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DEMYSTIFYING "*NO WORK, NO PAY*" AND THE IMPLEMENTATION OF SHORT-TIME AND SALARY REDUCTIONS

COVID-19 and the national lockdown have resulted in much confusion amongst employers and employees. This has been fuelled by the unchecked dissemination of misinformation regarding the status of the employment relationship and the reciprocal obligations of the parties thereto under lockdown.

Employers are confronted with unprecedented circumstances and are grappling to balance executing measures to salvage their businesses and mitigating the prejudice that such measures have on their employees.

Similarly, employees are facing salary reductions and short time, often as a fait accompli, and do not understand their rights, nor do they understand how this fits in with the frequently touted and menacing principle of "*no work, no pay*".

The employment relationship is a contractual relationship between an employer and an employee albeit statutorily regulated. As is the case with any contract, the parties are required to agree on the *essentialia,* or essential terms of the employment contract. Unsurprisingly, one of the material terms of an employment contract is remuneration. It follows that to vary and reduce an employee's remuneration would constitute a fundamental variation of the employment contract to the prejudice of the employee. It is axiomatic therefore that in such circumstances, the parties would be required to reach agreement on such an amendment.

There is a common misnomer amongst employers that COVID-19 and the national lockdown have somehow suspended employment rights and the proper application of the relevant labour law statues. This, we must caution, could prove to be a costly mistake, as when the CCMA and Labour Courts eventually resume operations, they will inevitably be inundated with referrals by employees who have had their employment rights disregarded, which will not be sympathetically viewed.

To be clear therefore, notwithstanding the largely unequal relationship between employers and employees, employers are not permitted to unilaterally vary material employment conditions, especially where such variation results in prejudice to employees.

A distinction must be drawn between the aforegoing scenario and the scenario where employees are practically unable to work and/or are lawfully prohibited from working during the lockdown period. If one takes the restaurant industry as an example, which has been lawfully precluded from operating during the lockdown period to date, restaurant employees have been precluded from working. This is a direct consequence of the lockdown regulations and not the product of operational considerations on the part of any employer. This is referred to as supervening impossibility of performance and it is in this case that the principle of "*no work, no pay*" finds application. This scenario results in an effective suspension of the employment relationship, often referred to as temporary layoff, and in this context the principle of "*no work, no pay*" may be unilaterally implemented by the employer.

The conundrum that employers are confronted with, is how to deal with employees who refuse to agree to a reduction of earnings or short time. Simply put, the employer effectively has four options:

- Accept that the terms of the employment relationship will remain unchanged, which is probably not feasible for the employer;

- Implement a "*no work, no pay*" policy, which is more prejudicial then reduced earning or short time;

- Commence retrenchment proceedings in terms of section 189 of the Labour Relations Act, which is exceptionally prejudicial, particularly in the context of a COVID-19 ravaged economy; or

- Consider liquidation and/or business rescue proceedings.

Employees who refuse to agree to a payment reduction or imposition of short time should judiciously consider their options, as an unreasonable refusal may in itself constitute a career limiting decision. This arises *inter alia* because cost savings measures such as these are generally not contemplated by employers who need not implement such measures and the failure to accede to an employer's request in circumstances such as these may necessarily culminate in the commencement of section 189 proceedings. It is important to note that intrinsic in legitimate section 189 proceedings, options short of dismissal must be considered and explored, and in this context, payment reduction and short time

can be implemented as an alternative to dismissal, failing which retrenchment would be the fallback position.

Please feel free to contact the writer with any queries as regards labour law issues and/or business rescue and insolvency.

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