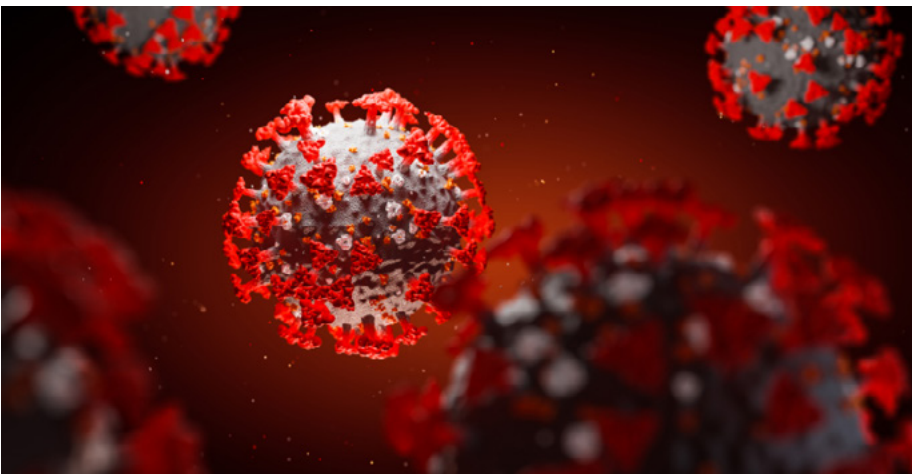


COVID-19 Lockdown:

What does this mean for employees?

By Seshni Govender - Staff attorney, Durban



As the COVID-19 outbreak spreads through society, the rules and norms in the workplace are changing. With South Africa in a 21-day lockdown for the first time in its history, many people are left with unanswered questions. Employers and employees are concerned about the impact this will have on their employment. Many employers were forced to shut down businesses and employees are forced to stay at home as a result.

During the period of the 21-day lockdown employees can fall into the following groups:

- Essential services employees;
- Employees who can work from home;
- Employees who cannot work from home or go in to work.

Essential services employees have been defined in terms of the Disaster Management Act, 57 of 2002: Amended Regulations, and not the Labour Relations Act, 66 of 1995. This group of employees is obligated to go to work despite the lockdown regulations that have been imposed by the President. These employees will be paid their salaries and will have to carry out their daily tasks as stipulated in their employment contracts. Should an employee refuse to work, or not go to work, then the principle of "no work no pay" will come into effect and the employee may face a disciplinary hearing.

In terms of the Occupational Health and Safety Act, 85 of 1993 employers must ensure that the working environment is safe for

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the employee. In this instance an employer must have gloves, masks, hand sanitisers and other protective gear available to employees who are required to work during this period. Employers must also ensure that social distancing is practised during working hours. Should employers not adhere to the aforementioned, then employees may refuse to work due to unsafe working conditions.

Many employees fall under the second category, which are employees who can work from home. These employees are entitled to be paid as long as they can carry out their duties. The employer may put in place specific deliverables to ensure that the employee is working at home i.e. timesheets, weekly calls, emails, progress reports, etc. Should an employee fail to carry out the daily tasks set by the employer while working from home, the employer can institute disciplinary action against the employee as set out in the employee's employment contract.

However, the question that arises when it comes to the third category of employees, is what will happen to them since they are unable to work? When we look at the business imperatives of a company, some employees' jobs are linked to the



business premises, such as cleaners. These employees are at risk of being arrested should they go to work and break the lockdown rules and regulations. Employers are therefore left with the daunting task of deciding what they should do with their employees during this crisis.

The options that are open to them are the following:

- Pay the employees in full;
- Pay their employees half of their salary;
- Force their employees to take annual leave; or
- Offer their employees a loan, which can be recovered at a later stage.

It has come to light that many employers are favouring the third option, which is to force employees to take annual leave. This has not been taken well by Government. Labour Minister T. W. Nxesi reiterated in a media briefing in Pretoria that the Government has made funds available to businesses to mitigate some of the losses experienced due to the shutdown. Employees will be entitled to benefits under the Unemployment Insurance Fund and the COVID-19 Benefit Fund that the Unemployment Insurance Fund has established as an instrument to mitigate the effects of the layoff of employees during the lockdown. Therefore, the Labour Minister has stated clearly that no employer should force his or her employees to take annual leave or leave without pay during the period of the lockdown.

This pandemic has created many hurdles and it will be interesting to observe how employers react to the challenges they are presented with and the impact this will have on the workplace. COVID-19 will have a lasting impact on the work environment, as it has forced us to explore alternative ways of working that were previously thought to be closed to us. One thing is for certain: at the end of this we can expect to see a very changed South African employment landscape. ●



South Africa's National Lockdown and Civil Liberties

By Shadreck Masike – Intern, Cape Town

The world has not faced a global crisis to the proportions being posed by the COVID-19 pandemic since World War II. Since its outbreak in late 2019, the pandemic has ravaged societies starting in Wuhan, China, spreading to the rest of Asia and the Middle East, Europe, the Americas and now Africa; infecting over a million people globally with a death toll of around 50 000 and rising, as at the time of writing. Its rapid spread necessitated the adoption of swift measures to curtail and contain its spread which has seen many countries embarking on national lockdowns where all non-essential services have been suspended and people ordered to stay at home. With confirmed corona virus cases standing at 1 380 and the total number of deaths at 5 as at 2 April 2020, South Africa has not been spared, with the President declaring a State of National Disaster and a concomitant 21 day National Lockdown which commenced at midnight on 27 March 2020. To ensure compliance with the National Lockdown, all the country's security forces were deployed to the streets including the South African National Defence Force (SANDF).

Since the lockdown, there has been wild speculation as to its effect on the Bill of Rights. Does the lockdown suspend the operation of the Bill of Rights, either partially or in its entirety? Such questions and fears were compounded further by reports of brutality and harassment against members of the public by security forces, in particular members of the SANDF. It has been reported, with evidence from video footage, that members of the army are beating people seen loitering in the streets, especially in township communities. Video footage has surfaced of people



being beaten, forced to roll on the ground in military fashion and doing squats, prompting the Defence Minister to issue a statement clarifying that such conduct by soldiers is unlawful and not in conformity with their mandate in respect of enforcing the lockdown regulations. The question that then remains is what effect the lockdown has on the civil liberties of our people?

The lockdown was effected pursuant to Regulations published by Government Gazette Notice 318 of 18 March 2020, as subsequently amended by Government Notice R. 398 of 25 March 2020. These Regulations were made under Section 27(2) of the National Disaster Management Act of 2002. Essentially, they are meant to restrict the movement of people locally, between cities and metros, amongst other things. The role of security forces then is to ensure that the restrictions on movement and gatherings are adhered to. Although the cited Regulations limit the exercise of human rights as espoused in the Bill of Rights, such limitation is permitted in terms of Section 36 of the Constitution, which provides that the exercise of rights may be limited by law of general application provided that the limitation is necessary, justified and reasonable in a democratic society. However, such limitation must only be to the extent that it is necessary to preserve, amongst other things, public

health, as in this case. This entails that even the rights that are directly limited by the Lockdown Regulations are not suspended in their entirety, but only limited to the extent that such limitation is necessary for the preservation of public health, and in this case, to contain the spread of Covid-19. To that end, the Bill of Rights is not suspended, nor are the security forces now enjoying impunity to commit human rights violations in the name of the lockdown. They are there to enforce law and order.

Provision is further made for criminal liability against anyone found guilty of contravening the regulations, with the offender being liable to pay a fine or serve imprisonment not exceeding six months, or both. This means that even where an individual contravenes the provisions of the regulations and is arrested, the rights of arrested, accused & detained persons enshrined in the Constitution applies to them. The regulations do not equip the army with powers to impose punishment on alleged offenders in the form of beatings, squats or military rolls.

To avoid doubt, the Bill of Rights is still very much in operation, though some rights have been limited, and the abuse of the citizenry by military personnel remains fundamentally unlawful. It constitutes unjustified limitation of the Bill of Rights in a democratic society as contemplated by the South African Constitution. ●

COVID-19

Infection and the workforce



By Siyabonga Zondi - Intern, Durban Office

In the most unequal society in the world, which is currently going through a recession, perennial power cuts and one of the highest unemployment rates in the world, a deadly communicable virus outbreak is the last thing South Africa needed. Apart from the lives that may be lost, a major area of concern is an economy, which was already on a declining trajectory prior to the outbreak hitting South Africa's shores, being made more vulnerable than ever and bordering on collapse. The people who will bear the brunt of this are the poor working class, who may be exposed to mass dismissals, unfair labour practices and a flouting of the basic conditions of employment.

This then begs the question: what role does the Labour Relations Act 66 of 1995 (LRA) and the Basic Conditions of Employment Act 75 of 1997 (BCEA) play in the wake of the COVID-19 outbreak? Do employees still enjoy the protection afforded by these two pieces of labour legislation, even in a time where employers may not be in a position where they are able to meet their obligations towards their employees?

Among the most pressing concerns for most employees is whether they can be dismissed due to contracting COVID-19.

In terms Schedule 8: Code of Good Practice Dismissals, an employer is obligated to investigate the extent of an illness if an employee is temporarily unable to work. If the illness may result in a prolonged

absence from work, alternatives to a dismissal must first be considered. The factors that should be taken into account when considering alternatives to dismissal include the seriousness of the illness, the period of absence, the nature of the employee's job and whether a temporary replacement may be secured. Throughout the process the employee is to be afforded an opportunity to make recommendations. If all processes have been followed and no suitable alternative to dismissal is found, the employer would then have an option to dismiss the employee.

There are also situations where businesses may find themselves having to dismiss much of their workforce due to operational requirements. Dismissals based on operational requirements are carried out in terms of section 189 of the LRA. These requirements can be defined as technological, structural, economic or similar needs of the employer. The recommended recovery/isolation period for a person who is deemed to have COVID-19 is 14 days, which in itself would not justify a need to retrench the employee. This position would significantly change, however, where an employer would have several employees being infected and requiring time away for isolation or recovery. In this situation a retrenchment based on operational requirements would be necessitated.

The Occupational Health and Safety Act 85 of 1993 (OHSA) obligates an employer to maintain as far as reasonably practicable a safe working environment that is without

risk to the safety and health of its employees. This, however, does not mean that an employee may refuse to come to work in fear of contracting COVID-19. Employees who stay away from work may be required to furnish reasons for their absence, and failure to provide them may result in the employee facing disciplinary action.

A point of much debate and uncertainty for many employees is the "no work, no pay" principle. To pay employees for work done is one of the obligations of the employer, but what happens if the employees show up at work but are unable to work for some reason or another because of COVID-19? In such a situation the employer is obliged to pay the employees, as they have made themselves available and shown up at work. The fact that something beyond their control has inhibited them from performing their duties should not result in the employees not being given their due remuneration. The employer may, however, have recourse to the temporary layoff of employees where normal business operations may not continue.

They say every generation has a war that it must fight. In the past it was the attainment of freedom and equality, both in general and in the workplace. Our labour legislation is now very liberal in its nature and promotes equality. The battle we now face is one of decreasing unemployment rates, and increasing the quality of life of all employees, in the wake of a weakened economy and a dangerous communicable virus. ●



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Birth certificates for undocumented minors

The Department of Home Affairs appears to have a policy (unrelated to any law that I can find) that they will only issue a Birth Certificate in the following circumstances:

1. To a woman who is the mother of the child, personally appearing to bring that application;
2. Where there is documentary evidence of the birth of the child in a South African hospital or medical facility;
3. Where she has registered the birth within seven days.

In any circumstances apart from the above, all of us as role-players in the social welfare and legal environments have had endless difficulty in getting a birth certificate issued.

Where there is a biological unmarried father of the child, Home Affairs requires that he have a genetic test to prove his fatherhood. If so established, there are some instances where they issue the birth certificate to him, particularly when Home Affairs already have him as the father on their system or where the Children’s Court forces them to do so. Of course, the law is that both parents have parenting rights and there is no real reason in law why a birth certificate could not simply be given to a father. Nevertheless, it is likely one would need a court order to force them to do so.

In cases where the other aspect is not satisfied – for example when the mother is missing or the mother does not have documentary evidence of the birth, or where the birth was not timeously registered, there would be room to bring an application to force Home Affairs to issue a birth certificate. In each such application one would need to establish to the satisfaction of the Court that:

1. The child is a South African – whether by birth or descent. Thus, place facts before the Court on affidavit about who the parents are and the place of birth of the child;
2. There is good cause why the mother cannot appear to apply for the certificate;
3. The person/s applying for the birth certificate have parental rights and responsibilities or ought to have them or are entitled to the issuing of the certificate. So even where the applicant is the aunt or a children’s home or a social worker, that person should be entitled to get the birth certificate and have a purpose for it.

As a final point, the application should be brought by way of a Notice of Motion and a Founding Affidavit. Remember that it is very easy to lose an application by asking for more urgency than the circumstances justify. Take your time and win the first time. ●



The Green Market Square furore

By: **Matthew December - Intern, Cape Town**

On 8 October 2019, a group of refugees commenced a sit-in protest at the Cape Town offices of the United Nations High Commission for Refugees (UNHCR) following a wave of xenophobic attacks on foreign nationals across the country. The group, which include about 624 men, women and children and 65 undocumented refugees, alleges that they are being persecuted in South Africa by a community insensitive to their plight as refugees and therefore are living in fear for their lives on a daily basis. Their demand to the UNHCR was to be relocated to a third country, which is not South Africa or their country of origin since, in both, they feared persecution. The UNHCR could not guarantee such a demand, citing international law on refugees, as well as their operational guidelines. Since no agreement could be reached concerning relocation, the City Council proceeded to forcibly evict them from the UNHCR premises, and an ugly scene of violence erupted, resulting in the Reverend Allan Storey of the Central Methodist Church offering them temporary shelter until their plight was addressed.

Until recently, the refugees have been staying in the Central Methodist Church right in the heart of the Cape Town CBD. The conditions of their stay there became a concern, with reports of violence between factions of refugees, poor sanitary conditions, health scares and fire risks owing to overcrowding.



The conditions were clearly degrading to say the least. This prompted the City of Cape Town to seek an order from the Western Cape High Court to enforce Municipal Regulations with regard to the occupation of the church by the protesters. Court hearings were also scenes of violence between the police and the protesters. The court ruled that the City has to ensure that the protesters' human rights are protected before any penalties for infringing by-laws could be enforced. At the end of it all, it was a battle between the City to enforce by-laws by evicting the refugees, and the refugees resisting eviction until they were moved to another country that is not South Africa or their country of origin.

To many ordinary people who witnessed the debacle unfold, the refugees were the victims and the South African government, its agencies and the UNHCR were being insensitive to their plight. In the eyes of an innocent bystander, they were caught between a rock and a hard place; either to return to their communities in Cape Town and face persecution, or remain in the CBD facing running battles with the police. Some wondered why the UNHCR is not relocating them to a third country, which appeared to be the only logical thing to do to settle this crisis. But what does the law say?

Refugees are governed by International Law and the laws of the receiving country - in this case, South Africa.

Generally, when a country receives a refugee, it is not at liberty in law to return that person to a country that they are fleeing from, by operation of the principle of non-refoulement. In the event that such a person returns to the country from which they fled, their refugee status is automatically revoked. Where a refugee is facing persecution in the country they fled to, two options are available; either they are returned to their country of origin or relocated to a third country. However, relocating them to a third country requires (a) individual determination of each case to determine the circumstances of the persecution and whether they warrant relocation, and (b) the availability of a third country that is willing to receive the refugees. In the present case, neither requirement has been met. The refugees are not willing to have each case be decided on its own merit and secondly, there is no country which has shown willingness to welcome the refugees. The refugees too are refusing to go back to their country of origin. Under such circumstances, there is nothing that the South African government or the UNHCR can do about the situation. A solution can only be found through the cooperation of the refugees, which has not been forthcoming owing to factional fights, and the availability of a third country willing to receive the refugees and settle them within their territory. ●

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