

A Legal Analysis of Work-Care Leave Policies and the Promotion of Gender Equality in the South African Workplace¹

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Abstract

The United Nations (UN) has come up with several Sustainable Development Goals (SDGs) for its 2030 vision. One of these SDGs deals with the need for all countries to promote gender equality. The gender equality goal is premised on empowering women and girls with various economic opportunities. The assumption is that in many countries, including in South Africa, women and girls are marginalised socially, culturally, economically, and politically. To this end, it should be noted that the South African constitution promotes equality for all persons. It also provides for fair labour practices. Labour statutes such as the Labour Relations Act 66 of 1995 (LRA), the Employment Equity Act 55 of 1998 (EEA) and the Basic Conditions of Employment Act 75 of 1997 (BCEA) provide for, inter alia, the realisation of gender equality in the South African workplace. This includes promoting a health balance between work and care obligations for women. While gender equality is a noble goal, its pursuit exposes some of the underlying inequalities that have not been fully addressed in South Africa. Historically, labour rights have been skewed against African or black men in the South African workplace. In the euphoria of a democratic South Africa, the new push has been to promote equality of men and women in the workplace. This tends to overlook the fact that African men have hardly enjoyed work-care obligations. In this regard, the South African labour laws offer very little for the African men. Consequently, little has been done to provide men with better work-care conditions in the South African workplace. Thus, despite efforts to promote gender equality, women still disproportionately shoulder the care burden in South Africa. This article provides that a lot needs to be done to promote gender equality and balance how the rights of both women and men are protected in the South African workplace.

Keywords: Sustainable Development Goals, gender equality, workplace, labour rights, marginalised.

JEL Classification: K31, K38

1. Introductory remarks

South Africa is lagging behind many other constitutional democracies in fostering a healthy work-care balance for employees and promoting gender equality in the workplace.⁴ A balanced work-care life refers to the employees' ability to sufficiently control the circumstances, time and manner of fulfilling their remunerated work obligations and family care responsibilities.⁵ In this regard, South Africa does not fully acknowledge that employed fathers need adequate work-care leave policies to actively take part in rearing their children.⁶ Since 1994, the adopted work-care leave policies have failed to redress apartheid distortions that continue to afflict the proper welfare of employed fathers in the South African workplace.⁷ For the purposes of this article, a "workplace"

¹ This article was supported in part by the National Research Foundation of South Africa (NRF), Grant Number 141933. In this regard, the authors wish to thank the NRF for its valuable support. This article was initially presented at the Southern African Law Teachers' Conference 2022 held at the University of Fort Hare in East London on 11-14 July 2022. Moreover, the article was influenced in part, by Elfai Torerai's LLM mini-dissertation titled; *The Protection of Paternity Leave and Related Rights for Employed Fathers in South Africa under the Labour Laws Amendment Act 10 of 2018* (LLM- Mini-dissertation, North West University, 2020), pp. 23-65. In this regard, Dr. Torerai wishes to acknowledge the expert input of Professor Chitimira.

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⁴ S. D'Andrea, 'Implementing the Work-Life Balance Directive in Times of COVID-19: New Prospects for Post-Pandemic Workplaces in the European Union?' 23(1) *Academy of European Law Forum* (2022), pp. 8-9.

⁵ S. D'Andrea 23(1) *ERA Forum* (2022), pp. 8-9; T. Cohen and N. Gosai 'Making a Case for Work-Life Balance for the South African Employee', *Industrial Law Journal* (2016), pp. 2237-2238; J.A. Waumsley, D.M. Houston and G. Marks 'What about Us? Measuring the Work-Life Balance of People Who Do Not Have Children', *Review of European Studies* (2010), pp. 3-4.

⁶ See related comments by P. Eerola, J. Lammi-Taskula, M. O'Brien, J. Hietamäki, and E. Räikkönen "'Fathers" Leave Take-up in Finland: Motivations and Barriers in a Complex Nordic Leave Scheme', 9(4) *SAGE Open*, (2019) pp. 2-3.

⁷ A. Behari, 'The Effects of the Labour Laws Amendment Bill 2017 on Shared Parental Responsibilities', *Industrial Law Journal*, (2018), pp. 2149-2150; A. Rycroft and C.G. Duffy 'Parental Rights: Progress but Some Puzzles' *Industrial Law Journal* (2019), pp. 12-14.

is a formal or informal recognised work environment where employees carry out the business of their employers.⁸ The current South African work-care leave policies do not reflect the changing work and family care roles for employed fathers. South African work-care leave policies seem to promote the long-held assumptions and gender stereotypes that fathers are bread-winners who contribute economically while mothers are home-makers, child bearers and care-givers.⁹

However, there are several dual-earner families where the father and mother are both employed.¹⁰ In such families, fathers and mothers play a complementary role in economically providing for their children. However, the South African labour laws and related policies do not acknowledge this reality. Some fathers are also leaving the workplace to take up care roles for their children to help their wives or partners socially and economically. This reversal of historically entrenched gender roles has not found expression in the labour law regulatory framework in South Africa. Since the outbreak of the Coronavirus (Covid-19) Pandemic in 2019 and the subsequent economic lockdowns, many employed fathers have worked from home in South Africa.¹¹ During this period, schools and other care institutions were also closed.¹² Thus, many employed fathers were forced to work virtually, in most instances at home, where they had to meet vocational and care demands for their families.¹³ Reports done in South Africa show that fathers contributed significantly towards fulfilling work and care responsibilities during the lockdown periods, bringing some relief to mothers.¹⁴ Although the Covid-19 Pandemic exposed many weaknesses in the work-care leave policies as will be discussed later, it also had some positives that policymakers can take to develop work-care leave policies that promotes gender equality in the South African workplace.

2. The United Nations' sustainable development goals and gender equality

The United Nations (UN) has proposed about 17 aspirational targets better known as the Sustainable Development Goals (SDGs) that all member states, including South Africa, should strive to implement by the year 2030.¹⁵ One of these SDGs deals with the promotion of gender equality.¹⁶ This gender equality goal seeks to, *inter alia*, eliminate all forms of discrimination, particularly against women. Furthermore, this SDG is premised on the notion that women suffer systematic gender segregation both horizontally and vertically across the world.¹⁷ Horizontal segregation occurs when women do most of the informal, part-time unpaid and low-paid jobs such as domestic services and care work.¹⁸ On the other hand, vertical segregation occurs when very few women occupy top management positions in large companies.¹⁹ South Africa should be commented

⁸ See section 213 of the Labour Relations Act 66 of 1995 as amended (LRA); H. Chitimira and E. Torerai 'An Overview Analysis of the Protection of Paternity Leave for Employed Fathers in the South African Corporate Workplace', *Interdisciplinary Journal of Economics and Business Law* (2021), pp. 219-220.

⁹ T. Cohen and N. Gosai, *Industrial Law Journal* (2016), pp. 2239-2240; A. Behari, *Industrial Law Journal* (2018), pp. 2149; Department of Social Development, (2012) *White Paper on Families in South Africa* <http://www.dsd.gov.za/index> (*White Paper on Families in South Africa*) accessed 3 April 2019, pp. 7-8.

¹⁰ C.G. Field, J.J. Bagraim and A. Rycroft, 'Parental Leave Rights: Have Fathers been Forgotten and does it Matter?' *South African Journal of Labour Relations* (2012), pp. 30-31; L. Dancaster and T. Cohen, 'Workers with Family Responsibilities: A Comparative Analysis to Advocate for the Legal Right to Flexible Working Arrangements in South Africa', *South African Journal of Labour Relations* (2010), pp. 31.

¹¹ S. D'Andrea, 23(1) *Academy of European Law Forum* (2022), pp. 10-11.

¹² S. D'Andrea, 23(1) *Academy of European Law Forum* (2022), pp. 10-11.

¹³ S. D'Andrea, 23(1) *Academy of European Law Forum* (2022), pp. 10-11.

¹⁴ D. Casale and D. Posel, 'Gender and the Early Effects of the COVID-19 Crisis in the Paid and Unpaid Economies in South Africa', *National Income Dynamics (NIDS)-Coronavirus Rapid Mobile Survey (CRAM) Wave*, (2020), pp. 11-14.

¹⁵ United Nations, *Transforming Our World: The 2030 Agenda for Sustainable Development*, <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> accessed 28 June 2022.

¹⁶ Goal 5 of the UN's SDGs, <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20For%20Sustainable%20Development%20web.pdf> accessed 28 June 2022.

¹⁷ Goal 5 of the UN's SDGs, <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20For%20Sustainable%20Development%20web.pdf> accessed 28 June 2022.

¹⁸ Goal 5 of the UN's SDGs, <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20For%20Sustainable%20Development%20web.pdf> accessed 28 June 2022.

¹⁹ Goal 5 of the UN's SDGs, <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20For%20Sustainable%20Development%20web.pdf> accessed 28 June 2022.

for ratifying several international conventions, treaties, resolutions that empower women. It should be also lauded for enacting statutes such as the Labour Relations Act 66 of 1995 (LRA), the Employment Equity Act 55 of 1998 (EEA) and the Basic Conditions of Employment Act 75 of 1997 (BCEA) to, *inter alia*, promote various women's rights and employment opportunities.

Nonetheless, there has been an apparent failure to realize and acknowledge that most employed fathers have not really enjoyed balanced work-care leave benefits both during the apartheid era and in democratic South Africa.²⁰ In this regard, it is submitted that a balanced approach should be adopted by policy makers and other key stakeholders to enforce and promote the gender equality SDG, so that it include fathers, in South Africa. Accordingly, this article proposes that there should be equitable work-care leave policies for both employed fathers and mothers in South Africa. This approach could enhance work-care balance for employed parents and promote gender equality in South Africa.

3. Overview background on work-care leave policies in South Africa

Despite the political and some legislative changes in 1994, work-care leave policies largely remained skewed against employed fathers in South Africa. In 1996, the Constitution of the Republic of South Africa (Constitution) came into operation. The Constitution guarantees several rights such as the right to equality and fair labour practices.²¹ Moreover, legislation such as the LRA,²² the BCEA²³ and the EEA²⁴ provide for gender equality and fair labour practices in the South African workplace. While the LRA and the BCEA seek to promote fair labour practices, the EEA advances the equitable and fair treatment of employees and employers in the South African workplace.²⁵ Although the LRA also provides for the rights to equality, freedom of association and fair labour practices, it does not expressly provide for work-care leave policies for employed fathers.²⁶ On the other hand, the EEA provides for equal access to opportunities, equal treatment and the elimination of unfair discrimination and inequality in the workplace in South Africa.²⁷

Nevertheless, the EEA's thrust appears to be more on reversing racial imbalances and exclusion of women in top management positions than it is on promoting equitable work care-leave provisions for all workers in South Africa. The BCEA provides for leave entitlements that are made available to all employees in the South African workplace.²⁸ It provides for the right to maternity leave and protection of employees immediately before and soon after the birth of a child.²⁹ Maternity leave is prescribed for at least four consecutive months.³⁰ However, these rights are expressed in effeminate pronouns such as 'she', 'her' which point to the fact that they are meant for women or employed mothers in South Africa.³¹ In this regard, employed fathers are excluded from claiming maternity leave on grounds of their gender. Before the recent amendments, the BCEA provided a three-day family responsibility leave that employed fathers could claim when their children are born, sick or in the event of death in the family.³²

The Labour Laws Amendment Act 10 of 2018 (Amendment Act) provides for a ten-day

²⁰ See E. Torerai, LLM – Mini-dissertation, North West University (2020), pp. 23-25.

²¹ Sections 9 and 23 of the Constitution.

²² Sections 1 and 3.

²³ Section 2.

²⁴ Sections 2 and 3.

²⁵ Section 1(a) and (b) of the LRA; section 2(a) and (b) of the BCEA; section 2(a) of the EEA; A. Behari, 'Daddy's Home: The Promotion of Paternity Leave and Family Responsibilities in the South African Workplace', *Obiter* (2016), pp. 348-349.

²⁶ Sections 8, 17 and 27 of the LRA; D. Collier, E. Fergus, T. Cohen, M Du Plessis, S. Godfrey, R. Le Roux and S. Singlee, *Labour Law in South Africa: Context and Principles* (Oxford University Press Southern Africa (Pty) Limited Cape Town, 2018), pp. 29; A. Behari, *Obiter* (2016), pp. 349.

²⁷ Sections 8, 17 and 27 of the LRA; D. Collier *et al*, *Labour Law in South Africa*, (2018), pp. 29; A. Behari *Obiter* (2016), pp. 349.

²⁸ See sections 19-27 of the BCEA.

²⁹ Sections 25 and 26 of the BCEA.

³⁰ Section 25(1) of the BCEA.

³¹ Sections 25 and 26 of the BCEA.

³² Section 27(2) of the BCEA, which is now repealed.

parental leave that an employee can claim at the time of the birth or adoption of their child.³³ Parental leave does not specifically apply to employed fathers but is available to any employed parent in South Africa.³⁴ In other words, the parental leave provision is gender neutral and flawed, leaving room for only employed mothers being eligible to claim for the parental leave. Since maternity leave is gender specific,³⁵ an adequate work-care leave policy and/or work-care leave regulations that specifically apply to employed fathers should be statutorily enacted in South Africa. Moreover, there is no incentive for employed fathers to take up this parental leave entitlement. To this end, the absence of equitable paternity leave hinders the care roles of employed fathers in South Africa. Against this background, this article exposes the weaknesses and flaws of the South African work-care leave policies. This is done to recommend the adoption of leave policies that promote equal parenting opportunities for employed fathers and mothers in South Africa.

4. Policy challenges on gender equality in the South African workplace

Workplace policies adopted since the outbreak of the Covid-19 Pandemic reawakened the emerging school of thought that paid work and family domains do not necessarily operate in isolation.³⁶ However, the current labour policy framework does not provide sufficient balance to work-care leave provisions for employed parents in South Africa. In other words, there is a disproportionate allocation of care-related leave for employed fathers and mothers in the South African workplace.³⁷ Thus, the current work-care leave policy framework does not effectively promote the achievement of gender equality in South Africa. Employed fathers and mothers are often under pressure to balance their vocational and family care demands. Without adequate work-care leave policies, the burden to meet work and care responsibilities is highly impossible for employed parents. The current South African work-care leave policies are more flexible for women, but they provide very little support for employed fathers. Nonetheless, without the support of their husbands around the home, many employed women suffer the double jeopardy of economically providing and shouldering the greater burden of care in many homes in South Africa.³⁸ This defeat efforts towards gender equality and retards the progress of women of child-bearing age to take up senior corporate, economic, and political leadership opportunities.³⁹

Moreover, the absence of appropriate work-care leave policies reinforces entrenched cultural norms and traditions that are inimical to the achievement of gender equality in the South African workplace.⁴⁰ Consequently, fewer women stand a chance to reach their full potential in the workplace in South Africa.⁴¹ Additionally, women continue to be saddled with a disproportionate burden of shouldering family care responsibilities without the support of working fathers.⁴² This negatively affects the full realisation of gender equality in the South African workplace. Accordingly, policymakers should seriously consider introducing adequate and equitable work-care leave entitlements for both fathers and mothers in the South African workplace. In addition, there should be incentives for fathers to take up such leave entitlements as has been the case in other

³³ Section 3 of the Amendment Act; section 25A of the BCEA; A. Rycroft and C.G. Duffy, *Industrial Law Journal* (2019), pp. 17-19; A. Bauling, 'Maternity, Paternity and Parental Leave and the Best Interests of the Child: MIA V. State Information Technology Agency (Pty) Ltd [2015] JOL 33060 (LC) Cases', *Obiter* (2016), pp. 163-164.

³⁴ Section 3 of the Amendment Act; section 25A of the BCEA; A. Rycroft and C.G. Duffy *Industrial Law Journal* (2019), pp. 12; A. Behari, *Industrial Law Journal* (2018), pp. 2152-2153.

³⁵ Sections 25 and 26 of the BCEA.

³⁶ L. Dancaaster and T. Cohen, *South African Journal of Labour Relations* (2010), pp. 31-32.

³⁷ H. Chitimira and E. Torerai, *Interdisciplinary Journal of Economics and Business Law* (2021), pp. 230; A. Behari, 'The Effects of the Labour Laws Amendment Bill 2017 on Shared Parental Responsibilities', *Industrial Law Journal*, (2018), pp. 2149-2150.

³⁸ E. Torerai, LLM-Mini-dissertation, North West University (2020), pp. 63-64.

³⁹ L. Dancaaster and T. Cohen, *South African Journal of Labour Relations* (2010), pp. 31-32.

⁴⁰ J. Armstrong, S. Walby and S. Strid, 'The Gendered Division of Labour: How can we Assess the Quality of Employment and Care Policy from a Gender Equality Perspective?' *Benefits* (2009), pp. 264-267.

⁴¹ See T. Cohen and N. Gosai, *Industrial Law Journal* (2016), pp. 2243-2244.

⁴² See related comments by P. Engle, T. Beardshaw and C.R. Loftin, 'The Child's Right to Shared Parenting', in L. Richter and R. Morrel (eds), *Baba: Men and Fatherhood in South Africa* (HSRC Press, Cape Town, 2006), pp. 302-304.

jurisdictions such as Finland and other Nordic states.⁴³

5. Statutory analysis of work-care leave policies and gender equality in South Africa

5.1. The work-care leave challenges and flaws

During apartheid, South Africa had a migrant labour system that kept employed fathers away from their wives and children, especially in black African communities.⁴⁴ Thus, most employed African fathers did not have the opportunity to exercise care duties on their families, a situation that has persisted post-1994 in South Africa. Put differently, South Africa has poor work-care leave policies and/or laws for employed fathers. In light of the negative effects of apartheid on fatherhood, especially on the black African race in South Africa, there ought to be adequate redress of this inequality in the workplace.⁴⁵

The Universal Declaration of Human Rights⁴⁶ provides for the special protection and assistance of motherhood and childhood to all mothers and children globally. In addition, the Convention on the Elimination of all forms of Discrimination against Women⁴⁷ requires state parties to take appropriate measures towards eliminating discrimination against women in the workplace. Such measures include, *inter alia*, safeguarding women's reproductive functions by providing adequate and suitable maternity leave and related benefits.⁴⁸ The International Labour Organisation (ILO) adopted the Maternity Protection Convention which also seeks to uphold the rights of employed mothers in the workplace.⁴⁹ South Africa is an ILO member which is bound by the provisions of the Maternity Protection Convention.

However, the international law instruments stated above are silent on the protection of the rights and welfare of fathers in the workplace. Maternity leave and other leave provisions available to employed parents in South Africa are discussed below.

5.1.1. Maternity leave

Maternity leave provides a period of at least four months for an expecting mother or mother of a newly born baby, away from the South African workplace.⁵⁰ Whether the four months maternity leave is paid or unpaid falls outside the scope of this article. The four months period of maternity leave provides such a mother reasonable time to learn parenting skills and bond with the child. However, such rights and leave entitlements are not available to working fathers.⁵¹ The Constitution provides that unfair discrimination occurs if the state directly or indirectly excludes any person on grounds such as gender, sex, marital status or pregnancy.⁵² It appears that the equality clause in the Constitution envisages that there should be, at least, equitable provision of

⁴³ P. Eerola *et al*, *SAGE Open*, (2019), pp. 3-4.

⁴⁴ D. Posel and R. Devey, 'The Demographics of Fathers in South Africa: An Analysis of Survey Data, 1993-2002', in L. Richter and R. Morrell (eds), *Baba: Men and Fatherhood in South Africa* (HSRC Press Cape Town, 2006), pp. 44-45; M. Ramphela and L. Richter, 'Migrancy, Family Dissolution and Fatherhood', in L. Richter and R. Morrell (eds), *Baba: Men and Fatherhood in South Africa* (HSRC Press Cape Town, 2006), pp. 73-76.

⁴⁵ L. Richter, 'The Importance of Fathering for Children', in L. Richter and R. Morrell (eds) *Baba: Men and Fatherhood in South Africa* (HSRC Press Cape Town, 2006), pp. 57-58; A. Behari, *Obiter* (2016), pp. 348-349.

⁴⁶ Article 25(2) of the Universal Declaration of Human Rights (UDHR) which was adopted by the UN General Assembly as Resolution 217 on 10 December 1948 in Paris, France.

⁴⁷ Article 11(1)(f) of the Convention on the Elimination of all forms of Discrimination against Women of 18 December 1979 (CEDAW).

⁴⁸ See Article 11(1) and (2) of the CEDAW.

⁴⁹ Articles, 3, 4, 5 and 6 of the Maternity Protection Convention of 2000 (Maternity Protection Convention).

⁵⁰ Section 25 of the BCEA.

⁵¹ C.G. Field, J.J. Bagraim and A. Rycroft, *South African Journal of Labour Relations* (2012), pp. 31-33; L. Lancaster and M. Baird, 'Workers with Care Responsibilities: Is Work-Family Integration Adequately Addressed in South African Labour Law' *Industrial Law Journal* (2008), pp. 22-23.

⁵² Section 9(2) of the Constitution.

work-care leave entitlements for employed fathers and mothers in South Africa.⁵³ However, provisions of the LRA, the BCEA, the EEA and the Amendment Act do not effectively promote equitable of work-care leave entitlements to working fathers. For instance, the LRA and the BCEA provides that only working mothers are eligible for maternity leave and related rights in the South African workplace.⁵⁴ The BCEA expressly uses gender specific terms “her” and “she”, which shows that maternity leave and protection of employees before and after the birth of a child is meant for working mothers in South Africa.⁵⁵

Additionally, the Unemployment Insurance Act⁵⁶ provides that only a pregnant contributor can claim maternity benefits. Thus, provisions in the BCEA and UIA stipulates that maternity leave and related rights only apply to women. Despite the recent amendments, the fact that the BCEA retains maternity leave and related benefits means that only employed mothers may be the primary care-giver for their children.⁵⁷ Although fathers cannot fall pregnant, they can take the primary care-giver role once the child is born. The LRA, the BCEA and the UIA do not promote equal parenting between employed fathers and mothers in South Africa. Put differently, the stated statutes extent the shortcomings of the international law conventions discussed above, at least in the South African context. Consequently, employed fathers may only resort to parental leave if they want to claim care-related leave in South Africa.⁵⁸

The EEA provides employed fathers and mothers the right to demand fair workplace rights which should ideally include equitable work-care leave benefits.⁵⁹ However, the envisaged equality is qualified in that there could be a justification for unequal treatment of employed fathers and mothers for a legitimate government purpose.⁶⁰ In this regard, a legitimate government purpose refers to measures that government can take to justify the unequal treatment of employed fathers and mothers.⁶¹ It is not clear whether limiting the work-care leave entitlements to employed mothers constitute a valid legitimate government purpose.

5.1.2. Parental leave

Parental leave is a period of absence from work that is available to a parent of newly born or adopted child in South Africa.⁶² Parental leave was introduced to the South African labour law in 2018. It grants ten consecutive working days off to any employed parent of a newly born or adopted child.⁶³ This relatively new leave policy repealed the family responsibility leave that allocated three leave days for an employed parent to be there at the birth, illness or death of a child or close family member.⁶⁴ Notably, parental leave is gender-neutral, hence it can be made available to either an employed father or mother who is not the primary caregiver of a newborn baby or adopted child.⁶⁵ In this regard, the Amendment Act implies that parental leave is for parents who are secondary-care givers.⁶⁶ Owing to this, a perception is created that maternity leave remains the primary leave for

⁵³ Sections 9 and 23 of the Constitution; C.G. Field, J.J. Bagraim and A. Rycroft, *South African Journal of Labour Relations* (2012), pp. 31-32.

⁵⁴ Sections 186 and 187 of the LRA; sections 25 and 26 of the BCEA.

⁵⁵ Sections 25 and 26 of the BCEA; C.G. Field, J.J. Bagraim and A. Rycroft, *South African Journal of Labour Relations* (2012), pp. 31-32.

⁵⁶ Section 24 of the Unemployment Insurance Act 63 of 2001 (UIA); C.G. Field, J.J. Bagraim and A. Rycroft, *South African Journal of Labour Relations* (2012), pp. 31-32.

⁵⁷ Section 25 of the BCEA; A. Rycroft and C.G. Duffy, *Industrial Law Journal* (2019), pp. 19.

⁵⁸ Section 3 of the Amendment Act; section 25A(1) of the BCEA.

⁵⁹ Sections 5 and 6 of the EEA.

⁶⁰ Section 6 of the EEA and section 36 of the Constitution.

⁶¹ *Hugo* case, para 70.

⁶² Section 3 of the Amendment Act; E. Torerai LLM-Mini-dissertation, North West University, (2020), pp. 20-21.

⁶³ Section 3 of the Amendment Act; sections 25A of the BCEA; A. Rycroft and C.G. Duffy, *Industrial Law Journal* (2019), pp. 12.

⁶⁴ Section 3 of the Amendment Act; sections 25A and 27 of the BCEA; A. Rycroft and C.G. Duffy *Industrial Law Journal* (2012), pp. 12; A. Behari *Industrial Law Journal* (2018), pp. 2152-2153.

⁶⁵ Section 3 of the Amendment Act, section 25A of the BCEA; A. Rycroft and C.G. Duffy, *Industrial Law Journal* (2019) 17; A. Behari *Industrial Law Journal* (2018), pp. 2152-2153.

⁶⁶ Section 3 of the Amendment Act; sections 25A and 25 of the BCEA; A. Rycroft and C.G. Duffy, *Industrial Law Journal* (2019), pp. 17; A. Behari, *Industrial Law Journal* (2018), pp. 2152-2153.

family care and that mothers remain primary care-givers of children while fathers may only be secondary care-givers. If this assumption is correct, then the Amendment Act could be perpetuating the gender stereotype that places value in fathers' roles as merely breadwinners rather than primary care-givers.⁶⁷ Therefore, the current parental leave downplays the role of employed fathers as parents who can play significant role in providing care duties to their families in South Africa. Yet, according to Behari, parental leave was enacted, in part, to assist employed fathers to meet their work and family care responsibilities.⁶⁸ It suffices to argue that although parental leave is a positive step in availing time for parents to care for their newly born or adopted children, it does not expressly and equitably empower employed fathers to have sufficient days to care for their children.

5.1.3. Adoption leave

In addition to parental leave, the Amendment Act also introduces adoption leave to the South African labour law statutory framework.⁶⁹ Commendably, unlike maternity leave, adoption leave is expressed in gender-neutral terms.⁷⁰ Put differently, adoption leave does not show gender bias because it empowers both employed father and mother to claim at least ten consecutive weeks off to care for the newly adopted child who is under the age of two.⁷¹ Consequently, it is left to the discretion of employed parents to decide on whether the father or a mother can claim this leave to take care of a newly adopted child. The adopting parent who elects to claim adoption leave should ensure that time off from work is spent in actual care of the adopted child.⁷² In this regard, adoption leave shows that it is possible that there can be equal parenting opportunities for both employed fathers and mothers in South Africa. Field, Bagraim and Rycroft⁷³ argue that if an adoptive father can claim at least ten consecutive weeks adoption leave, there is no legitimate reason for barring the biological father of a newly born child from claiming equitable work-care leave. The South African policy makers should take appropriate measures to provide adequate work-care leave to employed fathers to enable them time to nurture their children. South African policy makers should adopt equitable leave policies that enable employed fathers and mothers adequate time off the workplace to take care of their children.

6. The courts' decisions on work-care roles of fathers in South Africa

There are several cases on family care roles for fathers in South Africa. However, for the purposes of this article, the discussion is focused on two cases, namely, the *President of the Republic of South Africa v. Hugo*,⁷⁴ and the *MIA v. State Information Technology Agency (Pty) Ltd*.⁷⁵

6.1. The *Hugo* case and its implications on gender equality in South Africa

In *Hugo* case, the Constitutional Court was called on to decide on the constitutionality of former President, Nelson Mandela's action to pardon only women inmates on the grounds that they

⁶⁷ A. Behari, *Industrial Law Journal* (2018), pp. 2150-2151; International Labour Organisation (ILO) *Maternity and Paternity at Work: Law and Practice across the World* (International Labour Office, Geneva, 2014), pp. 52.

⁶⁸ A. Behari, *Industrial Law Journal* (2018), pp. 2160-2161; A. Rycroft and C.G. Duffy *Industrial Law Journal* (2019), pp. 25; see further ILO, *Maternity and Paternity at Work* (2014), pp. 116.

⁶⁹ Section 3 of the Amendment Act; section 25B of the BCEA; A. Behari, *Industrial Law Journal* (2018), pp. 2153-2155; A. Rycroft and C.G. Duffy, *Industrial Law Journal* (2019), pp. 19-21.

⁷⁰ Section 3 of the Amendment Act; section 25B (6)-(7) of the BCEA.

⁷¹ Section 3 of the Amendment Act; section 25B (6)-(7) of the BCEA.

⁷² Section 27(1)(b) of the UIA; section 25B of the BCEA; A. Behari, *Industrial Law Journal* (2018), pp. 2154.

⁷³ Section 3 of the Amendment Act; section 25B of the BCEA; C.G. Field, J.J. Bagraim and A. Rycroft, *South African Journal of Labour Relations* (2012), pp. 34-35.

⁷⁴ 1997 (6) BCLR 708 (CC) (*Hugo* case).

⁷⁵ [2015] JOL 33060 (LC) (*MIA* case).

cared for children. The brief facts are that President Mandela invoked the Presidential Act⁷⁶ to release all mothers who had children under the age of 12 from South African prisons.⁷⁷ Hugo, a prisoner and father to a son under the age of 12 at the material time, applied to be released to care for his son since the mother had died. However, Hugo's application failed on grounds that he was a man. The prisoner then challenged the decision arguing that it discriminated against fathers. The majority decision held that the discrimination was fair since it was for a legitimate government purpose. In this regard, the legitimate government purpose was to pardon mothers in the best interests of children.

In its obiter, the Constitutional Court held that the release of mothers with young children was to promote mothers' primary function as caregivers.⁷⁸ Goldstone J held that fathers were more of secondary caregivers who are not as emotionally attached to young children as mothers are.⁷⁹ Thus, the release of fathers of young children would have defeated the legitimate government purpose to protect women and children. However, in the minority judgment, Kriegler J persuasively argued that accepting the release of mothers at the expense of fathers with children under the age of 12 as fair discrimination only worked to entrench gender stereotypes in South Africa.⁸⁰ Furthermore, the minority judgment decried the classification of fathers as secondary nurturers and distant parents despite the tide showing that traditionally cherished gender roles are changing.⁸¹ The *Hugo* case is a huge setback on efforts to create parental parity between fathers and mothers the South African workplace.

6.2. The *MIA* case and its implications on gender equality in South Africa

In the *MIA* case, the Labour Court was called to decide on whether a male same-sex parent could claim maternity leave and related benefits. The applicant was a senior business executive who worked for the respondent. The applicant, his civil union partner, and a surrogate mother had reached a surrogate-motherhood agreement that was made an order of the High Court.⁸² The commissioning parents agreed that the applicant would take up the role of primary caregiver to the child from birth onwards.⁸³ The applicant applied for four months maternity leave, in line with the respondent's leave policy at the birth of the child. However, the respondent objected to granting maternity leave arguing that since the applicant was not the biological mother of the child, he was not eligible for the requested leave.⁸⁴ The respondent granted the applicant two months paid adoption leave and an additional two months unpaid leave instead.⁸⁵ Moreover, the respondent argued maternity leave was based on the understanding that maternity leave only applied to biological mothers who, *inter alia*, need time to recuperate from the physiological effects of birth.⁸⁶ The respondent relied on LRA⁸⁷ and gender specific words such as "her" and "she" in the BCEA to turn down the applicant's request.⁸⁸ The applicant argued that the respondent's refusal to grant him four months maternity leave amounted to unfair discrimination on the grounds of gender, sex, family responsibility, and sexual orientation.⁸⁹ The court held that the respondent's refusal to grant the applicant maternity leave amounted to unfair discrimination.⁹⁰ The court held that the

⁷⁶ Section 82(1)(k) of the *Constitution of the Republic of South Africa* 1993 (interim Constitution).

⁷⁷ *Hugo* case, para 2; A. Behari, *Obiter* (2016), pp. 355; E. Torerai, LLM-Mini-dissertation, North West University (2020), pp. 33.

⁷⁸ *Hugo* case para 70; C.G. Field, J.J. Bagraim and A. Rycroft, *South African Journal of Labour Relations* (2012), pp. 32-33; A. Behari, *Obiter* (2016), pp. 355-356.

⁷⁹ *Hugo* case para 46.

⁸⁰ *Hugo* case paras 78-82.

⁸¹ *Hugo* case paras 83 and 92.

⁸² *MIA* para 5.

⁸³ *MIA* para 16.

⁸⁴ *MIA* para 1.

⁸⁵ *MIA* para 2.

⁸⁶ *MIA* para 12.

⁸⁷ Sections 186(1)(c)(i) and 187(1)(e) of the LRA.

⁸⁸ Section 25(2)(b) and (3) of the BCEA; see further sections 186(1)(c)(i) and 187(1)(e) of the LRA; *MIA* para 12.

⁸⁹ *MIA* para 1.

⁹⁰ Section 6(1) of the EEA; also see section 187(1)(f) of the LRA; *MIA* para 21.

respondent used a narrow and unacceptable approach in interpreting the BCEA.

The court argued further that the right to maternity leave in the BCEA is not only for the welfare and health of the mother but for the best interests of the child as well.⁹¹ Thus, the court correctly held that there was no reason for denying the applicant or a person in the position of the applicant maternity leave in the same way it is accorded to a biological mother.⁹² Accordingly, it is clear that one's gender or sexuality should not be the only factors considered when dealing with work-care leave applications in South Africa. The policy makers should introduce a leave that is like maternity leave for employed fathers to enable them to be more involved in care-giving duties for their children in South Africa.⁹³

7. The Covid-19 Pandemic and work-care leave challenges in South Africa

Government's response to the Covid-19 Pandemic had both positive and negative outcomes for employed parents in South Africa. The lockdown measures and mandatory remote working to contain the spread of Covid-19 somewhat redefined the workplace in that the physical aspect of the place of work changed.⁹⁴ An employee could work from home, a car or anywhere convenient using information communication technologies (ICTs) platforms such as Zoom, Microsoft Teams and teleconferences.⁹⁵ Employed parents, especially fathers, who used to endure inflexible working hours, low paid parental leave and a culture of "presenteeism" that values presence at the workplace rather than performance, were able to work remotely in the comfort of their homes during Covid-19 lockdowns.⁹⁶ The positive take away is that the Covid-19 Pandemic increased remote working, a tool that policymakers can build on to promote gender equality through gender-sensitive work-care policies in the South African workplace.⁹⁷ To some extent, the Covid-19 lockdowns benefitted families and society at large since most employed parents were forced to stay together sharing care and general household duties.⁹⁸

However, there are several adverse factors that came with the Covid-19 Pandemic which can be addressed through appropriate work-care policy interventions to promote gender equality in the South African workplace. For example, although Covid-19-induced lockdowns opened up opportunities for remote working, the new working arrangements required individuals who are well trained and equipped in using technology devices and various software, and this was a major challenge for many employed parents.⁹⁹ Moreover, schools and other care facilities were closed during lockdown periods, adding extra pressure to employed parents.¹⁰⁰ The burden of care disproportionately disadvantaged most employed mothers who added home-schooling children to their career demands and other general family care duties.¹⁰¹ This also means that home space had to be shared for work, home-schooling and the general household activities in a family set-up.¹⁰²

⁹¹ Section 28(1) (b) of the Constitution; *MIA* para 13.

⁹² *MIA* para 17.

⁹³ *MIA* paras 20-21; A. Behari, *Obiter* (2016), pp. 354; A. Bauling, *Obiter* (2016), pp. 162-163.

⁹⁴ M. Shirmohammadi, W.C. Au, & M. Beigi, 'Remote Work and Work-Life Balance: Lessons Learned from the Covid-19 Pandemic and Suggestions for HRD Practitioners', *Human Resource Development International* (2022), pp. 167-168; see related comments by S. D'Andrea, 23(1) *Academy of European Law Forum* (2022), pp. 10-11.

⁹⁵ O. Borah Hazarika & S. Das, 'Paid and Unpaid Work during the Covid-19 Pandemic: A Study of the Gendered Division of Domestic Responsibilities during the Lockdown', *Journal of Gender Studies* (2021), pp. 436; M. Shirmohammadi, W.C. Au, & M. Beigi *Human Resource Development International*, (2022), pp. 170-171.

⁹⁶ S. D'Andrea, 23(1) *Academy of European Law Forum* (2022), pp. 10-11; M. Shirmohammadi, W.C. Au, & M. Beigi, *Human Resource Development International* (2022), pp. 167-168.

⁹⁷ K. Möhring, E. Naumann, M. Reifenscheid, A. Wenz, T. Rettig, U. Krieger, S. Friedel, M. Finkel, C. Cornesse & A.G. Blom, 'The COVID-19 Pandemic and Subjective Well-being: Longitudinal Evidence on Satisfaction with Work and Family', *European Societies* (2021), pp. 5605-5606.

⁹⁸ M. Shirmohammadi, W.C. Au, & M. Beigi, *Human Resource Development International* (2022), pp. 170-171.

⁹⁹ M. Shirmohammadi, W.C. Au, & M. Beigi, *Human Resource Development International* (2022), pp. 170.

¹⁰⁰ O. Borah Hazarika & S. Das, *Journal of Gender Studies* (2021), pp. 434; M. Shirmohammadi, W.C. Au, & M. Beigi, *Human Resource Development International* (2022), pp. 170-171.

¹⁰¹ O. Borah Hazarika & S. Das, *Journal of Gender Studies* (2021), pp. 435-436.

¹⁰² M. Shirmohammadi, W.C. Au, & M. Beigi, *Human Resource Development International* (2022), pp. 169-170; O. Borah Hazarika & S. Das *Journal of Gender Studies* (2021), pp. 434.

Some employed parents did not have the space to accommodate the aforesaid changes. Furthermore, the new environment came with anxiety and the need to control noise especially when employed parents were attending work meetings.¹⁰³ These and other factors weighed heavily on the shoulders of employed parents, especially mothers as they endeavoured to meet work and care obligations during the Covid-19 Pandemic in South Africa.¹⁰⁴

Other negative externalities such as power and network outages compounded the plight of working from home for employed parents in South Africa. Moreover, the Covid-19 Pandemic somewhat increased gender inequality in that it increased the work and care pressure on employed mothers who were ill-equipped and poorly trained to deal with remote working technologies while providing care to their families during the lockdown periods.¹⁰⁵ Some of the employed parents felt isolated, neglected and stress levels increased due to the pressure of working away from colleagues.¹⁰⁶ There was also a blurring of work and non-work time during remote working during the lockdowns.¹⁰⁷

The Covid-19 Pandemic also opened a window of opportunity for policymakers to develop work-care policies that can promote division of labour and gender equality in South Africa.¹⁰⁸ Policymakers should acknowledge that lack of robust work-care provisions and/or policies has created gender inequalities in the South African workplace.¹⁰⁹ In this regard, the policy makers should consider amending the current work-care leave regulations to enact adequate parental leave provisions that give more days to employed parents.¹¹⁰ Alternatively, they should enact new work-care leave provisions that equally cater for both employed fathers and mothers in the South African workplace.

8. Concluding remarks

This article provides a timely perspective on the flaws of the South African work-care leave policies. These work-care leave flaws could impede the attainment of the UN's SDG on gender equality by the year 2030 in South Africa. The absence of adequate work-care policies has negatively affected gender equality in the South African workplace.¹¹¹ Thus, the current gender skewed policies are still affecting employed fathers who are denied adequate work-care leave days in South Africa.¹¹² In this regard, very little has been done to debunk the traditionally assigned roles for men and women in South Africa.¹¹³ Owing to this, employed fathers have limited or no express care leave provisions that enable them to have sufficient time off the workplace to take care of their children.

While there is maternity leave and related rights for employed mothers, there is no clear paternity leave policy for employed fathers in South Africa.¹¹⁴ Consequently, the burden of care is

¹⁰³ M. Shirmohammadi, W.C. Au, & M. Beigi, *Human Resource Development International* (2022), pp. 169-170; O. Borah Hazarika & S. Das, *Journal of Gender Studies* (2021), pp. 434.

¹⁰⁴ M. Shirmohammadi, W.C. Au, & M. Beigi, *Human Resource Development International* (2022), pp. 169-171; O. Borah Hazarika & S. Das *Journal of Gender Studies* (2021), pp. 435-436.

¹⁰⁵ M. Shirmohammadi, W.C. Au, & M. Beigi, *Human Resource Development International* (2022), pp. 168-171; K. Möhring, *et al*, *European Societies* (2021), pp. 5605-5606.

¹⁰⁶ O. Borah Hazarika & S. Das, *Journal of Gender Studies* (2021), pp. 435; see related comments by K. Möhring *et al*, *European Societies* (2021), pp. 5612.

¹⁰⁷ O. Borah Hazarika & S. Das, *Journal of Gender Studies* (2021), pp. 435; K. Möhring, *et al*, *European Societies* (2021), pp. 5612-5613.

¹⁰⁸ O. Borah Hazarika & S. Das, *Journal of Gender Studies* (2021), pp. 436-437.

¹⁰⁹ S. D'Andrea, 23(1) *Academy of European Law Forum* (2022), pp. 16.

¹¹⁰ Section 25A of the BCEA; section 3 of the Amendment Act.

¹¹¹ M. Ramphele and L. Richter, 'Migrancy, Family Dissolution and Fatherhood' in L. Richter and R. Morrel, *Baba: Men and Fatherhood in South Africa* (HSRC Press, Cape Town 2006), pp. 74-76.

¹¹² M. Cunningham, 'Changing Attitudes Towards the Male Breadwinner, Female Homemaker Family Model: Influences of Women's Employment and Education over the Lifecourse', *Social Force*, (2008), pp. 299-301.

¹¹³ R. Morrel, 'Fathers, Fatherhood and Masculinities in South Africa' in L. Richter and R. Morrel, *Baba: Men and Fatherhood in South Africa* (HSRC Press, Cape Town 2006), pp. 18-21.

¹¹⁴ See A. Behari, *Obiter*, (2016), pp. 348-349.

largely placed on mothers.¹¹⁵ Thus, policymakers should consider introducing policies that promote gender equality regarding work-care leave for fathers and mothers in the South African workplace. In this regard, policy makers should introduce paternity leave provisions that are comparable to maternity leave.¹¹⁶ Behari argues that statutory protection of paternity leave and related rights for employed fathers is the first crucial step towards promoting gender equality at in the workplace.¹¹⁷ Additionally, policymakers should also consider introducing better incentives for working fathers and mothers in order to encourage working parents to invest time in caring for their families.¹¹⁸

The Covid-19 Pandemic has assisted to lay bare the shortcomings of the work-care leave policies in South Africa. Although lockdown measures allowed fathers to work from home and somewhat relieve mothers of the family care responsibilities, not much has changed in the division of family care responsibilities for many homes in South Africa.¹¹⁹ Employed mothers remained overburdened by work and family care obligations during Covid-19 Pandemic.¹²⁰ Accordingly, policymakers should consider developing a suitable work-care policy and/or statutory regulations that empower all employed parents to have equal work and family care leave days in the South African workplace. Such policies and/or regulations should provide adequate and flexible work-care leave opportunities and benefits for employed parents in the South African workplace. Without equitable work-care leave policies, it will be difficult for South Africa to comply with the UN's gender equality SDG by the year 2030.

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¹¹⁵ See related comments by E. Torerai, LLM-Mini-dissertation, North West University (2020), pp. 46-48.

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¹¹⁷ A. Behari, *Obiter* (2016) pp. 360-361.

¹¹⁸ See P. Eerola *et al*, *SAGE Open* (2019), pp. 3-4.

¹¹⁹ M. Shirmohammadi, W.C. Au, & M. Beigi, *Human Resource Development International* (2022), pp. 169-171; O. Borah Hazarika & S. Das, *Journal of Gender Studies* (2021), pp. 435-436.

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