



**A DECOLONIAL CRITIQUE OF THE SOUTH AFRICAN LEAVE SYSTEM IN THE  
CONTEXT OF TRADITIONAL AND SPIRITUAL RESPONSIBILITIES**

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Submitted in partial fulfilment of the requirements for the degree of  
Master of Laws by Coursework and Research Report  
at the University of the Witwatersrand, Johannesburg

Date: 13 OCTOBER 2023

## **DECLARATION**

I, 1827076 (Student number, declare that this Research Report is my own unaided work. It is submitted in partial fulfillment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

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**Word Count:** 10017 [Incl. the body of your report, footnotes **BUT** excl. title page, declaration, abstract, table of contents and bibliography]

## **ABSTRACT**

South Africa as a country consists of many cultures, traditions, religions and races. Hence it is often referred to as the rainbow nation, however the diversity of South Africa is often not reflected in its laws as such laws are of colonial origin. This research paper seeks to demonstrate that the current South African leave system as regulated by the Basic Conditions of Employment Act is of colonial origin and does not have regard to the cultural and religion landscape of South Africa. This will be done by looking at how the aforementioned legislation is colonial or western in nature to the detriment of the indigenous people of South Africa and other previously excluded races at the peak of colonisation. This paper will look at such traditional and spiritual responsibilities such as ancestral calling which are prevalent in South Africa's employment relationship but remain unrecognised by the current leave system. This paper argues for the decolonisation of South Africa's leave system in order to account for traditional and spiritual responsibilities.

Key words: Ancestral calling; Kievits Kroon; Sangoma; Mmoledi; Sick leave, Family responsibility leave; decolonisation.

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## I. INTRODUCTION.

South Africa is known and embraced for being a rainbow nation.<sup>1</sup> This is owing to the diversity in its population, cultures, traditions and religions.<sup>2</sup> It is to no surprise that even the supreme law of South Africa recognises this diversity by making provisions for their practices and observations.<sup>3</sup> It follows that laws within the borders of South Africa should take cognisance of the diversity in South Africa and to the extent that it is reasonable and practical have such diversity take precedence in matters concerning those that live in South Africa. Unfortunately, the above may be wishful thinking and miles away from ever happening. This paper seeks to advance an argument that there is a need for the South African labour law to be sensitive to the reality of South Africans and those who live in South Africa through decolonisation. As a result of labour law being broader than what this paper can account for, focus will be on the leave system as provided for by the law. In advancing the argument towards the need for a decolonised leave system, this paper will look at the concept of decolonisation. It will further briefly look at the diversity within South Africa in order to show the need for decolonisation. It shall be demonstrated in this paper that the roots of the leave system are deepened in that which is not diverse and/or realistic to South Africa. We will further have a look at the current leave system and provide the necessary criticism in line with the idea of this paper.

### *(a) Limitation of Study.*

This paper is written in partial fulfilment of the LLM course-work and by implication certain aspects will be narrowed to a point that the intentions and meanings are not lost but rather could further be expanded. South Africa is known to be a rainbow nation, which simply attest to its diversity. Hence it would be impractical to consider each and every tribe, culture, religion and believe in such a small research project. Therefore, the study will make reference to available resources that makes reference to whatever culture and such shall be deemed to represent every other culture in showing that inadequacy of the leave system. The above is further influenced by the limited availability of resources which is a direct result of most cultural beliefs and traditions in South Africa, taking the shape and form of living customary law, i.e. not written down. Although where possible every other culture with resources available will be referred to. The author of this paper will base most of his views on his culture and tradition as a Muvenda (a member of the Vhavenda tribe of South Africa). The above will strengthen the argument as the author lives such living traditions and customs of the Vhavenda people.

### *(b) Methodology.*

The nature of this research is that of a multi-discipline. This research will be done using doctrinal research methodology. Therefore, the research will entail the use of both primary and secondary sources of law. As a multi-discipline research, this research will also consider material outside the sources of law to demonstrate and explain relevant issues.

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<sup>1</sup> Monique Prinsloo & Elzabe Huysamen 'Cultural and Religious Diversity: Are they effectively accommodated in the South African workplace?' (2019)40 *Law Democracy and Development* 26.

<sup>2</sup>Ibid.

<sup>3</sup> Constitution of the Republic of South Africa, 1996 S15.

## II. THE ORIGIN OF SOUTH AFRICAN LEAVE SYSTEM

It is common knowledge within the legal academic and fraternity that most of South Africa's law is a product of the events preceding 1652 and those of 1652, and thereafter.<sup>4</sup> Fact is 1652 marked the beginning of what would later be known as colonisation.<sup>5</sup> When the Whites came to South Africa, they did not just come with their tools and equipment, they also came with their laws which already had various influences and further developed over years in South Africa.<sup>6</sup> This is an argument that has long been presented and accepted. As thus even today sources of the South African law includes common law.<sup>7</sup> Common law did not originate in South Africa but was imposed and consequently adopted to form part of the South African Law.<sup>8</sup> Prior to enactment of legislations regulating the employment relationship, freedom of contract prevailed, in that parties could contract whatever terms that they want provided such was not contra bone mores, against the law and unreasonable.<sup>9</sup>

The position around freedom of contract in certain areas began to change as pieces of legislation limiting this freedom were enacted.<sup>10</sup> The other legislation to limit such freedom in as far as the employment relationship was the Labour Relations Act 28 of 1956 (LRA) which although poor did impose some standard.<sup>11</sup> A better development came with the introduction of the Basic Conditions of Employment Act 3 of 1983 which was more comprehensive than the LRA of 1956.<sup>12</sup> The important aspect to note is that all these pieces of legislation were enacted at a time where there was minimum to no consideration for Black South Africa.<sup>13</sup> The ethos of Black people before the dawn of freedom were of minimum concern to the oppressor and as thus the origin of the leave system in South Africa was one that had much as the needs of the employers would have been concerned, it was to the greater consideration of western standards and not those of the indigenous people of South Africa.<sup>14</sup> Unfortunately, this is still prevalent.

## III. WHAT IS DECOLONISATION?

Owing to the history of South Africa of being colonised many have sought to have a South Africa that does not only have free Black people and those who were oppressed but to have a South Africa that is entirely decolonised.<sup>15</sup> Decolonisation has been defined in various context to mean different but closely knitted things. In the academic space many have written about

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<sup>4</sup> Duard Kleyn *et al Beginner's Guide for Law Students* 5<sup>th</sup> ed (2019) 30.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid at 44.

<sup>7</sup> Nagel *et al Commercial Law* 5<sup>th</sup> ed (2015) 4.

<sup>8</sup> Ibid at 6.

<sup>9</sup> Ibid at 644.

<sup>10</sup> Ibid at 644.

<sup>11</sup> Labour Relations Act 28 of 1956

<sup>12</sup> Christopher Albertyn 'Basic Conditions of Employment Act, 1983' (1983) 1 *Indicator South Africa* 3.

<sup>13</sup> Debbie Budlender *The introduction of a minimum wage for domestic workers in South Africa* (2016) 2.

<sup>14</sup> Ibid at 3.

<sup>15</sup> Khawulile Ednah Radebe *Exploring the Interface between the Decolonisation of Higher Education and Open Access* (Unpublished Master of Library and Information, University of Cape Town, 2022) 4.

the decolonisation of universities and education in general.<sup>16</sup> Although some authors have written on the decolonisation of labour law, little to nothing has been said about the decolonisation of the leave system. One therefore question what decolonisation is and in particular in the context of a leave system.

The question of what exactly constitutes decolonisation has been a subject of much controversy and contention.<sup>17</sup> It is thus difficult to exactly define decolonisation. There is a group that believes that decolonisation entails doing away with everything western and/or that came with settlers or is a result of the settlement of colonialist in South Africa.<sup>18</sup> The above can be perceived as advocating for Africa in its purest form or Africa in the state that it was in prior to coming of settlers.<sup>19</sup> This is impractical and far from the reality of today or let alone constitute what people want to see happening.<sup>20</sup> On the other end certain authors have advocated for a more acceptable definition. In the pursuit for a better definition they argue that decolonisation should not mean the return of South Africa as it then was before 1652.<sup>21</sup> In defining it, they opine that , in the context of decolonisation of the law such should entail the definition of law from a non-western or non-colonial understanding but instead the definition of law should be inspired by different sources of law that encourages the purpose of the law of achieving economic and social justice.<sup>22</sup> In other words we should do away with looking at law from the lens of colonialist and seek to look at various sources of knowledge that have views on what law entails. This would therefore in the context of decolonisation include looking at law from an African or customary lens, which is the way that Africans themselves perceive the law.<sup>23</sup>

This is the definition that this paper leans into, together with other views. The unfortunate part is that it appears that one cannot speak about decolonisation without perhaps frustrating a few heads or having views that spoils the purpose of decolonisation.<sup>24</sup> Post apartheid South Africa has witnessed a number of activisms towards decolonisation and this has often ended up in courts as there are some who are anti decolonisation or at least feel that decolonisation seeks to do away with them as individuals.<sup>25</sup> Decolonisation should not be viewed differently to restoration, wherein it entails giving back that which was taken as a result of colonisation and this would include believes, dignity and a voice in general.<sup>26</sup> The context in this paper is not to do away with any view of what leave system of South Africa should be

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<sup>16</sup> Lufuno Sadiki 'Decolonising the Criminology curriculum in South Africa: Views and experiences of lecturers and postgraduate students' (2022) 7 *Transformation in Higher Education* 2.

<sup>17</sup> Monray Marsellus Botha & Elmarie Fourie 'Decolonising the labour law curriculum in the new world of work' (2019) 82 *THRHR* 178.

<sup>18</sup> Mankhuwe Caroline Letsoalo & Zenia Pero 'Historically White Universities and the White gaze: critical reflections on the decolonisation of the LLB Curriculum' (2020) 14 *PSLR* 5.

<sup>19</sup> Himonga C and Diallo F 'Decolonisation and Teaching Law in Africa with Special Reference to Living Customary Law' (2017) 20 *PER* 5.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid* at 6.

<sup>24</sup> Radebe, *op cit* 15 at 11.

<sup>25</sup> Malose Makhubela 'Decolonise, Don't Diversify': Discounting Diversity in the South African Academe as a Tool for Ideological Pacification' (2018) 22 *Education as change* 6.

<sup>26</sup> Tamara Cohen et al *Labour Law in South Africa Context and Principles* (2020) 15.

but rather to argue for an expansion on the current views which would then mould a new leave system based on multilayers of knowledge emanating from diverse schools of thoughts. This position is the position supported by justices in the case of *Chairperson of the Council of the University of South Africa and others v AfriForum NPC*.<sup>27</sup> In this case the court opined that universities can achieve the decolonisation of language by ensuring that all indigenous languages are afforded an opportunity to be languages of teaching and learning.<sup>28</sup> Notable from this view of the court is that the court did not say that decolonisation can be championed by ensuring that all colonial languages are eradicated from institutions of learning. It follows that the decolonisation of a leave system can be referred to as the shift of a leave system that is purely based on western principles of what constitute the need to be absent from work to a system that considers the diverse needs that forces employees to be absent from work.

#### IV. THE DIVERSE TRADITIONAL AND SPIRITUAL LANDSCAPE OF SOUTH AFRICA

South Africa like most African countries consist largely of the Black race. Although others believe that all these Blacks share a common ancestor, presently the Black people of South Africa consist of various tribes that subscribe to different traditions and culture. The province of Limpopo houses the Vhavenda tribe, the Vatsonga tribe and Mapedi tribe. Noteworthy is that there is no law prohibiting any tribe from living in a certain province. Hence all the provinces may have other tribes living in harmony with the tribes that dominates the province. In Mpumalanga due to its proximity to Eswatini (previously Swaziland) and Limpopo it is populated largely by Swati and Vatsonga people. Next to Mpumalanga is the province of Kwazulu Natal which is predominately Zulu people. South Africa further has the tribe of Batswana who are largely found in North West province and parts of Gauteng. The province of Free State close to the country of Lesotho is dominated by the tribe of Basotho people. Eastern cape and Western Cape are dominated by Amakhosa tribe and some Khoisan tribe people in parts of Western Cape and Northern Cape. All these tribes are arguably the indigenous people of South Africa or at least there is consensus that they are indigenous people of South Africa.

Although all of this tribes are indigenous people of South Africa, they do not exclusively own South Africa as the position in South Africa, is that South Africa belongs to all who live in it. Therefore, people of South Africa would further include Whites, whether Afrikaans or English; Coloureds, Indians and other Asians. This may appear to be a diversity beyond comprehension, but this is the reality of South Africa because even if for example, Indians or other Asians are not of South African origin it cannot be ignored that some of them have never lived anywhere else and some of them have been in South Africa for decades. This very same argument can be advanced for Whites and generally everyone who may not be of South African origin but lives in South Africa or has been living in South Africa for a very long time.

The diversity in this tribes means a diversity in tradition and culture. It further means diversity in religion. This is because whilst certain religions are largely practiced by certain races, they are not exclusive to such races and are open to other races observing them. In essence it can be argued that almost every religion that exists can be found in South Africa,

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<sup>27</sup> *Chairperson of the Council of UNISA v AfriForum NPC* 2022 (2) SA 1 (CC).

<sup>28</sup> *Ibid.*

although it may be observed by an insignificant amount of people. Some of these religions includes Christianity, African religion, Islam, and Hinduism. Owing to the scope of this research where the leave system is discussed from a religious point of view reference will be made to either of these religions as there most common ones. This should in no way be inferred to mean that the others matter more than the others.

In the absence of decolonisation, there cannot be a consideration of all these indigenous people of South Africa and/or any other race that was previously shun upon by the settlers. Given the magnitude of this diversity, it is one that begs for attention and shall be demonstrated later on, it has in several occasions tried to find its way to recognition but was only met with tolerance. All this tribes, religions, cultures and traditions must be one of the lenses through which we understand the concept of law.

## V. THE CURRENT LEAVE SYSTEM OF SOUTH AFRICA.

The South African leave system is regulated by the Basic Conditions of Employment Act 75 of 1997 (BCEA).<sup>29</sup> This legislation creates various categories of leaves that an employee is entitled as a minimum condition of employment.<sup>30</sup> It was not long ago that there was necessary amendment to this legislation that led to more entitlement which whilst good is unfortunately still on the basis of colonial or western considerations as shall later be demonstrated in this paper.<sup>31</sup> The categories of leave that this paper finds contention with and not on the basis of them not being necessary but on the basis that they are not enough and are from the lenses of western considerations are, annual leave, sick leave, family responsibility leave, maternity leave, parental leave, adoption leave and commission parental leave.<sup>32</sup> These categories of leave shall be discussed in full detail hereunder.

### (a) *Annual Leave.*

This is the most common leave that every employee is entitled to and is found within Section 20 of the BCEA.<sup>33</sup> It is leave that is a product of the consideration of the employee's health and wellness.<sup>34</sup> It may be viewed as a leave for the purpose of resting and rejuvenating so that the employee does not lose the much-needed productivity that may be hindered by fatigue.<sup>35</sup> Accordingly, every employee is entitled to either 21 consecutive days of annual leave in a leave cycle or 12 months or alternatively a day of annual leave for each 17 days worked.<sup>36</sup> Further alternatively by an agreement an employee may be entitled to 1 hour towards leave for every 17 hours worked.<sup>37</sup> This is the minimum entitlement and may be varied by collective agreements.<sup>38</sup> An annual leave is one that an employee should still be remunerated for as if he had not taken leave.<sup>39</sup> One cannot fault this class of leave but it's not a leave that an employer

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<sup>29</sup> J Grogan *Workplace Law* (2014) 63.

<sup>30</sup> Ibid.

<sup>31</sup> Michael Beaumont *Beaumont Express Vol 20* (2018) 36.

<sup>32</sup> Cohen, op cit 26 at 152.

<sup>33</sup> Basic Conditions of Employment Act 75 of 1997 S20.

<sup>34</sup> Michael Beaumont *Beaumont Express Vol 22 no 8* (2020) 165.

<sup>35</sup> Ibid.

<sup>36</sup> MA Fouche *A Practical Guide to Labour Law* (2019) 58.

<sup>37</sup> Grogan, op cit 29 at 69.

<sup>38</sup> Grogan, op cit 29.

<sup>39</sup> Grogan, op cit 29.

throws at the employee for any other important responsibility that an employee may have, as such would then not constitute rest but be a direction of energy towards other responsibilities.

*(b) Sick Leave.*

Absurdity in the workplace would have been the absence of a sick leave, as to be sick is not something that one calls upon themselves. Thankfully the BCEA recognises this reality and entitles an employee who is newly employed and who has not been employed for a period exceeding 6 months to a sick leave of one day paid leave for each 26 days worked.<sup>40</sup> This means that an employee who has not been employed for a period exceeding 6 months will for example be entitled to 2 days of paid sick leave if he or she has worked for 52 days (52 divide by 26 days). This employee would then after being employed for more than 6 months, be entitled to a full sick leave of the number of days such an employee would ordinarily work in the period of 6 weeks.<sup>41</sup> This entitlement is for every leave cycle of 36 months.<sup>42</sup> In other words, an employee who for example works 3 days per week would then be entitled to 18 days of paid sick leave in a leave cycle of 36 months. Although sick leave is an entitlement the employer is entitled to demand from an employee who has not been to work for more than 2 consecutive days, a medical certificate by a medical practitioner or an individual who has been certified and registered with a professional council, failure of which the employer is not bound to remunerate for such days off, this can be varied by an agreement.<sup>43</sup> The challenges within the present conception of a sick leave will be demonstrated later in this paper.

*(c) Maternity Leave.*

A maternity leave, as the name suggest is an entitlement of every female employee.<sup>44</sup> It is a leave entitlement that is heavily protected as an employee who takes this leave and is later denied return to work is automatically deemed to have been unfairly dismissed.<sup>45</sup> On any given occasion that evokes maternity leave, an employee is entitled to 4 consecutive months.<sup>46</sup> These 4 consecutive months can commence at any of the following times, which is the time agreed upon, four weeks before the time that such unborn child is expected to be birthed or where the health of the mother and/or that of the unborn child with the certification of a medical practitioner or midwife demands that the mother takes time off.<sup>47</sup> The minimum condition of employment demands that a woman who lost her child through miscarriage during third trimester of the pregnancy or a woman who gave birth to a still born, shall unless waived by a medical practitioner or midwife be allowed 6 weeks off after such birth or miscarriage.<sup>48</sup> A mother who is not or will not be remunerated during her maternity leave or will receive a lesser

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<sup>40</sup> A Van Niekerk *Law@work* (2019) 109.

<sup>41</sup> Ibid at 110.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

<sup>44</sup> Motlhatlego D Matotoka & Kola O Odeku 'Discrimination on the grounds of pregnancy, denial of maternity leave and lack of conducive environment for nursing mother in the workplace in South Africa' (2020) 41 *Obiter* 597.

<sup>45</sup> Ibid at 600.

<sup>46</sup> Ibid at 603.

<sup>47</sup> Ibid at 603.

<sup>48</sup> Ibid

remuneration than the one she normally receives will be entitled to claim from the unemployment insurance fund.<sup>49</sup>

*(d) Parental Leave.*

In any functional society that is experiencing development and growth the law ought to develop or reinvent itself to be aligned with the new norms. In the employment space modern changes were introduced in 2018 to create new categories of leave that an employee is entitled to.<sup>50</sup> This was done by the Labour Laws Amendment Act 10 of 2018 (LLAA), which introduced section 25A, Section 25B and Section 25C.<sup>51</sup> In terms of Section 25A, parental leave was created.<sup>52</sup> This is a leave that parents are entitled to at the birth or adoption of their child.<sup>53</sup> It entitles new parents whether by birth or by adoption to 10 consecutive leave days during each such event of birth or adoption.<sup>54</sup> A parent entitled to this leave will be given such leave from the date that the child is born or where the child is adopted, from the date the adoption order is made.<sup>55</sup> It is expected of an employee who will apply for such leave to inform the employer at least within a month of such occasion evoking parental leave, taking place or expected to take place.<sup>56</sup> Therefore, an employee must give 1 month notice to the employer before he or she takes such leave. Due to the fact that this leave is similar to maternity leave, an employer is not bound to pay the employee such leave, but such employee is entitled to claim unemployment insurance fund for such parental leave.<sup>57</sup> This is indeed a step in the right direction but does not make one hopeful as we are still on the same track that ignores Afrocentric consideration and other valid consideration to the benefit of western considerations.

*(e) Adoption Leave.*

As mentioned above, another newly introduced category is that of adoption leave which was also introduced in 2018.<sup>58</sup> This new form of leave entitles those who are adopting a child to 10 consecutive weeks from the date that the child is handed over to the care of the adoptive parents or the granting of such order of adoption.<sup>59</sup> This leave appears to attempt to put new parents by virtue of adoption in the same pedestal as new parents by virtue of giving birth to a child. Perhaps the thinking behind this provision was that like any other new parent, an adopting parent may want to establish an uninterrupted bond with the new member of the family. If the adoption order is given to two parents, one of the parents would have to take a parental leave whilst the other takes the adoption leave.<sup>60</sup> Perhaps this is important in the context of families

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<sup>49</sup> Van Niekerk, op cit 40 at 111.

<sup>50</sup> Labour Laws Amendment Act 10 of 2018.

<sup>51</sup> Ibid.

<sup>52</sup> LLAA, S25A.

<sup>53</sup> Fouche, op cit 36 at 60.

<sup>54</sup> Fouche, op cit 36 at 60.

<sup>55</sup> Asheelia Behari 'Lessons on parental leave: a comparative analysis of parental leave in South Africa and the United Kingdom' (2020) 41 *Obiter* 791.

<sup>56</sup> Ibid at 792.

<sup>57</sup> Ibid at 7992

<sup>58</sup> LLAA, S25B.

<sup>59</sup> Tshepiso Rasetlola and Asithandile Liwela 'A victory for parents and children – the commencement of the amendments to the Basic Conditions of Employment Act' (2020) 5 *De Rebus* 1.

<sup>60</sup> Ibid.

created by civil unions as the parties themselves would then have to elect who takes parental leave and who takes adoption leave.<sup>61</sup> The biggest question is that where such parents are employed at different places and thus have employment contract independent of that of their spouse which thus mean that the other employer cannot get involved in such private and intimate matter, how would employers navigate the question of not giving all of them adoption leave. It thus seems impractical that one would get adoption leave and the other parental leave. This leave system like maternity leave and parental leave, entitles an employee who is not or will not be remunerated during such leave, to claim from the unemployment insurance fund.<sup>62</sup>

*(f) Commissioning parental leave.*

The commissioning parental leave is in many ways similar to the adoption leave. It is leave that recognises the other unconventional method of having a child, surrogacy.<sup>63</sup> It entitles a commissioning parent to 10 consecutive weeks of unpaid leave.<sup>64</sup> A commissioning parent is basically a parent who has a surrogate mother who is carrying his or her child in terms of a surrogate agreement. In a surrogate agreement, the surrogate mother is made pregnant through advanced artificial means, in order to give birth to a legitimate child of the commissioning parent.<sup>65</sup> This is often used by couples or individuals who experiencing pregnancy related issues that makes having a child either impossible or difficulty and, in some circumstances, where the couple or individuals simply elect to have their child through such means. The surrogate mother in the surrogate agreement undertakes to give the child to the commissioning parent soon after birth or as soon as reasonably possible.<sup>66</sup> The commissioning parent must thus make known to the employer within a period of one month from the date that the surrogate mother is expected to have such a baby that he or she will be taking a commissioning parental leave.<sup>67</sup> In the event of the surrogate agreement having two commissioning parents, only one of the parents is entitled to take the commissioning parent leave and the other shall be entitled to parental leave in the context discussed earlier.<sup>68</sup> A commissioning parent is entitled to claim from the UIF payment if during such commissioning parental leave he or she is not remunerated.<sup>69</sup>

*(g) Family responsibility leave.*

All employees who make available to their employer their services in terms of their contract of employment for a minimum of 4 days in a week are entitled to a family responsibility leave.<sup>70</sup> An employee will however be entitled to this leave upon completion of the first 4 months of employment.<sup>71</sup> In a leave cycle of 12 months an employee who has been employed for more

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<sup>61</sup> Ibid.

<sup>62</sup> Ibid.

<sup>63</sup> A Louw 'The acquisition of shared parental responsibility by same-sex civil union partners' (2007) 28 *Obiter* 326.

<sup>64</sup> Danielle Visser *Parental leave in South Africa: bridging the gap between gender roles and the right to equality* (Unpublished LLM Thesis, University of Pretoria, 2018) 51.

<sup>65</sup> Children's Act 38 of 2005, S1.

<sup>66</sup> Children's Act 28 of 2005, S197(1)(b).

<sup>67</sup> BCEA, S25C(3).

<sup>68</sup> BCEA, S25C(6).

<sup>69</sup> BCEA, S25C(5).

<sup>70</sup> J Grogan *Workplace Law* (2017) 52.

<sup>71</sup> Ibid.

than 4 months will be entitled to 3 days paid leave of family responsibility.<sup>72</sup> This leave is taken at the birth of the child of the employee or when such child is sick.<sup>73</sup> Family responsibility leave should not be confused for parental leave. Parental leave is an unpaid leave whereas family responsibility leave is paid leave. It is a question of when a child is born, which leave does the new parent desire perhaps with the consideration of the various benefits each offer. A family responsibility leave can further be taken in the event of death of the spouse, life partner, child (including adoptive child), parent (including adoptive parent) or sibling.<sup>74</sup> The employer can however ask the employee to furnish him with proof of such event necessitating the family responsibility leave.<sup>75</sup>

## VI. CRITICISM OF THE CURRENT LEAVE SYSTEM

As mentioned earlier, this paper seeks to demonstrate how colonial and inadequate our current leave system is we have looked at the meaning of decolonisation and in that regard adopted a meaning that when considered together with the constitution and the diversity in South Africa, it would be to err if one speaks for a decolonisation that then advances just the indigenous people. Hence although this paper tends to lean towards indigenous cultures and traditions, it is the position of this paper that the decolonisation in question should be one that results in a new conception of law that accommodates all that live in South Africa. Therefore, in criticising the current leave system where necessary, other religions, traditions and/or cultures will be considered as well. We shall criticise the current leave system under two views, which are that it is a Eurocentric leave system and further that it is inadequate to cater for the true South Africa and its people.

### *(a) South African leave system is Eurocentric.*

As discussed earlier, there are various categories or types of leave that an employee may be or is entitled to, under South African law. The unfortunate part for those who are not of European descent or associates themselves with something less or non-European, all these leave systems do not help them as much as they are expected to. We shall put under a microscope some of this leave that we find contention with.

### *(i) Family Responsibility leave.*

Family responsibility leave is based on the definition or understanding of a family in the context of western culture.<sup>76</sup> A family responsibility leave that is based on what constitute family in the indigenous context would have been wider in the consideration of those classes of people a person is responsible for.<sup>77</sup> The aforementioned consideration would have resulted in a

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<sup>72</sup> Ibid

<sup>73</sup> Ibid.

<sup>74</sup> Ibid.

<sup>75</sup> Van Niekerk, op cit 40 at 111.

<sup>76</sup> Matome M Ratiba “‘Badimo ba fihlile mošomong’ – is there a place for cultural ethos and practices at the workplace? African Cultural Practices and Beliefs Revisited’ (2015) 14 *African journal of indigenous knowledge Systems* 215.

<sup>77</sup> Ibid.

realisation that it is impractical to create an exhaustive list of people whose funerals you ought to be allowed at work to attend. The legislature would have rather opted for a definition that is inclusive of everyone who falls within the scope of the definition than a list. The above is demonstrable also from how customarily a man would become the husband of his late brother's wife and automatically raise the family as his own.<sup>78</sup> This man in English will be known as an uncle but in African customs he is regarded as a father.<sup>79</sup> In African customs siblings of the same gender as your parents are perceived to be your parents as well. Hence for example, an older brother of my father (khotsi in Tshivenda) is in accordance with Tshivenda customs known as khotsimuhulu, which translates to older father.<sup>80</sup> Therefore, African people have far more family responsibilities than accounted for by the current family responsibility leave. The chaotic effect of this is that a child who was raised by his father's brother and does not have annual leave days available but has family responsibility leave, will not be able to attend the funeral of someone who basically raised him or her and by default is the reason the person qualifies for the job.

(ii) *Sick leave.*

The constitution of South Africa guarantees everyone the right to practice a religion and culture of their choice, but this appears to be prohibited when it comes to sick leave.<sup>81</sup> An African person who is sick and believes that he will only be healed if he consults a traditional healer (Sangoma) is not entitled to taking leave on the basis that he or she will later provide a letter or a sick note given to him by a Sangoma.<sup>82</sup> The position is that only medical certificate from registered health professional is considered.<sup>83</sup> This is absurd when one considers that there are people who genuinely believe in traditional healing, and it works for them. It does not make sense that someone who is African and lives in Africa and was born and fortified by a traditional healer cannot as an adult consult the same healer for healing. Although a number of criticism has been levelled against the sick note of a traditional healer being of less standard owing to the absence of regulations, it is the position of this paper that a sick note from a Sangoma should not even be compared to a medical certificate as we know it, because that is effectively imposing western standards to persons who have long practiced their beliefs well in the absence of any regulation or related paper work.<sup>84</sup> A topic of further controversy is that of people being absent from work, not to necessarily just see a healer but to become one. It is not the position of this paper that such people are sick and should thus be given sick leave when they have to undergo training to become traditional healers. A person who has to undergo training to become a Sangoma and must necessarily be absent from work is a person who has ancestral calling or premonitions.<sup>85</sup> A person who has ancestral calling must be treated as a

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<sup>78</sup> C Rautenbach *Introduction to Legal Pluralism in South Africa* (2014) 106

<sup>79</sup> Ibid.

<sup>80</sup> Mashudu Makhavhu *Relational nouns in Tshivenda* (Unpublished MA thesis, Stellenbosch University, 2006) 123.

<sup>81</sup> Constitution of the Republic of South Africa, 1996 S15.

<sup>82</sup> Ratiba, op cit 76 at 214.

<sup>83</sup> Grogan, op cit 29 at 70.

<sup>84</sup> Adrian Bellengere & David Spurrett 'A discordant Note: Kievits Kroon Country Estate v Mmoledi' *SALJ* 10

<sup>85</sup> Ratiba, op cit 76 at 215.

person with ancestral calling and the absence of understanding of this phenomenon should not lead to it being rounded to the nearest concept that people understand, which is sickness.

The absurdity of the issue of medical certificate can be seen clearly in the CCMA award in *Numsa obo Nkinqa v Gemtec (Pty) Ltd*<sup>86</sup> where an employee was in a bad state such that he could not work. The employee was said to be suffering from amafufunyana, which has to do with his body being infested with evil spirits. The employee was then forced to be absent from work and consulted a traditional healer who healed him. The employee was dismissed on the basis that the reasons that he furnishes does not meet the policy of the company since he did not consult a medical practitioner or a doctor. Fortunately, the Arbitrator find in favour of the employee and awarded reinstatement. This is one of many cases and unfortunately not all of them ended with reinstatement.

The argument of this paper is not that sick notes of Sangomas should be recognised as medical certificate and that a Sangoma should be accorded the status of a medical practitioner, the argument is that healing is not limited to western means or conventional method but there are other means which may even include praying. The constitutional right is that a person can choose whichever means, he or she subscribes to. An example of a different method of healing is the secret healing that people who believe in it receive from the Zion Christian Church headquarters in Morija just outside the capital city of Limpopo. As a child and as an adult I have heard with much conviction that people with different tribulations receives healing in what they call Mount Zion (other name for ZCC headquarters). This was the case in *Mdluli v Ekurhuleni East College*<sup>87</sup> where the employee was suffering from a “mental illness” related to alcoholism and went to ZCC Limpopo to receive treatment. He was then dismissed but took the matter to CCMA and obtained a default arbitration award of reinstatement.<sup>88</sup> This is a clear demonstration that it could be any form of healing that the person subscribes to, such should be recognised for the purpose of sick leave.

Indigenous people know that there are what one would call ‘indigenous’ sicknesses for the lack of a better word.<sup>89</sup> These are sicknesses that indigenous people believe can only be healed by traditional means and/or going to a traditional healer.<sup>90</sup> Unfortunately, even if the employee has the intentions to do ‘right’ and to meet the expectation of his or her employer by producing a sick note at times such sicknesses may not be seen using western medical procedures.<sup>91</sup> This means that a western doctor will not be able to provide a medical certificate to the effect that such person is sick since in his eyes such person is not sick.

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<sup>86</sup> *Numsa obo Nkinqa v Gemtec (Pty) Ltd* 1008 [1998] 8 BALR 1008 (CCMA)

<sup>87</sup> *Mdluli v Ekurhuleni East College* [2015] 6 BALR 664 (CCMA).

<sup>88</sup> *Ibid.*

<sup>89</sup> Mokgale Makgopa ‘Indigenous healing system: an oral transmission’ (2001) *International Conference on Indigenous Knowledge System held at University of Venda* 51

<sup>90</sup> *Ibid* at 52.

<sup>91</sup> *Ibid* at 53.

*(b) The inadequacy of the current leave system.*

The current leave system over and above being very Eurocentric still fails to cater for all the needs of people within the borders of South Africa, and their beliefs. One would have hoped that given many events of justified absenteeism from work in an Afrocentric eye they would have been developments simultaneous to the developments that happened in 2018 when other forms of leave were introduced like discussed earlier. The current leave system does to a western extent cover a lot of fundamental aspects and none of it should be removed but rather more must be added to make it more African. We shall look on the basis of why such leave system is not adequate for a country like South Africa.

*(i) Absence of spiritual and/or religious leave.*

The CCMA and labour courts have heard many cases relating to employees being absent from work due to their spiritual needs and until such is properly addressed through decolonisation many cases are yet to come. Although there has been other absenteeism's outside those of going to train as a Sangoma, it is often the training for becoming a Sangoma that puts employees in a no choice situation but to be absent from work which often leads to dismissal. The training of becoming a Sangoma is one that many and sometimes even Sangomas and the trainee deems it to be a sickness for the purpose of a sick leave.<sup>92</sup> Hence even Sangomas have endeavoured to provide some form of sicknote to employers to prove that such person is sick.<sup>93</sup> It is perhaps the lack of any other leave in the current leave system that has coerced employees and their Sangomas to opt for what they deem to be the closest thing to what they ought to be getting. In order to properly demonstrate that spiritual calling is not a sickness we will zoom into the landmark case of *Kievits Kroon Country Estate (Pty) v Mmoledi and Others*.<sup>94</sup>

This is an appeal case against a decision that the dismissal of the employee was substantively unfair. The employee was employed as a chef de partie for the appellant.<sup>95</sup> In the course of her employment the employee approached her manager to request that she be excluded from attending to night shift duty in order for her to undergo a course of becoming a Sangoma.<sup>96</sup> She explained to her manager that she was having visions of her ancestors and had to undergo the training.<sup>97</sup> The manager agreed and she was accommodated by being exempted from the night shift duty.<sup>98</sup> The employee then sought to request five weeks unpaid leave so that she can attend the course.<sup>99</sup> This time her request was rejected forcing her to go to the training without permission and thus attracting a disciplinary hearing and her subsequent dismissal.<sup>100</sup>

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<sup>92</sup> *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi and Others* [2014] 1 All SA 636 (SCA) para 15.

<sup>93</sup> *Mlangeni v Woolworths (Pty) Ltd* [2022] 11 BALR 1120 (CCMA).

<sup>94</sup> *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi and Others* [2014] 1 All SA 636 (SCA).

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.*

When one looks at the facts of this case, there are two important aspects. The first one is that she had a spiritual calling as evident from her visions of her ancestors. The second one is that there is a Sangoma training course which she must undergo in order to answer the calling from her ancestors. Therefore, there is no sickness in any of this. The issue of sickness comes at a point where she had to go for disciplinary hearing.<sup>101</sup> The employee when she initially asked to be exempted from the night shift, she did not say that she is sick and her sickness is of the nature that she cannot work during night shift.<sup>102</sup> Cumulatively even when she asked for the five weeks unpaid leave, she did not make reference to a sickness but rather to a training that she had to undergo.<sup>103</sup> It is remote from common sense that a person who is sick must be healed by a training. It is trite that sickness is associated with pain and some sense of discomfort whereas training is associated with the body being highly active be it physically or mentally. As a matter of fact, Sangoma training includes amongst other thing rigorous dancing.<sup>104</sup> It is therefore difficult to reconcile a spiritual calling with a sickness.

The struggle of associating spiritual calling with sickness is further notable from the letter of the Sangoma under whom the training was going to happen. The Sangoma struggled to come up with the name for the sickness and therefore made reference to premonitions of the ancestors.<sup>105</sup> Premonitions is not in any way a sickness but rather a feeling or a strong sense that bad will happen.<sup>106</sup> The employee ought to have had such premonitions of the possibility of something bad happening which could range from anything like illness to death in the event of her failure to answer the ancestral calling.<sup>107</sup> Hence sickness and any other harm are the results of failure to answer a spiritual call which therefore necessitate the training and absence from work. A person with a spiritual calling is therefore not a sick person entitled to sick leave but is a person who has a calling which should be answered by a training to become a Sangoma and failure of which can result in bad things happening.

Research in the traditional healing space demonstrates that there is no conclusion on ancestral calling being pathological.<sup>108</sup> In a research conducted amongst Sangomas in the Kwazulu Natal, the Sangoma argued that ancestral calling manifest itself differently to different people and to some it may include misfortunes such as not getting a job.<sup>109</sup> Hence it cannot be true that a person who is not getting a job because he or she must first undergo training to become a Sangoma is sick. True some of the people with this calling may have experiences related to being sick and in particular mentally disturbed, however such is usually in the case of persons not answering their calling.<sup>110</sup> Effectively it means that the current legislation makes

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<sup>101</sup> Ibid para 14.

<sup>102</sup> Ibid para 4.

<sup>103</sup> Ibid para 5.

<sup>104</sup> Rebecca Rogerson *The way of the ancestors* (Unpublished Masters thesis, York University, 2017) 27.

<sup>105</sup> Kevits Supra note 92 para 8.

<sup>106</sup> Larry Dosey 'Premonitions' (2008) 4 *Explore* 83.

<sup>107</sup> M Van der Zeijst *et al* 'Ancestral calling, traditional health practitioner training and mental illness: An ethnographic study from rural KwaZulu-Natal, South Africa' (2021) 4 *Transcultural psychiatry* 7.

<sup>108</sup> Ibid at 2.

<sup>109</sup> Ibid at 5.

<sup>110</sup> Ibid at 6.

it conducive for employers to force employees to work despite this calling and in the process risking more than just their health but a variety of misfortunes.

Although this research is inclined towards the consideration of indigenous people, it cannot be neglected that the present South Africa has far beyond the indigenous people such that failure to consider them may result in the proposed outcome of this paper being received with outrage by other South Africans who are not necessarily indigenous. As mentioned earlier decolonisation in this paper proposes the inclusion of every other consideration that falls out of western consideration and has thus been disregarded in the consideration of the drafting of the BCEA. Hence such inclusions may include spiritual leaves. If an employee is of the view that his spirituality or religion is important to an extent that like in the event of ancestral calling, he or she is willing to take unpaid leave, perhaps such a consideration may produce a better leave system.

The need for a religious or spiritual leave can be seen in the case of *FAWU & others v Rainbow Chicken Farms*.<sup>111</sup> In this case the employer who had appointed employees of the Muslim faith on the basis that the slaughtering of the chicken had to be done to the satisfaction of Halaal considerations, was faced with a challenge of such employees refusing to work on an Islamic holiday. The employees and the employer had a collective agreement that entitled them not to work on gazetted public holidays which effectively excluded their Islam Eid ul Fitr. The employees were willing to put in overtime work and to further work on Saturdays to compensate for their absence on such a holiday. Noteworthy is that the employer only sold chicken cut in accordance with Halaal standard and as thus sourced butchers with the assistance of the Muslim Judicial Council. Although the employees in question had previously worked on the holiday in the past years, the dawn of the Constitution and the benefits it came with encouraged them to seek an entitlement in line with their faith. The employees had endeavoured to communicate with the employer their intentions not to work on such a Muslim holiday but their plea was not heard. Despite being warned of the possible repercussions of not reporting for duty, the employees in this case did not report for duty and were dismissed as a result. The dismissal was found not to be fair by the labour court.

What is shocking in this case is that an employer who by a number means associates or affiliates with the Muslim faith could not be open to consider Muslim holidays. The very fact that employees were sourced from a Muslim Judicial Council and were required to be Muslim in good standings who observe the necessary protocols of a Muslim, should have guided the employee into considering days that people of Muslim faith would not want to work and effectively make arrangements to mitigate for such days that they will not work.

This case goes to show that employees would have days off on days that the western had deemed important in light of their religion not to work. Hence a person who is not a Christian will be given a day off as in this case on Christmas but not on a day that is spiritually or religiously important to the person. Hence the BCEA ought to consider that in South Africa there are such religions and believes that would require an employee to be absent from work

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<sup>111</sup> *FAWU & others v Rainbow Chicken Farms* [2000] 1 BLLR 70 (LC).

and not be forced to utilise their annual leave that is vital to resting and restoring working efficiency.

*(ii) Absence of traditional responsibility.*

The family responsibility leave not only does it limit the definition of family to a western definition thus giving such ‘responsibility’ to the limited family members, but it further defines responsibilities in a western way. Majority of South Africans have far more family responsibilities than death and sickness. There are other responsibilities that are applicable to the most indigenous people of South Africa that do not speak to a person of western background. In indigenous communities some people are born with roles and responsibilities that arise by virtue of their birth.<sup>112</sup> The simplest example of this, are traditional leaders, be it a king, queen, headman or headwoman as recognised by the Traditional Leadership and Governance Framework Act 41 of 2003(TLGFA).<sup>113</sup> This legislation on its own create a responsibility that may demand that a person be absent from work. All of the aforementioned traditional leaders are appointed by a process that follows customary law and is administered by the members of the royal family.<sup>114</sup>

A counter argument maybe presented that such people are not employees, but the truth of the matter is that not all traditional leaders receive remuneration and/or government incentives.<sup>115</sup> As a matter of fact, no one is paid by the government to be a member of the royal family but rather it is their birth right and responsibility.<sup>116</sup> This means that whilst their member of the royal family they still ought to make a living, and such may mean getting a job like any other ordinary person. What then happens when such person in the course of their employment has family responsibilities to attend to, such as meetings to appoint a new traditional leader. An example of a traditional leader is just the most popular but also ordinary people have family responsibilities that are not catered for by the current understanding of responsibility, for example an aunt.<sup>117</sup> An aunt is known in South Africa mostly as makhadzi or rakgadi which refers to the sister of the one’s father.<sup>118</sup> This person has roles that at times may even suggest that in most families she is the head or assistant head of the family.<sup>119</sup> Nothing is done in families without her being informed and at times having duties to perform, owing to what needs to happen in the family.<sup>120</sup> These duties stretch from performing traditional rituals to appease the ancestors to a simple lobola negotiation and a whole lot more.<sup>121</sup> Some of these duties come without there being foresight about their occurrence and may even be some form of emergency, for example when the ancestors are unhappy and there must be an event to appease them or

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<sup>112</sup> Pfarelo Eva Matshidza *The role of Makhadzi in traditional leadership among the venda* (Published Doctoral thesis, University of Zululand, 2013) 2.

<sup>113</sup> TLGFA, Section 20.

<sup>114</sup> TLGFA, Section 9(1)9(a).

<sup>115</sup> M Musitha & N Nkuna ‘Developmental local government and the municipal remuneration structure for traditional authorities in South Africa: a broiling ethical inferno (2014) 3 *Journal of Public Administration* 777.

<sup>116</sup> Mphephu-Ramabulana and Another v Mphephu and Others 2022 (1) BCLR 20 (CC) Para 17.

<sup>117</sup> Hugh A Stayt *The Bavenda* 88.

<sup>118</sup> Ibid at 174.

<sup>119</sup> Ibid at 174.

<sup>120</sup> Ibid at 174.

<sup>121</sup> Ibid at 174.

else nothing will go right.<sup>122</sup> In the above example one can note that this person has a family responsibility to attend to but may be constrained by the current leave system.

*(iii) Lack of consideration of other African ceremonies*

In African communities there are several events that may require a person to be absent from work perhaps for a time longer than what the employer is open to tolerating. These are however very important events that not only deserve recognition but also requires the legislation to give considerations to them. The BCEA to this end is still lacking to make provisions for the consideration of African events that may be necessary. An attempt at listing them all may be a futile exercise as some do not necessarily apply to a specific tribe but rather a clan. Effectively it means that only members of that particular clan may know of such events that may warrant their absence from work. A simple example that I relate to is that much as my surname is Maanda, my clan names are Mukwevho Mufamadi wa ha Mashau. As a member of this clan it is our belief that a person must first be buried and later on in life there will be an event warranting the exhumation of that person's remains for the purpose of cremation and disposing of the ashes to a local river.<sup>123</sup> This is my belief as a member of a clan but not as a Muvenda. Therefore, should it happen that a person with the same belief with me has to attend an event of the exhumation of their loved ones and associated rituals, what piece of legislation will enable them to make such a request. This is a simple demonstration of the diversity within the very same diverse groupings.

Other examples that may apply across many tribes, would include things like initiation schools. Depending on your tribe a need may arise in the course of a person's employment that they must go to the mountain to get circumcised and to be initiated as men.<sup>124</sup> The current leave system does not make provisions for such leave. One may argue that initiation schools meant to initiate boys into men by *inter alia* circumcising them should be treated as sick leave but traditional initiation schools are more than just medical circumcision.<sup>125</sup> In traditional initiation schools initiates are circumcised and thereafter initiated with various secret training meant exclusively for men who went to traditional schools.<sup>126</sup>

The short coming of the BCEA can be seen in the CCMA matter of *NUM obo Nkabinde / Mafube Coal Mining (Pty) Ltd*.<sup>127</sup> In this case the Applicant was employed by the Respondent as a plant engineering assistant.<sup>128</sup> During the course of his employment the Applicant approached his employer through his foremen seeking leave for a duration of two months or more in order to attend his tribal traditional initiation school.<sup>129</sup> The Applicant wanted to attend

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<sup>122</sup> Matshidza, op cit note 112 at 36.

<sup>123</sup> This is also practiced by the Vhatavhatsindi, Stayt Op cite note 116 at 212.

<sup>124</sup> Kotie Geldenhuys 'Initiation Schools' (2016) *Servamus* 30.

<sup>125</sup> Ibid.

<sup>126</sup> Tapiwa Magodyo, Michelle Andipatin & Kyle Jackson 'The role of Xhosa traditional circumcision in constructing masculinity' (2016) *South African Journal of Psychology* 350.

<sup>127</sup> *NUM obo Nkabinde / Mafube Coal Mining (Pty) Ltd* [2010] 5 BALR 561 (CCMA).

<sup>128</sup> Ibid.

<sup>129</sup> Ibid.

the initiation school as a vital step in order to transition into manhood.<sup>130</sup> The Applicant sought to obtain 30 days from his annual leave which was yet to be accrued.<sup>131</sup> The Applicant further wanted an extension on that leave on unpaid basis.<sup>132</sup> The unpaid leave was deemed necessary by the Applicant since the initiation school takes longer than a month. The employer was willing and did give the applicant an approval of 30 days leave but could not give him the extension. The refusal by the employer to grant the extension on the basis that production would suffer prompted the involvement of the tribal leader of the Applicant. The tribal leader wrote a letter and further took it upon himself to engage the employer's HR department in order to explain the initiation school processes and its necessity. Efforts by the tribal leader were futile as the employer did not grant such necessary extension. Unfortunately, the employee had already commenced the initiation process and could not miss such an opportunity as the initiation school in his tribe happens once every four years. The employee left to attend the initiation and returned a month after the time he ought to have returned and found that he had been dismissed in absentia.

After the Applicant was not successful in internally appealing his dismissal he referred the matter to the CCMA. The Commissioner found in favour of the Respondent that the dismissal was substantive and dismissed the application. One cannot fault the employer or even the commissioner in this instance but one can fault the shortcomings of the BCEA. If the BCEA was enacted having regard to the diversity of South Africa, it would have recognised that most of South African men in tribes like Basotho, Bapedi, Vhavenda, etc have traditional initiation schools that has existed since time immemorial. In situation such as this one it means that due to the fact that the law does not make provisions for such leave and the employer does not make provision for unpaid special leave, the employee should have neglected to attend the initiation school and suffer humiliation. It is common knowledge that if people do not regard you as an adult or a man, they will not accord you the necessary respect, therefore Mr Nkabinde would have been regarded as a boy and thus not qualify to sit and have conversation with other men or even qualify to marry a woman as he would have been regarded a boy.

## VII. RECOMENDATIONS

It is said that the employment relationship is economic in nature. Hence when the relationship is no longer of an economic value the relationship usually comes to end through processes such as retrenchment. Therefore, when proposing solutions, one should be careful not to impose an unnecessary strain on the employment relationship. What then are the solutions that can be had when dealing with the issues presented herein that would ensure that the relationship remains a viable one. The biggest consideration is that like in most things there ought to be consultation with the relevant bodies to hear their views in this matter. This means that government should facilitate for engagements that includes, traditional leaders, religious leaders and even

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<sup>130</sup> Ibid.

<sup>131</sup> Ibid.

<sup>132</sup> Ibid.

employers. This is to avoid a unilateral presentation of solutions that would once again be subject to a negative scrutiny such as this one.

Although consultation ought to be had, one cannot shy away from the fact that at the end of the day there is a need for a legislative intervention. The BCEA needs to be amended to properly have due regard to the cultural, spiritual and traditional landscape of South Africa. This is more important in pressing issues over which the employee has no control over such as sickness and ancestral calling. When it comes to other consideration a balanced has to be struck in the competing interest of the employer and the employee to ensure that the relationship is not hindered. Therefore, I recommend the recognition of traditional and spiritual healers as bodies that can facilitate for an employee to get a sick leave, perhaps not through a medical certificate but through an alternative that will constitute sufficient evidence that the employee was sick. In respect of ancestral calling, it is one that requires traditional healers themselves to best define how they can be best accommodated as it is clear that it is an ongoing issue.

Perhaps the BCEA should facilitate as a compulsory step to appointment that individuals receive a leave structure that is specifically tailored for them having regard to their traditional roles, spirituality and religion. This will ensure that the employer knows what to expect from their new employee. A good example would be asking questions such as, has anyone in your family ever been called by their ancestors or when you are sick do you prefer to go to a medical doctor or a Sangoma. These questions will not be answered with the view of discriminating against the employee but to accommodate such an employee. This is because the employees' beliefs remain protected by the Constitution and no one may discriminate against such employee on the basis that such employee, for example is a Sangoma.

#### VIII. CONCLUSION.

The ability to afford is very important. Employment offers such ability to afford oneself but what worth is an employment when it keeps you on your toes as you never know when your being and beliefs would result in you being dismissed. As demonstrated in this paper the BCEA does not have regard to the people of South Africa in their entirety and remains rooted in Western beliefs and consideration. Hence the BCEA, a piece of legislation that is meant to protect employees and take care of their being, continuously fails to do so and leaves a room for an employer to dismiss an employee on the basis that such person is of a certain faith. As things stand a person currently employed may receive an ancestral calling tomorrow and he/or she will be without any help as they would ultimately have to choose between staying employed and attract misfortunes or leaving their jobs to answer their ancestral calling only to be unemployed thereafter. This paper has properly demonstrated the need for the consideration of traditional, spiritual and cultural responsibilities in the BCEA as many have lost their jobs owing to this inadequacy. It is the hope of this paper that in future the BCEA will reflect that it is a legislation in South Africa where the majority are the indigenous people. It must remain borne in mind that this paper does not propose the exclusion of other South Africans who are of Western descent but rather the inclusion of the previously and in this case continuously marginalised indigenous people. As the Constitution of the Republic of South Africa say, "South Africa belongs to all who live in it".

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