

EMPLOYMENT LAW

ALERT

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KIETI LAW LLP, KENYA

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COVID-19 versus the Common Law: States of Disaster won't jettison an employer's contractual obligations

In 2020, the Labour Court handed down judgment in the matter of *MacSteel vs NUMSA*, which held that a company could apply the no-work-no-pay principle to employees who did not or could not work during periods of 'hard lockdown' due to COVID-19.



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COVID-19 versus the Common Law: States of Disaster won't jettison an employer's contractual obligations

In 2020, the Labour Court handed down judgment in the matter of *MacSteel vs. NUMSA*, which held that a company could apply the no-work-no-pay principle to employees who did not or could not work during periods of 'hard lockdown' due to COVID-19.

As per Judge Prinsloo:

"The reality in law is that the employees who rendered no service, albeit to no fault of their own or due to circumstances outside their employer's control, like the global COVID-19 pandemic and national state of disaster, are not entitled to remuneration and the Applicant could have implemented the principle of 'no work no pay'."

However, on 25 January 2022, the Cape Town Labour Court handed down judgment in *Buys vs Oasis Group Holdings*, holding that Judge Prinsloo's comments in *MacSteel v NUMSA* constituted obiter, and that an employer cannot avoid its contractual obligations notwithstanding COVID-19, and its associated lockdowns.

In the case of *Buys vs Oasis Group Holdings*, the applicant in the matter brought a claim for specific performance of the notice clause in his contract of employment. On 1 January 2020 Buys (Applicant)

who was employed by Oasis Group Holdings as a Senior Fiduciary Specialist, had resigned. In terms of his contract of employment, he was required to give six calendar months' notice, and at no stage did Oasis Group Holdings waive the notice period.

Owing to the COVID-19 pandemic, South Africa went into a 'hard lockdown' in March 2020, and the Applicant was placed on unpaid leave from 1 April 2020, which formed part of his notice period, as he had been identified as a non-essential employee.

The Applicant's submission in support of his position that the three remaining months of his notice period should be paid to him notwithstanding the hard lockdown, was that where an employer does not require an employee to work during his/her notice period, the employer is obliged to pay the employee in lieu of such period. In addition, the principle of no-work-no-pay is only applicable during the period of the



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employee's employment and finds no application to an employee serving his notice period. To this end, counsel on behalf of the Applicant referred to the matter of *Mohsen & another vs. Brand Kitchen Hospitality (Pty) Ltd & Another*:

"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."

In evaluating the evidence before him, Judge Rabkin-Naicker found that the above-mentioned paragraph referenced from the *MacSteel* judgment is obiter and cannot form part of the ratio of the judgment. Judge Rabkin-Naicker's rationale was that should this be the case, then the common law on impossibility of performance would be undermined as well as the reciprocal relations between employer and employee regarding the obligation to tender performance in return for remuneration. She accordingly found Oasis Group Holdings in breach of

the contract of employment and ordered payment of the Applicant's remuneration for the balance of his notice period, up to date of his referral to the CCMA.

This judgment potentially throws caution to the wind regarding the manner in which companies deal with employees during hard lockdown periods, which based on the multiple 'waves' experienced by the country and the continued national state of disaster, may be implemented once again. Companies should be cautious to place employees on unpaid leave in situations where performance is necessary and possible, and the employee has tendered services. In addition, companies should avoid 'blanket' decreases to salaries for both employees continuing to work full time and those placed on leave, as an employee who tenders full service would be entitled to full remuneration.

**HEDDA SCHENSEMA AND
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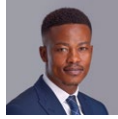
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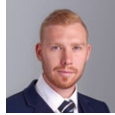
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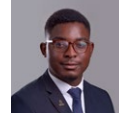
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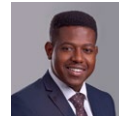
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