Sir, your **maternity leave** has been granted …

Some laws need to be updated for civil unions and same-sex couples.

By Naledi Motsiri and Olivia Timothy

From the early 1950s, women in South Africa were involved in many activist campaigns to fight for their maternity leave benefits in the workplace. This was an important guarantee as many women needed economic security whilst going on maternity leave due to the fact that they did not want to lose their jobs.

Internationally, the Maternity Protection Convention, 2000 (No. 183) allows for a woman to whom this Convention applies a period of maternity

leave of not less than 14 weeks.

In South Africa, Section 25 of the Basic Conditions of Employment Act 75 of 1997 ("BCEA") allows pregnant women at least four consecutive months of maternity leave. Each company has its own policy and a company can choose how much to pay their employees for their maternity leave. If a company does not provide maternity leave benefits, a female employee can claim benefits for 17 weeks of maternity leave from the Unemployment Insurance Fund (UIF).

Civil Union Act

Our legal system recognises civil unions of people of the same sex in terms of the Civil Union Act 17 of 2006 ("Civil Union Act"). The Civil Union Act, defines a civil union as a voluntary union of two persons who are both 18 years of age or older, which is solemnised and registered by way of either a marriage or a civil partnership, in accordance with the procedures prescribed in this Act. The Civil Union Act, also defines a civil union partner as a spouse in a marriage or a partner in a civil partnership, as the case may be concluded in terms of this Act.

The Civil Union Act gives partners in a same-sex relationship the **equal protection** as couples in a heterosexual marriage.

The Civil Union Act, gives partners in a same-sex relationship the equal protection as couples in a heterosexual marriage.

Recent judgement

In the ground breaking case of *MIA v State Information Technology Agency (Pty) Ltd* [2015] JOL 33060 (LC) ("MIA judgment"), a couple in a registered civil union entered into a surrogacy agreement in terms of which they would be deemed to be the parents of the child born of the surrogate mother. The surrogacy agreement was duly made an order of court.

Prior to the birth of the child, the applicant applied for paid maternity leave. The employer refused to grant the leave relying on the fact that paid maternity leave in terms of its policies and the BCEA only applies to female employees. The employer initially offered the applicant family responsibility leave or special unpaid leave. Finally, the employer allowed the applicant to take two months' paid adoption leave and two months' unpaid leave.

The applicant challenged the employer's policy on maternity leave in the Labour Court. He claimed that the employer's refusal to grant him paid maternity leave as a result of his not being the biological mother of the child amounted to unfair discrimination on the grounds of gender, sex, family responsibility and sexual orientation in terms of Section 6 of the Employment Equity Act 55 of 1998.

In defence of its policy (which is similar to the provisions of the BCEA), the employer claimed that the purpose of maternity leave, was to protect biological mothers before and after birth.

The Court found that the respondent's policy discriminates unfairly on the applicant and that he was in fact entitled to four months' paid maternity leave. The court accordingly ordered the employer to pay the applicant two months' salary as compensation.

Basis of the court's findings

The Court held that the right to maternity leave in the BCEA is not only aimed at protecting the birth mother from physical effects of birth, but to also take into account the best interests of the child and a failure to do so would be contrary to the Constitution.

The Court also relied on the Children's Act 38 of 2005 (''Children's Act") which states that the best interests of the child are of paramount importance in all matters concerning protection and wellbeing of a child.

The Court emphasised that the law recognises same sex marriages and regulates the rights of parents who have entered into surrogacy agreements. As such, the policies of the employer should protect the rights from the Civil Union Act and the Children's Act.

Commentary

The above case shows how our South African labour legislation needs to be more progressive towards both men and women in the workplace that have children. Section 25 of the BCEA is completely silent on maternity leave for same-sex partners in a civil union.

Section 27 of the BCEA grants an employee three days' family responsibility leave when a child is born. This then means that three days' family responsibility leave is the only statutory leave available to parents in a civil union and for paternity leave. Certain countries like Iceland, Finland and Portugal allow men to take more paternity leave.

In terms of Section 228 of the Children's Act, an adopted child is one that has been placed in the permanent care of a person in terms of a court order. Presently, some companies allow employees to take adoption leave. The problem, however, is that the adoption leave granted is often shorter than maternity leave. Employees are also entitled to claim adoption benefits from the Unemployment Insurance Fund if a child has been adopted in terms of the Children's Act.

The Children's Act deals with the best interest of a child and does not delve into any labour law issues. By contrast, the Children and Families Act 2014 in the United Kingdom (UK) gives employment protection, leave and compensation (equivalent to maternity rights) to UK parents having children born through surrogacy. This law applies to heterosexual and same-sex couples who have a child through surrogacy, provided they intend to apply for a parental order. As a parent in a civil union if your company allows you three days' family responsibility and/or paternity leave, one has to ask whether three days is sufficient time to bond with your new born child. Is three days sufficient to prepare for the child's mental and physical well-being and then be absent for the most critical part of a child's development?

Are three days sufficient to prepare for the child's mental and physical well-being and then be absent for the most critical part of a child's development?

Perhaps South African Labour legislation needs to consider the option of "parental leave" and allow men and women in civil unions equal access to this type of leave in the event of an adoption or surrogacy arrangement.

Expert opinion

Professor Frederick Noel Zaal, a Family Law expert from the Law Faculty at University of Kwa-Zulu Natal, Durban, said in reference to the MIA judgement that "this judgment is to be welcomed as a step forward in promoting equality and is in accordance with section 9(3) of the Bill of Rights."

Conclusion

Although the recent judgement is welcomed by many South Africans, there remain some unanswered questions. The judgement seems to be applicable only to homosexual persons in registered civil unions, who have or will become parents by way of surrogacy agreements. However, there is no clarity as to whether both parents are equally entitled to maternity leave. To the extent that only one parent is entitled to maternity leave, what would the criteria be to determine which parent should be granted maternity leave? Should both parents be entitled to maternity leave, one could argue that this will constitute unfair discrimination towards heterosexual men who are only entitled to three days' family responsibility leave upon the birth of their children. A further concern is whether this ruling would be equally applicable to a same-sex couple in an unregistered civil union who have concluded a surrogacy agreement.

Despite the recent judgement being a progressive step in our South African legal system, our labour legislation needs to consider other legislation like the Civil Unions Act, the Children's Act, Unemployment Insurance Act and public policy in order to protect the rights and interests of all South Africans as envisaged in the Constitution. ■

Naledi Motsiri, Bachelors of Laws, LLB (University of Pretoria) and Certificate in Advanced Labour Law (University of Pretoria), is a Senior Associate in the Probono Department at Werksmans Attorneys.
Olivia Timothy, Bachelor of Laws, LLB (University of Kwa-Zulu Natal) and LLM Labour Law (University of South Africa), is the HR Manager at Werksmans Attorneys, www.werksmans.com.