

# Force Majeure and Employment Contracts Q & A

*By Advocate AM Matjila*



**Practical questions have arisen during this period of lockdown that create legal uncertainty about work for many of us who are quarantined as a result of this extraordinary event. In this article we examine and attempt to answer many of these legal questions with regard to employment contracts in the context of vis majeure.**

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## What is Force Majeure and what is its applicability to employment contracts in the context of COVID-19?

According to the Trilingual Legal dictionary compiled by Hiemstra and Gonin<sup>1</sup> vis major or force majeure or *damnum fatale* refers to a superior force that cannot be resisted. Similarly le Roux<sup>2</sup> wrote in the following article entitled:<sup>2</sup> *Force Majeure* – an analysis of what force majeure is, mitigating its risks, remedies available to parties in the event of a force majeure, and whether COVID-19 is an event of force majeure.

That;

'Force Majeure' is often described in law to refer to unforeseen and extraordinary event or circumstance that cannot be resisted. The events are sometimes described as 'Acts of God' such as hurricanes, floods, earthquakes, volcanic eruptions etc.

See also article on: Case Extracts compiled by Advocate Chris Rodel, Kwa-Zulu Natal Bar in particular the case on New Heriot Gold Mining Company Ltd, (Appellant) v Union Government ( Minister of Railways and Harbours (Respondent) 1916 AD 415

See also, a collection of articles by Derek Harms SC; and articles by Thato Mashini, Sunelle Eloff and Kayla Shadiack.

<sup>1</sup> Hiemstra V G and Gonin H L, Trilingual Legal Dictionary, Juta & Company Ltd, 3rd edition, 2016, CAPE TOWN.

<sup>2</sup> Lydia le Roux, Legal Advisor, for LexisNexis South Africa. (Durban, 07 April 2020).

<https://www.lexisnexis.co.za/news-and-insights/covid-19-resource-centre/practice-areas/contract-law/force-majeure-an-analysis-of-what-force-majeure-is>

See also article on: Case Extracts compiled by Advocate Chris Rodel, Kwa-Zulu Natal Bar<sup>3</sup> in particular the case on New Heriot Gold Mining Company Ltd, (Appellant) v Union Government ( Minister of Railways and Harbours (Respondent) 1916 AD 415

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### **Casus fortuitus**

Casus fortuitous is regarded as a species of vis major and it includes all direct acts of nature, the violence of which could not reasonably have been foreseen or guarded against.

From a number of cases before the courts, casus fortuitous/damnum fatale refers also to 'Acts/order of State'. Acts of man such as in war, strikes, riot, crime, plague and such unforeseen acts that have the effect of rendering performance impossible.

'Vis major' and 'casus fortuitous' are often used interchangeably though at times reading through some court judgments a subtle distinction can be observed between these two concepts. Whether a clear distinction exists is a matter of debate for another day.

Acts or order of state regarded as extinguishing performance were reported in a number of cases including the matter of Peters Flamman and Company v Kokstad Municipality where the treasury ordered the winding up of the

<sup>3</sup> Advocate Chris Rodel, Kwa- Zulu Natal Bar

[https://www.lexisnexis.co.za/\\_data/assets/pdf\\_file/0008/759005/Case-extracts-on-force-majeure-and-vis-major-1880-to-2019.pdf](https://www.lexisnexis.co.za/_data/assets/pdf_file/0008/759005/Case-extracts-on-force-majeure-and-vis-major-1880-to-2019.pdf)

## FAQ

Appellant/Defendant business. The court found that the state's act or order had the effect of extinguishing the contract by making it impossible for the defendants to carry on with their business. And if the contract had come to an end, there could be no further breach of it, and consequently no action would lie for damages for breach of contract.

Peters Flamman and Company v Kokstad Municipality, 1919 AD 423.

In another case of Petersen v Tobiansky and Tobiansky the court found that an Act of State, that is, an order by the Army Commander for conscription was regarded as vis major. .

Petersen v Tobiansky and Tobiansky 1904 TH 73.

The court in Ex parte: Lebowa Development Corporation stated that in the law of contract vis major etc. should render performance of contractual obligations impossible unless the contract provides otherwise, the contract will be discharged to the extent of the impossibility and the loss will lie where it falls.

Ex parte: Lebowa Development Corporation Ltd (1989) 4 ALL SA 524.

As a general rule impossibility of performance brought about by vis major or casus fortuitous will excuse performance of a contract. But it will not always do so. The rule will not avail a defendant if the impossibility is self – created nor will it avail the defendant if the impossibility is due to his or her fault. The onus of proving the impossibility will lie upon the defendant.

Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal (2008) 3 ALL SA 255 (SCA).

In Encarnacao NO and Another v Commissioner for the South African Revenue Services, the court said that ...."Unless the loss was occasioned by

something in the way of inevitable fate or vis major, which would not include theft as distinguished from robbery with violence not to be resisted the defendants will be liable."

Encarnacao NO and Another v Commissioner for the South African Revenue Services (2017) 2 ALL SA 153 (GP).

In Bischofberger v Van Eyk the court made the following statement of the law:

'When the court has to decide on the effect of impossibility of performance on a contract, the court should first have regard to the general rule that impossibility of performance does in general excuse the performance of a contract, but does not do so in all cases.....If the causes were in the contemplation of the parties, they are generally speaking bound by the contract, if on the contrary, they were such as no human foresight could have foreseen, the obligations under the contract are extinguished.'

Bischofberger v Van Eyk 1981 SA 07 (W) at 11 B – D.

The court in the matter of Joint Venture between Aveng and Strabag contended that if a provision is made in a contract about a foreseeable event and how to deal with it, If the event does happen and one party or both do not follow the procedure agreed to deal with that situation, neither party can claim force majeure or at least that event cannot be classified as such. The court disagreed therefore that protests and unrests fall within force majeure. Joint venture between Aveng (Africa) (Pty) Ltd and Strabag International GMBH v South African National Roads Agency SOC Ltd and Another (2019) 3 ALL SA 186 (GP) at paras (122 – 129).

Before we attempt to answer the questions that might be raised related to COVID-19 lockdown period, it is important to review some of the provisions

of relevant legislation in place at the moment. A further review of other relevant legislative provisions will be done as questions are responded to elsewhere in this article.

### **Employment contract**

All contracts in our law including employment contracts must comply with certain requirements before the law recognises the contract as legally binding.

Requirements for a valid employment contract

- Parties to the contract must have the necessary capacity to conclude a contract.
- Parties must reach consensus about the contents of the contract.
- Parties performance of their obligations must be possible
- The conclusion and objectives of the contract must be lawful.

### ***Contractual duties of the employee***

#### **1. To tender his or her services**

The employee complies with his or her primary contractual duty if he or she tenders or offers his or her services to the employer. As soon as the employee tenders his or her services to the employer, he or she is entitled to remuneration.

#### **2. To work competently and diligently**

The worker has a duty to exercise due care and diligence and do the work competently in terms of the contract.

#### **3. To obey lawful and reasonable instructions of the employer.**

The employee must follow the reasonable instructions of the employer as to how the work is to be done, where it is to be done and on other matters

which are implied consequences of the employment contract.

#### **4. To serve the employer's interest and act in good faith.**

Trust and confidence are a natural consequence of the employment relationship. The employee owes his or her employer a fiduciary duty, this means that the employee may not work against his or her employer's interests.

### ***Contractual duties of the employer***

#### **1. To remunerate the employee**

The payment of wages is the primary duty of the employer in terms of the employment contract. Remuneration is one of the essential features of an employment contract.

The common law rule as regards remuneration is 'no work no pay' – an employee is entitled to remuneration only for work done. If an employee cannot work because of illness, the employer does not, in terms of the common law principles and rules have to pay that employee any remuneration. However this common law rule is now excluded by the statutory section 22 of the Basic Conditions of Employment Act 75 of 1997<sup>4</sup> which now stipulates how sick leave is to be paid to a sick employee who cannot perform his or her duty in terms of the employment contract.

#### **2. A duty to provide work**

Generally speaking, the employer has no duty to provide the employee with tasks to perform if the employee tenders his or her services. As long as the employer pays the employee the remuneration agreed upon, the employer

<sup>4</sup> Basic Conditions of Employment Act No. 75 of 1997

will not be in breach of the employment contract if the employee is left sitting idle.

However, there are exceptions to this rule. In *Faberlan v McKay and Fraser* 1920 WLD 24<sup>5</sup>, the court held that where the employee's wage depends on work being provided by the employer – for instance where the employee is remunerated on a commission basis – the employee must be provided with work and failure on the part of the employer to provide work amounted to a breach of contract.

A similar right to be provided with work may arise where the employee requires the work in order to maintain or develop skills or where an actor or actress, for example, who is not provided with work, will lose publicity.

### 3. Safe Working environment

The employer is obliged to provide employees with safe working conditions. The common law duty requires the employer to provide a safe work place, safe machinery and tools and to ensure that safe procedures and processes are followed.

Section 8 of the Occupational Health and Safety Act 85 of 1993<sup>6</sup> imposes a general duty on every employer to provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of his employees.

### 4. A duty of fair dealing with employees

In *Murray v Minister of Defence* (2008) 6 BLLR 513 (SCA)<sup>7</sup> the Supreme Court of Appeal introduced a new general and contractual obligation on employers, namely a duty of fair dealing with employees. In this matter a

military policeman, claimed that he had been constructively dismissed by his employer. The court held that the employee though not covered by the Labour Relations Act then, was entitled to rely directly on the right to fair labour practices and also on his contractual rights. The court thus imposed a duty on all employers (not only the military) to deal fairly with their employees.

### 5. Termination of contract

In common law either party can terminate the contract by giving the other party a required notice and no reason is required for such termination. In an employment contract the termination must be 'fair' and the Labour Relations Act dictates that such dismissal or termination must comply with certain substantive and procedural requirements.

<sup>5</sup> *Faberlan v McKay and Fraser* 1920 WLD 24

<sup>6</sup> Occupational Health and Safety Act 85 of 1993

<sup>7</sup> *Murray v Minister of Defence* (2008) 6 BLLR 513 (SCA)

### **COVID-19 situation in South Africa**

COVID-19 or coronavirus pandemic has been declared officially so by World Health Organization (WHO) due to its rapid spread across many countries of the World.

The contention here, is that it meets all the criteria of vis major or casus fortuitous in that it is an extraordinary circumstance that could not be foreseen and cannot be resisted. It has the effect of temporarily suspending the operation of various contracts and not necessarily leading to their extinction. In other words, these contracts will resume as soon as time permits in the future.

The action of the state to declare a lockdown is therefore, not vis major or casus fortuitous but a response to this extraordinary event in order to preserve life as far as it is able to do so.

During the period of lockdown it is possible for some contracts to continue to be operational such as contracts between purchasers and suppliers of essential and allowable goods, suppliers of services such as banks and insurance institutions and so on hence the temporary nature of the suspension of contracts.

Certain questions however arise during this period of lockdown that create legal uncertainty to many of us who are quarantined as a result of this extraordinary event. In this article an attempt will be made to examine these questions given the law as it is in our country. Some of the questions we are confronted with are the following:

### **Can you be forced to serve notice period during a retrenchment period? What happens if the employee is unable to serve notice due to illness or another force that he/she cannot control?**

Section 37(1) of the Basic Conditions of Employment provides that subject to section 38, a contract of employment terminable at the instance of a party to the contract may be terminated only on notice and further provides for various required notice periods.

Section 37 prohibit scertain actions by the employer as regards the serving of notice periods and these are the following;

Section 37(5) - Notice of termination of a contract of employment given by an employer must –

- (a) Not be given during any period of leave to which the employee is entitled in terms of Chapter Three; and
- (b) Not to run concurrently with any period of leave to which the employee is entitled in terms of Chapter Three except sick leave.

Section 41 on severance pay is silent on the notice period during a retrenchment period.

During retrenchment notice period employees are generally encouraged to look for alternative employment and allowed to attend interviews as prospective employees of those companies. If an employee has a valid reason for not serving a notice period, for example, he or she has found employment and he is required to commence employment immediately, the current employer has the option of paying an employee instead of having

an employee serve notice in terms of section 37 of the Basic Conditions of employment.

Similarly, where an employee is unable to serve notice due to illness or another force that he or she cannot control such as *vis majeure* or *casus fortuitous*, an employer can consider paying an employee instead of having an employee serve notice in terms of section 38(1) of the Basic Conditions of Employment Act.

As regards inability to serve notice due to sick leave, if an employee has sufficient sick leave to his or her credit, section 5(a) of the BCEA allows the employer to have the notice period run concurrently with the period of sick leave or alternatively an employer may waive a portion of the notice period not served in terms of section 38(2) of BCEA and pay the employee full notice pay.

### **Is the employer forced to pay commission where an employee is prevented by circumstances to work?**

To respond to this question we need to refer to the findings of the court in *Faberlane v Mckay*<sup>7</sup> and *Fraser* wherein the court stated that: - where the employee's wage depends on work being provided by the employer – for instance where the employee is remunerated on a commission basis – the employee must be provided with work and failure on the part of the employer to provide work will amount to a breach of the employment contract.

In a *vis majeure* or *casus fortuitous* situation like the COVID - 19, both the employer and the employee will be prevented from performing their contractual duties due to extraordinary circumstance beyond their control

which cannot be resisted.

Unless the employee has annual leave to his or her credit, the common law principle of 'no work 'no pay' will apply. Fortunately in our case the Government has come up with some measures to mitigate these adverse effects on employees and their families through UIF relief funds.

### **Does the principle of 'no work no pay' apply in force majeure situations? If yes can the contract be cancelled? Are there insights?**

Yes, it is contended that it does – see comments in the preceding paragraphs.

In a number of situations force majeure does lead to cancellation of the contract because it renders one or both party's performance(s) impossible to be executed as was the case in *Peters Flamman and Co. v Kokstad Municipality* 1919 AD 4233 where Treasury ordered the winding up of the Appellants/Defendants business. The court held that by our law, the contract was extinguished as soon as it became impossible for the defendants to carry on with their business.

However, in a COVID -19 situation that we find ourselves in, it is unlikely to see many contracts being successfully cancelled as the situation is considered by majority of people to be a temporary setback that will pass. For a contract to be cancelled during this time there must be a very good reason for it such as liquidations etc.

## ■ Can I be forced to come to work if I am scared?

The Occupational Health and safety Act 85 of 19936 imposes duties on employers and employee alike with regard to health and safety in the workplace.

Section 8(1) of the Act provides that: - every employer shall provide and maintain as far as reasonably practicable a working environment that is safe and without risks to the health and safety of employees.

Section 8(2) (f) – as far as reasonably practicable, not permitting any employee to do any work..... Unless the precautionary measures ..... have been taken.

Section 14(c) directs the employee to carry out any lawful order given to him and obey the health and safety rules and procedures laid down by his employer or anyone authorized thereto by his employer, in the interest of health and safety.

Section 14(d) provides that 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 or her workplace or section thereof, as the case may be, who shall report it to the employer.

In answer to the question – the presumption is that the employer shall not issue an order or instruction that is contrary to the provisions of this Act as that will be unlawful. In other words an employer cannot order or instruct an employee to come to work knowing that the work environment is unsafe.

Where the employee alleges that the workplace is unsafe it will be up to the employee to proof that indeed the fear is real. The employee risk disciplinary action if he or she is to stay at home and allege that he or she is scared to go to work.

However, in a COVID-19 situation it is mandatory that employees must stay at home and if they have to go back to work, the duty is on employers to take precautionary measures to make the workplace safe otherwise they will be held to have been negligent and face criminal and civil litigation.

## ■ How far does the duty to create a safe environment for employees extend during the Corona outbreak?

In answer to this question – During the corona virus outbreak, this duty has become even more important by virtue of the fact that the virus can attach to any surfaces even clothes and it is contagious. It requires that employers must put more effort and resources than they normally do. Unsafe work environments carry more risk of closure and liquidations to companies with accompanying loss of employment.

## ■ Where my work include foreign travel am I still bound by all my contractual obligations? (Under what conditions can contractual obligations be suspended or permanently abandoned?)

The fact that foreign travel is not allowed at present due to lockdown does not extinguish the contract but operation thereof has been put on pause or hold and will resume as soon as the situation becomes normal, to put it in another way the contractual obligations are temporarily suspended. One cannot abandon or walk away from the contract now unless circumstances are such that the obligations are discharged or distinguished by operation of the law which coincided with the lockdown period.

## **Will my salary be affected if my company has shut down due to corona virus?**

Salaries of employees will be affected unless they have sufficient annual or sick leave to their credit otherwise the principle of 'no work no pay' will apply.

To mitigate adverse effects, the state has introduced some measures through various funds including UIF to assist those who need assistance.

## **Can I be dismissed for refusing to do work which may expose me to the corona virus?**

Section 14 of the Occupational Health and Safety Act states that an employee shall carry out an instruction that is lawful. If an employer failed to create a safe working environment and the employee can prove that the employer failed to do so, the employee will be within his or her right not to carry out such an unlawful order or instruction and any subsequent dismissal would in terms of the Labour Relations Act be seen as unfair.

## **If we are forced to be quarantined, will this be regarded as sick leave or special leave?**

This leave will either be sick or annual leave or unpaid leave. Some companies do have special leave relating to different things such as a meritorious event where an employee will be running a comrade marathon or representing the country in international events and so on.

## **Where an employee requests voluntary self – quarantine, will he /she be granted sick leave to do so?**

It is contended that where employee who is asymptomatic but has been in contact or interaction with someone who subsequently tested positive or that

other person has travelled to high risk areas the request by an employee to self - quarantine would not be unreasonable. In such a situation an employee should be allowed sick leave if he has sick leave or can be granted sick leave in advance of his or her cycle alternatively annual leave could be considered.

## **What is an employer's obligation to an employee who is under quarantine?**

The employer needs to be supportive and grant whatever assistance is possible under the leave arrangements currently in place at the workplace.

## **Is my company mandated to undergo a shut – down where my employees exceed 50 in number?**

When the lockdown was declared with effect from midnight the 26th March 2020 the regulations issued under section 27 of the Disaster Management Act outlined the essential services establishment that were allowed to operate under the lockdown period. All companies that were not classified as essential service providers were subjected to lockdown regulations and the ban was only lifted when risk was adjusted to level 4 permitting specified companies to commence operation at 50% capacity.

## **If I am infected by corona whilst on duty is my company liable for my medical costs and salary?**

An employer normally pays an assessment premium to a fund established under the Compensation for Occupational Injuries and diseases Act 61 of 1997<sup>9</sup>. This fund is managed by the Director – General who decides on compensation as regards reported cases.

<sup>9</sup> Compensation for Occupational Injuries and diseases Act 61 of 1997

The Director General will not make periodical payments in respect of temporary total disablement or temporary partial disablement which lasts for three day or less. In this instance an employee will utilize his medical aid for medical expenses if he is a member and if not a member the employer will normally pay those expenses. The employer will also pay an employee for those days that the employee is not at work in the form of sick leave.

If the duration of the illness is more than three days, the employer is obliged to report the illness to the Director General and complete the necessary forms and required medical reports. In practice the employer will initially pay the medical costs and salary and recover such costs from the Director General at the rate that the Director – General deems appropriate.

### **Where an employer fails to send home a sick employee, is this a contravention on the part of the employer?**

It sometimes happens that a sick employee is given medication by the clinic doctor or clinic nurse but the effect of those medicine are such that they require an employee to rest for a while before being released home. Usually they will be ordered to use the clinic bed to rest until the clinic staff are satisfied that a sick employee can be released home. In this situation no contravention of the Act will arise, However if an employer permits a sick employee to go back to work before taking the prescribed precautionary measures of ensuring a safe working environment that will give rise to a contravention of section 8 of the Occupational Health and Safety Act.

### **Can I be sued for failure to abide by contractual terms where delays in the service industry have been caused due to corona virus outbreak?**

The outbreak is a pandemic that led to lockdown of all activities that are non - essential. The lockdown as discussed in the preceding paragraphs does

have the effect of temporarily suspending existing contract unless something extraordinary occurs that will extinguish the contract. Although parties to contracts have a right to sue for performance or cancellation of contracts it is unlikely to see lawsuits that are as a result of corona virus outbreak.

**I resigned from a job on verbal agreement to begin work at another company. The virus has now reached our country, business has hit a downward spiral and companies are suffering financially. Do I still have a job based on a verbal agreement? How do I enforce this should my prospective employer advise that all positions are frozen or that they will let me know in due course without a definite time / date by which I will be notified. Can my verbal agreement still stand in order for me to get paid from the date I was scheduled to commence work?**

In *Goldblatt v Fremantle*<sup>10</sup> the court determined that subject to certain exceptions, mostly statutory, any contract may be verbally entered into; writing is not essential to contractual validity. Unless expressly or impliedly, orally agreed that a written contract will be executed at a later stage and signed by both parties.

From the facts in this scenario it does not appear that there was such an intention and in the absence thereof, the contract becomes enforceable. The employee does have an oral agreement of employment as an offer has been accepted and an employee can commence work as scheduled.

Even if the employer advises that positions have been frozen, the advice will not include the position that has been offered and accepted otherwise the employer will be in breach of the oral agreement.<sup>9</sup>

<sup>10</sup> *Goldblatt v Fremantle* 1920 AD 123

## ■ Can employees elect to work from home?

There is nothing in our law that provides that employees may elect either to work from home or attend to their workplaces except through individual employment contracts. Where an employee will work is determined by the policy laid down by employers. Very few jobs can be performed at home except Sales representatives who are required to follow a daily route call schedule of retailers and write reports about their calls. However, with the advent of new technology an employer may determine that certain categories of employees who are for example in planning and logistics that they can access shared information technology platforms for purposes of checking stock at hand, replenishing stock relating to product variants the company offers to a variety of customers.

## ■ Notice periods for domestic workers and gardeners.

Section 37(1)(c)(ii) of the Basic Conditions of Employment Act 75 of 1977 provides for a notice period of four weeks if an employee is a farm worker or domestic worker who has been employed for more than six months.

## ■ To what extent do employers of domestic workers have the obligation to send their workers home?

We contend that there is no obligation on the part of the employer, however by mutual agreement parties can agree that the domestic workers stays for the duration of the lockdown or allowed to leave before the lockdown period takes effect.

## ■ To what extent do employers of domestic workers have the obligation to continue paying their domestic workers who no longer have a job due to the virus?

It is submitted that employers should utilized employee's sick and annual leave during the lockdown and once that is exhausted the employer's obligation ceases to exist and the principle of 'no work no pay' applies.

As the lockdown has temporarily suspended the employment contract, employers should expect the return of employees to work when the lockdown is eased to an extent of allowing domestic work to resume. If an employer contemplates a retrenchment, the normal procedures as laid down in section 189 of the Labour Relations Act have to be followed.

## ■ Can an employer temporarily lay off an employee?

If an employer contemplates laying off an employee most probably for operational reasons, it is submitted here that, the employer would have to follow the procedure as laid down in section 189(3) of the Labour Relations Act 66 of 1995. In other words, the employer after a brief discussion with the employee, will be required to issue a notice inviting the employee to consult with it and disclose all relevant information, including but not limited to the reasons for the proposal and the alternatives an employer considered.

## ■ What rights do employees have where an employer forces an employee to take leave to prevent the spread of the virus?

Section 14 (a) of the Occupational Health and Safety Act provides that 'every employee shall take reasonable care for the health and safety of himself and other persons who may be affected by his acts or omissions'.

Section 14(c) – provides that every employee shall 'carry out any lawful order given to him and obey the health and safety rules and procedures laid down by his employer or anyone authorized thereto by his employer, in the interest of health and safety'.

Employees do not in terms of the said Act have any rights to prevent the carrying out of a lawful order in the interest of health and safety in the workplace issued by an employer or any authorized delegate.

### **Where forced to take leave to prevent the spread of the virus, will the employee be taking sick leave or normal (vacation) leave?**

Depending on how long it takes to reduce the risk of the spread, employees might end up using both their sick and annual leave and entering into a situation of 'no work no pay'.

### **If the employee exhausts sick leave, will he/she be granted other paid leave?**

Our submission is that employers might consider granting employees annual leave.

### **What happens if I would rather stay home because of the rapid spread of the virus but my employer insists that I come to work or implement unpaid leave should I choose to stay at home?**

If work entails an essential service as defined in the regulations, an employee would have no option but to obey the instruction as it is considered to be a reasonable and lawful instruction. If work is not of an essential nature as defined, the employee is not obliged to obey such an instruction and most probably the employer might be in breach of lockdown regulations hence he will not be in a position to issue a permit for the employee to travel to work.

### **What rights do employees have where an employer forces an employee to continue working despite the on – going concern on the spread of the virus?**

We submit that it will be against COVID-19 regulations and unlawful for an employer who is not in an essential service or has not been authorized to open for business to force an employee to continue working during the period of lockdown where the spread of the virus is on – going.

### **What practical steps are employers obligated to take to ensure that the work environment is safeguarded from COVID 19?**

The general duties of employers in terms of section 8 of the Occupational Health and Safety Act has been augmented specifically with practical steps to include among others, proper sanitation of the work environment before work begins, screening of employees before the start of shift, the wearing of face masks, the use of sanitizers and the keeping of social distances of employees and customers alike.

### **Where an employer decides to close down in order to avoid the spread of the virus, and thereby keeps an employee out of work even although he/she does not have COVID-19 virus, is there an obligation to compensate that employee?**

As outlined elsewhere above the employer's obligation to compensate the employee is limited to the granting of annual leave during the shut - down period.

### **What happens where an employee refuses to come to work for fear of contracting the virus?**

One of the most important duties of an employee is to tender his or her services to the employer as and when required by the employment contract.

Section 14(d) of the Occupational Health and Safety Act places a burden on the employee that: - 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.

An employee cannot unreasonably refuse to come to work for fear of contracting the virus without first having discharged his or her onus as required by section 14 of the OHSA.

## **Will an employee be able to refuse to travel as part of their work obligations?**

The lockdown regulations prohibit any travel between provinces and abroad at present.

## **How can an employer manage employees who have to travel out of South Africa?**

Travel out of South Africa is currently not allowed except repatriation of foreign nationals by their embassies and the Government.

## **How can employers effectively monitor employees who are working remotely?**

As a matter of opinion, objectives are the best tools of managing employees working remotely. Objectives are then broken down into daily targets that are reviewed daily through Skype meetings at set times, for example at 10am.

At this meeting everyone will report on the progress made on his or her outputs for the day before, what is outstanding and when will that be achieved, what are the targets for that particular day. Now that service employees have been allowed to work, monitoring by cell phones will become important. Customers assisted who called for help, quotations sent to new customers who require assistance by text messages, texting proof of payments and so on.

## **If an employee contracts COVID-19 at work, are they covered by Workmen's Compensation?**

It is our submission that they are.

Section 65(1) of chapter VII of the Compensation for Occupational Injuries and Diseases Act 61 of 1997 provides that: - subject to the provisions of this chapter, an employee shall be entitled to the compensation provided for and prescribed in this Act if it is proved to the satisfaction of the Director – General –

(a) That the employee has contracted a disease mentioned in the first column

of schedule 3 and that such disease has arisen out of and in the course of his or her employment; or

(b) That the employee has contracted a disease other than a disease contemplated in paragraph (a) and that such disease has arisen out of and in the course of his or her employment.

## **What are my rights, if I am told that my employer has embarked on short – time as they were not able to receive imports required for their production?**

We submit that implementing short – time constitute a change to terms and conditions of employment for which an employee has a right to be consulted, the right to respond to proposal for such a change and the right to be given an opportunity to advance alternative proposals to the employer. The consultation will be similar with the necessary changes to section 189(3) of the Labour Relations Act. Section 64(4) (a) of the Labour Relations Act limits the right of an employer to unilaterally change conditions of employment.

## **Will I receive a salary if my company decides to close business due to corona virus?**

If the business is closed temporarily due to corona virus the employee can hope to be granted sick leave if there is still such leave to his or her credit and /or accumulated annual leave could be considered.

## **Are employers required to remunerate employees at the same rate if they are working from home?**

There should be no change in employee remuneration if employees are working and achieving the objectives they would have achieved had they been at their physical work places.

For further on Covid-19 employment issues, see the articles at <https://www.lexisnexis.co.za/news-and-insights/covid-19-resource-centre/practice-areas/labour-law>