

17 JUNE 2020

EMPLOYMENT ALERT

IN THIS ISSUE

Updating workplace plans to include *"vulnerable persons"*

On 25 May, the Department of Health issued a guidance document related to the treatment of *"vulnerable persons"* in the workplace. (Guidance Document). The Guidance Document expanded on the list of persons who are at particular risk of experiencing severe effects should they contract COVID-19. Pursuant to the Guidance Document, the Department of Employment and Labour issued further regulations consolidating occupational health and safety measures in workplaces who have commenced operations, replacing the directive issued on 29 April 2020. Employers are therefore required to update their workplace plans to include provisions related to, *inter alia*, *"vulnerable persons"*.

Business Rescue, Employment Law and Supervening Impossibility: *Mhlonipheni v Mezepoli and various other related matters*

A consolidated application for business rescue brought by employees and creditors under section 131(4)(a) of the Companies Act 71 of 2008 (Act) successfully placed numerous companies, operated by a single trust, under supervision and business rescue.

UPDATING WORKPLACE PLANS TO INCLUDE "VULNERABLE PERSONS"

1 LIST OF VULNERABLE PERSONS:



Persons over the age of 60.



Persons who have comorbidities.



Persons with chronic lung disease.



Persons with diabetes or with late complications.



Persons with moderate/severe hypertension (poorly controlled) or with target organ damage.



Persons with serious heart conditions: heart failure, coronary artery disease, cardiomyopathies, pulmonary hypertension; congenital heart disease.



Persons with chronic kidney disease being treated with dialysis.



Persons with chronic liver disease including cirrhosis.



Persons with severe obesity (BMI of 40 or higher).

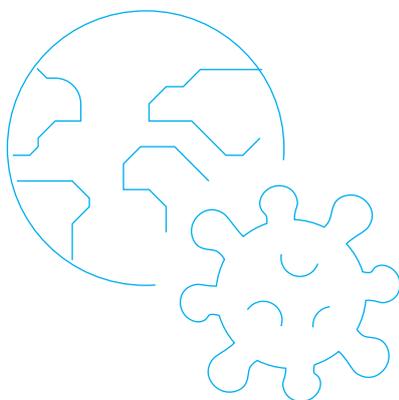


Persons who are immunocompromised.



Employees who are beyond 28 weeks pregnant (and especially with any of co-morbidities listed above).

2 PROTOCOL REGARDING VULNERABLE PERSONS:



Work from home where possible.



If not possible, must be assessed by a medical practitioner at their own expense or where they cannot afford one, at the expense of the employer.



The assessing medical practitioner should provide a confidential note to the employer indicating the presence of a condition that may render the employee high risk, from the list contained in the Guidance Document, without giving a specific diagnosis.

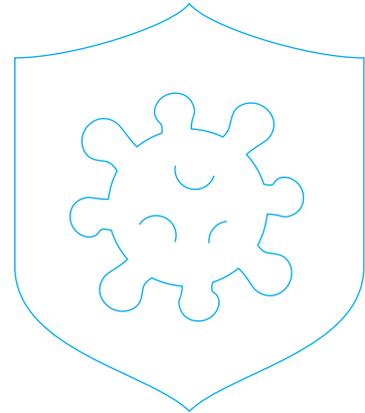


Where the employee has a condition that is not listed in the Guidance Document, but that may nevertheless render the employee a vulnerable employee, a motivation from the medical practitioner is necessary.



The medical practitioner should ensure that the employees' health condition is fully optimised which may include recommending flu vaccinations and continuous advice on maintaining a compliance and treatment plan.

UPDATING WORKPLACE PLANS TO INCLUDE "VULNERABLE PERSONS"



3

WHERE A VULNERABLE PERSON RETURNS TO THE WORKPLACE, AN EMPLOYER MAY CONSIDER THE FOLLOWING MEASURES TO TAKE UPON THEIR RETURN:

 <p>Alternative temporary placement/ redeployment of the employee.</p>	 <p>Restriction on certain duties and a prohibition on performing high risk procedures.</p>	 <p>Stricter physical distancing protocols, barriers or additional hygiene measures.</p>	 <p>Protective isolation.</p>	 <p>Specific PPE appropriate to the risk of the tasks/activities assigned to the employee.</p>
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4

APPLICABLE LEAVE PROCEDURES FOR EMPLOYEES WHO CANNOT WORK FROM HOME AND WHO ARE NOT PERMITTED TO RETURN TO THE OFFICE:

 <p>Temporary incapacity, motivated by a medical practitioner/ occupational medical practitioner.</p>	 <p>Where temporary incapacity is impossible, the employee should be entitled to use their sick leave if appropriate.</p>	 <p>Where an employee's sick leave is exhausted, employees may use their annual leave, where an employee's working time is reduced or temporarily stopped, an employee may be entitled to special leave in terms of TERS.</p>	 <p>Where applicable, the business must assess the eligibility of the employee to receive additional company benefits and/or UIF.</p>	 <p>Unpaid leave in these circumstances is not recommended and should be a measure of last resort.</p>
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Business Rescue, Employment Law and Supervening Impossibility: *Mhlonipheni v Mezepoli and various other related matters*

The decision of the court, reported as *Mhlonipheni v Mezepoli and various other related matters*, provides a useful assessment of the legal, economic and social ramifications of the national lockdown imposed in response to the COVID-19 pandemic in South Africa, and the relief that can be obtained for employees through business rescue proceedings.

A consolidated application for business rescue brought by employees and creditors under section 131(4)(a) of the Companies Act 71 of 2008 (Act) successfully placed numerous companies, operated by a single trust, under supervision and business rescue. The decision of the court, reported as *Mhlonipheni v Mezepoli and various other related matters*, provides a useful assessment of the legal, economic and social ramifications of the national lockdown imposed in response to the COVID-19 pandemic in South Africa, and the relief that can be obtained for employees through business rescue proceedings.

The key mechanism through which the employment relationship may trigger business rescue proceedings is expressed in section 131(4)(a)(ii) of the Act, which provides that the court may make an order placing a company under supervision and commencing business rescue proceedings if it is satisfied that:

"the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulations, or contract, with respect to employment related matters".

The respondent companies operate primarily as sit-down restaurants. The companies' business activities had slowed from 16 March 2020, and they have not traded at all since 26 March 2020. Following the introduction of the national lockdown, the companies' directors had elected not to trade at all even though they could elect to trade on a 'delivery only' or

delivery/collection basis during levels 4 and 3 of the lockdown. The companies indicated their intention to resume operations only once the lockdown had been lifted. The companies' 158 employees were last paid their salaries on 28 March 2020.

On 28 April 2020, the day on which staff salaries were contractually required to be paid, a memorandum was sent to employees stating that:

'the company will not be paying you for the month of April 2020 as a direct result of the down-trading and continued losses incurred during the recent months exhausting any historic profits there may have been.'

Two further memoranda were sent to employees of the respondent companies:

'It is with regret that the company has to inform you and confirm that the temporary layoff as of 1 April 2020 continues to be in force.'

'The temporary layoff period will continue until the end of lockdown, when each company's circumstances will be reviewed.'

'As a result of the company being closed and not being allowed to trade as normal, a "no work no pay" principle will apply.'

Following engagement with the directors, the employees launched a series of applications for business rescue in terms of the Act.

Business Rescue, Employment Law and Supervening Impossibility: *Mhlonipheni v Mezepoli and various other related matters...continued*

The court further noted that the contracts of employment contained no express provisions dealing with *force majeure*.

The respondents challenged the applicants' *locus standi* on the basis that, as a result of *force majeure*, they were neither employees, nor creditors. The respondents attempted to argue that as a result of the lockdown, the employment contracts had been 'terminated' and the employees thereby could not apply for an order under section 131(4)(a)(ii).

In response, the court held that:

"The term 'creditor' includes employees to the extent that any amounts relating to employment that were not paid to that employee immediately prior to the commencement of those proceedings, became due and payable by a company to that employee. The fact that the employment contract of such a person might be suspended for any reason does not have the effect that the employment contract is terminated.

The employees of the respondent companies have at all times tendered their services, and the respondent companies at all times expected them to remain available to return to work. Their employment contracts were not suspended; the respondent companies took a decision not to operate on any basis during the lockdown and thus did not require their employees to attend to their ordinary functions."

The court further noted that the contracts of employment contained no express provisions dealing with *force majeure*.

Impossibility of performance and the contract of employment

In analysing the common law, the court held that if provision is not made contractually by way of a *force majeure* clause, "a party will only be able to rely on the very stringent provisions of the common law doctrine of supervening impossibility of performance, for which objective impossibility is a requirement". Relying on traditional conceptions of 'supervening impossibility', the court held that performance is not excused in all cases of *force majeure*, reaffirming the position in Unlocked Properties that:

'The impossibility must be absolute or objective as opposed to relative or subjective. Subjective impossibility to receive or to make performance does not terminate the contract or extinguish the obligation.'

Force majeure and the contract of employment

The judgment introduces a degree of certainty regarding the impact of the national lockdown on contracts of employment. By way of summary, the court at paragraph 39 stated that:

"The obligation which the trust companies owed to their employees, to pay them their salaries, has always been capable of performance and was at no time rendered impossible. It is trite that the duty to pay, and the commensurate right to remuneration, arises not from the actual performance of work, but from the tendering of service".

Business Rescue, Employment Law and Supervening Impossibility: *Mhlonipheni v Mezepoli and various other related matters...continued*

The judgment does provide possible insights into how courts may view the employment relationship in the context of the COVID-19 pandemic.

The court held that the respondent companies could not rely on *force majeure* as a defence to their obligation owed to their employees as it was possible to pay their salaries.

The applicants further contended that the trust companies had also been permitted to trade in some form during the lockdown. In the context of business rescue, the court made it clear that:

"The decision to remain closed until the end of the lockdown will result in tremendous financial hardship to the respondent companies and their employees, particularly when there is no indication as to when the lockdown will reach the level at which restaurants will be permitted to resume normal trading."

Conclusion

It is important to note that the respondent companies were able to conduct their businesses to some degree, albeit in alternate forms (i.e. takeaways and deliveries, rather than sit down). The ratio of this judgment

therefore does not necessarily apply to businesses that were prevented from operating in terms of the Regulations under the Disaster Management Act 57 of 2002 (DMA).

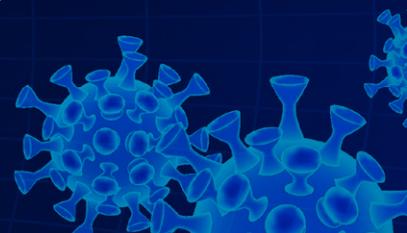
The judgment does provide possible insights into how courts may view the employment relationship in the context of the COVID-19 pandemic. Business rescue may present an option to employees in such circumstances. It may also serve as a powerful deterrent against failure by employers to pay their employees during lockdown or refrain from operating to the extent permitted under the Regulations.

The court has emphasised the strong commitment to the enforcement of employees' rights under the Act, particularly to remuneration, in spite of the lockdown and the decision not to trade. The judgment has provided guidance to employers affected by the national lockdown and decisions with regard to the reopening of businesses.

Fiona Leppan and Jonathan Sive

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EMPLOYMENT

CASE LAW UPDATE 2019



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BBBEE STATUS: LEVEL TWO CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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