WERKSMANS
ATTORNEYS

EMPLOYMENT

Non-payment of salaries leads to business rescue

10 June 2020 *6 min read*

by Bradley Workman-Davies, Director

The South Gauteng High court has recently handed down a judgment in which it placed two high profile Johannesburg restaurants into business rescue, primarily on the basis that their unpaid salary bill to employees was a legal debt and that the restaurants' legal defence, of inability to pay, constituted grounds to place them into business rescue.

From the perspective of the employer and employee relationship, the judgment in *Mhlonipheni v Mezepoli Melrose Arch and Others 2020* is interesting in that the court found that the usual principle of *force majeure* (in which parties to a contractual relationship can hold the agreement to be unenforceable) did not apply to an employment relationship, on the basis that the employment contracts entered into between the parties did not contain *force majeure* clauses. This is to be expected, as contracts of employment (due to the regulation by statutory instruments such as the Labour Relations Act, 66 of 1995) are only terminable by the employer in special and prescribed circumstances (essentially, where the employer can demonstrate that its unilateral termination of the employment relationship is for a fair reason which must be related either to the employee's misconduct or incapacity or the employer's operational requirements, and then only after following the requisite fair procedure). *Force majeure* clauses are not recognised by the Labour Relations Act as a fair reason for the termination of the employment relationship, and as such, do not usually find their way into employment contracts. Even if they were to be included, they would be unenforceable, for this very reason.

The court nevertheless considered whether usual common law principles of legal impossibility of performance could have an effect on the employment relationship. In so doing, the court recognised that there is a stringent test to be passed, before it can be accepted that the performance of a party's legal obligations may be excused on the basis of this legal impossibility to perform. Paraphrasing this test as applied in a variety of previous matters (none of which involved an employment relationship) the court found that it is important to consider:

- the type of contract and relationship between the parties;
- the circumstances of the case;
- the type of performance which is claimed to be impossible; and
- whether the impossibility is objective and absolute (as opposed to a subjective difficulty).

The court, in applying this test and making its finding in this case demonstrably reached the incorrect conclusion when applying these principles to an employment relationship, especially in the case of the restaurants in question. This is for the reason that although the court correctly held that the legal obligation to pay salaries arises from an employee merely tendering services, and not having to actually perform any work, it then went further to find that employers (arguably all employers, on the court's reasoning) were not excused from their legal obligation to pay salaries, since employees were able to tender their services, and further that the Level 5 lockdown regulations expressly recognised as an essential service "*implementation of payroll systems, to the extent that such arrangement has not been made for the lockdown, to ensure timeous payment to workers*."

The above findings are wrong in both law and fact, since the employees in this case, (and all other employees who were not recognised as essential services workers during the Level 5 and Level 4 phases of lockdown) were **not** in fact legally able to tender their services. Non-essential workers, which included all of the restaurant staff employed by the employers in this case, were locked down in their homes, unable to leave their premises, unable to travel to work, and liable to arrest if they attempted to do so. In any event, the employer would have been unable to receive their services, even if they were able to attend the premises of the employer. As such, the court's entire argument, underpinned by an assumption that employees were able to tender their services, and therefore entitled to payment of salaries,

is legally incorrect. With regard to the reference to payroll systems in the lockdown regulations, the court appears to have been confused by the fact that a limited number of businesses were legally able to operate during the Level 5 and Level 4 phases of lockdown, and a limited number of essential staff were able to work. The reference to payroll systems in this case was to allow payment to such staff, and not to every person who is an employee.

On the flawed reasoning above, the court found that the employers had failed to legally discharge their obligation to pay April salaries, and that such salaries were owed to the employees, making them creditors and affected persons for the purposes of the business rescue application, which was granted by the court.

Further compounding its error, the court also dealt with the payment of Temporary Employee Relief Scheme (TERS) benefits from the UIF, which were paid to employees in advance by the employers; the court found (without providing any reasoning) that although some UIF payments were made to employees, they still remained entitled to their salaries. This is completely at odds with the recognised purpose and objective of the UIF TERS Scheme, which expressly recognises that employees on temporary lay-off (not working, due to the legal impossibility of doing so, under the Level 5 and Level 4 phases of lockdown) were entitled to the TERS benefits. Had employees been legally entitled to their salaries, as the court found in *Mhlonipheni*, the entire basis for the existence of the TERS scheme would be academic.

Whilst the effort of the court to come to the aid of the employees is laudable, it did so on a complete misunderstanding of the peculiarities of the special relationship that exists in the case of employment, and in the vacuum of the full effect of the legality of employees being able to work, or tender services, during the lockdown.

Since a large number of employers have correctly adopted an approach of legal impossibility during the lockdown, which has resulted in the suspension of the legal obligations of both the employer (to pay salaries) and the employee (to work or to tender services), this judgment should be appealable, and should be overturned on a closer consideration of the legal issues.



Bradley Workman-Davies

Director

View Profile