The contract of employment in the time of the coronavirus

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> "[W]isdom comes to us when it can no longer do any good" (Gabriel García Márquez *Love in the Time of Cholera* (1988) 22)

1. Introduction

The sudden and unprecedented worldwide spread of the coronavirus disease (Covid-19) has left economies and financial systems under severe strain. South Africa, like many other countries, instituted a national lockdown in March 2020 to combat the spread of the virus. This national lockdown has had a significant negative impact on the economy and particularly on the general performance of obligations in employment contracts.

Employment contracts create reciprocal obligations which are to be fulfilled in the future. On the one hand, employees are expected to provide their services, whilst on the other hand, employers are expected to pay remuneration for services rendered. In instances of a supervening force, like the South African national lockdown (the shutdown), the contractual mechanism of supervening impossibility applies to address the non-fulfilment of contractual obligations due to the impossibility of performance. Employment contracts have been particularly impacted by the shutdown and have left many unsure of how the shutdown may impact their continued employment and the payment of remuneration. In this regard, one should consider whether employment contracts could be terminated in instances of a supervening impossibility, and if so, when? The issue of whether employers are required to pay employees their remuneration for the duration of the shutdown should also be considered (see Cohen "Termination of employment contracts by operation of law - bypassing the unfair dismissal provisions of the Labour Relations

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Act" 2006 *Stell LR* 91-104). In what follows, we will consider contractual and labour-law mechanisms to address unforeseen circumstances and the impossibility of performance in employment contracts. Note that this contribution only considers and incorporates the legal mechanisms that were applicable during level 5 of the shutdown (for the period 26 March 2020 to 30 April 2020).

2. Contractual mechanisms

2.1 The reciprocal nature of the contract of employment

During the shutdown, many workers found themselves without an income, except for certain unemployment insurance benefits. Although workers in the informal economy and atypical employees have been more vulnerable against the disease and the economic consequences thereof, employees in traditional employment relationships were also not guaranteed of an income. This is a consequence of the nature of the common-law contract of employment. Grogan *Workplace Law* (2017) 25 defines the contract of employment as

> "an agreement between two legal personae (parties) in terms of which one of the parties (the employee) undertakes to place his or her personal services at the disposal of the other party (the employer) for an indefinite or determined period in return for a fixed or ascertainable remuneration, and which entitles the employer to define the employee's duties and to control the manner in which the employee discharges them".

It is therefore an essential element of the contract of employment (*locatio conductio operarum*) that the employee (*locator operarum*) agrees to perform certain specified and/or implied duties for the employer and that the employer (*conductor operarum*) agrees to pay a fixed or ascertainable remuneration to the employee. It should, however, be noted that although remuneration was an essential element in Roman law (*Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A) 56E-G) and our courts have generally accepted the same (*R v Caplin* 1931 OPD 172 173), some have argued that it is not an

essential element (see Mureinik "The contract of service: an easy test for hard cases" 1980 *SALJ* 246 249 n 16; for cases of vicarious liability see Riekert *Basic Employment Law* (1987) 8 and Scott *Middellike Aanspreeklikheid in die Suid-Afrikaanse Reg* (1983) 86). However, in C*oin Security (Cape) (Pty) Ltd v Vukani Guards and Allied Workers' Union* the court held that "[a] contract of employment is a contract with reciprocal rights and obligations. The employee is under an obligation to work and the employer is under an obligation to pay for his services" (1989 (4) SA 234 (C) 239I).

As long as employees tender service, they are entitled to be paid their earnings and other benefits (Grogan 45). As a consequence, non-performance by employees of their contractual obligations, other than during periods of sick or annual leave, entitles the employer to withhold their earnings. In *Wyeth SA (Pty) Ltd v Manqele* the labour appeal court held that:

> "[a]t common law an employee in a contract of employment commits a breach thereof [when] he reneges on his duty of placing his personal service at the disposal of the employer. The employer on the other hand breaches the contract of employment if he reneges on his undertaking to pay the salary or wages agreed in consideration for services rendered" ((JA 50/03) 2005 ZALAC 1 (23 March 2005) par 13).

The reciprocal nature of the employment contract is also legislatively recognised. Section 1 of the Basic Conditions of Employment Act 75 of 1997 and section

213 of the Labour Relations Act 66 of 1995 both define "remuneration" as "any payment in money or in kind, or both in money and in kind, made or owing to any person in return for that person working for any other person, including the State, and 'remunerate' has a corresponding meaning". Remuneration also includes commission earned by employees (*Small v Noella Creations (Pty) Ltd* 1986 7 ILJ 614 (IC)) and certain benefits such as travel concessions (*Marinus and Protekon (Pty) Ltd* 2003 24 ILJ 1595 (CCMA)), and the Namibian labour court has held that it also includes supplementary allowances (*Kruger v The Office of the Prime Minister* 1996 17 ILJ 1092 (LCN)). Remuneration does not have to be fixed, but it has to be ascertainable with certainty (*R v Caplin* 173). The definition of remuneration in both Act 75 of 1997 and Act 66 of 1995 therefore also highlights the reciprocal nature of the employment relationship. In *Zapop (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* (2016 37 ILJ 1882 (LAC) par 34) it was held that it is a contravention of Act 75 of 1997 to fail to pay an employee remuneration that is due. This is so as the legal obligation to pay remuneration, apart from the contract itself, is contained in section 32 of Act 75 of 1997. Section 32(4) in particular requires an employer to effect payment not later than seven days after the completion of the period for which the remuneration is payable.

As a consequence, workers who did not work during the shutdown could, without further intervention or agreement, not reasonably expect to be remunerated during the shutdown period. However, workers who were expected to work from home during this period through electronic means, among other methods, must still be remunerated.

2.2 Impossibility of performance

The law will not require parties to do the impossible (Brassey "The effect of supervening impossibility of performance on a contract of employment" 1990 *Acta Juridica* 22). However, as the shutdown is temporary in nature one must consider to what extent such an impossibility would interrupt a contracting party's performance of his or her obligations.

There are two major types of impossibility in South African law (referred to as *impossibilitas* under Roman law, see Ramsden "Some historical aspects of supervening impossibility of performance of contract" 1975 *THRHR* 153). The first is initial impossibility, which impossibility is present at the start or inception of a contract and results in a void contract. The second is that of an impossibility (also referred to as a supervening impossibility), which occurs during the life of a contract and often results in the automatic termination of the contract (referred to as *casus*, which essentially means an "accident or change occurrence", see Ramsden 153). In Germany the *Schuldrechtsmodernisierung* of 2002 (introduced as part of implementing directive 1999/44/EC of the European parliament, see Aksoy *Impossibility in Modern Private Law: A Comparative Study of German, Swiss, and Turkish Laws and the Unification Instruments of Private Law* (2014) 7), amended § 275 of the *Bürgerliches Gesetzbuch (BGB*) by removing the distinction between initial and subjective impossibility and incorporating new rules relating to impossibility in § 275 and § 313 *BGB* (see Aksoy 7). However, South African law has retained the distinction between initial impossibility and supervening impossibility, and follows the Roman-Dutch concept of supervening

impossibly, which refers to a superior force that, during the contract, prevents the parties from fulfilling their contractual obligations (Brassey 23). The general rule is that if impossibility of performance was as a result of *vis maior* or *casus fortuitous*, then

the debtor would be excused from performing his or her contractual obligations (*Transnet Ltd t/a National Ports Authority v Owner of MV "Snow Crystal"* 2008 (4) SA 111 (SCA)). Similarly, article 1351 of the French *Code Civil* incorporates the concept of *force majeure*, which is balanced against the concept of *pacta sunt servanda* found in article 1134 of the French *Code Civil* (see R?sler "Hardship in German codified private law – in comparative perspective to English, French and international contract law" 2007 *European Review of Private Law* 483 500). The French law contemplates that *force majeure* or an accident in the form of *cas fortuity* (R?sler 500) would not apply (and that the debtor will remain bound to his or her performance) if the event merely resulted in a more expensive performance or a difficulty in the performance on the part of the debtor (a 1148 of the French *Code Civil*; Puelinckx "Frustration, hardship, *force majeure*, *imprévision*, *Wegfall der Geschäftsgrundlage*, *Unm?glichkeit*, changed circumstances" 1986 *Journal of International Arbitration* 56). However, the term *force majeure* is not expressly found in the *BGB*, and the German law is generally more focused on the concept of fault (*Verschuldensprinzip*) to attribute liability to a contracting party (Ridder and Weller "Unforeseen circumstances, hardship, impossibility and *force majeure* under German contract law" 2014 *European Review of Private Law* 371 373). This notwithstanding, similar consequences of *force majeure* or supervening impossibility may be found in § 275 of the *BGB*, which deals with the general concept of impossibility (*Unm?glichkeit*) of performance (Aksoy 11). Also, § 275 provides for a debtor to be excused from performance (except for obviously negligent and culpable actions) if the performance is impossible for the debtor or anyone else, and applies in instances where performance would require an unreasonable effort from the debtor (Seichter in Herberger/Martinek/Rüßmann /Weth/Würdinger, *JurisPK-BGB* (2020) § 275 *BGB* 1). In fact, impossibility in the *BGB* relates to the result of the performance rather than the actual act of the performance (Aksoy 11 n 22), and unlike South African law (in which a supervening impossibility would apply to instances where the performance has become objectively or absolutely impossible) it appears that the *Schuldrechtsmodernisierung* of 2002 has paved the way for a wider interpretation of § 275 *BGB* (Aksoy 7). Prior to the reform, impossibility was largely limited to objective impossibility, but now § 275 *BGB* applies to both instances of subjective and objective impossibility (Aksoy 12), as well as temporary, real, practical and moral impossibilities and their consequences (Aksoy 10). It is worth noting that § 275(2) now provides a form of defence to a debtor for practical or factual impossibility where the expense of performance of the debtor is grossly disproportionate to that of the interest of the creditor (Ridder and Weller 391). In Germany the closest equivalent to *force majeure* (although the term is not used in the *BGB* but is sometimes referred to in German case law relating to travel law) can be referred to as *höhere Gewalt* (see *Amtsgericht Augsburg* Urt v 9. Nov 2004, Az 14 C 4608/03 Er, which referred to and considered the concept of *force majeure* with regard to the SARS outbreak in relation to termination of a travel contract).

In South Africa, the concept of *vis maior* is considered to determine whether a supervening impossibility has occurred. *Vis maior* (a higher power, superior force, or an irresistible force) can be described as a "direct act of nature, the violence of which could not reasonably have been foreseen or guarded against" (*New Heriot Gold Mining Company Limited v Union Government (Minister of Railways and Harbours)* 1916 AD 415 433; see also Claassen *Claassen's Dictionary of Legal Words and Phrases* (2019) *sv* "vis major"). *Vis maior* typically also includes acts of government or the change in legislation, which is comparative to the shutdown. Also, impossibility can be caused by a legal impossibility (Brassey 23), and the law

will not allow parties to perform contractual obligations that are illegal or unlawful (Brassey 23).

The second concept which forms part of supervening impossibility is *casus fortuitous*, which relates to an event that happened by chance (Hutchison "The doctrine of frustration: a solution to the problem of changed circumstances in South African contract law" 2010 *SALJ* 84 95), or an unavoidable accident that neither of the contracting parties could have anticipated or foreseen (Claassen *sv* "casus fortuitous"). *Casus fortuitous* is incorporated into, and forms part of, the concept of *vis maior* (Brassey 23; the *New Heriot* case 433).

Supervening impossibly would only operate if the following conditions are met:

(i) The impossibility must be absolute and not relative to the contracting party's ability to perform (Brassey 24). This means that if a third party were to be able to perform in similar circumstances but the debtor cannot perform because of his or her particular circumstances, then such an impossibility would not be considered to be a supervening impossibility (Brassey 24);

(ii) The impossibility must not be as a result of the contracting party's fault, nor must it be self-created (Brassey 26; the *Transnet* case 14; *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA));

(iii) The debtor must not have contractually assumed the risk of the impossibility (Brassey 28; see *eg Williams Hunt & Co (Natal) (Pty) Ltd v Christie* 1935 NPD 453; *Nuclear Fuels Corporation of SA (Pty) Ltd v Orda AG* 1996 (4) SA 1190 (SCA). See a similar principle in a 1351 of the French *Code Civil*).

Suspension of performance or termination of contractual obligations due to an impossibility is also regulated in other jurisdictions.

English law, for example, uses the doctrine of frustration, which is slightly wider in its application than the South African mechanism of supervening impossibility. The doctrine of frustration applies to instances where an event has occurred that is fundamentally different to what the parties contemplated when they entered into the contract (Katsivela "Contracts: *force majeure* concept or *force majeure* clauses?" 2007 *Uniform Law Review* 101 109). In other words, if a party is frustrated by finding himself or herself in a "fundamentally different situation" after the conclusion of the contract (Rösler 506), then the doctrine of frustration dictates an automatic termination of the contract and the parties would then have to negotiate and enter into a new contract (Rösler 499). With respect to the performance and obligations that occurred prior to the event that caused the frustration, the Law Reform (Frustrated Contracts) Act 1943 allows a form of recovery of expenses if the contract had been impacted by frustration (adapted from Puelinckx 52). However, the Law Reform (Frustrated Contracts) Act can be excluded by the contracting parties with an express term in their contract and also does not apply to the carriage of goods by sea and certain other carriage agreements (Puelinckx 52).

The French equivalent to hardship is the doctrine of *imprévision* which relates to unforeseen circumstances (Puelinckx 56). A similar provision can be found in article 1195 of the French *Code Civil*.

Germany, on the other hand, also has similar concepts in § 313 *BGB*, which essentially deals with economic impossibility or a serious change in circumstances (*Störung der Geschäftsgrundlage*). Paragraph 313 *BGB* was introduced following the *Schuldrechtsmodernisierung* of 2002 (see also Schwenzer "*Force majeure* and hardship in international sales contracts" 2008 *Victoria University of Wellington Law Review* 709 711). For § 313 *BGB* to apply, one would consider the set of facts (i) objectively, in that the contract should have substantially changed since its inception

(Ridder and Weller 382; see also Rösler 489); (ii) subjectively, relating to what the parties thought when entering into the contract but had subsequently found different to their initial understanding after the conclusion of the contract (Ridder and Weller 383; see § 313(2) *BGB*; Rösler 495); and (iii) using a normative element, in which the performance of both parties must be considered so that any adapted performance is geared to achieve equitable results (Ridder and Weller 383 and 386). The exact relationship between § 275 and § 315 *BGB* has not been definitively established, but there seems to be a general view that the two provisions should be considered side by side (Seichter *ad* § 275 *BGB* 5), and that § 313 *BGB* should be interpreted as being subsidiary to § 275 *BGB* (Rösler 490). In reading the two provisions together, one notes that § 275(1) *BGB* would not cover instances of hardship, but such hardship may fall within the scope of § 275(3), which provides a type of procedural defence to a claim for specific performance (Ridder and Weller 375). Also, § 275(1) *BGB* as a whole will not provide a release from performance for economic impossibility or any adjustments (see Ridder and Weller 380). In instances where it is not possible to deal with the impossibility matter in terms of § 275, § 313 *BGB* could apply. Paragraph 313 *BGB* contemplates that a contract (often the price) could be adapted in instances where the circumstances that were originally contemplated in the contract have materially changed. It would appear that typical cases in which § 313 of the *BGB* can be used include instances of inflation of costs or price; the devaluation of an obligation; and economic impossibility, which often results in the

unreasonableness of performance. It can also be used in instances of frustration relating to the purpose of the contract and even in matters where the contracting parties were mistaken in their motivations for having entered into the contract (Ridder and Weller 391).

Finally, the Dutch *Burgerlijk Wetboek* also contemplates legal excuses for shortcomings or non-performance of a contractual obligation. If there is a shortcoming in performance attributable to the debtor, it would constitute a breach. However, if the shortcoming is not attributable or due to the debtor's fault, then it would be considered a *force majeure* (or an *overmacht*) (a 6:75 *BW*). Whether or not a *force majeure* is present would be dependent on the set of facts of each matter, but a *force majeure* event must not have been foreseeable (see *eg* ECLI: NL: PHR: 2008: BG2241).

The concepts of frustration, change in circumstances, *force majeure*, supervening impossibility, doctrine of *imprévision*, *overmacht*, *Unmöglichkeit,* and even *höhere Gewalt* are related but have different meanings and applications in various jurisdictions (adapted from Puelinckx 47). It is not the intention of the discussion herein to consider these concepts in detail but rather to focus on the impact of the South African concept of supervening impossibility on employment contracts and the specific rules applicable and most relevant to the shutdown. In this instance the government has made it illegal to provide non-essential services to the public, which consequently means that employment contracts could be terminated under these circumstances, and employers could fail or refuse to pay employees their remuneration. Both of these instances will be considered with specific reference to the mechanism of supervening impossibility as applied in South Africa.

2.3 Supervening impossibility: termination of employment contracts

If a supervening impossibility occurs that renders performance impossible, then the contract will come to an end. However, if the impossibility is of a temporary nature, then it would not immediately bring the contract to an end (*World Leisure Holidays (Pty) Ltd v Georges* 2002 (5) SA 531 (W) 533). The shutdown is for a specific period.

Therefore, there is a need to consider the rules for terminating a contract based on supervening impossibility due to a temporary impossibility of performance. The *World Leisure Holidays* matter (533-534) highlighted different tests that could be applied in these circumstances:

(i) There is a difference between contracts in which performance is considered divisible and those in which performance is indivisible. Where performance is divisible, a party's reciprocal performance is proportionate to that which was impossible to perform. Whereas, if performance is indivisible, then the contract is extinguished, as in the case of complete impossibility (the *World Leisure Holidays* case 534, quoting *Bedford v Uys* 1971 (1) SA 549 (C)). There also exists the possibility for the creditor to accept part performance in such instances.

(ii) Other views include that temporary impossibility must not only be of a material nature but the incompleteness must also be material for the termination of the contract (the *World Leisure Holidays* case 534 referring to Christie *The Law of Contract in South Africa* (2001) 550 and Kerr *The Principles of the Law of Contract* (1998) 491).

(iii) Partial impossibility would not terminate the contract, unless the creditor cannot accept the incomplete performance (the *World Leisure Holidays* case 534 referring to Lotz as quoted in XIX *LAWSA* re (revised by Rabie) § 178).

(iv) If the original obligations cannot be substantially performed and a substantial portion of the performance is incapable of being performed (having regards to both the materiality and timing of the performance), then either party may consider the contract to be terminated (the *World Leisure Holidays* case 534 referring to Ramsden "Temporary supervening impossibility of performance" 1977 *SALJ* 162 170).

(v) If the original obligations cannot be performed substantially but can only be performed partially, then the creditor has the choice either to consider the contract terminated, or to suspend such termination until the temporary impossibility has ended (the *World Leisure Holidays* case 534 referring to Ramsden 170).

The shutdown is temporary in nature, and from the above approaches it appears that a contract will not always automatically terminate when the supervening event results in a temporary impossibility. However, the termination of employment contracts has additional

considerations.

Generally, when an employee is dismissed or retrenched, certain legislative requirements must be fulfilled so as to ensure both the substantive and procedural fairness of the dismissal or retrenchment (s 188 of Act 66 of 1995). There are instances where the commission for conciliation, mediation and arbitration (CCMA) has held that the operation of law could result in the termination of an employment contract that would not constitute a dismissal or retrenchment of an employee (Cohen 99). A supervening impossibly would be one such instance which could result in the termination of an employment contract as a result of the operation of law (Cohen 99). This would include a "legal impossibility such as a statutory requirement that prohibits an employee from working" (Cohen 99). Examples of such a legal impossibility can be found in *FAWU obo Meyer/Rainbow Chickens* (2003 2 BALR 140 (CCMA)), where an employee was registered by the Muslim Judicial Council to slaughter chickens according to Halaal standards, but the certificate to operate was withdrawn. In this instance the commissioner found that incapacity could arise from a supervening impossibility of performance. Another example can be found in *Themba v Springbok Patrols* (1997 18 ILJ 1465 (CCMA)), in which an employee

had to be registered in terms of the now repealed Security Officers Act 92 of 1987, but the Security Officers Board rejected the application. On this basis it became impossible to continue to employ the security officer. The court in the *Themba* matter found that no dismissal occurred, but rather that performance had become objectively impossible, which was not due to any of the contracting parties' fault to perform. In such an instance the employment contract had automatically come to an end by operation of law. Therefore, the inability to provide services due to a change in regulations and that originates from a change in the operation of law is not considered to be a dismissal, but rather a form of incapacity that arises from "a species of supervening impossibility of performance, which might be permanent, temporary or absolute" (see *Mhlungu and Gremick Integrated Security Specialists (A Division of Servest (Pty) Ltd)* 2001 2 ILS 1020 (CCMA) 1033-1034). This principle is, however, further qualified. In instances where an employee is willing but unable to provide services to their employer due to some form of supervening impossibility, then an employer cannot always terminate the employment contract due to the supervening impossibility but should attempt to provide alternative employment, if such alternative employment is available (see *Moeketsi and Spilkin Optometrist* 2012 8 BALR 831 (CCMA)).

However, the labour appeal court has held that termination of service because of supervening impossibility constitutes a dismissal for incapacity, which must meet the requirements of substantive and procedural fairness. In *Solidarity v Armaments Corporation of South Africa (Sco) Ltd* (2019 40 ILJ 535 (LAC)) the employee's services with Armscor were terminated after the South African National Defence Force refused to renew the employee's security clearance. Armscor's conditions of employment and the Defence Act 42 of 2002 provide that an employee may not be retained as an employee unless such an employee has been issued with an appropriate security clearance. The court held that the incapacity need not arise from illness or injury. Employees may be dismissed for incapacity arising from any condition that prevents them from performing their work and that termination of service was based on supervening impossibility of performance that constituted a form of incapacity. However, the court found that an award of reinstatement is not legally competent as the employee does not hold the relevant security clearance.

The shutdown would more accurately be described as a legal impossibility, due to the change in law brought about by the declaration of a national disaster under the Disaster Management Act 57 of 2002. In this instance, it appears that, in line with the general principles of impossibility, employment contracts could be considered terminated due to supervening impossibility should the shutdown be of an extended duration. However, employers will still have to meet the requirements of substantive and procedural fairness enunciated in Act 66 of 1995 as such a termination would be regarded as a dismissal for incapacity (refer to paragraph 3.5 below).

2.4 Supervening impossibility: payment of remuneration

Due to the reciprocal nature of obligations in employment contracts, the basic principle is that where an employee does not work or tender his or her services, then the employer is not obliged to pay the employee (Brassey 31). As a general rule, this principle of "no-work no-pay" applies in instances of a supervening impossibility (Brassey 31). An employer's payment

obligation is essentially not due until the employee has performed their services (Brassey 31; see *eg BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 3 All SA 166 (A)). However, there appears to be some authority (albeit rather old) that exceptions could apply

to this rule, and that partial services could result in partial payment in instances of supervening impossibility (Brassey 32).

The first comparison can be drawn with *Van der Merwe v Colonial Government* ((1904) 21 SC 520), in which an employee could not perform his services due to martial law and was entitled to his salary for the duration of the martial law. As in this case, many employees in South Africa during the shutdown are willing and able to provide their services and such services would be able to be provided if it had not been for the shutdown. It was noted that the nature of the employee's work would have an influence as to whether he would be paid or not (524). Also, in *Lubbe v The Colonial Government* ((1885--1906) 2 Buch AC 269), the employee was prevented from providing services due to, firstly, his deportation and additional restrictions placed under martial law, and, secondly, his having become incapacitated through no fault of his own. In this instance it was found that the employee was entitled to claim his wages.

The exception to the general rule of "no-work no-pay" was expanded upon in *Boyd v Stuttaford & Co* (1910 AD 101). The question before the court was whether the employee should be paid his wages for a period that the employee had been absent from work. The employee fell ill and this was found to be a form of *casus fortuitous*, which prevented the employee from providing services. In this instance the employer did not terminate the contract and was willing to continue the contract after the employee returned (116). The general rule was confirmed that payment was not due if the employee had not rendered any services, whether this was on a permanent or temporary basis (116-117). The following test was extrapolated (which would apply only in certain limited circumstances):

(i) If the supervening event operated upon an employee, then the employee could only claim those wages for services that had been provided to the employer (117). In other words, the remuneration claimed would be in proportion to the value of the services rendered (117).

(ii) If the supervening event operated upon the employer, then the employee could possibly claim their full salary and wage (118). The court did, however, indicate that this rule was subject to certain limitations, but did not list these exceptions (118).

If the same principles laid down by the court are applied to changes in legislation and the test is interpreted literally, then, according to Brassey, the employer must pay the employee his or her full wage and salary (33). Also, the employer would not be able to rely on an implied term, or an express term in the employment contract, to avoid making payment of an employee's remuneration (Brassey 33). The *Boyd* matter, however, suffers from a number of challenges, as follows:

(i) The limitation anticipated to the general rule was reliant on the narrow interpretation of Voet, which appears to have been intended to apply to domestic workers, and which was extended to workmen by Pothier (as referenced in the *Boyd* matter 123). The court, however, had not expressly endorsed the wider application of Pothier.

(ii) The facts are dissimilar to those of the shutdown, as the facts of the *Boyd* matter related to an ill employee and not to a legal impossibility as seen in the shutdown.

(iii) The matter related to an impossibility that resulted from a *casus fortuitous* and not a *vis maior*. The shutdown would be considered a *vis maior* and not a *casus fortuitous*, and therefore the *Boyd* case provides, at best, a possible indication of

how our courts could deal with similar matters impacted by *vis maior*. As *casus fortuitous* is a subset of *vis maior* one could argue that there is a possibility that the rules set out in the *Boyd* matter would similarly apply to a *vis maior*.

(iv) Brassey warns that the test must be applied with circumspection to achieve what the authorities intended to achieve (Brassey 33).

Notwithstanding this, the *Van der Merwe*, *Lubbe* and *Boyd* matters are indicative, only insofar

as the principles could be related to the shutdown, of a possible claim of remuneration where employees are willing and able to provide their services but a supervening impossibility has prevented the employer from allowing them to do so. If such an argument can be sustained, then these principles could be applied to employment contracts impacted by the shutdown. However, this would have to be considered against current labour laws and would neither impact nor overrule the legislative position of the payment of remuneration as set out in paragraph 2.1 above or the termination of the contract by operation of law as set out in paragraph 2.3 above. If the limited application of the exception of the "no-work no-pay" rule cannot be sustained, then an employer may still waive his or her rights to receive services from an employee. A waiver of such a right is, however, optional and does not provide sufficient protection for employees.

2.5 *Force majeure*, hardship and allocation of risk

It is possible for contracting parties to allocate the risk relating to unforeseen circumstances that may lead to impossibility of performance. To address such risks, a contract will often include specific provisions to regulate instances of impossibility. Such contractual mechanisms may have three possible influences on contractual obligations:

(i) The performance of the debtor's duties could be suspended for the period of the impossibility. This is typically when impossibility of performance is of a temporary nature.

(ii) The creditor is given the right to terminate the contract if the impossibility is of a material nature, or if the impossibility endures for a long time. The materiality and duration of impossibility which would entitle the termination would be expressly specified in the contract.

(iii) Unforeseen circumstances and the resultant change in the economic conditions of one or both of the contracting parties could require a renegotiation of specific contractual terms or the entire contract.

The first two instances would typically take the form of a *force majeure* clause, whilst the third instance would be formulated in a hardship clause. Commercial contracts would normally include a *force majeure* clause and such a clause is not typically found in an employment contract (see *Rumdel Cape/EXR Holdings/Mazcon Joint Venture v South African National Roads Agency Soc Limited* 2015 JOL 30703 (KZD), *Glencore Grain Africa (Pty) Ltd v Du Plessis NO* 2007 JOL 21043 (O)). The concept of *force majeure* has been adopted in civil law countries and finds its roots in Roman law under the concepts of *vis maior* and *vis divina* (Katsivela 101-102). A *force majeure* event is generally considered to be an impossibility of performance that occurs as a result of an "unforeseeable or irresistible" event that excuses the debtor from performing his or her contractual obligations (Katsivela 102). Although the concept finds its origin in civil law, when a *force majeure* clause is included in a contract, then the depth and breadth of such a clause would regulate the

consequences of a *force majeure* event on the performance or continued existence of the contractual obligations. The clause itself regulates the consequences (being a suspension of performance and therefore no counter performance, or the termination of a contract). Such a provision would normally be interpreted restrictively.

The second type of contractual mechanism that could be included in a contract is a hardship clause (Hutchison 84, see for example *Imerys South Africa (Pty) Ltd v Competition Commission* 2016 2 CPLR 708 (CT)). A hardship clause is typically found in commercial contracts and not often included in employment contracts. A hardship clause would be included in a contract to address unforeseeable events that may impact a contracting party's ability to fulfil his or her obligations under the contract. Normally, a hardship clause would require the parties to renegotiate the obligations of the parties in light of the hardship a contracting party would suffer as a result of the unforeseeable event (Patru "Aspects regarding imprevision in employment contracts" 2015 *Perspectives of Business Law Journal* 146). Naturally, should a hardship clause be found in an employment contract, any renegotiation of a contract flowing from a hardship clause would have to be consistent with applicable labour laws. A typical *force majeure* clause or hardship clause would not provide a suitable solution for employees seeking to retain their jobs or to receive continued payment of their remuneration under the shutdown.

3. Labour law mechanisms

3.1 Essential services

According to regulation 11B (GN 318, *GG* 43107 (17-03-2020) made in terms of section 27(2) of the Disaster Management Act 57 of 2002), every person was confined to his or her place of residence, unless, among other things, for the purpose of performing an essential service. In addition, all businesses and other entities were ordered to "cease operations during the lockdown, save for any business or entity involved in the manufacturing, supply, or provision of an essential good or service". In addition, certain financial services, excluding debt collection services, were allowed to operate during this time (reg 11B(4A)).

Essential services are defined in regulation 11A as the services as defined in section 213 of Act 66 of 1995 and designated in terms of section 71(8) of that act. Essential service is defined in section 213 of that act as "a service the interruption of which endangers the life, personal safety or health of the whole or any part of the population; the Parliamentary service; [and] the South African Police Service". To be deemed an essential service, an employer must be designated as such by means of the publication of a notice in the *Government Gazette* (see s 71 of Act 66 of 1995).

The essential services committee has designated the following essential services in terms of section 71(8) of the act: air traffic control and Weather Bureau (GN 784, *GG* 18043 (06-06-1997)), certain computer services (GN 1542, *GG* 18439 (21-11-1997)), emergency health, nursing and medical and paramedical services, support and blood transfusion services (GN 436, *GG* 18761 (27-03-1998)), South African National Blood Service (GN 2054, *GG* 22670 (21-09-2001)), old age homes and child and youth care centres (GN 1462, *GG* 27104 (24-12-2004)), immigration officers (GN 769, *GG* 29987 (22-06-2007)), privately-owned old age homes, nursing homes and frail care institutions (GN 278, *GG* 38648 (31-03-2015)), airports (GN 229, *GG* 35155 (23-03-2012)) and service of road traffic incident management, services at boarding schools, services at private health and welfare centres, and services for the detection and reporting of fires and the wholesale and supply of cash (GN 271,

GG 42464 (17-05-2019)). In addition, municipalities and provinces were directed to provide, among other things, water and sanitation services; hygiene education, communication and awareness; and waste management, cleansing and sanitisation services (reg 2 of GN 399, *GG* 43147 (25-03-2020)). It was not open for employers to decide for themselves, without having followed the procedures laid out in section 71(8), that they were or are an essential service. All employees not employed in essential services as listed above were therefore prohibited from rendering services during the shutdown period. Interestingly, the regulations did not provide that employees employed in maintenance services should continue to tender their services. "A service is a maintenance service if the interruption of that service has the effect of material physical destruction to any working area, plant or machinery" (s 75 of Act 66 of 1995). The labour inspectorate, police services (GN 396, *GG* 43146 (27-03-2020)) and the South African National Defence Force were tasked to ensure compliance with the shutdown. It should be noted that non-compliance with the provisions could result in a fine or even possible imprisonment.

3.2 Employee/employer temporary relief scheme

The Covid-19 Temporary Relief Scheme, 2020, a directive issued by the minister of employment and labour (GN 215, *GG* 43161 (26-03-2020)), acknowledges that during this period of shutdown, companies will have to shut down and employees will have to be "laid off temporarily". According to the directive, this means that "employees are compelled to take leave, which is not out of choice". It was therefore anticipated that employees may lose income. Although the directive encouraged employers to continue to pay employees, where this was economically possible, a special benefit under the Unemployment Insurance Fund (UIF) was created (see the preamble of the directive).

The directive provided as follows: first, should an employer close its operations for three months or less and suffer financial distress, the company was to qualify for a Covid-19 Temporary Relief Benefit (item 3.1). Second, the benefit was to be delinked from the UIF's normal benefits, and therefore the normal rule that for every four days worked, the employee accumulates a one-day credit and the maximum credit days payable is 365 for every four years did not apply (item 3.2). Third, the benefits only covered the cost of salary for the employees during the temporary closure of the business operations (item 3.3). Fourth, the

salary benefits were capped to a maximum amount of R17 712 per month, per employee and employees were paid in terms of the income replacement rate sliding scale (38-60 per cent) as provided in the Unemployment Insurance Act (item 3.4). Fifth, if an employee's income determined in terms of the income replacement sliding scale fell below the minimum wage of the sector concerned, the employee was paid a replacement income equal to minimum wage of the sector concerned (item 3.5). Sixth, for the company to have qualified for the temporary financial relief scheme, it must have been registered with the UIF; must have complied with the application procedure for the financial relief scheme; and the company's closure must have been directly linked to the Covid-19 pandemic (item 3.7). In addition, the directive provides for an "illness benefit" for employees who were quarantined for fourteen days due to the Covid-19 pandemic (item 4.1), where confirmation letters from the employer and employee were sufficient (item 4.3). For periods longer than fourteen days a medical certificate was required (item 4.4).

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3.3 Annual leave

During the shutdown, many employers used annual leave as an alternative to the non-payment of employees; as an employer must pay an employee leave pay "at the employee's rate of remuneration immediately before the beginning of the period of annual leave" (s 21(1)(*a*) of Act 75 of 1997). Entitlement to annual leave is regulated in section 20 of Act 75 of 1997. According to section 20(2) an employer "must grant an employee at least 21 consecutive days' annual leave on full remuneration in respect of each annual leave cycle; or by agreement, one day of annual leave on full remuneration for every seventeen days on which the employee worked or was entitled to be paid; by agreement, one hour of annual leave on full remuneration for every seventeen hours on which the employee worked or was entitled to be paid". In terms of section 20(3) an employee is entitled to take leave accumulated in an annual leave cycle on consecutive days and, according to section 20(4), "[a]n employer must grant annual leave not later than six months after the end of the annual leave cycle".

In terms of section 20(5) "[a]n employer may not require or permit an employee to take annual leave during any other period of leave to which the employee is entitled in terms of this Chapter; or any period of notice of termination of employment". In what follows, we will consider whether employees could be entitled to take sick leave during the period of the shutdown, notwithstanding the fact that they may not have been infected. Suffice is to say, however, that were that to be the case, employers would not be able to require employees to take annual leave during the shutdown.

According to section 20(9), "[a]n employer may not require or permit an employee to work for the employer during any period of annual leave". Therefore, it is impermissible for employers to require workers to work from home if they were required to take annual leave or if there was an agreement to that effect.

Although it is a common misconception that annual leave is to be taken at the discretion of the employee, section 20(10) makes it clear that annual leave must be taken in accordance with an agreement between the employer and employee or, where there is no such an agreement, it should be taken at a time determined by the employer. The effect hereof is that leave is to be taken at the discretion of the employer, and the question therefore arises as to whether an employer is entitled to refuse to grant employees annual leave during the shutdown period so as to avoid paying them remuneration. Our courts have held that the consequence of a decision made in terms of such a discretion may amount to an unreasonable and arbitrary exercise of a discretion with unfair consequences to an employee (*Public Service Association of South Africa v PSCBC* (D751/09) 2013 ZALCD 3 (26 February 2013) par 20; *Popcru v Department of Correctional Services* 2017 38 ILJ 964 (LC) par 24). It is submitted that in most cases, but depending on the circumstances, the refusal of employers to grant annual leave to employees who have an appropriate amount of accrued days available would be deemed to be an unreasonable exercise of the employer's discretion with unfair consequences to an employee. The matter is, however, significantly more complicated when employees do not have an appropriate amount of accrued days available. Although it is the practice of some employers, depending on the circumstance, to grant employees annual leave per agreement even though an appropriate amount of accrued days is not available, the employer under these circumstances takes a significant risk in doing so as there is no guarantee that employees will in the future continue to tender their service for a sufficiently long time to accrue such leave. Contractual remedies to force employees either to comply with

their contracts (specific performance) or to pay damages to the

employer is generally prohibitively expensive and difficult to enforce. Under such a circumstance it may therefore be reasonable for employers to refuse employees annual leave.

After the level 5 shutdown had ended, the Covid-19 Temporary Relief Scheme, 2020 was amended to provide for payment of benefits to contributors who had lost income or had been required to take annual leave in terms of section 22(10) of Act 75 of 1997 due to the Covid-19 pandemic.

3.4 Sick leave

Employees who fall ill with the Covid-19 virus will be able to claim sick leave. During every sick leave cycle, an employee is entitled to an amount of paid sick leave equal to the number of days the employee would normally work during a period of six weeks (s 22(2) of Act 75 of 1997). However, during the first six months of employment, an employee is entitled to one day's paid sick leave for every 26 days worked (s 22(3)). An employer must pay an employee for a day's sick leave the wage the employee would ordinarily have received for work on that day and on the employee's usual pay day (s 22(5)). However, an agreement may reduce such pay if the number of days of paid sick leave is increased at least commensurately with any reduction in the daily amount of sick pay and the employee's pay is at least 75 per cent of the wage payable to the employee for the ordinary hours the employee would have worked on that day. However, an employer is not required to pay an employee if the employee does not produce a medical certificate stating that the employee was unable to work for the duration of the employee's absence on account of sickness or injury (s 23(1)). In addition, the medical certificate must be issued and signed by a medical practitioner or any other person who is certified to diagnose and treat patients and who is registered with a professional council (s 23(2)). These may include traditional healers, and employers should not lightly disregard the views of "sangomas" (*Kievits Kroon Country Estate (Pty) Ltd v CCMA* 2011 3 BLLR 241 (LC)). Sick leave is classified as a so-called "core right" in Act 75 of 1997 and cannot be varied by agreement unless such variation is more beneficial to employees (s 49).

The question as to whether employees who have not contracted Covid-19 disease will be able to claim sick leave is, however, more vexed. It is submitted that the extension of sick leave to employees by means of an agreement between the employee and employer may possibly be a novel and beneficial solution for both parties. Although employees are entitled to benefits in terms of the employee/employer temporary relief scheme, this is a capped amount and on a sliding scale. It may therefore be more beneficial for employees rather to use their sick leave, if they have sick leave available. The drawback of this approach is that it disadvantages employees with chronic illness or who have legitimately taken their sick leave in the past. A possible hurdle for employees may be that employers in certain instances could require that employees should submit a medical certificate in terms of section 23(1) of Act 75 of 1997. On an overly literal reading of the provision, it may be argued that a medical certificate is required in each instance. It may however be worthwhile to consider the purpose of the extension of sick leave to employees. Illness causes the temporary inability of an employee to work because of sickness or injury and an employee is entitled to statutory sick leave because of incapability to report for work. The purpose of the requirement of a medical certificate is to provide proof of such inability or incapacity. In the context of the Covid-19 state-mandated shutdown, such a requirement would surely fall away as it is trite that

non-essential employees were incapacitated and unable to work. The reason for the inability of employees to work is obviously related to medical reasons which are beyond the control of employees.

3.5 Dismissal

Every employee has the right not to be unfairly dismissed (s 185 of Act 66 of 1995). A dismissal is unfair if the employer fails to prove that the reason for dismissal is a fair reason related to the employee's conduct or capacity or based on the employer's operational requirements and that the dismissal was effected in accordance with a fair procedure (s 188). It therefore follows that an employer will still be entitled to dismiss employees during the Covid-19 shutdown period, and in certain instances thereafter due to the effects of the shutdown.

In the first instance, the prerogative of employers to dismiss employees for misconduct continues during the shutdown period. Although it is not possible to reproduce the entire legal position related to dismissal for misconduct here, it should be noted that our courts have endorsed the concept of progressive discipline. According to this approach, efforts should be made to correct employees' behaviour through "a system of graduated disciplinary measures such as counselling and warnings" (*Bridgestone SA (Pty) Ltd v National Union of Metalworkers Union of South Africa* 2016 37 ILJ 2277 (LAC) par 2). It may therefore, depending on the seriousness of the act or omission, not be appropriate to dismiss employees for every possible transgression. In addition, it should be recalled that where misconduct occurs outside of the workplace but impacts on the employer, the employer is entitled to take disciplinary action against the employee. The employer will however have to establish that it has a legitimate interest in the matter, such as when the misconduct is disruptive to the employer's business or reputation, and where it involves criminal conduct, dishonesty or corruption and where the nature of such conduct was to destroy the relationship of trust between the employee and the employer. (See *Custance v South African Local Government Bargaining Council* 2003 24 ILJ 1387 (LC) and *City of Cape Town v South African Local Government Bargaining Council* 2011 JOL 26801 (LC)). As a result, employees who provide essential services, who are required to work from home and whose services are not engaged during the shutdown period may still be subjected to disciplinary action by the employer. Failure to comply with certain regulations that carry criminal sanctions may also be cause for dismissal.

In the second instance, employers should be able to dismiss employees for operational requirements as their economic fortunes change due to the Covid-19 virus (s 189 and s 189A of Act 66 of 1995). Operational requirements are defined as "requirements based on economic, technological, structural or similar needs" (s 213 of the act). Importantly, our courts have held that a dismissal for operational requirements does not have to be a measure of last resort (*SACWU v Afrox (Pty) Ltd* 1999 20 ILJ 1718 (LAC)). The courts will not intervene merely because they hold the view that another option could have been adopted (*Mamabolo v Manchu Consulting CC* 1999 20 ILJ 1826 (LC)). According to Grogan, what is required is "proof by the employer, on a balance of probabilities, that the cause of or reason for the dismissals was based on a genuine operational requirement . . . that a procedure was followed in accordance with the provisions of s 189; and that there was a substantively fair reason for the dismissals" (297). Section 189(2) to (4) of Act 66 of 1995 sets out the procedure required for dismissals for operational requirements which is aimed at encouraging a "meaningful joint consensus-seeking process" in which the parties attempt to reach agreement on a range of issues aimed, at

best, at avoiding retrenchment or, if that is not possible, at ameliorating its effects. This procedure is termed consultation. However, after the consultation process has been completed, the final decision whether to proceed with dismissals rests with the employer. Employers must select employees to be retrenched according to criteria that have been agreed upon by the consulting parties, or, if no criteria have been agreed upon, criteria that are fair and objective (s 189(7)). To cushion the blow of unemployment, employees who have been dismissed for reasons related to operational requirements will be entitled to severance pay equal to at least one week's remuneration for each completed year of continuous service with that employer (s 41 of Act 75 of 1997).

In the third instance, an employer is entitled to dismiss employees for poor work performance, incompatibility and incapacity. Although the prerogative of the employer to dismiss employees during the shutdown period remained unaffected thereby, especially in the essential services where this prerogative can be regarded as paramount to the successful continuation of services, it is specifically the question of whether infected employees may be dismissed for incapacity related to ill health that draws ire. Employers should tread carefully in such cases, as dismissal on the grounds of ill health may fall within the scope of the provisions relating to automatically unfair dismissals, or infringe the prohibition on discrimination on the ground of disability contained in the Employment Equity Act 55 of 1998 (see Code of Good Practice on the Employment of People with Disabilities (GN 1345, *GG* 25789 (19-08-2002)) and *Standard Bank of SA v CCMA* 2008 29 ILJ 1239 (LC)). A dismissal is automatically unfair if the reason for the dismissal is that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including disability. Section 6(1) of the Employment Equity Act 55 of 1998 specifically prohibits unfair discrimination against an employee based on disability or any arbitrary grounds. According to Grogan, "'[i]ncapacity' suggests that the employee concerned is incapable of performing his or her duties" whilst

"'disability' suggests that the person may do so with reasonable accommodation and assistance" (285). The Code of Good Practice: Dismissal (Sch 8 of Act 66 of 1995) differentiates between temporary and permanent incapacity on the grounds of ill health:

> "If an employee is temporarily unable to work in these circumstances, the employer should investigate the extent of the incapacity or the injury. If the employee is likely to be absent for a time that is unreasonably long in the circumstances, the employer should investigate all the possible alternatives short of dismissal. When alternatives are considered, relevant factors might include the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement for the ill or injured employee. In cases of permanent incapacity, the employer should ascertain the possibility of securing alternative employment, or adapting the duties or work circumstances of the employee to accommodate the employee's disability" (item 10(1)).

The employee should be given the opportunity to state a case in response and be assisted by a trade union representative or fellow employee (item 10(2)). The degree of incapacity and the cause thereof will be relevant to the fairness of any dismissal. In certain cases, for example alcoholism or drug abuse, counselling and rehabilitation may be appropriate steps to consider (item 10(3)). The duty on the employer to accommodate the incapacity of the employee is more onerous in those circumstances where employees are injured at work or are incapacitated by work-related illness (item 10(4)). The following factors should be used to determine whether dismissal arising from ill health or injury is unfair:

> "(a) whether or not the employee is capable of performing the work; and
>
> (b) if the employee is not capable —
>
> (i) the extent to which the employee is able to perform the work;
>
> (ii) the extent to which the employee's work circumstances might be adapted to accommodate disability, or, where this is not possible, the extent to which the employee's duties might be adapted; and
>
> (iii) the availability of any suitable alternative work (item 11)".

3.6 Compensation for occupational injuries and diseases

It remains the employer's primary obligation to provide employees with safe working conditions. This is especially so when work is rendered under hazardous conditions. This obligation is recorded in section 8(1) of the Occupational Health and Safety Act 85 of 1993, which provides that "[e]very employer shall provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health and safety of his employees". It is accepted that this obligation extends to the provision of personal protective equipment. In *Association of Mineworkers and Construction Union v Minister of Mineral Resources and Energy* ((J427/2020) 2020 ZALCJHB 68 (4 May 2020)) it was held that "public health and occupational health are not discrete categories. Covid-19 is both a public health issue, and an occupational health issue. It requires both a public health response, and an occupational health response in the specific context of mines" (par 34). In *National Education Health and Allied Workers Union (NEHAWU) obo Members Providing Essential Services v Minister of Health* ((J423/20) 2020 ZALCJHB 66 (11 April 2020)) the court acknowledged this fact but warned against bringing frivolous proceedings so as to force employers to provide personal protective equipment when it could not be proved that such equipment was in fact not provided.

A range of benefits was made available to workers who were subject to an occupational exposure to Covid-19. First, payment for temporary total disablement was made possible for as long as such disablement continued, but not for a period exceeding 30 days (item 5.1(a) of the Notice on Compensation for Occupationally-acquired Novel Corona Virus Disease (Covid-19) under the Compensation for Occupational Injuries and Diseases Act 130 of 1993 as amended (GN 193, *GG* 43126 (23-03-2020)). Second, for those who were self-quarantined following the recommendation of a medical practitioner, the employer will be liable for remuneration for days of absence (item 5.1.1(a)). It should be noted that, as this entitlement was made in terms of the notice, this entitlement is separate to sick leave that the employee is entitled to in terms of Act 75 of 1997. Third, in the event of total disablement, employees are entitled to the compensation provided for in the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (item 5.2). The act provides for a claim for medical expenses as well as a constant care allowance against the compensation fund. Fourth, in all cases of infection, medical aid is provided for a period of not more than 30 days from the date of diagnosis. If further medical aid will reduce the extent of the disablement, such an extension

will be considered (item 5.3). Fifth, reasonable burial expenses and widow's and dependant's pensions shall be payable, where applicable, if an employee dies as a result of the complications of infection (item 5.4). It should also be noted that affected employees and/or their family members will be barred from instituting civil claims against the employer for damages that result from occupational-exposure to Covid-19 (s 35 of Act 130 of 1993 and *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 (2) SA 1 (CC)).

4 Concluding remarks

Contract law does not leave the contracting parties without a remedy in instances of performance being rendered impossible due to a supervening impossibility. However, the contractual mechanism of supervening impossibility does not, in instances of employment contracts, provide a wholly satisfactory answer, as employees remain vulnerable to losing their employment under such circumstances. Including a typical *force majeure* or hardship clause in employment contracts does not provide any additional protection to an employee in instances of a supervening impossibility. Although the *force majeure* and hardship clauses attempt to address circumstances and events that could not have been anticipated by the contracting parties, it normally only allows for the renegotiation of the contract, for a contractual obligation to be suspended or for the contract itself to be terminated.

The general principle of "no-work no-pay" applies to instances of supervening impossibility. The obligations in an employment contract are reciprocal in nature and if an employee does not perform his or her services, the employer is not obliged to make payment of his or her wage or salary. However, the *Van der Merwe*, *Lubbe* and *Boyd* matters seem to support the view that employees should be paid in certain limited circumstances, irrespective of the fact that an employee cannot provide his or her services. Whether such exceptions to the general rule of "no-work no-pay" would be applicable in the shutdown is still debatable.

There are various contractual mechanisms available to the contracting parties in instances of an impossibility of performance, including the concept of supervening impossibility, specific contractual provisions (such as *force majeure* and hardship clauses) and waivers. These mechanisms are, however, not an entirely satisfactory remedy for employees that have been impacted by the shutdown, as these contractual mechanisms do not necessarily protect the employees' continued employment or the payment of their remuneration. Perhaps more practical solutions can be found within the field of labour law and social protection.

The Employee/Employer Temporary Relief Scheme that has been adopted by government will do much to alleviate the effects of non-payment of workers during the shutdown period. Nevertheless, it may be more beneficial for workers if they were able to make use of annual leave or sick leave instead, especially as these employees will also be (at least partially) recompensed therefore in terms of the Covid-19 Temporary Relief Scheme, 2020. It is suggested that the legislature should amend section 23(1) of Act 75 of 1997 to provide for exceptions to the requirement that employees should produce medical certificates in circumstances similar to the shutdown. Employees who have been exposed to Covid-19, and in certain instances their dependants, will also be entitled to claim compensation for occupationally acquired Covid-19. Nevertheless, the prerogative of the employer to dismiss employees during the shutdown period remains, and employers will be able to dismiss employees for substantively fair reasons and in terms of a fair procedure.