13 JULY 2021

EMPLOYMENT LAW **ALERT**

IN THIS **ISSUE**

A "*workplace*" on fire: What to do with your employees

In response to the current civil unrest taking place in South Africa, many businesses have had to close operations out of fear of attacks and to ensure the safety of their employees. Some employees have also been unable to reach their places of work as protestors disrupt entries and exits from communities. In this article, we examine the impact of this on employees and explore what recourse is available to an employer who is forced to unexpectedly close its doors.

CDH
CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA

CLICK HERE

For more insight into our expertise and services

A "*workplace*" on fire: What to do with your employees

Economic hardship is not a valid basis to excuse an employer from paying salaries.

In response to the current civil unrest taking place in South Africa, many businesses have had to close operations out of fear of attacks and to ensure the safety of their employees. Some employees have also been unable to reach their places of work as protestors disrupt entries and exits from communities. In this article, we examine the impact of this on employees and explore what recourse is available to an employer who is forced to unexpectedly close its doors.

Under the Basic Conditions of Employment Act 75 of 1997, for as long as an employee tenders their services, even without actual performance, they will have a valid claim for their agreed wages or salary. An employment contract is a reciprocal contract with an agreement that an employee will perform work for their employer and the employer will in return remunerate the employee at an agreed rate. If the employee is available and legally tenders their services, their employer has a duty to pay them.

An employee may justifiably refuse to attend an unsafe workplace until it is safe to go to work again. That would be a valid tendering of services. Sections 8(1) and 8(2)(h) of the Occupational Health and Safety Act 85 of 1993 "*places a duty*" on employers to provide and maintain, as far as reasonably practicable, a safe working environment and to enforce such measures as may be necessary in the interest of health and safety. This would include not subjecting employees to workplaces where the risk of being attacked during civil unrest is imminent. Where possible, the parties may, as an alternative, agree to a remote working arrangement while the unrest persists.

South African courts have ruled on instances where an employer ceases to trade because of economic hardship, and where it does so as a result of a force majeure event. Economic hardship is not a valid basis to excuse an employer from paying salaries. In relation to a supervening impossibility, or force majeure, our courts have held that a temporary impossibility

A "*workplace*" on fire: What to do with your employees...*continued*

Employers and employees may need to conclude a temporary lay-off period in a scenario where the company is struggling to pay its employees due to an unexpected event.

neither terminates an obligation nor gives rise to a right to terminate an obligation. It merely temporarily suspends the duty to perform the obligation while the impossibility continues.

In *Mhlonipheni v Mezepoli Melrose Arch and Other* (2020/10556) [2020] ZAGPJHC 136 the court stated that the question to be answered was whether it is objectively impossible for a party to perform its obligations arising from a concluded employment agreement. In *Unlocked Properties 4 (Pty) Limited v A Commercial Properties CC*, the court stated that the test for impossibility is as follows:

> *"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. A contract is terminated only by objective impossibility (which always or normally has to be total) subjective impossibility to receive or make performance at most justifies the other party in exercising an election to cancel the contract. "*

Conclusion

To circumvent the financial strain of a company having to pay its employees full pay for work not done, at no fault of the employer or the employee, employers and employees may need to conclude a temporary lay-off period in a scenario where the company is struggling to pay its employees due to an unexpected event. The agreement can stipulate that the period of this agreement can continue until such a time that the employer is able to pay its employees. Where possible, employers should enter into an agreement regarding shorter working hours and less pay. The Basic Conditions of Employment Act prohibits deductions without mutual consent but allows for less pay for fewer hours worked. In addition, employers should invoke annual leave until it is able to resume operations.

To the extent that an employee's services will not be needed for the foreseeable future, the employer could initiate a retrenchment process, basing it on operational requirements, in terms of the Labour Relations Act 66 of 1995.

CDH Employment Law Department

OUR TEAM

For more information about our Employment Law practice and services in South Africa and Kenya, please contact:

Aadil Patel
National Practice Head
Director
T +27 (0)11 562 1107
E aadil.patel@cdhlegal.com

Imraan Mahomed
Director
T +27 (0)11 562 1459
E imraan.mahomed@cdhlegal.com

Thabang Rapuleng
Director
T +27 (0)11 562 1759
E thabang.rapuleng@cdhlegal.com

Anli Bezuidenhout
Director
T +27 (0)21 481 6351
E anli.bezuidenhout@cdhlegal.com

Bongani Masuku
Director
T +27 (0)11 562 1498
E bongani.masuku@cdhlegal.com

Hedda Schensema
Director
T +27 (0)11 562 1487
E hedda.schensema@cdhlegal.com

Jose Jorge
Director
T +27 (0)21 481 6319
E jose.jorge@cdhlegal.com

Phetheni Nkuna
Director
T +27 (0)11 562 1478
E phetheni.nkuna@cdhlegal.com

Njeri Wagacha
Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E njeri.wagacha@cdhlegal.com

Fiona Leppan
Director
T +27 (0)11 562 1152
E fiona.leppan@cdhlegal.com

Desmond Odhiambo
Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E desmond.odhiambo@cdhlegal.com

Michael Yeates
Director
T +27 (0)11 562 1184
E michael.yeates@cdhlegal.com

Gillian Lumb
Director
T +27 (0)21 481 6315
E gillian.lumb@cdhlegal.com

Hugo Pienaar
Director
T +27 (0)11 562 1350
E hugo.pienaar@cdhlegal.com

Mohsina Chenia
Executive Consultant
T +27 (0)11 562 1299
E mohsina.chenia@cdhlegal.com

OUR TEAM

For more information about our Employment Law practice and services in South Africa and Kenya, please contact:

Faan Coetzee
Executive Consultant
T +27 (0)11 562 1600
E faan.coetzee@cdhlegal.com

Sean Jamieson
Senior Associate
T +27 (0)11 562 1296
E sean.jamieson@cdhlegal.com

Rizichi Kashero-Ondego
Associate | Kenya
T +254 731 086 649
T +254 204 409 918
T +254 710 560 114
E rizichi.kashero-ondego@cdhlegal.com

Jean Ewang
Consultant
M +27 (0)73 909 1940
E jean.ewang@cdhlegal.com

Tamsanqa Mila
Senior Associate
T +27 (0)11 562 1108
E tamsanqa.mila@cdhlegal.com

Jordyne Löser
Associate
T +27 (0)11 562 1479
E jordyne.loser@cdhlegal.com

Avinash Govindjee
Consultant
M +27 (0)83 326 5007
E avinash.govindjee@cdhlegal.com

Asma Cachalia
Associate
T +27 (0)11 562 1333
E asma.cachalia@cdhlegal.com

Christine Mugenyu
Associate | Kenya
T +254 731 086 649
T +254 204 409 918
T +254 710 560 114
E christine.mugenyu@cdhlegal.com

Riola Kok
Professional Support Lawyer
T +27 (0)11 562 1748
E riola.kok@cdhlegal.com

Jaden Cramer
Associate
T +27 (0)11 562 1260
E jaden.cramer@cdhlegal.com

Peter Mutema
Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E peter.mutema@cdhlegal.com

BBBEE STATUS: LEVEL ONE 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.

JOHANNESBURG
1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN
11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI
CVS Plaza, Lenana Road, Nairobi, Kenya. PO Box 22602-00505, Nairobi, Kenya.
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114 E cdhkenya@cdhlegal.com

STELLENBOSCH
14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA