ Accordingly, post-apartheid laws should be interpreted to redress the injustices of the apartheid era. As such, the prohibition of unfair dismissals under the *LRA* fosters the constitutional right to fair labour practices and equality.¹³⁴

In this regard, it can be alluded to that the *LRA* provides a general guideline for the regulation and protection of fair labour practices in South Africa. Although the *LRA* does not expressly provide for paternity leave rights, it protects the welfare of working fathers.¹³⁵ The researcher opines that the promulgation of the *LRA* was a general guideline for the ensuing legislation to ensure the progressive realisation of fair labour practices in South African workplaces.

3.3.4 The BCEA

The *BCEA* was enacted in 1997 to regulate the basic working conditions of employees in South African workplaces.¹³⁶ The enactment of the *BCEA* was also a measure for South Africa to comply with international labour conventions and standards.¹³⁷ The *BCEA* also marks the foundation of the regulation of maternity leave in South Africa.¹³⁸ The *BCEA* expressly provides that a mother is entitled to at least four consecutive months of

¹³² See Basson, Christianson, Garbers, Le Roux and Strydom *The New Essential Labour Law Handbook* 270; also see Dancaster and Baird 2008 *Industrial Law Journal* 22.

¹³³ Ramphele and Richter "Migrancy, Family Dissolution and Fatherhood" 75; Rycroft 1999 *Industrial Law Journal* 1411.

¹³⁴ Sections 9(3) and 23(1) of the *LRA*; also see Huysamen "Women and Maternity: Is there Truly Equality in the Workplace between Men and Women, and Between Women Themselves?" 50.

¹³⁵ Section 187(1)(f) of the *LRA*.

¹³⁶ Dupper 2002 *Stellenbosch Law Review* 85; Motaung, Bussin and Joseph 2017 *South African Journal of Human Resource Management* 3.

¹³⁷ See Long Title of the *BCEA*; Behari 2020 *Obiter* 788.

¹³⁸ Section 25 of the *BCEA*; Dancaster "State Measures Towards Work-Care Integration in South Africa" 183.

maternity leave.¹³⁹ Interesting to note is that the *BCEA* provides for a compulsory six-week period of maternity leave unless advised otherwise by a midwife.¹⁴⁰ The researcher submits that for the longest time, women have been regarded as the primary caregivers and men as breadwinners. However, with the active participation of women in the labour market in the post-apartheid era, the legislature has failed to progressively regulate the needs of both mothers and fathers in workplaces.¹⁴¹ The lack of a corresponding paternity leave under the *BCEA* is a reflection of inequality and gender-based discrimination.

The recent amendments to the *BCEA* introduced the gender-neutral parental leave of ten days.¹⁴² The *Act* states that an employee who is a parent is entitled to ten consecutive days of parental leave.¹⁴³ The addition of parental leave under the *BCEA* was essential to redress the injustices caused by the lack of express regulations on paternity leave rights in South Africa. However, it should be noted that the *BCEA* does not specify which parent is entitled to parental leave.¹⁴⁴ Understandably, any employee is entitled to parental leave if they meet the eligibility requirements.¹⁴⁵ Thus, one should be the parent of the child. Parental leave is available to an employee who is not the primary caregiver of a newborn or adopted child.¹⁴⁶ The primary caregiver is entitled to maternity leave or adoption leave who is on leave four months and ten weeks long, respectively.¹⁴⁷ The differences between the duration of parental leave and maternity leave remain problematic. Although ten days seems like a development from the previously regulated three days, the researcher argues that it is still inadequate for one to care for and bond with their newborn child.¹⁴⁸

¹³⁹ Section 25(1) of the *BCEA*; Mistry *A Feminist Critique of Parental Leave in South Africa* 12; Behari 2016 *Obiter* 349.

¹⁴⁰ Section 25(3) of the *BCEA*.

¹⁴¹ Mistry *A Feminist Critique of Parental Leave in South Africa* 12.

¹⁴² Section 25A of the *BCEA*.

¹⁴³ Section 25A of the *BCEA*; Mistry *A Feminist Critique of Parental Leave in South Africa* 15; Behari 2020 *Obiter* 788.

¹⁴⁴ Behari 2018 *Industrial Law Journal* 2148.

¹⁴⁵ Smith 2011 *Journal of Comparative Family Studies* 18.

¹⁴⁶ Section 25A of the *BCEA*; also see Rycroft and Duffy 2019 *Industrial Law Journal* 18; Behari 2018 *Industrial Law Journal* 2149-2150.

¹⁴⁷ Section 25B of the *BCEA*; Behari 2018 *Industrial Law Journal* 2153; also see Rycroft and Duffy 2019 *Industrial Law Journal* 15-17.

¹⁴⁸ See related comments by Mistry *A Feminist Critique of Parental Leave in South Africa* 15; Behari 2020 *Obiter* 788.

Parental leave comes as a direct replacement for family responsibility leave.¹⁴⁹ The researcher submits that parental leave is the only leave entitlement available for working fathers to fulfil their family responsibilities. The adequacy of parental leave for working fathers to fulfil this role cannot be argued. The *BCEA* provides that parental leave can be claimed from the day the child is born and adoption leave is only claimable from the day the adoption order is granted.¹⁵⁰ Contrarily, maternity leave can commence weeks before the birth of the child.¹⁵¹ This gives maternal parents ample time to prepare for the birth of the child.

The researcher argues that childbirth is a process that requires preparation by both parents and fathers and also requires time to prepare accordingly. This includes time to actively participate in the adoption and time to support the mother of the child. As such, it is submitted that the caregiving role is still construed as a feminine responsibility in South Africa. Society is rapidly evolving, and the researcher argues that public policy and legislation should play a central role in accommodating this transition.¹⁵²

Unlike the family responsibility leave, the parental leave is unpaid.¹⁵³ Thus, the employer is not required to pay an employee for the duration they are on parental leave.¹⁵⁴ Parental leave benefits are determined by the Minister of Labour and paid through the Unemployment Insurance Fund (UIF). Such payment depends on the condition that the employee is recorded as the father of the newborn or adopted child.¹⁵⁵ The researcher argues that unpaid parental leave may be taken as a financial disadvantage by working

¹⁴⁹ Sections 25A and 27 of the *BCEA*; see also Rycroft and Duffy 2019 *Industrial Law Journal* 18; Behari 2018 *Industrial Law Journal* 2153.

¹⁵⁰ Section 25A of the *BCEA*; see Behari 2018 *Industrial Law Journal* 2152; also see Rycroft and Duffy 2019 *Industrial Law Journal* 18.

¹⁵¹ Section 25 of the *BCEA*; Torerai *The Protection of Paternity Leave and Related Rights for Employed Fathers under the Laws Amendment Act 10 of 2018* 36.

¹⁵² See Mistry *A Feminist Critique of Parental Leave in South Africa* 15; Langa 2006 *Systematic Law Review* 353.

¹⁵³ Section 27 of the *BCEA*; see also Dancaaster "State Measures towards Work-Care Integration in South Africa" 186; Behari 2018 *Industrial Law Journal* 2154.

¹⁵⁴ Section 27 of the *BCEA*; see also Dancaaster "State Measures towards Work-Care Integration in South Africa" 186; Behari 2018 *Industrial Law Journal* 2154.

¹⁵⁵ Section 11 of the *LRA* as amended; *Unemployment Insurance Fund Act* 63 of 2001; Torerai *The Protection of Paternity Leave and Related Rights for Employed Fathers under the Laws Amendment Act 10 of 2018* 36.

fathers who are breadwinners. Consequently, the conditions attached to parental leave render it unfavourable for working fathers. As such, the current lack of regulations on paternity leave is a deterrent for working fathers to fulfil their caregiving role in their families. The researcher proposes that the conditions attached to parental leave under the *BCEA* be revisited to ensure the active participation of working fathers, by introducing paternity leave.

3.3.5 *The Employment Equity Act*

The *Employment Equity Act*¹⁵⁶ gives effect to the International Labour Organisation (ILO) Convention of 1958.¹⁵⁷ The *EEA* was enacted to redress the past injustices of the apartheid era by promoting equitable employment opportunities and treatment.¹⁵⁸ The *EEA* protects employees against unfair discrimination on the grounds of, *inter alia*, sex, gender and family responsibility.¹⁵⁹ Family responsibility is defined as the roles and duties that a working father or mother has with regard to their spouse, partner, children or immediate family.¹⁶⁰ In *Co-operative Workers Association v Petroleum Oil and Gas Co-operative SA*, the Labour Court held that employees with family responsibilities are a vulnerable group that requires support to meet their responsibilities.¹⁶¹ This entails that family responsibility is a substantial ground that warrants employees to be awarded relevant resources to fulfil this role. However, the researcher argues that despite the judgement in *Co-operative Workers Association v Petroleum Oil and Gas Co-operative SA*, there have not been robust measures to ensure that working fathers effectively fulfil their

¹⁵⁶ *Employment Equity Act* 55 of 1998 (EEA); see related comments by Mistry *A Feminist Critique of Parental Leave in South Africa* 14.

¹⁵⁷ Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

¹⁵⁸ See preamble of the *EEA*.

¹⁵⁹ See section 6(1) of the *EEA*; see also section 9(3) of the Constitution.

¹⁶⁰ Section 1 of the *EEA*; Basson *et al The New Essential Labour Law Handbook* 233; Van Jaarsveld 2002 *South African Mercantile Law Journal* 401.

¹⁶¹ *Co-operative Workers Association v Petroleum Oil and Gas Co-operative SA* (2007) 28 ILJ 627 (LC).

family responsibilities.¹⁶² The researcher argues that the reluctance in this regard could be a result of gender stereotypes which regard women as primary caregivers.¹⁶³

As mentioned earlier in this thesis, migration patterns that demanded fathers to leave their families and seek employment elsewhere, amongst other causes, have always deprived working fathers of their family responsibility rights.¹⁶⁴ Accordingly, the *EEA* sought to address such deprivations and promote equality in the workplace. However, the fact that employees have to resort to costly and time-consuming litigation processes to enjoy these rights still amounts to injustice.¹⁶⁵ In this regard, the researcher submits that the provision of equality rights in statute alone is not adequate. There is a need for robust enforcement measures to ensure that the rights provided for under the Constitution and, in this regard, the *EEA* are fully enforced and protected.

3.3.6 *The UIA*

The *UIA* was enacted to establish an unemployment insurance fund to which employees contribute some amount of money.¹⁶⁶ The *UIA* also aims to alleviate the harsh economic and social effects of unemployment.¹⁶⁷ Ideally, the provisions of the *UIA* are applicable to all employees who make contributions. The *Act* provides that upon claiming maternity leave, women are entitled to certain benefits from the UIF to sustain them economically during the period of maternity leave.¹⁶⁸ However, the *UIA* does not make provisions for fathers or paternity leave. The *Act* grants applicants for parental leave the right to claim

¹⁶² *Co-operative Workers Association v Petroleum Oil and Gas Co-operative SA* para 82; Behari 2016 *Obiter* 352.

¹⁶³ See related discussion by Dancaster "State Measures towards Work-Care Integration in South Africa" 192.

¹⁶⁴ Van Jaarsveld 2002 *South African Mercantile Law Journal* 408; Basson *et al The New Essential Labour Law Handbook* 115.

¹⁶⁵ See *Co-operative Workers Association v Petroleum Oil and Gas Co-operative SA* para 82; Behari 2016 *Obiter* 352.

¹⁶⁶ See preamble of the *UIA*; also see Van Jaarsveld 2002 *South African Mercantile Law Journal* 408; Basson *et al The New Essential Labour Law Handbook* 115.

¹⁶⁷ Mistry *A Feminist Critique of Parental Leave in South Africa* 13; Behari 2018 *Industrial Law Journal* 2157.

¹⁶⁸ Section 24 of the *UIA*; Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 34; Dancaster "State Measures Towards Work-Care Integration in South Africa" 180.

parental benefits from the UIF.¹⁶⁹ In the case of adoptive parents, the right to claim parental benefits is only available to one parent, the father, and the adopted child should be under the age of two.¹⁷⁰ This raises an area of difficulty for gender-neutral homes. Due to the stringent requirements attached to the UIF, fathers become reluctant to claim parental leave and, later on, parental benefits in terms of the *UIA*.¹⁷¹ This follows that the procedure and requirements for parental leave benefits claims are strenuous and do not encourage working parents to look forward to parental leave. In this regard, the researcher submits that the legislature indirectly enforces gender roles in South African societies. As such, there is a need for regulatory reforms to ensure the realisation of equality and fair labour practices in South Africa.

3.4 Recent developments

The recent High Court judgement in *Van Wyk and Others v Minister of Employment*¹⁷² declared the unconstitutionality of sections 25 and 25A-C of the *BCEA* and sections 24, 26A, 27 and 29A of the *UIF Act* on the grounds of unfair discrimination and inconsistency with the right to equality provided under the Constitution.¹⁷³ In this matter, Mrs Van Wyk is self-employed and runs her own businesses, whilst Mr Van Wyk, the husband, is a salaried employee. On the one hand, Mr Van Wyk and Mrs Van Wyk agreed that Mrs Van Wyk would go back to her business immediately after childbirth, for fear of losing her business and could not be on paid maternity leave. On the other hand, Mr Van Wyk was also not eligible for maternity leave and could only claim a maximum of ten (10) days of parental leave. Accordingly, Mr Van Wyk took an extended unpaid leave in liaison with his employer. In this regard, the issue before the court was the constitutionality of sections 25, 25A, 25B and 25C of the *BCEA* and sections 24, 26A, 27, and 29A of the *UIF Act* in line with sections 9 and 10 of the Constitution.

¹⁶⁹ See sections 1, 12 and 13 of the *UIA*; also see Behari 2018 *Industrial Law Journal* 2159; Rycroft and Duffy 2019 *Industrial Law Journal* 17.

¹⁷⁰ Section 27 of the *UIA*.

¹⁷¹ Rycroft and Duffy 2019 *Industrial Law Journal* 19; Behari 2018 *Industrial Law Journal* 2154.

¹⁷² *Van Wyk v The Minister of Employment and Labour* (2022-017842) [2023] ZAGPJHC 1213 (*Van Wyk case*).

¹⁷³ Sections 9 and 10 of the Constitution.

To this effect, the court found that sections 25 and 25 A-C of the *BCEA* were inconsistent with the Constitution on the grounds that the sections unfairly discriminate between mothers, fathers and adoptive and surrogacy parents. The court ordered several amendments to be made to the provisions relating to parental leave under the *BCEA*. However, it should be noted that the order of the court does not automatically disregard the current statutory provisions of maternity and parental leave under the *BCEA*.¹⁷⁴ The Parliament was granted two years to correct the defects of the *BCEA* and the *UIF Act*. Erstwhile, there are interim provisions to the effect that natural parents may decide who may take up the parental leave, adoptive and commissioning parents are now entitled to the same leave rights as natural parents and all parents are now entitled to equal UIF benefits in this regard.

The researcher submits that the ruling in the Van Wyk case marks the dispensation of a new era. The ruling gives rise to more inclusive and equitable social norms which recognise the role of men in nurturing their children and accept family dynamics. The court remarked that, notwithstanding that maternity leave serves a legitimate purpose to enable the birth mother to recover from childbirth, it fails to take into account the modern family dynamics where both parents participate in nurturing the child. The presumption that mothers should be the primary caregivers does not account for family dynamics and constitutional values of gender equality and dignity. Accordingly, the researcher submits that this ruling is a step towards the right direction.

In the same vein, parents are given the discretion to decide who, between them, will claim the four (4) months parental leave. The researcher submits that although the amendments provide an opportunity for fathers to participate in caregiving, this could lead to abuse of parental leave by working fathers. For instance, fathers may claim parental leave but not use the time to nurture their children. Accordingly, it is important that proof of primary caregiving by the parent claiming parental leave be submitted to employers to prevent abuse of the provisions for example the employer may ask for

¹⁷⁴ Sections 25, 25A-C of the *BCEA*.

recommendations from the other spouse in form of affidavits to confirm the involvement of the father in caregiving. Also, the proposed amendments do not only grant biological fathers an opportunity to care for and nurture their newborn children, but they also create opportunities for same-sex partners who previously could not claim maternity leave rights to care for and nurture their children. However, the overarching challenges that could emanate from this judgement cannot be overlooked.

Considering the current economic situation in South Africa, which is characterised by stagnant growth and recession, the researcher argues that the amendments proposed in the *Van Wyk case* could affect production in the workplace due to absenteeism during the duration of employees' parental leave. However, Cohen and Gosai,¹⁷⁵ argue that paternity leave promotes flexibility and boosts wellness in the workplace. This follows that if employees are granted time to fulfil their caregiving role, they will not feign sickness and be absent from work so that they can spend time with their families.

The researcher also suggests that extended parental leave could be abused by working fathers, especially when one considers that one working father could be customarily married to more than one wife. This may result in the same employee claiming parental leave more than once a year or short period. Accordingly, the legislature should be clear and give guidelines on the scope and parameters of claiming parental leave. For example the guidelines should give the time frame, like for instance one cannot claim such leave every year it should be at least after two years, this will ensure the proper use of the leave. It could be further noted that in terms of section 172(2)(a) of the Constitution, the order made in *Van Wyk* has no force until it is confirmed by the Constitutional Court. Therefore, this research remains important and can contribute to resolving the issue. It could also be further noted that there is no obligation for employers to change their policies until the Constitutional Court has confirmed the judgement.

¹⁷⁵ Cohen and Gosai 2016 *Industrial Law Journal* 2245; also see Eaton 2003 *Industrial Relations: A Journal of Economy and Society* 145, 163.

3.5 Conclusion

Currently, the lack of express regulations on paternity leave rights in South Africa is a reflection of the gender imbalances and stereotypes that currently exist in South African societies. Gender is socially construed, and the legislature has contributed to this position. There is a need for legislative transformation to move away from the notion that men's responsibilities are solely financing the household whilst women are caregivers. The researcher submits that this can be achieved by establishing an express paternity leave scheme in South Africa. A regulated paternity leave scheme enables working fathers to take ample time to care for and bond with their newborn children. In particular, this can make parenting a gender-neutral role and enable parents to adequately fulfil their family responsibilities. The researcher acknowledges that the process of enacting new legislation or amendments thereof is lengthy and proposes the development of company maternity and paternity leave policies that enable employees adequate time for their family responsibilities, than the minimum stipulated in the *BCEA*.

The next chapter focuses on the challenges and flaws of the current regulatory framework. The researcher identifies the regulatory gaps in the current framework so as to propose possible solutions to address these challenges and gaps.

CHAPTER FOUR

FLAWS AND REGULATORY GAPS IN THE CURRENT REGULATORY FRAMEWORK FOR PATERNITY RIGHTS IN SOUTH AFRICA

4.1 Introduction

The previous chapter of this thesis established that no legislation expressly regulates paternity leave rights in South Africa. The current legislation only makes provision for parental leave which is couched in gender-neutral terms and fails to award working fathers ample time to fulfil their family responsibility roles.¹⁷⁶ The reluctance of the legislature in this regard is worrisome and creates room for unfair labour practices and inequality in South African workplaces.¹⁷⁷ This follows that South Africa recognises same-sex marriages which should be complemented by the significant recognition of paternity rights in workplaces.¹⁷⁸ However, South African leave policies fail to take into consideration the family dynamics which project women as breadwinners and the change the roles of fathers.¹⁷⁹

The lack of political will to address the challenges emanating from the lack of paternity leave rights in South Africa, inequality in the workplaces, gender-neutrality of parental leave provisions and the duration of parental leave pose considerable challenges to the regulation of paternity rights in South Africa.¹⁸⁰ This chapter provides an examination of the flaws and regulatory gaps in the current regulatory framework for paternity rights in South Africa. This is done to propose measures and regulatory amendments to address the identified flaws and challenges in the last chapter of this thesis.

¹⁷⁶ See section 27A of the *BCEA*; Van Jaarsveld 2002 *South African Mercantile Law Journal* 401; Motaung, Bussin and Joseph 2017 *South African Journal of Human Resource Management* 4.

¹⁷⁷ Rycroft and Duffy 2019 *Industrial Law Journal* 20; Behari 2020 *Obiter* 788; Motaung, Bussin and Joseph 2017 *South African Journal of Human Resource Management* 5.

¹⁷⁸ See *Mia v State Information Technology Agency (Pty) Ltd* [2015] 7 BLLR 694 (LC); Dancaster and Cohen 2010 *South African Journal of Labour Relations* 40-41

¹⁷⁹ Gambles, Lewis and Rapoport *The Myth of Work-Life Balance: the Challenge of our time for Men, Women and Societies* 16.

¹⁸⁰ Makusha and Richter "Father Involvement in the First 1,000 Days" 52; Morrell "Fathers, Fatherhood and Masculinities in South Africa" 19.

4.2 International Standards on Paternity Leave Rights

Gender gaps and inequalities in South African workplaces are a direct influence of disparities in the division of unpaid work between working fathers and mothers.¹⁸¹ Women often devote more time to unpaid work than their male counterparts. Consequently, men inherently have more time to develop their professional careers and their existence in the workplace. In most South African societies, women are regarded as the primary caregivers. This has resulted in imbalances between the professional and caregiving roles of women. To circumvent and balance these inequalities, the researcher argues for the establishment of international standards and best practices relating to paternity leave rights. The Constitution of South Africa provides for the consultation of international laws to interpret the rights provided under the Bill of Rights.¹⁸² As such, the development of international standards on paternity leave rights will have a direct effect on the recognition of paternity leave rights in South Africa. Accordingly, the researcher takes the stand that, the legislature should take initiative and promote the recognition of paternity leave rights through making laws to promote fathers to be involved in care giving during the early stages of the child, as provided by the children's Act which stresses that the rights of children in every matter are of paramount importance, hence legislature should pass hybrid working conditions , where some days you work at home and some days at the office to ensure fathers involvement in a child's life. Companies should offer maternity and paternity coaching. These programmes will enable companies to support their employees during paternity leave. Companies can also offer flexible working conditions such as introduction of remote work to ensure the father's involvement in a child's life and half days or introduction of a four days working week.

According to the ILO, the establishment of paternity leave rights is a direct measure for encouraging working fathers to participate in caregiving roles and unpaid work.¹⁸³ Parental leave rights have the potential to equalise unpaid work responsibilities between

¹⁸¹ Huerta *et al* 2014 *European Journal of Social Security* 308, 310.

¹⁸² Section 39(1)(b) of the Constitution.

¹⁸³ International Labour Office [ILO], *Women at Work: Trends* (2016) clause xi.

working fathers and mothers. Subsequently, this could contribute to the eradication of gender stereotypes which position mothers as caregivers and fathers as breadwinners. The ILO states that the establishment of paternity leave rights guarantees a positive effect on workplace gender equality.¹⁸⁴ However, it should be noted that the ILO does not provide for international standards relating to the application and implementation of paternity leave rights, especially to curb existing gender inequalities. Currently, the ILO only makes provisions for workplace gender equality, equal opportunities and treatment of workers with family responsibilities, equal payment and non-discrimination. There are no legally binding paternity and parental leave rights. Accordingly, the researcher submits that the ILO should establish international standards to promote the regulation of paternity leave rights in all member states.

The researcher submits that the ILO can draw lessons from the *European Union Directive*.¹⁸⁵ The European Union provides for the right to paternity leave for fathers and parental leave for partners in its member states. Although the *European Union Directive* does not specify parental leave benefits and how they should be paid out, the *Directive* requires member states to facilitate the take up of parental leave by providing a payment allowance.¹⁸⁶ The *European Union Directive* is cemented on promoting the involvement of women in the labour market, reconciling work and family life, sharing caregiving roles equally between parents and curbing gender wage gaps in the workplace. In the recent *Van Wyk* case, the court held that parents have the discretion to choose who, between them, will claim parental leave. The researcher argues that considering the gender stereotypes that are already embedded in South Africa's societies, fathers may not be willing to take parental leave and perform caregiving roles. Accordingly, the researcher proposes that an ILO Standard on paternity and parental leave could introduce incentives for working fathers to claim parental and paternity leave.

¹⁸⁴ ILO *Women at Work* 84.

¹⁸⁵ *European Union Directive* 2019, section ii.

¹⁸⁶ Article 4(1) of the *European Union Directive*.

4.3 Flaws and Challenges in Promoting Gender Equality in South African Workplaces

4.3.1 The Lack of Established Paternity Leave Rights in South Africa

The lack of express provisions relating to paternity leave rights in South Africa creates a barrier for working fathers to fulfil their nurturing and family responsibilities.¹⁸⁷ The available leave entitlements under the *BCEA* and the *Labour Law Amendment Act* are not adequate enough to enable working fathers to care for their newborn babies.¹⁸⁸ Although the Constitution provides for fair labour practices in South African workplaces, there has not been a legislative instrument that expressly regulates paternity leave rights in South Africa.¹⁸⁹ The researcher argues that the constitutional right to fair labour practices underpins equal treatment and opportunities for both fathers and mothers in the workplace. Nonetheless, as established in the previous chapter,¹⁹⁰ the *BCEA*, the *LLAA*, the *Employment Equity Act*¹⁹¹ and the *Unemployment Insurance Act*¹⁹² have no provision for paternity leave.

The *BCEA* only makes provision for parental leave, which is gender-neutral and only ten days long.¹⁹³ Parental leave does not specifically apply to working fathers only as mothers are also within their rights to claim the same. This illustrates a gender stereotype and imbalance in South African labour laws. According to the *LLAA*, it seems to imply that the beneficiaries of parental leave should not be the child's primary caregivers.¹⁹⁴ The researcher argues that this position classifies fathers as secondary caregivers as opposed

¹⁸⁷ Motaung, Bussin and Joseph 2020 *SA Journal of Human Resource Management* 1, 4; Koslowski 2021 *Social Inclusion* 250, 258.

¹⁸⁸ See section 27A of the *BCEA*; also see *Labour Laws Amendment Act* 10 of 2018 (*LLAA*), section 3.

¹⁸⁹ Constitution of the Republic of South Africa, 1996, section 23; Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 29, 33.

¹⁹⁰ See paragraph 3.3 of this thesis.

¹⁹¹ *Employment Equity Act* 55 of 1998 (*EEA*); by Mistry *A Feminist Critique of Parental Leave in South Africa* 14.

¹⁹² *Unemployment Insurance Act* 63 of 2001 (*UIA*); Basson *et al The New Essential Labour Law Handbook* 115

¹⁹³ See section 27A of the *BCEA*; Behari 2020 *Obiter* 788.

¹⁹⁴ See section 3 of the *LLAA*; Torerai *The Protection of Paternity Leave and Related Rights for Employed Fathers under the Laws Amendment Act 10 of 2018* 38.

to their female counterparts. This also seems true considering the provisions which relate to maternity leave and the duration thereof. This mirrors a social order where mothers are regarded as primary caregivers and fathers as breadwinners. The researcher submits that this has created barriers between fathers and their children. This follows that according to Makusha and Richter, a father's involvement in their children's life during the first days has lifelong positive effects on the well-being and intelligence of the child.¹⁹⁵ Accordingly, gender stereotypes and imbalances that currently exist in South Africa not only hinder working fathers' caregiving role but also affect the best interests of the child.¹⁹⁶

4.3.2 Gender Wage Gap

The gender wage gap refers to the differences in average earnings between men and women in the labour market.¹⁹⁷ Gender differentials between men and women in South African workplaces reveal that women are paid less than their male counterparts.¹⁹⁸ This can be attributed to societal beliefs that men are the breadwinners and women are nurturers and caregivers who do not belong in the workplace.¹⁹⁹ The researcher argues that this perception has been exacerbated by the government and policymakers who have contributed to this belief through discriminatory leave policies.²⁰⁰

The lack of express paternity leave rights in South Africa not only deny working fathers a chance to care for and nurture their newborn, but also contributes to a distinct gender wage gap. This follows that women are regarded as caregivers who potentially contribute less to the family's economic well-being.²⁰¹ As such, this has influenced remuneration

¹⁹⁵ Makusha and Richter "Father Involvement in the First 1,000 Days" 51; Hall and MacDermid 2009 *Journal of Family and Economic Issues* 215, 221.

¹⁹⁶ Section 28(1)(b) of the Constitution; also see Felicity and Christina 1993 *Acta Universitatis Danubius Juridica* 1, 6.

¹⁹⁷ Porter 2015 *George Washington International Law Review* 203, 206; Mosomi 2019 *Agenda* 29, 30; Grun 2004 *International Journal of Manpower* 321, 323.

¹⁹⁸ Bosch and Barit 2020 *South African Journal of Science* 1, 3; Kollamparambil and Razak 2016 *Indian Journal of Human Development* 49, 52.

¹⁹⁹ See Torerai *The Protection of Paternity Leave and Related Rights for Employed Fathers under the Laws Amendment Act 10 of 2018* 38.

²⁰⁰ See discussion by Mosomi 2019 *Agenda* 31.

²⁰¹ Dancaster and Cohen 2010 *South Africa Journal of Labour Relations* 36.

policies in many workplaces to the effect of women inherently earning less than men. Accordingly, the establishment of paternity leave rights in South Africa could enhance and balance the position of men and women in the workplace by allowing mothers to be at work whilst fathers care for the children at home.²⁰² The researcher argues that once fathers are granted time off to care for their children, equal treatment with their female counterparts can be achieved.²⁰³ Subsequently, the gender wage gap can be eradicated if working mothers and fathers are treated equally.

4.3.3 The Regulation of Parental Leave Benefits under the Unemployment Insurance Act and the LLAA

The *Unemployment Insurance Act* provides that parental leave benefits are determined by the Minister of Labour.²⁰⁴ However, several conditions underpin parental leave claims under the UIA. A father can only claim for parental leave benefits if he is registered as the child in terms of the *Births and Deaths Registration Act*.²⁰⁵ Additionally, the amount receivable may not exceed the amount the applicant normally receives when they are not on parental leave.²⁰⁶ The researcher submits that these requirements are too stringent and may deter fathers from claiming paternity leave. This follows that the registration of a father's name on the child's birth certificate is not an automatic procedure, especially when the child is born out of wedlock in South Africa. Consequently, this may deter fathers who want to take time off from work and bond with their newborn babies.²⁰⁷ In this regard, fathers become reluctant to claim parental leave, especially in circumstances

²⁰² See related discussion by Cool, Fiva and Kirkebøen 2015 *The Scandinavian Journal of Economics* 801, 803; also see Porter 2015 *George Washington International Law Review* 203, 207.

²⁰³ Cohen 2012 *Industrial Law Journal* 29, 34; Engle, Beardshaw and Loftin "The Child's Right to Shared Parenting" 294.

²⁰⁴ *Unemployment Insurance Act* 63 of 2001, sections 1, 12, 13 and 26A; Mistry *A Feminist Critique of Parental Leave in South Africa* 21.

²⁰⁵ Section 23A (3) of the *UIA*; Rycroft and Duffy 2019 *Industrial Law Journal* 19; Makusha and Richter "Father Involvement in the First 1,000 Days" 54.

²⁰⁶ Section 23A (3) of the *UIA*; also see section 11 of the *Labour Law Amendment Act*; Rycroft and Duffy 2019 *Industrial Law Journal* 18.

²⁰⁷ Torerai *The Protection of Paternity Leave and Related Rights for Employed Fathers under the Laws Amendment Act 10 of 2018* 24.

where there is no proof of paternity.²⁰⁸ Therefore, the researcher argues that the requirements for parental leave claims under the *UIA* should be reconsidered to prevent deterrence from paternity leave claims by working fathers in South Africa.

Another challenge that emanates from the regulation of parental leave benefits under the *UIA* relates to the restrictions imposed on parental leave benefits for adoptive parents. In the case of adoptive parents, the right to claim parental benefits is only available to one parent, the father, and the adopted child should be under the age of two.²⁰⁹ This raises an area of difficulty for gender-neutral homes. For example, in a same-sex marriage between two males, only one party is eligible to claim parental leave benefits under the *UIA*.²¹⁰

The *LLAA* provides ten weeks' leave to a primary adoptive parent and ten days of parental leave to the perceived secondary adoptive parent.²¹¹ The differences in the duration of the leave between primary and secondary caregivers under the *LLAA* are problematic for same-sex adoptive male parents.²¹² This follows that the *LLAA* seems to divide parental responsibilities and it deters equal participation in parenting. The secondary parent is deprived of an equal opportunity to bond with the child, they can only claim ten days of parental leave and are not eligible to claim maternity leave under the *BCEA*.²¹³ In this regard, it is submitted that the regulation of UIF benefits in relation to parental leave unfairly discriminates against same-sex partners. The *UIA* restricts parental leave benefits to one party and creates a barrier for males in same-sex marriages to bond with their children during their early days.²¹⁴ Accordingly, the researcher proposes a law reform to foster the realisation of equality and fair labour practices in South African workplaces.

²⁰⁸ Motaung, Bussin and Joseph 2017 *South African Journal of Human Resource Management* 4; Behari 2018 *Industrial Law Journal* 2156.

²⁰⁹ Section 27 of the *UIA*.

²¹⁰ Section 27 of the *UIA*; Van Jaarsveld 2002 *South African Mercantile Law Journal* 399, 402.

²¹¹ Section 25B-C of the *LLAA*; Rycroft and Duffy 2019 *Industrial Law Journal* 25.

²¹² See *Mia v State Information Technology Agency (Pty) Ltd* para 71.

²¹³ Section 27A of the *BCEA*; also see discussion by Behson and Robbins "The Effects of Involved Fatherhood on Families, and How Fathers can be supported both at the Workplace and in the Home" 4.

²¹⁴ Rycroft and Duffy 2019 *Industrial Law Journal* 19; Behari 2018 *Industrial Law Journal* 2154.

4.4 Conclusion

Several challenges and flaws that hinder the promotion of paternity rights in South Africa have been identified. The lack of express statutory regulations of paternity leave rights remains a challenge. Currently, working fathers are only entitled to ten days of parental to care for and bond with their newborn children.²¹⁵ The researcher argues that ten days is too short a period for a parent to bond with their child and offer support to their partners after childbirth.²¹⁶ The disparity between parental leave and maternity leave raises important constitutional considerations in relation to equality and fair labour practice rights. It seems that the government of South Africa subscribes to the discourse that women are better caregivers than employees, a position of intent gender equity. A paradigm shift from the current leave policies is essential for restructuring societal beliefs and acknowledging the role of fathers as caregivers. The point of departure will be an introduction of paternity leave rights and policies.

The next chapter is the concluding chapter of this research. The researcher proposes recommendations that could be implemented by policymakers to foster the promotion of paternity rights in South African workplaces. This is done to alleviate the challenges and flaws that currently exist in South African labour laws and leave policies.

²¹⁵ Fleischmann and Sieverding 2015 *Sex Roles* 462, 470.

²¹⁶ Fleischmann and Sieverding 2015 *Sex Roles* 470.

CHAPTER FIVE

RECOMMENDATIONS AND CONCLUSION

5.1 Introduction

This chapter presents the overall conclusion to the preceding discussion on the promotion of gender equality in South African workplaces. The chapter also provides recommendations on how the current labour laws in South Africa can be amended to provide for paternity leave rights and enhance the protection of the rights of working fathers in South Africa.²¹⁷ The researcher has established that the lack of paternity leave rights in South Africa is a reflection of gender imbalances and stereotypes.²¹⁸ Despite several transitions, for example, the recognition of same-sex marriages and the participation of women in the labour markets, gender remains socially construed.²¹⁹ The researcher submits that the legislature has contributed to this position by failing to foster gender balance in workplaces through the regulation of paternity leave rights.

The lack of political will to alleviate the challenges caused by the lack of paternity leave rights in South Africa, inequality in the workplaces, gender-neutrality of parental leave provisions and the duration of parental leave are some of the challenges that were identified to deter the regulation of paternity rights in South Africa.²²⁰ Working fathers are often caught between committing time to their careers and fulfilling their family care responsibilities. In the end, the submission that the researcher seeks to make is that there is a need for a law reform to eradicate gender stereotypes and imbalances that exist in South Africa, especially in the workplace. The express regulation of paternity leave rights could be a starting point in this regard.

²¹⁷ See Constitution of the Republic of South Africa, 1996, sections 9 and 23; *Basic Conditions of Employment Act* 75 of 1997 (BCEA); *Labour Laws Amendment Act* 10 of 2018 (LLAA); *Employment Equity Act* 55 of 1998 (EEA); *Unemployment Insurance Fund Act* 63 of 2001.

²¹⁸ Mistry *A Feminist Critique of Parental Leave in South Africa* 12; Behari 2016 *Obiter* 349.

²¹⁹ Huysamen "Women and Maternity: Is there Truly Equality in the Workplace between Men and Women, and Between Women Themselves?" 50.

²²⁰ Makusha and Richter "Father Involvement in the First 1,000 Days" 52; Morrell "Fathers, Fatherhood and Masculinities in South Africa" 19.

This chapter provides proposed recommendations to promote gender equality in the workplace. Possible solutions to address the challenges raised in this thesis are also provided.²²¹ This is done to promote discussions relating to the regulation of paternity leave rights in South Africa.

5.2 Recommendations

The recommendations to enhance the promotion of gender equality in South African workplaces are provided. The researcher hopes that the recommendations made in this thesis can be used by relevant authorities and policymakers to promote gender equality rights and statutorily regulate paternity leave rights in South Africa. The researcher recommends that:

5.2.1 the BCEA should be amended to expressly regulate paternity leave rights

The *BCEA* provides for a four month long maternity leave without a corresponding paternity leave.²²² The provision of maternity leave rights is a measure to enable maternal parents, and mothers, to acquire time off from work to provide care for their newborn babies and recover from childbirth.²²³ The *BCEA* also provides for a ten-day gender-neutral parental leave.²²⁴ Parental leave can be claimed by any employee who meets the requirements as discussed in Chapter Three of this thesis. Although the researcher does not seek to transpose maternity leave rights on working fathers, there exists a regulatory gap with regard to paternity leave rights and a chance for fathers to fulfil their caregiving role in their families.²²⁵ Parental leave and paternity leave are not synonymous and should not be confused. This projects that there currently is no statute that provides for paternity

²²¹ See chapter 4 of this thesis.

²²² Section 186-187 of the *LRA*; section 25 of the *BCEA*; Mkhwanzai and Bhana *Young Families: Gender, Sexuality and Care* 43.

²²³ Section 186-187 of the *LRA*; section 25 of the *BCEA*; Boswell and Boswell 2009 *Agenda 76*; Ritchter and Morell *Baba: Men and Fatherhood in South Africa* 28.

²²⁴ See section 27A of the *BCEA*; Behari 2020 *Obiter* 788; Mkhwanazi and Block 2016 *Social Dynamics* 273, 279.

²²⁵ Behari 2020 *Obiter* 786.

leave rights in South Africa.²²⁶ Although fathers may claim parental leave after the birth of their children, the researcher argues that the duration of paternity leave is not enough for a parent to bond with their newborn child nor provide support to the mother of the child.

In this regard, the research recommends that the *BCEA* and the *LLAA* be amended to expressly provide for paternity leave rights for working fathers in South Africa. The regulation of paternity leave rights is essential for the promotion of gender equality in workplaces and eradication of gender stereotypes in South Africa. There should be a corresponding paternity leave that working fathers can claim at the birth of their children. According to Cohen and Gosai, paternity leave also improves employees' performance and productivity in the workplace by reducing absenteeism, providing a flexible workforce, boosting wellness and improving staff retention.²²⁷ Also, considering the high divorce rate in South Africa, the provision of paternity leave may help preserve the family unit by enabling parents to support and care for each other.²²⁸ Accordingly, the regulation of paternity leave rights should be considered as a measure to enable working fathers to fulfil their caregiving role and realise fair labour practices in South Africa.²²⁹

5.2.2 paternity leave rights should be established to eradicate gender wage gaps in South Africa.

Gender differentials in South Africa date as far back as pre-apartheid but remain a challenge in many South African communities in the post-apartheid era. Despite the efforts fostered by the constitutional dispensation, the gender wage gap is a persistent problem in South African workplaces. This is evidenced by the gender wage gaps which see women earning less than their male counterparts despite being in the same positions

²²⁶ Motaung, Bussin and Joseph 2020 *SA Journal of Human Resource Management* 1, 4; Koslowski 2021 *Social Inclusion* 250, 258.

²²⁷ Cohen and Gosai 2016 *Industrial Law Journal* 2248.

²²⁸ Ackermann 2004 *Social Work/Maatskaplike Werk* 26, 32; Sheykhi 2020 *Konfrontasi Journal: Culture, Economy and Social Changes* 116, 121.

²²⁹ See section 23(1) of the Constitution.

and performing similar tasks.²³⁰ Factors contributing to the gender wage gaps in South Africa include, *inter alia*, historical gender inequalities, ongoing gender discrimination in the workplace and the lack of family-friendly policies.²³¹ The lack of family-friendly policies such as paternity leaves rights places a disproportionate burden on women and their careers.²³² Often, women experience reduced earning potential, work hours and job flexibility after childbirth and this reduces women's likeliness to negotiate for higher salaries or promotions, unlike their male counterparts.²³³

In this regard, the researcher recommends the establishment of family-friendly policies to allow fathers to be actively involved in child care and family responsibilities. The equal distribution of caregiving responsibilities enables working mothers to create a balance between child caring and career progression so as to increase their earning potential. Accordingly, paternity leave policies play a crucial role in narrowing the gender wage gaps by encouraging equitable distribution of care responsibilities between working mothers and fathers.

5.2.3 there should be established measures to raise awareness to promote paternity rights and eradicate gender stereotypes in South Africa.

The influence of cultural norms and societal factors in the promotion of paternity rights cannot be overemphasised.²³⁴ This follows that cultural norms and societal expectations of the role of men as providers and women as caregivers have largely influenced attitudes towards and efforts to promote paternity leave rights in South Africa.²³⁵ The ingrained

²³⁰ Porter 2015 *George Washington International Law Review* 203, 206; Mosomi 2019 *Agenda* 29, 30; Grun 2004 *International Journal of Manpower* 321, 323.

²³¹ See Torerai *The Protection of Paternity Leave and Related Rights for Employed Fathers under the Laws Amendment Act 10 of 2018* 38.

²³² Cool, Fiva and Kirkebøen 2015 *The Scandinavian Journal of Economics* 801, 803; also see Porter 2015 *George Washington International Law Review* 203, 207.

²³³ Bosch and Barit 2020 *South African Journal of Science* 1, 3; Kollamparambil and Razak 2016 *Indian Journal of Human Development* 49, 52.

²³⁴ Motaung, Bussin and Joseph 2017 *South African Journal of Human Resources Management* 1, 3; Bosch, De Bruin, Kgaladi and De Bruin 2012 *The International Journal of Human Resource Management* 2835, 2838.

²³⁵ Torerai *The Protection of Paternity Leave and Related Rights for Employed Fathers under the Laws Amendment Act 10 of 2018* 38.

traditional gender roles have negatively affected the realisation of paternity rights in South African workplaces.²³⁶ The legislature has been too reluctant to establish paternity leave rights as a result of cultural norms and societal beliefs that have qualified men as the breadwinners and women as caregivers. Changing these norms requires significant cultural shifts and education campaigns targeted at employers and the general public.²³⁷ Employers may lack an understanding of the benefits of paternity leave such that they are relaxed to foster the promotion of paternity leave rights in workplaces.²³⁸

Accordingly, the researcher recommends raising awareness and education campaigns as measures to change cultural norms and societal beliefs regarding paternity leave. Thus, adequate awareness and education could play a significant role in narrowing traditional norms that create resistance to the establishment of paternity leave policies in South Africa. As such, measures to educate employers and the general public on the benefits of paternity leave should be established to foster the promotion of paternity rights in South African workplaces.

5.2.4 the conditions relating to parental leave benefits under the Unemployment Insurance Act should be revisited.

The *BCEA* makes provision for parental leave, which is claimable by working parents to fulfil their parental responsibilities.²³⁹ The *Unemployment Insurance Act* regulates the benefits and the conditions required for one to claim parental leave benefits in South Africa.²⁴⁰ The *UIA* requires that fathers who claim parental leave benefits should be registered as the parent of the concerned child,²⁴¹ ought to have been employed for a

²³⁶ Clark, Cotton and Marteleto 2015 *Journal of Family and Marriage* 575, 580; Van Den Ber and Makusha "State of South Africa's Fathers" 6.

²³⁷ Van Den Ber and Makusha "State of South Africa's Fathers" 6; Morrell, Dunkle, Ibragimov and Jewke 2016 *South African Review of Sociology* 80, 92.

²³⁸ See related comments by Ndzi 2023 *International Journal of Environmental Research and Public Health* 5454, 5461.

²³⁹ Section 27A of the *BCEA*.

²⁴⁰ *Unemployment Insurance Act* 63 of 2001 (*UIA*), section 23A (3); Rycroft and Duffy 2019 *Industrial Law Journal* 19; Makusha and Richter "Father Involvement in the First 1,000 Days" 54.

²⁴¹ *Births and Deaths Registration Act* 51 of 1992, section 9; section 23A (3) of the *UIA*.

period of not less than 13 weeks at the time of application²⁴² and should not be the child's primary caregiver.²⁴³ Whilst employers are generally quick to grant maternity leave benefits, the same cannot be said about parental leave. Several requirements, which may deter fathers from claiming parental leave, are attached to parental leave benefits. The researcher argues that these stringent requirements could make working fathers also lose interest in pursuing paternity leave rights.

As such, the researcher recommends that the provisions relating to the requirements for parental leave benefits claims under the *LLAA* and the *UIA* be revisited.²⁴⁴ Thus, the two Acts should be amended to delete the stringent requirements attached to parental leave claims. This follows that working fathers may rather opt not to claim parental leave resulting in promoting ingrained gender roles which disqualify fathers as capable caregivers. Consequently, this may also undermine the efforts to promote paternity leave rights in South African workplaces.

5.2.5 courts and relevant role players should actively participate in the quest for paternity leave rights in South African workplaces.

The role played by courts and relevant role players to enforce the law cannot be overemphasised. Employers, employees, trade unions and the government play a crucial role in influencing the establishment and enactment of labour laws in South Africa.²⁴⁵ Employers are responsible for observing and complying with labour laws and regulations. Employers are also responsible for establishing workplace policies to ensure safety and good working conditions.²⁴⁶ In addition, employees should be aware of their rights and be able to advocate for, defend and protect their rights from violation.²⁴⁷ The role of the

²⁴² Section 11 of the *LLAA*; section 26A (5) of the *UIA*.

²⁴³ Section 3 of the *LLAA*; section 25A of the *BCEA*; see Behari 2018 *Industrial Law Journal* 2148, 2154.

²⁴⁴ See Section 11 of the *LLAA*; section 26A (5) of the *UIA*.

²⁴⁵ Manamela "The Social Responsibility of South African Trade Unions: A Labour Law Perspective" 57; Van Niekerk *et al* 2011 *South African Journal of Occupational Therapy* 85, 87.

²⁴⁶ Brassey *et al* *The New Labour Law* 26.

²⁴⁷ Benjamin 2008 *Industrial Law Journal* 1579, 1583; Devereux 2020 *Development Southern Africa* 382, 386.

trade unions involves representing the collective interests of their members through constant dialogue and negotiation with employers.²⁴⁸ Another important role player in this regard is the government. The government is responsible for setting minimum standards for employment conditions through enacting and amending labour laws that promote and protect the rights of workers. The collaborative efforts of employers, employees, trade unions and the government are crucial for creating and compliance with enacted labour laws and policies.²⁴⁹ The researcher submits that the courts should also cooperate with employers, employees and trade unions to promote and protect paternity rights in workplaces. Courts could play an enforcement role and ensure that labour laws and policies uphold the values of the Constitution.

Accordingly, the researcher recommends the establishment of measures to ensure effective collaboration and communication amongst all relevant role players to protect paternity rights in South Africa. This follows that the quest for paternity leave rights requires collaborative and coordinated efforts to pursue their realisation. This includes raising awareness and educating all relevant parties on the importance of paternity leave rights in South African workplaces. The researcher also submits that such collaboration is important for motivating the legislature to enact laws and policies that promote paternity leave rights in South Africa. This follows that the reluctance of the legislature has to date deterred the establishment of paternity leave rights in South Africa. As such, it is recommended that the South African courts and relevant role players should actively participate in the quest for paternity leave rights in South African workplaces. Relevant legislation should also provide for penalties for defaulting role players to ensure participation.

5.3 Conclusion

The government and policymakers of South Africa seem reluctant to address workplace inequalities that currently exist in South Africa. There is no considerable effort to promote

²⁴⁸ Manamela "The Social Responsibility of South African Trade Unions: A Labour Law Perspective" 20
²⁴⁹ Jain, Horwitz and Wilkin 2012 *The International Journal of Human Resource Management* 1, 8;
Benjamin 2008 *Industrial Law Journal* 1583.

the regulation of paternity leave rights by the legislature. The researcher argues that the lack of intervention by the government in this regard suppresses the potential of working fathers to care for their newborn babies or their families in general. According to Dancaster and Cohen,²⁵⁰ policies regulating paid work and care responsibilities have received a large audience globally, but the South African authorities remain reluctant to incorporate these policies into their domestic laws. It seems there is an urgency to address racial inequalities from the apartheid era and little has been done to redress gender inequalities in the workplace, a case of competing policy priorities.²⁵¹ This follows that fathers are regarded as uncaring and absent from family responsibilities. Be that as it may, there is a need for policies to change the narrative and grant fathers adequate time to realise their caregiving responsibilities and bond with their children from an early stage of their lives.

The current position in South Africa is that a working father may claim ten consecutive parental leave days at the birth or adoption of their child.²⁵² However, it should be noted the provisions relating to parental leave under the *BCEA* state that parental leave is available to any employee who is a parent.²⁵³ As such, there remains a regulatory gap in the promotion of paternity leave rights in South Africa, one which the legislature is reluctant to address. Parental leave is not adequate for fathers to bond with their children and also provide support to the mothers of their children.²⁵⁴ The presence of fathers in the first days of their children's lives contribute to the positive cognitive well-being of their children.²⁵⁵ It also contributes to the intelligence of the child and their children tend to do well in school and life in general.

²⁵⁰ Dancaster and Cohen 2010 *South Africa Journal of Labour Relations* 36; Dancaster and Cohen 2010 *South African Journal of Labour Relations* 43.

²⁵¹ Field, Bagraim and Rycroft 2012 *South African Journal of Labour Relations* 31; Gambles, Lewis and Rapoport *The Myth of Work-Life Balance: the Challenge of our time for Men, Women and Societies* 16.

²⁵² Section 25A(1)-(2)(a)(b) of the *BCEA*; Rycroft and Duffy 2019 *Industrial Law Journal* 118

²⁵³ Section 25A(1)-(2)(a)(b) of the *BCEA*; Rycroft and Duffy 2019 *Industrial Law Journal* 118.

²⁵⁴ Richter "The Importance of Fathering for Children" 2, 5; Behari 2016 *Obiter* 348.

²⁵⁵ Richter "The Importance of Fathering for Children" 5; Makusha and Richter "Father Involvement in the First 1,000 Days" 51.

Nonetheless, intelligence and good performance in school are not only attributed to the father's presence in the first days of the child's but also rely on an ongoing father-child relationship that was established early, during paternity leave.²⁵⁶ Accordingly, the researcher argues that the lack of political will to promote paternity leave rights in South Africa does not only hinder fathers from fulfilling their caregiving role, but also the well-being of their children.

Furthermore, the quest for paternity leave rights in South African workplaces is not a new discourse. Several scholars have expressed relevant facts to support the establishment of paternity leave rights in South Africa. Unfortunately, there has been minimum law reform to ensure the promotion and establishment of paternity rights in South Africa.²⁵⁷ The researcher opines that the reluctance of the legislature and traditional norms which disqualify fathers as potential caregivers are some of the challenges that have deterred the establishment of paternity leave rights in South Africa. It should be noted that the lack of express regulations on paternity leave rights is not without effects, especially in families and the upbringing of children. Makusha and Richter argue that a father's involvement in their children's life during the first 1000 days has lifelong positive effects on the well-being and intelligence of the child.²⁵⁸ The researcher inclines to this view and submits that the involvement of fathers in their children's lives could also play a crucial role in preserving the family unit in South African societies. On that note, the researcher concludes that the establishment and regulation of paternity leave rights is imperative for the eradication of gender stereotypes and roles in South African societies and workplaces.

²⁵⁶ Richter "The Importance of Fathering for Children" 5; Makusha and Richter "Father Involvement in the First 1,000 Days" 53.

²⁵⁷ See section 25A of the *BCEA*.

²⁵⁸ Makusha and Richter "Father Involvement in the First 1,000 Days" 51; Hall and MacDermid 2009 *Journal of Family and Economic Issues* 215, 221.

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LIST OF ABBREVIATIONS AND ACRONYMS

BCEA	Basic Conditions of Employment Act
EEA	Employment Equity Act
ILO	International Labour Organization
LLAA	Labour Law Amendment Act
LRA	Labour Relations Act
SALJ	South African Law Journal
STELL LR	Stellenbosch Law Review
UIF	Unemployment Insurance Fund
U S	United States of America