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EMPLOYMENT

Labour court provides much needed correction on no work no pay cases

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The Johannesburg High Court recently found in the matter of *Mhlonipheni v Mezepoli Melrose Arch and Others 2020* that employees (in this case, employed by the Mezepoli and Plaka chain of restaurants) were able to tender their services during Level 5 and Level 4 of the National Lockdown, and accordingly that their salaries were owing by their employers during that period. This resulted in their unpaid salaries being regarded as debts owed by the employers, and the employers' self-professed inability to pay these amounts leading them to be placed into business rescue.

This judgement has been criticised, not least by the writer, for its arguably incorrect approach that non-essential employees were legally entitled to tender their services during the Level 5 and Level 4 stages of the lockdown. A review of this judgment was suggested in order to correct this legal misinterpretation.

Fortunately, the Labour Court has recently pronounced on the issue in the recent case of *Macsteel Service Centres SA Proprietary Limited v NUMSA and Others*. Although the case dealt with an urgent application brought by Macsteel to try and prevent a strike by NUMSA (which application was ultimately unsuccessful for unrelated reasons), the judge correctly dealt with the issue of whether employees could tender their services, and therefore be entitled to payment of salary, during these restricted periods of economic activity during Level 5 and Level 4 stages of the lockdown.

In doing so, the judge found that whereas Macsteel had generously undertaken to pay 100% of salaries in March and April, and then up to 80% of employees' salaries for May, June and July 2020, with the Unemployment Insurance Fund Temporary Employee Relief Scheme being relied upon to make payment of the balance, it in fact had no legal obligation to do so in respect of employees who were not legally able to work. The court held correctly, that those 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 or the national state of disaster, are not entitled to remuneration and Macsteel could have implemented the principle of "no work no pay."

The judge properly applied a detailed analysis of the employer's situation, in also finding that where employees rendered their full services (bear in mind that for a portion of the lockdown, employers such as Macsteel were able to perform essential services, or to operate at 50% of manufacturing capacity, and as such, some employees would have been legally entitled to render services full time) these employees were in fact entitled to 100% of their salaries. The reduction to 80% was, in these cases, problematic and was a unilateral change to terms and conditions of employment.

This labour court judgment is to be welcomed, in that it confirms that the correct legal approach is that where it was legally impermissible for employees to perform services, the tendering of services by these employees is irrelevant, and the employer is entitled to implement a no work no pay principle, on the basis of the legal impossibility of both parties performing. Additionally, a case by case analysis must be adopted, and even (if necessary) assessing employees on an individual basis to

assess their specific rights. This *Macsteel* judgement from the specialist labour court, rather than that of the High Court in *Mezepoli*, should be relied upon as setting out the correct approach.



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