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**Rethinking Chapter 3 of the Basic Conditions of Employment Act 75 of 1997:
Towards an *Ubuntu*-based theory**

by

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**A thesis submitted in partial fulfilment of the requirements for the LLM Research
Project: LLM with Specialisation in Labour Law**

in the

FACULTY OF LAW

at the

UNIVERSITY OF THE FREE STATE

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November 2024

ETHICAL CLEARANCE DISCLOSURE

This study is characterised by a desktop-based approach, wherein all primary and secondary sources were meticulously cited. The research instruments did not include individual or group interviews/questionnaires, as the aim was to avoid sensitive, embarrassing, or distressing subject matters. The study did not involve the disclosure of any criminal or other information that would require legal action, nor did it pose any potential risks, hazards, or adverse effects for research participants. Consequently, there was no need for insurance or indemnity arrangements to address the potential legal liability of the University of the Free State for any harm caused to research participants as a result of the research conduct.

ACKNOWLEDGMENTS

To God be the Glory. I prayed about it, worked on it, and it came to life. Special thanks to my late sister Nonkonzo Vatsha who serves as my motivation to always strive for the best for my family. To my mother, Lindiwe Vatsha, I love you and thank you for raising such a hardworking lady. To my big sister, Nontsindiso Vatsha, I love you and appreciate you. To Melokuhle and Kwandokuhle Vatsha, I love and appreciate you little ones and lastly, to my last-born sister, Thandaza Vatsha, you have no idea how much you push me to be the best version of myself, your letters appreciating the little things I do for you and Melo are what keeps me moving and motivated, I love you sister.

To my supervisor, when I prayed to God for a smooth academic journey and for direction, he surely directed me to you, from undergraduate studies until now, thank you Mr Simbarashe for being a good mentor and a supervisor to me, may the good Lord continue to bless you and your family.

To my friends and family, thank you for always believing in me.

TABLE OF CONTENTS

ABBREVIATIONS.....	7
1. CHAPTER 1.....	8
1.1. Introduction and Background.....	8-9
1.2. Research Problem.....	10
1.3. Research Question.....	10
1.4. Research Motivation.....	11
1.5. Methodology.....	11
1.6. Chapter Outline.....	12
2. CHAPTER 2.....	13
2.1. Introduction.....	13-14
2.2. Application of the Act.....	14
2.3. Conditions of Employment.....	15
2.4. The Framework of Chapter 3 of the BCEA.....	16-18
2.5. Summary.....	18-19
3. CHAPTER 3.....	20
3.1. Introduction.....	20
3.2. Sick Leave.....	20-23
3.3. Family Responsibility leave.....	23-25
3.4. Caregiving leaves.....	25-26
3.4.1. Parental leave.....	26
3.4.2. Discrimination – Mode of Conception.....	26-27
3.4.3. The Van Wyk case.....	27-29
3.4.4. Practical challenges from the Van Wyk interim measures.....	29-30
3.5. Protection of employees before and after childbirth.....	30-33
3.6. The best Interest of the child.....	34-35
3.7. Summary.....	35
4. CHAPTER 4.....	36
4.1. Introduction.....	36

4.1.1.	International Law and South African Democracy.....	36-37
4.1.2.	South Africa's commitment to International and Foreign law.....	37-38
4.1.3.	ILO's Conventions Ratification.....	38
4.2.	Caregiving leaves and work-life balance.....	38-39
4.2.1.	International law on caregiving leaves.....	39
4.2.1.1.	ILO's Care at work report.....	39-40
4.2.2.	International standard on maternity leave.....	40-42
4.2.3.	International standard on paternity leave.....	42
4.2.4.	International standard on caregiving leaves (foreign law)	42-43
4.3.	The promising future or paternity leave, foreign countries.....	43-45
4.4.	Funding for Paternity leave.....	45
4.4.1.	Source of funding for unpaid leave in South Africa.....	45
4.5.	Summary.....	46
5.	CHAPTER 5.....	48
5.1.	Introduction.....	48
5.1.1.	What is Ubuntu?	48-49
5.2.	History of South Africa and Ubuntu.....	49-51
5.3.	Ubuntu and BCEA objectives.....	50-51
5.3.1.	Ubuntu and Chapter 3 of BCEA.....	52
5.3.2.	Annual leave.....	52-53
5.3.3.	Sick leave.....	53
5.3.4.	Family Responsibility Leave.....	54
5.3.5.	Ubuntu-based framework on caregiving leaves.....	54-55
5.3.5.1.	Redefining Parental Leave.....	55
5.3.5.2.	Equal Parental leave for parents.....	55
5.3.5.3.	Discrimination based on mode of conception.....	55-56
5.3.5.4.	Ubuntu and the <i>Van Wyk</i> case.....	56-57
5.4.	A possible consideration guided by Ubuntu.....	57
5.5.	Ubuntu and the right to fair practices.....	57-58
5.6.	Summary.....	58
6.	CHAPTER 6.....	59

6.1. Introduction.....	59
6.2. Shortcomings of Chapter 3 of the BCEA.....	59-60
6.3. BCEA, International and Foreign Law.....	61
6.4. BCEA and Ubuntu.....	61-63
6.5. Recommendation.....	63
7. BIBLIOGRAPHY.....	64-65

ABBREVIATIONS

BCEA	–	Basic Condition of Employment Act 75/1997.
CCMA	–	The Commission for Conciliation, Mediation and Arbitration.
EEA	–	Employment Equity Act 55/1998.
EY	–	Ernst and Young Global Limited.
ILO	–	International Labour Organization.
LAC	–	Labour Appeal Court.
LRA	–	Labour Relations Act 66/1995.
LGBTQI	–	Lesbian, Gay, Bisexual, Transgender and Intersex.
UIF	–	Unemployment Insurance Fund.
UIA	–	Unemployment Insurance Act 63/2001.
ILO's 5R	–	Recognize, Reduce, Redistribute, Reward and Represent workers.

CHAPTER 1: INTRODUCTION AND BACKGROUND

1.1. Introduction

The Basic Conditions of Employment Act 75 of 1997 (BCEA), gives effect to section 23 of the Constitution, which provides for the right to fair labour practices.¹ Since the enactment of the BCEA and other labour legislations such as the Labour Relations Act 66 of 1995 and the Employment Equity Act 55 of 1998, South African employees and employers enjoy a variety of labour rights. The BCEA regulates and establishes basic conditions of employment and has the duty to comply with the International Labour Organization.² Chapter 2 of the Act regulates working time including ordinary work hours, overtime work, compressed working week, averaging of hours, determination of hours of work by the minister, meal intervals, daily and weekly rest period, pay for work on Sundays, night work and public holidays.³ In the context of this research, the regulation for the minimum and maximum working hours and conditions emphasize how the Act aims at protecting workers' rights.

Chapter 3 of the BCEA regulates 'leave entitlements'.⁴ To summarise the Chapter, section 20 provides for annual leave,⁵ section 21 regulates pay for annual leave,⁶ section 22 regulates sick leave whilst section 23 deals with proof of incapacity,⁷ section 24 regulates application to occupational accidents or diseases,⁸ section 25 regulates maternity leave, parental leave, adoption leave as well as commissioning parental leave⁹ section 26 deals with the protection of employees before and after childbirth, and lastly,¹⁰ section 27 regulates family responsibility leave.¹¹ This research focuses on Chapter 3 of the BCEA, with the aim of navigating whether Chapter 3 does not deviate from the main objectives

¹ *Constitution of Republic of South Africa*, 1996: sec. 23(1).

² *Basic Conditions of Employment Act*: preamble.

³ *Basic Conditions of Employment Act*: chapter 2.

⁴ *Basic Conditions of Employment Act*: chapter 3.

⁵ *Basic Conditions of Employment Act*: sec. 20.

⁶ *Basic Conditions of Employment Act*: sec. 21.

⁷ *Basic Conditions of Employment Act*: sec. 22-23.

⁸ *Basic Conditions of Employment Act*: sec. 24.

⁹ *Basic Conditions of Employment Act*: sec. 25.

¹⁰ *Basic Conditions of Employment Act*: sec. 26.

¹¹ *Basic Conditions of Employment Act*: sec. 27.

of the BCEA as per the preamble of the Act and the stipulations of section 23(1) of the Constitution which provides for the right to fair labour practices.¹²

This research draws motivation from various sections of the Constitution that support the approach followed by the paper. For example, section 9(3) of the Constitution prohibits unfair discrimination on one or more of the mentioned grounds, which include gender, pregnancy, belief, race, language, birth and others,¹³ and section 39(1) of the Constitution, which charges courts or tribunals to consider international law when interpreting the Bill of Rights and allows them to also consider foreign law.¹⁴

The research is also motivated by novel cases such as *Van Wyk and Others v Minister of Employment and Labour*, *Mahlangu v Samancor Chrome Ltd*,¹⁵ *Toyota South Africa Motors (PTY) Ltd v NUMSA obo Njilo and Others*,¹⁶ *Manyetsa v New Kleinfontein Gold Mine (pty) Ltd*,¹⁷ which have recently contributed to the debate on the content and interpretation of Chapter 3 of the BCEA. These and other cases will be referenced to draw an inference of the possible deviation by Chapter 3 of the BCEA.

This research finds that although the preamble of the BCEA provides for wide and generous conditions of employment to protect workers, Chapter 3 of the BCEA falls short of fulfilling the objectives of the Act. This is because through recent interpretations of Chapter 3 of the BCEA in case law, there seems to be a disconnect in relation to the letter of the law, the purpose of the law and the application of the law. Chapter 3 fails to adequately bring to life the protections envisaged by the preamble and the objectives of the Act. This then brings to the fore the question of whether Chapter 3 of the BCEA is effective in fulfilling the objectives of the Act or if there is a need for an alternative theory and approach.

Upon navigating the lacuna and shortcomings from Chapter 3 stipulations, an alternative theory is investigated. In this light, the research looks at the possibility of adopting an

¹² *Constitution*: sec. 23(1).

¹³ *Constitution*: sec. 9(3).

¹⁴ *Constitution*: sec. 39(1).

¹⁵ *Van Wyk and Others v Minister of Employment and Labour* [2023] ZAGP JHC 1213.

¹⁶ *Toyota motors South Africa (Pty) v NUMSA Obo and Njini and Others* (2022) 43 ILJ 2393 (LC).

¹⁷ *Manyetsa v New Kleinfotnein Gold Mine (Pty) Ltd* (2018) 39 ILJ 415.

Ubuntu-based theory in approaching leave entitlements, founded on the values of generosity, compassion, kindness, humanity, respect, and dignity will be analysed as a feasible alternative approach.¹⁸

1.2. Research Problem

This research notes that there are discrepancies between Chapter 3 of the BCEA, its preamble and section 23(1) of the Constitution. The BCEA's preamble stipulates that the Act gives effect to section 23(1) of the Constitution. However, there is a possible disjuncture between the stipulations of the Act as per the preamble, the purposes of the various types of leave this Act provides for in Chapter 3 and the right to fair labour practices. The provisions of the Act and its applicability is so stringent and in turn defeats the purpose to give effect to the right to fair labour practices.

The BCEA has been constantly amended and challenged when it comes to chapter 3 and there is also a call currently for several further amendments of certain sections under this chapter, including section 25.¹⁹ The stipulations of chapter 3 are meant to provide labour standards that are socially just to workers but their enforceability in turn disadvantage such workers which then defeats the purpose of the chapter. The deviation amongst other things is caused by lacunas found in the Act's stipulations, issues related to how our courts interpret this Act and lastly even lack of sufficient knowledge of the employees and employers' rights by the employees and employers.

1.3. Research Question

The main research question that will guide this research is whether it is not time for Chapter 3 of the Basic Conditions of Employment Act to follow an 'Ubuntu-based' theory to leave entitlements and move towards a caretaking approach. To answer the main question, the research comprises of a number of sub-questions.

Research sub-questions:

- What is the history and purpose of the BCEA?

¹⁸ M Molefe 2019: 66(1).

¹⁹ *Van Wyk and Others v Minister of Employment and Labour* [2023] ZAGP JHC 1213.

- What are the shortcomings of the BCEA?
- What is an *Ubuntu-based* theory?
- Does the BCEA align with the International Labour Organization's care policy?

1.4. Research Motivation

The theory behind the BCEA, which seems to be more Western-centered, does not accommodate the given realities of many African families. For example, when defining family, the traditional concept is that of a 'nuclear family' consisting of a couple, their children and the couple's parents. However, in African culture, family includes extended and distant relatives beyond the 'nuclear family'. The BCEA also does not complement the Act's objectives in relation to leave entitlements; the leave entitlements have various shortcomings and might not be as much favourable to employees, thus, there is a need to rethink the BCEA approach and explore other alternatives and as such, this paper aims to explore an Ubuntu-based theory as a feasible alternative.

1.5. Methodology

This research follows a doctrinal legal research methodology, also called the black letter methodology. The black letter is a methodology that sticks to the law as it is.²⁰ To that end, the research will comprise of a detailed and descriptive analysis of the Basic Conditions of Employment Act and other legal rules found in both primary and secondary literature like statutes, regulations, case law, academic books, and academic articles. The research will also incorporate the comparative research methodology by juxtaposing the South African approach to leave with that of international law instruments such as the ILO and foreign jurisdictions. The comparative methodology is important as it will aid in answering whether South Africa is in line with international best practices and whether there are any lessons to be learnt from an international and foreign perspective.

²⁰ 2023 Mkhululi Nyathi Sabinet African Journal Re-asserting the Doctrinal Legal Research Methodology in the South African Academy: Navigating the maze

1.6. Outline of Chapters

Chapter 1 – Introduction and Background

Chapter 1 consists of an introduction to the study. It among other things, lays out a foundation for the rest of the discussion by discussing the research problem, the aims of the research and providing justification for the research.

Chapter 2 – Contextual Framework of the BCEA

Chapter 2 comprises a conceptual framework of the Act, it helps understand the Act's applicability, conditions of employment and Chapter 3 provisions.

Chapter 3 – Shortcomings of Chapter 3 of the BCEA

Chapter 3 investigates the challenges/shortcomings of Chapter 3 of the BCEA which are the roots cause of why this chapter may be deemed to be deviating from the Act's objectives.

Chapter 4 – International Standards pertaining to leave

Chapter 4 provides a glimpse into international best practices in relation to leave, this chapter reiterates the importance of the 'care' element in applying leaves, it draws motivation from the international law.

Chapter 5 – An *Ubuntu*-based theory as an alternative

Chapter 5 introduces and discusses *Ubuntu* as a theory that can be used in interpreting Chapter 3 of the BCEA, this chapter navigates and paints a picture on how an *Ubuntu* based Chapter 3 of the BCEA would look like.

Chapter 6 – Conclusion and Recommendations

Chapter 6 summarises the findings of the research and offers concluding remarks and recommendations.

CHAPTER 2: AN OVERVIEW OF THE BASIC CONDITIONS OF EMPLOYMENT ACT

2.1. Introduction

Apartheid which was in place from 1950 until 1994 in South Africa imposed social and economic measures in South Africa which segregated South Africa's racial groups which were Coloureds, Africans, Indians and Whites,²¹ such segregation extended to even the labour market,²² as evidenced by apartheid-era laws that did not provide for Black people or were used as tools to exclude the majority from accessing the labour market and labour protections.²³ Thus, necessitating a shift in not only policy but legislation that reflected that transformative policy.

The BCEA, enacted in 1997, responded to South Africa's historical context of apartheid-era labour laws.²⁴ Post this era, the legislative landscape aims at advancing economic development and social justice.²⁵ The BCEA aims to do this by ensuring that the working conditions of vulnerable employees meet minimum standards that are socially acceptable.²⁶ The BCEA, thus, gives effect to section 23(1) of the Constitution, which provides for the right to fair labour practices.²⁷ It establishes and enforces basic employment conditions.²⁸ This Act binds itself to comply with the obligations of the Republic as a member state of the International Labour Organization.²⁹

The BCEA has eleven chapters and four schedules, with the same aim, to give effect to the right of fair labour practices and the setting of basic conditions of employment for the employees.³⁰ This chapter aims to analyse the contextual framework of the Basic

²¹ Mariotti 2009.

²² Mariotti 2009.

²³ Mariotti 2009.

²⁴ 2002 National Labour Law Profile: International Labour Organization.

²⁵ 2002 National Labour Law Profile: International Labour Organization.

²⁶ 2002 National Labour Law Profile: International Labour Organization.

²⁷ *Basic Conditions of Employment Act 75/1997*: sec. 2(a).

²⁸ *Basic Conditions of Employment Act 75/1997*: sec. 2(a)(i).

²⁹ *Basic Conditions of Employment Act 75/1997*: sec. 2(b).

³⁰ *Basic Conditions of Employment Act 75/1997*.

Conditions of Employment, and it will do that by addressing the application of the Act, conditions of employment and leave entitlements.

2.2. Application of the Act

The BCEA applies to all employees and employers except to members of the State Security Agency.³¹ The Act defines an employee as any person, excluding independent contractors who works for another person or for the state and receives or is entitled to receive remuneration,³² or any person who assists in any manner in conducting or carrying the business of an employer.³³ The employee definition begs the question of whether, is the BCEA application clause fair as it excludes various numbers of workers, BCEA is a substantial Act in protecting worker's rights and by virtue of the employee definition excluding independent contractors, these workers then do not enjoy the fruits and protection of the Act which might be problematic. The Act also does not apply to unpaid volunteers for an organization serving a charitable purpose.³⁴ The BCEA applies to people that are undergoing vocational training with an exception to an extent that any term or condition of their employment is regulated by provisions of another law.³⁵ The whole Act with only the exception of section 41, does not apply to persons employed on vessels at sea in respect of which the Merchant Shipping Act 57 of 1951 applies, except to the extent provided for in a sectoral determination.³⁶ Section 41 deals with severance pay entitlement for employees who got dismissed for reasons based on the employer's operational requirements and how to deal with disputes that arise as a result of this.³⁷

³¹ *Amendment Act 2002.*

³² *Basic Conditions of Employment Act 75/1997: sec. 1.*

³³ *Basic Conditions of Employment Act 75/1997: sec. 1.*

³⁴ *Basic Conditions of Employment Act 75/1997: sec. 3(1)(b).*

³⁵ *Basic Conditions of Employment Act 75/1997: sec. 3(2)*

³⁶ *Basic Conditions of Employment Act 75/1997: sec. 3(3).*

³⁷ *Basic Conditions of Employment Act 75/1997: sec. 41.*

2.3. Conditions of Employment

The BCEA regulates minimum conditions of employment,³⁸ for purposes of the paper minimum conditions will be considered to be the provisions that are stipulated in Act, for instance, 'minimum' conditions in different types of leaves will be the days and conditions provided by Chapter three of the Act. Chapter two of the Act regulates working hours,³⁹ Chapter three provides for various leave entitlements,⁴⁰ Chapter four speaks about the employer's duty to make provision of employment and remuneration information to the employee in writing,⁴¹ Chapter five addresses employment termination,⁴² Chapter six prohibits children employment and forced labour,⁴³ Chapter seven regulates the variation of basic conditions of employment,⁴⁴ Chapter eight makes provision for the sectoral determinations,⁴⁵ these can be made by the minister establishing basic conditions for employees in a sector and area,⁴⁶ they shall be made in accordance with Chapter eight of the BCEA and by a notice in the *Gazette*,⁴⁷ Chapter nine speaks about the Employment Conditions Commission,⁴⁸ Chapter 10 monitoring, enforcement of the Act and legal proceedings and Chapter 11 address the generic concepts of the Act.⁴⁹

The Act consists of four schedules, with schedule one dealing with procedures for progressive reduction of maximum working hours,⁵⁰ schedule two addressing the maximum permissible fees which may be imposed for failure to comply with Act,⁵¹

³⁸ *Basic Conditions of Employment Act 75/1997*: sec. 2(a)(i).

³⁹ *Basic Conditions of Employment Act 75/1997*: Chapter 2.

⁴⁰ *Basic Conditions of Employment Act 75/1997*: Chapter 3.

⁴¹ *Basic Conditions of Employment Act 75/1997*: Chapter 4.

⁴² *Basic Conditions of Employment Act 75/1997*: Chapter 5.

⁴³ *Basic Conditions of Employment Act 75/1997*: Chapter 6.

⁴⁴ *Basic Conditions of Employment Act 75/1997*: Chapter 7.

⁴⁵ *Basic Conditions of Employment Act 75/1997*: Chapter 8.

⁴⁶ *Basic Conditions of Employment Act 75/1997*: Chapter 8.

⁴⁷ *Basic Conditions of Employment Act 75/1997*: Chapter 8.

⁴⁸ *Basic Conditions of Employment Act 75/1997*: Chapter 9.

⁴⁹ *Basic Conditions of Employment Act 75/1997*: Chapter 10.

⁵⁰ *Basic Conditions of Employment Act 75/1997*: schedule one.

⁵¹ *Basic Conditions of Employment Act 75/1997*: schedule two.

schedule three focuses on transitional provisions,⁵² whilst schedule four focuses on the laws that were repealed by section 95(5).⁵³

2.4. Navigating Chapter Three of the BCEA

The crux of this research is Chapter 3 of the BCEA, which is the contested chapter. Chapter three generally regulates the minimum leaves an employer should grant to employees based on various circumstances and issues related thereto. As a policy norm, the statutory regulation provides for the types of leave that employees are entitled to, and time off work for a specific minimum period under specified circumstances; this right does not exist in the common law.⁵⁴

The first benefit provided in chapter three of the BCEA is paid annual leave; this is stipulated in sections 20 and 22 of the Act.⁵⁵ The mentioned sections provide for the annual leave cycle being calculated over a 12-month leave cycle⁵⁶ and requires employees to be granted a minimum of 21 consecutive days, alternatively, one day for every 17 days of completed work or one hour for every 17 hours worked.⁵⁷ This entitlement shall be extended by one day for every public holiday which falls within the leave period.⁵⁸

The second benefit as provided by the Act in section 22, is the minimum duration of paid leave to recover from illness.⁵⁹ This type of basic benefit is commonly known as sick leave and comprises leave of absence with full pay calculated over a 36-month leave cycle.⁶⁰ The employee, as per this section, is entitled to the full sick leave at any time during the cycle under the condition that they have completed the first six months of employment.⁶¹ Over the three-year period, an employee, in terms of sick leave, is entitled to the total

⁵² *Basic Conditions of Employment Act 75/1997*: schedule three.

⁵³ *Basic Conditions of Employment Act 75/1997*: schedule four.

⁵⁴ *Van Wyk and Others v Minister of Employment and Labour* [2023] ZAGP JHC 1213.

⁵⁵ *Basic Conditions of Employment Act 75/1997*: sec. 20-22.

⁵⁶ *Basic Conditions of Employment Act 75/1997*: sec. 20(1).

⁵⁷ *Basic Conditions of Employment Act 75/1997*: sec. 20(2).

⁵⁸ *Basic Conditions of Employment Act 75/1997*: sec. 20(8).

⁵⁹ *Basic Conditions of Employment Act 75/1997*: sec. 22.

⁶⁰ *Basic Conditions of Employment Act 75/1997*: sec. 22(1).

⁶¹ *Basic Conditions of Employment Act 75/1997*: sec. 22(3).

number of days that they would normally work in six weeks.⁶² In the first six months of employment, the employees are limited to one day of paid leave for every 26 days they have worked.⁶³

A third basic benefit and paid leave is provided for by section 27 of the BCEA. This section makes provision for three days of paid family responsibility leave which is designed to respond to family emergencies.⁶⁴ For this leave entitlement, an employee should have been employed for a period longer than four months and should work at least four days a week for that specific employer.⁶⁵ Employees can only take this leave when their child is born, their child is sick, in the event of the death of the employee's spouse or life partner, or in the event of the death of the employee's parent, adoptive parent, grandparent, child, adopted child, grandchild or the employee's sibling.⁶⁶

The following category of leave entitlements is in relation to employees being parents to their children, the provided period of leave does not mandate the employer to pay the employee for such leave, these leaves are regulated by sections 25, 25A, 25B, 25C and 26 of the BCEA, sections 25A to 25C were recently amended by Act 3 of 2018 and accordingly came into effect on the 1st of January 2020. These sections differentiate the leave types based on the mode of conception for the parents. Section 25 provides for 4 consecutive months of maternity leave for a birth mother, and a month from this leave can be taken four weeks prior to the date of giving birth,⁶⁷ section 25A(1) and section 25A (2)(a) entitles fathers to 10 days of parental leave from the date of which the child was born.⁶⁸ Section 25(3) prohibits mothers to work in the next six weeks after giving birth unless otherwise approved by a doctor or midwife.⁶⁹

Section 25B focuses on adopted child,⁷⁰ this section recognizes both adoptive parents, it, however, limits the leave entitlement to a child who is not more than two years old, one

⁶² *Basic Conditions of Employment Act 75/1997: sec. 22.*

⁶³ *Basic Conditions of Employment Act 75/1997: sec. 22(3).*

⁶⁴ *Basic Conditions of Employment Act 75/1997: sec. 27.*

⁶⁵ *Basic Conditions of Employment Act 75/1997: sec. 27(1)(a)(b).*

⁶⁶ *Basic Conditions of Employment Act 75/1997: sec. 27(2).*

⁶⁷ *Basic Conditions of Employment Act 75/1997: sec. 25(1).*

⁶⁸ *Amendment Act of 2002 sec. 25A(1)(2)(A).*

⁶⁹ *Basic Conditions of Employment Act 75/1997: sec. 25(3).*

⁷⁰ *Amendment Act 2002: sec. 25B*

parent is entitled to 10 consecutive weeks of leave and the other parent is entitled to the 10 days of parental leave as provided for in section 25A. The adoptive parents have the right to choose how they want to apply the two leave types and this provision is gender neutral and does not differ with different sexual orientation or identification of parents.

The next type of leave is that of children born through surrogacy. This leave is provided for by section 25C of the BCEA,⁷¹ and through it, it is guaranteed for the genetically linked parents, known as the commissioning parents, to take maternity leave. The provisions for the commissioning parents are the same as those of adoptive parents, one parent can be entitled to 10 consecutive weeks whilst the other is entitled to the 10 days of parental leave.

Section 26 of the BCEA specifically deals with the physiological dimension of pregnancy and the nurture of the child immediately after birth.⁷² This section forbids mothers from performing work that is hazardous to their health and that of the child during pregnancy and 6 months after birth.⁷³ Section 26(2) requires employers to find feasible alternative jobs for employees during their pregnancy if their initial or primary jobs are risky and hazardous,⁷⁴ but if no alternative employment can be found for them, then they are entitled to the leave in terms of this section.

As has been identified, the leaves provided for by sections 25A, 25B and 25C do not compel employers to pay employees for the leaves taken, they just guarantee the employee time off from work and secure their jobs upon returning to work. However, employees who are contributors can claim financial benefits from Unemployment Insurance Fund.⁷⁵

2.5. Summary

In summation, this chapter has examined the framework of the Basic Conditions of Employment Act and its importance in shaping South Africa's labour laws. The BCEA aims

⁷¹ *Amendment Act of 2002: sec. 25C.*

⁷² *Basic Conditions of Employment Act 75/1997: sec. 26.*

⁷³ *Basic Conditions of Employment Act 75/1997: sec. 26(2).*

⁷⁴ *Basic Conditions of Employment Act 75/1997: sec. 26(2).*

⁷⁵ *Unemployment Insurance Fund Act: sec. 12(1).*

to protect workers by setting minimum standards for employment, reflecting the country's commitment to fair labour practices as outlined in the Constitution and in line with international obligations. The Act applies to a wide range of employees, ensuring that even the vulnerable ones are covered, although there are some exceptions. It also details important aspects of employment, especially regarding leave entitlements like annual leave, sick leave, family responsibility leave, and parental leave.⁷⁶ These provisions represent significant progress in supporting employees' rights and needs.

However, despite these advancements, Chapter 3 of the BCEA still contains several loopholes related to leave entitlements. These gaps can hinder the effectiveness of the protections intended for workers. The next chapter will explore these shortcomings in detail, highlighting areas where improvements are necessary to fully realise the Act's goals.

⁷⁶ *Basic Conditions of Employment Act: Chapter three.*

CHAPTER 3: SHORTCOMINGS OF CHAPTER 3 OF THE BCEA

3.1. Introduction

In the past two chapters, it has been established that the crux of the matter in relation to this research is chapter 3 of the BCEA. The last chapter in particular, conducted a thorough discussion of the types of leave provided for by the BCEA. This was important in laying a foundation for Chapter three of this research, which focuses on the shortcomings of the leave provisions in the BCEA. To that end, this chapter aims at diving deep into the shortcomings of Chapter 3 of the BCEA; this chapter will analyse the possibility of deviation or the contradictory nature of Chapter 3 with the Act's objectives. It has been established that the general purpose of the BCEA is to give effect to the right to fair labour practices by ensuring that the working conditions of vulnerable employees meet minimum standards that are socially acceptable,⁷⁷ one might argue that, simply put, BCEA aims at protecting workers. The sections that are going to be analysed in this chapter, are sections 20 and 22, 27, 25, 25A, 25B, 25C and 26 of the BCEA particularly because they are of great significance in addressing leave entitlements yet has various shortcomings and lacunas which in turn might disadvantage the employee.

As a point of departure, the Application of Chapter 3 is regulated in section 19,⁷⁸ Chapter 3 does not apply to employees that work for less than 24 hours a month,⁷⁹ secondly, unless there is an agreement that provides otherwise, Chapter 3 does not apply to leave that has been granted to an employee in excess of the employee's entitlement under Chapter 3.⁸⁰

3.2. Section 22 of the BCEA: Sick Leave

Paid sick leave is defined as compensated days that are lost due to sickness of workers.⁸¹ Various academics and authors have written on the risks and wrongfulness of the

⁷⁷ *Basic Conditions of Employment Act: Preamble.*

⁷⁸ *Basic Conditions of Employment Act: sec. 19.*

⁷⁹ *Basic Conditions of Employment Act: sec. 19(1).*

⁸⁰ *Basic Conditions of Employment Act: sec. 19(2).*

⁸¹ International Labour Office – Geneva Global Campaign on Social Security and Coverage for All

absence of sick pay. Professor Phil James has noted the following, “In the absence of sick pay, workers effectively are faced with choosing between protecting their health and protecting their financial security of themselves and their families”.⁸² Whilst this paper is in total agreement with this statement, it cannot shy away from the issue that there is little to no literature addressing the issue of unfavourable terms of paid sick leave in certain countries and in this instance including South Africa.

Section 22 of the Act entitles employees to full paid sick leave during the 36-month cycle,⁸³ only if they have worked for longer than 6 months, in terms of section 22(2) in every sick leave cycle, the employee is entitled to an amount of paid sick leave that equals the number of days they would have normally worked in six weeks.⁸⁴ In terms of the BCEA, an employee is entitled to be paid for a day’s sick leave the wage he would have received that day and on their usual pay day,⁸⁵ the sick leave pay may however be reduced by an agreement,⁸⁶ where an employee may be entitled to increased days of sick leave proportionally with a reduction from the daily amount of sick pay.⁸⁷

In terms of section 23, an employee who has been absent from work for more than two consecutive days or who has been absent on more than two occasions within an eight-week period and upon request by the employer,⁸⁸ fails to produce a medical certificate that states that he was unable to go to work for such a period due to sickness or injury,⁸⁹ such employee is not entitled to payment by the employer as per section 22,⁹⁰ in addition, the required medical certificate to prove incapacity shall be issued and signed by a medical practitioner,⁹¹ or any other person who is certified to treat or diagnose patients and is registered with a professional council established by an Act of Parliament,⁹² this may include professionally registered traditional healers. Lastly, in terms of section 23 of

⁸² James 2019.

⁸³ *Basic Conditions of Employment Act*: sec. 22(3).

⁸⁴ *Basic Conditions of Employment Act*: sec. 22(2).

⁸⁵ *Basic Conditions of Employment Act*: sec. 22(5).

⁸⁶ *Basic Conditions of Employment Act*: sec. 22(6).

⁸⁷ *Basic Conditions of Employment Act*: sec. 22(6)(a).

⁸⁸ *Basic Conditions of Employment Act*: sec. 23(1).

⁸⁹ *Basic Conditions of Employment Act*: sec. 23(1).

⁹⁰ *Basic Conditions of Employment Act*: sec. 23(1).

⁹¹ *Basic Conditions of Employment Act*: sec. 23(2).

⁹² *Basic Conditions of Employment Act*: sec. 23(2).

the BCEA, if it is not reasonably possible for an employee that stays within the employer's premises to obtain a medical certificate, then the employer may not withhold payment except if the employer assists the employee to obtain the certificate.⁹³

The above referred sections (22 and 23 of the BCEA), do not apply on inability to work that has been caused by an accident or an occupational disease as per the Compensation for Occupational Injuries and Diseases Act 130 of 1993 or the Occupational Diseases in Mines and Works Act 78 of 1973, an exception to the applicability of section 22 and 23 is only made in respect of a period when no payment was payable in terms of the stipulated Acts.

Whilst the BCEA plays a major role in providing protection for employees in times of sickness, there is a gap in some of the requirements or provisions of section 22. Section 22(3) of the BCEA provides that in the first six months of employment, an employee is entitled to one day's paid sick leave for every 26 days worked. Put in other words, this section basically says, 'if one is sick for more than one day within a period of 26 days, they will not get paid and might even risk losing their job if they took a day off from work on basis of sickness.' This is where Professor James' observations become pertinent; when employees are now sick, this goes back to the issue of being faced with either protecting their health or financial security for themselves and their families.

To get a better understanding on this, being sick is often unpredictable, to be sick or ill is to be not in good health,⁹⁴ which begs the question of how realistic it is to expect a worker to be sick once or for one day for a period of 6 months before they can get the full sick leave period. This also raises a concern about what differentiates an employee who has been working for 7 months and one who has been working for 5 months when it comes to issues like health. It is highly recommended that BCEA should reconsider or re-look at this stipulation.

⁹³ *Basic Conditions of Employment Act: sec. 23(3).*

⁹⁴ Oxford Dictionary

In conclusion, whereas the Act cannot be reasonably expected to cover the whole time or all sick days, even if its 20 days of sick leave, the current conditions raise a concern about whether the Act is even trying to at least meet the workers halfway in this regard.

3.3. Section 27 of the BCEA: Family Responsibility Leave,

Family Responsibility leave is provided for by section 27 of the BCEA. The BCEA does not define what family responsibility is, however, the Employment Equity Act (EEA) does. The EEA aims at promoting equal opportunities and fair treatment in employment by eliminating unfair discrimination,⁹⁵ the EEA provides definition and concepts related to employment rights, the definition by the EEA can be used as interpretative guidance and for legal consistency because the courts have applied it in various matters.⁹⁶ In terms of section 1 of the EEA, family responsibility leave is defined as ‘the responsibility of employees in relation to their spouse or partner, their dependent children or other members of their immediate family who need their care or support’.⁹⁷ This definition promises more than it actually achieves in reality, especially in the context of BCEA’s family responsibility leave. From the above definition, two questions are raised: firstly, who forms part of ‘immediate family’? Considering the diverse cultures and as a consequence, conceptions of family in South Africa, there is no universal definition of what constitutes ‘immediate family’. Secondly, what does a member who needs the employee’s ‘care and support’ need? The question is what does ‘care and support’ entail? Firstly, section 27(1)(a) of the BCEA only qualifies employees for family responsibility leave if they have been working for longer than four months,⁹⁸ and section 27(1)(b) requires such employees to have been working at least four days a week for that employer.⁹⁹ For purposes of this specific leave, the paper will not dive deep into the issue of requirements for qualifying for this leave because the paper shares the same ideology/incentives as the sick leave requirements of qualifying, which are discussed in the above sub-topic. Section 27 of the BCEA provides for three days of paid family

⁹⁵ *Employment Equity Act*: sec. 1.

⁹⁶ *Toyota motors South Africa (Pty) v NUMSA Obo and Njini and Others* (2022) 43 ILJ 2393 (LC).

⁹⁷ *Employment Equity Act*: sec. 1.

⁹⁸ *Basic Conditions of Employment Act*: sec. 27(1)(a).

⁹⁹ *Basic Conditions of Employment Act*: sec. 27(1)(b).

responsibility leave. Arguably, this period might not be adequate for certain kinds of family emergencies.¹⁰⁰ A practical example would be when a single parent's child gets sick for longer than 3 consecutive days, that parent would be compelled to take paid annual leave and if they have already exhausted all their other alternative leaves, they would then have to choose between taking care of their child and taking unpaid leave and in certain circumstances, losing their job/ financial security.

Furthermore, the BCEA provides for this type of leave, when the employee's child is born, when the employee's child is sick, or in the event of death of the employee's spouse or life partner, the employee's parent, adoptive parent, grandparent, child, adopted child, grandchild or sibling.¹⁰¹ Drawing an inference from the definition of family responsibility leave provided by EEA, these categories of people are then what is regarded as an immediate family by the BCEA. From the stipulated provisions, an employee does not qualify for family responsibility leave if any other family member of theirs is sick except if it's their child. Therefore, even if their spouse or parents are sick, family responsibility leave is limited to only the child's sickness. Secondly, immediate family, as per the BCEA, is hugely discriminatory of certain types of families in South Africa. In the case of *Toyota motors South Africa (Pty) v NUMSA Obo and Njini and Others*,¹⁰² Mr Lungani Njilo's dismissal as a result of his work policy that provided for compassionate leave in respect of the death of immediate family was found substantively unfair by Honorable Whitcher J.¹⁰³

In this case, Toyota, Mr Njilo's employer had a leave policy that provided for compassionate leave in the event that an immediate family member of the employee dies.¹⁰⁴ The policy defined immediate family as 'husband, wife, grandparents, father, mother, father in law, mother in law, sister, brother, sister in law, brother in law, child and grandchildren'.¹⁰⁵ The policy required employees to provide a copy of the death certificate as proof and, where necessary, also, an affidavit outlining the employee's relationship

¹⁰⁰ *Basic Conditions of Employment Act: sec. 27(2)*.

¹⁰¹ *Basic Conditions of Employment Act:sec. 27*.

¹⁰² (2022) 43 ILJ 2393 (LC).

¹⁰³ (2022) 43 ILJ 2393 (LC).

¹⁰⁴ (2022) 43 ILJ 2393 (LC).

¹⁰⁵ (2022) 43 ILJ 2393 (LC).

with the deceased.¹⁰⁶ In this specific matter, Mr Njilo was dismissed for allegedly being dishonest and duplicitous, the allegation was accompanied by a reason that he requested family responsibility leave for family members that are not ordinarily accepted as one's immediate family.¹⁰⁷

Mr Njilo had mentioned that he only heard from a colleague that they can apply for leave of their family members without further explanation on the policy's provisions. Mr Njilo mentioned that he did not know that the policy excluded some family members who, in Zulu culture, are regarded as immediate family.¹⁰⁸ Mr Njilo had applied for leave for the deaths of his nephew and his father's second wife, and in terms of his culture, he regarded these people as his son and mother.¹⁰⁹ The arbitrator at the CCMA granted an award in favour of Mr Njilo, and the employer lodged a review application with the Labour Court, but the review application was dismissed.¹¹⁰

Whilst this paper agrees with the verdict of the court in the *Njilo* case, it is, however reasonably arguable that the courts missed the crux of the matter in this case. Taking a closer look at the policy, it drew the inference of excluding certain family members from section 27 of BCEA, even more concerning, the policy's provisions are actually better than those of section 27 of the BCEA, yet it still caused such issues. The crux of the matter here is the underlying issue of exclusion of certain family members that can be regarded as immediate family by certain cultures. The Act, which purports to promote the spirit of the Constitution – an equal, open and democratic society, should accommodate the accepted (and celebrated) African diversity and customs. In this regard, it can be argued that the Act's definition of immediate family is western/euro-centric and should shift to accommodate the current realities of South African families.

3.4. Caregiving leave

Maternity leave, adoption leave, surrogacy leave, and parental leave are all going to be discussed under the caregiving sub-topic because they are all related to employees being

¹⁰⁶ (2022) 43 ILJ 2393 (LC).

¹⁰⁷ (2022) 43 ILJ 2393 (LC).

¹⁰⁸ (2022) 43 ILJ 2393 (LC).

¹⁰⁹ (2022) 43 ILJ 2393 (LC).

¹¹⁰ (2022) 43 ILJ 2393 (LC).

parents to their children, and the loopholes identified in these types of leaves are linked to each other.

3.4.1. Parental leave

Even though there has been substantial legal reforms over the past two decades, inequality between men and women is still evident in many areas of life,¹¹¹ in South Africa, equality in the workplace has improved, with more women entering and staying in long-term jobs.¹¹² However, it's important to note that most efforts to change towards gender transformation in work have focused on increasing women's rights, while not much attention has been given to the challenges men face regarding family responsibilities and similar issues.¹¹³

A practical example of the above-mentioned statement would be the leave entitlements men have when it comes to being parents, as compared to women. Section 25 of the BCEA grants the birth mother, four months of consecutive maternity leave whilst the other parent, often father are only entitled to 10 days of parental leave.¹¹⁴ The fathers of the children are often perceived to play an 'ancillary role' in the child's life, thus creating a clear differentiation in the parental leave stipulation. The mere 10 days that is granted to the other parent who is not a birth mother, fathers in most circumstances, might not be enough to advocate for caregiving and more fatherly involvement in their child's upbringing.

3.4.2. Discrimination based on the mode of conception.

The BCEA also unfairly discriminates on mothers and parents based on their mode of conception. The Act grants commissioning parents and adoptive parents 10 weeks' leave for one parent, and the other parent can opt for parental leave.¹¹⁵ There is a 6-week difference between the period granted to natural birth mothers and that granted to adoptive parents and commissioning parents. Even though one may argue that the birth

¹¹¹ Stoneman 2017 Emory Int'l L. Rev. 51

¹¹² Worldbank <https://data.worldbank.org/indicator/sl.tif.totl.fe.zs> (accessed 2024-09-10).

¹¹³ Katrina A *et al* 2023.

¹¹⁴ *Amendment Act of 2002: sec. 25A(1)(2)(A)*.

¹¹⁵ *Van Wyk and Others v Minister of Employment and Labour* [2023] ZAGP JHC 1213.

mother needs more time to heal as mandated by section 25 of the BCEA that employees may not go to work within six weeks after birth unless safety is guaranteed by a doctor or a midwife,¹¹⁶ without invalidating the need to recognize and assure proper physical recovery for birth mothers as provided for by legislation, this research also acknowledges that the High Court in the *Van Wyk* case noted that the BCEA provisions are related to the child's nurturing and not the physiological needs of a birth mother.¹¹⁷ Since this research advocates for transformation, equality and inclusivity, it highly advocates for an Ubuntu-based approach to leave, that is why the research is in agreement with the court's finding in this case., Nevertheless, the research proffers that had the Van Wyk case followed an Ubuntu-based approach, it could have addressed some of the challenges that still persist in South Africa's leave framework. Below, I conduct an in-depth discussion of the Van Wyk case to determine the extent to which it positively impacted the current legislative provisions with respect to leave and what else is still outstanding.

3.4.3. Van Wyk and Others v Minister of Employment and Labour and Others (2022/017842) [2023] ZALCJHB 2: Section 25 of the BCEA

In the Van Wyk case, these were the facts, Mr Van Wyk was a salaried employee and Mrs Van Wyk owned her business, the couple then decided that Mrs Van Wyk shall return to trade as soon as possible after she gave birth to their child, this was so she can ensure smooth running and sustainability of the business.¹¹⁸ Mr Van Wyk was the one who could take leave and take care of the child whilst Mrs Van Wyk is back to business, however Mr Van Wyk did not qualify for more than 10 days of parental leave and he ended up taking a partially unpaid extended leave after having made this agreement with his employer,¹¹⁹ he was unfortunately not eligible for the UIF benefits.¹²⁰

The legal issue was whether section 25A, 25B and 25C of the BCEA unfairly discriminated parents and whether they were consistent with sections 9 and 10 of the Constitution, the

¹¹⁶ *Basic Conditions of Employment Act: sec. 25(3).*

¹¹⁷ *Van Wyk and Others v Minister of Employment and Labour* [2023] ZAGP JHC 1213.

¹¹⁸ *Van Wyk and Others v Minister of Employment and Labour* [2023] ZAGP JHC 1213.

¹¹⁹ *Van Wyk and Others v Minister of Employment and Labour* [2023] ZAGP JHC 1213.

¹²⁰ *Van Wyk and Others v Minister of Employment and Labour* [2023] ZAGP JHC 1213.

court found the provisions of section 25, 25A, 25B and 25C of the BCEA and sections 24, 26A, 27 and 29A of the UIF Act to be invalid because they were found inconsistent with section 9 and 10 of the Constitution.¹²¹ The parliament is granted two years to cure the defects.¹²² The interim provisions include that the child bearing parents have the discretion of allocating the four-month parental leave period amongst themselves in their preferred manner, or the period can be allocated to them freely, secondly, parents who adopts a child that is younger than two years are now entitled to the same leave stipulations like the child bearing parents, the court justified the two year age restriction by saying that children who are less than two needs more intensive nurturing than the ones who are older than two years,¹²³ this paper finds this very problematic and is of the view that adoptive parents deserve time to bond and nurture their newly adopted minor children regardless of their age, also when viewed in the lenses of prioritizing the best interest of the child, it would be reasonably expected for adoption leave to be granted in cases of minor children adoption without necessarily basing it on age. The third interim provision following the Van Wyk case was that Commissioning parents are also now entitled to the same leave entitlement as the child-bearing parents.¹²⁴

The court in the *Van Wyk* case based their judicial decision in that section 25, 25A, 25B and 25C of the BCEA and the corresponding provisions of the UIF Act, section 24, 26A, 27 and 29A are inconsistent with section 9 and 10 of the Constitution because they unfairly discriminate between mothers and fathers, they unfairly discriminate between one set of parents and the other in relation to whether the children were born of the mother, conceived by surrogacy or were adopted. Section 25 entitles/d a pregnant employee to four months consecutive maternity leave,¹²⁵ section 25A entitles employees who are parents of a child to 10 days consecutive leave when their child is born,¹²⁶ or when the adoption is granted,¹²⁷ or when a child is placed in the care of anticipated adoptive parent

¹²¹ *Van Wyk and Others v Minister of Employment and Labour* [2023] ZAGP JHC 1213.

¹²² *Van Wyk and Others v Minister of Employment and Labour* [2023] ZAGP JHC 1213.

¹²³ *Van Wyk and Others v Minister of Employment and Labour* [2023] ZAGP JHC 1213.

¹²⁴ *Van Wyk and Others v Minister of Employment and Labour* [2023] ZAGP JHC 1213.

¹²⁵ *Basic Conditions of Employment Act*: sec. 25.

¹²⁶ *Basic Conditions of Employment Act*: sec. 25A.

¹²⁷ *Basic Conditions of Employment Act*: sec. 25A.

by a competent court pending conclusion of the adoption order.¹²⁸ Section 25B grants employees who are adopted parents of a child that is less than two years,¹²⁹ ten weeks consecutive adoptive leave or ten days parental leave when the adoption is granted or the child is placed at their as prospective parents by a competent court,¹³⁰ lastly, section 25C entitles/d commissioning parent in a surrogate motherhood agreement to at least ten weeks consecutive commissioning parental leave or ten consecutive days parental leave when their child is born as provided by the agreement.¹³¹

The *Van Wyk* judgment has established a precedent which can pave a way to a more equal and inclusive work environment for all South African parents.

3.4.4. Possible Practical Challenges related to the interim measures

There is no doubt that the *Van Wyk* case sets a precedent that advocates for more equal and inclusive BCEA which reflects the realities of our modern societies, however, the precedent set has also left a lot of questions and possible practical implications in place. Firstly, the judgement does not explicitly stipulate how the taking of parental leave by parents simultaneously will be carried out in instances of natural birth, adoption and surrogacy. Secondly, in terms of section 25(3) of the BCEA, a birth mother is not allowed to go back to work within the next six weeks of giving birth, which basically means that birth mothers are automatically entitled to the first six weeks leave period after birth. However, the precedent set in the *Van Wyk* case does not really provide clear guidance on how this will affect parental leave; what will the situation be when it comes to sharing the parental leave? Lastly, there are likely a lot of couples and parents who often do not see eye to eye, the judgement in the *Van Wyk* case further widened the lacuna on how disputes arising between parents on how to share the parental leave will be resolved. In that regard, what will happen if the two parents cannot reach an agreement on how to divide their four months of parental leave?

¹²⁸ *Basic Conditions of Employment Act*: sec. 25A.

¹²⁹ *Basic Conditions of Employment Act*: sec. 25B.

¹³⁰ *Basic Conditions of Employment Act*: sec. 25B.

¹³¹ *Basic Conditions of Employment Act*: sec. 25C.

It is quite evident that whilst the proposed amendments will be focused on merely BCEA sections, more gaps will be opened and more challenges will also come to play, the approach that this paper is advocating for, being the rethinking of underlying BCEA principle advocates for an Ubuntu based principle and consequently this principle is in agreement with the perspective that was followed by a Labour Court judge in the matter of *Mia v The State*, this approach prioritizes the best interest of the child when it comes to leaves that are focused on parents being parents.¹³²

3.5. Section 26 of the BCEA – Protection of employees before and after birth of a child.

In the famous case of *Manyetsa v New Kleinfotnein*, judge Tlhotlhemaje noted at follows:

Be it as it may, the policy (pregnant policy) having been modeled on the BCEA, clause 5.4 cannot therefore be attacked on the grounds of being unfair or not rational, particularly in the light of the lacuna in section 26(6) of the BCEA.¹³³

Section 26 of the BCEA provides for pregnant women who work in hazardous or risky environments to be placed on extended leave if no alternative suitable employment that has favourable working conditions compared to their initial work was found for them.¹³⁴ The Code of Good Practice identifies four types of hazards that can be found in the workplace, the physical hazards, ergonomic hazards, chemical hazards and biological hazards.¹³⁵ Section 26 of the BCEA does not stipulate whether the possible extended leave is paid or unpaid and, in most cases, it has been interpreted as unpaid, like in the *Manyetsa* and *Mahlangu* cases.¹³⁶ The second gap in the stipulations of this section is

¹³² *Mia v The State* (604/08) ZASCA 47.

¹³³ *Manyetsa v New Kleinfotnein Gold Mine (Pty) Ltd* (2018) 39 ILJ 415.

¹³⁴ *Basic Conditions of Employment Act*: sec. 26.

¹³⁵ *Code of Good Practice on the Protection of Employees during Pregnancy and after the Birth of a Child*.

¹³⁶ (2018) 39 ILJ 415.

the part addressing 'alternative suitable employment with no less favorable conditions than their initial employment. Section 26(2) of the BCEA further provides that the alternative suitable employment under hazardous and risky workplaces shall be offered by the employer to the employee if it is practicable to do so.¹³⁷

The term 'practicable' is not defined in the BCEA,¹³⁸ this term is defined in the *Manyetsa* case, the normal meaning of the term entails whether something is capable of being accomplished, put in practice or done.¹³⁹ the ILO Maternity Protection Recommendation uses 'feasible' which can be equally ascribed to 'practicable'.¹⁴⁰ In the *Manyetsa* case it is further alluded that 'practicable' can also be referenced to something that is attainable, viable, achievable, realistic, possible and workable.¹⁴¹

Even though the *Manyetsa* case provides some guidance in relation to the test of 'practicable', various workplaces still face problems and uncertainty when it comes to this issue, like in the *Mahlangu* case. In the case of *Mahlangu v Samancor Chrome Ltd* 2020(41) ILJ, the appellant was working as an underground heavy-duty truck driver There was a clause in their 'Pregnancy in the Workplace Procedure', which limited leave to be applicable to only one maternity leave during a three-year cycle and if a female fell pregnant twice within three years, she would then as per BCEA stipulations, be granted four months unpaid leave.¹⁴² Mahlangu was an appellant in the Labour Appeal Court appealing the court a quo's decision which dismissed the CCMA decision of unfair discrimination.¹⁴³ Mahlangu appealed the Labour Court's decision, and the appeal succeeded in the LAC.¹⁴⁴ In this case, Mahlangu was claiming that her employer unfairly discriminated against her based on pregnancy by not placing her in an alternative position prior to her going on unpaid leave. In the Mahlangu matter, an employee who reported her pregnancy after Mahlangu was placed in alternative position,¹⁴⁵ which then begs the

¹³⁷ *Basic Conditions of Employment Act: sec. 26(2)*.

¹³⁸ *Manyetsa v New Kleinfotnein Gold Mine (Pty) Ltd* (2018) 39 ILJ 415.

¹³⁹ *Manyetsa v New Kleinfotnein Gold Mine (Pty) Ltd* (2018) 39 ILJ 415.

¹⁴⁰ International Labour Organisation's (ILO) Maternity Protection Recommendation.

¹⁴¹ *Manyetsa v New Kleinfotnein Gold Mine (Pty) Ltd* (2018) 39 ILJ 415.

¹⁴² *Mahlangu v Samancor Chrome Ltd* 2020(41) ILJ.

¹⁴³ 2020(41) ILJ.

¹⁴⁴ 2020(41) ILJ.

¹⁴⁵ 2020(41) ILJ.

question of which procedure shall practically be followed to find alternative suitable employment for pregnant employees working in hazardous areas.

The question will be then, what qualifies as alternative suitable employment? What test is in place to see whether the employer exhausted all possible remedies to find the alternative suitable employment? For example, in the case of *Manyetsa*, it was alleged that other female employees who got pregnant after *Manyetsa* were placed on alternative jobs whilst one could not be found for her.¹⁴⁶ This begs the questions of what was different in the circumstances between *Manyetsa* and the other colleagues, and whether this differentiated approach be justified. Where there are no set standards, or test to be applied in cases like *Manyetsa*'s, there is always the risk of employees not being treated equally. The last question that arises is whether the employees' skills are the ones considered in finding alternative suitable employment. Shouldn't financial freedom outweigh position and skills in the interim? In the case of *Manyetsa*, she ended up losing her house and having to go stay with her family with a newborn baby because she could not afford to take care of all her expenses.¹⁴⁷ In such instances, an Ubuntu-based framework would consider things like the possible financial effects that may be encountered by the employer if they are without income for such a long time and, if possible, would advocate for employees to have the discretion of accepting a job that pays less or a lower position in the interim until they are fit to go back to their risky jobs. The above approach speaks to both the financial freedom of the parents and the best interest of a child because, if a parent can materially provide for their child because of having financial security, part of the interests of the child are already taken care of.

Using the circumstances that arose in the *Manyetsa* case and the court definition which can be a guide on 'alternative suitable employment', it is undeniable that the test to this involves various factors, including the assessing whether the alternative position is genuinely available,¹⁴⁸ whether it can serve as a suitable alternative,¹⁴⁹ whether it is

¹⁴⁶ *Manyetsa v New Kleinfotnein Gold Mine (Pty) Ltd* (2018) 39 ILJ 415.

¹⁴⁷ *Manyetsa v New Kleinfotnein Gold Mine (Pty) Ltd* (2018) 39 ILJ 415.

¹⁴⁸ *Manyetsa v New Kleinfotnein Gold Mine (Pty) Ltd* (2018) 39 ILJ 415.

¹⁴⁹ *Manyetsa v New Kleinfotnein Gold Mine (Pty) Ltd* (2018) 39 ILJ 415.

suitable for the concerned employee,¹⁵⁰ this test consider the job content,¹⁵¹ appropriate skills and experience of the affected employee as can be seen as well from *Manyetsa*, and the terms of this alternative position.¹⁵² Importantly, the case of *Manyetsa* also notes the importance of considering personal circumstance of the affected pregnant employee,¹⁵³ which is a strong leg of advocating for ubuntu and realism in the midst of wanting to also follow the formalities and exhaust the test.¹⁵⁴ The *Manyetsa* case highlights that a proper assessment of 'alternative suitable employment' includes realizing that what may be considered alternative may not be suitable for the employee and what may be suitable might not be available at that moment,¹⁵⁵ emphasizing the importance of viewing this in *Ubuntu* lenses

¹⁵⁰ *Manyetsa v New Kleinfotnein Gold Mine (Pty) Ltd* (2018) 39 ILJ 415.

¹⁵¹ *Manyetsa v New Kleinfotnein Gold Mine (Pty) Ltd* (2018) 39 ILJ 415.

¹⁵² *Manyetsa v New Kleinfotnein Gold Mine (Pty) Ltd* (2018) 39 ILJ 415.

¹⁵³ *Manyetsa v New Kleinfotnein Gold Mine (Pty) Ltd* (2018) 39 ILJ 415.

¹⁵⁴ *Manyetsa v New Kleinfotnein Gold Mine (Pty) Ltd* (2018) 39 ILJ 415.

¹⁵⁵ *Manyetsa v New Kleinfotnein Gold Mine (Pty) Ltd* (2018) 39 ILJ 415.

3.6. The Best Interest of the Child

In the case of *Mia v State*, the labour court judge, honourable D H Gush has stated the following:

This approach ignores the fact that the right to maternity leave as created in the BCEA 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.¹⁵⁶

Judge Gush made this remark following the employer's justification for only allowing maternity leave for birth mothers. The justification was premised on the reasoning that at least 10 weeks of maternity leave benefits were introduced to protect birth mothers due to physical incapacity to work after childbirth.¹⁵⁷

MIA entered into a surrogacy agreement and was denied maternity leave by his employer on the basis that maternity leave was solely for birth mothers for the above-outlined psychological incapacity reason.¹⁵⁸ In turn, the Applicant was granted two months of paid adoption leave and two months unpaid leave. The matter started in the CCMA and went to the Labour Court, and both courts granted a verdict in favour of the Applicant.¹⁵⁹ The Labour court reiterated the importance of considering the best interest of the child in applying section 25 of the BCEA concerning the employer. In this case, the policy he had related to maternity leave provisions and/or qualifying was in line with section 25 of the BCEA.¹⁶⁰

South Africa, as per the Children's Act 38 of 2005 and the Constitution, prioritises the best interest of the child on all matters that involve the care, protection and well-being of

¹⁵⁶ *Mia v The State* (604/08) ZASCA 47.

¹⁵⁷ (604/08) ZASCA 47.

¹⁵⁸ (604/08) ZASCA 47.

¹⁵⁹ (604/08) ZASCA 47.

¹⁶⁰ (604/08) ZASCA 47.

a child.¹⁶¹ Section 28 of the Constitution grants every child the right to family care and parental care.¹⁶² With the discrimination based on the mode of conception that is currently in place in terms of the BCEA, it is questionable whether the best interests of the child are understood to be of paramount interest. The current stipulations are clearly influenced or underlined by who the parent is and what the mode of conception was in place which resulted in the parenthood.

3.7. Summary

The BCEA binds itself to protect vulnerable employees, to give effect to the right to fair labour practices and to establish basic conditions that are socially acceptable for employees. The current realities of workers when it comes to stipulations of Chapter 3 does not reflect this in a sense that various employees who have been seeking protection from chapter 3's stipulations have been in turn disadvantaged due to the discussed shortcomings and lacunas of the chapter, a practical example would be drawn from the cases discussed in this chapter of the research. South Africa can learn a lot from various countries that prioritizes care giving leave, and the next chapter will be outlining international standards on leave, this will be done by analyzing both foreign law and international law. The next chapter discusses international law instruments and foreign law in a bid to determine whether the BCEA is in line with international best practices and find if there are any lessons as to how the identified challenges to Chapter 3 of the BCEA can be resolved.

¹⁶¹ *Constitution*: sec. 9(3).

¹⁶² *Constitution*: sec. 28.

CHAPTER 4: INTERNATIONAL STANDARDS PERTAINING TO LEAVE

4.1. Introduction

4.1.1 International Law and South African Democracy

This research makes references, recommendations and comparisons to international law; as a point of departure, it will address South Africa's commitment to international law. This research will give a brief overview of how international law became one of our democratic pillars and the extent to which international law is applicable in South Africa.

From 1948 to 1990 there was a conflict between South Africa, and international community due to the Apartheid practice and laws.¹⁶³ Apartheid in South Africa was associated with the breaching of international law, the democratization was then inevitably linked with great receptiveness of international law at a domestic level.¹⁶⁴ The 1993 interim Constitution restored international law as a respected component of South African law.¹⁶⁵ The international law, which was previously viewed as a threat to the state, is now perceived as one of the new democracy pillars.¹⁶⁶

The interim Constitution, which was drafted by several political groups in Kempton Park in 1993, came into effect on April 1994 and governed South Africa's first-ever democratic elections.¹⁶⁷ The Final Constitution was drafted from January 1995 to May 1996, and after the few recommendations which were brought by the Constitutional Court were remedied,

¹⁶³ J Dugard 1997.

¹⁶⁴ M Olivier 2009.

¹⁶⁵ M Olivier 2009.

¹⁶⁶ J Dugard 1997.

¹⁶⁷ J Dugard 1997.

this Constitution came into effect in December 1996.¹⁶⁸ The previous South African Constitutions did not mention or include international law and this was remedied by both the interim and the final South African Constitutions.¹⁶⁹

In the case of *Azanian Peoples Organization v President of the Republic of South Africa*, (CCT17/96) [1996] ZACC 16, it was stipulated that International law and the contents of international treaties which South Africa might or might not be part of are relevant only in the interpretation of the Constitution itself, on the grounds that Constitution lawmakers shall not lightly be presumed to authorize any law that might breach the obligations of the state in terms of international law.¹⁷⁰

4.1.2 South Africa's Commitment to International Law and Foreign law

Section 39(1) of the Constitution provides that when interpreting the Bill of Rights, a court or tribunal or forum must consider international law and may consider foreign law.¹⁷¹ The use of the word 'must' as opposed to 'may' points to the consideration of international law being peremptory rather than optional. Section 35(1) of the Constitution provides that:

In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.¹⁷²

Section 231 of the Constitution governs international agreements, and their binding nature to the public....¹⁷³ Section 233 stipulates 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. Lastly, section 232 states that Customary International law is law in the

¹⁶⁸ J Dugard 1997.

¹⁶⁹ J Dugard 1997.

¹⁷⁰ *Azanian Peoples Organization v President of the Republic of South Africa* 1996 (4) para 26.

¹⁷¹ *Constitution*: sec. 39.

¹⁷² *Constitution*: sec. 35(1).

¹⁷³ *Constitution*: sec. 231.

Republic unless it is inconsistent with the Constitution or an Act of Parliament¹⁷⁴ All these sections put emphasis on how South African bounds itself to commit and abide to the international law. In *S v Makwanyane*, the Constitutional Court stated that international law gives a framework that can be evaluated and understood, and specialized agencies like the International Labour Organization can grant guidance to correct interpretation of provisions.¹⁷⁵ South Africa rejoined the ILO in 1994 when it was firstly demanded to adjust and review its national legislation and bring it to alignment with the International Law.¹⁷⁶

4.1.3 The International Labour Organisation (ILO) Conventions

The International Labour Organization sets labour standards, develop policies and come up with programmes that promotes decent work for all men and women, this organization bring together governments, employers and employees of 187 members states, it aims at protecting social justice and internationally recognized human and labour rights.¹⁷⁷

International law and international labour standards play a pivotal role in the development of labour law and it is also a source of Customary International law.¹⁷⁸ Following the apartheid regime's non-conformity with international law, South Africa rejoined the International Labour Organization on the 26th of May 1994 and ratified all 8 core conventions.¹⁷⁹ Currently, South Africa has ratified 28 ILO conventions.¹⁸⁰ It ratified 9 out of 10 fundamental conventions,¹⁸¹ 2 out 4 governance conventions, and 17 out of 177 technical conventions.¹⁸² Out of the 28 conventions ratified by South Africa, 23 are in force.¹⁸³ No convention has been ratified in the past 12 months, and no convention has been denounced.¹⁸⁴ There are 55 conventions that are not ratified by South Africa.¹⁸⁵

¹⁷⁴ *Constitution*: sec. 232.

¹⁷⁵ *S v Makwanyane* (CCT3/94) [1995] ZACC 3.

¹⁷⁶ International Labour Organization: Decent Work Programme (South Africa).

¹⁷⁷ International Labour Organization: About the ILO.

¹⁷⁸ Du Toit *et al* Labour Relations Law A Comprehensive Guide 3rd ed (South Africa Lexis Nexis) 78-79.

¹⁷⁹ Du Toit *et al* Labour Relations Law A Comprehensive Guide 3rd ed (South Africa Lexis Nexis) 78-79.

¹⁸⁰ International Labour Organization: Ratifications for South Africa.

¹⁸¹ International Labour Organization: Ratifications for South Africa.

¹⁸² International Labour Organization: Ratifications for South Africa.

¹⁸³ International Labour Organization: Ratifications for South Africa.

¹⁸⁴ International Labour Organization: Ratifications for South Africa.

¹⁸⁵ International Labour Organization: Ratifications for South Africa.

South Africa has not ratified any Conventions nor Recommendation that regulates maternity leave or protection.¹⁸⁶

4.2. Caregiving leaves and Work-life balance

There are various factors that need to be considered when it comes to work-family life balance; the balance is not only associated with the reduction of work hours, but the availability of sufficient leave entitlements, which allows employees to carry out their caregiving responsibilities, also contributes to the balance.¹⁸⁷

Previously, Caregiving leaves have been highly focused on the benefits associated with women and maternity leave, but in the current era, Caregiving leave has become more inclusive for both males and females.¹⁸⁸ This shift has been significantly influenced by the change in the perspective that is used to view caregiving responsibilities as though it were only duties for females, but with the understanding that caregiving responsibilities can vest in anyone regardless of gender, and the women increased participation in formal employment has also influenced the shift of associating caregiving responsibility as though it is gender-based.¹⁸⁹

4.2.1 International Law on ‘Caregiving’ nature of leaves

4.2.1.1 Introduction to the ILO Care at Work Report.

The ILO’s Care at Work report aims at investing in care leave and services for a more gender-equal world of work.¹⁹⁰ The Care at Work report shows that investing in care policies has the potential to generate decent work in care sectors, strengthen social protection systems and also close the long-standing gender gaps at work and home.¹⁹¹ The Report outlines that even prior to the COVID-19 pandemic, gender inequality at homes and workplaces already existed, and the inequalities were aggravated by the

¹⁸⁶ International Labour Organization: Ratifications for South Africa.

¹⁸⁷ 2020 De Jure Law Journal

¹⁸⁸ Cohen and Gosai 2016 ILJ 2239.

¹⁸⁹ 2020 De Jure Law Journal.

¹⁹⁰ International Labour Organization: Care at work.

¹⁹¹ International Labour Organization: Care at work.

pandemic.¹⁹² One of the pillars of the ILO's human-centred agenda is a balanced sharing of paid work and family responsibilities at home and between families.¹⁹³

In terms of the Report, the following falls under the category of transformative care policies:

- a) Time to care and be cared for – This would be the care leave which support all care needs including illness, disability and breastfeeding and it is equally distributed among all carers.¹⁹⁴
- b) Income security – This speaks to care-related cash benefits, including during leave, such benefits ensure health, well-being and dignity of caregivers and receivers.¹⁹⁵
- c) Services – This speaks to access to quality healthcare, childcare, education and long-time care services which meet the needs of caregivers and receivers.¹⁹⁶
- d) Rights – This prevents and grants protection from all forms of discrimination and assures employment protection, safe and healthy workplace, decent working time and freedom of association and right to collective bargaining.¹⁹⁷

The transformative care policy is regarded as a key component of the ILO's 5R framework for Decent Work to promote a high road to care work, which is done by recognizing, redistributing, and reducing, rewarding and representing housework and family care.¹⁹⁸

The main policy areas for 5R are care policies, macroeconomic policies, social protection policies, labour policies and migration policies.¹⁹⁹ The policy recommends recognising, reducing and redistributing unpaid care work, rewarding more decent work for care workers and representation recommends recognizing, reducing and redistribution of unpaid care work, rewarding more decent work for care workers and representation, which advocates for social dialogue and collective bargaining for care workers.²⁰⁰

4.2.2 International Labour Standards on Maternity Leave

¹⁹² International Labour Organization: Care at work.

¹⁹³ International Labour Organization: Care at work.

¹⁹⁴ International Labour Organization: Care at work.

¹⁹⁵ International Labour Organization: Care at work.

¹⁹⁶ International Labour Organization: Care at work.

¹⁹⁷ International Labour Organization: Care at work.

¹⁹⁸ International Labour Organization: Care at work.

¹⁹⁹ 5R framework for International Labour Organization: Decent work.

²⁰⁰ 5R framework for ILO Decent work

The importance of maternity leave and its purpose is explicitly outlined in the ILO's Care at Work report. As per the report, paid and job-protected maternity leave is important to the life, health, safety and economic protection of women and their children.²⁰¹ Maternity leave is therefore, viewed as a pre-condition to the right to care and be cared for.²⁰² Regarding the maternity leave duration, the ILO standard mandates a minimum of 14 weeks of maternity leave.²⁰³ This period required by the ILO also highlights the possible contradictions and practical challenges in relation to the new developments in South Africa emanating from the *Van Wyk case*, particularly with regard to the duration of the leave - especially if no proper guideline on the practicality and strategy of the developments is drafted.

In terms of maternity leave payment, the ILO requires that the amount of maternity leave cash benefits 'shall be adequate to keep the woman and her child healthy and out of poverty'.²⁰⁴ If our courts and legislature in South Africa can appreciate the importance of this specific provision, quagmires like the one that was discussed in chapter 3 where Manyetsa found herself homeless with a new-born baby because there was no suitable employment found for her, could be minimized.²⁰⁵ The loophole in section 26 of the BCEA will be attended to by using an Ubuntu-based approach, which will be discussed thoroughly in the following chapter.

The ILO further stipulates that maternity leave is a collective responsibility and for the public good, and thus requires maternity leave cash benefits to be provided through public funds or compulsory social insurance and employers financing maternity leaves should not be solely the liability of employers.²⁰⁶ It further requires that adequate maternity benefits through non-contributory social assistance funds be provided to women that do not qualify for benefits out of social insurance like the ones in the informal economy.²⁰⁷

²⁰¹ International Labour Organization: Care at work.

²⁰² International Labour Organization: Care at work.

²⁰³ ILO Maternity Protection Convention 183 of 2000.

²⁰⁴ Convention 183 of 2000.

²⁰⁵ *Manyetsa v New Kleinfotnein Gold Mine (Pty) Ltd* (2018) 39 ILJ 415.

²⁰⁶ International Labour Organization: Care at work.

²⁰⁷ International Labour Organization: Care at work.

In conclusion, even though South Africa has not ratified the ILO Maternity Protection Convention 183 of 2000,²⁰⁸ which then entails that the mandated stipulations as per this convention do not have a binding nature in South Africa, South Africa can still draw lessons or take guidance in respect of maternity leave. Considering the new developments in South Africa from the verdict in the *Van Wyk* case where the parliament is granted two years to amend the BCEA, these stipulations can be used to make sure that the BCEA is amended accurately in a way that does not open lot of issues in the future, whilst fixing another side be opening a floodgate on another.

4.2.3 International Standards on Paternity Leave: The rise in men’s care rights and responsibilities

This specific type of leave, as addressed by the ILO Care at Work report, is one of the most significant parts which are facing challenges as a result of possible inequality from the BCEA stipulations. Paternity leave plays an important role in recognizing men’s caregiving role.²⁰⁹

As per the report, paternity leave challenges the norm that women should be the main caregivers, whilst men are perceived as breadwinners.²¹⁰ Paternity leave is said to draw fathers into the daily realities of childcare, enables them to develop parenting skills and to become active co-parents throughout the child’s life.²¹¹ With many countries reforming their labour legislations and including same sex and adoptive parents under paternity leave provisions, the benefits of paternity leave are also evident for same-sex and adoptive parents.²¹² The Report also categorizes paternity leave as a collective responsibility. Comparison will be made to various foreign countries on how they enforce paternity leaves and caregiving leaves which play such a significant impact in uniting families and breaking family stereotypes.

4.2.4 Foreign Perspectives on caregiving leaves

²⁰⁸ International Labour Organization: Ratifications

²⁰⁹ International Labour Organization: Care at work.

²¹⁰ International Labour Organization: Care at work.

²¹¹ International Labour Organization: Care at work.

²¹² International Labour Organization: Care at work.

Over the past decade, there has been a huge change in employer and cultural support for fathers.²¹³ More companies are providing paternity leave and various work-life balance initiatives for new fathers in heterosexual couples, adopting couples and LGBTQI couples.²¹⁴ Various organizations from different countries now offer “parental bonding leave” and “secondary caregiver leave” for all types of parents regardless of their mode of conception which acknowledges the substantial benefits for individuals, families, and children.²¹⁵ There has been an increased recognition of adoption parents to the extent that some countries might be viewed to favour the other parents or fathers more than biological parents. For example, in Ukraine, adoptive fathers have the right to 56 days of paid paternity leave, while biological fathers have the right to 14 days of unpaid paternity leave.²¹⁶ Similarly, a 2021 labour law reform allows Kenyan adoptive fathers to take one month of fully paid paternity leave instead of 14 days.²¹⁷ In other countries, however, the length of paternity leave for adoptive fathers is shorter than for biological fathers. For example, in Suriname, adoptive fathers qualify for five days of paternity leave, which is three days less than that of biological fathers.²¹⁸ In Turkey, adoptive fathers are entitled to just three of the five days of paternity leave available to biological fathers.²¹⁹ As has been stipulated the provisions of these countries in approaching adoption leave is the increased recognition of adoptive parents and whilst the research strives for equality it appreciates and notes the importance to continually reevaluate labour laws to meet the standards of diverse communities.

Caregiving leave is of great significance to make parents present and responsible in their families, and one might recommend that caregiving leave be made compulsory like maternity leave. A few countries share the same sentiments that paternity leave deserves to be made mandatory. There are eight countries that have mandatory paternity leave being Chile, the Islamic Republic of Iran, Italy, Luxembourg and Suriname, and in some

²¹³ International Labour Organization: Care at work.

²¹⁴ International Labour Organization: Care at work.

²¹⁵ International Labour Organization: Care at work.

²¹⁶ International Labour Organization. Care at work: Ukraine.

²¹⁷ International Labour Organization. Care at work: Kenya.

²¹⁸ International Labour Organization: Care at work: Suriname.

²¹⁹ International Labour Organization: Care at work: Turkey.

countries like Portugal, France and Spain a portion of paternity leave is compulsory.²²⁰ In France, 4 out 25 days of paternity leave are compulsory,²²¹ in Portugal 20 out 25 days are compulsory and,²²² in Spain 42 out of 112 days are compulsory.²²³

4.3. The promising future of Paternity leave and caregiving approach in other countries

Various companies from several foreign countries offer different policies for supporting paternity leave as a collective effort,²²⁴ South African employers and companies can derive some of the caregiving or paternity supporting leave strategies from those countries. Below a comparison will be made between companies from Egypt, Japan, the United States, India and Sweden.

In Egypt, there is an initiative called Sekem which is adopted by various companies and allows men to benefit from paternity leave despite this leave being not guaranteed in Egyptian legislation,²²⁵ Japan, Fujitsu company has adopted various measures to support the care and responsibilities of its workers, this company offers 14 weeks of paid paternity leave.²²⁶ In the United States, the consulting firm EY has revamped the leave policy for its employees in the United States and provides 16 weeks of paid parental leave for all employees who are welcoming a child through birth, adoption, surrogacy, foster care or legal guardianship.²²⁷ This gender-neutral parental leave has replaced its previous 12 weeks maternity leave provision and a 6-week leave for new fathers and adoptive parents.²²⁸

In India in 2021, Diageo, certain companies have introduced family leave policy that takes into consideration surrogacy, adoption and biological conception, which then offers

²²⁰ International Labour Organization: Care at work.

²²¹ International Labour Organization: Care at work: France.

²²² International Labour Organization: Care at work: Portugal.

²²³ International Labour Organization: Care at work: Spain.

²²⁴ International Labour Organization: Care at work.

²²⁵ International Labour Organization: Care at work.

²²⁶ International Labour Organization: Care at work.

²²⁷ International Labour Organization: Care at work.

²²⁸ International Labour Organization: Care at work.

employees a 26-week parental leave which has all benefits and bonuses irrespective of gender or sexual orientation.²²⁹

Work-life balance is held at high priority of gender equality in Sweden, ensuring that everyone, regardless of gender, has the right to support themselves while balancing career and family life.²³⁰ This principle is important for strengthening the economy,²³¹ as Sweden has long pursued policies aimed at achieving equal participation of men and women in the workforce to maximize growth.²³² Sweden became the first country to replace gender-specific maternity leave with parental leave, allowing both parents the opportunity to take time off to care for their children in 1974.²³³

In Sweden, the Swedish parental insurance entitles parents to 480 days of paid parental leave when a child is born or adopted.²³⁴ Each parent, if it is two of them, is entitled to 240 days, and a single parent is entitled to the full 480 days.²³⁵

4.4. Funding for Paternity leave

The source of funding for paternity leave varies from country to country, in some countries, it cashes through social insurance,²³⁶ in other countries, it is mix of social insurance and employer liability,²³⁷ and whilst in some countries, although rare, the cost of paternity leave is fully borne by employers.²³⁸

4.4.1. Source of funding for Unpaid leave in South Africa

As it has been stipulated, the South African legislation provides for only 10 days of parental leave, adoption leave and commissioning leave, whilst it provides for 16 weeks

²²⁹ International Labour Organization: Care at work.

²³⁰ E Hanson et al 2022.

²³¹ E Hanson et al 2022.

²³² E Hanson et al 2022.

²³³ E Hanson et al 2022.

²³⁴ E Hanson et al 2022.

²³⁵ E Hanson et al 2022.

²³⁶ International Labour Organization: Care at work.

²³⁷ International Labour Organization: Care at work.

²³⁸ International Labour Organization: Care at work.

of maternity leave; these are financed through the Unemployment Insurance Fund governed by the Unemployment Insurance Act.²³⁹

Under the Unemployment Insurance Act 63/2001 (UIA), the benefits available for parental leave are severely limited. The maximum period for parental benefits is 10 days at 66% rate of earnings,²⁴⁰ applicable only to one registered parent of a child born through surrogacy, and the commissioning parental benefits are only limited to one contributor parent of a child born from surrogacy for a maximum period of 10 consecutive weeks at 66% of the rate of earnings.²⁴¹ The same applies to parents of adopted children who are less than two years old. These provisions do not provide adequate support for taking care of children and might possibly hinder the financial freedom of the affected families.

4.5. Summary

To conclude, the ILO's Care at Work report emphasises the importance of caregiving leave policies, which aim at promoting gender equality and improving economic outcomes. The report highlights the transformative nature of caregiving leave policies, these include adequate maternity and paternity leave, income and job security for caregivers, and protections against discrimination. Even though various countries have made significant strides in establishing leave systems that recognize the shared responsibilities of parenting, South Africa's current framework falls short.

The country provides limited parental leave benefits with little to no enforceability, and this leaves many caregivers without adequate support during important and early stages of childraising. Lots of South African leave provisions are unjustified and their alignment to the BCEA's objectives is highly questionable.

This current Western-centric approach in South Africa does not align with the transforming dynamics and needs of modern families, specifically in recognizing the roles and responsibilities of fathers and caregivers in diverse family structures which includes same-sex partners and adoptive parents. The absence of an equitable parental leave

²³⁹ *Unemployment Insurance Act 63/2001.*

²⁴⁰ *Unemployment Insurance Act 63/2001.*

²⁴¹ *Unemployment Insurance Act 63/2001.*

policy limits their potential to nurture family bonds and strive for united families; it further does not support balanced caregiving responsibilities between parents.

To address these shortcomings, adopting an Ubuntu-based framework can provide a result-driven solution. Ubuntu, putting its emphasis on interconnectedness, community, and respect for one's fundamental rights and support, aligns well with the principles of shared caregiving responsibilities. By striving to foster an approach that values cooperation and care, South Africa can develop more inclusive and caregiving leave policies that recognize the different needs of families. This framework would not only enhance the well-being of children, caregivers and families at large but would also contribute to more productive and equitable workplaces, which will in turn benefit the South African economy as a whole.

CHAPTER 5: AN UBUNTU-BASED FRAMEWORK AS AN ALTERNATIVE TO UNDERLIE THE BCEA.

5. Introduction

5.1.1. What is *Ubuntu*?

Ubuntu is an African philosophy that has been holding African communities for the longest time.²⁴² The Ubuntu philosophy ensured the amicable solving of conflicts amongst communities.²⁴³ Ubuntu is a philosophy that taught Africans that they depend on each other, it taught Africans to treat others with dignity.²⁴⁴

Ubuntu is symbolized by sympathy, caring, kindness, collectivity, consensus, openness, generosity and sharing.²⁴⁵ Broodryk outlines the values of Ubuntu as caring, sharing, respect, compassion and humanness.²⁴⁶ Nussbaum defines Ubuntu as what capacitates African cultures to show reciprocity, compassion, dignity, humanity, and harmony, which would assist in building a just community that cares mutually.²⁴⁷

However, with the current crime rates, xenophobia, corruption, homophobia and ethnic wars, some scholars argue and have concluded that Ubuntu is dead and no longer exists.²⁴⁸ This research argues that despite the challenges faced in South Africa, there is still hope for Ubuntu, in fact, Ubuntu is the solution to the current issues. With reference to the Basic Conditions of Employment Act, this paper's research argues that an Ubuntu-based principle approach to leave is the possible solution for the loopholes in BCEA applicability and alignment to its objectives.

In the case of *S v Makwanyane*, justice Mokgoro J describes Ubuntu as 'a concept that envelopes key values of solidarity, respect, compassion, human dignity and morality,

²⁴² Mokhutso 2022.

²⁴³ Mokhutso 2022.

²⁴⁴ Mokhutso 2022.

²⁴⁵ Mligo, 2021.

²⁴⁶ Broodryk 2002.

²⁴⁷ Nussbaum 2003.

²⁴⁸ Mokhutso 2022.

Ubuntu spirits emphasise respect for human dignity which marks a shift from confrontation to conciliation.²⁴⁹

Ubuntu is further defined by various scholars, the Ubuntu scholarly definition is well outlined by subSaharan Indigenous languages proverb, in Tswana being 'motho ke motho ka bath oba bangwe' in Zulu 'Umuntu ngumuntu ngabantu' and a direct English translation is 'a person is a person through others' or 'I am because we are'. Thus, Ubuntu places a strong emphasis on group or societal well-being over that of an individual. This theory, if applied to the various forms of leave provided for by the BCEA, would place the well-being of the child and their parents, over the profit-making needs of a company or employer.

5.2. History of South Africa and Ubuntu

For decades, South Africa has been battling with deep conflicts that involved the minority who were in control of the country and the majority who sought to resist such ruling and domination.²⁵⁰ Fundamental Human rights were a casualty of such conflict, and as a result of this conflict, the legitimacy of the law was deeply wounded.²⁵¹ In the 1980s, it became clear to everyone that, despite our country's natural wealth, stunning landscapes, and human resources, we were heading toward disaster unless the ongoing conflict was resolved. This realization, thankfully, prompted a turning point in the early 1990s, when those in power began to negotiate a new future with individuals who had been imprisoned, silenced, or forced into exile due to their resistance to that very control and its repercussions.²⁵² The negotiations held became the prerequisite of the interim constitution,²⁵³ which then was focused on transforming the country and make it a more just and democratically led country which was based on protecting the fundamental human rights.²⁵⁴

²⁴⁹ *S v Makwanyane* (CCT3/94) [1995] ZACC 3.

²⁵⁰ (CCT17/96) [1996] ZACC 16.

²⁵¹ (CCT17/96) [1996] ZACC 16.

²⁵² (CCT17/96) [1996] ZACC 16.

²⁵³ Act 200 of 1993, which is referred to in this judgment as "the Constitution".

²⁵⁴ CCT17/96) [1996] ZACC 16.

The current constitution does not explicitly mention the word 'Ubuntu' anywhere in the constitution; however, a fundamental philosophy was expressed in the epilogue of the interim Constitution of South Africa 1993 as follows:

National Unity and Reconciliation This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex. The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society. The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.

These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation. In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed. With this Constitution and these commitments, we, the people of South Africa, open a new chapter in the history of our country.²⁵⁵

This epilogue was emphasising the need for reconciliation and amnesty to heal the past injustices, and to strive for national unity,²⁵⁶ as it can also be seen, the epilogue reiterates the importance of Ubuntu and not victimization, of which, even in this instance, the paper

²⁵⁵ *Constitution of the Republic of South Africa 200 of 1993: Preamble: National Unity and Reconciliation.*

²⁵⁶ *Constitution of the Republic of South Africa 200 of 1993: Preamble: National Unity and Reconciliation.*

draws an inference to propose an Ubuntu-based framework to govern the BCEA. According to Mazrui, the first duty of Ubuntu is to protect the innocent.²⁵⁷

5.3. Ubuntu and the BCEA objectives

The concept of Ubuntu is only mentioned on one occasion in the interim constitution, whilst it is not mentioned even once in the final Constitution. However, the concept of Ubuntu is highly reflected in the stipulations of the constitution, even the Preamble, in this sense by making reference to social justice (i.e. Ubuntu) in the matrix of the Constitution.²⁵⁸ What is social Justice defined as by our Constitution?

Section 39(2) of the Constitution calls for courts to promote the spirit, purport and objects of the Bill of Rights every time they interpret the legislation,²⁵⁹ define the Bill of Rights. There is therefore not mandatory necessity to inscribe (look for synonym) Ubuntu in the final Constitution as the Constitution itself is (denotative) of Ubuntu.²⁶⁰

Many of the laws emerging from various legislative bodies in the country reflect this conscientious approach. Notable examples of such legislation include the Employment Equity Act, the Extension of Security of Tenure Act, the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, the South African Social Security Agency Act, the Consumer Protection Act, and the National Credit Act.²⁶¹

To prove the encapsulation of Ubuntu in the Constitution by promoting legislative interpretations that promote the spirit and purport of Bill of Rights, the Bill of Rights itself encapsulates the value of Ubuntu, this value is (embodied) in section 9 of the Constitution, which speaks to the right to equality and the right to not be unfairly discriminated on basis of any of the mentioned grounds. This value can also be seen in section 10 of the Constitution, which speaks to the right to respect human dignity, human dignity being one of the core values of Ubuntu; section 11 of the Constitution speaks about the right to Life, which is in alignment to the advocates of Ubuntu; section 12 speaks to the right to freedom

²⁵⁷ Keevy 2009.

²⁵⁸ Cornell (n 53) 385.

²⁵⁹ *Constitution*:sec. 39(2).

²⁶⁰ Ubuntu & SA Law: Juridical Transformative Impact.

²⁶¹ Ubuntu & SA Law: Juridical Transformative Impact.

and security of the person; section 21(3) speaks about the right to enter, remain and reside anywhere in South Africa, section 26(3) which speaks about the right to decent accommodation, section 35 regulating the right to a fair trial and most importantly, section 23, the right to fair labour practices.

It is particularly section 23 of the Constitution, in alignment with the BCEA objectives, that convinces this research paper to be of the perspective that BCEA is obliged to follow an Ubuntu-based framework.

For the right to fair labour practices to be a reality for South African workers cannot exist in separation from the values of Ubuntu. The BCEA is tasked with a very big duty to give effect to the right to fair labour practices, and as such, the successful completion of the BCEA mandate is rooted in BCEA having a strong and humane way to word and enforce its provisions and that plan lies in an Ubuntu-based framework.

In South Africa, despite historical challenges such as apartheid, Ubuntu has endured as a guiding principle for rebuilding society, especially in fostering reconciliation, national unity, and social justice. Though not explicitly mentioned in the final Constitution, Ubuntu permeates its spirit and objectives, particularly in how it shapes the protection of human rights, dignity, equality, and fairness.

5.4.1. Ubuntu and Chapter 3 of the BCEA

Chapter 3 of the Basic Conditions of Employment Act regulates leave entitlements, which, as mentioned prior, include annual leave, sick leave, family responsibility leave, parental leave and maternity leave. Even though the BCEA sets an explicit, legally binding standards for the leave entitlements, an Ubuntu-based framework would offer a more human-centric interpretation and compassionate approach of these provisions, which in turn will align them with the values of respect, humanity, equality, dignity, and fairness. This paper will draw a picture of how an Ubuntu based approach could inform the application of BCEA, specifically, Chapter three.

5.4.2. Annual Leave – Section 20 of the BCEA

An Ubuntu-based approach would emphasize the importance of rest for employee's well-being, and an Ubuntu-based framework would understand that a collective community cannot thrive if its members are overworked or overly exhausted. The BCEA guarantees annual leave, granting employees time to rest and rejuvenate. From an Ubuntu perspective, this right would not just be about fulfilling a legal obligation but about recognizing and protecting the dignity of employees by supporting their well-being, which benefits the workplace community as a whole.

Employers, guided by Ubuntu, shall not view annual leave merely as a legal requirement that needs to be fulfilled but as a great chance to honour the humanity of their workers, to ensure their employees and themselves can rest, rejuvenate, and return to work motivated and more productive.

5.4.3. Sick Leave – Section 22 of the BCEA

The BCEA grants employees paid sick leave during the 36-month cycle, this protects employees to not lose income due to sickness that resulted to them taking a leave.²⁶² Ubuntu puts emphasis on compassion and caring, and as such would require that sick leave policies be worded and enforced in a way that protects employees and gives meaning to the purpose of this type of leave, an Ubuntu based sick leave would understand that everyone is vulnerable to health challenges.

An Ubuntu guided sick leave shall be administered with empathy, considering the employee's dignity. This may include not only meeting the legal requirements but also ensuring that employees are supported with a holistic approach to health, such as understanding that getting sick is unpredictable, therefore grant sick leave benefits to all employees regardless of how long have they been working for that specific company or employer, where possible invest in things like medical aid and basic medication that does not necessarily need prescription like grandpa, disprin and other, prioritise granting measures that increase or makes accessing healthcare a little bit easier or offering at least offer a compassionate response to requests for sick leave.

²⁶² *Basic Conditions of Employment Act: sec: 22.*

5.4.4. Family Responsibility Leave – Section 27 of the BCEA

As alluded to in the above paragraphs, Ubuntu underscores the importance of and in the above paragraphs; Ubuntu underscores the importance of community and family to maintain social harmony. Family responsibility leave entitles employees to take time off for their ‘immediate’ family matters, such as the birth of a child or the illness of a family member.²⁶³ In an Ubuntu-based framework, family responsibility leave is not just a statutory obligation but a recognition of the interdependence of workers and their families.

An Ubuntu approach to family responsibility leave would be guided by supporting employees in times of family crises with empathy and flexibility, an Ubuntu based framework would approach the term ‘family’ in a very open ,open minded way and differently in terms of various family cultures and situations, an Ubuntu based framework would understand that what forms immediate family in the Vatsha family would not necessarily be the same with what immediate family is in the Zunguza family, this approach would ensure that employees are not penalized for fulfilling family obligations because it is not every employee that will have the knowledge and capacity to fight for their rights in an instance that they get unfairly penalized for taking care of who they consider immediate family member, like in the Njilo case, there is uncertainty on how many cases have involved the same issue but employees did not have means to fight against it like Mr Njilo, yet out courts still based the verdict on intent and wording of the Family Responsibility Policy in Mr Njilo’s work and shy away from the roots of the matter, being the definition of ‘immediate family’ that is not inclusive enough. A practical example of an Ubuntu-based Family Responsibility Leave and enforcement would be providing the necessary time and space for an employee to care for a sick close family member to attend to family emergencies; this would reflect Ubuntu’s spirit of caring and shared responsibility.²⁶⁴

5.4.5. Ubuntu Based Framework on Caregiving leave

The recommendation of Ubuntu on caregiving leaves opens an opportunity to advocate for fairness, equality and collective responsibility in modern families. An Ubuntu-based

²⁶³ *Basic Conditions of Employment Act:sec: 27.*

²⁶⁴ *Toyota motors South Africa (Pty) v NUMSA Obo and Njini and Others (2022) 43 ILJ 2393 (LC).*

framework would play a significant role in rethinking parental leave entitlements, specifically as they relate to certain discriminatory aspects in our law, this part of the paper will analyse the reform that would be advocated by Ubuntu in parental leave, maternity leave, surrogacy leave and adoption leave and will also attempt to close the gaps that have been left by the Van Wyk case as navigated in Chapter three.

5.4.5.1. Redefining Parental Leave – A shift towards Ubuntu Based Framework

An Ubuntu-based parental leave would be guided by the values of inclusivity, gender neutrality and support; these will reflect the realities of modern families and both parents, regardless of gender, will be given a chance to be equally responsible for nurturing the child. Redefined caregiving leaves grant parents' the opportunity to contribute to the upbringing of their children and it will promote united families and prioritizing the best interest of the child. Redefined caregiving leaves, parental leave would advocate for equal parental leave right for all parents and address the discrimination that is based on mode of conception.

5.4.5.2. Equal Parental Leave for Parents

Under Ubuntu, parental leave will be viewed as a collective responsibility which grants an opportunity to both parents to take care and nurture their child, regardless of mode of conception or gender. The existing gap between the four months of maternity leave for birth mothers and the 10 days of parental leave is against the principles of Ubuntu, which advocates for equality in the responsibilities of both parents. Parental leave is not just a statutory obligation, but it is an important right to nurture the child.

An ubuntu-based BCEA would ensure extended parental leave for fathers and other parents, to promote gender equality and ensure that parents are involved in their children upbringing, an Ubuntu guided BCEA would ensure that adoption and surrogacy leave are given to parents equally, which would prioritize granting these parents time to bond with their child no matter how they came into the family.

5.4.5.3. Discrimination based on Mode of Conception

Ubuntu as an answer to this disparity, would recognise the child's best interest as of great importance, Ubuntu highlights the fact that the nurture of the child is not determined by how that child came into the family, it is thus based on the Ubuntu and equality lens that adoptive parents and surrogacy parents shall be entitled to the same leave periods as the biological parents. The *Van Wyk* case reflects a promising step towards Ubuntu-based reform; an Ubuntu-based principle can also help address the gaps identified in this case.

5.4.5.4. Ubuntu and the *Van Wyk* case

The verdict set by this case that parliament is given two years to amend maternity leave to parental leave that advocates for equal treatment between mothers, fathers, adoptive parents and surrogacy parents is a promising step towards an inclusive and Ubuntu-guided parental leave.²⁶⁵ However, there are gaps stemming from this judgement that ought to be discussed below:

The *Van Wyk* Judgement does not provide guidance or clarification as to how will the simultaneous parental leave be implemented in cases of birth, adoption and surrogacy. To answer this, Ubuntu advocates for a system that would allow parents to equally and flexibly share the parental leave; it would advocate for a provision that explicitly permits parents to take this leave concurrently to be included in the BCEA or in a way that is responsive to that specific family's needs.

The *Van Wyk* judgement also leaves a lacuna in terms of addressing how disputes that may arise as a result of the new developments shall be dealt with, an Ubuntu-based solution would be guided by the value of reconciliation and communal responsibility. It would then recommend a formal procedure for mediation or support for purposes of solving the disputes related to the sharing of parental leave; BCEA can have a provision requiring employers to offer mediation services in case of disputes other than letting them deal with such disputes independently without being guided by the law. In absentia of such guidance being explicitly written in the BCEA, more practical challenges will come into play; for example, what would then happen if a father who is absent in their child's life and not supporting them in any way demands this lives to go do his other stuff and

²⁶⁵ *Van Wyk and Others v Minister of Employment and Labour* [2023] ZAGP JHC 1213.

not nurture the child? Can a parent who is not residing with the child and not planning to be eligible for two months of Parental leave? Protection to avoid parents hiding behind parental leave to go do their other things is necessary hence the recommendation of the clear mediation procedure to be set by the BCEA.

In relation to the 6 weeks post-birth leave that is also encouraged by the ILO,²⁶⁶ an Ubuntu-based approach would encourage a flexible interpretation and an explicit provision in the BCEA addressing the Act's position in this regard. Such a provision, whilst prioritising the best interest of the child, would also take full cognisance of the need to still take care of the well-being of parents, and in this instance of the mother's physical recovery, this element can be considered or be taken as a contributory factor in issues of dispute and deciding how can the period be shared fairly between parents.

5.5. A possible additional consideration guided by Ubuntu

As part of committing to human dignity and respect, Ubuntu calls for empathy on other matters that might not be necessarily binding but are important for worker's well-being. Our labour law and specifically the BCEA, currently do not make provision for Menstrual pain leave, but an Ubuntu-based framework would recommend that employers recognize the unique health needs of their employees and act with compassion. Advocacy for this type of leave would require diving deep into research that is specifically intended for it; this paper aims to focus on the shortcomings of BCEA chapter three and will not deviate much from such.

5.6. Ubuntu and the Right to Fair Labour Practice

In summation, the BCEA aims at giving effect to the right to fair labour practices; this objective when aligned with Ubuntu would focus on also giving effect to the values of human dignity, equality, solidarity, fairness and social justice. For the right to fair labour practices to be fully recognized, the BCEA should not just be seen as a technical standard but should reflect the values of Ubuntu. Employers are advised to approach Chapter

²⁶⁶ ILO Maternity Protection Convention 183 of 2000.

Three of the BCEA provisions with the understanding that employees are not only 'tools' to generate profit, but they are individuals who form part of a larger and interconnected communities., Leave provisions should not be viewed as a cost to the business but rather as investments into employees' well-being, dignity, health and overall lives.

5.7. Summary

Adopting Ubuntu to be the BCEA underlying principle would ensure that the Act's provisions are understood in the lens of respecting people's dignity and approached with humanity, this approach would align the BCEA with our Constitutional rights to dignity, equality and social justice, this would then help the country move towards a more harmonious, fair and equitable society.

CHAPTER 6: CONCLUSION AND RECOMMENDATIONS

6.1. Introduction

This research has pointed out discrepancies between the BCEA's objectives and its stipulations, especially in Chapter 3, which deals with leave entitlements. Various lacuna that result in a deviations from the Act's objectives were identified and discussed. This research was guided by the question of whether 'is it not time for Chapter 3 of the BCEA to follow an Ubuntu-based theory'. The purposes of the Act have been navigated, an Ubuntu-based theory as a feasible recommendation was dived deeper into, and BCEA's comparison to international and foreign law was made; the findings as per the paper were quite interesting.

The purpose of the BCEA is even reflected in the Act's name, which is to provide basic conditions of employment for workers that are socially acceptable.²⁶⁷ The Act aims to achieve this vision by giving effect to the pivotal right to fair labour practices.²⁶⁸ From this research paper, the right to fair labour practice has been established to be a right that is linked to the values and principles of Ubuntu, which further motivates why this theory has been recommended the under the current discrepancies of BCEA Chapter 3, before diving deep on the element of Ubuntu and giving effect to the right to fair labour practices, it is of great significance to summarise or highlight some of the most attention-demanding chapter 3 shortcomings.

6.2. Shortcomings of Chapter 3 of the BCEA

Sections 20 and 22, 27, 25, 25A, 25B, 25C and 26 of the BCEA have caught this paper's attention by their visible lacunas, which have been associated with various scrutinization from various legal bodies,²⁶⁹ sick leave is treating employees differently based on how long have they been working for a certain workplace, this leave further does not accommodate the reality that being sick is unpredictable and whilst the BCEA might not

²⁶⁷ *Basic Conditions of Employment Act: Preamble.*

²⁶⁸ *Basic Conditions of Employment Act: Preamble.*

²⁶⁹ *Basic Conditions of Employment Act: Preamble; [2023] ZAGP JHC 1213, (2022) 43 ILJ 2393 (LC)*

make magic and make unreasonable provisions, the least it can do would be to try and meet employees halfway.

Family Responsibility leave, which leaves a lot of questions from the wording of section 27, has been associated with various issues, firstly the provision is quite limiting when it comes to defining immediate family, this is not accommodative of the various kinds of families that exist in South Africa, this leave is further limited in a sense that, one is not eligible for this leave if a close person other than their child is sick, even if its their spouse, which then in return defeats the purpose of the leave which is alleged to 'grant employees a chance or responsibility towards their immediate family members who need their care and support' in contrast, one is only eligible for this leave in circumstance of the death of the other family members who are not children, a question can be asked ' Is it that my immediate family member needs my care and support when they are dead and not when they are sick?'

Lastly, this paper has noted some concerning shortcomings of Chapter 3 of the BCEA when it comes to the leaves categorised as caregiving leaves, being Parental leave, adoption leave, surrogacy leave and maternity leave. The highlight of the shortcomings of these leave is the different treatment or provisions of the leaves based on mode of conception, the paper noted the gap between maternity leave and the other leaves to be quite concerning and lacking legal justification, this research further navigated these leave in the lens of prioritising the child's best interest as has been also reiterated upon by various case law and legislation.²⁷⁰ Lastly, this paper has noted the lacuna in section 26, which has constantly resulted in women who work at hazardous areas and where it has been alleged that no alternative suitable employment has been found for them, has resulted in them being placed on extended unpaid leave with no protection from the Act or whatsoever, let alone the Act's failure to even establish a test of 'trying to find alternative suitable employment' for such women.

²⁷⁰ *Mia v The State* (604/08) ZASCA 47.

6.3. BCEA, International and Foreign law

This research, before recommending a feasible solution to all the Chapter 3 issues, drew an inference from International law, specifically ILO and from foreign law, this was specifically done to show that an Ubuntu-based framework is possible and would be in alignment to the ILO's care at work policy which prioritises the rights and well-being of employees, advocates for gender neutrality and a caregiving approach to leaves.²⁷¹ The foreign countries whose leave systems have been analysed were done to bring into perspective some approaches that South Africa can learn a thing or two from and also to prove that the transformation towards a more compassionate and neutralised approach is highly doable.

It is an undisputed fact that indeed, this research has pointed out some number of challenges and shortcomings, however the paper was aiming at just pointing out problems without any contributions to seeking solutions to such problems, chapter 5 of this research paper recommends an Ubuntu based framework as a feasible alternative principle that can be used to underly the BCEA, by now, it has been established that the BCEA is a very important piece of legislation that governs a very large part of the conditions of the workplace as further discussed in chapter 2, when such an important legislation does not compliment the current realities of various South Africa families, then that is a cry for help and this paper has argued that the constant amendments being made and/or proposed every time a provision in chapter 3 has been challenged are missing the crux of the matter, being the principle underlying the BCEA, the current principle underlying this Act can be argued to be one that is GDP focus or Western Centric.

6.4. BCEA and Ubuntu

Ubuntu being a theory symbolized by kindness, caring, generosity, collectivity, and openness is arguably just what is needed to put a stop to the constant challenges of the BCEA and specifically, chapter 3 for purposes of this research, as has been discussed, there are various stipulations in our Constitution that advocates for Ubuntu guided principles without necessarily or explicitly mentioning the term itself, for example section

²⁷¹ International Labour Organization: Care at work Report.

9 which speaks to the right to Equality, section 10 which addresses the Right to dignity, section 11 which speaks about the right to Life, section 12 which speaks about the right to freedom and security of persons, section 21(3) which speaks about the right to enter and remain in South Africa, section 26(3) the right to decent accommodation and lastly, section 23 which is the right to fair labour practices. Ubuntu being embodied in these sections alone shall be proof that this term is the hope to our labour law future, BCEA's future, chapter 3's future.

This writing drew a picture of how the leaves would be perceived in the perspectives of Ubuntu guided framework, with the annual leave emphasising on the importance of employees well-being and giving them time off to rejuvenate and coming back more productive, with the Sick leave to be applied equally regardless of having worked three months in that workplace or seven months, family responsibility leave to give effect to its vision, to be applied with openness and consideration of the various families we have in South Africa and to consider the need for employees to take care of their families even in emergency family situations and not only during death.

When it comes to caregiving leaves, an Ubuntu based approach appreciates the and prioritises the best interests of the child regardless of how they joined their respective families, an Ubuntu based approach on these leaves recognises the significant rights of every parents to care for and nurture their children without being discriminated or treated unequally due to mode of conception or their gender, an Ubuntu based framework advocates for Parental leave that is shared fairly amongst the different parents depending on their family's specific needs.

An ubuntu based framework is all about solutions, striving to better and fair world of work, hence also in this research various solutions to the practical possible challenges imposed by the Van Wyk case judgement have been recommended, an Ubuntu based framework advocates for possibility of concurrent parental leave, this approach further advocates for mediation body related to the sharing of the leave period disputes to be established and measures to avoid this leave period being used for ulterior motives to be put in place, to take consideration that even though parental or maternity leave is not about mother's physically recovery but fair consideration of their health after childbirth shall be prioritised

because again Ubuntu is all about dignity, compassion, humanity, respect and unity amongst other things.

6.5. Recommendation

In conclusion, it has been thus established from this research that it might just yet be time for Chapter 3 of the BCEA to rethink its underlying principles and to follow an Ubuntu-based approach, it is believed that this research might have found and cracked the crux of the matter with Chapter 3 of the BCEA with its roots being the underlying principle that needs novel theories like that of Ubuntu.

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