

## **CURBING DIFFERENTIATION IN THE WORKPLACE: A CASE OF FAMILY RESPONSIBILITY LEAVE**

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### **INTRODUCTION**

The Constitution of the Republic of South Africa complies with international obligations to guarantee the right to equality. To give effect to the Constitution, subordinate legislation was passed to promote and enforce the rights to fair labour practice. This subordinate legislation has to comply with the International Labour Organisation (ILO), in line with the Republic's obligation as a member. The Basic Conditions of Employment Act 75 of 1997, (the BCEA) was passed to regulate and enforce minimum conditions of employment within its parameters/limits, amenable to section 23 (1) of the Constitution, which confers the right to fair labour practice. The Employment Equity Act 55 of 1998 (the EEA) on the other hand was introduced to achieve equality in the workplace by promoting equal opportunity and fair treatment in employment. Further legislation was passed in the form of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, (the PEPUA) to assist employees not covered by the BCEA and/or the EEA. Despite the stated provisions, African employees experience challenges in the workplace that limit them from practicing their family values/cultures.

This paper refers specifically to instances when applications for family responsibility leave (FRL) are declined, limiting the employees to exercise cultural responsibilities for members of

their families. When employers decline applications, employees become frustrated and emotionally distressed, resulting in workplace strains and conflict which may in certain instances lead to dismissals. These dismissal may end up at alternative dispute resolution centre like the CCMA or to Courts.

Several questions arise when the feeling of differentiation is experienced and displayed. Is there cultural discrimination/ differentiation in the awarding of family responsibility leave or is it assumed? If differentiation exists, is subordinate legislation able to deal with the situation or could it be that the legislation is permeable and not able to prevent irregularities? Are there problems of interpretation of the legislation that open implementation loopholes? Could it maybe the result of cultural differences and thus misunderstandings or other issues not alleged or even presumed?

In responding to the questions stated, this paper reviewed legislative documents related to culture and family responsibility, including leave. The paper also made an attempt to understand the influence that culture may have on the workplace challenges and how such understanding would contribute to the solution of problems. Information below provides background on the legislative documents and culture and then discusses the subject of the study, drawing conclusions and making recommendations.

## **RESEARCH PROCESS**

This paper explores the cause of frustrations experienced despite stipulations of rights in the Constitution. A qualitative inquiry, based mainly on document analysis was used to examine legislative descriptions, create an understanding of cultural issues and then review implementation of legislation in workplaces.

It was important for this paper to attempt to respond to the questions stated above. That is, establish the effects of legal definitions and understand the sensitivity of application of the legislative documents to cultural circumstances. It was hoped that results would guide both the employers and the employees and provide assistance when disputes are being resolved.

## **BACKGROUND**

### South African legislation

Prior to 1994 South Africa was governed by the White minority with the law being based on Western beliefs and practices. Liberation led to the recognition of the rights of others, resulting in culture being among the list of prohibited grounds of discrimination. The right to cultural practice is based on article 23 of the International Convention on Civil and Political Rights, 1996 (ICCPR), which protects the rights of minorities to practise their culture, in which an individual right is enjoyed when shared with a group. Currie et al (2005) confirm this by stating that culture is a communal object and a means to expressing values and tradition, protecting both the rights of the individual and group interest. South Africa based its laws on the international instruments to transform the systems as per its commitment.

Several policies and Acts have been passed that deal with culture, and especially with family as a functional unit. The Draft White Paper on Families in South Africa, 2012 interestingly brings about the Eurocentric context of family units, the nuclear and extended families, with manner of family relations as biological or adoptive. Meanwhile, the Green Paper on Families, 2011 acknowledged the existence of the definition within the country's diverse nature.

The Indigenous African group seem to be on the majority at the moment and while it is important to understand the cultures of all groups, there seems to be an urgent need to understand practices relating to such groups to be able to cope with challenges experienced in

the workplaces. Information below elaborates on how other the legislative documents provide for culture, family and family responsibility leave.

The Constitution serves as a supreme law which may be limited as provided for within its framework. It confers the right to fair labour practice, a right which is unique to the South African Bill of Rights. The Constitution prohibits unfair discrimination on a number of grounds including culture and although family responsibility is not listed, it is protected as an analogous ground associated with the right to culture. Section 31 of the Constitution provides that persons belonging to a culture, religious or linguistic community may not be denied the right with other members of that community to enjoy their culture, practice their religion and the use of language, and to form, join and maintain culture, religious and linguistic associations and other organs of the civil society. The greater the number of people engaged in the practice, the more likely it is to be regarded as genuine.

The BCEA on the other hand, serves as subordinate legislation regulating basic conditions of employment, including working hours, leave entitlement regulated within its parameters and termination of contracts of employment. Initially, in its 1983 version, the leave provision did not provide for family responsibility leave as an entitlement. The amendment of the Act in 1997 assured conformity with the Constitution, international instruments and regional documents, which recognise the importance of family and the need to accommodate employees with family responsibilities. Its broad scope to protect employees from all sectors relates to what Basson et al, 2000: 288 refer to as “a floor of basic conditions protecting all employees”. The legislation assists both employers and employees to create a base for their relationship.

Entitlement to leave, including family responsibility leave (FRL) is provided for in section 27 (2). Classification provided in the section limits members of a family to a Eurocentric definition of a family without any explanation of how this was arrived at. The section refers

to birth and sickness of a child and death of a limited group of members, also limiting the period of leave to a few days. To some employees, it also serves as an employment policy, occasionally permitting variations. The effect is observable even in cases where collective agreements are concluded to regulate the sectors and are influencing the discretions of employers and bargaining parties (such as the Motor Industry Bargaining Council, the Metal and Engineering Industry Bargaining Council and Resolution 7 of 2000 of the Public Service Coordinating Bargaining Council etc.) despite the powers they have to vary the provision of the Act. The absence of a deviation/variation of policies from the BCEA emphasises the influence of the Act. Reliance on the BCEA is also observed within the SMMEs. This implies that the provisions of the Act have to be wide enough to accommodate a broader sphere of employment conditions.

The EEA promotes equality through the elimination of unfair discrimination in an attempt to achieve a diverse workplace. The Act prohibits unfair discrimination on listed grounds and this includes culture and family responsibility. The EEA is crucial to transformation and enjoys supremacy to all other employment law legislation, taking precedence in instances of conflict in laws. The Act specifically prohibits discrimination in any employment policy or practice including remuneration, employment benefits and terms and conditions of employment.

In its definition of family responsibility, the EEA adds members of the immediate family who need care and support. Although the term is broader, it has not been defined and thus open to different interpretations. What may even be confusing is the fact that what may be understood to be immediate family in one culture may mean something different in another. The Act then leaves broader interpretation to parties involved, including the Courts and bargaining councils, should a dispute arise. The term immediate family, although Eurocentric, provides a broader representation of members of a family, accommodating other cultures. Interpretation requires

compliance with the Constitution and international laws, especially those relating to the International Labour Organisation Convention (111) concerning Discrimination in Respect of Employment and Occupation.

PEPUDA on the other hand gives effect to sections 9 and 23 of the Constitution and also promotes equality, applicable to employees outside the parameter of the EEA. PEPUDA is not specifically restricted to employment relations but applies in instances where the BCEA and the EEA are not applicable to prohibit unfair discrimination and promote equality. The Act explains family responsibility beyond the immediate family. Responsibility is not only about children, spouses and the next of kin but even for members in respect of whom one is liable for care and support. This accommodates any other member that may be classified in the category by a culture of the people.

#### Matters pertaining to culture

The typical Western family operates with two (2) generations, parents and their children. Although in the post-modern era, Stacy (1996) reveals that changes in family (including the Western family) were introduced by processes of urbanisation introducing democratic forms of intimacy. These include extensions beyond co-residence boundaries, for example, the multigenerational extensions observed by Bentson (2001). Popenoe (1993) accepts that the Western definition of family is narrow and does not include other forms of family in other cultures despite its evolution. The acknowledgement confirms the distinction of the Western definition from those of other cultures. It is therefore important to accept the existence of partisan and cultural explanations related to behaviour of members of a culture.

Such partisan explanations may introduce bias in an attempt to understand the culture of others. For example, Tembo (1988) blames such bias and Eurocentric perspective for the false

understanding of the African culture. This is observable in the comparisons made through the use of terminology such as immediate family and extended family, which are Western concepts, to serve as a norm for the understanding of other cultures (Nyoka, 2013). These will make the understanding of other cultural practices difficult and problematic and may cause those that practice their cultures to feel inferior or even disadvantaged unless the other cultures succumb to European practices.

There exists a broad spectrum of African traditions across ethnic groups but Nzimande (1987) ensures similarities in structure that only differ in detail. An African family is in general stable, large, multigenerational, durable and socially reinforcing (Okon, 2012). The culture has a structural base for helping behaviour and a sense of obligation for mutual assistance for family members requiring assistance. Rules of society, according to Nzimande, expect care and support from members of the family and there exists a “group responsibility” to share sadness. Accordingly, family is a “primary source of social support” as prescribed, in values and practiced as a social pattern, attached to a sense of social obligation (Nzimande, 1987: p34).

Okon refers to psychological and emotional ties in families that do not require any legal confirmations in respect of child care, introducing the element of non-blood relationships that is non-formal but important. There is therefore no need for a distinction between biological and non-biological kin for primary parental obligations. Any external influence to this arrangement will contaminate and/or overshadow important features upholding the culture (Tembo, 1988).

Okon and Tembo suggest that the definition of family and thus family responsibility be based on functionality within societal conditions. It is important to note that support on hardship and distress is expected from blood and non-blood relatives that exist within a family. Care and

support mark the emphasis of functionality in the African family and this has to be observed whenever decisions have to be made that relate to matters affecting the institution.

The African culture continue to exist despite colonisation and its attempts to fit the African culture into the oppressors culture (Russell, 2003), with all its religious paraphernalia and the Western stereotypes such as “west is best”. The culture also resisted industrialisation forces that introduced migration conditions such as small houses and modern urban arrangements. Bigombe and Khadiagala (2001) advise that the African culture persists beyond all these factors. According to the authors, there are no indications that Africans will completely abandon their traditional practices. According to Russell, 2003 Africans are said to adapt to new environments by adopting new practices and aligning them with their culture.

It was expected that the African culture, and therefore family, would find its place in the new system in South Africa, in which culture is constitutionally recognised. Observing these contextual differences of family between the Western and African cultures, some form of resistance may be expected from those that subscribe to the Western culture and in workplaces this may create a problem.

## **Discussions**

Several discoveries are discussed below that may be blamed for discrepancies related to FRL. This paper reveals confusing definitions/categorisation of family responsibility by subordinate legislation. While acknowledging the provision of family responsibility and the definition thereof as set out in the EEA, which refers to immediate family, the Eurocentric classification by the BCEA excludes persons that are classified by other cultures as members of a family. The problem here is created by employers’ heavy reliance on the BCEA despite the discretion

they have to decide otherwise. The employers have in fact forgone the exercise of their discretion and apply section 27 of the BCEA literally.

The provision of the BCEA is also considered and promoted by employment law professionals like Jackson who rely on the narrow, restrictive entitlement to leave as set out in the BCEA. In some of the disputes referred to the dispute resolution entities, Arbitrators felt confined/bound by regulations and ended up making unpopular rulings occasionally referred to Courts.

Reliance, especially on section 27 is observed in the Public Servants Association on behalf of Jonase and the Department of Justice & Constitutional Development, in which the Arbitrator disregarded extenuating factors/circumstances. Despite the cultural implications of the circumstances, the Arbitrator found that the employee (Applicant) was not entitled to FRL in circumstances of a non-direct/immediate family member. In another case of family responsibility, the Baby City case, similar facts were considered by the Arbitrator. In this case the Arbitrator accommodated cultural responsibilities and the decision was confirmed by the Labour Court. Although the race of the Arbitrator is not the issue of consideration in this paper, it was observed that the Arbitrator in the *Jonase* case was White and the one in the *Baby City* case African. These types of conflicting decisions raise cause confusion in the employment sphere.

As stated, the EEA gives a broader definition to the concept of family responsibility. Meanwhile, its definition of family responsibility as meaning 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 requires explanation/classification of immediate family. Clarity on the concept will assist in the determination of its breath and extent of cultural inclusion and thus accommodation of equality. If the definition in the EEA

is considered, its supremacy allows/compels its consideration in the interpretation of employment policies inclusive of the BCEA. This places the BCEA in the category of such policies since it sets out basic terms and conditions of employment. The BCEA may therefore not discriminate on any of the listed grounds. It is understandable that the initial BCEA was passed before the existence of the EEA, but the introduction of the latter assisted in the inclusion of previously excluded factors such as the FRL. It is a pity that the amended version of the BCEA still confines itself to a nuclear family.

A clearer definition of family responsibility that is closer to international instruments and the Green Paper on Families is expressed in the PEPUDA. The definition is broad and inclusive and therefore accommodates members of other cultures. The fact that the Act can prohibit discrimination where the BCEA and the EEA are not applicable gives it supremacy and makes it the most important document to protect culture in this regard.

The other revelation relates to the fact that limitations in the categorisation of instances when FRL may be granted seem to be influenced by the different cultural descriptions of the structure of a family, which is interpreted through sociological or anthropological ideologies. Research reviewed in this study reveal the concept family to explain relationships of people in terms of agreed upon norms of a given society/culture. Although different meanings are attached to it in a manner that impacts on the ultimate responsibility associated with the concept, a central definition may be necessary to guide legislative document, professionals, judicial officers, employers and the employees.

A cleared understanding is crucial for the application of FRL, to enable employers to regulate the exercise of their discretion and for employees to adjust their leave requests within clarified circumstances without fear of differentiation. Meanwhile authors agree that a universally acceptable definition may not exist and advice that a broader definition that considers context

in relation to culture and trend would be acceptable. This calls for the understanding of such cultural context and what has to be considered in order to be accommodating.

Some cultural explanations of family are restricted to blood relations, referring to a group of people who live together and operate as a single household or dependents of common ancestors. Whether nuclear or in evolved families that are multigenerational, or even including adoption for that matter, this Western definition still confines classification to blood and legally obtained relations. This definition is said to be narrow and undermine the African tradition. Sociologists go further to blame the other scholars for superimposing perceptions and practices from other countries, especially the West, when attempting to understand the African situation, creating misconceptions about the African cultural practices.

A general African family includes parents, their children and other relatives related by blood or marriage. The list includes uncles, aunts, polygamous mothers and their children. Accordingly, care and support is expected from members of such families, which includes caring for widows, orphans and the older generation. The list also includes persons not related by blood who may have carried the responsibility of care and became psychologically attached to each other. The relationship based on care, outside blood connections, is unique to Africans and has to be respected and acknowledged even in workplaces as an important cultural milestone. It is this kind of relationship that may not be documented in the legislative literature, leading to unintended acts of discrimination.

The African culture dictates that any member of a family requiring care and assistance becomes the responsibility of the one that is capable of providing such. In the event of death or misfortune, there is group responsibility and sharing of sadness is expected from all persons classified by the family as members.

What has become apparent is the difference in definition between the Western and the African cultures, and because of colonisation the Western culture seems to have had greater influence in law making in the previously colonised countries including South Africa. The processes of industrialisation related to migrant labour and provision of small dwelling together with other forces of colonisation (western civilisation behaviour and apartheid policies) that compelled Africans to conform to western culture have unfortunately not completely converted Africans or erased their culture. The distinction between the Western and the African definition is therefore that the West restricts the concept too narrow while the African culture broadens it. Linguistics has also created some misunderstandings that lead to confusion. For example, attempts to understand the African culture through the use of phrases such as nuclear or immediate families may become problematic.

Unfortunately, there still appears misleading perceptions that other forms of family other than the Western type are wrong. The oppressive idea that Western practices are the best may have given the Apartheid government a wrong impression that their culture was highly regarded and adopted by Africans. During apartheid, laws of the country would have understandably taken the shape of the applicable forces. Fortunately there are no indications that African families completely abandon their tradition. It would therefore have been expected that laws which were passed after 1996, starting from the South Africa Constitution would consider all the necessary practises and would be aimed at addressing diversity and imbalances of the past. This however does not appear to be clearly visible from a reading of the Constitution although group rights and individual rights are protected. The entitlement of family responsibility leave conferred by the BCEA seems to be narrowing the meaning of family contrary to other legal and continues to adopt the colonial understanding of a family. The provision excludes some members of the African family and creates disparity in the workplace.

The understanding of cultural practices in the workplace is of significant importance. Jordaan alludes to the importance of understanding cultural practices of employees and warns of serious consequences when culture is ignored. The Constitution in section 31 provides that persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community to enjoy their culture, practise their religion and use their language; and to form, join and maintain cultural, religious and linguistic associations and other organs of civil society. The protection afforded by the Constitution was considered in the matter of *POPCRU v Department of Correctional Services* and in *Kiewiets v Kroon Country Estate* where the Supreme Court found that it was sufficient that the employee proved they held a certain belief or followed certain cultural practices. Once this is established, then the employee is entitled to protection in terms of the Constitution.

## **CONCLUSIONS**

It is concluded that the definition/classification of members of a family influences the understanding of family responsibility as a factor of culture. The situation is observable in South Africa as a country with diverse cultures. Although the Western culture dominated during the colonial period with the addition of other secular factors such as industrialisation, the African culture has resisted the effects and defied all other influences imposed on it. Family in the African culture is based on care and support and includes blood and non-blood relatives beyond legal boundaries.

It is further concluded that any exclusion of family members acquired from this care and support conduct will be perceived as some form of differentiation. The BCEA's classification influences some decision makers to apply the classification narrowly while others found it necessary to deviate from the classification. This and other observation of collective

agreements by organised workplaces evidence the challenges and problems caused by the classification in its current form.

Definitions of family and family responsibility obtained from the EEA and PEPUDA are embracive and inclusive of the blood and non-blood classification of the African culture, except that the members of a family are not fully classified. For example, the EEA refers to the “immediate family”, classification which may be obtained from dictionaries. The EEA’s role is to clarify matters of discrimination. When it falls short of providing the necessary guidance, it leaves FRL vulnerable to differentiation and the African culture undermined.

Because of the use of the word, “immediate family” the definition in the EEA, may in some instances be regarded as misleading. However, the definition in PEPUDA is all embracing. It complies with and takes into cognisance international instruments and other South African documents which provide for a broader definition. The Act therefore protects the right to cultural practices as conferred by the Constitution and enjoyed by individuals and groups.

It is concluded that the Western culture influenced law-making in South Africa as far as FRL is concerned, raising issues of differentiation. For example, the BCEA definition of family is narrow and is inclined to the nuclear-type family. The classification of members excludes members who would be regarded as part of the family in the African culture. With the concept of FRL being relatively new in the country (introduced in 1997), the BCEA classification has not been helpful and is seen as discriminatory especially to some members (care-givers) of the African culture, misleading applications of the FRL. The influence comes because the BCEA is an important legislative document to regulate and provide working conditions in the workplace, it therefore must not be misleading.

## **RECOMMENDATIONS**

The following recommendations are made in this study:

Prohibition of unfair discrimination in workplaces espoused by the EEA and the Constitution has to be upheld at all costs. As FRL and culture are among the listed grounds, any discrimination on such grounds has to be prohibited.

In order for the grounds to be protected, there is a need for a definition of family and family responsibility and classification of members of a family in South Africa that is inclusive of the African culture. For the definition (s) to be inclusive and accommodative of the African culture both blood and non-blood (care-giving) relatives have to be classified as family members. Such a definition will assist in the application of the family responsibility leave.

The interpretation of the term family responsibility in PEPUDA is broad enough and accommodating and therefore should be considered whenever family responsibility leave is at stake in order to meet the constitutional imperatives.

To avoid abuse of a broader definition in the application of FRL, other strategies such as the restriction of the number of leave days for family responsibility and the application of the provision of section 27 of the BCEA for employers to require proof may be used. Culturally, sincerity and good faith are important elements in the classification, and to assist the employer to make informed decisions.

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