Employment Economics

Is your business struggling to keep the boat afloat as a result of COVID-19? What measures can employers implement to alleviate financial distress in these unprecedented times?

By: Euphemia Faro

Attorney LLB LLM, Director (Pretoria office)

28 April 2020

Introduction

On 24 March 2020, President Ramaphosa announced a nationwide lockdown with effect from midnight on 26 March 2020 until 16 April 2020. On the 9 April 2020, the lockdown was extended for a further two weeks until the end of April 2020.

The effect of this is that certain companies, except for those rendering "essential services", as provided for in the regulations, will be closed for just over a month, consequently bringing production and service delivery to a complete halt and resulting in the loss of millions of rands in income. Businesses find themselves in a dire financial position, where remuneration of their employees may be rendered an impossibility. On 23 April 2020, the President announced that the country would resume economic activity, through a phased approach, commencing on 1 May 2020. In the premise, all permitted businesses may resume operations, subject to a maximum one third of their total work force returning to the business premises.

The employment issues arising from the COVID-19 pandemic

What are the legal implications of this lockdown for your business and employees? The employment relationship is a reciprocal one and fundamentally based on an employee rendering services, in exchange for payment of a determinable remuneration by the employer. Although employees would, under these circumstances, still tender their services, the lockdown prohibits such rendering of non-essential services. Under these circumstances, the question remains as to whether an employer is required to fully remunerate its employees or does the concept of no-work- no-pay come into operation?

The principal of no work, no pay

As mentioned above, the very basis of an employment contract is for an employee to come to work in order to perform the duties for which she has been hired. However, should an employee not render these services, as is the case with many non-essential workers as a result of the lockdown, the employer is not obliged to have to pay its employees for non-service delivery, which is the employer's contractual right to receive. Simply put, no-work- no-pay comes into operation and an employer may legally implement this principle during the lockdown period. However,

employers are urged to opt for this course of action only as a last resort. Employers who are in a position to continue to pay their employees during the lockdown period, have been encouraged to do so.

Force majeure

Many companies will also rely on the principle of '*force majeure'* which is a regulatory clause in various agreements which typically includes events such as acts of God and natural disasters, such as fires and plagues. Such a clause excuses the non-performance on the part of one or both of the contracting parties, when an event or circumstance occurs beyond such a party's control.

Many employers are asking whether COVID-19 pandemic allows them to invoke the *force majeure* clauses in their employment contracts to excuse their inability to perform their contractual obligations. Arguably, the COVID-19 pandemic falls under the category of a *vis major*, namely, a natural disaster, the consequences of which, were unforeseeable. Employers should note that a *force majeure* clause is contractually agreed upon between parties and the specific wording of the clause will also determine the extent upon which the non-performing party may rely. A comprehensive *force majeure* clause may cover various occurrences including pandemics and natural disasters.

Furthermore, the party wishing to invoke this principle should be mindful of the fact that the occurrence of an event, and the consequences thereof, have to cause the default in question. In other words, an employer who wishes to rely upon this principle during the lockdown period, will have to prove that the default is due to the COVID-19 pandemic, rendering contractual performance objectively impossible.

Supervening impossibility

Our common law provides for a doctrine known as *"supervening impossibility of performance"* which, in certain circumstances, suspends or terminates a contracting party's obligations due to an unforeseeable event or circumstances beyond the control of that contracting party. In circumstances where a contract does not provide for a *force majeure* clause, the common law principle of *supervening impossibility of performance* may come into operation.

Similar to any *force majeure* provisions, *supervening impossibility of performance*, when proven, will discharge the contracting parties from their respective contractual obligations. In the current circumstances, if it becomes objectively impossible for the employer to meet its contractual obligations, the employer in this instance will not be in breach of contract and the employer's obligation to pay such remuneration, may be suspended, for as long as the impossibility endures (or for as long as the lockdown remains operative). Employers should take cognisance of the fact that the defence of *supervening impossibility of performance* may only be relied upon for as long as the unforeseeable impossibility endures and that the fact that performance may become uneconomical, does not render performance impossible.

Relying on any of the above two principles will depend upon the facts of each case and the wording of *force majeure* clause(s), if any. Employers should also be mindful that, when seeking to rely upon a *force majeure* clause, an employer may still be under a duty to mitigate the impact that this pandemic has on its obligations to perform under the employment contract. Parties are, therefore encouraged to seek legal advice to consider and assess their respective positions properly.

COVID-19 TERS and other benefits

Our government has established a Temporary Employer/Employee Relief Scheme known as COVID-19 UIF-TERS benefits ("TERS"). The Minister of Employment and Labour issued a directive on 26 March 2020, and an amended directive on 8 April 2020, setting out the requirements for these benefits. These benefits provide, *inter alia,* that employees affected by the partial closure of their employer's business are entitled to benefits and that these benefits may be used by the employers to "top-up" salaries of affected employees. Employers who are, therefore, unable to pay their employees' full salaries, may apply to this fund for relief.

The President also announced on 21 April 2020, that, in an endeavour to stabilise the economy, a social relief fund of R500 billion will be made available. R40 billion has been set aside for income support payments, in respect of workers whose employers are not able to pay their wages. Further support is also granted to Small, Medium and Micro Enterprises ("SMME's"), spaza shop owners and other informal businesses in the form of loans, grants and debt-restructuring. An additional amount of R2 billion will be made available to assist SMME's, spaza shop owners and other small businesses.

The President further announced that a R200 billion loan guarantee scheme will be introduced, in

partnership with major banks, the National Treasury and the South African Reserve Bank, in order to assist certain enterprises with operational costs, such as salaries, rent and the payment of suppliers. In the initial phase, only companies with a turnover of less than R300 million per annum will be eligible for this scheme. Specific tax relief measures have also been included in the relief.

Retrenchments and alternative options

Our government is making a concerted effort to minimise the devastating effects of the resultant economic loss caused by the COVID-19 pandemic. Companies are encouraged to apply for the necessary financial aid as provided for by government. We are positive that the financial aid will assist companies and curb job losses. However, applying to these relief schemes may take time and the Minister of Employment and Labour has recently acknowledged that the UIF system is under pressure as the fund is currently experiencing extraordinary volumes of requests due to the COVID-19 pandemic.

Although the TERS benefits may provide some minimal temporary relief, many companies might not be able to dig themselves out of the hole that this epidemic has created and will have to consider closing their business or terminating employment contracts, once the lockdown has been uplifted and once a proper damage analyses has been done. The retrenchment process remains an option. Employers may dismiss employees due to "operational requirements" as defined in terms of Section 213 of the Labour Relations Act, No 66 of 1995, (the "LRA"). These requirements may be based on economic, technological, structural or similar needs of the employer. Employers should keep in mind that retrenchments, as in the case of any type of dismissal, should be both procedurally and substantively fair. A proper procedure, as prescribed in terms of Section 189 and 189A of the LRA, should be followed.

One of the aforesaid procedures is a pre-retrenchment consultation that needs to be held between the employer and the employee. It is not only a procedural requirement, but should be comprehensively done, in order to allow employees concerned, or their representatives, a fair opportunity to suggest ways in which job losses may be avoided or the effects of retrenchments ameliorated. The employer is not bound to accept these suggestions, but is obliged to seriously consider them.

Our courts agree that, after the consultation process has taken place, the final decision on potential dismissal rests with the employer. Employers are required to consider alternative measures to retrenchment, as retrenchment should only be implemented as an avenue of last resort. In the alternative, an employer may:

- Place its employees on short-time, which entails reducing an employee's working hours during financial difficulties thereby reducing an employee's remuneration. Employers should keep in mind that this is a temporary solution and may not be unilaterally implemented without the consent of employee(s) concerned. Employees on the other hand should keep in mind that unreasonable failure to give their consent, in circumstances where an employer has valid operational reasons therefor, may create redundancy, leaving the employer with valid reasons to embark upon a retrenchment process.

- Temporary lay-off of staff. This process does not terminate the employment contract, but temporarily suspends it in circumstances where the employer is unable to continue with normal business activities. Under ordinary circumstances, an employer would have to bear in mind that where an employee's contract does not make provision for a lay-off process, the lay-off of an employee cannot be unilaterally implemented and can only be done by agreement with the employee concerned. The above directives issued by the Minister of Employment and Labour, however, provides for the temporary lay-off of employees during the lockdown period, due to the COVID-19 pandemic. The directives define temporary lay-off, as *"a temporary closure of business operations due to COVID-19 pandemic for the period of the National Disaster"*. Under normal circumstances, an employer and employee would have to negotiate and reach agreement on the terms of a lay-off. TERS benefits may also be claimed during this period.

Employers are advised to consult their employees at all times when seeking to implement measures during and after the lockdown and not to unilaterally implement measures, as employees can still refer an unfair labour practice dispute to the Commission for Conciliation, Mediation and Arbitration ("CCMA").

Companies in dire financial distress can also consider business rescue proceedings as provided for in terms of the Companies Act, No 71 of 2008. In terms of Section 128(1)(f) of the aforesaid Act, "financial distress" is described as:

"(i) it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months; or

(ii) It appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months."

The aim of the process is to restructure the affairs of the company in such a manner that it would result in the company being rehabilitated and able to continue to exist on a solvent basis.

It is advisable to consult our labour law and insolvency and business rescue specialists during these uncertain and unprecedented times.

List of resources

1. Grogan, J. 2014. *Workplace Law.* 11th ed. Claremont: Juta and Company (Pty) Ltd;
2. Labour Relations Act, No. 66 of 1995;
3. The Companies Act, No. 71 of 2008;
4. Government Gazette, 26 March 2020, Vol. 657, No. 43161;
5. Government Gazette, 8 April 2020, Vol. 658, No. 43216;
6. Ramsden, W.A. 1983. *Supervening impossibility of performance in the South African Law of Contract (submitted in partial fulfilment of the requirements for the degree of Master of Laws, University of Witwatersrand, Johannesburg);*
7. Van Schalkwyk, A.J. 2018. *The Nature and effect of Force Majeure Clauses in the South African Law of Contract (submitted in fulfilment of the requirements for the degree LLM (Law of Contract) in the Faculty of Law, University of Pretoria).*