REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Reportable

C422/2020

In the matter between:

WAYNE BUYS **Applicant**

and

OASIS GROUP HOLDINGS **Respondent**

Date heard: 10 – 11 August 2021 by means of virtual hearing; Heads filed by 10 September 2021

Delivered: 24 January 2022 by means of email; deemed received on 25 January at 10.00hr

Summary: ***Contractual claim for payment of three months' notice pay; applicant put on unpaid leave during Covid-19 lockdown; Macsteel Service Centres SA (Pty) Ltd v National Union of Metalworkers of SA & Others (2020) 41 ILJ 2670 (LC) considered; 'no work no pay principle' is part of collective bargaining law and paragraph 83 of the Macsteel judgment should not be considered the ratio of the judgment; if it was intended to be so, it is respectfully incorrect; common law principle of reciprocal obligations between employee and employer not jettisoned in Covid-19 context; Matshazi v Mezepoli Melrose Arch (Pty) Ltd & another; Nyoni v Mezepoli Nicolway (Pty) Ltd & another; Moto v Plaka Eastgate***

Restaurant & another; Mohsen & another v Brand Kitchen Hospitality (Pty) Ltd & another (2021) 42 ILJ 600 (GJ) considered.

JUDGMENT

RABKIN-NAICKER J

[1] The applicant essentially brings a claim for specific performance based on clause 29.1.4 of his contract of employment which provides for 6 calendar months' written notice of termination. The final three month of that period were not paid to him when he was placed on unpaid leave during the Covid Lockdown.

[2] The following facts were common cause between the parties and are contained in their pre-trial minute. I record these below:

> "3.1 The Applicant was employed on 9 January 2017 as a Senior Fiduciary Specialist. The Applicant's salary (cost to company) as at date of alleged dismissal was R88 452.00 per month.
>
> 3.2 The Applicant resigned on 1 January 2020 and in terms of clause 29.1.4 of the contract of employment, he was obliged to give six (6) months' notice. The Applicant's last day of employment was supposed to be on 30 June 2020.
>
> 3.3 The Applicant tendered his services during his notice period and at no stage did the Applicant accept any notice period less than what is provided for in clause 29.1.4 of the contract of employment. During the latter part of January 2020, the Applicant was instructed to start handing over his responsibilities and functions to Mr Irshaad Aboo (Mr Aboo) due to his resignation. Mr Aboo would be absorbing certain of the Applicant's functions.
>
> 3.4 The Respondent, on or about 26 March 2020, removed the Applicant's laptop and reallocated the laptop to another member of staff whose functions were deemed to be critical to the smooth operation of

the company. No consultation was held with the Applicant regarding the reallocation of his laptop and/or regarding the decision made by the Respondent as to which employees needed to carry out critical functions.

3.5 The entire country was placed on a 'hard' national lockdown on 27 March 2020.

3.6 The Applicant advised the Respondent that employers cannot force employees to take unpaid leave during the lockdown and that he had already advised the Department of Labour of the Respondent's intention to withhold his salary. The Respondent, despite the Applicant's view, continued to place the Applicant on unpaid leave as from 1 April 2020 and did not remunerate the Applicant for the remaining three months of his notice period, being April, May and June 2020 even though the country moved to level 4 alert on 1 May 2020 and to level 3 alert on 1 June 2020.

3.7 The Respondent, on 7 April 2020, advised the Applicant that the principle of no-work-no-pay will apply during the National Lockdown and that given that the Respondent had to shut down most of its operations due to lockdown, the Applicant was not required nor was he able to provide his services. The Applicant was therefore advised that the Respondent cannot be expected to pay for services that have not been rendered.

3.8 The Applicant, on 27 April 2020, following the President's announcement that the country will be moving to alert level 4, enquired from the Respondent whether he would be returning to work on Friday, 1 May 2020. The Applicant, on 1 May 2020, again enquired whether he must return to work on Monday, 4 May 2020. The Respondent responded on 2 May 2020 advising the Applicant that he must not return to work on 4 May 2020 and that he will be advised of when to do so. The Applicant asked to be provided with reasons for this decision given that the country was at alert level 4. The Respondent responded and advised

that they are still operating on skeleton staff and that they will try very hard to revert to the Applicant soon.

3.9 The Respondent, on 13 May 2020, advised the Applicant that the company is still not operating at full capacity; that the relaxation from level 5 to level 4 does not mean that the risk has been mitigated; that the company has taken a risk adjusted approach to do its part to assist the government to combat the invisible enemy; that the Applicant cannot simply expect the company to open and relax the rules during these circumstances; and that it is therefore the decision of the company that the Applicant and other non-critical staff members must remain on lockdown.

3.10 The Applicant, on 2 June 2020, again enquired from the Respondent why he was kept on unpaid leave despite the country having moved to level 3 alert of the lockdown. The Respondent did not respond to this email. The Respondent previously advised the Applicant that he would be informed when to return to work.

3.11 The Applicant's attorneys, on 17 June 2020, advised the Respondent that Mr Aboo has continued to fulfil the Applicant's role during the hard lockdown and subsequent alert levels and that the Applicant has not been asked to return to work. The Respondent was also advised that, prior to the commencement of the Applicant's unpaid leave, the Applicant was required to hand over his laptop, which resulted in the Applicant having been unable to continue handing over his responsibilities to Mr Aboo.

3.12 The Respondent was further advised by the Applicant's attorneys that where an employer does not require an employee to work during his/her notice period, the employer is obliged to pay the employee in lieu of such period, or any part thereof, the remuneration that the employee would have received had he worked during the period, or part thereof. The Respondent was also advised that forced unpaid leave, or the principle of no-work-no-pay is only applicable during the period of an employee's employment and that it finds no application while the

employee is serving his/her notice period. The Respondent was accordingly advised that by removing the Applicant's laptop, not allowing him to work and refusing to remunerate him since 1 April 2020, the Respondent has fallen foul of the notice provisions in the BCEA and has acted in breach of clause 29.1.4 of the Applicant's contract of employment, which breach the Applicant did not accept. The Respondent was requested to restore the *status quo* retrospectively.

3.13 The Respondent was also advised by the Applicant's attorneys that even if the Applicant did not resign on 1 January 2020, the Respondent would still have not been able to lawfully force the Applicant to take unpaid leave, since it has not been required to close its doors during any period of the lockdown and since Mr Aboo has been required to attend to the Applicant's function as from 1 April 2020 to date. The Respondent was advised that there was no supervening impossibility of performance in respect of either party and that the Respondent's obligation to consult with the Applicant and to obtain his consent prior to enforcing any period of unpaid leave would not have been obviated.

3.14 The Respondent responded on 27 June 2020 and advised that the principle of no-work-no-pay applies during the lockdown and that since the Applicant was not required nor able to provide services during the period, the Respondent cannot be expected to pay for services that have not been rendered.

3.15 The Applicant, on 24 June 2020, referred an alleged unfair dismissal dispute to the CCMA, together with a claim for outstanding notice pay to be paid. The matter was unresolved at conciliation and was referred to arbitration. The CCMA found that the Applicant could not prove that he was dismissed and that absent a dismissal, the CCMA lacked jurisdiction to determine the dispute concerning the notice pay that was not paid.

3.16 The Applicant, on receipt of the award, decided to approach the above Honourable Court with this claim in terms of section 77(3) of the BCEA. "

Evidence at Trial - Applicant

[3] Mr Buys (Buys) testified that his duties were to focus on the directors of the Respondent, Ebrahim family, their trusts and fiduciary structures. He had to administer their tax returns as part of these duties. On the 1 of January 2020, he resigned from his employment on six month's notice as required by his employment contract. He testified that he and his employer did not waive the six month notice requirement in the said contract. On the 30 March 2020, he received an email from the HR Department. He read the first two paragraphs into the record:

"Dear Wayne

I confirm receipt of and acceptance of your resignation. Please note however that you submitted your resignation on 1 January 2020 and, as you correctly note in your Letter of Resignation, you are required to give 6 calendar months' notice of your resignation. Your notice period accordingly commenced on 1 January 2020 and expires on 30 June 2020.

I note your comment that "I trust that this period of transition will be dealt with by the company in a fair and equitable manner" and must confess that I am confused as to why you feel the need to make such a comment. However, given that you have raised this, I am forced to respond thereto and do so as follows:

At the outset, I wish to place on record that you have always been treated in a fair and equitable manner (in actual fact, the company has always endeavored to accommodate you when you required time out of the office to attend to personal matters……Where your work was at the required standard you were commended and where it was not, you were held accountable but guided accordingly. This will of course continue to be the case while you remain in the employ of the company…"

[4] Buys testified that the contents of the letter were not discussed with him. He stated that the job he performed was essential to the smooth functioning of the entities he described as his responsibility. The company had no long term liabilities and sound extensive capital reserves, and off shore assets. However, on the 30 March 2020, he received the following letter from the Human Resources Department:

"Dear Wayne,

As you know, on 27 March 2020 we entered a period of National lockdown as announced by our President. This lockdown period is currently set to expire on 16 April 2020.

During the lockdown, you will not be providing any services to the company as you do not render an essential service as contemplated in the prevailing Regulations.

Given that the company's revenue is under pressure as a result of the lockdown and the overall stock market having dropped substantially in a relatively short space of time and the fact that you will not be providing any services in this time, in order to ensure that the company is able to continue to meet is financial soundness and operational ability requirements, you have been placed on unpaid leave for period of the lockdown……"

[5] Buys referred to a letter he wrote in reply to the above on 30 March 2020 which read as follows:

'Hi Anis

Given that the government has provided resources and programs to aid companies to pay their workers, I find it absolutely incredibly (sic) that Oasis has taken this stance My laptop was taken from me and I was afforded no opportunity to work. Nothing was discussed with me prior to the lockdown. Now 4 days into the lockdown you provide me with this letter. No opportunity has been provided to even utilize my leave instead of being on unpaid leave At 1.5 leave days per month over 6 months I'd (sic) would have accumulated 9 days leave that could have been used against the 13 days actual working days lost No provision has been made in this regard.

Please detail the efforts being made by the company to claim from the UIF fund and in terms of the deferment of PAYE and provisional tax payments? I would like to ensure that the company isn't claiming government assistance whilst simultaneously withholding salaries from its staff.

Kindly note that upon my return to the office I will be proceeding to lodge a grievance against you and the directors for the way in which this matter has

been handled. It's so easy for the directors who extract millions every year for the company to refuse to pay their staff for three weeks without considering the cost to the staff…….. It is hardly my fault that the company chose to refuse to allow me to work during this time. It is quite clear to me that this is simply payback for me resigning from the company. Petty and vindictive If this matter isn't resolved in the grievance procedure I will proceed to take the matter further with the CCMA."

[6] Buys also referred to an email he sent the same day informing the Company that he was going to report it to the Department of Labour. He testified that he did not receive any TERS monies. He was asked who had performed his functions during April, May and June, and he stated that one of his colleagues did, one Aboo. He testified that he could have continued his functions if he was not on forced leave – other employees had performed remotely or from the company's disaster recovery site. He did not have access to his laptop or the network. He testified that despite asking the respondent when he should return to office when the lockdown level was downgraded at the end of April 2020, he was not asked to return, nor was he the recipient of any TERS payments.

[7] Under cross-examination, Buys agreed that his claim was to enforce his contract of employment. He denied that a head of an institution could decide who was an essential worker. It was put to him that the respondent consisted of 14 departments and he was part of a section of the legal department. He agreed. He also conceded that all of his functions were concerned with fiduciary duties for the Ebrahim family and not with the other areas of the business. He was not a trustee of the trusts in his remit and had to have any amendments to trust deeds signed off. He reported to the head of the Legal Department, Mr Nazim Ebrahim.

[8] It was put to him that his work was simple and straightforward and he did not exercise specialist knowledge. He disagreed and referred to the property trusts he had to administer. He conceded that one of his tasks was to pay DSTV bills for the Ebrahim family and stated that his work was essential not irreplaceable. He further agreed that he did no work on the investment side of the company. He emphasized that he was not paid over R1 million a year for a checklist job.

He stated that he speculated that he was not paid for the final three months of his employment, because he had resigned.

[9] It was put to Buys that he had threatened to go to the press with confidential information. He said he had threatened to do so in respect of how the respondent treats its staff. He conceded that he was not privy to the respondent's executive decisions about Covid.

[10] It was put to Buys that Covid was the reason he was declared a non-essential worker and his laptop was given to an essential worker. He stated he could have worked on his own computer if he had been given access to the network. It was put to him that it was the choice of the company to decide who could work and who could not. He replied 'if you say so'. Buys conceded that investors were very nervous during the material period and it was important for businesses to keep calm and act decisively.

[11] In respect to the payment of TERS, Buys was asked if he was aware that the respondent was debt free and the company philosophy was not to have debts. He agreed with this statement. He stated that only the employer could apply for TERS when it was put to him that he could have applied. Under re-examination, he testified that he did try to apply for TERS and could not and then tried again to get the respondent to do so.

Evidence for the Respondent

[12] Mr Adam Ebrahim (Ebrahim), CEO and Chief Investment Officer of the respondent gave evidence on its behalf. He explained the distinction between external functions of the company involving institutional investors- corporates or individuals, who invest in respondent's funds, and internal functions. The latter dealt with companies and trusts internal to Oasis.

[13] He testified that the external business was under a regulatory framework and was run to provide services to investors and to report to them in respect of daily pricing. With the advent of the lockdown, the respondent had split the employees into essential and non-essential groups. The essential employees

were further identified in respect of the level of their activity in three operational units: asset management, wealth management and property management. Buys was not involved in these.

[14] Ebrahim testified that Buys' role was administrative and his intellectual input was limited. The committee he reported to had longstanding expertise in company law. Buys served that committee administratively. The tax returns he did were not complex and his work was always checked as this was part of the company ethos. Buys paid the bills in respect of PBO's and paid the rates for the property companies. Ebrahim stated that he is a chartered accountant and chartered financial analyst. In his view, filing of tax returns could be done by a bookkeeper. The non-essential side of the business was very simple. If the respondent needed high level tax advice they would approach an expert such as Professor Booth.

[15] Ebrahim testified that the respondent's PBOs had functions such as a bursary scheme and the giving of donations, for example to the Red Cross Hospital. They were not managed by Buys, but he made payments to recipients. Buys would have had access to all internal companies of the respondent and partial access to an Ultimate Holding Trust relating to certain direct expenses within the trust, such as a shared family home for elderly members of the family. Less than 2% of the respondent's assets were contained in this trust. Buys could not sign off expenses in this trust.

[16] Ebrahim testified that with the advent of Covid internationally they had started planning regarding their essential staff by February 2020, and started trying to get necessary additional tools and laptops for a work from home situation. In early March, they began to ask non-essential employees to take 1 week annual leave and activated a large disaster recovery site owned by the respondent for social distant working. He testified at length about the economic climate and the unprecedented financial risks for the respondent in the face of the world wide pandemic. His evidence in this regard was not materially disputed. The decision as to which employees performed an essential function was in response to Covid, he stated.

[17] Ebrahim was asked about the letter sent to Buys on 7 April 2020 by the company which read inter alia:

"With reference to your emails dated 30 and 31 March 2020, we wish to clarify the following issues:

1. The principle of no-work-no-pay applies during the national lock-down. Given that Oasis (as many other employers) had to shut down most of its operations due to the lock down, you are not required nor are you able to provide your services during this period and we cannot be expected to pay for services that have not been rendered The fact that you cannot render your services is not due to your laptop being allocated to another employee (who is performing essential regulatory services during the lock down) but rather as a result of the lock down itself – as stated , most of Oasis's operations have been shut down It also has no bearing on the fact you resigned.."

[18] He was asked to comment on which part of the operation had shut down and he stated that physically they shut down their disaster recovery sites from the beginning of April, and operational activities that were not essential, marketing as an example. Regarding mentioning the no work no pay principle, he said it reflected 'the thought process they went through'.

[19] Regarding payment of TERS, Ebrahim was asked why the respondent did not apply for these payments for its employees. He said that the respondent's philosophy was to try and minimize debt and be sustainable as a business and the perception of being sound and secure was very important to them. The respondent did not take third party financial assistance in any form because when clients did due diligence on the respondent it would be damaging. To need financial assistance would have undermined the respondent's standing with regulators. The respondent was dealing with people's hard earned money.

[20] He was asked why Buys could not be accommodated when the lockdown level went down to level 4 and 3. Ebrahim stated that their modus operandi stayed the same. Buys did not fall into the category of an essential worker although the volume of those who did was increased when the lockdown levels were relaxed. Government regulations and business regulations required social distancing

and this was even true at the time of the trial. There was no work for Buys to do and this was as a result of Covid.

[21] Under cross-examination, Ebrahim stated that the respondent's decision to decide who was an essential worker was in line with lockdown regulations. He insisted that only essential workers needed laptops of which there was a shortage. Regarding the no work no pay principle, he said respondent took that approach based on legal advice for as long as lockdown levels 4 and 5 applied. The respondent had to take the decision based on the broad Covid regulations as to who was essential. The company operated but those working in the offices were only IT people. He stated that Aboo performed some of Buy's functions and that basic payments had to be continued, but tax payments were deferred.

[22] On the issue of TERS, it was put to Ebrahim that the assistance offered was for employees not the respondent. He stated that Buys was an employee of the company and so would have an impact on the company directly and indirectly. It would have had to be disclosed to respondent's regulators. He was asked why the respondent did not pay Buys at least what he would have got from TERS. His answer was that the mandate was not to take financial assistance directly or indirectly and this would impact on all staff negatively.

[23] It was put to Ebrahim that by placing Buys on unpaid leave on 31 March 2020, he had already decided not to have him back during his leave period. He said they had already identified those people who were non-essential and the respondent did not know how long the lockdown on level 4 and 5 would be. It was put to Ebrahim that Buys could have done his work remotely even if not an essential worker in terms of the level 5 regulations. Ebrahim said Buys could not do his functions because he was not in possession of a protected laptop. The protected laptops were allocated according to a hierarchy of essential functions. Cybersecurity had to remain robust. It was put to Ebrahim that the respondent was not entitled to breach the contract of employment and place Buys on forced unpaid leave. Ebrahim stated that the respondent complied with Covid Regulations and industry and financial services practices. Its primary focus was on Covid.

Evaluation

[24] The submissions on behalf of the parties deal, *inter alia*, with the meaning to be ascribed to section 11B (2) of the Regulations issued in terms of section 27 (2) of the Disaster Management Act, 2002 (the Regulations), dated 25 March 2020. It was common cause that the respondent was considered to be an institution providing an essential service in terms of these. Regulation 11B(2) reads as follows:

"(2) The head of an institution must determine essential services to be performed by his or her institution, and must determine the essential staff who will perform those services: Provided that the head of an institution may delegate this function, as may be required in line with the complexity and size of the business operation."

[25] The Regulations define the 'head of an institution':*" as the accounting officer of a public institution and the chief executive officer or the equivalent of a chief executive officer of a private institution."*

[26] On a reading of Regulation 11B (2), I am satisfied that the head of the respondent, Ebrahim, duly took the decision as to who should comprise the essential staff during the period of the lockdowns in question. The proposition that he did so ''unilaterally' which was argued on behalf of the applicant, is not meritorious.Both parties approached the matter before me as one for breach of contract. I agree with the respondent's submissions that fairness is not a consideration for this Court.

[27] The crux of the disputed claim before me is whether the respondent was entitled to breach the contract of employment entered into between the parties in the circumstances of the Covid pandemic, and apply the 'no work-no-pay principle'. It is common cause that TERS UIF benefits were applied for by many employers who had to shut down their operations, in order that their employees could receive at least partial payment of their wages/salary. Despite this issue being raised during evidence, the submissions before me did not touch on the question.

[28] The respondent relies on the case of **Macsteel Service Centres SA (Pty) Ltd v National Union of Metalworkers of SA & Others**[1], in which the Court found

[1] (2020) 41 ILJ 2670 (LC)

that employees were entitled to strike on the basis that there had been a unilateral change to their terms and conditions of employment, when the employer adopted emergency measures during the national state of disaster arising from Covid-19 pandemic. The Court found that the company's undertaking to pay TERS benefits directly to employees did not constitute restoration of the *status quo* for purposes of s 64(4) of LRA 1995 and the employees were entitled to strike. The case is not on all fours with that before me. The respondent however submits that the judgment establishes the principle that where no services are rendered because of Covid-19, there is no entitlement to pay. The following paragraphs are cited:

"[81] Another factor central to the respondents' case which cannot be ignored, is the fact that the applicant failed to distinguish between employees who are working and those who are not in applying the salary reduction to all its employees. The respondents submitted that the employees who are working on a full-time basis during May, June and July 2020 are entitled to their full salaries. The salary reduction should have been applied only to the employees who are not working.

[82] In my view, there is merit in this issue. Notwithstanding the applicant's best intentions not to prejudice any of its employees and to treat them the same, the reality is that they are not in the same position. *The reality in law is that the employees who rendered no service, albeit to no fault of their own or due to circumstances outside their employer's control, like the global Covid-19 pandemic and national state of disaster, are not entitled to remuneration and the applicant could have implemented the principle of 'no work no pay'.* (emphasis mine)

[83] The converse is however also true. Where employees rendered their full-time services, they are entitled to their full salaries and any reduction in their salaries, even for a sound reason to protect the greater good of all employees, would constitute a unilateral change in terms and conditions.

[84] Insofar as the applicant is not prepared to guarantee that the employees who worked full time would receive their full salaries, regardless of the outcome

of the application for the TERS benefits, the applicant has not restored the terms and conditions of employment, as contemplated in s 64(4) of the LRA."

[29] The applicant on the other hand, cites a judgment handed down in the Gauteng High Court, that of **Matshazi v Mezepoli Melrose Arch (Pty) Ltd & another; Nyoni v Mezepoli Nicolway (Pty) Ltd & another; Moto v Plaka Eastgate Restaurant & another; Mohsen & another v Brand Kitchen Hospitality (Pty) Ltd & another**[2] in particular the following paragraph:

"[39] The obligation which the trust companies owed to their employees, to pay them their salaries, has always been capable of performance and was at no time rendered impossible. It is trite that the duty to pay, and the commensurate right to remuneration, arises not from the actual performance of work, but from the tendering of service. The regulations which were in force during level 5 of the national lockdown make it clear that employers are not excused from their obligation to pay their employees' salaries, because it includes in the list as an essential service the '[i]mplementation of payroll systems to the extent that such arrangement has not been made for the lockdown, to ensure timeous payments to workers'." [3]

[30] Mr Ackermann for the respondent submits that the facts in the ***Brand Kitchen*** matter are distinguishable in that the obligations which the employers had in that matter, had always been capable of performance and was never rendered impossible. In the Court's view both cases relied on are distinguishable on the facts. However, legal principles are sought to be drawn from them. Mr Ackerman submitted that paragraph 82 of ***Macsteel*** above, is not *obiter* but rather forms part of the *ratio decidendi* of the judgment. He points to the fact that later paragraphs contained in the judgment are headed "Obiter". These paragraphs read as follow:

"Obiter

[86] The circumstances which employers and employees currently find themselves in are unprecedented, distressing and uncertain. Answers are not

[2] (2021) 42 ILJ 600 (GJ)
[3] Reference is made to the regulations published in terms of s 27(2) the Disaster Management Act 57 of 2002: GN 318 of 2020 in GG 43107 (18 March 2020), as amended by s 6(e) GN R419 in GG 43168 (26 March 2020) annexure B para 32.

to be found in precedents, no map exists to show direction and only time will tell the full extent of the disruption and devastation which the economy and all who play a part in it, will suffer.

[87] In my view, the best answers and solutions would be found in applying common sense and seeking common ground to find a solution in a time when problems and challenges overshadow answers and solutions. It is unfortunately true that common sense is not a flower that grows in every garden.

[88] The applicant conveyed its displeasure about the fact that NUMSA has called out its members on strike, notwithstanding the possibility that their salaries would be fully paid by way of the TERS benefit and it expressed its view that NUMSA has no appreciation for the efforts made by the applicant to pay its employees in circumstances where there was no obligation to do so. The applicant's observations in this regard are not without merit. The reality is that NUMSA's members would, for the duration of the strike, forsake their wages, which the applicant ironically had been at pains to pay during difficult times."

[31] The heading 'Obiter' is neither here nor there. It does not mean all the proceeding paragraphs must be read as the ratio of the judgment. In my view, the Court's dictum contained in paragraph 83 of **Macsteel** is not the ratio of the judgment. If it is be read as such, it would set a precedent that would jettison common law authority on impossibility of performance, as well as the reciprocal relations between employer and employee regarding the obligation to tender performance in return for remuneration[4]. I am of the view that the said paragraph was not intended by my sister Prinsloo J to comprise the ratio of the judgment and to be understood as meaning that where employees were laid off during lockdown the no work no pay principle applies. If it was, I must respectfully disagree with the dictum. It would in effect broach no investigation into whether an employer was in fact unable to remunerate employees who tendered their services, but for reasons such as the Covid pandemic were unable to actually work.

[4] Brassey 'Employment and Labour Law Volume 1' Juta 1998 E2:25

[32] The principle of 'no work no pay' sits squarely in the context of collective bargaining.[5] As the Court in **Airline Pilots Association of SA v SA Airways SOC Ltd & others** stated: "In South African law, a reading of the definitions of 'strike' and 'lock-out' and the protections extended by s 67 of the LRA to protected strikes and lock-outs, discloses that the model adopted by the legislature is one of indemnity for breaches of the employment contract that a strike and a lock-out respectively occasion."[6]

[33] In the statement of response before Court, the respondent pleads that it was entitled to place Buys on unpaid leave: "on the basis that his contract of employment was suspended during the period of lockdown. For the same reason it is denied that the company's actions constituted a breach of contract". In addition, the respondent pleaded that:

"It is admitted that the company advised that the no-work-no pay principle applied to the employee. It is self-evident that this was the case from the commencement of lockdown. The fact that the employee was willing and able to tender his services, and that this was during his notice period, is of no consequence."

[34] The respondent did not rely on a plea sourced in contract and the doctrine of impossibility of performance, nor did it seek to rely on clause 34.4 of the contract of employment[7] in its pleadings. Submissions by Mr Ackerman on these issues were thus not part of the respondent's pleaded case before me, and I do not consider them.

[35] In view of the above, I find that the respondent did breach the contract of employment between the parties when it did not pay Buys the requisite notice pay during the period that he tendered his services. However, Buys did refer an unfair dismissal dispute to the CCMA[8] on the 24 June 2020 which indicated the

[5] See **Nasecgwu & others v Donco Investments (Pty) Ltd (2010) 31 ILJ 977 (LC)** : "[16] What, however, stands out from all of these cases is the fact that it is the purpose of the strike or lock-out notice to give the employer or the union and employees an opportunity to reflect on the proposed action and their response thereto. The reason for allowing the parties this opportunity is obvious: Once a lock-out is instituted, the employer *does not have to remunerate the locked out employees*. Likewise, once the employees embark on strike action because the employer does not wish to accede to their demands, *the principle of no work no pay will apply*.

[6] Airline Pilots Association of SA v SA Airways SOC Ltd & others (2021) 42 ILJ 1087 (LC) at para 12

[7] This provides that any part of the contract which is held to be unenforceable shall be ineffective.

[8] The CCMA found it had no jurisdiction.

termination of the employment relationship. This means that he is not entitled to his notice pay after this date.

[36] I therefore make the following order, bearing in mind that as thus is a contractual claim, the *Zungu* principles do not apply to costs orders:

Order

1. The respondent is to pay Wayne Buys notice pay for the period April 1 2020 to June 24 2020.
2. The above remuneration must be paid by no later than 28 February 2022.
3. Costs to be paid by the respondent.

H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Appearances:

Applicant: C De Kock instructed by Bagraims Attorney

Respondent: LW Ackermann instructed by BCHC Inc