INTRODUCTION

This work focuses on the contemplated termination of employment that may occur due to Covid-19 pandemic. It is clear that businesses will struggle as Covid-19 continues to cause havoc around the world. With recent implementation of lockdown in South Africa, employees are now forced to stay away from work and continue working from home. These measures, to combat Covid 19 pandemic, presented some employers with great challenges as day to day management of their business became badly affected by the lockdown due to Covid-19 destruction. It is unfortunate that many businesses are faced with the prospect of contemplating termination/ retrenchments due to the impact of lockdown.

TERMINATION OF EMPLOYMENT DUE TO *"VIS MAJOR or FORCE MAJEURE"*

A similar principle applies in the situation of *vis major*. A vis major (Force Majeuroe) event is an unforeseen and superior force, event or circumstance, which is beyond the control of the contracting parties, and which renders contractual performance impossible. From the above definition, a question arises whether the Covid-19 is a vis major in the context of this exercise. In his address on the 15 March 2020, President Cyril Ramaphosa declared a "national state of disaster" as a result of Covid-19. In his recent address of the 23 April 2020, the President outlined phases to be followed as a measure to gradually relax the lockdown, referring to the current stage as phase 5 (five) and a complete lockdown.

Accordingly, contracting parties can rely to vis major until such time the lockdown restrictions are lifted or reduced to lower phases. The principle of impossibilium nulla obligatio was discussed in the case **of Peters Flamman & Co v Kokstad Municipality 1919 AD 427 at 434-437**. The Court stated that "by the Civil Law a contract is void if at the time of its inception its performance is impossible. The Court went further to say that where a contract has become impossible of performance after it had been entered into the General Rule was that the position is then the same as if it had been impossible from the beginning.

In **Schlengemann v Meyer, Bridgens & Co. Ltd,1920 CPD 494 at 500**,the Court submitted that "according to our Law impossibility of performance, even when it arises after the conclusion of the contract, dissolves the contract. In the context, the employer would not have reasonably foreseen the grave impact of Ccovid-19. No country in the world was prepared for the economic disaster the pandemic had caused.

In a situation where the clause was not written or included in the contract, we must follow the common law principles, note that there are certain conditions that must be met in order to render *force majeure.* It is important that a company proves that the force majeure was beyond their control. Since the announcement of the National lockdown, certain contractual obligations will be rendered impossible to perform and contracting parties would be able to rely on a *force majeure* or common law principles.

Furthermore, note that the LRA recognizes only three circumstances which seems termination of employment fair, namely on the grounds of misconduct, incapacity and operational requirements also know as “retrenchment”, but all these circumstances will not automatically deem a dismissal to be fair in the eyes of the CCMA, should the fairness be disputed, therefore in such a situation a party may not be able to rely on *force majeure.*

RETRENCHMENT BASED ON OPERATIONAL REQUIREMENTS

Section 189 of the *LRA* (Labour Relations Act) addresses the termination/dismissal of employees based on operational reasons, the Act defines the term "operational requirements" as one that is based on economic, technological or structural reasons, but mostly is because of economic reasons. An employer's economic needs in this context relate to financial difficulties which will be experienced by the business as a result of changes in market due to the impact of Covid 19. This is said to be a substantively fair dismissal and is generally referred to as a "no fault" dismissal because the termination does not result from the actions or fault of the employee, there is also a procedure that needs to be followed by the employer for retrenchment to be rendered fair, the employer must consult with the employees who are likely to

be affected, employer must also provide written notice informing the employees of the consultation and all the necessary information.

Substantive fairness will mean that the employer must truly have an economical, technological, or structural need to dismiss employee. **In Kotze v Rebel Discount Liquor Group (Pty) Ltd**, it was stated that the Court should not "second guess" the employer's commercial reasons for taking a specific decision to retrench employees. **In Welch v Kulu Kenilworth (Pty)** Ltd & others, a company which struggled financially retrenched employees in order to save the business. The Court held that it would not interfere with a reasonable decision taken by the company, even if it meant closure of the business.

In a case where an employee has been dismissed on the grounds of operational requirements, the employer must provide the employee with severance pay which is one weeks payment for each completed year of ongoing service (depending also on how long the employee was employed for) or the employer must provide the employee with alternative work; employee must also pay employer an amount of money equal to the annual leave or time off that ha snot been taken by the employee, note that once an employee has been retrenched s/he is entitled to claim from the UIF.

RELIEF FROM THE UNEMPLOYMENT INSURANCE FUND:

In case the employee have been let go, retrenched, or if their employer becomes bankrupt, such employees can claim from the UIF. The UIF gives short-term relief to workers who become unemployed or are unable to work because of maternity, adoption leave or illness. During this national lockdown in South Africa, the UIF has given employers a relief where they were unable to pay full salaries of their employees during the lockdown period, by applying for the Covid-19 Temporary Employer-Employee Relief.

It is inevitable that most companies will be badly affected by Covid-19 and some will have to let their employees go in an attempt to save the business. In case where an

employee is retrenched as a result of financial difficulties by the company due to Covid-19, the UIF provides that every worker who contributed to the UIF can claim if they have been retrenched or their contracts have expired or if the employer goes bankrupt.

CONCLUSION:

Section 189 of the Labour Relations Act permits employers to dismiss employees for operational requirements, such as economic needs of the employer. Like all dismissals, retrenchments must be both procedurally and substantively fair. A retrenchment package is usually negotiated by the parties and in case the company is indeed bankrupt, a claim is to be made with the UIF.

Siyabulela Matanzima, Candidate Attorney at Snail Attorneys @ Law Inc
Skype: Siyabulela Matanzima
E-mail: siya.matanzima@snailattorneys.com

Masego Morige, Paralega; at Snail Attorneys @ Law Inc
Skype: Masego Morige
E-mail: masego@snailattorneys.com

Reference

Legislation

Labour Relations Act, 66 of 1995

Case Law

Kotze v Rebel Ddiscount Liquor Group (Pty) Ltd (2002) 21 ILj 129 (LAC)

Peters Flamman and Co v Kokstad Municipality 1919 AD 427 at 434-437

Schlengemann v. Meyer, Bridgens & Co. Ltd., 1920 C.P.D. 494 at p. 500

Welch v Kulu Kenilworth (Pty) Ltd & others (2013) 34 ILj 1804 (LC)

Sources

Department: Employment and Labour, R. o. (2020, April 09). *Employment & Labour.* Retrieved from labour.gov.za: http:www.labour.gov.za/unemployment-insurance-fud-relaxes-processes-to-minimise-physical-contact-during-the-lockdown

Services, S. A. (2020). *Unemployment Insurance Fund*. Retrieved from sars.gov.za: https://www.sars.gov.za/TaxTypes/UIF/Pages/default.aspx

Nodel, A. C. (n.d.). *Force Majeure and Vis Major.* Retrieved from lexisnexis.co.za: http://www.lexisnexis.co.za/_data/assets/pdf_file/0008/759005?Case-extracts-on-force-majeure-and-vis-major-1880-to-2019.pgf

M MCGREGOR & A DEKKER (EDS), M. B.-N.-B. (2017). Labour Law Rules. Cape Town, South Africa: Siber Inc CC

Legal Wise South Africa, retrieved from legalwaise.co.za : https://www.legalwise.co.za/help-yourself/quicklaw-guides/retrenchment

The South African Labour Guide, (2020), Discipline and Dismissal. retrieved from labourguide.co.za :https://www.labourguide.co.za/discipline-dismissal/96-procedural-and-substantive-fairness