PATERNITY LEAVE - LABOUR LAWS AMENDMENT BILL

PORTFOLIO COMMITTEE ON LABOUR
Since 1993, LAW FOR ALL has made it our mission to make the law affordable and accessible to every single South African. Today, we protect and fight for the rights of over 1 million people, looking out for everyone – from the businessman at the top who faces more lawsuits than he can manage, to the worker on the factory floor who’s unable to afford legal advice.

At LAW FOR ALL we specialise in a multitude of legal services, as well as mediation, which allows us to resolve legal matters outside of court. Our team of highly qualified and passionate legal professionals value compassion and respect above all, treating our clients as human beings – not just another case number.

At the end of the day, we’re all about making mediation and other law services affordable and accessible to ALL.
Current South African employment laws place an unequal burden of work on mothers. Female employees are entitled to four consecutive months’ maternity leave, while fathers are only entitled to three days family responsibility leave. Thus, most of the childcare work becomes the responsibility of mothers.

Sufficient paternity leave benefits to fathers, could go a long way towards allowing women to return to the workplace sooner, and improve their career opportunities.

At present our employment laws (Basic Conditions of Employment Act of 1997) makes provision for only three days family responsibility leave per annum (S.27) and grants four months maternity leave, to mothers (S.25). The Act further restricts fathers to only three days family responsibility leave when their child is born, a dependant becomes ill or a close relative dies.

The Act fails to make provision for instances where fathers are the primary caregivers or instances where mothers die during childbirth or shortly after the birth of the child. The Act makes no provision whatsoever for parental leave for surrogate, adoptive and same sex parents. Our employment laws seem to be premised on the outdated notion that men are the breadwinners. In South Africa the reality is that many women are single parents or have subsequently become the breadwinner or even earns more than her partner. The four month’s maternity leave is thus a double edged sword. While it allows the mother time to nurture her infant, it means that she is out of the workforce for four months. Her employer may or may not remunerate her for the full four months, in which case she has to apply for maternity benefits as stipulated in the Unemployment Insurance Act of 2001. In instances where the mother is the main breadwinner, it would make economic sense for the family, if the father/partner is to take longer parental leave instead, as the loss of earnings of the mother during maternity leave would detriment the family unit unfairly.

The Constitution of the Republic of South Africa (S.9) protects South Africans against discrimination on the basis of, inter alia, gender, sex, and sexual orientation. We are of the opinion that S.25 of the Basic Conditions of Employment Act is discriminatory on the grounds of gender, and in direct conflict
with the Constitution, as it only affords parental leave to female employees. This is discrimination on the basis of gender, sex and sexual orientation, and must subsequently be remedied.

This issue was raised in the case of MIA v State Information Technology Agency (Pty) Ltd (unreported case no D312/2012, 26-3-2015 (Gush J). The applicant was in a same sex marriage. Through the services of a surrogate mother, a child was born to the couple. When the applicant approached his employer for maternity leave, he was granted two months paid leave and two months unpaid leave. This was in contrast to the employer’s maternity leave policy for females, which made provision for four months paid maternity leave. The employer held that our laws only made provision for female employees, and was silent on instances involving same sex parents who have children through a surrogate. The case went to the CCMA and then to the Labour Court.

The Court held that in terms of S.28 of the Constitution, which states that every child has the right to family and parental care, the respondent’s refusal to grant four months paid leave constituted unfair discrimination. The employer was ordered to pay the applicant for the two months’ unpaid leave that the employer granted to him. The court indicated that amendment to the Basic Conditions of Employment Act was necessary, when dealing with similar matters in the future.

We believe that the proposed Labour Laws Amendment Bill is a step in the right direction. However, we do not believe that ten days’ paternity leave, is sufficient. The aforesaid court case strengthens the argument that fathers should be allowed the same amount of leave (especially when they are the primary or sole caregivers or the child’s mother passes away). In this regard the Legislature should look at countries such as Sweden where parents are given “shared leave”, and couples can decide between themselves who takes leave and how it will be utilised. We are of the view, that failure to amend our laws to take into account modern family dynamics and to provide “shared parental leave” now, could result in unnecessary litigation based on discrimination, later on.

LAW FOR ALL is proud to say, that we provide paternity leave benefits to our employees, and strongly believe that proper legislation could have a positive impact in the workplace. Already we have seen the trigger of a change in
workplace culture, where fathers feel more confident to talk about taking time-off for childcare. In the past this was almost a taboo subject amongst staff. We are confident that the flexibility it offers to our employees, encourages a healthy work-life balance that will in turn have a positive impact on productivity, business success and growth.

A 2015 policy brief on paternity leave, issued by the United States Department of Labour, indicates that when fathers take more paternity leave, it increases the ability of mothers to engage in paid work, with a resultant positive effect on female labour force participation and wages. Also, the increase in work by mothers, results in increased household income, which benefits the whole family. In addition to this, The Organisation for Economic Co-operation and Development released a study in 2013, which found that fathers who take paternity leave are more likely to play an active role in their children’s lives. Households where both parents are actively involved in their children’s lives, tend to have happier, healthier children who do better at school, have greater self-esteem and fewer behavioural problems.

Turning to South Africa, women make up 43.84% of the work force. Yet the old stereotype that men provide for their families and women take care of the children still prevails. In reality, women have to earn a living and shoulder most of the responsibility for child rearing. Existing legislation makes it possible for men to side step the unpaid work involved in caring for children at home. Even if employed men choose to be involved in caring for their new born children, legislation makes it very difficult for them to do so.

We are delighted that the ACDP has taken up this cause, and that its Member Bill has been accepted by Parliament. We need to point out that the ACDP does not support the rights of homosexual individuals or partners and the Bill in its current form does not sufficiently recognise the challenges faced by homosexual couples or parents.

The Bill in its current form only proposes ten weeks leave to a parent who has a child through surrogacy. In MIA v State Information Technology Agency (Pty) Ltd (unreported case no D312/2012, 26-3-2015 (Gush J), the court technically awarded four months paid leave benefits to a homosexual father. The court
placed emphasis on the rights of parties in a civil union, as well as the rights of commissioning parents in a surrogacy agreement, and noted that maternity leave benefits are not solely connected to the welfare and health of a mother, but also the best interest of the child. It would be unfair towards a child born through surrogacy as he/she would have less time with their parent, than a child born to a heterosexual couple.

This move from four months, to only ten weeks, also could lead to further unnecessary litigation, based on discrimination and can be avoided by giving proper recognition in the Bill, to the complex challenges faced by homosexual coupleparents and their legal rights under our Constitution.

TO SUMMARISE

• The best interest of the child is paramount and must be prioritised in the proposed Bill.

• The proposed amendments are too limited, and need to properly distinguish and sufficiently cater for various family dynamics and scenarios such as where fathers are the primary or sole caregivers of a new born, where mothers pass away during or shortly after birth.

• The proposed amendments should be expanded to properly distinguish, sufficiently cater for and acknowledge the rights of those involved in surrogacy agreements, adoption and civil unions.

• In the case where homosexual men have children through a surrogate, they should be awarded the same benefits as mothers (four months). The proposed amendments do not sufficiently cater for this scenario and doesn’t recognise that the father would have to take home, take care and bond with a new born baby. The child would have less time with a parent than a child born to a heterosexual couple.

• Our employment laws currently place the responsibility of raising children solely on women, and unfairly keep them out of the workplace. Men are able to side step unpaid work and even if they do want to be involved, are prohibited. Our laws should not discriminate based on sex, gender and sexual orientation. Sufficient paternity and/or parental leave would remedy discriminatory provisions and would promote opportunities in the workplace for women.

• Ten days paternity leave is a step in the right direction, but still not sufficient. We believe that parents should be allowed to choose how to utilise the allocated four months maternity leave between themselves, and this should not be up to the legislature. This would especially make economic sense where the mother is the main breadwinner or earns more than the father.

• Sufficient parental leave will benefit households (Children, Mothers and Fathers) and companies in the long run. Women would benefit economically, while fathers would be more involved in their children’s lives. Children will be happier and healthier and do well at school.

• It is important for the points mentioned to be addressed in the Bill, so that costly litigation can be avoided in the future, and to create legal certainty.
IMPORTANT SOURCES

**References / Annexures**

1. Proposed Labour Laws Amendment Bill
4. MIA v State Information Technology Agency (PTY) Ltd (unreported case no D312/2012.
5. *A Dad can Mother too - Are South African Employment Law Discriminatory at the Core* Advocate K. Grobler

**Law for All in the Media (on Paternity Leave)**

*KykNet Winslyn*
https://www.youtube.com/watch?v=dnJzb5ZZLlI

*News 24*
https://www.youtube.com/watch?v=nsSM73Fjlqw
https://www.youtube.com/watch?v=sHxPEvTqWng

*The Daily Sun*
http://www.dailysun.co.za/Success/Health/WHAT-ABOUT-DAD-20150419

*Destiny Man*

*Uphondo*

*SAFM*
http://www.sabc.co.za/news/a/56b1dc00482d4fae9805ff4d1170398b/Are-SA-labour-laws-discriminatory-towards-fathers

*Voice of the Cape*
http://iono.fm/e/166276
CONTACT DETAILS

Written submission & legal opinion prepared by:

Ms. Natalie Faure (BA) (LLB Admitted Attorney)
Ms. Sabeeha Moolla (LLB Admitted Attorney)
Advocate Kaiél Grobler
Advocate Jackie Nagtegaal

For queries:
T: +27 21 522 6400
M: +27 83 790 7066
F: +27 21 522 6401
E: kaielg@lawforall.co.za
Blaauwberg Mall,
3 Blaauwberg Road,
Table View,
7441