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# EMPLOYMENT LAW ALERT

## IN THIS ISSUE

### A “workplace” on fire: What to do with your employees

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## A “workplace” on fire: What to do with your employees

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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

## AN EMPLOYER'S GUIDE

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## 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](#)

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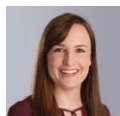
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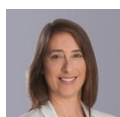
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