College of Law and Management Studies, and School of Law

Coronavirus in South African workplaces: The safety, remuneration, and retrenchment of employees during the lockdown

By

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DECLARATION

I Siphesihle Hendry Zungu do hereby declare that unless specifically indicated to the contrary in the text, the work submitted is my own original work and has not been submitted to any other university in full or partial fulfilment of the academic requirements of any other degree or other qualification.

Signed at Durban on this the 04th day of March 2021.

Signature: SH ZUNGU

DEDICATION

I dedicate this work to all my deceased family members who played a role in my life but sadly could not live on to witness my work – including my two grandmothers, Mrs Norah Mpanza and Mrs Magdalene Zungu. To my aunts Miss Hlengiwe Zungu and Melanie Zungu, and my uncles Mr Bheki Zungu and Jeffery Mpanza. I want to thank you all for having contributed immensely in my life. I will forever be indebted to the wisdom and discipline you all imparted in me. May you all rest in peace.

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ABSTRACT

The sudden and unprecedented spread of coronavirus has left the world, including South Africa, negatively affected. The coronavirus pandemic has been a new experience, and South Africa is faced with questions about whether the existing laws on employment are adequate to manage coronavirus in the workplace, maintain the working relationship between the employer and the employee, and allow the employers to continue to function. The intention of this study is to explore the balance between the right of the employee to safety in the workplace with the interest of the employer in running a profitable business. Existing employment laws guiding employers on protection of employees in the workplace are considered as well as the duty of employees to follow protective measures provided by the employer to protect them against coronavirus.

The study interprets the contractual principle of supervening impossibility of performance with regard to the sudden and unexpected onset of the coronavirus and the standard the courts have set in interpreting this principle as a defence. In analysing the principle and the courts' interpretation on the limits of such a defence, the study concludes that employers remain bound to pay employees full remuneration if they provide their services during the pandemic, but do not have an obligation to pay employees their full remuneration if employees do not work on account of the pandemic. In this instance the pandemic constitutes an intervening impossibility of performance for the employer, and the employer is excused from making payment to an employee who is not working during the pandemic on the plain ground that the employee has not honoured their side of the employment obligation. The study further interprets the Labour Relations Act and case law dealing with retrenchment to establish what procedure the employer can follow in retrenching employees during the pandemic. The analysis reveals that the procedure for retrenching employees based on operational requirements has not changed. However, employers must retrench employees fairly and may not use the pandemic as an excuse to unfairly target or dismiss employees.

From the findings of the analysis, the study draws lessons learnt during the pandemic and makes suggestions for developing existing employment laws to be able to address a similar scenario should South Africa face another pandemic in the future.

ABBREVIATIONS

BCEA	Basic Conditions of Employment Act
CCMA	Commission for Conciliation Mediation and Arbitration
COIDA	Compensation for Occupational Injuries and Diseases Act
EEA	Employment Equity Act
GDP	Gross Domestic Product
LAC	Labour Appeal Court
LC	Labour Court
NUMSA	National Union of Metal Workers of South Africa
OHSA	Occupational Health and Safety Act
ODIMWA	Occupational Diseases in Mines and Works Act
STATS SA	Statistics South Africa
TERS	Temporary Employee Employer Relief Scheme
UIF	Unemployment Insurance Fund
QLFS	Quarterly Labour Force Survey

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CHAPTER 1

WHAT IMPACT HAS THE CORONAVIRUS EPIDEMIC HAD ON BUSINESSES IN SOUTH AFRICA?

1.1 Introduction and background

The coronavirus virus was first detected in Wuhan, China, and followed by numerous deaths in the absence of any vaccine or cure for the illness it caused.[1] The virus later spread around the world (including South Africa) killing millions of people, and was declared a Public Health Emergency of International Concern on 30 January 2020 by the World Health Organisation.[2] Coronavirus, which is also known as Covid 19, is said to be caused by 'severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2)'. A person who has been infected with the virus can show symptoms within two days of infection, and the symptoms include fever, coughing, and a headache.[3] The virus can be transmitted between persons by droplets expelled by a cough, talking or sneezing; and touching surfaces where a person who is infected with the virus had touched.[4] The outbreak of the virus led the President of South Africa, Cyril Ramaphosa, to announce a total shutdown of the country on 15 March 2020 in an attempt to curb the spread of the virus.[5] The lockdown of the country resulted in minimal social or economic activity in the country; schools, businesses, and companies were shut down, with the exception of entities deemed to be providing essential services, which were allowed to operate under strict safety measures.[6] The shutting down of businesses had dire consequences for the country and the economy, resulting in businesses and companies closing down and employees being retrenched.[7]

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[1] G du Plessis 'Covid-19 and the future relationship of employers and Unions', available at: *https:// www. businesslive.co.za/bd/opinion/2020-04-15-covid-19-and-the-future-relationship-of-employers-and unions*, accessed on 15 April 2020.

[2] 'Rolling updates on coronavirus disease (COVID-19)', available at: *https://www.who.int/emergencies /diseases/novel-coronavirus-2019/events-as-they-happe*n , accessed on 28 January 2020.

[3] Ibid.

[4] A Vatalidis et al 'The effects of the coronavirus in the workplace', available at: *https://www.werkmans .com/firm-news/the-effects-of-the-coronavirus-in-the-workplace* , accessed on 19 March 2020.

[5] Ibid.

[6] Jan Truter, 'Coronavirus impact in the workplace', available at *https://www.labourwise.co.za/labour-news-teazer/coronavirus-panic-in-the-workplace* , accessed on 16 March 2020.

[7] W le Roux 'When is a workplace safe or unsafe? The safety criterion in terms of the Occupational Health and Safety Act and the Mine Health and Safety Act' (2011) 111 *The Journal of SA Institute of Mining and Metallurgy* 530-531.

This dissertation seeks to explore existing South African legislation applicable in the workplace and provide clarity as to how legislation can be applied during a pandemic to protect employers and employee's rights. In doing so, the study argues that employers have a duty to ensure the safety of employees in the workplace and at home when they are working from home, and that employees have an equal responsibility to follow the safety precautions provided by the employer.[8] Further to this, the study submits that employers can force employees to undergo medical testing to detect whether they have coronavirus. The focus of the study then shifts to the issue of whether the employer has an obligation to pay employees who could not work on account of the shutdown, arguing that employers have no obligation to remunerate employees when employees have not rendered their services to the employer.[9]

Another pertinent issue addressed in the study is whether employers have the authority to force employees to take their annual leave days during lockdown.[10] The study argues that employers have authority in terms of section 20(10)(b) of the Basic Conditions of Employment Act (the BCEA),[11] to require employees to take annual leave during lockdown. The study then canvasses the issue of employees who refuse to come to work during the lockdown despite being legally permitted to do so. The study submits that the conduct of these employees amounts to insubordination,[12] entitling employers to institute disciplinary proceeding against these employees, subject to having provided adequate safety conditions in the workplace.[13]

The study finally examines measures available to employers when facing financial difficulties in their businesses. This may include changing the terms and conditions of employees' contracts to cut costs, or retrench employees as a last resort as per section 189 of the Labour Relations Act (the LRA).[14] The study argues that employers can use these remedies to cut costs, but also advises that employers may not retrench employees if they

[8] Truter op cit note 6 above.
[9] 'South Africa working on new sick leave rules for coronavirus', available at: *https:// business tech-co-za. cdn.ampproject.org/v/s/businesstech.co.za/news/business/383417/south-africa-working-on-new-sick-leave-rules-for-corona*, accessed on 20 March 2020.
[10] Fadia Arnold 'What are the rights of employees and support staff who work for essential service providers during lockdown', available at *https://www-schoemanlaw-co-za.cdn.ampproject.org* , accessed on 31 March 2020.
[11] Act 75 of 1997.
[12] Max Rainer 'Insubordination in the workplace: What you need to know', available at*: https://www. Schoemanlaw .co.za /insubordination-in-the-workplace-what-you-need-to-know* , accessed on 27 May 2019.
[13] Fadia Arnold 'Can your employer utilise your annual leave during lockdown', available at: *https://www .iol.co.za /personal -finance/guides/can-your-employer-utilize-your-annual-leave-during-lockdown-45756396* , accessed on 31 March 2020.
[14] Act 66 of 1995.

refuse to accept revised contractual conditions, as this constitutes an automatically unfair dismissal under section 187(1)(c) of the LRA.[15] The study concludes by making recommendations for developing existing employments laws in South Africa to address any future pandemic.

1.2 Statement of purpose and research questions

The purpose of this study is to explore the duty of employers to protect employees during the period of lockdown in South Africa by interpreting the existing South African legislation governing the employer-employee relationship in the workplace and clarifying what rights employers and employees have during a pandemic. The rationale of the research is to balance employers' interests in running a profitable business during a pandemic with ensuring that employees' rights to fair labour practice are not violated.

Since the main objective of this study is to ascertain the nature and scope of the employer's duty to protect and remunerate employees during the lockdown, the following research questions will inform this study:

1. What impact has the coronavirus had on businesses in South Africa?

2. To what extent does the existing health and safety legislation apply to employees working at home under lockdown?

3. Can the employer's obligation to remunerate employees be suspended during lockdown or are employers only obliged to pay employees they have required to take annual leave?

4. Can employers retrench employees who refuse unilateral changes to their contracts introduced by the employer to address financial challenges in the employer's business?

1.3 Methodology

The methodology used to conduct this research is desktop based, and no primary data was gathered through interviews. The information was obtained from a variety of relevant sources, including legal textbooks and journals. Statutes such as the Constitution of the

[15] Jason Whyte 'Employers must accept contract changes that avoid dismissal despite s 87(1)(c)', available at: *https://www .nortonrosefulbright.com/en-za/knowledge/publications/dc18f0f6/employees-must-accept-contract-changes-that-avoid-dismissals-despite-s1871c*, accessed on 15 June 2019.

Republic of South Africa,[16] the Labour Relations Act (LRA), Basic Conditions of Employment Act (BCEA), Employment Equity Act (EEA),[17] Compensation for Occupational Injuries and Diseases Act (COIDA),[18] and the Occupational Health and Safety Act (OHSA)[19] were also consulted to conduct the research. The research also makes reference to reported case law and online articles.

1.4 Synthesis of relevant literature

The outbreak of coronavirus in South Africa has sparked much debate about existing employment laws, starting with the issue of whether the existing legal duty of the employer to ensure the health and safety of employees applies to employees working from home and what legal implications employers face when they fail to uphold such a duty if it does exist. The next contested issue is whether the employer can force employees to test for coronavirus. Also in contention is whether employees can be forced by their employers to take their annual leave days, and whether the employer is obliged to remunerate employees who have not worked during lockdown. The retrenchment of employees who refuse unilateral changes to their terms and conditions as a solution to financial difficulties by companies has also been a subject of debate, and is addressed below. The issues all concern the aforesaid need for employees' right to safety in the workplace to be balanced with the employer's right to run a profitable business.

This section deals first with the obligation of employers to ensure the health and safety of employees in the workplace. In terms of section 8 of the OHSA, employers are obliged to ensure the safety of their employees in the workplace as far as reasonably possible. The issue arises whether the employer's duty extends to the employees working from home during the lockdown period. Fouche agrees that the employer has a duty to ensure the protection of employees in the workplace; but a legal lacuna exists with regard to employees working from home under the pandemic, creating uncertainty whether the duty of the employer extended to employees who are exposed to harm while performing their duties at home.[20] The study analyses this uncertainty and submits that the employer's duty does extend to employees working from home.

[16] Act 108 of 1996
[17] Act 55 of 1998
[18] Act 130 of 1993
[19] Act 85 of 1993
[20] P Fouche et al 'The health and safety implications of remote working in light of Covid 19 working from home' available at: *https://www.golegal.co.za/* , accessed on 24 April 2020.

In terms of the OHSA, a 'workplace' is defined as any premises or place where a person performs their duties in the course of their employment. In line with this definition, an employee working from home must still be protected against coronavirus by their employer. The employer's duty depends on assessing whether it was reasonably possible for an employer to have protected the employee upon the occurrence of a harmful event.[21] The following factors with respect to coronavirus infection need to be considered: the severity and scope of the hazard or risk concerned, the feasibility of removing or mitigating that hazard or risk, availability of means to remove or mitigate that hazard or risk, and the cost of removing or mitigating that hazard or risk.[22] The employer will be assessed according to the standard of a reasonable person to determine whether they are liable for their employees being exposed to coronavirus.

If an employee does in fact contract coronavirus in the workplace or at home, the employee will be entitled to compensation under COIDA that provides for employee's rights to compensation in the event of injury or disease incurred in the scope of their employment. Contracting coronavirus whilst performing their duties qualifies the employee for compensation under COIDA. However, an employer can be held directly liable should they fail to uphold their duty to ensure the protection of employees against the exposure to coronavirus.[23] According to section 38(1)(p) and section 38(2) of the OHSA, an employer who fails to ensure that their employees are protected in the workplace can be fined an amount not exceeding R50 000 or imprisoned for not more than one year, or both.

Another uncertainty created under the pandemic is whether employers have a duty to remunerate employees who were legally prevented and could not provide their services because of lockdown regulations. According to Burger and Moch, South African legislation places no obligation on employers to pay employees when they have not rendered their services to the employer.[24] The question arises whether the same principle applies under a pandemic. The study addresses this uncertainty by applying the principle of supervening impossibility of performance in the employer-employee contractual relationship under a pandemic. South African common law provides that parties to an agreement can have their

[21] S Rothmann & J Pienaar 'Employee health and wellness in South Africa: The role of legislation and management standards' (2009) 7(1) *SA Journal of Human Resource Management* 22.
[22] W Le Roux 'When is a workplace safe or unsafe?: The safety criterion in terms of the Occupational Health and Safety Act and the Mine Health and Safety Act' (2011) 111 *The Journal of The Southern African Institute of Mining and Metallurgy* 532.
[23] Roze Moodley 'Employers urged to comply with lockdown regulations', available at: *https://www.sa news.gov.za/south-africa/employers-urged-comply-lockdown-regulations,* accessed on 31 March 2020.
[24] Burger& Moch op cit note 12 above.

obligations extinguished if a party's obligation becomes objectively impossible to perform due to an unforeseeable event.[25] This principle is applicable under a pandemic as the virus affects the contractual agreement of the employer and employee, making it impossible for both parties to honour their contractual duties.

Where an employee can provide service to the employer, but the employer experiences difficulty in paying employees due to lockdown restrictions, the employer can apply for the Temporary Employee/ Employer Relief Scheme (TERS),[26] established to assist businesses that close down wholly or partially due to coronavirus. Whilst TERS has assisted some employees as well as employers' businesses during the lockdown, it has been tainted by dishonest conduct in the form of fraud, non-payment of employees, and employee benefit pay-outs being used for other purposes by the employer.[27] Despite these challenges the scheme continues to provide some support for businesses facing financial ruin.

The study also addresses the issue of quarantine requiring persons who test positive or are exposed to coronavirus being required to isolate for 14 days. Traditionally employees are allowed two sick leave days, and should they require a longer period this must be authorised by a doctor. Under the pandemic the traditional two days is altered, introducing a 14-day sick leave period for employees requiring isolation. Employees being in isolation for more than two days have the right to be remunerated. Employees can claim illness benefits under the Unemployment Insurance Fund (the UIF) should they become sick and not be able to work. Employees must first take their sick leave as per section 22 of the BCEA, and be fully remunerated for a period not exceeding 14 days. If the employee remains ill, then they can apply for and receive payment under the Illness Benefit scheme. In any event, the employee must obtain a medical certificate confirming the medical need to be absent from work on account of quarantine.[28]

Pre-pandemic law was silent on whether the employer is obliged to test employees for coronavirus to ensure that they do not infect other employees in the workplace. Section 7 of the EEA grants the employer the authority to test employees under the pandemic as it is

[25] Arnold op cit note 10 above.
[26] L du Preez 'UIF to probe Ters delays to employees despite R21bn paid out', available at: *https://www.sowetanlive.co.za/ sowetan-live/business/money/*, accessed on 18 June 2020.
[27] W Beech 'Occupational health & safety: When working from home does the home become a workplace and what happens if you are injured at home? available at: *https://www.golegal.co.za/,* accessed on 18 May 2020
[28] Sanlamreality 'What are your employment rights when a pandemic like COVID-19 hits?', available at *https://www. sanlamreality.co.za/wealth-sense/employment-rights-covid-19/* , accessed on 24 April 2020.

justified under law to test employees who may have been exposed to coronavirus to protect other employees in the workplace.

Apart from the above, employers have proposed that the time spent at home by employees not working during the lockdown be transformed to annual days of paid leave. According to section 20(10) (b) of the BCEA, employers have the authority to decide when employees can take their leave days, and accordingly employers can require their employees to take their annual leave days to make up for the time spent at home during lockdown. However, the question has been asked whether this rule can apply under a pandemic. Scholars in the field have answered the question positively; and the study argues that indeed employers can force employees to take their annual leave days during the pandemic. The study however cautions against this practice and rather encourages employers rather use the TERS scheme to pay employees for the lockdown period.

The next issue of uncertainty is whether employees can refuse to come to work for fear of contracting coronavirus. Lockdown regulations state that if employees can work from home, employers are encouraged to allow such employees to do so.[29] If employees cannot work from home because they need to be in the workplace to perform their work tasks, these employees must come to work and if they refuse, this may be deemed insubordination.[30] The study further submits employees can refuse to come to work if their fear of infection is justifiable, for example when an employer fails to provide employees with protective gear in the workplace. This is a further example of the law seeking balance between the health and safety rights of the employee with the right of the employer right to run a viable business.

A contested issue is whether employers can retrench employees who refuse to obey unilateral changes to their contractual terms and conditions, imposed to reduce costs. It is trite law that an employer is expected to consult with an employee with regards to changes to an employment contract. If an employer executes such changes without consulting the employee it constitutes an unfair labour practice and the employee can refuse to accept the new conditions or sue the employer for damages.[31] If the employer resorts to retrenchment of an employee after the refusal to accept the new terms of the contract, this can be classified as an

[29] Rothman & Pienaar op cit note 21 above.
[30] Sanlamreality op cit note 28 above.
[31] J Grogan *Dismissal, Discrimination & Unfair Labour Practices* 2 ed (2007) 426.

automatically unfair dismissal.[32] The study confirms this legal position applies under the pandemic.

The case of *National Union of Metalworkers of South Africa and Another v Aveng Trident Steel* is illustrative.[33] The company was involved in a restructuring process to increase profitability and consulted employees to change their employment conditions to cut costs. The employees refused to accept the changes and the company retrenched them. The National Union of Metal Workers of South Africa (NUMSA) contended in the Labour Court (LC) that their members had been unfairly dismissed for refusing to accept changes. The LC rejected this argument, and the decision was upheld by the Labour Appeal Court (LAC). The LAC held that the employees had not been automatically unfairly dismissed as a result of failing to accept a demand in respect of a matter of mutual interest between them and the employer, but were instead fairly dismissed as a result of the employer's operational requirements pursuant to a *bona fide* retrenchment process.

The above case is authority for the principle that dismissal of employees for refusing to accept changes to their employment contract amounts to an automatically unfair dismissal. However, if the retrenchment is a legitimate way of cutting costs, such a dismissal will not be unfair if it is genuinely done to reduce company costs and not to force employees to accept new conditions of employment.

1.5 Structure of the chapters

The dissertation consists of six chapters. The first chapter is the introduction which outlines the background of the research, rationale, research questions and methodology, and provides a synthesis of the relevant literature on the topic. The second chapter deals with the discussion of the impact that coronavirus has had on businesses and the South African economy. The third chapter deals with the legal framework governing the protection of employees against diseases in the workplace, and the testing of employees for coronavirus. The fourth chapter deals with the issue of whether employees can be forced to take annual leave and whether employees who have not worked during the lockdown can be remunerated. The fifth chapter discusses whether employers can retrench employees who refuse to accept unilateral changes to their contract as a means to cut costs in the business of the employer. The sixth and last chapter offers recommendations for developing employment laws to deal

[32] Arnold op cit note 15 above.
[33] [2019] 9 BLLR 899 (LAC).

with a pandemic should South Africa encounter another one in future. All the chapters embrace the extent to which the status of the employer-employee relationship has been affected by the pandemic.

CHAPTER 2

THE IMPACT OF CORONAVIRUS ON SOUTH AFRICAN BUSINESSES AND THE ECONOMY

2.1 Introduction

Coronavirus has ravaged South Africa, causing numerous infections and deaths. This chapter examines the South African economy prior to coronavirus and how the virus has impacted on businesses and the economy of the country. Further to this, the chapter explores how employees have been affected by the pandemic and speculates on the prospects of recovery of the country's economy.

2.2 The impact of coronavirus on the South African economy and businesses

Coronavirus struck South Africa on the back of years of economic strain. In 2019 South Africa experienced a technical recession in the final two quarters of the year with a decline in growth of the economy by 0.8% in quarter 3 and by 1.4% in quarter 4. The unemployment rate increased by 0.1% in 2019, sitting at 29.1% which was the highest since 2008 according to the Quarterly Labour Force Survey (QLFS) released by Statistics South Africa (Stats SA) annually.[34] A technical recession takes place when an economy faces two consecutive quarters of negative economic growth.[35] The reasons for the decreased growth and weakened economy stem from many factors, including constraints in electricity supply, declining consumer spending and fixed investment spending, low consumer and business confidence, slow implementation of proposed structural reforms and further deterioration of the financial conditions of state-owned enterprises.[36]

Coronavirus led to further weakening as there was virtually no economic activity under lockdown. The lockdown, announced by President Cyril Ramaphosa, commenced on 26 March 2020 and endured until 16 April 2020. The initial period of 21 days turned into months, enforced through the Disaster Management Act.[37] The country endured a hard lockdown (level 5) which restricted movement of persons, and only allowed movement for

[34] 'Unemployment rises slightly in third quarter of 2019', available at: *http://www.statssa.gov.za/?p=12689*, accessed on 29 October 2019.
[35] J Rossouw, 'South Africa's in a recession. Here's what that means', available: *https://theconversation.com /south-africas-in-a-recession-heres-what-that-means-78953*, accessed on 6 June 2017.
[36] Du Plessis op cit note 1 above.
[37] GN 657 of GG 43148, 25/03/2020; 6-9.

people who performed essential services in health, retail, fuel, and banking industries, while the rest of the country was ordered to remain at home.

The country then moved to level 4 on 1 May 2020, which saw an estimated 1.5 million workers returning to work.[38] This allowed for the opening of the agriculture and forestry sectors, the partial opening of the manufacturing industry, mining, legal services, and restaurants for delivery purposes. On 28 May 2020, the country moved to level 3, opening up the electronics, furniture, finance and retail sectors. About 8 million employees returned to work under level 3. On 17 August 2020 the country went to level 2 lockdown and the inter-provincial travel ban was lifted and the tourism industry and schools were re-opened, as well as the real estate and trade and industry sectors. Level 1 lockdown was announced on 18 September 2020 which saw the opening of all sectors of the economy with the exception of night clubs.

The reduction in economic activity led to an economic contraction for the year 2020.[39] According to Stats SA, the national statistical service of South Africa, the gross domestic product (GDP) of South Africa fell by over 16% in the first and second quarters of 2020, giving an annualised growth rate of negative 51%.[40] The second quarter of 2020 experienced the biggest fall in GDP since 2009, far steeper than the annualised 8.2% decline in the fourth quarter of South Africa's financial year in 1982. In constant 2010 prices, the country generated almost R654 billion (not annualised) in the second quarter of 2020, the lowest level of production since the first quarter of 2009 when the economy generated R649 billion.[41]

The crisis of coronavirus and lockdown brought about workplace closures, leading to disruption of the supply chain of businesses and a decrease in productivity in all sectors. According to a recent Stats SA survey there were reported job losses in all industries in the second quarter compared to the first quarter of 2020.[42] The survey further revealed that job losses were mainly caused by decreased employment in trade and industry. Furthermore,

[38] 'About alert system' available at: *https://www.gov.za/covid-19/about/about-alert-system*, accessed on 7 August 2020.
[39] A Jeffery et al 'Covid19: How South Africans can save lives and livelihoods', available at: *https:// irr.org.za /reports /occasional-reports/files/01-1-irr-policy-response-to-covid-19-pandemic-25-march-2020.pdf*, accessed March 2020.
[40] 'Steep slump in GDP as COVID-19 takes its toll on the economy', available at *http://www.statssa.gov.za /?p=1 3601*, accessed on 8 September 2020.
[41] Rossouw op cit note 35 above.
[42] 'SA loses more than 600k formal sector jobs during COVID 19 lockdown', available at: *http://www.statssa .gov.za/?p=13690*, accessed on 15 October 2020.

employment losses were reported in the transport, manufacturing, and construction sectors. The electricity and mining industries suffered moderate job losses.

South Africa also experienced a decrease in consumer demand for goods and services. The closure of economic sectors in the country also had an impact on international trading, with imports and exports greatly reduced.[43] These negative effects led to reduced business confidence, reduced investment appetite from potential stakeholders, and reduced foreign investment in South Africa.[44] The weakened economy and restricted operation of businesses prompted projections of a deep recession in South Africa, more severe than the 2009 global financial crisis, where South Africa experienced a 1.5% growth contraction.[45]

2.2.1 The challenges and impact of coronavirus on employees

The unemployment rate in South Africa increased from the already high 29% to 30.1% due to coronavirus epidemic, seeing the economy shed 2,2 million jobs in the second quarter of 2020 (Stats SA QLFS).[46] The survey indicated an increase by 2.2 million to 14.1 million unemployed people in the second quarter of 2020 compared with the first quarter − the largest employment decline in South Africa since 2008. The survey also revealed that approximately 5.6 million people formed a new category of people who were not seeking employment due to being discouraged by the overwhelming number of people losing their jobs due to coronavirus.

It was anticipated that the unemployment rate would continue to rise in 2020 to its record highest level − 33%, leaving at least 8 million people without jobs; and job losses are expected to continue in the year 2021.[47] Unemployment has increased the most since the GDP contraction of 1.5% in 2009.[48] Struggling businesses have contributed to the high unemployment rate by being forced to retrench employees to reduce costs.[49] The Commission

[43] H Bhorat et al, 'The Economics of Covid-19 in South Africa: Early Impressions' 2020 *Development Policy Research Unit University of Cape Town* 7-12.
[44] P Burger 'The Unemployed and the Formal and Informal Sectors in South Africa: A Macroeconomic Analysis' (2019) 22(1) *South African Journal of Economic and Management Sciences* 1-12.
[45] P Blaauw 'Informal Employment in South Africa: Still Missing Pieces in the Vulnerability Puzzle' 2017 *Southern African Business Review* 339-361.
[46] 'SA economy sheds 2,2 million jobs in Q2 but unemployment levels drop', available at: *http://www.statssa.gov.za/?p =13633*, accessed on 29 September 2020.
[47] H Bhorat et al, op cit note 43 above at 13-14.
[48] C Maphanga, 'Covid-19 and stigma: Staff testing positive cannot be sole grounds for dismissal' available at: *https://www.news24.com/news24/southafrica/news/29-eastern-cape-schools-close-due-to-positive-covid-19-cases-48-more-have-suspected-cases-20200611*, accessed 12 June 2020.
[49] 'Don't be penalised for Covid 19 non-compliance', available at: *https://www.golegal.co.za /publishers/ lexisnexis,* accessed on 14 August 2020.

for Conciliation, Mediation, and Arbitration (CCMA) received more than 1 800 retrenchment claims by the end of June 2020.[50] Between April and June 2020, the CCMA had received 1 518 small-scale retrenchments and 323 large-scale retrenchment claims. During 2018/2019, the CCMA received only 38 588 retrenchment claims, but in the first three months of 2020 it had already received 98 818 (individualised) cases − an increase of 156% from the 2018/2019 financial year. Further to this the CCMA reported 278 claims for unfair dismissal between March 2020 and June 2020.[51]

Employees also faced the added challenge of employers unilaterally changing employment terms. Employers argued that their actions were justified in the face of the financial crises faced by businesses. The court pronounced in the recent case of *MacSteel Service Centres SA (Pty) Ltd v NUMSA,*[52] that a unilateral change to an employee's contract without consulting with the employee was unjustifiable even under coronavirus conditions and amounted to unfair dismissal. The courts also condemned unilateral changes in respect of an employee's retirement age in *BMW South Africa (Pty) Ltd v National Union of Mineworkers*[53] where an employee had been forced to retire at age 60 when he had indicated he wished to retire at age 65. The court held that such action by the employer amounted to an automatically unfair dismissal of the employee.

Employees have faced challenges with regard to access to remedies when their rights have been violated. The courts and the CCMA did not hear any matters in person from 17 March 2020 to the end of April 2020.[54] Matters already on the roll were either postponed or struck off the roll and given new dates. From the beginning of May 2020, the CCMA and the courts allowed minimised physical attendance in courts, permitting only affected parties and their representatives to be in court. Most of the cases were heard through virtual means as well as 'on paper' by the filing of documents to court or the CCMA.[55] This process had a negative impact on persons wishing to access labour remedies. The closure of courts and the CCMA caused backlogs, resulting in new cases landing at the back of the queue.[56] Further to this,

[50] Sarah Smit, 'Possible lockdown retrenchments are already soaring', available at: *https://mg.co.za/business /2020-06-29-possible-lockdown-retrenchments-are-already-soaring/*, accessed on 29 Jun 2020
[51] Ibid.
[52] [2020] JOL 47372 (LC).
[53] (2020) 41 (ILJ) 1877 (LAC).
[54] D Chiti 'Proceding in the Labour court and the CCMA during lockdown', available at: *https://www.mondaq .com/home/redirect/28306?modecompany&articleid=949052*, accessed on 14 April 2020.
[55] Blaauw op cit note 45 above.
[56] 'Courts under lockdown' available at: *http:www.litnet.co.za/courts-under-lockdown*, accessed on 29 April 2020.

persons without the necessary electronic means to connect electronically could not be assisted, and neither could they file documents to court or the CCMA. This meant that there was minimal or limited access to court for employees facing violation of their rights during lockdown.[57]

Some employers have been reported to have been in breach of protocols in place to protect employees against the virus.[58] Employees are alleged to have been expected to work in a workplace where another employee or employees had tested positive for coronavirus without the business premises being disinfected. Other businesses did not follow the rule of operating without 100% of their workforce in an attempt to curb the spread of the virus. This led to the Department of Labour inspectors issuing correction notices, compliance orders and even prohibition orders against employers who had failed to properly follow coronavirus protocols.[59]

2.2.2 Attempts to save the economy

Attempts were made to save the South African economy by obtaining a loan from the International Monetary Fund (IMF) in the amount of R500 billion to alleviate the economic distress caused by the pandemic.[60] Although this plunged South Africa deeper in debt, it was a much-needed economic stimulus. The cash injection was targeted at increasing welfare grants, assisting struggling businesses, as well as preventing more job losses. The loan also assisted in supporting the national health services, protecting the poor, and stabilising the spiralling public debt caused by the pandemic.[61]

The state also attempted to minimise economic distress by a phased unlocking of its economy to try and get it running whilst also guarding against the rapid spread of the disease caused by free movement of employees in the workplace.[62] Although the state used a stage-by-stage opening of the economy there was some criticism from political parties. The Economic Freedom Fighters (EFF) advocated a stricter lockdown which, in their view, should have

[57] Chiti op cit note 54 above.
[58] S Friedman, 'South Africa is failing on COVID-19 because its leaders want to emulate the First World', available at: *https://www.medicalbrief.co.za/archives/mkhize-warns-of-exponential-rise-of-covid-19-infections,* accessed on 16 July 2020.
[59] Blaauw op cit note 45 above.
[60] M Van der Merwe 'Some businesses will reopen in May but it won't be business as usual', available at: *https://m.fin24.com/Economy/South-Africa/some-businesses-will-reopen-but-it-wont-be-business-as-usual-2020042*, accessed on 20 April 2020.
[61] Chiti op cit note 54 above.
[62] Blaauw op cit note 46 above.

lasted for months and the Democratic Alliance (DA) called for a faster opening of the economy to prevent irreparable economic damage.[63]

The state introduced additional measures to keep businesses afloat. Businesses were allowed payment holidays to cut their costs and survive the effects of the pandemic.[64] Businesses received: a four-month holiday in return for contributing 1% for skills development levy; a three-month deferral for filing the return and first payment of carbon tax; deferral of payment of excise taxes on alcoholic beverages and tobacco products; and case-by-case applications to South African Revenue Services (SARS) for waiving of business tax penalties.[65] As mentioned above TERS was established to assist employers facing financial distress in providing wage benefits to employees. The scheme had paid R41 billion to more than 9.5 million workers by 11 September 2020.[66]

Attempts to save the economy were partially successful, but came with challenges.[67] Numerous cases of misuse of the funds allocated to assist businesses were reported. According to the Auditor General's report there were numerous instances of fraud and corruption cases in the management of the funds.[68] The report revealed that government officials enriched themselves and did not use funds for their allocated purpose. The information technology used in government departments was inadequate to handle the managing of funds resulting in lack of accountability systems to monitor the funds. Further to this, the systems that the departments used failed to properly identify persons who required financial relief, resulting in payments being made to persons not in need or in some instances in the duplication of payments to the same beneficiaries.[69] The report further revealed that the delivery of personal protective equipment (PPE) for the educational and health sectors was

[63] 'DA views on economy 'ill-informed' and show its been acting in bad faith-ANC caucus', available at: *https:www.-news24-com.cdn.ampproject.org*, accessed on 11 May 2020.
[64] Business Tech 'Mboweni announces wave of tax measures to help South Africans-everything you need to know', available at: *https://businesstech.co.za/news/finance/392025/mboweni-announces-second-wave-of-tax-measures-to-help-south-africans-everything-you-need-to-know,* accessed on 23 April 2020.
[65] Jan Botha 'Covid-19: New tax measures announced to assist businesses and workers', available at: *https://www.iol.co.za/business-report/covid-19-new-tax-measures-announced-to-assist-businesses-and-workers-47029708*, accessed on 23 April 2020.
[66] Melitta Ngalonkulu 'UIF Ters benefit payments suspended-again', available at: *https://citizen.co.za/ category/ news/ covid-19/*, accessed on 11 September 2020.
[67] Blaauw op cit note 45 above.
[68] Auditor General, 'Auditor-general says the multi-billion rand Covid-19 relief package landed in an environment with many control weakness', available at: *https://www.agsa.co.za*, accessed on 2 September 2020.
[69] Van der Merwe op cit note 60 above.

delayed. In some instances, the protective equipment was sold for up to five times more than its market price and was not being delivered to where it was needed. [70]

Another challenge in curbing the spread of coronavirus was trying to ensure that the virus did not spread in informal settlements. Although curbing the spread was feasible in urban areas, it was almost impossible in informal settlements due to overcrowding and the lack of essential services such as water and toilet facilities.[71] People living in such conditions could not practise good hygiene, leaving them vulnerable to the virus.[72] People were allowed to use public transport, but drivers refused to follow lockdown regulations which prohibited taxis from carrying a full load of passengers. This contributed to a rapid increase in infections in the country, which the health system lacked capacity to handle.[73] A further health concern was that the result of tests for coronavirus were delayed, meaning that even people who had tested positive for coronavirus would remain ignorant of the fact and come into contact with other people and spread the virus.

2.2.3 Prospects of recovery of the economy and economic growth

South Africa is expected to take some time to recover from the economic devastation brought about by the coronavirus epidemic, especially because the economy had already been underperforming since the 2008/2009 global financial crisis.[74] Furthermore the country is burdened with debt, topped off with IMF loan mentioned above.[75] The country also has a record unemployment rate − those without jobs remaining unemployed and those employed losing their jobs. The suspension of international trade also has had a detrimental effect on economic growth.[76]

In the light of such problems, a rapid response is required to save the country's economy; further delay will exacerbate the dire state of the economy.[77] The conceptualisation of the road to recovery will be determined by the will to overcome the economic distress caused by

[70] Blaauw of cit note 45 above.
[71] I Khambule 'The effects on Covid-19 on the South African Informal economy: Limits and pitfalls of governments responses' (2020) 24 *Loyola Journal of Social Sciences* 98-100.
[72] Auditor General's report note 68 above.
[73] Khambule op cit note 71 above at 98-100.
[74] A Shapiro, 'Institutions Informal Labour Markets, and Business Cycle Volatility' (2015) 16(1) *Economía*, 77-112.
[75] Auditor General's report note 68 above.
[76] I Khambule, 'The effects of covid-19 on the South African informal economy: Limits and Pitfalls of government response' (2020) 24 *Loyola Journal of Social Science* 100-106.
[77] Botha op cit note 65 above.

the pandemic.[78] The long-term growth rate of the economy should be at the centre of policy-makers' concerns, accompanied by rapid economic reform.

The raising of domestic saving levels and the removal of barriers to local and foreign long-term investments are key reform objectives according to the Supplementary Budget Review 2020 Report of the National Treasury.[79] The report also emphasises the importance of raising productivity and seeking export markets, coupled with lowering costs and reducing demands of state-owned companies on the public purse. These measures include finalising electricity supply strategy, modernising ports and rail infrastructure, opening up energy markets and reconsidering licensing spectrum to enhance digital communication.[80]

The report further highlights the importance of lowering the cost of doing business and the development of finance for small, medium and micro enterprises. Agriculture, tourism and other sectors with high job-creation potential should be promoted, and skilled immigrants attracted to remedy the skills deficit.[81] The report also encourages the facilitating of international trade to boost growth and attract foreign investments.[82]

2.3 Conclusion

In this chapter, it has been established that coronavirus has negatively impacted the economy as a whole, and businesses and companies in particular, causing high unemployment, exacerbated by numerous retrenchments. A rapid response is required to save the economy. In the next chapter, the dissertation will deal with the duties of the employer to ensure the health and safety of employees performing their duties.

[78] Blaauw op cit note 45 above.
[79] 'The COVID-19 shock and the revised economic outlook', available at: *https://www.treasury.co.za*, accessed on 15 June 2020.
[80] Khambule op cit note 76 above.
[81] W Gumede 'Ideological responses, traditional economic theory won't help life SA out economic slump' available at: *https://www.news24.com/news24/analysis/william-gumede-ideological-responses-traditional-economic-theory-wont-lift-sa-out-out-of-covid-19-slump*, accessed on 25 June 2020.
[82] Blaauw op cit note 45 above.

CHAPTER 3

LEGAL FRAMEWORK GOVERNING THE EMPLOYER'S DUTY TO PROVIDE A SAFE WORKING ENVIRONMENT

3.1 Introduction:

Employers have a duty to ensure that employees are safe in the workplace. Employees have a reciprocal duty to follow precautionary measures imposed by the employer to achieve safety in the workplace. It has to be asked whether this duty of ensuring safety of employees extends to employees working from home. Accordingly, this chapter examines the existing law (common law and statutory law) protecting employees in South African workplaces, and whether this duty extends to employees working from home due to coronavirus.

3.2 Common law

Common law can be simply defined as a body of uncodified laws developed by legal precedents established by the courts.[83] Common law places a duty of care on employers to ensure the safety of employees in the workplace.[84] This was established in the case of *Van Deventer v Workmen's Compensation Commissioner,*[85] where Boshoff J summarised an employer's duty as follows:

> 'An employer owes a common law duty to a workman to take reasonable care for his safety. The question arises in each particular case what reasonable care is required. This is a question of fact and depends upon the circumstances of each particular case. A master [employer] is in the first place under a duty to see that his servants [employees] do not suffer through his personal negligence, such as failure to provide a safe working environment and a failure to provide [a] proper and suitable plant, if he knows or ought to have known of such 'failure'.'

The employer does not guarantee that the workplace will always be safe; a claim by an employee for damages based on a contract of employment against an employer in the event of the employee being injured or contracting a disease in the workplace would not automatically lie. The claim would depend on delictual proof of negligence by the employer in failing to uphold the duty of care and ensuring the safety of the employee. In the *Van Deventer* case,[86] the court held that the common law duties of the employer to an employee included taking all 'reasonable' precautions to ensure the safety of employees; the employer

[83] Grogan J *Workplace Law* 10 ed (2009) 53-57.
[84] A Basson *Essential Labour Law* 5 ed (2009) 384-385.
[85] 1962 4 SA 28 (T).
[86] Ibid.

is not liable for any exposure to danger that could be seen by an employee through reasonable examination. The employer must ensure that employees are not exposed to any danger in the workplace flowing from the employer's negligence.

There is therefore an expectation that the employer ensures 'reasonable protection' for employees in the workplace. What is 'reasonable' will differ according to circumstances of each case, as the courts will measure the reasonableness of the employer's actions in protecting the safety of the employee in the workplace.[87] The employer's duty to provide a safe working environment is therefore not absolute.[88] In assessing the employer's actions, the courts ask the following questions: [89]

- Would a 'reasonable person' in the position of the employer have foreseen the possibility that a person may be injured?
- Would the 'reasonable person' have taken steps to guard against the accident which gave rise to the injury?'
- Did the employer fail to take the steps a reasonable person would have taken?

The answers to the above questions determine whether the employer acted in a negligent manner and breached their common law duty of care towards the employee. The employer has a statutory duty to ensure the protection of employees from harm when performing their work duties.

If the employer acted negligently, liability to compensate the employee would follow. If the court finds that the employer acted as a reasonable person would have acted in the circumstances, no liability for any injury the employee suffers in the workplace would follow. Employees also have the responsibility to ensure their own safety in the workplace by following the safety measures provided by the employer.

3.3 Statutory law

Statutory law can be defined as rules derived from Acts of Parliament, regulations passed by Ministers, and other subordinate legislation such as municipal ordinances.[90] The Constitution of South Africa plays an important role in ensuring protection of people's rights in South Africa. Section 23 stipulates that everyone has the right to fair labour practice, promoting the

[87] Gumede op cit note 81 above.
[88] CI Tshoose 'An employer's duty to provide a safe working environment: A South African perspective' (2011) 6 *Journal of International Commercial Law and Technology* 166-169.
[89] *Van Deventer* 85 above.
[90] Ibid.

right to a safe and healthy workplace for employees. The rights and duties under the Constitution are supplemented by other legislation, such as the OHSA, COIDA and the EEA, which are discussed below.

3.3.1 The Constitution

The Constitution ensures the protection of rights specified in the Bill of Rights of persons, including the rights of employees performing their duties in the workplace or at home. Section 24(a) states that 'everyone has the right to an environment that is not harmful to their health or well-being'. This can be interpreted to mean the protection of people's rights in relation to their 'environment', which can be understood to mean the space where they live and work.[91] Section 24 promotes the well-being of persons in the workplace, which further amplifies the duty of employers to ensure the safety of employees.[92]

3.3.2 Occupational Health and Safety Act

The OHSA deals directly with the health and safety of employees in the workplace, but does not include miners, owners of certain shipping vessels, those exempted by the Minister, and those employed in temporary employment services.[93] Section 8 of the Act places a duty on employers to provide a safe working environment for employees. A working environment is not limited to the workplace, but can extend to the home of an employee.[94] The employer is expected to do what is reasonable in the circumstance of the particular case. The case of *City of Johannesburg v Swanepoel N.O.*[95] illustrates the limits of reasonable protection for employees working at home. In this case the employer had requested that the employee transfer to a different region under the same terms and conditions of his employment as the employee's life was in danger. The employee refused and was dismissed for gross insubordination. The employee challenged the dismissal as unfair. The Labour Court held that the dismissal was fair as the employer had a duty to protect an employee performing his or her employment duties. This included threats to the life of the employee and family even at home.

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[91] A du Plessis 'South Africa's Constitutional environmental right (generously) interpreted: what is in it for poverty' (2011) 27 *SAJHR,* 292-297.
[92] A Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right in the Local Government Sphere* (unpublished LLD thesis, North West University, 2009) 348.
[93] S Rothmann & J Pienaar 'Employee health and wellness in South Africa? The role of legislation and management standards' (2009) 7(1) *SA Journal of Human Resource Management 18*-25.
[94] Ibid.
[95] (JR2316/12) [2016] ZALCJHB 80.

The circumstances of each case determine whether the employer had a duty to protect the employee. In the case of *Kruger v Charlton Paper of South Africa (Pty) Ltd*,[96] a qualified engineer had squeezed through a gap on the side of an electric terminal that was live and suffered serious injuries. He took action against the employer for not ensuring his safety in the workplace. The court held that a person in the position of the employer would not have foreseen that a person would have squeezed through the gap in the terminal and suffer injuries from the live electric terminal and therefore the employer was held not to be liable.

In *MacDonald v General Motors South Africa (Pty) Ltd* [97] the employer was alleged to have failed to adequately safeguard a tank platform by providing railings to prevent accidents. In dealing with the standard of care in such a case, Eksteen J held:

> '[H]ere again the test as to whether the protective devices contended for by the plaintiff ought to have been supplied must be the view that a reasonable person would take. An employer would only be expected to guard against accidents which are likely to happen in the ordinary common use of the machinery'.

The employer's duty to provide safety for employees in the workplace turns on reasonableness or what steps a reasonable employer would have taken in the circumstances. In upholding their duty of care, the employers must follow the duties set out under s 8(2) of the OHSA, listed as follows:

'a) The provision and maintenance of systems of work, plant and machinery that, as far as is reasonably practicable; are safe and without risks to health;

b) Taking such steps as may be reasonably practicable to eliminate or mitigate any hazard or potential hazard to the safety or health of employees, before resorting to personal protective equipment;

c) Making arrangements for ensuring, as far as is reasonably practicable, the safety and absence of risks to health in connection with the production, processing, use, handling, storage or transport of articles or substances;

d) Establishing, as far as is reasonably practicable, what hazards to the health or safety of persons are attached to any work which is performed, any article or substance which is produced, processed, used, handled, stored or transported and any plant or machinery which is used in his business, and he shall, as far as is reasonably practicable, further establish what precautionary measures should be taken with respect to such work, article, substance, plant or machinery in order to protect the health and safety of persons, and he shall provide the necessary means to apply such precautionary measures;

e) Providing such information, instructions, training and supervision as may be necessary to ensure, as far as is reasonably practicable, the health and safety at work of his employees;

[96] 2002 (2) SA 335 SCA.
[97] 1973 (1) SA 232 (E).

f) As far as is reasonably practicable, not permitting any employee to do any work or to produce, process, use, handle, store or transport any article or substance or to operate any plant or machinery, unless the precautionary measures contemplated in paragraphs (b) and (d), or any other precautionary measures which may be prescribed, have been taken; taking all necessary measures to ensure that the requirements of this act are complied with by every person in his employment or on premises under his control where plant or machinery is used;

g) Enforcing such measures as may be necessary in the interest of health and safety;

h) Ensuring that work is performed and that plant or machinery is used under the general supervision of a person trained to understand the hazards associated with it and who has the authority to ensure that precautionary measures taken by the employer are implemented; and Causing all employees to be informed regarding the scope of their authority as contemplated in s 37(1)(b).'

The employer further has a duty under section 9(1) of the OHSA to protect any other person who has dealings with the business. Under section 9(2) of the OHSA, the person who has dealings with the business has a corresponding responsibility to follow the preventative measures provided by the employer to ensure safety in the workplace. Employees also have a responsibility to ensure that they follow safety measures provided by their employers. Under section 14 of the OHSA, employees have the following duties in the workplace:

'a) Take reasonable care for the health and safety of himself and of other persons who may be affected by his acts or omissions;

b) As regards any duty or requirement imposed on his employer or any other person by this Act, co-operate with such employer or person to enable that duty or requirement to be performed or complied with;

c) Carry out any lawful order given to him, and obey the health and safety rules and procedures laid down by his employer or by anyone authorized thereto by his employer, in the interest of health or safety;

d) If any situation which is unsafe or unhealthy comes to his attention, as soon as practicable report such situation to his employer or to the health and safety representative for his workplace or section thereof, as the case may be, who shall report it to the employer; and

e) if he is involved in any incident which may affect his health or which has caused an injury to himself, report such incident to his employer or to anyone authorized thereto by the employer, or to his health and safety representative, as soon as practicable but not later than the end of the particular shift during which the incident occurred, unless the circumstances were such that the reporting of the incident was not possible, in which case he shall report the incident as soon as practicable thereafter.'

The employee is responsible for his or her injuries in instances when, through his or her own negligence, he does not follow the precautions required by the employer.[98] In *National Union*

[98] M Yeats & T Nhleko 'Safety is a lock . . . but who holds the key' (2016) *Without Prejudice* 48-49.

of Mineworkers v Commission for Conciliation Mediation and Arbitration,[99] an employee working on a conveyor belt failed to lock it to ensure that it stopped being in motion. He was held to have failed to comply with the lockout procedure whilst working on the machine and was dismissed by the employer. The employee lodged a grievance but the CCMA held that the employee's dismissal was fair. The Labour Court upheld the decision holding that the employee's dismissal was fair as the employee had failed to satisfy the safety standard expected of him in the workplace.

It is evident that, whilst the employer bears the greater burden to ensure safety of employees while they perform their workplace duties, employees have a corresponding responsibility to follow measures provided by employers. Failure can lead to employees facing disciplinary action.

Employees who suffer injury or a disease in the workplace can lodge a claim in terms of COIDA.

3.3.3 Compensation for Occupational Injuries and Diseases Act (COIDA)

COIDA entitles an employee to compensation in the event of suffering an injury or contracting a disease in their scope of employment. The Act applies to all employees (including casual employees) who suffer a workplace injury or disease.[100] The protection includes employees who become disabled, fall ill, are killed or are injured in the workplace. COIDA excludes the following category of employees:

1. Those who are disabled for less than three days;
2. Members of the South African National Defence Force;
3. Individuals undergoing military training;
4. Workers guilty of wilful misconduct (unless the nature of the injury is serious, or they are killed); and
5. Anyone employed outside South Africa for 12 or more consecutive months, and for temporary work assignments in South Africa.[101]

COIDA also excluded domestic workers, but this has been altered by a recent judgment in the case of *Mahlangu v Minister of Labour and Others*,[102] in which it was held that the exclusion

[99] (2009) ZALC 125 (JR1239/09).
[100] S Rothmann & J Pienaar 'Employee health and wellness in South Africa: The role of legislation and management standards' (2009) 7(1) *SA Journal of Human Resource Management* 22.
[101] *McDonald* op cit note 97 above.

of domestic workers from being able to claim from the COIDA in the event of death, injury and illness sustained or contracted during the course of their work duties was unconstitutional.

The compensation of employees under COIDA is based on a no-fault system, by which employees or their dependants (in case of death) are compensated for work-related injuries or diseases without regard to whether they, their employer or any other person was negligent.[103] COIDA lists diseases that employees can be compensated for;[104] if an employee contracts a disease that is not listed as a common disease, that employee must prove that their disease is work-related in order to be compensated under COIDA.[105] In terms of section 35(1) of COIDA, an employee or their dependants cannot claim against an employer for injuries or diseases incurred in the workplace,[106] altering the common law position which allowed employees who were injured or contracted diseases in the workplace to claim against employers.[107]

The position of employees claiming against their employer for occupational diseases was considered in *Mankayi v AngloGold Ashanti,*[108] which interpreted section 35(1) of COIDA. The employee contracted tuberculosis and chronic obstructive airways disease while working at the mine and he lodged a claim for compensation against the employer and the Compensation Commissioner in terms of Occupational Diseases in Mines and Works Act (ODIMWA) for the diseases he had contracted in the workplace. The employee was awarded R16 320. Dissatisfied, the employee claimed R2.6 million for past and future loss of earnings against the employer. The High Court and the Supreme Court of Appeal ruled that the employee was barred by section 35(1) of the COIDA from claiming against his former employer. The employee appealed further to the Constitutional Court which considered whether COIDA applies to employees covered by section 100(2) of ODIMWA, and whether the exclusionary and extinguishing effect of section 35(1) applied only to employees who had

[102] [2020] ZACC 24.
[103] McGregor et al *Labour Law Rules* (2012) 99-102.
[104] Le Roux 'Powers of the inspectorate to close a working place' (2011) 11 *The Journal of the Southern African Institute of Mining and Metallurgy* 542-544.
[105] W Le Roux 'When is a workplace safe or unsafe?: The safety criterion in terms of the Occupational Health and Safety Act and the Mine Health and Safety Act' (2011) 111 The *Journal of The Southern African Institute of Mining and Metallurgy* 532.
[106] Rothman &Pienaar op cit note 100 above.
[107] W Badenhorst 'We are masters of our fate' 2015 *Without Prejudice,* 6-7.
[108] (2011) 32 ILJ 545 (CC).

a claim for compensation under COIDA in respect of the occupational disease suffered by the employee. The court held:

> 'Section 35(1) must be read in the context of the other provisions of COIDA. The employee referred to in s 35(1) whose common-law claim is expunged is limited to an employee who has a claim for compensation under COIDA in respect of occupational diseases mentioned in COIDA. It is this employee that section 35(1) of COIDA excludes from instituting a claim for the recovery of damages against the employer for occupational diseases resulting in disablement or death. The expungement does not extend to an employee who is not entitled to claim compensation in respect of 'occupational diseases' under COIDA. The exception raised by the Respondent should therefore be dismissed as the employee contracted a disease in the scope of their employment and S 35 (1) does apply to them and so they can claim against the employer for the employer's negligence in allowing them to contract a disease in the workplace.'

Section 35 (1) of the COIDA excludes employees who qualify to claim against the COIDA for occupational injuries and diseases from claiming against the employer, as this would amount to double compensation, as the employer already contributes to the insurance scheme that covers employees with claims for injury or illness. However, mineworkers who contract diseases under ODIMWA retain their common-law right to claim against their employers, because section 35(1) does not cover an employee who qualifies for compensation in respect of diseases under ODIMWA.

3.3.4 Employment Equity Act (EEA)

The EEA deals with employment equity and purports to eliminate unfair discrimination in the workplace. A sensitive issue that arises is the medical testing of employees, as it inherently violates their constitutional rights to privacy as guaranteed by section 14 of the Constitution. Section 7 of the EEA provides that the medical testing of an employee is prohibited unless legislation permits or requires the testing. Section 7(b) further states 'that medical testing will be permissible if it justifiable under the medical facts, social policy, the fair distribution of employee benefits or the inherent requirement of the job'.

The courts are guided by section 7 when determining whether medical testing of an employee is justifiable in the circumstances. In the case of *Pharmacy Distributions (Pty) Ltd v Weidman*,[109] the employee was a sales representative and was dismissed for failure to take a medical test on request by his employer. The employer argued that the employee was contractually obliged under the employment contract to undergo a psychiatric test after the

[109] (JA104/2015) [2017] ZALCJHB 258.

employer had discovered she had bipolar depression. The Labour Court and the Labour Appeal Court found there were no justifiable reasons for the employer to compel its employee to undergo medical testing in the circumstances of this case. The Labour Appeal Court held that 'consent' (in the contract of employment) could not be relied upon by the employer as a ground to justify compelling of the employee to undergo medical testing.

Courts follow a strict approach when dealing with medical testing of an employee; employers seeking to have an employee undergo medical testing must ensure that such testing is justifiable under section 7(1) of the EEA, and not merely based on consent in an employment contract. If employers fail to show that testing is justifiable and dismisses an employee for refusal to undergo medical testing, this amounts to an unfair dismissal.

3.3.5 Application of South African legislation to the employer's duty to protect employees in the course of performing their employment duties

In the situation of a pandemic, employers have common law and statutory duties to ensure protection of employees against any injury or disease they might be exposed to in the workplace. The expectation is that the employer must ensure that employees are given guidance on how to protect themselves against coronavirus. The Department of Employment has issued a labour directive to provide guidance on measures to be taken by the employer and employees under the coronavirus epidemic.[110] The directive requires employers to submit a record of its risk assessment and written policies on how it plans to protect employees against coronavirus in the workplace. Employers must also ensure that employees who show symptoms associated with coronavirus or who have been infected do not come to the workplace and infect other employees. Alternatively, the employer may instruct employees to work at home to protect employees from being exposed to coronavirus.

Employers (in the pandemic) must ensure that there is minimal contact between employees in the workplace, as it has been established that the coronavirus is transmitted through contact between persons or contact with a surface where the virus is present. If it is not practical to practise social distancing in the workplace, the employer should arrange physical barriers between work stations to ensure minimal contact between employees. Furthermore, the employer must provide hand sanitisers and face-protecting masks for each employee in the workplace.

[110] GN 479 of GG 43257, 29/04/2020; 7-20.

An employer who fails to provide such protection, is liable to compensate their employees.[111] Employees can claim 75% of their salary against COIDA if they contract coronavirus in the workplace.[112] The employee must be able to prove that they contracted coronavirus while providing their services to the employer. The employer can test employees for coronavirus in the workplace, even without the consent of the employee, as this is permissible under legislation; section 7(1) of the EEA allows for employers to perform medical tests on its employees if it is permitted by legislation. The employer is thus under an obligation to ensure all employees are tested for coronavirus regardless of their agreeing to be tested or not. If an employee tests positive for coronavirus, the employer can instruct the employee to stay at home and isolate.[113] If the employee refuses to test, the employer can deny them access to the workplace until the employee tests for coronavirus.[114]

3.4 Conclusion

As indicated in the outline provided in chapter 1, this chapter has examined South Africa's health and safety, and has determined the extent to which it is applicable in the pandemic. Both the right of the employer to run a viable business and the rights of employees to work in reasonable safety are protected. It has further been established in this chapter that all employees are under an obligation to test for coronavirus and, should they refuse the employer can deny them access to the workplace.

The next chapter, will explore employee's rights to remuneration and benefits under lockdown.

[111] K Heycock & S Amin, 'Coronavirus: Health and safety when working from home', available at: *https://www.farrer.co.uk/people/kathleen-heycock*, accessed on 17 April 2020.
[112] McGregor op cit note 103 above.
[113] M Yeates, 'Keep employees safe from threats of criminal misconduct, court says', available at: *https://jouwerk.solidariteit.co.za/en/category/article-of-the-day/,* accessed on 21 May 2020.
[114] *Mankayi* note 108 above.

CHAPTER 4

EMPLOYEE REMUNERATION AND LEAVE DAYS DURING LOCKDOWN

4.1 Introduction

The employment relationship entails the employee rendering services to the employer, and the employer in turn paying the employee for these services. The question that needs to be addressed is whether the employer has an obligation to pay an employee who has been prevented from rendering services to the employer because of lockdown regulations.

This chapter analyses the employer's remuneration obligations and examines whether employees can refuse to come to work on account of coronavirus concerns. It subsequently considers whether an employer can compel employees to take annual leave during lockdown and whether employees who contract coronavirus are entitled to additional paid sick leave. Lastly, alternative measures available to employers to compensate employees during lockdown are discussed.

4.2 The payment of salaries by employers to employees during lockdown

The conventional employment contract between the employer and employee has been disrupted under lockdown as non-essential employees have been legally prevented from rendering their services to the employer.[115] Only essential employees worked under the strict lockdown and were paid; employees who could not work did not receive payment.[116] It has to be asked whether there is an obligation on the employer to pay such employees, and whether failure to do so constitutes a breach of the employment contract by the employer? [117] The answer is that the employer is not legally obliged to make payment to employees who have not worked as they have not rendered their services to the employer. In instances where the employer makes payment, this would be in line with a moral and not a legal obligation.[118] In essence, the employer has the right to apply the 'no work no pay' principle under lockdown.

The principle of 'no work no pay' has featured strongly under lockdown and the Labour Court dealt with this topic in *Mhlonipheni v Mezepoli Melrose Arch* [119] and *Macsteel Services*

[115] McDonald of cit note 97 above.
[116] Ibid.
[117] B Sono et al 'Are employers obliged to pay employees' salaries/wages during the national lockdown?', available at :*https://www.werksmans.com/,* accessed on 14 April 2020.
[118] McDonald op cit note 97 above.
[119] [2020] ZAGPJHC 136 (3 June 2020).

Centres SA (Pty) Ltd v National Union of Metal Workers of South Africa.[120] In *Mhlonipheni*, the employer had instructed its employees to stay at home as the business (restaurant) could only deliver goods to its customers and this meant no profit for the business. As a result, the employer did not pay employees their salaries, raising the defence of *force majeure*. The court considered the principle of supervening impossibility of performance in terms of which performance in terms of a contract is excused when it is objectively impossible to carry it out. This principle was held not to be applicable in this case as the employees could still render their services to the employer under level 4 and 5 and therefore the employer was under an obligation to pay the employees.

In the case of *Macsteel*, the court came to a different conclusion. The employer in this case had continued paying employees 100% of their salaries despite the employees not rendering their services to the employer. The court held at paragraph 82:

> 'The reality in law is that the employees who render no services, albeit to no fault of their own or due to the circumstances outside their employers control, like the global covid-19 pandemic, are not entitled to remuneration and the Applicant could have implemented the principle of 'no work no pay.'

The judgment in the *Macsteel* case is the more convincing as it repeats the dictum that employees who have not rendered any services to the employer are not entitled to payment, even if a pandemic like the coronavirus was the cause of them not being able to render their services. The *Mhlonipheni* judgment is not convincing as it places an obligation on employers to pay employees regardless of whether the employees render their services to the employer.

The employer is therefore not obligated to pay employees who have not rendered any services to their business.[121] The common law contractual principle of supervening impossibility of performance can be invoked where performance under a contract becomes impossible to fulfil.[122] The impossibility to perform must have been caused by a natural force, 'a direct act of nature, the violence of which could not be guarded against'.[123] In order for supervening impossibility to succeed as a defence two requirements must be met by the party seeking to rely on it:[124]

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[120] (2020) 41 (ILJ) 1877 (LAC).
[121] M Katsivela 'Contracts: Force majeure concept or force majeure clauses?' (2007) *Uniform Law Review* 101.
[122] D Robertson 'Contracts – Interpretation & construction; Vis major' (2009) (1) (25) *Journal on Contract Law* 62.
[123] *New Heriot Gold Mining Company Limited v Union Government (Minister of Railways and Harbours)* 1916 AD 415.
[124] Hutchinson et al *The Law of Contract in South Africa* (2012) 2 ed 496.

1. Performance must be objectively impossible and not difficult, burdensome or economically onerous. Factual impossibility is not an absolute requirement; in the instance that performance is illegal or has become more onerous it will qualify as objective impossibility.[125]
2. Performance must be unavoidable by a reasonable person.[126] This means that even if the debtor could have foreseen the event occurring, it must be unavoidable in order for it to be objectively impossible. The debtor must not be able to control it despite having foreseen the event.

The coronavirus epidemic qualifies as an unforeseen natural event which could not have been reasonably guarded against rendering performance under the contract of employment impossible to fulfil, entitling an employer to rely on supervening impossibility of performance and not pay employees who have not rendered any services. This would be in line with the 'no work no pay' principle. This approach was followed in the *Boyd v Stuttaford & Co,*[127] in which the court had to determine whether an employee was entitled to be paid his wages for the period he had been absent from work. The employee had fallen at work and this was claimed to be an uncontrollable accident which prevented the employee from providing their services to the employer. The court held that payment was not due to the employee as the employee had not rendered any service to the employer.

The supervening impossibility of performance to not pay employees must not be impossibility created by the employer. South African courts are not inclined to allow employers to use a self-created impossibility to avoid paying their employees – an issue dealt with in the *Mhlonipheni* case. The court found that the employer had chosen not to trade and therefore *force majeure* did not annul the employer's obligation to pay employees' salaries.

[125] Hutchinson et al, op cit at 383.
[126] F du Bois Wille's *Principles of South African Law* (2007) 9 ed 850.
[127] 1910 AD 1.

4.3 Can employees refuse to come to work for fear of being infected with coronavirus at the workplace?

Employees are obliged to report for duty, and should they fail to do so, they would be in breach of their contract of employment. This view is upheld in the judgment of *Glencore (Pty) Ltd v National Union of Mineworkers obo Sonnyboy Manyoni*,[128] where an employee was refused a request for leave as another employee in his department was on leave. He nonetheless took leave and was subsequently dismissed. The court held that his dismissal was fair in that he was absent from work without authorisation. Employees who absent themselves from work due to fear of coronavirus despite the employer providing a safe working environment are in breach of their employment contract and could face disciplinary action. If the employer provides protective equipment and ensures that employees are safe from being infected with coronavirus, employees do not have reason to refuse to attend the workplace and refusal to report to the workplace amounts to unauthorised absenteeism.[129]

The refusal to report to work also amounts to insubordination on the ground of defying the instructions of the employer. Insubordination can be defined as: 'a wilful and serious refusal by an employee to obey a lawful and reasonable instruction or where the conduct of an employee poses a deliberate (wilful) and serious challenge to the employer's authority' (*Sibanda v Pretorrius* N.O (JR2637/16) [2019] ZALCJHB 84).

The essential elements of insubordination are as follows:

1. An employer/superior gives a clear order to an employee;
2. The order being given by the employer/superior is not unlawful; and
3. The reasonableness of the order is beyond reproach.

In a recent award in the case of *Botha v TVR Distribution*,[130] the employee was an essential worker and during level 5 lockdown was expected to report to work. The employee refused to report to work, contending that the employer had not provided him with protective gear and had failed to provide him with a permit and that, in any event, the lockdown regulations did not permit him to work. These allegations were shown to be false, and accordingly the

[128] JR 1251/2014.
[129] Ibid.
[130] (2020) 12 BALR 1282 (CCMA).

commissioner held that the dismissal of the employee was substantively fair as the employee had failed to obey a reasonable instruction to come to work.

The *Botha* case is authority for the proposition that refusal by an employee to report to work, based on the frivolous pretext of fearing coronavirus is a dismissible offence. The question then has to be asked: what happens if an employee refuses to report to work because the employer has not ensured that the employee is protected from coronavirus? Section 14 of the Directive on Occupational Health and Safety issued on 28 April 2020 and updated on 28 September 2020[131] deals with refusal to report to work based on a sound reason by the employee. Subsection 1 of the directive states that an employee may refuse to report to work if there is a reasonable justification for not reporting to work or when there is a threat to their health because they have been exposed to the virus. The reason for the refusal to work must be communicated to the employer or the safety representative in the workplace. In terms of section 14(2) of the directive, the employer is then obliged to address the issue that might put the employees' health in danger. An employee may not be dismissed, disciplined, prejudice, or harassed for refusing to perform any work because of fear of exposure to coronavirus as contemplated under subsection 1 of the directive. Where the employee is being treated unfairly for not working because of the threat to their health, the employee can refer a dispute to the CCMA.

Although section 14 of the directive protects employees where there is a threat to their health because of possible exposure to coronavirus, it nevertheless raises the problem of determining when the refusal to work is justified. 'Reasonable justification' is not defined, is too wide, and can be interpreted differently by the employer and employee which causes problems for both parties. The employer may view the employees' fears for their health as not being justified and take disciplinary action against the employees. Employees may abuse their right and refuse to report to work by raising trivial or unsubstantiated safety issues.

4.4 Can employers oblige employees to take their annual leave during lockdown to cover their salary?

A leave period is a period when the employee can be relieved of his or her duties at work, either to rest, attend to family issues, or take time off work to attend to a family member's ill-health. There are different types of leave days, including annual leave, sick leave, family

[131] GN 479 of GG 43257, 29/04/2020; 7-20.

responsibility leave, and maternity leave. In this section, annual leave and sick leave are discussed as they are relevant to the study.

4.4.1 Annual leave

Annual leave entitles an employee to take time off work usually to rest during an annual cycle. Section 20 of the BCEA describes an 'annual leave cycle' as a period of 12 months' employment with the same employer. Section 20(2) (a) states that every employee is entitled to 21 consecutive days paid leave per year, which amounts to 15 working days for employees who work five days a week. Section 20(10) of the BCEA provides that annual leave must be taken in accordance with the terms of the contract of employment. If such an agreement does not exist, the timing of annual leave must be determined by the employer (section 20(10) (b) of the BCEA).

An employer, therefore, has the right to oblige employees to take their annual leave days during the pandemic lockdown period and pay them for these days. Despite this, the Minister of Labour has urged employers not to force employees to take such annual leave;[132] and insists that when the employer requires an employee to take annual leave this must be accompanied by full remuneration.[133] It remains to be seen whether employees have a remedy when forced to take their annual leave as no case has come before South African courts dealing with this issue.

4.4.2 Sick leave

According to section 22 of the BCEA a 'sick leave cycle' means a period of 36 months' employment with the same employer following an employee's commencement of employment or the completion of that employee's prior sick leave cycle. An employee is entitled to a maximum of 30 days sick leave in the 36-month sick leave cycle.[134] In every sick leave cycle, an employee is entitled to paid sick leave in accordance with the number of days an employee would work in a six-week period.[135] In terms of section 23 of the BCEA, an employer is not required to pay an employee sick leave if the employee is absent for more

[132] 'Employers urged to comply with lockdown regulations', available at *https://www.sanews.gov.za/south-africa/employers-urged-comply-lockdown-regulations* , accessed on 31 March 2020.
[133] A Patel 'South Africa: Forced Leave, Retrenchments and Dismissals − Lockdown Labour Questions Answered', available at: *https://www.modaq.com/southafrica/employee-benefits-compensation/973634/forced-leave-retrenchments-and-dismissals-lockdown-labour-questions-answered* , accessed on 06 August 2020.
[134] R Bregman & S Moodley 'Employers and COVID-19' (2020) *De Rebus.*
[135] Hutchinson op cit note 125 above.

than two consecutive days or on more than two occasions during an eight-week period and does not provide a medical certificate indicating that the employee could not fulfil their duties in the workplace.

The coronavirus epidemic has caused the existing health legislation to be altered by a new Directive for Occupational Health and Safety[136], according to which an employee can be placed in quarantine for 14 days should they have been exposed to someone who has coronavirus or shows symptoms of coronavirus. This can be voluntary quarantine, or at the request of the employer because the employee has been exposed to coronavirus. This changes the traditional provision of the BCEA which allows for an employee to be on sick leave for not more than two days without a medical certificate. A medical practitioner in this instance includes a traditional healer who is registered as such, as held in the case of *Kievets Kroon Country Estate v Mmoledi.*[137]

The directive provides that an employee in quarantine for 14 days or more qualifies to receive sick leave remuneration from an Illness Benefit Scheme under the UIF (provided they contribute to UIF). The employer and employee must provide a confirmation letter that the employee is in isolation at home and cannot perform their tasks at work.

Employees in quarantine therefore qualify for sick leave and receive remuneration for the period of absence for sickness or isolation, provided they contribute to UIF. If not, this category of employees is left without an income, placing them at a disadvantage compared to their colleagues who contribute to the UIF. In consequence, the state has tried to intervene and provide financial aid to such employees through the TERS scheme.

4.5 The Temporary Employer/Employee Relief Scheme (TERS)

On 26 March 2020 the Department of Labour issued the Covid-19 TERS directive,[138] in terms of which UIF benefits were expanded by providing wage benefits to employees left without income due to the pandemic. The benefit was applicable to employers who were registered with the UIF and made monthly contributions on behalf of their employees. In terms of the directive, employers who had closed down their operations for a period of three months or a lesser period and suffered financial distress were entitled to apply for TERS financial relief. The TERS scheme did not accommodate employers who could still operate

[136] GN 479 of GG 43257, note 131 above.
[137] (857/12) [2013] ZASCA 189.
[138] GN 657 of GG 43161, 26/03/2020; 7-12.

parts of their business operations during the lockdown period.[139] The directive, however, was revised on 8 April 2020 to allow employers who operated parts of their business operations to benefit from the scheme. In order to receive financial relief, employers have to make an application to the UIF and submit the relevant documents.

4.5.1 Documents required from employees to apply for relief

The employer is required to submit the following documents when applying for TERS:

- UI19 and UI2.7 (completed by employer);
- UI 2.1 (application form);
- UI 2.8 (bank form completed by the bank);
- A letter from the employer confirming company shutdown or employee's 'temporary lay-off' is due to the coronavirus; and
- A copy of employee's ID document.

4.5.2 Relief offered to employees

The directive decrees that TERS-assisted employers pay employees' salaries during lockdown of their businesses being shut down. The TERS benefit would be calculated in terms of the income replacement rate sliding scale starting from 38% (for high earners) to 60% (for low earners). The salary to be taken into account in calculating the TERS benefit, capped at a maximum amount of R17 712 a month, per employee and the maximum benefit for a high-earning employee was 38% of R17 712.00 per month (R6 730.56 a month). All employees received a benefit of no less than R3 500, which equates to the national minimum wage.[140] Employers could supplement these payments, but employees could not get 100% of their salary plus benefits. This meant that, for example, if an employee earned R15 000 as salary and R6 730.56 as benefits, the employer could supplement the amount to reach R15 000 − but no more. To apply for the TERS benefit the employer was required to send an email to *Covid19ters@labour.gov.za* and there was an automatic response outlining the application process. The employer could then follow this process and attach all the relevant documents required to complete the application.

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[139] S Jainarain, 'A quandary for employers: the unilateral changes to terms and conditions of employment', available at: *https://ceosa.or.za/a-quandry-for-employers-the-unilateral-changes-to-terms-and-conditions-of-employment*, accessed on 19 July 2019.

[140] S Schreiber 'Some companies claiming UIF Ters on behalf of the deceased − Labour dept' available at: *https:// saco ronavirus.co.za/?utm_source=TheCitizen&utmmedium=link&utm_campaign=covid19*, accessed on 23 July 2020.

4.5.3 The process of payment of employees

According to the directive dealing with the TERS benefit, if the employer had more than 10 employees, the employer could apply on behalf of the employees. Employers with fewer than 10 employees, the employees could make their own applications. The directive states that if the employer pays the employees the amount before receiving the benefit, the employer can set off this amount and pay the remaining amount to the employees. The directive further provides that if the employer has completed a memorandum of agreement with the UIF or if the employer accepts the terms and conditions of the UIF, the benefit can be received by the employer. The employer then has an obligation to pay the benefit amounts to the employees within two days from receipt of the benefit, except when the employer has already paid the employees.

Where an employer is a member of a bargaining council and has signed a memorandum of agreement with the UIF, the benefit can be received by the bargaining council and paid to employees. The employer or bargaining council must pay the benefit amounts within two business days of receipt of the amount from the UIF. Employers are required to submit proof of payment to the UIF after making payments to employees within five business days of payments being made. All monies not paid to employees must be returned to the UIF within 10 business days. Employers are required to keep all records of benefit amounts paid to employees for five years, separate from the business financial records; and employers are obliged to keep a proper audit trail of the monies received and paid to employees to facilitate any audit or investigation into the employer's compliance with the memorandum of agreement.

Despite the mechanisms to create a record of the transfer of monies to employees and businesses, the scheme has faced controversy from an administrative perspective, with misuse of money paid to employers as well as acts of fraud.

4.6 Challenges faced by the TERS

The TERS scheme faced numerous problems from the start, ranging from difficulty experienced by applicants processing their applications, lodging of fraudulent applications by parties who did not qualify, applications on behalf of deceased persons, as well misuse of the money from the scheme by employers to cover other business expenses.[141] This led to the

[141] L du Preez 'UIF to probe Ters delays to employees despite R21bn paid out', available at: *https://www.sowetanlive .co.za/sowetan-live/business/money/*, accessed on 18 June 2020.

scheme not fulfilling its objective, leaving numerous employees without an income.[142] Although some beneficiaries benefited from the scheme, many did not. These findings were released on 31 January 2021 in the report 'Covid-19 TERS corruption at work' compiled by Corruption Watch on their investigation into corruption surrounding the TERS. As at 26 June 2020, 75 cases of fraud had been reported.[143] The culprits changed the bank account details of companies and made themselves recipients of funds meant for businesses and their employees. As a result, the scheme lost millions, leaving intended beneficiaries with nothing.

The report by Corruption Watch made recommendations to address corruption surrounding TERS, including the recovery of monies stolen and the involvement of law enforcement to investigate employers who had not paid the TERS money to employees. The report further recommends the investigation of inspectors and Department of Labour officials who allegedly took bribes. The improvement of technology systems dealing with the TERS is also recommended, as well as an appeal process for rejected TERS applications.

4.7 Conclusion

In this chapter, it has been established that an employer is not obliged to pay employees not working during lockdown. This chapter underlines the aims and rationale of the study set out in chapter 1 by specifying the legal protection during the pandemic afforded to employers by seeking to keep their businesses profitable, balanced against the protection of employee's rights to remuneration, health safety and leave benefit. The employees who qualify to be paid by the employer are those who take annual or sick leave, or were working from home. Employees who unreasonably refuse to come to work for fear of being exposed to coronavirus are held to be absent from work without authorisation and their actions can be classified as being insubordination. The chapter also dealt with the role of the TERS in providing relief to employees and struggling businesses and some of the challenges that surrounded the TERS.

In the next chapter, the refusal by employees to accept unilateral changes to their employment contract during the pandemic is examined and also whether these employees can be retrenched by the employer.

[142] 'Employers urged to comply with lockdown regulations note 132 above.
[143] Ibid.

CHAPTER 5

RETRENCHMENT OF EMPLOYEES WHO REFUSE TO ACCEPT UNILATERAL CHANGES TO TERMS AND CONDITIONS OF EMPLOYMENT BY THE EMPLOYER

5.1 Introduction

The coronavirus epidemic has had such a detrimental effect on South African businesses and its economy that employers have resorted to unilaterally altering the contractual terms of employment to cut costs and avoid retrenchments. This chapter explores the legality of such unilateral changes in the face of financial distress caused by the epidemic.

5.2 Unilateral changes to an employee's contract of employment by the employer

Under extreme financial pressure, many employers have resorted to changing employees' contracts of employment. However, in principle, employers cannot unilaterally make changes to employees' contracts without engaging them in the exercise. Under common law, employers are obliged to notify their employees of an intention to change their contractual terms and must consult with them on the proposed alterations, provide reasons for seeking to make the changes and attempt to reach agreement to the proposed changes. This principle was affirmed in the case of *SAPU v National Commissioner of the South African Police Services*,[144] in which it was held that the employer can change the contractual terms only when the employee agrees to work under the new contractual regime.[145] If the employee refuses, the employer cannot make changes to the contract. If the employer makes changes unilaterally without consent from the employee, the employee can have recourse under section 64(4) of the LRA, by which the employee can demand restoration of the original contractual terms and conditions and institute a civil action against the employer for breach of contract.

[144] (2005) 26 ILJ 2403 (LC) 2428.
[145] S Jainarain op cit note 139 above.

5.3 Can employers retrench employees who refuse to accept changes to their contract in the face of financial difficulty of the employer's business?

Where employees have refused to accept a reduction in salary, the employer may lock out employees to compel them to accept the new contractual terms as a last option.[146] Lockout implies the following:

> 'The exclusion by an employer of employees from the employer's workplace, for the purpose of compelling the employees to accept a demand in respect of any matter of mutual interest between employer and employee, whether or not the employer breaches those employees' contracts of employment in the course of or for the purpose of that exclusion.'

According to section 64(1)(ii) of the LRA, an employer can enforce a lockout under extreme circumstances against employees where negotiations with employees have failed, a dispute is declared, and a conciliating commissioner has tried and failed to resolve the dispute after 30 days. A bargaining council or the CCMA can issue an order entitling the employer to enforce a lockout where the employees are engaged in a strike (notified to the employer in writing 48 hours prior to a strike as required by section 64(1)(b) of the LRA). The employer in response may lock out employees, but must first notify them in writing 48 hours before the lockout,[147] as required by section 64(1)(c) of the LRA. Lock-outs are usually not good for ailing companies but may be used as a last option by employers in order to save their company. In *Schoeman v Samsung Electronic (Pty) Ltd*,[148] the court held that an employer's need to survive and prosper economically entailed adapting to market changes and being competitive. The employer could use all available resources wisely and use all options available to ensure survival. One of the options was the lockout mechanism to compel employees to agree to a demand.

The employer may also institute retrenchments under section 189 of the LRA to save their business.[149] The process of retrenchment entails the employer dismissing one or more employees based on the employer's operational requirements, for example, economical, technological and structural or other needs of an employer. The economic reasons relate to the financial position of the business, the technological reasons relate to the introduction of new technology which replaces the labour of employees and makes them redundant and

[146] L Kgope, 'Retrenchments during lockdown', available at: *https://www.lexisnexis.co.za/news-and-insights/covid-19-resource-centre/lebogang-kgope*, accessed on 19 May 2019.
[147] T Quoi & A van der Walt 'Dismissals within the Context of Collective Bargaining' 2009 *Obiter* 63-119.
[148] (1999) 20 ILJ 200 (LC).
[149] *Frys Metals (Pty) Ltd v National Union of Metalworkers of SA (NUMSA) (2003) 24 ILJ 133 (LAC)*.

structural reasons are redundancy in posts in the business. In retrenchments, the employer must first consult with all persons who will be affected by the retrenchment or alternatively, a workplace forum or trade union to which these employees are affiliated. The purpose of the consultation is to reach consensus on appropriate measures to avoid dismissing the employees, minimising the number of dismissals, changing the timing of dismissals, mitigating the adverse effects of the dismissals, devising a method for selecting employees and negotiating severance pay (section 189(2) of the LRA).

The retrenchment of employees must, however, not be in retaliation by the employer for employees refusing to accept revised contractual terms proposed by the employer; it must be based on fair reasons, embracing the fact that the business can no longer employ these employees. Retrenchment to compel employees to accept changes to their contract would amount to an 'automatically unfair dismissal'.[150] Section 187(1)(c) of the LRA precludes employers from dismissing employees for refusing to accept a demand in respect of a mutual interest as this undermines the collective bargaining process between the parties.

Any dismissal must be substantively and procedurally fair as required by section 188 of the LRA. The reason for a dismissal of an employee must be fair and effected in accordance with a fair procedure. Whether or not an employer's dismissal for operational reasons (retrenchment) is substantively fair is a factual one.[151] The employer must prove that the reason for dismissing an employee is based on the operational requirements.[152] The requirement of fair procedure means that the employer must comply with all the requirements for a fair procedure when dismissing an employee.[153] Such requirements are set out in section 189(3) of the LRA − the employer must issue a written notice to invite employees or their representatives to disclose:

' (a) The reasons for the proposed dismissals;

(b) The alternatives that the employer considered before proposing the dismissals, and the reasons for rejecting each of those alternatives;

(c) The number of employees likely to be affected and the job categories in which they are employed;

(d) The proposed method for determining which employees to dismiss;

[150] Todd C and Damant G 'Unfair Dismissal - Operational Requirements' 2004 *ILJ* 896-922.
[151] K Newaj & S Van Eck, 'Automatically Unfair and Operational Requirements dismissals: Making sense of 2014 Amendments' 2016 *PER* 17-25.
[152] T Laubscher 'Dismissals for operational requirement' 2015 *De Rebus* 54.
[153] Du Preez op cit note 141 above.

(e) The time when, or the period during which the dismissals are to take effect;
(f) The severance pay proposed;
(g) Any assistance that the employer proposes to offer to the employees likely to be dismissed;
(h) The possibility of future re-employment of the employees who are dismissed;
(i) The number of employees employed by the employer; and
(j) The number of employees that the employer has dismissed for reasons based on its operational requirements in the preceding 12 months.'

There are additional requirements when dealing with large-scale retrenchments. First, the employer may not retrench employees during a strike, and must obtain facilitation by a CCMA representative or an accredited agency during the consultation process. Furthermore, section 189A of the LRA prohibits the employer from dismissing employees for at least 60 days from the date on which notice of intention to retrench was issued, applicable to employers with more than 50 employees. Section 189A of the LRA sets thresholds for the number of retrenchments as follows: only 10 employees if it employs up to 200 employees; 20 employees if it employs 200 to 300 employees; 30 employees if it employs 300 to 400 employees; 40 employees if it employs 400 to 500 employees and 50 employees if it employs more than 500 employees.

If the employer has followed the retrenchment procedure and has a fair reason to retrench, then the employer can indeed retrench the employees who refuse to accept new contractual terms. The court in *SACWU v Afrox*[154] used an objective causation test to establish the fairness of an employee's dismissal. Employees had engaged in a strike against staggered shifts. The employer responded by not implementing the shift system but instead proposed outsourcing some functions of its business and retrenching employees. The employees were subsequently retrenched. The court had to determine whether the employees' participation in the strike was the reason why they were dismissed and whether the dismissals were fair. The first issue was one of factual causation: whether the dismissal would have occurred had there been no refusal by the employees to accept the demand proposed by the employer. The court found that the reason to dismiss was not because of the strike, as the employer was comfortable with the staggered shift system it had implemented, and so no factual causation was established. The second issue concerned whether the refusal by the employees to accept the revised contractual terms was or was not the most likely cause of the dismissal. The court

[154] (1999) 10 BLLR 1005 (LAC).

held that the need to change the shift system was to get the business functioning on a permanent basis which resulted in the employer retrenching the employees. The court concluded that the dismissals were fair because the employer had dismissed the employees for operational requirements and not for their participation in the strike.

The case of *CWUI v Algorax (Pty) Ltd* is also instructive in illustrating the delicate balance between employees' right and the employer's right to run a viable business.[155] The employer dismissed employees who had refused to accept a new shift system, but was prepared to reinstate the employees provided that they were prepared to work the new shifts. The employer offered reinstatement to the employees when the matter was before the Labour Court, and the court held that the dismissals were fair. On appeal, the Labour Appeal Court held that because the dismissal was conditional, it was an unfair dismissal as it was solely enforced to compel employees to agree to the new shift system proposed by the employer. Accordingly, the court held that the dismissal fell within the ambit of s 187(1)(c) and therefore was automatically unfair.

Another case of relevance was *NUMSA v Frys Metal (Pty) Ltd,*[156] in which the employer had proposed an alteration of shift arrangements with employees, subject to certain employees being deprived of their transport subsidies if they refused changes. The court held that the use of dismissal in collective bargaining to coerce employees to accept terms and conditions proposed by the employer was not permissible; section 187 of the LRA rendered any dismissal to compel employees to accept new contractual terms automatically unfair. The employer was therefore restrained from dismissing employees. However, the decision was overturned on appeal.[157] The LAC considered whether the employer dismissed the employees to force them to accept the new shift system and found that the dismissal was final and irrevocable and was not intended to compel the employees to accept the new shift. The dismissal of the employees did not fall within the ambit of section 187(c) of the LRA as the dismissal was final and irrevocable. The purpose of the employer was to get rid of the employees permanently and replace them with employees willing to accept the new conditions. The employee's dismissals were held to be fair.[158]

The objective of section 187(1)(c) of the LRA is to promote collective bargaining by removing the power of the employer to dismiss employees for refusing to accept new

[155] (2003) 24 ILJ 1917 (LAC).
[156] (2001) 22 ILJ 701 (LC).
[157] *Frys Metals (Pty) Ltd v National Union of Metalworkers of SA (NUMSA)* (2003) 24 ILJ 133 (LAC).
[158] *NUMSA v Frys Metal (Pty) Ltd* (2005) 26 ILJ 698 (SCA).

contractual terms. The use of retrenchment when employees refuse new contractual terms may only be based on operational requirements and have to be commercially justifiable. In the same breath employees must be willing to engage the employer and discuss the new contractual terms and be prepared to accept them if they are reasonable to be in a position to avoid retrenchment. Although an objective test exists to establish whether dismissal of an employee who refuses new contractual terms is fair or not, there are some challenges, as set out below, in implementing retrenchment as a response to employees refusing to accept new contractual terms.

5.4 Challenges of section 187(1)(c) of the LRA in protecting collective bargaining and the disadvantages of retrenchment when employees refuse revised contractual terms and conditions

As stated above, the main purpose of section 187(1)(c) of the LRA is to promote collective bargaining, which by its nature entails engagement of the employer and employees to reach consensus in case of a dispute. However, *Jacobson v Vitalab*[159] is authority for section 187(1)(c) only being available to groups of employees and not individuals. In this case the founding director and shareholder of Vitalab (the employer) received a 'settlement offer' to the effect that he resigns, sell his Vitalab shares, and be re-employed until 31 May 2019. He refused the offer and was dismissed. The court considered whether section 187(1)(c) applied where a dismissal dispute concerned an individual, and held that the purpose of section 187(1)(c) was to protect collective bargaining involving more than one employee, and so did not apply where a single employee refuses to accept the employer's demand and is dismissed.

It follows that individual employees are not protected by section 187(1)(c), and an individual employee's rights are limited in terms of being able to challenge the employer if there is disagreement over new contractual terms. Although the employer still has to prove that the dismissal is fair, the platform for engagement with the employee is limited by this decision. It may also prove detrimental to employers, especially where they have financial difficulties and there is a valid reason for dismissal but there is no engagement platform to persuade the employee to consider the new contractual terms.

The second issue in this section is to consider problems in the enforcement of retrenchments of employees who refuse revised contractual terms from the employer. The employee may

[159] (JS 1042/19, 28-5-29).

agree to terms during the negotiating stages for fear of being retrenched should they refuse the new terms proposed by the employer, but the process of challenging the employer in court for unfair dismissal has no guarantee of success. The collective bargaining process is undermined by employees being prone to accept initial offers in order to avoid being retrenched, and then challenging their dismissal − a syndrome especially relevant during the period of coronavirus and concomitant high unemployment.

Employers might also use the current financial pandemic crisis to retrench targeted employees. A restrictive interpretation of the need to retrench for operational requirements may hamstring some employers' ability to run their businesses effectively and efficiently to be competitive in a depressed market. The employer's inability to run the business accordingly may be used as a disguise need to retrench. This retrenchment of employees in such a case would not be for good reason but could be a cover for the employers' failure to run their business efficiently, meaning that the retrenchments would amount to unfair dismissals.

Another problem in retrenching employees who refuse new contractual terms is that employers who offer reinstatement to employees who accept new contractual terms are in principle held to have unfairly dismissed the employees. This take it or leave it approach where the employer does not make another offer to an employee who refuses to accept changes to a contract but rather retrenches the employee runs counter to basic principles of collective bargaining.

Although section 187(1)(c) protects employees against automatically unfair dismissal, it does present problems in ensuring maximum protection of employees who face demands for revised contractual terms. South African courts must be fully satisfied with reasons provided by employers in resorting to retrenchment before declaring the retrenchments lawful. In any event it is trite law that retrenchment must be the last resort for employers and not a way to get rid of employees to maximise profits.

5.5 Conclusion

In this chapter, it has been established that employers cannot unilaterally make changes to a contract without consulting with the employee about the intended changes. Further to this, employers may use retrenchment as a remedy to save their business from total collapse but this must be based on justifiable commercial reasons and not in retaliation to employees refusing new contractual terms.

In the next chapter, the study will conclude by making recommendations for the development of current South African legislation dealing with employment law under a pandemic such as the coronavirus.

CHAPTER 6
SUGGESTIONS AND RECOMMENDATIONS FOR EXISTING SOUTH AFRICAN EMPLOYMENT LAWS

6.1 Introduction

This study has examined the impact of the coronavirus epidemic in South Africa and how it has affected businesses and employees in the employment context. Laws dealing with employment have been supplemented by directives from the state to provide guidance to employers and employees in the midst of the pandemic. The study concludes by highlighting lessons learnt under coronavirus and making recommendations to strengthen existing South African employment laws should the country face another pandemic.

6.2 Lessons learnt under coronavirus

The main objective of the study was to examine the impact of coronavirus on businesses and how this has affected the employment relationship. The aim was to weigh the employer's duty to ensure health and safety of employees with the right of employees inter alia to be remunerated and enjoy employment benefits during lockdown. Further to this, the study aimed to establish whether employers could protect the viability of their businesses by retrenching employees who refused to accept unilateral changes to their employment contracts introduced by the employer to save costs.

In achieving the above objective, the study recognises the importance of balancing employees' rights to protection in the workplace with protection of employers' interests to run a profitable business. The study achieves this, first by examining the duty of the employer under section 8 the OHSA to ensure a safe working environment for employees in the workplace.[160] It is argued that this duty is especially applicable under the pandemic, obliging employers to ensure that employees receive protective gear to shield themselves from the coronavirus in the workplace.[161] Employees working from home still fall within the ambit of employees to be protected by the employer. This duty depends on whether it was reasonably practicable to expect the employer to protect the employee from being infected by coronavirus.[162] Where such protection is reasonably practicable, the employer assumes

[160] T Thomas et al, 'Challenges around COVID-19 at a tertiary level healthcare facility in South Africa and strategies implemented for improvement' (2020) 110 (10) SAMJ, 964-967.
[161] Ibid.
[162] Khambule op cit note 76 above.

liability should an employee be exposed to coronavirus. Employees in turn have a responsibility to follow the protective measures provided by the employer to ensure their safety in the workplace.[163]

The study further argues that employers have an obligation to fully remunerate employees who have provided their services to the employer during the pandemic. Employees working from home, employees who take annual leave voluntarily or compulsorily during lockdown, and employees who take sick leave (provided they have a medical certificate or letter confirming they are on sick leave) are entitled to remuneration. The study submits that employees who have not rendered any services to the employer are not entitled to remuneration. The pandemic in this instance acts as a supervening impossibility of performance and suspends the employer's duty to remunerate employees who have not rendered their services.[164] In this way the study has clarified the balance between, on the one hand, the protection of employees' right to remuneration and protection in the workplace and, on the other hand, for the protection of employers for not remunerating employees who have not worked under lockdown.

In further achieving the objective of the study, the issue of employers locking out or retrenching employees who refuse unilateral changes to their contract of employment is addressed. It is argued that the employer should lock out employees who refuse to accept unilateral changes to a contract only under extreme circumstances and as a last resort.[165] The employer should first negotiate with employees and, if the negotiations fail and a conciliation commissioner cannot resolve the dispute after 30 days, then lockout can be considered as an option. The employer must, however, notify employees 48 hours before locking them out of the intention to do so.

The study submits that employers, as in the normal event, must consult employees before retrenching them and explore alternative options available to the employer to save the business and employees' jobs. In the instance that the consultation process aborts, the employer can retrench employees as a last option if it is operationally justified. The objective causation test set out in the case of *SACWU v Afrox*,[166] discussed in Chapter 5, must be used to determine whether retrenchment is justified or not. It is submitted that this test establishes whether the reason for dismissal is the refusal to accept revised contractual terms or genuine

[163] Gumede op cit note 81 above.
[164] N Nxumalo 'Employee support amidst the covid-19 pandemic in South Africa' (2020) *De Rebus* 43.
[165] Ibid
[166] *Afrox* note 154 above.

operational grounds. If the retrenchment is based on operational requirements and is not in retaliation to the employee's refusal of revised contractual terms, the retrenchment is lawful.[167] If not, the retrenchment amounts to an automatically unfair dismissal prohibited under section 187 of the LRA.

In light of the analysis and reasoning in the previous chapters, recommendations are made in the next subsection regarding areas where our employment laws can be improved in advance of any future pandemics.

6.3 Recommendations to strengthen employment laws post coronavirus

Firstly, should South Africa find itself in another pandemic, both the rights of employers and of employees must be protected to ensure that employees are safe in the workplace and that employers are protected from paying employees who have not rendered their services, allowing them to save costs so as to be in a better position to maintain the viability of their business.[168] In achieving this, the obligation on employees to follow precautionary measures provided by the employer should be intensified to balance the rights of both parties. Employees who do not follow precautionary measures should accordingly bear the responsibility for contracting coronavirus in the workplace, and the employer should be cleared of any liability for employees' negligence.

A further recommendation is that employment contracts should include standard clauses that cover challenges brought on by a pandemic, specifying situations of supervening impossibility of performance, and measures to deal with such a situation.[169] For instance a contract may state that contractual obligations are suspended for the duration of the epidemic causing supervening impossibility, suspending the obligation to pay wages or render services between employer and employee until such a time that it is practical to resume normal contractual obligations.[170] This would assure the parties that their duty to honour employment contracts would be held in abeyance until it is practical to reinstate contractual obligations.

The practice of substituting annual leave for time off work taken by an employee in circumstances where the employee could not report for duty for a justifiable reason (such as

[167] S July & N Mathebula, 'Employment laws in light of COVID 19: Are they equipped for disaster situation?, available at: *https://www.labourguide.co.za/recent-articles/2768-employment-laws-in-light-of covid 19-are-they-equipped-for-disaster situations'*, accessed on 08 April 2020.
[168] Ibid
[169] M Van Eck & M Van Staden, 'The contract of employment in the time of the coronavirus' (2020) 4 TSAR 814-817.
[170] Ibid at 819-821.

quarantine or lock down during a pandemic) should be prohibited. The employer must be prohibited from enforcing section 20(10)(b) of the BCEA by forcing employees to take 'paid leave' in a pandemic.[171] Although an employee may derive an advantage in being remunerated during this time, the employee forfeits the right to genuine leave in which to rest and recover. Alternatively, a clause in the contract of employment dealing with annual leave could carry the addendum that empowers the Minster of Labour to issue a directive in case of a pandemic to guide employers and employees on what steps to follow in a pandemic.[172] Such a clause could also apply to powers of the Minster to amend sick leave rules during a pandemic, to allow for an increase in the number of sick leave days an employee can take when they fall victim to the virus during a pandemic.

Lastly this study recommends that employers should always try to resolve disputes of mutual interest with employees through collective bargaining. If collective bargaining does not work, the employer has recourse to retrench employees as a last option. The employer should use retrenchment only where there is an immediate danger of the collapse of their business and where retrenchment would ensure its survival.[173] Employers, however, should ensure that the dismissal of the employee is not in retaliation for refusal by employees to accept revised contractual terms, as this would amount to an automatically unfair dismissal.

6.4 Conclusion

The coronavirus epidemic has been an unprecedented catastrophe for the South African nation, prompting this study to analyse the existing labour legislation and interpret how South African employment laws can be applied during a pandemic. The study has achieved its aim in showing how both employers' and employees' rights can be protected under the pandemic. Whilst the OHSA is vital to ensure the safety of employees in the workplace, responsibility also rests with the employees to follow precautionary measures directed by the state and provided by the employer in order to ensure a balance in the protection of the rights of employers and employees. Under a pandemic, employers are only obligated to pay employees who provide services to the employer. Employees who do not provide services to the employer cannot rely on the pandemic to excuse themselves from work and expect payment. Furthermore, it is important for employers to exhaust collective bargaining procedures in resolving disputes on revised contractual changes before retrenching employees.

[171] Patel op cit note 133 above

[172] Laubscher op cit note 152 above.

[173] N Nxumalo 'Employee support amidst the covid-19 pandemic in South Africa' (2020) *De Rebus* 43.

Retrenchment should be exclusively based on operational requirements, and should not be a device to punish employees who refuse to accept revised contractual terms.

It is hoped that this study has shed some necessary light on the application of employment law under a pandemic, and made recommendations that will ensure clarity in future for businesses should South Africa face another pandemic.

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The Department of Employment and Labour Directive GN 479 of GG 43257, 29/04/2020; 7-20

Directive for Occupational Health and Safety GN 479 of GG 43257, 29/04/2020; 10-11

Department of Labour Directive on TERS GN 657 of GG 43161, 26/03/2020; 7-12

Mr Siphesihle Hendry Zungu (214508840)

School of Law

Pietermaritzburg

Dear Mr Siphesihle Hendry Zungu,

Protocol reference number: 00008401

Project title: Coronavirus in South African workplaces: The safety, remuneration, and retrenchment of employees during the lockdown.

Exemption from Ethics Review

In response to your application received on 01/09/2020, your school has indicated that the protocol has been granted **EXEMPTION FROM ETHICS REVIEW.**

Any alteration/s to the exempted research protocol, e.g., Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through an amendment/modification prior to its implementation. The original exemption number must be cited.

For any changes that could result in potential risk, an ethics application including the proposed amendments must be submitted to the relevant UKZN Research Ethics Committee. The original exemption number must be cited.

In case you have further queries, please quote the above reference number.

PLEASE NOTE:

Research data should be securely stored in the discipline/department for a period of 5 years.

I take this opportunity of wishing you everything of the best with your study.

Yours sincerely,

Mr Simphiwe Phungula

Research and Higher Degrees Committee

School of Law