

**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG**

**Case Number:** 2022-017842

In the matter of:

**WERNER VAN WYK**

First Applicant

**IKA VAN WYK**

Second Applicant

**SONKE GENDER JUSTICE**

Third Applicant

**COMMISSION FOR GENDER EQUALITY**

Fourth Applicant

and

**MINISTER OF EMPLOYMENT AND LABOUR**

Respondent

and

**CENTRE FOR HUMAN RIGHTS, UNIVERSITY OF  
PRETORIA**

First *amicus curiae*

**SOLIDARITY CENTRE, SOUTH AFRICA**

Second *amicus curiae*

**INTERNATIONAL LAWYERS ASSISTING WORKERS  
NETWORK**

Third *amicus curiae*

**LABOUR RESEARCH SERVICE**

Fourth *amicus curiae*

**NATIONAL EMPLOYERS' ASSOCIATION OF SOUTH  
AFRICA (NEASA)**

Fifth *amicus curiae*

**SIYASANGA NJAMBATWA**

Sixth *amicus curiae*

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**FIRST TO FOURTH *AMICUS CURIAE*'S HEADS OF ARGUMENT**

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## INTRODUCTION

- 1 Just a few days ago, Justice Kollapen said the following when describing what the modern notion of family and parenthood ought to be:

*“Traditional notions of family and parenthood have undergone revolutionary change under our constitutional dispensation. This can be attributed to a number of factors: the strong commitment to inclusivity and equality our Constitution evinces; the celebration of diversity as a source of richness rather than of division; and the recognition that for individual autonomy to flourish it must be enabled to be expressed in its fullest form. If, pre-constitutionally, South Africa was characterised by an obsession with difference and exclusion, then the post-democracy era must represent a triumph for inclusion and diversity.”<sup>1</sup>*

- 2 The present case challenges, at its core, archaic and rigid gender roles that are forced upon family units, with critical impacts for the inclusion of women in the workforce, the stubborn gender wage-gap and the entrenchment of gender stereotypes. It also implicates the equitable redistribution of care work within the home, as recognized in *Centre for Child Law* by Justice Victor’s statement that *“it is both parents that bear the primary responsibility to care for their child, as is provided for in the Children’s Act. And, it is a child’s right to bask in the parenting of both parents ...”<sup>2</sup>*

- 3 In *Mahlangu*, Justice Victor speaking to the intersectionality of discrimination, said that *“[i]t means nothing more than acknowledging that discrimination may impact on an individual in a multiplicity of ways based on their position in society and the structural dynamics at play. There is an array of equality jurisprudence emanating from this Court that has, albeit implicitly, considered the multiple effects of discrimination.”<sup>3</sup>* What this means for the present case is that the Court must, when analysing parental leave through an intersectional lens, consider that a structurally unequal parental leave

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<sup>1</sup> *VJV and RT v Minister of Social Development and Another* [2023] ZACC 21 at par 1-2.

<sup>2</sup> *Centre For Child Law v Director-General Dept of Home Affairs and Others* [2021] ZACC 31, 2022 (2) SA 131 (CC), 2022 (4) BCLR 478 (CC) at par 46.

<sup>3</sup> *Mahlangu v Minister of Labour* [2020] ZACC 24; 2021 (2) SA 54 (CC); 2021 (1) BCLR 1 (CC) at par 76.

framework impacts on mothers (and also on fathers) in a myriad of complex ways including by their race, class, religion and culture.

- 4 According to a 2020 report of the UN Working Group on discrimination against women and girls on women's human rights in the changing world of work, "[g]lobally, women do three times as much unpaid care work and domestic work as men, reflecting discriminatory stereotypes based on sex and gender that feminize this work."<sup>4</sup> The report further states that across the world, 606 million working-age women perform unpaid care-work on a full time basis compared with 41 million men."<sup>5</sup>
- 5 In South Africa, this unequal care burden is enforced, at least partly, through gendered leave provisions such as that found in the Basic Conditions of Employment Act No. 75 of 1997 ("**BCEA**"). It obviates personal choice and can be seen as an important driver of occupational segregation, women's predominance in part-time work and informal economy work, which sustains socio-economic disadvantage. Ultimately, persons should be free to choose how parental care manifests within their respective family units and that choice should be accommodated by the law as an inherent part of their dignity and equality. Indeed, in *Dawood*,<sup>6</sup> Justice O'Regan confirmed that the right to dignity included the right to family life. It should not be controversial that the right to choose any permutation of the family unit is a manifestation of substantive equality and is an inherent part of the right to dignity.

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<sup>4</sup> UN Working Group on Discrimination against Women and Girls, *Report on women's human rights in the changing world of work*, 2020 at par 13.

<sup>5</sup> Ibid.

<sup>6</sup> *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* (CCT35/99) [2000] ZACC 8; 2000 (3) SA 936; 2000 (8) BCLR 837.

- 6 The challenge in this case requires a broad understanding of family and ultimately the best interests of the child – a proposition that we will demonstrate – and that comparative jurisdictions are increasingly addressing through gender neutral parental leave reform.<sup>7</sup>
- 7 In these submissions, we specifically focus on non-discrimination both between a child-bearing and non-child-bearing parent, as well as for non-traditional parents who still carry the responsibility of child-rearing, such as adoptive and surrogacy commissioned parents, regardless of gender. The thread that emerges is that we must progress our notion of what a family entails towards a modern standard and our progressive constitution must shape the policies that impact on that notion of family, including the BCEA.
- 8 Economic, cultural and technological advances have shifted norms and practices around child-birth and child-rearing. While South Africa has been a front runner in embracing different forms of marriage and family, the BCEA, and particularly maternity and paternity leave provisions, have not kept pace. Indeed, South African law already recognises the diversities of modern families, childbearing and parenting, which in turn requires that parental leave be reformed in consonance with this recognition.
- 9 These heads of arguments will highlight South Africa's legal obligations, regional and international norms, standards and evolving comparative best practices relating to parental leave that will assist the Court in adjudicating the challenge to the interpretation and constitutionality of sections 25 and 26 of the BCEA.

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<sup>7</sup> EU Directive 2019/1158 on work-life balance for parents and carers; Japan's Child Care and Family Care Leave Act 1991; EU's Equal Treatment Directive 2006/54/EC; Republic of Singapore's Government-Paid Share Parental Leave; 2019 Amendments to the Republic of Korea's Equal Employment Opportunity and Work-Family Balance Assistance Act; Taiwan's Act of Gender Equality in Employment; Part 8 of the UK's Employment Rights Act 1996.

- 10 In order to be in line with constitutional and international legal obligations regarding non-discrimination and the best interests of the child, South Africa must adopt a stance that allows for broader, non-gendered, parental leave provisions.
- 11 It is important to distinguish maternal leave from parental leave. Simply put, maternal leave ought to be for birthing persons who have just given birth. This leave ensures recovery of the birthing person. Parental leave, on the other hand, relates to the individual choices and liberties of parents to give care and create a bond with the newborn child.
- 12 The current legal frameworks on parental leave are predominantly female-focussed, rigid and unjustifiable, as it primarily focuses on maternity leave and disempowers fathers from taking up a care-giving role in a newborn's life. These outdated frameworks create barriers to substantive gender equality and do not allow for families to exercise their liberty and autonomy to decide whether and how to best distribute the care burden in what they determine is in the best interests of their child. The frameworks themselves impose a gendered conception of care-work, with deleterious impacts on the rights to gender equality and work, as well as the right to family.
- 13 A transformative approach is called for in light of South Africa's international human rights and own domestic obligations under transformative constitutionalism. It is imperative that it alter the status quo around the gendered division in care burdens and become part of a global move towards shared parental leave. Judgments of the Constitutional Court, such as *Dawood*, *Centre for Child Law* and *VJV and RT, Hugo*,<sup>8</sup> and *Fraser*<sup>9</sup> demonstrate that there is a pressing constitutional imperative to revisit the idea of parenthood and provide authority for our proposition that the current legal frameworks no longer reflect the varieties of caregivers that have arisen out of the social,

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<sup>8</sup> *President of the Republic of South Africa and Another v Hugo* [1997] ZACC 4; 1997 (6) BCLR 708 (CC); 1997 (4) SA 1 (CC).

<sup>9</sup> *Fraser v Naude and Others* [1998] ZACC 13; 1999 (1) SA 1(CC); 1998 (11) BCLR 1357 (CC).

economic and technological changes that have taken place in our society. What we deal with below is a demonstration that these constitutional obligations are consistent with regional and international human rights obligations.

## **SOUTH AFRICAN LAW**

- 14 The Court must consider how Section 9 of the Constitution, the Employment Equity Act 55 of 1998 and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 prohibit unfair discrimination, directly or indirectly, against an employee in any employment policy or practice on one or more grounds, including race, gender, sex, pregnancy, or family responsibility.
- 15 An analysis of the constitutional and legislative obligations towards non-discrimination leads to the conclusion that post-birth leave policies must be restructured to allow for parental leave to be taken by either parent. The applicants in this matter have dealt with this analysis at length and we mention it here only to frame our submissions on South Africa's regional and international obligations.
- 16 Having read the First and Second Applicants' Heads of Argument, we draw specific reference to *MIA v State Information Technology Agency (Pty) Ltd (D312/2012) [2015] ZALCD; 2015 (6) SA 250 (LC); [2015] 7 BLLR 694 (LC); (2015) 36 ILJ 1905 (LC)* in para 77 to 83.
- 17 In *MIA*, the court found that the employer's policy was unfairly discriminatory if the maternity leave is only applicable to female employees and that this approach fails to protect the best interest of the child.
- 18 Further, the Court directed the employer to adjust its policy to recognise the status of parties to a Civil Union and to ensure that such policy did not discriminate against the rights of commissioning parents who enter into surrogacy agreements.

- 19 It is clear that the Court's intention is to ensure the universal application of parental leave for all parents, without discrimination, regardless of sex, gender, sexual orientation or child-bearing status.

## INTERNATIONAL AND REGIONAL LAW

- 20 South Africa has obligations under various international- and regional-law instruments relating to the issues of right to equality, right to family, right to work, and the right to a healthy development for children. These rights are interdependent, interrelated and indivisible, and must be read with the principles of non-discrimination and best interests of the child in mind. Under Section 39 of the constitution, the Court must consider international law in determining the meaning and constitutionality of domestic legislation.
- 21 This section will explain South Africa's positive obligations to further human rights in these intersections under various binding treaties and agreements including, *inter alia*:
- 21.1 the Convention on the Elimination of All Forms of Discrimination Against Women ("**CEDAW**");
  - 21.2 the International Convention on Economic, Social, and Cultural Rights ("**CESCR**");
  - 21.3 the Convention on the Rights of the Child ("**CRC**"); and
  - 21.4 the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa ("**Maputo Protocol**").
- 22 The section will also include analysis from recommendations and standards from the various treaty bodies as well as the International Labour Organisation ("**ILO**") and other United Nations treaty bodies and institutions. These soft law norms better reflect more recent trends in international norms, standards, and practices. Authoritative interpretations by treaty bodies highlight the obligations that state parties have under the



relevant treaties. Although these soft law norms are yet to be incorporated into South African domestic law, our courts have held that “*international agreements [that are not binding], particularly those dealing with human rights, may be used as interpretive tools to evaluate and understand our Bill of Rights.*”<sup>10</sup> To assist the Court in navigating the ratification status of the instruments under consideration, we have included a table as Annexure A to these submissions that details the status of each instrument and where ratification has occurred, the date upon which South Africa ratified the respective instrument.

23 The recognition that discrimination against women on the grounds of pregnancy is a key obstacle to women’s equal participation in the labour force is entrenched in almost all international human rights instruments, from the Universal Declaration on Human Rights in 1948, onwards.<sup>11</sup> At the same time, these instruments were wary of entrenching gender stereotypes and cognisant that gender roles are socially constructed. CEDAW’s preamble captures this tension in its concerns for the “*social significance of maternity*” and that “*the role of women in procreation should not be a basis for discrimination.*”<sup>12</sup>

24 The CEDAW preamble similarly lays out its vision that “*the upbringing of children requires a sharing of responsibility between men and women and society as a whole.*”<sup>13</sup> As a result, protections of maternity were accompanied by provisions committing states to non-discrimination and gender equality. Instruments such as CEDAW are very specific in their requirements that states modify or eliminate laws, customs and practices

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<sup>10</sup> *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC) ; 2011 (7) BCLR 651 (CC) (17 March 2011) at par 96.

<sup>11</sup> For instance, the Universal Declaration of Human Rights, provides in article 25(2), that “motherhood and childhood are entitled to special care and assistance”; similarly, article 23(2) of the International Covenant on Civil and Political Rights establishes that “special protection should be accorded to mothers during a reasonable period before and after childbirth”, Article 10(2)(b) of the International Convention on Economic, Social and Cultural Rights, recognizes the right of pregnant women and nursing mothers to special protection, and the Convention on Elimination of all forms of Discrimination against Women at Article 11(2)(b) requires states to provide special protection to women during pregnancy and after child birth, including ensuring they have adequate maternity leave. Similarly, the ILO Maternity Convention No.183 establishes certain minimum standards governing maternity protection.

<sup>12</sup> Convention on the Elimination of All Forms of Discrimination Against Women, pmbl, Dec. 18, 1979.

<sup>13</sup> *Ibid.*

that perpetuate gender stereotypes (article 5(a)) and address the common responsibility of men and women for the upbringing of their children (article 5(b)).

- 25 Outside of CEDAW, the ILO and UN treaty body Recommendations and General Comments are increasing recognition that transforming gender norms are required to realize the common responsibility of both parents to contribute to the upbringing and development of children. Target 5.4 of the UN Sustainable Development Goals on gender equality and empowering girls, directly addresses the recognition and value of unpaid care and domestic work, and *“the need to engage men in caregiving and reduce the disproportionate burden on women.”*
- 26 The following sections will explain the legal positions in regional and international law and apply them to the matter in front of the Court.

### **Right to Gender Equality**

- 27 The applicants submit that section 25 of the BCEA self-evidently discriminates between mothers and fathers on the basis of sex and gender, or on a certain category of parent based on whether they have given birth. The applicants proceed to conduct a constitutional analysis of the discrimination under the *Harksen* test to establish whether there is a legitimate government purpose for the discrimination and whether there is a rational connection to that discrimination.<sup>14</sup>
- 28 In this section, we examine South Africa’s international and regional obligations regarding discrimination based on sex and gender as they relate to parental leave. Although there is no specific obligation on states to implement equal parental leave, this gap has been critiqued, and there is increasing soft law recognition of the critical importance of involving fathers through equivalent paternity leave schemes, in an

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<sup>14</sup> Van Wyk Applicants’ Heads of Arguments, ch 3, CL 06-38 to 06-51.

attempt to actualize the still elusive realization of gender equality.<sup>15</sup> Further, we would argue that complying with international human rights obligations to transform discriminatory social norms and gender stereotypes requires affirming the right of either parent to take parental leave.

- 29 Such is the importance of gender equality that nearly every international and regional treaty has a provision concerning the obligation of States to take active steps in combatting harmful gender-based discrimination, including gender stereotypes.<sup>16</sup> And yet, despite substantial reform at the international, regional and domestic levels, men and women are still not recognised as being equal caregivers.<sup>17</sup>

CEDAW:

- 30 CEDAW obliges states *“to pursue by all appropriate means and without delay a policy of eliminating discrimination against women.”*<sup>18</sup> In particular, state parties to CEDAW have obligations to *“embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle.”*<sup>19</sup>
- 31 State parties further have obligations to *“refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions...act in conformity with this obligation...[and] modify or abolish existing laws, regulations, customs, and practices which constitute discrimination against women.”*<sup>20</sup> The constitutional imperative of the “achievement of equality” is not merely aspirational. The

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<sup>15</sup> Marcia Porter, *Combating Gender Inequality at Home and at Work: Why the International Labour Organization Should Provide for Mandatory Paid Paternity Leave*, THE GEORGE WASHINGTON INTERNATIONAL LAW REVIEW (2015).

<sup>16</sup> UN Charter Art. 55(c); UDHR arts. 2, 7, 23(2); ICCPR arts. 2(1), 26; CESCART arts. 2, 3

<sup>17</sup> The Global Gender Gap Index, World Economic Forum.

<sup>18</sup> CEDAW, art. 2.

<sup>19</sup> CEDAW art. 2(a).

<sup>20</sup> CEDAW art. 2(d)&(f).

CEDAW Committee explains that the treaty is meant to “[target] discriminatory dimensions of past and current societal and cultural contexts which impede women’s enjoyment of their human rights...including the elimination of the causes and consequences of their de facto or substantive inequality.”<sup>21</sup> The focus on substantive equality holds through in other regional and international instruments.<sup>22</sup>

- 32 Although CEDAW does not specifically mention parental leave, Article 11(2)(c) addresses non-discrimination at work on the grounds of marriage or maternity, by encouraging states to provide “the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities.” In the eyes of the CEDAW drafters in 1979 when it was adopted, a response to the challenge of ensuring non-discrimination in employment and the public sphere was the provision of maternity leave (article 11(2)(b)) coupled with state-provided child-care facilities. Yet, at the same time, it was also aware that re-negotiating and sharing childcare responsibilities in the home, was equally fundamental to gender equality. This is reflected in the preamble which states:

*“Convinced that the full and development of a country....require the maximum participation of women on equal terms with men in all fields,*

*Bearing in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognized, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole, Aware that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women...”<sup>23</sup> (emphasis added).*

<sup>21</sup> CEDAW Committee General Recommendation No. 25, 2004, at par 14.

<sup>22</sup> CESCR, General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights, 2005, at par 7; Maputo Protocol, art. 1.

<sup>23</sup> CEDAW, preambular par 12-14.

- 33 Indeed, an analysis of the *travaux préparatoires* of CEDAW reveals a concern that the realisation of substantive equality would require elimination of stereotyped gender roles, specifically in relation to ensuring men are more involved in the upbringing of children, which was widely discussed during its drafting.<sup>24</sup>
- 34 As a consequence, Article 5 states that States *must* “*modify [prejudicial] social and cultural patterns*” and ensure “*the recognition of the common responsibility of men and women in the upbringing and development of their children.*”
- 35 This was expanded upon in CEDAW Committee’s General Recommendation No. 21 on Equality in Marriage and Family Relations, where it is explained that in terms of CEDAW, *de jure* equality is insufficient where society assigns roles to women, and “[t]he shared rights and responsibilities enunciated in the Convention should be enforced at law.”<sup>25</sup>
- 36 In recent years, between 2022 and 2023, the CEDAW Committee has emphasized through its concluding observations that shared parental leave policies are a key step in fulfilling a state’s obligations under the convention. In these concluding observations, the CEDAW Committee has noted that paid parental leave is needed to ensure that domestic responsibilities are shared and that men effectively fulfil their parental obligations.<sup>26</sup> It has criticized states providing two weeks of paid leave to partners as insufficient, and welcomed family leave laws that provide equal leave for both parents.<sup>27</sup>

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<sup>24</sup> Elisabeth Hakansson, *Paternity Leave as Human Right: the right to Paternity Leave, Parental Leave for the Father, as a Way to Actual Gender Equality in the View of CEDAW and other International Instruments*, UNIVERSITY OF LUND (2005) pp. 55-56.

<sup>25</sup> CEDAW Committee, General Recommendation No. 21, 1994, at par 20.

<sup>26</sup> CEDAW Committee “Concluding observations on the fourth periodic report of Timor-Leste” (2023) at par 24(c); CEDAW Committee “Concluding observations on the combined initial and second to fifth reports of Sao Tome and Principe” (2023) at par 25(5); CEDAW Committee “Concluding observations on the combined fifth to ninth periodic reports of Saint Kitts and Nevis” (2022) at par 21; CEDAW Committee “Concluding observations on the seventh periodic report of Switzerland” (2022) at par 59(b).

<sup>27</sup> *Ibid.*

African Charter:

- 37 Regionally, the Maputo Protocol emphasises that States must enact national legislative measures to ensure that “*a woman and a man shall jointly contribute to safeguarding the interests of the family, protecting and educating their children.*”<sup>28</sup> This is an important step in ensuring that women and men are equal partners in relationships and is equally applicable to the right to family that is discussed below.

ILO:

- 38 While the ILO Maternity Convention adopted in 2000 established the right to paid maternity leave, it applies only to employed women. However, the Maternity Protection Recommendations of 2000 address the entitlement of employed fathers to paid maternity leave in certain circumstances.<sup>29</sup> Further, the 1981 ILO Convention on Workers with Family Responsibility and its Recommendations was one of the first international instruments to recognise the obligation of states to provide “effective equality of opportunity” for workers with family responsibilities.<sup>30</sup> Although this convention falls short of requiring states to put in place parental leave policies, the ILO has since reflected that this convention was “*an important step towards the creation of effective equality of opportunity and treatment for men and women workers...the way in which fathers are included in childcare leave policies can have important implications for gender equality.*”<sup>31</sup>
- 39 Further, the ILO has addressed gender stereotypes and family responsibility in its recommendations under the Convention No. 111 on Discrimination (Employment and Occupation). For example, in response to Jordan’s Labour Code setting out the jobs and

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<sup>28</sup> Maputo Protocol, art. 6(i).

<sup>29</sup> ILO Maternity Protection Recommendation, 2000 (No. 191), art. 10.

<sup>30</sup> ILO, Workers with Family Responsibilities Convention, 1981 (No. 156), art. 3.

<sup>31</sup> ILO, Maternity and paternity at work: Law and practice across the world, 2014, p. 61.

times at which work by women was prohibited, the Supervisory Committee stated in 2003,

*“the Committee must repeat that family responsibilities may constitute an obstacle to equality in employment and be an important cause of direct or indirect discrimination against women. Therefore, it should be recognized that traditions and customs may reflect stereotype thinking and negative prejudices about men’s and women’s roles and capabilities, including those with respect to family responsibilities.”*<sup>32</sup>

- 40 CEDAW explicitly requires that steps be taken to counter stereotypes against women as designated caregivers<sup>33</sup> and the CEDAW Committee has called on States to target societal discriminatory norms in law, especially in relation to child upbringing.<sup>34</sup> The ILO has similarly recognized that stereotypical thinking about gender roles can constitute an obstacle to equality and correspondingly, that the inclusion of fathers in childcare policies can increase gender equality.<sup>35</sup>
- 41 South Africa’s commitment to transforming gender norms, in order to realize substantive equality and remedy *de jure* discrimination, requires that the BCEA’s provision for parental leave should be either interpreted to include both parents or be found unconstitutional as it imposes and entrenches inequitable care burdens and regressive societal expectations of women as primary caregivers.

## Right to Work

- 42 The applicants submit that the contested sections of the BCEA infringe on the mother’s right to work for an income.<sup>36</sup> This section examines the scope of the right to work in international human rights law, on the relationship between a woman’s right to work, and parental leave policies. As a preface to the analysis that follows, it is important here to

<sup>32</sup> ILO Committee of Experts on the Application of Conventions, *Direct Request Discrimination (Employment and Occupation) Convention, 1958 (No. 111) - Jordan (Ratification: 1963)* (2003).

<sup>33</sup> Art. 5, 11.

<sup>34</sup> CEDAW Committee, General Recommendation No. 21, 1994.

<sup>35</sup> ILO, “Maternity and paternity at work: Law and practice across the world,” 2014, p. 61.

<sup>36</sup> Van Wyk Applicants’ Heads of Arguments, ch 2, CL 06-07.

keep in mind Justice Victor's application of intersectionality in the case of *Mahlangu*<sup>37</sup> that was cited in the introduction to these submissions.

- 43 The right to work is enshrined in article 23 of the Universal Declaration of Human Rights, articles 6, 7, and 8 of the CESCRR and article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination, and article 15 of the African Charter on Human and Peoples' Rights. CEDAW article 11 similarly entrenches the right to work as an "*inalienable right of all human beings*," which can only be realised by women if States take measures to eliminate discrimination against women in work, especially on the grounds of marriage or maternity. This includes the obligation "*to encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities, and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities*." The specific impact that the responsibility to raise children has on women's right to work has been flagged by the CEDAW committee as early as 1994.<sup>38</sup>
- 44 The right to work entrenched in these instruments includes the right to equal remuneration for work of equal value and decent working conditions.
- 45 Yet, according to a 2020 report of the UN Working Group on Discrimination against women and girls, globally, women remain clustered in stereotypically female occupations, which have low pay, low status and little room for advancement. The report puts the global gender pay gap at 20% which is wider for "*women who experience multiple and intersecting forms of discrimination*."<sup>39</sup>
- 46 The 2020 UN report highlights the "motherhood penalty", which it describes as "*systematic disadvantage experienced by mothers in the workplace, which contributes*

<sup>37</sup> *Mahlangu v Minister of Labour* [2020] ZACC 24; 2021 (2) SA 54 (CC); 2021 (1) BCLR 1 (CC) at par 76.

<sup>38</sup> CEDAW Committee, General Recommendation No. 21, 1994, at par 21, 29.

<sup>39</sup> UN Working Group on Discrimination against Women and Girls, *Report on women's human rights in the changing world of work*, 2020 at par 14.



*to a larger pay gap, and dramatically lower retirement savings or pension.”*

According to its figures, only 27.1% of managers globally are women, a figure that has remained relatively stagnant for 27 years. The report continues, *“such data not only reflects the persistent barriers women face, but also the low societal value ascribed to the work women do.”*<sup>40</sup> It concludes that adding women into the masculinist structure of work and the economy has failed to actualize the right to work.<sup>41</sup> The UN Working group recommends *“ensuring that all workers have a comprehensive system of paid maternity, paternity and parental leave.”*<sup>42</sup>

47 Similarly, the CESCR committee has stated that realisation of the right to work necessitates States taking *“deliberate, concrete, and targeted”* steps especially when fighting gender discrimination.<sup>43</sup> In addition, it has held that article 9, which provides for the right to social security and access to social services, and article 3, which requires measures to combat discrimination, together place on obligation on States to give *“adequate maternity leave for women, paternity leave for men and parental leave for both men and women.”*<sup>44</sup>

48 Childbirth and the unequal distribution of childcare responsibilities continue to lead to a decrease in a woman’s ability to engage in paid work. Studies conducted by the Organisation for Economic Co-operation and Development (**“OECD”**) show that *“disparities in unpaid care work remain both stark and resistant to change”* and *“while there has been growth in female labour force participation in recent decades, there has been little progress in changing the distribution of unpaid work.”*<sup>45</sup> Traditional gender

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<sup>40</sup> Ibid.

<sup>41</sup> Ibid, at par 41.

<sup>42</sup> Ibid, at par 46.

<sup>43</sup> CESCR, General Comment No. 18: The Right to Work (Article 6), UN Doc. E/C.12/GC/18, at par 13-23.

<sup>44</sup> CESCR, General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights (Article 3), UN Doc. E/C.12/2005/4, 2005, at par 26.

<sup>45</sup> OECD, *Enabling Women’s Economic Empowerment: New Approaches to Unpaid Care Work in Developing Countries* (3 June 2019).

norms which prescribe that women should bear a disproportionate load of unpaid house and care work remain intact and resilient, particularly in developing countries.<sup>46</sup>

49 Even where women's right to return to work after maternity leave is legally guaranteed, the ILO has found that many women between the ages of 26 and 35 resign after having a child because of the lack of support for childcare.<sup>47</sup> On the other hand, equitable parental leave policies increase the likelihood of a return to paid employment and enable choice on the distribution of unpaid childcare work.<sup>48</sup> According to the OECD, women are able to participate more equitably in labour markets when *"working-time arrangements are more flexible, childcare is subsidised, and paid parental leave for both men and women is available."*<sup>49</sup>

50 Indeed, the critical importance of recognising unpaid work to women's economic empowerment is emphasised through Sustainable Development Goal 5, and Target 5.4, *"[r]ecognize and value unpaid care work and domestic work...through the promotion of shared responsibility within the household and family."* Correspondingly, shared responsibility within the household has been found to positively change social norms.<sup>50</sup>

51 The 2022 Tool Kit on Paid and Unpaid work published by the ILO and UN, further recommends that states *"recognize, reduce and redistribute unpaid care work,"* which entails:

*"reducing the disproportionate share of unpaid care work carried by women and girls, and redistributing care responsibilities equitably between men and women, in households, communities, the world of work and the state. Key means include eliminating discriminatory social norms and gender stereotypes,*

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<sup>46</sup> Ibid.

<sup>47</sup> ILO, "Maternity and paternity at work: Law and practice across the world," 2014, pp. 79-80.

<sup>48</sup> Ibid, p. 118; ILO, Resolution on Gender Equality at the Heart of Decent Work, 2009.

<sup>49</sup> OECD, *Enabling Women's Economic Empowerment: New Approaches to Unpaid Care Work in Developing Countries* (3 June 2019).

<sup>50</sup> Ibid.

*encouraging positive masculinities, and enacting care-friendly employment policies to balance work and family commitments.”<sup>51</sup>*

52 The CEDAW Committee has also commented that parental leave policies “*increase women’s access to employment and decision-making positions*” and recommended such policies on several occasions in recent years.<sup>52</sup>

53 Given the continued impact of maternity on a woman’s right to work and the potential for parental leave policies to reverse these impacts, South Africa is obliged to take steps to guarantee a woman’s right to work. Such steps include comprehensive parental leave policies and not simply maternity leave policies.

### **Right to Family**

54 The family has been recognised as a fundamental unit in society in various international legal and regional instruments and therefore, the right to maintain family relationships and protection is broadly recognised.<sup>53</sup> The family is understood broadly, including biological, adoptive or foster parents.<sup>54</sup> This was echoed in our jurisprudence as far back as 2000 in the case of *Dawood*.<sup>55</sup>

55 The right to family is intertwined with the best interests of the child.<sup>56</sup> Children have a right to know and be cared for by their parents, and their parents have a responsibility for the child’s upbringing.<sup>57</sup> States, therefore, have an obligation to enact legislative and administrative measures to protect the child and family by “*taking into account the rights and duties of parents*.”<sup>58</sup> The African Charter on the Rights and Welfare of the Child

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<sup>51</sup> UN Women, “A toolkit on paid and unpaid care work: From 3Rs to 5Rs,” p. 6.

<sup>52</sup> CEDAW Committee “Concluding observations on the ninth periodic report of Spain” (2023) at par 33(c); CEDAW Committee “Concluding observations on the seventh periodic report of Armenia” (2022) at par 36€.

<sup>53</sup> CRC Preamble; CESC art. 23, 24; ACRWC art. 18.

<sup>54</sup> CRC Committee, General Comment No. 14, 2013, at par 59.

<sup>55</sup> *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* (CCT35/99) [2000] ZACC 8; 2000 (3) SA 936; 2000 (8) BCLR 837.

<sup>56</sup> CRC art. 3.

<sup>57</sup> CRC art. 7, 18; CEDAW art. 16(d).

<sup>58</sup> CRC art. 3.

further states that State Parties shall “*assist parents and others responsible for the child in the performance of child-rearing.*”<sup>59</sup>

56 The CRC Committee has commented that “*shared parental responsibilities are generally in the child’s best interest.*”<sup>60</sup> In 2019, UNICEF set out a policy brief aimed at improving “family friendly policies” across the world. The first recommended policy is sufficient parental leave to “*all parents and guardians, in both the formal and informal economies, to meet the needs of their young children.*”<sup>61</sup>

57 Taken together, the right to family both from the non-birthing parent’s perspective and the child’s perspective urges States to enact parental leave policies that enable all members of the family unit to spend time with the child in order to further the child’s best interests.

### Right to Healthy Development

58 It is well-established that being a part of a family unit, especially at a young age, is essential for a child’s development. The preamble of the CRC reflects this understanding:

*“the family, as the fundamental group of society and the natural environment for the growth and well-being of... particularly children...[T]he child, for the full and harmonious development this or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.”*

59 The family is not limited to the biological mother and father but has been understood to be “*a variety of arrangements that can provide for young children’s care, nurturance and development...provided these are consistent with children’s rights and best interests.*”<sup>62</sup>

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<sup>59</sup> ACRWC art. 2(b).

<sup>60</sup> CRC Committee, General Comment No. 14, 2013, at par 67.

<sup>61</sup> UNICEF, Family-Friendly Policies: Redesigning the Workplace of the Future. A Policy Brief, 2019, p 3.

<sup>62</sup> Committee on the Rights of the Child, General Comment No. 7, 2005, CRC/C/GC/7/Rev.1, at par 15.

This should not be a contentious proposition. Perhaps it may have been contentious in more archaic times, but not in 2023.

- 60 There is a growing recognition that more time spent between parents and new-borns increases the child's physical, social, and emotional development. A 2019 UNICEF study found that parental leave leads to increased access to medical care for children and better infant health.<sup>63</sup> A variety of studies have found that interactions between fathers and children positively impact the child's socio-emotional growth, leading to lower rates of mental illness as the child grows.<sup>64</sup>
- 61 Beyond physical and mental development, the Committee on the Rights of the Child has explained the importance of caregivers' time with new-born babies to the realisation of the child's own rights:

*Babies and infants ... are active social agents, who seek protection, nurturance and understanding from parents or other caregivers, which they require for their survival, growth and well-being. Newborn babies are able to recognize their parents (or other caregivers) very soon after birth, and they engage actively in non-verbal communication. Under normal circumstances, young children form strong mutual attachments with their parents or primary caregivers. These relationships offer children physical and emotional security, as well as consistent care and attention. Through these relationships children construct a personal identity and acquire culturally valued skills, knowledge and behaviours. In these ways, parents (and other caregivers) are normally the major conduit through which young children are able to realize their rights"<sup>65</sup> (emphasis added).*

- 62 The CRC Committee has elaborated that the State duty to ensure care and protection of the child is not limited to protection from harm, but to

<sup>63</sup> Alison Earle and Jody Heymann, UNICEF, Paid Parental Leave and Family-Friendly Policies: An Evidence Brief, 2019, pp. 2, 12.

<sup>64</sup> See, e.g., Leidy S, Schofield TJ, Parke RD. Fathers' Contributions to Children's Social Development, 2013; Allgood SM, Beckert TE, Peterson C. The Role of Father Involvement in the Perceived Psychological Well-Being of Young Adult Daughters: A Retrospective Study. North American Journal of Psychology. 2012; 14(1): 95–110; Lamb M, Lewis C. Father–Child Relationships. In: Cabrera NJ, Tamis-LeMonda CS. Handbook of Father Involvement: Multidisciplinary Perspectives, Second Edition. New York, NY: Routledge; 2013.

<sup>65</sup> Committee on the Rights of the Child, General Comment No. 7, 2005, CRC/C/GC/7/Rev.1, at par 16.

*“the comprehensive ideal of ensuring the child’s ‘well-being’ and development...includes basic material, physical, educational and emotional needs, as well as needs for affection and safety....*

*Emotional care is a basic need of children...children need to form an attachment to a caregiver at a very early age, and such attachment, if adequate, must be sustained over time in order to provide the child with a stable environment.”<sup>66</sup>*

- 63 Given the close relationship between parental time spent with new-borns and infants and their healthy development, the State obligation to ensure the child’s right to healthy development logically leads to ensuring that parents have access to as much time with their children as possible in a non-discriminatory manner. Such as in the case of the Van Wyk applicants, prescribing leave to only birthing mothers in situations where the birthing mother is best placed to provide economically for the family limits the potential of other parents to have nurturing interactions with the child, thereby leading to realisation of the child’s right to healthy development. This also implicates the caregivers’ rights to liberty and autonomy in deciding as a family who is best placed to take on the care burden.

## COMPARATIVE LAW & GLOBAL TRENDS

- 64 Much has already been stated on parental leave policies in other countries around the world and the increasing number of states enacting these measures in order to realise the positive impact on the rights of parents as well as children. Both the Van Wyk applicants<sup>67</sup> as well as the third applicant<sup>68</sup> expand on the list of parental leave policies in other countries referenced by the *amici* in their founding affidavit.<sup>69</sup> Instead of delving into further specific examples, this section comments on the global trend and scope of increasing recognition of the importance on parental leave.

- 65 In 2014, the ILO commented on the global trend in increasing parental leave policies:

<sup>66</sup> CRC Committee, General Comment No. 14, 2013, at par 71-72.

<sup>67</sup> Applicant’s founding Affidavit, paras 53-66, CL 01-17 to CL 01-19.

<sup>68</sup> Third Applicant’s Concise Heads of Argument, Section 4, CL 06-79 to CL 06-81.

<sup>69</sup> Lawyers for Human Rights Founding Affidavit, paras 59-71, CL 01-763 to CL 01-767.

*“As countries move towards greater gender equality in their legislation and policies, most countries are setting out parental leave as a shared entitlement, where either the mother or the father has the right to take the parental leave and the parents determine the allocation of leave themselves. Countries adopting this approach include Albania, Cuba, Estonia, Finland, New Zealand, Uzbekistan and many others.”<sup>70</sup>*

- 66 The ILO further tables the parental leave policies of all countries in 2013. Countries with parental leave policies available to either parent in 2013 included: Burkina Faso (up to 52 weeks), Chad (up to 52 weeks), Republic of Korea (up to 52 weeks); Mongolia (up to 156 weeks); Nepal (4 weeks), Australia (52 weeks); Austria (104 weeks), Belgium (17 weeks), Bulgaria (26 weeks), Canada (37 weeks), Cyprus (13 weeks), Czech Republic (156 weeks), Denmark (32 weeks), Estonia (36 weeks), Finland (26 weeks), France (156 weeks), Germany (208 weeks), Greece (12 weeks), Hungary (104 weeks), Iceland (16 weeks), Israel (52 weeks), Italy (26 weeks), Japan (52 weeks), Lithuania (156 weeks), Luxembourg (26 weeks), Malta (13 weeks), Netherlands (26 weeks), New Zealand (52 weeks), Norway (49-59 weeks), Poland (156 weeks), Portugal (17-35 weeks), Romania (104 weeks), Slovakia (156 weeks), Slovenia (37 weeks), Spain (156 weeks), Sweden (80 weeks), United Kingdom (13 weeks), United States (12 weeks), Albania (12 days), Armenia (156 weeks), Azerbaijan (156 weeks), Belarus (156 weeks), Bosnia and Herzegovina (156 weeks), Croatia (104 weeks), Georgia (50 weeks), Kazakhstan (156 weeks), Moldova (156 weeks), Russian Federation (156 weeks), Tajikistan (156 weeks), Macedonia (156 weeks), Turkey (26 weeks), Ukraine (156 weeks), Uzbekistan (156 weeks), Chile (12 weeks), Cuba (39 weeks).<sup>71</sup>
- 67 What we can surmise from the countries listed above is that equitable parental leave includes developed countries but also developing countries. Parental leave is important for economic development because it ensures:

<sup>70</sup> ILO, Maternity and paternity at work: Law and practice across the world, 2014, p. 62.

<sup>71</sup> Ibid, pp. 150-163.

*“that mothers and fathers have adequate paid leave for the birth of a child should be priority for economic development. Studies show that adequate maternity leave can lead to lower infant mortality rates, health benefits for the mother, higher female labor force participation and increased breastfeeding rates. Paternity leave also has a wide range of benefits that can improve development outcomes, including health and economic benefits to the mother, more equitable division of household labor and increased child bonding. Researchers have linked fathers’ use of leave with increased earnings for the mother, reduced mother-absenteeism due to sickness and higher female employment in private firms.”<sup>72</sup>*

- 68 Although parental leave policies are enacted with relation to the context of the specific country, there are further trends in ensuring that parental leave is inclusive and aimed at ensuring the rights of all types of non-birthing parents. In several countries, parental leave is offered to anyone who is recognized by the parents as raising the child if it is not used by the mother or the father.<sup>73</sup>
- 69 Under the ILO Recommendation No. 191, the same leave provisions that apply to biological parents must also apply to adoptive parents from the time that the child arrives at home.<sup>74</sup> A recent court decision in Argentina also held that maternity or parental leave should apply for surrogate parents, as *“the main purpose of the leave is to provide children with the first necessary care after birth, guaranteeing the integration of the whole family and the affective bonding of the children with the parents.”<sup>75</sup>*
- 70 The broad scope and increasingly prevalence of fair parental leave policies across the world point to the growing recognition that such policies are necessary and effective in realising the rights of families and children. It is past due for South Africa to not only recognise the international and regional best practices and norms that have been discussed above, but to become a leader for reform within the international community.

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<sup>72</sup> Katrin Schulz, Why parental leave matters for development (19 February 2020), <https://blogs.worldbank.org/developmenttalk/why-parental-leave-matters-development>.

<sup>73</sup> Examples as of 2013 included Azerbaijan, Lithuania, Russia, Estonia, Uzbekistan. Ibid, pp. 64-65.

<sup>74</sup> Ibid, p. 69.

<sup>75</sup> L&E Global, Argentina: Maternity Leave in Cases of Surrogacy, 2022, <https://leglobal.law/2022/07/27/argentina-maternity-leave-in-cases-of-surrogacy/>.



**CONCLUSION**

- 71 The Court is obliged to consider not only constitutional considerations, but international law obligations under Section 39(1)(b) of the Constitution. The legal comparisons with other jurisdictions across the world, as provided by the applicants, can shed light on the scope and possibility of parental leave policies and exactly where South Africa should place itself within the international community as a forerunner in equality rights.
- 72 The vision of international instruments such as CEDAW require a radical restructuring of parenting and caregiving policies to progress towards substantive equality by allowing the family to choose how to ensure the best interests of the child. A growing global trend recognizing the importance of parental leave policies supports the notion that to fully recognise its constitutional and international human rights commitments, South Africa must allow for equitable parental leave.

**JATHEEN BHIMA**

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11 July 2023

## “ANNEXURE A”

<b>Instrument</b>	<b>South Africa's Ratification Status</b>
African Charter on Human and Peoples' Rights	Ratified in 1996
African Charter on the Rights and Welfare of the Child	Ratified in 2000
ILO Convention on Workers with Family Responsibility and its Recommendations, 1981	Not ratified
ILO Maternity Convention No.183 of 2000	Not ratified
ILO Maternity Protection Recommendations of 2000	Not ratified
ILO Discrimination (Employment and Occupation) Convention, 1958	Ratified in 1997
Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa	Ratified in 2005
Convention on the Elimination of All Forms of Discrimination Against Women	Ratified in 1995
Convention on the Rights of the Child	Ratified in 1995
International Covenant on Civil and Political Rights	Ratified in 1998
International Covenant on Economic, Social and Cultural Rights	Ratified in 2015
International Convention on the Elimination of All Forms of Racial Discrimination	Ratified in 1995
Universal Declaration of Human Rights	No ratification required

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