

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

**Case Number:** 2022-017842

In the matter of:

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

First applicant for admission  
as *amicus curiae*

**SOLIDARITY CENTER, SOUTH AFRICA**

Second applicant for  
admission as *amicus curiae*

**INTERNATIONAL LAWYERS ASSISTING WORKERS  
NETWORK**

Third applicant for admission  
as *amicus curiae*

**LABOUR RESEARCH SERVICE**

Fourth applicant for admission  
as *amicus curiae*

*In re:*

**WERNER VAN WYK**

First Applicant

**IKA VAN WYK**

Second Applicant

**SONKE GENDER JUSTICE**

Third Applicant

and

**MINISTER OF EMPLOYMENT AND LABOUR**

Respondent

**NOTICE OF MOTION**

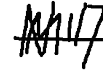
**TAKE NOTICE** that the first to fourth applicants for admission as *amicus curiae* ("the *Amici* applicants") hereby make application to this Court for an order in the following terms:

- 1 That the *Amici* applicants be admitted as *amicus curie* in this matter.
- 2 That the *Amici* applicants be granted leave to file written submissions and present oral submissions at the hearing of this matter.

**TAKE NOTICE** further that the affidavit of **LLOYD KUYEYA**, together with annexes thereto, will be used in support of this application.

**TAKE NOTICE** further that the *Amici* applicants will accept notice and service of all documents in these proceedings at the address set out below.

**DATED AT JOHANNESBURG ON THIS** 30th **DAY OF** JANUARY **2023.**



**LAWYERS FOR HUMAN RIGHTS**

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**REF: 26/SLP/2023**

**TO:** The Registrar of the Above Honourable Court  
*Service Per Court Online*

**AND TO:** Webber Wentzel  
*Attorney for the Applicants*  
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**AND TO:**      **Office of the State Attorney, Johannesburg**  
*Attorney for the Respondent*  
**Ref: 4196/22/P5/pn**  
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and

**MINISTER OF EMPLOYMENT AND LABOUR**

Respondent


**FOUNDING AFFIDAVIT**

I, the undersigned,

**FRANS VILJOEN**

do hereby state under oath that:

- 1 I am an adult male and the Director at the Centre for Human Rights (CHR) at the University of Pretoria.

PB  1-747

- 2 The facts contained herein are to the best of my knowledge true and correct and are, unless otherwise stated or indicated by the context, within my personal knowledge.
- 3 Where I make submissions of a legal nature, I do so on the advice of my legal representatives.
- 4 Where I make use of headings in this affidavit I do so for the purposes of convenience only and do not thereby intend to limit any facts stated under a particular heading only to the topic covered by such heading.

#### PURPOSE OF THIS APPLICATION

- 5 This application is to seek leave of this Court for the first to fourth applicants to be admitted as the first to fourth *amici curiae* in this matter in terms of Rule 16A of the Uniform Rules of Court. The *amici* applicants are The Centre for Human Rights, University of Pretoria (**CHR**); The Solidarity Center, South Africa (**SCSA**); International Lawyers Assisting Workers Network (**ILAW**); and Labour Research Service (**LRS**) (collectively, ***amici applicants***).
- 6 In this application, the CHR sets out grounds in support of its application to be admitted as an amicus curiae, together with the other amici applicants.
- 7 Several of the amici applicants are not based within South Africa, and as such their respective confirmatory affidavits could not be commissioned with the necessary notarisation before 31 January 2023. As such, the supporting affidavits deposed to by authorised persons within the employ of each *amici* applicant will be provided at the hearing of this matter, or at such sooner time as they may be available.

## OVERVIEW

- 8 The *amici* applicants have considered the Founding Affidavit and Supporting Affidavit filed by the Applicants in the main matter. We hold a substantial interest in these proceedings owing to our respective expertise and are in a unique position to offer submissions relating to international law obligations, normative standards, and best practices relating to parental leave and non-discrimination.
- 9 The above matter concerns a challenge to the constitutionality of Sections 25 and 26 (**the impugned provisions**) of the Basic Conditions of Employment Act 75 of 1997 (**BCEA**) insofar as it unfairly discriminates against fathers and mothers in a co-parenting relationship by:
- 9.1 Only removing mothers from paid employment;
  - 9.2 Infringing on the father's right to employment leave;
  - 9.3 Infringing on the mother's right to work for an income; and
  - 9.4 Infringing on the child's right to receive better care.
- 10 In 2021, following the birth of their son, the First and Second Applicants in the main matter, a husband and wife respectively, resolved that the First Applicant would act as their son's primary caregiver and, as such, applied to his employer for maternity leave for a period of four months which was not approved.
- 11 Consequently, the First Applicant made a further application to his employer for a six-month sabbatical, comprising two months of accumulated annual leave and four months of unpaid leave, which was governed by a sabbatical agreement between the First Applicant and his employer. The sabbatical agreement prejudiced the First Applicant's working conditions as well as his family's financial position.

- 12 In essence, the First and Second Applicants reasoned that because the option to apply for a sabbatical is not available to all fathers in relation to the need for a primary caregiver, the provisions of the BCEA discriminate against fathers overall.
- 13 The *amici* applicants' intervention in the main matter will place the issues of 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, within an international and comparative context.
- 14 The *amici* applicants seek to assist the Court with reliance on a range of international law instruments that taken individually and collectively will assist the Court in adjudicating the challenge to the constitutionality of the impugned provisions, especially as they relate to issues of discrimination.
- 15 The international law instruments which the *amici* applicants seek to rely on will place this reasoning of the High Court within the appropriate international law context.

#### **AMICI APPLICANTS' INTERVENTION**

- 16 The *amici* applicants are aware that a Rule 16A Notice was issued on 8 September 2022. Notwithstanding this, the *amici* applicants have noted that on 7 December 2022 at a case management meeting, the Deputy Judge President Sutherland had directed that all potential *amici curiae* file their applications to be admitted as *amici* before 31 January 2023. The *amici* applicants submit that they have acted in accordance with this directive.
- 17 As required by the Uniform Rules, the *amici* applicants wrote to all the parties on 25 January 2023, seeking their consent for admission as *amicus curiae*. That letter is attached to this application as **FV1**.

17.1 On 26 January 2023, the Respondent wrote to us and did not grant their consent.

This letter is attached as annexure **FV2**.

17.2 On 26 January 2023, the Applicants wrote to us and stated that "*the matter is being case managed by Deputy Judge President Sutherland, who has directed that all potential amici curiae make such applications by no later than 31 January 2023. As the court has directed that the joinder of all potential amici must be done by way of application, your clients should make the necessary application*". This letter is attached as annexure **FV3**.

18 The remainder of this affidavit is structured as follows:

18.1 I describe the *amici* applicants' interest in the proceedings; and

18.2 I set out the submissions which the *amici* applicants seek to make in the proceedings should they be admitted as *amicus curiae*; the relevance of these submissions and how they will assist this Court in determining the issues before it; and how these submissions differ from those of the other parties in the matter.

## **AMICI APPLICANTS' INTEREST IN THE PROCEEDINGS**

### ***The Nature of the Amici Applicants***

#### *The Centre for Human Rights (CHR)*

19 The CHR is uniquely positioned as both an academic department and a non-governmental organisation. A pioneer in human rights education in Africa, the CHR works towards a greater awareness of human rights, the wide dissemination of publications on human rights in Africa, and the improvement of the rights of women, people living with HIV, indigenous peoples, sexual minorities and other disadvantaged or marginalised persons or groups across the continent.



- 20 The CHR was established in the Faculty of Law, University of Pretoria, in 1986, as part of domestic efforts against the apartheid system of the time. Members of the CHR participated in meetings with the liberation movements outside the borders of South Africa, organised conferences and participated in efforts to promote human rights in South Africa, and, when the transition came, served as technical advisors in the constitution-writing processes.
- 21 Over the years, the CHR's focus broadened to encompass diverse issues of human rights law in Africa, and international development law in general. Today, the CHR is at the hub of an unmatched network of practising and academic lawyers, national and international civil servants and human rights practitioners across the entire continent. An ever-growing cadre of CHR graduates now contributes in numerous ways to the advancement of human rights and democracy and the strengthening of institutions all over the African continent, and beyond.
- 22 The CHR has been involved in litigation before United Nations human rights treaty bodies, African Union human rights bodies, ECOWAS Court of Justice and intervened as *amicus curiae* at the Inter-American Court of Human Rights, East African Court of Justice and the High Court of South Africa, including appearing as ninth respondent in *Democratic Alliance v Minister of International Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening)* (83145/2016) [2017] ZAGPPHC 53.

*Solidary Center, South Africa (SCSA)*

- 23 SCSA is the South African branch office of the Solidarity Center, a United-States based international worker's rights organisation that helps workers to attain safe and healthy workplaces, dignity and equity in the work place.

- 24 SCSA aims to improve the laws of vulnerable working people especially, including farm workers, domestic workers, migrant workers and women workers. It works closely with the union and organisation partners to conduct, amongst other things, gender equality training to ensure an environment where workers, especially women workers, achieve their rights to maternity protection and workplaces free of sexual harassment and other forms of gender-based violence.

*International Lawyers Assisting Workers Network (ILAW)*

- 25 The ILAW is currently a project of the Solidarity Centre, a US-based non-governmental organization which is dedicated to the promotion of workers' rights worldwide.
- 26 The core mission of the ILAW is to bring together legal practitioners and scholars in an exchange of ideas and information to best represent the rights and interests of workers and their organizations wherever they may be. Given the global nature of work and the common trends that affect workers regardless of nationality, a global legal network is needed now more than ever to effectively represent workers in issues that transcend national boundaries. Effective legal advocacy for workers will increasingly require the collaboration of lawyers in multiple legal jurisdictions.
- 27 The ILAW has filed numerous *amicus curiae* submissions related to the promotion of workers' rights with the high courts of numerous countries, including Colombia, Costa Rica, Ecuador, Mexico, the Republic of Georgia, Thailand, Uganda and the United States, as well as with regional human rights courts, including the Inter-American Court of Human Rights.
- 28 The ILAW also conducts and publishes comparative research on a broad range of labour issues, including, of particular relevance to the current proceedings, non-discrimination in employment, and gender-based violence and harassment, and gendered impacts of platform economy work, informal economy work, domestic work, and telework. This

includes research in South Africa, including gender-based violence and harassment in the mining sector, and continuing forms of legal discrimination for domestic workers. The ILAW is also in the final stages of a research project focused on understanding the barriers to the realisation of equality and non-discrimination in the world of work in countries including South Africa, Tunisia, Colombia, India, South Africa and the United Kingdom – particularly for workers in low-wage and informal employment. ILAW is also finalising a research paper on discrimination against domestic workers in law in Sub-Saharan Africa. Finally, the ILAW Network has been collaborating with law students on a research project focussed on comparative developments in law's addressing fathers and childcare provisions.

*Labour Research Service (LRS)*

- 29 The LRS is a membership-based labour support organisation established in 1986 which stands for the development of its member unions and the trade union movement in South Africa and in Africa.
- 30 The LRS stands for inspiring workers to believe in and exercise their individual and collective power in the struggle for social and economic justice as well as provides research and capabilities development for trade unions in several different areas including building cultures of gender equality in the workplace and the union.

***Amici Applicants' Interest in the proceedings***

- 31 The main application seeks a declaration that sections 25 and 26 of the BCEA are unconstitutional insofar as it discriminates against fathers of new-born children. The Applicants further seek to amend the definition of maternity leave as 'parental' and 'care giving leave' for a non-transferable period of 4 months and establish a new category of peri-natal leave.

- 32 The relief sought in the main application invokes several constitutional and human rights considerations such as, A) discrimination against men by specifying a longer 'maternity' leave; B) discrimination against mothers by only removing them from paid employment; C) a father or other non-birthing parent's right to employment leave to bond with their child; D) a birthing parent's right to work for an income; E) a child's right to receive family and parental care; and F) a burden on the mother to become the default caregiver.
- 33 The implications of parental leave policies are wide-reaching. The uptake of parental leave is an important step in the realisation of gender equality and affirming the best interests of the child. The period immediately following the birth of a child is a pivotal period in both the parents' and the child's life. The *amici* applicants note that the importance of the post-birth period has drawn recent attention in international human rights law and foreign jurisdictions. The main Applicants themselves have noted the international movement towards shared parental leave and indicated a handful of comparative examples.
- 34 The *amici* applicants seek admission in the main matter to assist the Court with submissions on constitutional and international law guarantees of non-discrimination to ensure that the broader context of international law is taken into account, specifically international law obligations, normative standards, and best practices relating to parental leave.
- 35 The *amici* applicants assume the overall stance that for South Africa to adopt a transformative stance on substantive equality in the context of parental leave and change the status quo around gendered burdens of care burdens, it needs to adopt a stance that allows for broader parental leave provision.

## SUBMISSIONS TO BE MADE BY THE *AMICI* APPLICANTS

36 If admitted, the *amici* applicants will seek to make the following submissions to this Court.

36.1 First, the *amici* applicants will draw on pertinent South African case law. It will rely on the Court's findings in the matter of *MIA v State Information Technology Agency (Pty) Ltd* (D312/2012) [2015] ZALCD 20; 2015 (6) SA 250 (LC); [2015] 7 BLLR 694 (LC); (2015) 36 ILJ 1905 (LC) (*MIA*). In this matter, the Court made significant pronouncements on how denying heterosexual fathers complete parental leave equates to discrimination based on gender and sexual orientation. In addition, the Court found that to protect the best interests of the child, fathers should be granted full parental leave.

36.2 Second, the *amici* applicants will rely on binding and non-binding international law instruments relating to gender equality, non-discrimination, and child rights considerations in the context of parental leave which this Court must consider. This includes the UN Convention on the Elimination of All Forms of Discrimination Against Women (**CEDAW**), the United Nations International Covenant on Economic, Social and Cultural Rights (**ICESCR**), the United Nations Convention on the Rights of the Child (**CRC**), the African Charter on the Rights and Welfare of the Child (**ACRWC**) and the comments from their respective treaty bodies, International Labour Organisation Conventions, United Nations General Assembly Resolutions, and United Nations Special Procedures' publications. The *amici* applicants will argue that these international law standards support the move from a scheme of maternity benefits for a child-rearing parent, to one of robust equality and 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.

36.3 Third, the *amici* applicants will also rely on comparative research which illustrates developments in parental leave standards in other jurisdictions.

37 I turn now to a thematic discussion of the proposed submissions set out above.

### ***The Current Position in South Africa***

38 As a point of departure, the amici will locate the main Applicants' complaint within the South African legal framework.

39 In 2020, the Labour Laws Amendment Act 10 of 2018 (**LLAA**) came into operation, in terms of which employees were afforded the right to take parental leave, adoption leave, and commissioning parental leave, all of which were not previously statutorily regulated. In particular, Section 3 of the LLAA inserts a provision relating to parental leave after section 25 of the BCEA which states:

*'An employee, who is a parent of a child, is entitled to at least ten consecutive days parental leave. An employee may commence parental leave on— the day that the employee's child is born; or the date— (i) that the adoption order is granted; or (ii) that a child is placed in the care of a prospective adoptive parent by a competent court, pending the finalisation of an adoption order in respect of that child, whichever date occurs first.'*

40 While parental leave is available to both parents in a co-parenting relationship, mothers remain the sole parent to which maternity leave is available. This indicates that in South Africa, the approach to parental leave is predominantly female-focused. While maternity leave and related benefits for women have traditionally been the focus of South African

parental leave laws and policy, this focus has expanded to include caregiving leave for both men and women.

- 41 In 2015, in the matter of *MIA*, the Labour Court was asked to assess whether a male employee who had requested maternity leave in accordance with his employer's Maternity Leave Policy, had been unfairly discriminated against by his employer.

41.1. In the context of the best interest of the child, the Labour Court, in para 13 of its judgment, stated:

*'...the right to maternity leave as created in the Basic Conditions of Employment Act in the current circumstances is an entitlement not linked solely to the welfare and health of the child's mother but must of necessity be interpreted to and take into account the best interests of the child. Not to do so would be to ignore the Bill of Rights in the Constitution of the Republic of South Africa and the Children's Act.'*

41.2. Ultimately, the Labour Court declared, at para 24, that the employer's application of its maternity leave policy and refusal to grant the applicant paid maternity leave constituted unfair discrimination. The Court further directed the employer to adjust its maternity leave policy in such a way as to reflect recognition of the status of parties to a Civil Union as well as to not discriminate against the rights of commissioning parents who have entered into a surrogacy agreement.

- 42 However, the BCEA does not apply to all workers. It excludes, amongst others, independent contractor,<sup>1</sup> members of the National Defense Force, National Intelligence

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<sup>1</sup> Section 1 of BCEA.

Agency, South African Secret Service; or unpaid volunteers working for charity<sup>2</sup> as well as atypical workers whose breaks are more than 12 months.<sup>3</sup>

- 43 If admitted, the *amici* applicants will submit that 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 and can be utilised to extend and restructure parental leave provisions.

### ***International and Regional Human Rights instruments***

- 44 The *amici* applicants submit that the Court will benefit from our analysis of international human rights obligations under Section 39(1)(b) of the Constitution which requires that a court or tribunal interpreting the Bill of Rights 'must consider international law', and Section 233 of the Constitution, which states that:

*'When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.'*

- 45 International human rights law underscores that all rights are interdependent, interrelated, and indivisible. The right against discrimination in the context of parental leave must be examined in connection with other rights, such as the right to work and the right to family under the ICESCR, the right to privacy and equality under CEDAW, and the right to family and healthy development of the child under the CRC.
- 46 These rights are also reflected in regional human rights systems such as in the European Convention on Human Rights, the ACRWC and the Maputo Protocol to the African

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<sup>2</sup> Section 3 of BCEA.

<sup>3</sup> Section 84 of BCEA.



Charter on Human and People's Rights on the Rights of Women in Africa. The *amici* applicants seek to assist the court in understanding positive state obligations to further human rights in these intersections.

- 47 International law instruments are increasingly recognising the common responsibility and right of both parents to contribute to the upbringing and development of children and places an obligation on States to codify non-discrimination measures to counter structural and social obstacles to substantive equality insomuch as they relate to parental leave policies. These obligations relate to both formal and informal employment and require governments to mandate a more holistic view of parenting and child-rearing by all employers. The *amici* applicants set out below a few of the international and regional instruments that it intends to refer the Court to should they be admitted as *amici curiae* in these proceedings.

*Best Interests of the Child*

- 48 Section 28(2) of the Constitution stipulates that –

*'child's best interests are of paramount importance in every matter concerning the child.'*

- 49 Article 14 of the **ACRWC** states that –

*'Every child shall have the right to enjoy the best attainable state of physical, mental, and spiritual health.'*

- 50 Similarly, the **CRC** contains several pertinent provisions in this context:

- 50.1 The Preamble to the CRC states that the family unit is regarded as a fundamental unit of society and should be provided with the appropriate protection and aid to fully fulfil its obligations within the community. The ICESCR contains a similar provision in Article 10(1) which states –

*'The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.'*

50.2 According to Article 3(1) of the CRC, the best interests of the child must be prioritised in all decisions involving children; and

50.3 Article 18 of the CRC states that both parents shall share responsibility for bringing up their children and should always consider what is best for each child.

#### *Gender Equality and Non-discrimination*

51 CEDAW was ratified by South Africa in 1995. Article 11 of CEDAW contains several specific provisions intended to safeguard women and prevent discrimination against them on the basis of pregnancy. However, CEDAW is also cognisant that sharing responsibility for childrearing is the joint responsibility of men and women.

52 CEDAW in its preamble clearly sets out that "the role of women in procreation should not be a basis for discrimination" and recognising the "social significance of maternity". It is also unambiguous in its view that "the upbringing of children requires a sharing of responsibility between men and women and society as a whole". CEDAW is saturated with the understanding that the realisation of gender equality state parties must make efforts to "modify the social and cultural patterns of conduct of men and women".

53 CEDAW recognizes that the cultural framework which exempts and excludes men from sharing tasks of care and raising children, have served to inhibit women's participation in public life. Indeed, the effects of extending paid maternity leave to mother's alone, entrenches traditional patterns of conduct around childcare, and women's disproportionate care burden,

54 In terms of Article 11 of CEDAW, member states are encouraged to –

*'enable parents to combine family obligations with work responsibilities and to participate in public life, in particular through promoting the establishment and development of a network of child-care facilities.'*

55 Similarly, Article 18(2) of the ACRWC provides that:

*'States Parties to the present Charter shall take appropriate steps to ensure equality of rights and responsibilities of spouses with regard to children during marriage and in the event of its dissolution.'*

56 In 1997, South Africa ratified the International Labour Organisation's Discrimination (Employment and Occupation) Convention 111 in terms of which, states should –

*'declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect.'*

57 The ILO Committee of Experts has recognised that "protective measures which protect the reproductive capacity of women are recognized for the achievement of substantive equality, whereas those aimed at protecting women generally because of their sex or gender, based on stereotypical perceptions of their capabilities and their appropriate role in society can undermine equality of women in employment and occupation".<sup>4</sup>

58 If admitted, the *amici* applicants intend on drawing the Court's attention to South Africa's full obligations under international and regional instruments and further, will highlight

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<sup>4</sup> Consideration of Algeria under C111 (2006).

certain case law where these obligations have been relied upon by litigants in other states to argue for non-discrimination as it pertains to parental leave.

### ***Comparative Law Analysis: Parental Leave around the World***

#### *Japan*

- 59 The Childcare Leave, Caregiver Leave, and Other Measures for the Welfare of Workers Caring for Children or Other Family Members Act No. 76 of May 15, 1991 (**Child Care and Family Care Leave Act**) in Japan was intended to promote the welfare of workers who engage in childcare or the caregiving of family members. The Act achieves this protection through establishing a system of childcare leave, caregiver leave, leave for sick/injured childcare, and leave for caregivers.
- 60 Significantly, the provisions relating to leave of the Child Care and Family Care Leave Act apply to both men and women and the length of the parental leave allowed for an employee is up to one (1) year.

#### *European Union*

- 61 The European Union has been a front runner in matters related to parental leave and childcare. The overarching goal in provisions on parental leave is to promote gender equality, the inclusion of women in the workforce, to close the gender pay gap, and to fight gender stereotypes. To this end, the following instruments bear reference:
- 61.1 Article 3(3) of the Treaty on European Union (**TEU**) provides that the EU is required to promote equality between women and men.

61.2 Article 23 of the Charter of Fundamental Rights of the European Union similarly requires equality between men and women to be ensured in all areas, including employment, work, and pay. Further, Article 33 provides that –

*‘To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.’*

62 Of critical importance, the EU Parliament has additionally approved Directive 2019/1158 which concerns the work-life balance for parents and carers. The Directive is binding on all 27 member states, which had to transpose its provisions in their national laws by 2 August 2022. The Directive lays down minimum requirements related to paternity leave and parental leave, as well as flexible working arrangements for employees who are parents. It provides that:

62.1 Fathers or equivalent second parents, should have the right to paternity leave comprising of ten (10) working days that have to be taken on the occasion of the birth of the employee's child, irrespective of the marital/family status. During this period, the related payment or allowance to which the employee is entitled shall guarantee an income at least equivalent to that which he/she would receive in the event of a break in the employee's activities on grounds connected with his/her state of health.

62.2 Every employee has an individual right to parental leave of four (4) months that is to be taken before the child reaches a specified age, up to the age of eight (8), to be specified by each Member State or by collective agreement. The payment or allowance for the worker shall be defined by the Member State or the social

partners and shall be set in such a way as to facilitate the take-up of parental leave by both parents.

62.3 Employees with children up to a specified age, which shall be at least eight (8) years, and carers, have the right to request flexible working arrangements for caring purposes. The duration of such flexible working arrangements may be subject to a reasonable limitation.

63 Along with the Directive, the European Union workers are protected by a Framework Agreement on Parental Leave signed in 2009 by the European Social Partners, which lays down minimum requirements on parental leave for all the employees in any Member state. The Framework Agreement entitles male and female employees to an individual right to parental leave on the grounds of the birth or adoption of a child and to care for that child until a given age up to eight years.

64 At the end of parental leave, employees have the right to return to the same job or, if that is not possible, to an equivalent or similar job consistent with their employment contract or employment relationship.

65 In a related case, the European Court of Justice in *Roca Alvarez v Sesa Start Espana*, addressed a Spanish law which provided breastfeeding breaks to female workers only, and the plaintiff father tried to exercise the leave in order to bottle feed his baby. In this case, the ECJ found in favour of the plaintiff father that bottle-feeding fathers had the same status as breastfeeding mothers, and that the leave "can be considered as time purely devoted to the child and as a measure which reconciles family life and work following maternity leave".

*Singapore*

- 66 Singapore's Government-Paid Paternity Leave (**GPPL**) is aimed at increasing the participation of fathers in caregiving. This benefit is available for both formally employed fathers, who have been employed for a continuous period of three (3) months or more with their current employer, as well as for self-employed fathers, who have been engaged in their current business for a continuous period of three (3) months or more and have lost income during the paternity leave period. The GPPL is also extended to adoptive fathers.
- 67 Additionally, Singapore's Government Paid Childcare Leave benefits are made available to working parents, whether formally employed or self-employed, adoptive parents, foster parents, step-parents, and legal guardians. This type of leave is specifically aimed at providing the flexibility to care for young children and extends beyond just the new-born stage of a child.

*United States*

- 68 The United States still lacks a paid paternity leave scheme at the federal level. Family and Medical Leave Act (**FMLA**) is the federal legislation that provides for twelve weeks of unpaid, job-secured paternity leave. However, California, New York, Massachusetts, New Jersey, Rhode Island, Washington, Connecticut, and the District of Columbia have paid parental leave policies.
- 69 The most favourable policies are ones that are in place in large corporations based in the United States. Microsoft, Netflix and Deloitte are regarded as the frontrunners in the same. At Microsoft, expectant mothers receive five months of paid leave and paternity benefits include three months of paid time off to natural, adoptive and foster care children. Microsoft also includes a policy to engage with such companies that offer

twelve-week minimum leave to new fathers and mothers. Similarly Netflix and Deloitte also offer an expansive parental benefit plans. Netflix offers four to eight weeks of parental leave to its employees.

- 70 There have been a number of successful lawsuits and settlements on the issue of parental leave. The American Civil Liberties Union, the ACLU of Ohio, and Outten & Golden LLP announced a class action settlement with JPMorgan Chase (Chase) on behalf of male employees who allege they were unlawfully denied access to paid parental leave on the same terms as mothers from 2011 to 2017. Under the settlement it has been clarified that the existing parental leave policy must be read in a gender-neutral manner and the employees would be trained to administer it in the same way. Further, \$5 Million was ordered to be paid to fathers who were denied parental leave.
- 71 In 2018, Estee Lauder paid US\$1,100,000 and provide other relief to resolve a lawsuit charging sex discrimination against male employees, which was filed by the U.S. Equal Employment Opportunity Commission.

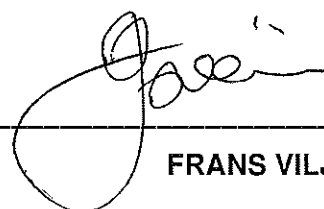
## CONCLUSION

- 72 The *amici* applicants' submissions are relevant, distinct, and novel. We believe, given the Court's obligation to consider international law, that the submissions sought to be made will be of assistance to the Court in analysing the issue of parental leave in the main application.
- 73 Accordingly, the *amici* applicants believe that they have established a case for leave of this Court to be granted to intervene as first to fourth *amicus curiae*.



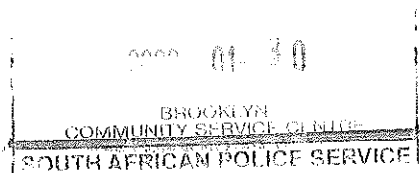
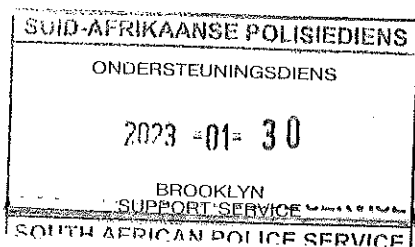
74 Given the complexity and breadth of the international law and comparative law submissions, the *amici* applicants respectfully pray that they be admitted and granted leave to make written and oral submissions at the hearing.

**WHEREFORE**, the *amici* applicants seek the relief as prayed for in the notice of motion to which this affidavit is attached.



FRANS VILJOEN

The Deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me at BROOKLYN SARSON on this the 30 day of January 2023, the regulations contained in Government Notice No. R1258 of 21 July 1972, as amended, and Government Notice No. R1648 of 19 August 1977, as amended, having been complied with.



PB TSOTEBI 72499511 CST  
PB TSOTEBI

**COMMISSIONER OF OATHS**

Full Names: PB TSOTEBI

Business Address: 119 DUXBURY ROAD

Designation: CST

Capacity:

# LAWYERS FOR HUMAN RIGHTS

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OUR REF: 26/SLP/2023

25 January 2023

**ATTN: Webber Wentzel**

*Attorney for the Applicants*

**Ref: O Geldenhuys**

By email: [nkosinathi.thema@webberwentzel.com](mailto:nkosinathi.thema@webberwentzel.com)

By email: [Odette.Geldenhuys@webberwentzel.com](mailto:Odette.Geldenhuys@webberwentzel.com)

By email: [Joani.vanVuuren@webberwentzel.com](mailto:Joani.vanVuuren@webberwentzel.com)

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By email: [Jamie.Jacobs@webberwentzel.com](mailto:Jamie.Jacobs@webberwentzel.com)

**ATTN: Office of the State Attorney, Johannesburg**

*Attorney for the Respondent*

**Ref: 4196/22/P5/pn**

By email: [HMaponya@justice.gov.za](mailto:HMaponya@justice.gov.za)

Dear Sir/Madam,

**RE: REQUEST FOR CONSENT TO BE ADMITTED AS AMICUS CURIAE IN THE MATTER OF WERNER VAN WYK AND OTHERS V MINISTER OF EMPLOYMENT AND LABOUR (CASE NO 017842/2022)**

1. We refer to the above application and act on behalf of:

1.1 The Centre for Human Rights, University of Pretoria;

1.2 The Solidarity Center, South Africa;

1.3 International Lawyers Assisting Workers Network; and

1.4 Labour Research Service (LRS).

(our clients), who seek your respective clients' written consent to be admitted as *amicus curiae* in the above matter, as contemplated by Rule 16A of the Uniform Rules of Court, to make written and oral submissions.

## Our clients' interest in the matter

2. Our clients are all educational, research, and advocacy groups with direct experience working on labour and workers' rights, gender equality, and child rights as they intersect to address the issue of parental leave. Although the Solidarity Center and the International Lawyers Assisting Workers Network are global organizations, their South African chapters have focused on the specific circumstances being brought before the Court.

3. Our clients' submissions will focus on international law obligations, normative standards, and best practices relating to parental leave.
4. The Court will benefit from our clients' thorough analysis of obligations under international human rights law, especially given the relevance of their submissions to Section 233 of the Constitution of the Republic of South Africa, 1996:

*When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.*

#### **Our clients' proposed submissions if admitted as *amicus curiae***

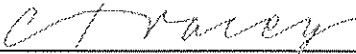
5. Our clients will advance, *inter alia*, submissions including:
  - 5.1. The international law to move from a scheme of maternity benefits for a child-rearing parent to one of robust equality and non-discrimination both between a child-bearing and non-child-bearing parent as well as for non-traditional parents who still carry the responsibility of child-rearing, such as adoptive and surrogacy commissioned parents. International law recognises the common responsibility and right of both parents to contribute to the upbringing and development of children and places an obligation on States to codify non-discrimination measures to counter structural and social obstacles to substantive equality insofar as they relate to parental leave policies. These obligations relate to both formal and informal employment and require governments to mandate a more holistic view of parenting and child-rearing by all employers;
  - 5.2. The international and regional law obligations on parental leave insofar as they relate to gender equality as well as child rights. In relation to gender equality, our clients intend to make submissions on the exclusion of heterosexual fathers from qualifying for full parental leave. Our clients will draw on, *inter alia*, the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, the United Nations Convention on the Rights of the Child, the International Labour Union's Conventions, and recent United Nations resolutions relating to sexual orientation and gender identity; and
  - 5.3. An overview of specific foreign case law and legislation examples in order to highlight best practices in other countries and regions;

#### **Conclusion**

6. We are advised that the Respondents have not filed any answering papers and that the deadline for all potential *amici curiae* to file their applications is 31 January 2023. Our clients' intervention will therefore not delay the adjudication of this matter.

7. We kindly request that you revert with your written consent to our clients' admission by **Friday, 21 January 2023** and in your response, kindly indicate whether you will accept service of affidavits and further submissions by email.
8. We trust the above is in order and look forward to receiving a positive response. For any queries contact Nabeelah Mia at [nabeelah@lhr.org.za](mailto:nabeelah@lhr.org.za) or Charné Tracey at [charne@lhr.org.za](mailto:charne@lhr.org.za).

Yours faithfully,



**LAWYERS FOR HUMAN RIGHTS**

Per: Nabeelah Mia / Charné Tracey



## Office of the State Attorney Johannesburg

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2000

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Secretary: 011 3307726  
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Enquires: Ms. H. Maponya  
Email: [HMaponya@justice.gov.za](mailto:HMaponya@justice.gov.za)

Our ref: **4196/22/P5/pn**  
Your ref: **26/SLP/2023**

---

26 JANUARY 2023

### URGENT

LAWYERS FOR HUMAN RIGHTS  
4<sup>TH</sup> FLOOR SOUTHPOINT CORNER BUILDING 87  
DE KORTE STREET (CNR MELLE)  
BRAAMFONTEIN

BY EMAIL:

Dear Sir/Madam

**REQUEST FOR CONSENT TO BE ADMITTED AS AMICUS CURIAE - VAN WYK //**  
**MINISTER OF EMPLOYMENT AND LABOUR – CASE NO: 2022-017842**

1. We acknowledge receipt of your letter dated 25 January 2023.
2. We place on record that our client does not consent to the intervention by your clients in the matter, as he is not of the view that it will benefit the Honourable Court.

All our client's rights are reserved.

**Yours Faithfully**

A handwritten signature in black ink, appearing to read 'H Maponya', written over a horizontal line.

**H MAPONYA (MS)  
FOR STATE ATTORNEY  
JOHANNESBURG**

**WEBBER WENTZEL**

in alliance with &gt; Linklaters

**Lawyers for Human Rights**  
4th Floor, Heerengracht Building  
87 De Korte Street  
Braamfontein

**Per: Charné Tracey & Nabeelah Mia**  
**By Email: [Charne@lhr.org.za](mailto:Charne@lhr.org.za) & [nabeelah@lhr.org.za](mailto:nabeelah@lhr.org.za)**

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Your reference  
26/SLP/2023

Our reference  
O Geldenhuys / J van Vuuren / N Thema  
3058918

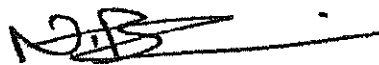
Date  
26 January 2023

Dear Charné and Nabeelah

**Werner van Wyk and Others // Minister of Employment and Labour (High Court of South Africa, Gauteng Division, Johannesburg. Case No. 22 / 017842)**

1. We refer to the above matter and your letter to us dated 25 January 2023.
2. Please note that the matter is being case managed by Deputy Judge President Sutherland, who has directed that all potential *amici curiae* make such applications by no later than 31 January 2023. As the court has directed that the joinder of all potential *amici* must be done by way of application, your clients should make the necessary application.

Yours faithfully



**WEBBER WENTZEL**

Nkosinathi Thema

Associate

Direct tel: +27 11 530 5870

Email: [nkosinathi.thema@webberwentzel.com](mailto:nkosinathi.thema@webberwentzel.com)

Senior Partner: JC Els Managing Partner: SJ Hutton Partners: BW Abraham RB Africa C Alexander AK Allie NG Alp RL Appelbaum TB Ball DC Bayman KL Bellings AE Bennett AP Blair K Blom AR Bowley M Bux V Campos RI Carrim T Cassim SJ Chong ME Claassens C Collett KL Collier KM Colman KE Coster K Couzyn DB Cron PA Crosland R Cruywagen JH Davies KM Davis PM Daya ST Dias L de Bruyn PU Dela M Denenga DW de Villiers BEC Dickinson MA Diemont DA Dingley G Driver W Drue GP Duncan HJ du Preez CP du Toit SK Edmundson LF Egypt KH Eiser AE Esterhuizen K Fazel G Fitzmaurice JB Forman L Franca KL Gawith OH Geldenhuys MM Gibson C Gopal CI Gouws PD Grealis L Green S Haroun JM Harvey JS Henning KR Hills Z Hlophe CM Hofeld PM Holloway KT Inglis ME Jarvis JC Jones CM Jonker S Jooste LA Kahn SJ Kalbskopf M Kennedy KE Kilner A Keyser MD Kota JC Kraamwinkel J Lamb E Louw M Mahlangu S Manley V Mannar L Marais G Masina T Masingi N Mbere MC McIntosh SJ McKenzie CS Meyer A Mhlongo AJ Mills D Milo M Mkhabela P Mohanlal N Moodley L Moolman LE Mostert VM Movshovich C Murphy P Naidoo DC Nchabeleng A Ngubo C Nothling ZN Ntshona M Nxumalo AN Nyatumba MB Nzimande A October L Odendaal GJP Olivier N Paige AS Parry S Pather GR Penfold SE Phajane M Philippides BA Phillips MA Phillips CH Pienaar DJ Rafferty D Ramjettan GI Rapson K Rew G Richard SA Ritchie J Roberts Y Robbertse S Rule G Sader H Samsodien JW Scholtz KE Shepherd N Singh N Singh-Nogueira P Singh S Sithole J Smit MP Spalding PS Stein MW Straeuli LJ Swaine Z Swanepoel WV Tembedza A Thakor T Theessen TK Thekiso C Theodosiou T Theunissen R Tihavani G Truter PZ Vanda SE van der Meulen JP van der Poel MS van der Walt CS Vanmali JE Veeran HM Venter B Versfeld MG Versfeld TA Versfeld DM Visagie EME Warrington J Watson AWR Westwood RH Wilson KD Wolmarans

Chief Operating Officer: SA Boyd

## Resolution of Executive Committee of the Centre for Human Rights, University of Pretoria

**In respect of intervention in *Werner Van Wyk and Others v Minister of Employment and Labour*  
(Case Number 017842/2022, Gauteng Local Division, Johannesburg)**

1. The Centre for Human Rights, University of Pretoria has become aware of the application in *Werner Van Wyk and Others v Minister of Employment and Labour* (Case Number 017842/2022, Gauteng Local Division, Johannesburg). The Executive Committee notes that:
  - a. proceedings against the South African Minister of Employment challenging sections 25 and 26 of the Basic Conditions of Employment Act 75 of 1997 ("BCEA") on the grounds that it is unconstitutional in that it unfairly discriminates against fathers, and mothers who are in a co-parenting relationship; and
  - b. The Centre for Human Rights, University of Pretoria, Solidarity Centre, South Africa, the International Lawyers Assisting Workers Network (ILAW) and Labour Research Service (LRS) seek to collectively apply as amici curiae to these proceedings.
2. The Executive Committee authorises Centre for Human Rights to apply for admission as an amicus curiae in proceedings concerning the constitutionality of Sections 25 and 26 of the Basic Conditions of Employment Act.
3. The Executive Committee confirms that Lawyers for Human Rights has been instructed to act as the attorneys of record for the Centre for Human Rights.
4. The Executive Committee authorises and mandates Frans Viljoen to depose to any necessary affidavits and take all steps which may be deemed necessary in the abovementioned proceedings, and to the extent necessary ratifies any actions taken by the aforementioned person on behalf of Centre for Human Rights in these proceedings.
5. On 30 January 2023 it was agreed by a majority of the Executive Committee members via email to authorise such intervention as a party in the above matter.

Date: 2023-01-30

Frans Viljoen

Executive Committee member: 

SAMUEL CHAMBOKO

Executive Committee member: 

NKATHA MURLINGI

Executive Committee member: 