THE IMPLICATIONS OF ELECTRICITY OUTAGES FOR THE PRINCIPLE OF NO WORK, NO PAY IN SOUTH AFRICA

by

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ABSTRACT

In South Africa, the advent of electricity outages, colloquially known as load-shedding, has affected every sector. It has had severe implications for businesses and labour alike. It has presented an unprecedented problem for labour relations. In particular, the problem has affected the longstanding principle of no work, no pay. This principle has formed the core of labour law in South Africa since time immemorial. In terms of this principle, the employee is only entitled to receive their salary for the services rendered to the employer. However, the advent of electricity outages has presented a situation wherein the employees come to work, but due to circumstances outside their control, namely the intermittent supply of electricity, they cannot tender their services to the employer. Thus, it raises the question of whether the employees are entitled to receive their salary in these situations.

While the principle of no work, no pay may seem straightforward, where the employee chooses not to present himself or herself for work. It often brings complications in no-fault situations. Hence, there is a need to research this principle in the context of electricity outages. Since no direct legislative framework regulates it, it becomes necessary to develop the common law on the principle and the ancillary case law applicable to such circumstances. A key finding of this study is that there is no direct case law dealing with a situation of no work, no pay in a no-fault situation, such as in the case of an electricity outage in South Africa. Therefore, it is imperative to use derivative jurisprudence to make recommendations and a possible conclusion to the study.

The *MacSteel* and *Mhonipheni* decisions are two derivative court cases that can be cited in this case. While these two decisions are relevant to the COVID-19 pandemic and the implementation of the no work, no pay principles, the reasoning laid out in them can apply to the study's subject matter. This is because, while they may appear to be contradictory in the sense that one may be considered the general norm, MacSteel, for example, with minor alterations, could be considered the exception to the general rule. The exception should be slightly modified in that the employer must have taken reasonable steps to guarantee that he is in a reasonable position to accept the employees' services.

Keywords: Electricity outages; principle of no work, no pay; duties of employee, duties of employer; common law; Labour Relations Act

DECLARATION

I hereby declare that the mini-dissertation hereby submitted to the University of Limpopo for the degree of Master of Laws (Labour Law) has not previously been submitted by me for the degree at this or any other University, that it is my work in design and in execution, and that all material contained herein has been duly acknowledged.

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Tau SM **Date:**

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LIST OF ACRONYMS

ILO	**International Labour Organisation**
LRA	**Labour Relations Act**
LAC	**Labour Appeal Court**
SCA	**Supreme Court of Appeal**
TERS	**Temporary Employment Relief Scheme**
BCEA	**Basic Conditions of Employment Act**
MEIBC	**Metal and Engineering Industries Bargaining Council**
NEHAWU	**National Education Health & Allied Workers Union**
NUMSA	**National Union of Mineworkers in South Africa**

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CHAPTER 1: INTRODUCTION TO THE STUDY

1.1 Introduction

Electricity outages are actions that reduce the load, especially the interruption of an electricity supply, to avoid excessive load on the generating plant.[1] In the case of South Africa, load shedding has had severe implications for businesses and labour alike. Since its establishment in 1922, the country's electric company, Eskom, has been responsible for electricity supply throughout South Africa and some neighbouring countries. Since 1994, when the country has become a democratic state, the company has embarked on a massive electrification programme. Due to ageing infrastructure, lack of maintenance, failure to construct new power stations, and corruption, the power supply became affected. From January 2008, South Africa was hit by load shedding for the first time, disrupting every aspect of life, including, among other things, industries, mining activities, businesses and households throughout the country.[2]

The power grid came under severe constraints during the summer maintenance programme in 2013/2014, and Eskom implemented load shedding in March 2014. Eskom implemented 99 days of load shedding around January to September 2015, and that caused a decline in manufacturing and mining output, resulting in negative economic growth for the country.[3] In 2016, Eskom reduced unplanned outages because there had been improvements in plant availability and a reduction in the usage of open-cycle gas turbines powered by costly diesel supplies. Eskom then implemented "stage 1" load-shedding amid an unlawful strike over wages in

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1 Oxford Dictionary of English<https://oxford-dictionary-of-english.en.softonic> accessed on 02 March 2023.

2 Olajuyin, OF and Mago, S 'Effects of Load-Shedding on the Performance of Small, Medium and Micro Enterprises in Gqeberha, South Africa' (2022) *Management and Economics Research Journal* 1.

3 *Pioneer Foods (Pty) Ltd v Eskom Holdings SOC Ltd* (2020) JDR 2110 (GJ).

June 2018, and there were several claims that load-shedding was caused by sabotage of power stations and coal supplies by, *inter alia*, Eskom employees and ANC Cadre Deployees.

Eskom began load-shedding, which affected, *inter alia*, mining activities and consequently production outputs, as mining is an energy-intensive field. Some mining operations have been severely affected due to power outages. Even Anglo-American Platinum warned its investors that the continued power outages could negatively impact production. Sibanye Stillwater also cut production and warned its investors that these continued power outages could negatively affect the company's production output.[4]

Since 2018, the country has been subjected to rolling load-shedding. Load-shedding has an impact on the country's economic growth, and as a result, the unemployment rate increases because without a continuous energy supply of electricity, workers who require a continuous supply of electricity for their work will be unable to perform their work more efficiently which has broad and severe implications for the economy, businesses and individuals alike.[5]

It is a known and accepted fact that without a reliable, constant supply of electricity, industries will not grow, factories cannot function, and the economy cannot flourish.[6] An intermittent supply of electricity is a turn-off for many prospective investors, as no investors will invest in a country that does not have a reliable supply of electricity.[7]

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4 Staff, W 'Load-shedding is Killing One of South Africa's Biggest Industries' <https://businesstech.co.za/news/energy/602502/load-shedding-is-killing-one-of-south-africas-biggest-industries-expert> assessed on 16 June 2023.

5 Moore, EO 'Exploring the Experience of Load Shedding on the Employment Relationship of Fuel Retailers in the North West University' [LLM Thesis, University of North West 2022).

6 Du Venage, G 'South Africa Comes to Standstill with Eskom's Load-shedding' 2020 *Engineering & Mining Journal* 18.

7 Du Venage, G 'South Africa Comes to Standstill with Eskom's Load-shedding' 2020 *Engineering & Mining Journal* 18.

Load-shedding impacts employment and labour. For instance, in 2007, mines were forced to tap back on production, losing out on the potential gain when palladium and platinum prices hit record highs in early 2008.[8] Load-shedding affects the employer and employee relationship, as employees are expected to tender their services to their employers' disposal due to contractual obligations arising from the parties' employment contracts. Under common law, the Basic Conditions of Employment Act and the Labour Relations Act, employees who do not render services to their employer are not entitled to receive their wages.[9]

This is because, in terms of our labour laws, it is the primary duty of the employer to pay the employee as long as the employee tenders his/her services, and if the employee does not tender his/her services, the principle of no work, no pay becomes applicable.[10] Furthermore, load-shedding has presented a fresh challenge to the employment relationship because it creates an environment of no work at no fault of the employee or the employer.

The working relationship is a mutual one. According to common law, the employer and employee owe each other certain obligations. When load shedding occurs, the employer owes the employees an obligation to make reasonable accommodation for them by offering alternative arrangements or trade equipment, ensuring that employees' working environments are safe and healthy. To lessen the impact of power outages, communicate with employees by telling them of the scheduled load shedding, the steps to be taken for operations, and the need to evaluate contractual responsibilities.[11] On the same premises, the employee's obligations to their employers include but are not limited to, exercising reasonable care for their safety and

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[8] Eskom 'Our Recent Past- "Shift performance and grow sustainably". <https://eskom.co.za/heritage/history-in-decades/eskom-2003-2012> accessed 23 March 2023.

[9] Grogan, J *Workplace law* (Juta 2009) 47.

[10] McGregor, M *Labour Law Rules* (Siber Ink 2017) 44.

[11] Grogan, J *Workplace Law* (Juta 2009).

the safety of others while at work, abiding by the procedures and policies the employer introduces to manage the impact of load shedding, reporting hazards, and being required to take any training the employer offers.[12]

But of particular importance to this study is the employer's duty to remunerate the employee and the employee's duty to tender his personal services available to the employer. These two duties, between employer and employee, form the core foundation of the 'no work, no pay' principle.

The advent of electricity outages threatens, among other things, these two foundational obligations, in the sense that there will be no work for the employee to render while there are electricity outages experienced, and at the same time, the employer will not make profits to be in a position to remunerate the employee, thus intimating the employer to apply the principle of no work, no pay. This would, in certain circumstances, be regarded as unfair to the employee because they came to work with the sole intention of rendering services available to the employer, but due to circumstances outside of their control or that of the employer, they are unable to perform.

Applying the no work, no pay principle is fairly simple and reasonable in normal circumstances. However, in light of electricity outages, it can lead to a full-blown legal dispute between the employer and employee, in that either party can, as will be seen in the study, substantively argue their case in an open court.

1.2 Research problem

In terms of common law, the employer is not obliged to pay an employee who has not worked, hence the application of the principle of 'no work, no pay'.[13] The principle has been operationalised through several statutory

[12] Allardyce, K *Load Shedding Your Employees: Legal Eagle:*(2008)2(2) HR Highway 18.
[13] McGregor, M *Labour Law Rules* (Siber Ink 2017) 44.

provisions and international conventions.[14] However, load-shedding has introduced a new twist to the operation of the principle because employees either do not come to work or, even when they are physically present, are not working because of power outages.

Often, employees arrive at work ready to provide their services to the employer in exchange for a salary or wages, but the employer cannot provide the work to the employee because of load-shedding. This is not intentional on the employee's side. Therefore, work hours have been lost at no fault of the employees. While the employee honours the duty to render services, the employer has a corresponding duty to provide work. Yet, in a load-shedding situation, the employer cannot provide work, and consequently, the employer, in equal measure, experiences the same problems of power outages because there were no operations. The legal issue is whether the employer is bound to pay employees even under those circumstances.

1.3 Rationale of the study

1.3.1 Purpose of the study

The study aims to analyse and investigate the implications of load-shedding on the time-honoured labour law principle of no work, no pay and the challenges that employer and employee relations face in South Africa due to the load-shedding experienced in the country. The study will achieve its aims by investigating, among other things, the gaps and barriers employees face in applying the principle of ‘no work, no pay’ by employers to alleviate their operational problems during load-shedding.

1.3.2 Specific objectives

[14] Section 213 of the Labour Relations Act 66 of 1995.

(a) To analyse the application of the principle of no work, no pay in a load-shedding situation, where work hours are lost at no fault of the employee.

(b) Investigate the implications of load-shedding on the employer's duty to provide work and remunerate employees when employees did not work at no fault of their own.

1.4 Research questions

The study seeks to answer the following questions:

(a) Are employees entitled to claim remuneration in a situation where work hours were lost at no fault of theirs, such as during load-shedding?

(b) Does the employer's duty to provide work and remunerate employees for the services rendered still subsist even during hours of work lost due to load-shedding?

(c) Does failure by the employer to pay the employees for not working during load- shedding amount to the unilateral modification of employment conditions and breach of contract?

1.5 The significance of the study

The study analyses the challenges employers and employees face during load-shedding: a socio-economic phenomenon that has crippled the country's economy. It affects the viability of workplaces and the employees' prospects of earning a living. It investigates the principle of 'no work, no pay' in the context of the current load-shedding problem. The study will investigate suitable working arrangements for employers and employees.

1.6 Hypotheses

Hypothesis 1: The employer has no obligation to pay an employee who has not worked, regardless of whether it was the employee's fault. The principle of no work, no pay applies. Therefore, the employee who did not work during load-shedding is not entitled to payment.

Hypothesis 2: When work hours are lost at no fault of the employee, like in a case of load-shedding, the no work, no pay principle does not apply. The employer has a duty to pay the employee. The employer is responsible for providing work.

Hypothesis 3: If an employer does not pay employees, even due to load-shedding, that is a unilateral modification of employment conditions and, consequently, a breach of the employment contract.

1.7 Research methodology

The study is qualitative in nature. It will use both primary and secondary sources. The primary sources to be used are material, legislation, case law, and international conventions. The secondary sources are books, journal articles, and carefully selected internet sources.

1.8 Literature review

1.8.1 The Constitution

The right to fair labour practice is one of the fundamental rights enshrined in the Bill of Rights under the Constitution of South Africa.[15] According to Section 23(1) of the Constitution,everyone has the right to fair labour practices. In the case of *NEHAWU v University of Cape Town & Others*,[16] the Constitutional Court held that the word everyone in terms of Section

[15] Cheadle, H *South African Constitutional Law: The Bill of Rights* (LexisNexis 2003).
[16] *NEHAWU v University of Cape Town & Other* (2002) JOL 9447 (LAC).

23(1) of the Constitution includes both employers and employees.[17] In the case of *Pretorius v Transnet,*[18] the Constitutional Court extended the right to even formal employment to other forms of work engagement.[19] The Labour Court, in the case *of MacSteel Service Centres SA (Pty) Ltd v NUMSA and Others,*[20] held that employees who have not rendered services due to unforeseen circumstances over which employers have no control are not entitled to remunerations; thus, the employer has to apply the no work, no pay principle.[21]

1.8.2 Common law

Under common law, employees are obligated to place their services at the employer's disposal and render services. This was stated in the case of *Smit v Workmens' Compensation Commissioner.*[22] This case highlights who qualifies to be regarded as an employee according to the law. It is important to know who an employee is because the principle of no work, no pay applies in an employment relationship. If employees are instructed to perform work and do so, they are entitled to remuneration, but if they are instructed to do work and fail to perform, that will be a breach of contract, and the employer is thus entitled to not remunerate the employee.

The common law doctrine of vis majeure, otherwise known as "supervening impossibility", provides that performance in terms of the contract is excused where performance is made objectively impossible.[23] An employee cannot

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17 *NEHAWU v University of Cape Town & Others (*2002*)* JOL 9447 *(LAC)*.

18 *Pretorius v Transnet* (2018) 7 BLLR 633 (CC).

19 *Pretorius and Another v Transport Pension Fund and others* (2018) 7 BLLR 633 (CC) 48.

20 *MacSteel Service Centres SA (Pty) Ltd v NUMSA and Others* (2021) 12 BLLR 1235 (LC).

21 *MacSteel Services Centres SA (Pty) Ltd v NUMSA and Other* (2021) 12 BLLR 1235(LC).

22 *Smit v Workman's Compensation Commissioner* (1979) 1 SA 51 (A).

23 Allardyce, K 'Load Shedding Your Employees: Legal Eagle' (2008) HR *Highway* 18.

come to work, or an employer cannot provide work due to circumstances outside their control. An employer will not have to pay an employee.

In *Mhlonipheni v Mezepoli Melrose Arch and Others,*[24] the employer during the Covid-19 pandemic applied the principle of no work, no pay, and this led to the High Court opining that employees employed by the Mezepoli and Plkaka chain of restaurants were in a position wherein they were capable of rendering their services, to the employer during a national lockdown, and therefore their salaries were due and payable by the employer.

The High Court, in the abovementioned case, further held that the regulations that had been promulgated in terms of the National State of Disaster Act[25] unambiguously made it clear that employers must not hide away from their duty to remunerate their employees because the employees were protected by the promulgated list of essential services workers in terms of the Regulations passed under the Act.[26] Furthermore, the Court held that economic hardship cannot be equated as a force majeure event because the court believed that economic hardship did not objectively render performance, in terms of the employment contract, impossible.[27]

The judgement in the abovementioned case allows employers to pay employees even when there is a COVID-19 pandemic, which makes employees not come to work due to those restrictions. However, the situation has changed, as evidenced by the Labour Court's decision in the case of *MacSteel* in June 2020, which held that the reality in law is that the employees who did not render services, whether through no fault of their own or due to circumstances beyond their employer's control, such as the global COVID-19 pandemic and national state of disaster, are not entitled to be paid because they did not render their services to the employer.[28]

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[24] *Mhlonipheni v Mezepoli Melrose Arch and Others* (2020) JOL 47359(GJ).

[25] National State of Disaster Act 57 of 2002.

[26] *Mhlonipheni v Mezepoli Melrose Arch and Others (2020) JDR 1033 (GJ).*

[27] *Mhlonipheni v Mezepoli Melrose Arch and Others* (2020) JDR 1033 (GJ).

[28] *MacSteel Service Centres SA (Pty) Ltd v NUMSA and Others* (2021) 12 BLLR 1235 (LC).

Employees must rely on the court's ruling in the *MacSteel* case when adopting the no work, no pay principle.

The situation of COVID-19 differs from the current situation of load-shedding as employees are at work but unable to perform their duties due to load-shedding, but with COVID-19, employees are restricted from coming to work. Meanwhile, with load-shedding, the employees come to work and tender their services to the employer. However, due to load-shedding, their production levels decrease due to intermittent electricity supply.

1.8.3 Statutory law

Regarding the principle of no work, no pay, there are two principal statutes: the Basic Conditions of Employment Act (BCEA) of 1997[29] and the Labour Relations Act (LRA) of 1995.[30] The Basic Conditions of Employment Act contains provisions related to the principle of no work, no pay.[31] Section 22 of the BCEA states that an employer is not required to pay an employee who does not perform work on a day that they were scheduled to work, and it includes even situations wherein an employee is absent due to illness, leave or any other reason not attributable to the employer.

In addition, section 23 of the BCEA provides that an employer may deduct pay from an employee who is absent from work without permission unless the absence is due to unforeseeable circumstances or circumstances beyond the employee's control. However, any such deduction must be reasonable and in accordance with a fair procedure. Section 34 of the BCEA also provides that an employer may not make any deduction from the employee's remuneration unless the employee agrees in writing to the deduction in respect of debt specified in the agreement and such deduction

[29] Basic Conditions of Employment Act 75 of 1997.
[30] Labour Relations Act 66 of 1995.
[31] Sections 22 and 23 of the Basic Condition of Employment Act 75 of 1997.

is required or permitted in terms of a law, collective agreement, court order, or arbitration award.[32]

According to the provisions of the Labour Relations Act, an employee who takes part in a strike is not entitled to remuneration for the duration of the strike unless the employer agrees otherwise.[33] The legal basis for exempting employers from the obligation to pay strikers is that employees on strike are not discharging their obligation to tender service. If workers decide to call off a strike, they must tender their services in full; otherwise, the employer is not required to accept their tender of service. This is in accordance with *3M SA (Pty) Ltd v SACCAWU and Others*, wherein the Court opined that this is so because of the *exceptio non adempleti contractus*.[34]

In *Ekurhuleni Metropolitan Municipality v South African Municipal Workers Union,*[35] on behalf of members, the Labour Appeal Court was tasked with determining whether the municipality should be obliged to pay its shop stewards even though the municipality employees were engaged in a strike. The Court held that they should not be paid because employees tendering their services to the employers were wholly dependent on the other employees not being engaged in the strike.[36]

1.8.4 International conventions

South Africa is a member state of the International Labour Organisation. The country has ratified all of the International Labour Organisation's core conventions and plays a key role in International Labour Organisation affairs. The employment relationship is the legal link between employers

[32] Basic Conditions of Employment Act 75 of 1997.
[33] Section 67 of the Labour Relations Act 66 of 1995.
[34] *3M (Pty) Ltd v SACCAWU and Others* (2001) 22 ILJ 1092 (LAC).
[35] *3M (Pty) Ltd v SACCAWU and Others* (2001) 22 ILJ 1092 (LAC).
[36] *Ekurhuleni Metropolitan Municipality v SAMWU and Others* (J793/2020) [2011] ZALCJHB 206.

and employees. It exists when a person performs work or services under certain conditions in return for remuneration. Some workers lack protection in the employment relationship.

The ILO discussed that in 2003 and 2006 by adopting Recommendation No 198 concerning the employment relationship.[37] This recommendation covers formulating and applying a national policy for reviewing at appropriate intervals and, if necessary, clarifying and adapting the scope of relevant laws and regulations to guarantee effective protection for workers who perform work in the context of an employment relationship.

1.9 Limitations of the study

The study will not focus on the technicalities that bring load-shedding in the country. Instead, it will only focus on how the prevalence of load-shedding affects the principle of no work, no pay as one of the founding principles of labour laws. This is because the study is not interested in the technicalities of load-shedding. Instead, it is interested in investigating the potential effects that load-shedding might have on the application of the principle of no work, no pay in our country in an attempt to find solutions to mitigate such potential effects on the application of the principle of no work, no pay, or alternatives to the principles.

1.10 Chapter outline

The mini dissertation will comprise four chapters.

CHAPTER 1: INTRODUCTION TO THE STUDY

The purpose of this chapter is to provide the reader with a brief background on the study by, among other things, providing the reader with the history of load-shedding in South Africa and the history of the no work, no pay

[37] International Labour "Organization on Labour Law" <https://ilo.org/ifpdial/areas-of-work/labour-law> accessed on 21st March 2023.

principle in our country's contractual law foundation and consequently our labour laws. This chapter also aims to outline some potential challenges due to the prevalence of load-shedding on South Africa's economy and, consequently, on employment relations within the country.

CHAPTER 2: CONCEPTUAL FRAMEWORK: THE DEVELOPMENT OF THE NO WORK NO PAY PRINCIPLE

The purpose of this chapter is to study the principle and broad history of the application of the no work, no pay principle in our country's contractual laws and, incidentally, labour laws and the application of policies and procedures to eradicate confusion within the workplace in the application of the no work, no pay principle. This principle essentially entails that employees will not receive wages for the time they do not work.[38]

CHAPTER 3: THE IMPACT OF LOAD-SHEDDING ON THE PRINCIPLE OF NO WORK, NO PAY

The purpose of this chapter is to investigate the potential impact that load-shedding will have/or has on the application of the no work, no pay principle in our labour laws since this principle has been at the core of our labour laws for time immemorial. This is because the principle can potentially damage employment relations between employers and employees. Hence, we must probe the potential impact of the country's no work, no pay principle.

CHAPTER 4: CONCLUSION AND RECOMMENDATION

This chapter will provide the reader with a summary of all the facts, laws, and key concepts applicable, as alluded thereto in the abovementioned chapters, to formulate a conclusion based on the information provided above, combined with the writer's opinions on the subject matter of this research. This is all done with the view of finding a suitable solution to the

[38] Van Niekerk, A *Law@Work* (LexisNexis 2019).

possible conundrum that employers and employees might face at some point in time regarding applying the principle of no work, no pay.

CHAPTER 2: CONCEPTUAL FRAMEWORK: THE DEVELOPMENT OF THE NO WORK, NO PAY PRINCIPLE

2.1 Introduction

The principle of no work, no pay essentially entails that employees will not receive wages for the time they do not work.[39] The employment contract is based on the presumption that the employer will remunerate the employee based on the work done; it is an integral part of labour relations.[40] South Africa is a member of the International Labour Organisation (ILO) and has ratified its fundamental conventions.[41] There is no ILO convention directly on no work, no pay. However, the organisation has produced a series of agreements and guidelines related to wages and labour rights that can indirectly influence the application of the principle.[42]

Hence, the chapter aims to study the principle and its broad history in South African labour laws. This chapter briefly outlines the broad history of work and payment. The chapter will then focus on the contractual aspect of the principle, including the duties of the employer and employees and policies and guidelines within the workplace. This chapter will also focus on the relevant conventions and recommendations that cover the topics of wages and labour rights that influence the indirect application of the principle. This chapter will focus on the doctrine of no work, no pay in South Africa, considering the Constitution, common law, and statutory laws.

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[39] Syahwal,S 'Paradigm of Application of the No Work, No Pay Principle in Determining Wage Process' (2023) *Journal Penelitian Hukum De Jure*.

[40] Grogan, J *Workplace Law* (Juta 2009).

[41] Van Niekerk, A *Law@Work* (LexisNexis 2019).

[42] Edgell, S *The Sociology of Work: Continuity and Change in Paid and Unpaid Work* (Sage 2020)

2.2 Historical development of work and the principle of no work, no pay

Work has only recently been synonymous with regular paid employment, a discrete area of specialised economic activity for which one receives remuneration, in the 40 000 years plus history of human societies.[43] Thus, the existing concept of work is a recent social invention, the result of certain historical conditions denoted by the phrase 'industrial capitalism'. The first component of this word implies that work is a productive activity employing equipment driven by inanimate energy sources that takes place outside the home in a specific building to which one must travel each work day.[44] The second element suggests that work involves payment, often agreed upon in advance in relation to time and/or output, and that it is part of a market system in which productive property is privately owned [45] with a profit motive and everything, including labour, has a price.[46]

Prior to the rise of industrial capitalism, the primary types of employment were all non-industrial, ranging from everyone cooperating on a minimally differentiated basis to a degree of gender and class specialisation, ending in some social groupings being free from productive work.[47] The transition from the household, where family and non-family members lived and worked together, pooling resources and producing food and goods for their own consumption, to the factory and other large-scale specialist production units, such as offices, where individuals worked for wages, was gradual.[48] Families were initially recruited to work in the factories, with parents

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[43] Edgell, S *The Sociology of Work: Continuity and Change in Paid and Unpaid Work* (Sage 2020).

[44] Edgell, S *The Sociology of Work: Continuity and Change in Paid and Unpaid Work* (Sage publication, 2020).

[45] Edgell, S *The Sociology of Work*: *Continuity and Change in Paid and Unpaid* Work (Sage publication 2020).

[46] Grint, K *The Sociology* of Work: *Introduction* (Polity Press 2005).

[47] Bonnin, D 'Transformations of Work: A Discussion of the South African Workplace' (2020) *Journal of Contemporary African Studies.*

[48] Grint, K *The Sociology of Work*: *Introduction* (Polity Press 2005).

effectively subcontracting work to their children. This method offered numerous advantages, including preserving parental authority, facilitating occupational training, and increasing family revenue.[49]

Employers' growing influence over workers, helped by the emergence of the factory, was reinforced when alternative sources of income vanished, and non-family sources of labour and non-family relationships grew more important. As a result, individuals grew less dependent on their family of origin and more reliant on the labour market.[50]

In pre-modern societies, economic activities such as farming and handicraft work were organised on a small scale and were primarily concerned with earning a livelihood rather than profits on investment, and for the vast majority, this meant subsistence, involving a mix of in-kind and cash payments. [51] The truck system, which paid wages in kind rather than currency during the early stages of industrialization in England, continued until an effective monetary system was developed.

When discussing the origin of employment contracts in South Africa, addressing the origin of labour is critical.[52] The origins of labour legislation in South Africa may be traced back to the Gold and Diamond Rush when significant groups of workers arrived in mining districts in the Witwatersrand, Kimberley, and Pilgrim's Rest for the first time in the country's history, where employees worked and stayed in deplorable conditions. They were paid poorly, and the workplace was dangerous and poorly controlled. [53]

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[49] Edgell, S *The Sociology of Work*: *Continuity and Change in Paid and Unpaid Work* (Sage publication, 2020).

[50] Edgell, S *The SAGE Handbook of the Sociology of Work and Employment* (Sage publication 2015).

[51] Edgell, S *The Sociology of Work*: *Continuity and Change in Paid and Unpaid Work* (Sage publication, 2020).

[52] Le Roux,R 'The Regulation of Work: Whither the Contract of Employment ?: An Analysis of the Suitability of the Contract of Employment to Regulate the Different Forms of Labour Market Participation by Individual Workers'(Doctoral dissertations,University of Cape Town 2008).

[53] Du Plessis, JV, *A Practical Guide to Labour Law* (LexisNexis 2019).

Not long ago, Western and European tradesmen brought with them knowledge of protective labour legislation, trade unions, safe working conditions, and basic worker protection, according to the article. They inspired local workers to band up and seek better working conditions collectively. This increased worker-employer friction resulted in large-scale, violent riots on the Witwatersrand in the early 1920s, prompting the enactment of the Industrial Conciliation Act of 1924. This Act was later superseded by the Industrial Conciliation Act of 1937 and the Industrial Conciliation Act of 1956.[54]

According to Du Plessis, labour law is divided into individual and collective labour laws. Historically, the employment contract was viewed as a type of lease and, in keeping with the individualistic nature of Roman-Dutch law, addressed only the individual components of the employment relationship. With the exception of civil service employment, this connection lay fully within the private sphere and was governed by the common law principles governing contracts".[55]

The employment contract is the foundation of the relationship between the employer and employee, but the principles of contract law only apply to a limited extent to this relationship. In terms of the employment relationship, labour law is protective and softens the idea of contract law. In an employment contract, the employer has a stronger bargaining position than the employee and can, to a significant degree, dictate the terms and conditions of the employment contract. Finally, the employer has the weapon of dismissal at its disposal. [56]

2.3 Contractual aspect of the no work, no pay principle

[54] Du Plessis, JV *A Practical Guide to Labour Law* (LexisNexis 2019).
[55] Du Plessis, JV *A Practical Guide to Labour Law (*LexisNexis *2019).*
[56] McGregor, M *Labour Law Rules* (Siber Ink 2017).

A contract is an agreement between two or more parties with the serious intention of creating a legally enforceable obligation.[57] Thus, in simple terms, a contract may be defined as an agreement between two or more persons intending to create a legal obligation.[58] Most contracts entail reciprocity, in that one party's performance is promised in exchange for the other party's performance.[59]

An obligation is a legal bond between two or more persons, obliging one (the debtor) to give, do, or refrain from doing something to or for the other (the creditor). As such, an obligation comprises a right and a corresponding duty: the right of the creditor to demand a performance by the debtor and the debtor's duty to make that performance.[60]The contract of employment is founded on the agreement and the law of contract in so far as it regulates the formation of the agreement. In such a contract, all parties have equal rights; neither party has more rights against the other party as the employment relationship is reciprocal.

Employment contracts play a significant role in developing the principle of no work, no pay. They outline the terms and conditions of employment, including the rate of pay, hours of work, and the responsibilities and duties of both the employer and the employee.[61] Employees who fail to meet those terms may not be entitled to receive their remuneration.[62] The opposite is also true: where the employer fails to pay its employees, the employees can withhold their services. The principle of no work, no pay is fundamental in employer-employee relationships: an employee can only be paid for work that has been done, and if an employee fails to work, they are not entitled to any payment. This principle is rooted in the notion of fair exchange, which

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57 Grogan, J *Workplace Law* (Juta 2009).
58 Grogan, J *Workplace Law* (Juta 2009).
59 Hutchison, D *The Law of Contract* (Oxford 2017).
60 Mbhele, T.V 'The South African Law of Contract as Influenced by the National Credit Act 34 of 2005: An Evaluation'(LLM Thesis, University of Pretoria 2014).
61 Grogan J *Workplace Law* (Juta 2009).
62 Van Niekerk, A *Law@Work* (LexisNexis 2019),

states that if an employee does not work, the employer has no obligation to pay them.

The South African contract law is a modernised version of the Roman-Dutch law of contract,[63] though the common law principles are today supplemented by several important statutes,[64] and like all of the country's laws, it is subject to the country's Constitution. In accordance with this understanding, no rule, no principle, and no doctrine of contractual law can be said to be valid and enforceable unless they are consistent with the Bill of Rights and the normative framework of the country's Constitution.

In an attempt to ensure that there is compliance with this principle, the Constitution has enjoined the courts with the authority to enforce compliance with this principle by empowering them to ensure that there is consistency by developing the common law where necessary and when developing the common law, they must promote the spirit, purport, and objects of the Bill of Rights.[65]

The point of departure in South African law is that contracts must be honoured (*pacta sunt servanda*) and, if necessary, enforced by the courts.[66] In the case of *Everfresh Market Virginia* (Pty) Ltd *v Shoprite Checkers* (Pty) Ltd, the court described *pacta sunt servanda* as "the old-aged contractual doctrine that agreements solemnly made should be honoured and enforced *(pacta sunt servanda).*[67] In *Barkhuizen* the court explained that "*pacta sunt servanda* is a profoundly moral principle on which the coherence of any society relies.[68] In principle, a party is entitled to have their contract enforced according to its terms.

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63 Hutchison, D *The Law of Contract* (Oxford 2017).
64 Hutchison, D *The Law of Contract* (Oxford 2017).
65 Hutchison, D *The Law of Contract* (Oxford 2017).
66 Pillay, M.M 'The Impact of *pacta sunt servanda* in the Law of Contract' (LLM Thesis, University of Pretoria 2015).
67 *Everfresh Market* Virginia (Pty) Ltd *v Shoprite Checkers* (Pty) Ltd (2012) (1) SA 256 (CC).
68 *Barkhuizen v. Napier (*2007) (5) SA 323 (CC).

Like any other contract, the employment contract must comply with the basic requirements for a valid contract. In addition to the basic requirements for any contract to be valid, the essential elements or requirements of the contract of employment need to be observed. These requirements, or *essentialia,* concern the parties' consensus as to the work the employee will have to perform and the remuneration payable by the employer.

There is a presumption that in any reciprocal contract, the common intention is that neither party shall be entitled to enforce performance unless that party has performed or is ready to perform. That is, the performance should take place simultaneously. Of course, where there is a clear indication that one party has to perform first, the other party will be entitled to claim performance before it has performed itself.

In terms of our common law, it is a general rule that parties to a contract must perform simultaneously unless the parties have agreed otherwise or (b) the *naturalia* of the contract in question dictates otherwise. [69] By virtue of employment contracts *naturalia*, it is a requirement that the employee performs first before the employer can be required to offer his counter-performance in terms of the employment contract. Hence, the employer is only obliged to pay the salary or wages at the end of the period. However,the parties are entitled to alter the sequence of performances indicated by the *naturalia* in their agreement.[70] Therefore, in terms of our common law, the sequence of performance will first be determined by the parties' intention to the contract and secondly by the *naturalia* of the contract if there is no specific agreement.[71]

2.3.1 Duties of employers and employees

[69] Hutchison, D *The Law of Contract* (Oxford 2017).
[70] Hutchison, D *The Law of Contract* (Oxford 2017).
[71] Hutchison, D *The Law of Contract* (Oxford 2017).

Employers are responsible for paying employees for their time during electricity outages. That should comply with the employment contract terms and applicable labour laws and regulations.[72] Under common law, employers are to provide a safe working environment, safe equipment and tools, and a safe method of work.[73] Employees are entrusted with a duty to ensure safe working conditions for their employees.[74] In the case of *City of Johannesburg v Swanepoel NO & others,* the court provided a measure of clarity on the extent of an employer's obligation to create a safe working environment for employees in accordance with the OHSA.[75]

In *Macdonald v General Motors South Africa (Pty) Ltd*[76], the court dealt with an employer's alleged failure to adequately protect a tank platform by providing railings in order to prevent accidents.[77] It was held that an employer would only be expected to guard against accidents that were likely to happen in the ordinary, common use of the machinery.

The provisions of the OHSA explicitly provide that employers are obliged to conduct their activities in such a manner as to reasonably ensure that they do not expose people other than their employees, who are directly affected by the employer's activities to any hazards to their health and safety.[78] Employees do have an obligation to promptly communicate with their employers about their availability and ability to work during electricity outages and must inform their employers about challenges that may hinder their productivity or work performance.[79] Employees then have the responsibility to comply with the working arrangements that are put in place by the employer and work according to the instructions and guidelines

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72 Van Niekerk, A *Law@Work* (LexisNexis 2019).
73 Tshoose, I. C 'Employer's Duty to Provide a Safe Working Environment: A South African Perspective' (2011) *Journal of International Commercial Law & Technology* 165.
74 Tenza, M 'Is the Employer Compelled to Provide Safe Working Conditions to Employees during a Violent Strike?'(2022) *Law*, *Democracy & Development* 256-285.
75 *City of Johannesburg v Swanepoel NO* & *Others* (2016) JOL 36406 (LC) 80.
76 *Macdonald v General Motors South Africa* Pty Ltd (1973) 1 SA 232.
77 *Macdonald v General Motors South Africa* Pty Ltd (1973) 1 SA 232.
78 Sections 8 and 9 of the Occupational Health and Safety Act 85 of 1993.
79 Van Niekerk, A Law@Work (LexisNexis 2019).

provided by their employers.[80] It is paramount that the employees make reasonable efforts to perform productive work during an outage, if feasible, and that means that they can perform their tasks even when they are offline or focus on the work that is not impacted by the lack of electricity.

As we know, with electricity outages, employees can come to work and thus allow employees to record the hours they have worked during the outage period, and by doing that, the employer will be able to calculate hours worked and compensate employees properly. Employees are responsible, in the event of their absence or inability to work, to inform their employers if they are unable to come to work due to sickness, personal reasons, or any other valid reason.[81]

2.3.2 Workplace policies and practices

In South African labour laws, workplace policies and practices have several factors that influence and play a significant role in the development of the principle of no work, no pay. Employers in South Africa have policies and procedures that outline acceptable conduct in the workplace and the consequences for violating these policies. Workplace policies and practices in South Africa have helped shape the development of the no work, no pay principle. While this concept may be controversial in some circles, it is recognised as a legitimate tool for promoting consistent attendance and ensuring that the workplace is not paying for work that has not been done.

The rate of absenteeism in South Africa increased each and every day, which historically influenced the development of the principle of no work, no pay, and that created a need for employers to implement mechanisms to incentivise employees to slow up for work consistently and no work, no pay is one of the most effective tools for doing so. [82] Employers introduce

[80] Van Niekerk, A *Law@Work* (LexisNexis 2019).
[81] Grogan J *Workplace Law* (Juta 2009) 50.
[82] Van Niekerk, A Law@Work (LexisNexis 2019).

workplace attendance policies that set clear expectations regarding punctuality and attendance.

Those policies outline what constitutes acceptable and unacceptable absences, including provisions for notifying management in advance or providing supporting documentation for sick leave. On the other hand, employers put in place leave policies to regulate different types of absences, such as annual, sick, and maternity/paternity leave. These policies outline the procedure for requesting time off, the maximum number of days allowed, and the consequences for not following the proper protocols when taking leave.

There are measures that employers take to address their employees' misconduct, including unauthorised absences. These procedures involve progressive steps, such as verbal warnings, written warnings, and suspension, before ultimately leading to termination in some cases. No work no pay may be triggered when an employee's absence results in disciplinary action, including withholding pay.

2.4 The international aspect of no work, no pay: ILO Standards

South Africa is an ILO member state that has ratified all of the International Labour Organisation's fundamental conventions and plays a vital role in ILO affairs.[83] As a member state, South Africa's national laws must be interpreted and applied to give effect to international laws.[84] Both the current LRA and the Constitution of the Republic of South Africa, respectively, provide that effect must be given to obligations incurred by the Republic as a member state of the ILO, and consideration must be given to international law when interpreting the Bill of Rights in the Constitution.[85]

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[83] Van Niekerk, A *Law@Work* (LexisNexis 2019).

[84] Sections 231, 232, and 233 of the Constitution.

[85] Section 39 of the Constitution reads together with Sections 232 and 233 of the Constitution, 1996.

The International Labour Organisation is the specialised agency of the United Nations that sets out international labour standards and promotes social justice and decent working conditions globally.[86] While the International Labour Organisation does not specifically address the concept of no work or pay, it has produced some agreements and guidelines related to wages and labour rights that can indirectly influence the principle's application. The ILO policies regarding remuneration are covered by three sets of international labour standards, supplemented by a few others not specifically dedicated to pay but that affect it.

The first standards of this kind adopted by the ILO were the Minimum Wage-Fixing Convention[87]and Recommendation No. 30, which apply to manufacturing and commerce. These were supplemented by the Minimum Wage-Fixing Convention (Agriculture)[88] and Recommendation No. 89, which apply virtually the same requirements to work in agriculture. In 1970, the ILO adopted the Minimum Wage-Fixing Convention No. 131 and Recommendation No. 135, with special reference to developing countries.

second major set of standards is the ILO Convention No. 95 on the Protection of Wages, which emphasises the need to protect workers' wages by providing regular payments, deductions only with the workers' consent, and protection against unlawful acts. This convention does not directly address the no work, no pay principle but emphasises the importance of ensuring that workers are paid for their work.[89]

The third major set of standards affecting pay in employment relationships are those on the prevention of discrimination in employment. The first to be adopted are the Equal Remuneration Convention (No. 100) and Recommendation (No. 90), 1951, which provide for the application of equal

[86] Zvidzayi, T 'Compliance with international standards on compensation for occupational injuries and diseases by Zimbabwe and South Africa' (LLM Thesis, University of the Western Cape 2015).
[87] 1928 (No. 26).
[88] 1951 (No. 99).
[89] ILO NORMLEX Information System on International Labour Standards (2013).

pay between men and women for work of equal value. Equally important in this area are the Discrimination (Employment and Occupation) Convention (No. 111) and Recommendation (No. 111), 1958, which promote the abolition of all discriminatory distinctions (based on race, religion, national extraction, political opinion, and gender) in providing equal opportunity and treatment in employment and occupation.

The final set of instruments that also affect pay are those governing freedom of association and the right to negotiation between employers and workers and their respective representatives and organisations with respect to pay and conditions of Minimum Wages and Low Pay: ILO Perspective 51 employment.[90]

It is important to note that the ILO instruments relating to minimum wage-fixing do not mandate the level of minimum wages as such, but rather the procedures for arriving at this level.[91] It is provided that “employers and workers concerned shall be associated in the operation of the machinery," implying that they must at least be consulted on the amount of the fixed minimum wages. Implicit is the underlying notion that, in the absence of satisfactory methods of pay determination, statutory intervention becomes a substitute for collective bargaining. Also implicit is the hope that, in time, adequate collective bargaining machinery will develop in most of the different economic sectors so that the statutory intervention can be withdrawn in these sectors.

Convention No. 131 and its accompanying Recommendation No. 135 are also more explicit in addressing the question of the level at which the minimum wages should be set. Article 3 of the Convention requires that the elements to be taken into consideration in determining the level of minimum wages shall, so far as possible and appropriate in relation to national

[90] Shaheed, Z ‘Minimum Wages and Low Pay: An ILO Perspective’ (1994) *International Journal of Manpower* 49-61.

[91] Shaheed, Z ‘Minimum wages and low pay: *An ILO Perspective’* (1994) *International Journal of Manpower* 49-61.

practice and needs, include: (a) the needs of the workers and their families, taking into account the general level of wages in the country, the cost of living, social security benefits, and the relative living standards of other social groups; and (b) economic factors, including the requirements of economic development, levels of productivity and the desirability of attaining and maintaining a high level of employment.[92]

The International Labour Organisation's standards related to working hours, such as the Hours of Work Convention No. 1 of 1919 and the Weekly Rest Convention No. 14 of 1921, aim to ensure reasonable working hours and rest periods for workers. These standards indirectly promote the notion that employees should be paid for the work they undertake within legal and agreed-upon working time limits. [93]

Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) are the principal instruments on freedom of association adopted by the ILO. In interpreting these principal instruments, it has been held that the right to negotiate freely with employers and their organisations with respect to wages and conditions of employment constitutes a basic aspect of freedom of association, and, consequently, trade unions should be able to exercise this right.[94]

ILO's Decent Work Agenda encompasses four strategic objectives: employment promotion, social protection, rights at work, and social dialogue, which indirectly support the principle of no work, no pay.[95] The principle can be seen as a way to ensure that workers are productive and fulfil their duties, aligning to promote employment.

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[92] Shaheed, Z 'Minimum Wages and Low Pay: An ILO Perspective' (1994) *International Journal of Manpower* 49-61.

[93] ILO NORMLEX Information System on International Labour Standards (2013).

[94] ILO NORMLEX Information System on International Labour Standards (2013).

[95] Cohen, T and Moodley, L 'Achieving" decent work" in South Africa?'(2012) *Potchefstroom Electronic Law Journal*.

2.5 The doctrine of no work, no pay in South Africa

The common law, constitution, and Labour legislation impact the employment relationship, even though the common law has a limited impact compared to the labour legislation. This is largely because the common law principles that used to be applicable to employment relations have been codified by means of statutes. Employers and employees have certain rights and corresponding duties flowing from the common law, and those duties are even covered in labour legislation like the LRA and BCEA.[96]Various factors have played a significant role in developing and sustaining the principle of 'no work, no pay' in South Africa. These factors are discussed below:

2.5.1 The constitution

Though the Constitution may seem silent on the principle of no work, no pay, Section 23 of the Constitution provides that everyone has the right to fair labour practice, which shows in a Labour Court matter *of Macsteel Service Centres SA (Pty)Ltd v NUMSA and Others*[97] that employees who have not rendered services due to unforeseen circumstances over which employers have no control are not entitled to remunerations thus employers have to apply for no work, no pay principles[98] and the Section goes furthermore by empowering employees and employers to join or form trade unions or employers' organisation. This is done with the view of engaging in collective bargaining, wherein the parties will be able to engage and agree more on the terms and conditions relating to their relationship.

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[96] Grogan,J *Workplace Law* (Juta 2009) 47.

[97] *MacSteel Services Centres SA (Pty) Ltd v NUMSA and Others (2021) 12 BLLR 1235 (LC).*

[98] *Macsteel Services Centres SA* (Pty) Ltd v *NUMSA and Other* (2021) 12 BLLR 1235(LC).

It is my contention that the right to form or join a trade union (freedom of association) with the view of being able to engage the employer or the employer's organisation in the collective bargaining process empowers the employees through their trade union to negotiate freely with employers and their organisations with respect to wages and conditions of employment, which constitutes a basic aspect of freedom of association.

Sections 231 to 233 of the Constitution recognise international law as the foundation of democracy.[99] By virtue of being a member state of the ILO and having ratified all of the fundamental conventions, the country is bound to comply with the policies and guidelines laid out by the ILO. Henceforth, the abovementioned policies and/or guidelines are binding on the country. Grogan gives meaning to this concept of collective bargaining by stating, "Collective bargaining is the process by which employers and organised groups of employees seek to reconcile their conflicting goals through mutual accommodation.

The dynamic of collective bargaining is demand and concession; its objective is agreement. Unlike mere consultation, therefore, collective bargaining assumes a willingness on each side not only to listen and consider the representations of the other but also to abandon fixed positions where possible to find common ground."

These agreements are pivotal in enhancing collective bargaining and addressing issues such as work conditions, wages, and leave. Through the collective bargaining process, parties may agree to incorporate the principle of no work, no pay as a measure to ensure fairness and incentive productivity. In the context of the no work, no pay principle, a collective bargaining agreement may outline conditions under which employees will not be paid for work not performed. This could include unauthorised absences, excessive sick leave, or participation in illegal strikes. The

[99] Van Niekerk, A *Law@Work* (LexisNexis 2019) 23.

agreement would define the circumstances, procedures, and consequences for non-payment of wages.

There are provisions in the Collective bargaining agreements in relation to absenteeism and the consequences of not showing up for work. Collective agreements are covered under the LRA. The LRA provides guidelines on negotiating and concluding collective agreements and specifies the rights and obligations of the parties involved.

Collective agreements must generally align with the provisions of the BCEA and other applicable labour legislation. These agreements provide the legal framework for enforcing the principle in the event of disputes between employers and employees. These agreements may establish specific rules around when an employer can withhold pay, and they can also provide for alternative forms of disciplinary action.

Collective bargaining remains an important tool for parties in the workplace. In South Africa, this tool is essential to the functioning of a particular workplace, the conditions of employment, and the avoidance of strike action or lockout. Conflict between capital and labour is inevitable;[100] however, the workplace will be more pleasant when parties engage each other constantly on issues affecting the employment relationship.

2.5.2 Common law

It is worth mentioning that this is merely an expansion of the principles of our contractual law, which were briefly stated in paragraph 2.3 above, as our law of contract emanates from our common law.

Most contracts entail reciprocity in nature, in the sense that one party's performance is promised in exchange for the other party's performance. A contract of employment, like many contracts, may also be defined as a

[100] Vosloo, C 'Extreme Apartheid: The South African System of Migrant Labour and its Hostels (2020) Image and Text, 1-33.

reciprocal contract because it requires the rendering of labour or services by the employee to his employer for remuneration while the employee subjects himself to the supervision and control of the employer.[101] The employee consequently sacrifices his freedom to some extent by offering his services to the employer and by subjecting himself to the authority of his employer.[102] The employer is at liberty to decide how the employee's services/labour is to be applied and utilised for his benefit.

The common law principles applicable to employment contracts place the individual employee in a rather weak position compared to his employer and offer little to no protection to the employee. This is because the common law emphasises the principle of freedom of contract, in other words, that the employee and/or employer are free to agree on anything that is legally possible. Thus, the advent of labour law legislation has attempted, to a certain extent, to protect these employees by providing them with the basic conditions of employment and ensuring that employers do not arbitrarily exercise their position of power. For example, under common law, no principle prescribed maximum working hours or whether or not there was anything such as paid leave.

In terms of the common law, the principle of no work, no pay prevailed above most of the applicable principles or rules. Consequently, it was important to have labour legislation that provided better protection for employees to counter this kind of asymmetry in employment contracts by creating, among other things, minimum conditions of employment that the parties may not ignore, even if both are perfectly willing to do so. [103] Hence, employment contracts are now subject to the labour legislation currently operational in the country. However, the common law principles are still applicable to a certain extent, namely when legal provisions have greatly augmented them.

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[101] Du Plessis, JV *A Practical Guide to Labour Law* (LexisNexis 2019).
[102] Du Plessis, JV *A Practical Guide to Labour Law* (LexisNexis 2019).
[103] McGregor, M *Labour Law Rules* (Siber Ink 2017).

Common law principles will prevail when labour legislation is silent on a particular issue. [104]

2.5.3 Statutory law

Two main acts regulate South Africa's employment relationships: the Basic Conditions of Employment[105] and the Labour Relations.[106] These statutes have also contributed to the development of the principle of no work, no pay in that the law protects both the employer and employee and ensures that there is fairness and equality in the workplace. South African labour laws protect workers, but to maintain fair and productive workplace relations, they also hold employees accountable for their actions. In this context, the principle of no work, no pay has been developed to ensure that employees fulfil their contractual obligations in exchange for pay.

Labour laws outline the minimum standards that must be met in terms of pay, hours of work, and other conditions of employment and provide penalties or fines for breach of these standards, including non-payment of wages for periods of unauthorised absence. There are labour laws that regulate employment relationships to ensure that each party adheres to their contractual obligations.[107] In such a situation, parties must be required to discharge their respective obligations. The initial codification of the principle can be found in the Industrial Conciliation Act of 1924, which established the framework for labour relations in South Africa.[108] The Act recognised the reciprocal nature of the employment relationship, with obligations on both the employer and employee.

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[104] McGregor, M *Labour Law Rules* (Siber Ink 2017).
[105] Basic Conditions of Employment Act 75 of 1997.
[106] Labour Relations Act 66 of 1995.
[107] Levy, A *Labour Law in Practice*: *A* Guide *for South African Employers (*Penguin Random House South Africa, 2021).
[108] Suchard, H 'Labour Relations in South Africa: Retrospect and Prospect' (1982) *Africa Insight* 89-97.

The principle is enshrined in BCEA, 1997, which sets out the minimum standards for employment contracts, including provisions for remuneration, hours of work, and leave.[109] It explicitly states that an employee is entitled to be paid only for the time worked or when leave is authorised. However, some circumstances prevent employees from working, such as the provision of sick leave, not due to lawful industrial action, inclement weather, or electricity outages, wherein the principle of no work, no pay is not applicable.

Employment relationships are regulated by national and international laws to achieve fairness, and this fact is confirmed in the preamble of the Constitution of the ILO, which states that it is imperative to regulate working conditions to address the injustice in labour conditions. Employers are responsible for paying employees for the time they have worked during electricity outages, which should comply with the employment contract terms and comply with the applicable labour laws and regulations.[110]

2.6 Conclusion

In conclusion, the concept of work is an evolving concept that evolves with time. What was known as work during the 19th century is different from the current definition of what we regard as work today. As the concept continues to evolve, one essential element of the concept still remains at the core of the principle, namely the principle of no work, no pay. The principle of no work, no pay essentially entails that employees will not receive wages for the time they do not work. This concept was handed down to our legal system by developing the concept of work.

Various factors have influenced the development and subsistence of the concept of no work, no pay in the country. But the most important factors

[109] Sections 6, 19 read together with 28 of the Basic Conditions of Employment Act 75 of 1997.

[110] Van Niekerk, A *Law@Work* (LexisNexis 2019).

are the international policies of the ILO, which are binding on South Africa as the country is a member state of the organisation, and the country's common law, as both of these two considerations have caused the national legislation to incorporate the principle of no work, no pay into our country's labour relations. However, the ILO does directly recognise that employees have a right to be remunerated for the work that they have rendered.

The right to freedom of association in the workplace is at the core of the ILO's policies. At the core of this right is the ideal that, if granted this opportunity/right, workers will organise to advance their rights. Included amongst this right is the right to be remunerated for the work done by the employees. Henceforth, national legislation has been promulgated to give effect to the ILO's policies and guidelines, as the country is bound by the policies of the ILO by virtue of having ratified them.

In conclusion, the concept of work is an evolving concept that evolves with time. Various factors have influenced the development and subsistence of the concept of no work, no pay in the country. But the most important factors are the international policies of the ILO and the country's common law, as both of these two considerations have caused the national legislation to incorporate the principle of no work, no pay into our country's labour relations.

CHAPTER 3: THE IMPACT OF ELECTRICITY OUTAGES ON THE PRINCIPLE OF NO WORK, NO PAY

3.1 Introduction

This chapter investigates the current jurisprudence relating to the no work, no pay principle in fault and non-fault situations wherein the employer has applied the principle. A no-fault situation is where the employee does not work because of no fault of his or her own. Yet, the employer decides not to pay the employee, given that they had not worked for those hours, even though it was not due to either the employee or the employer's conduct. A fault-based no work, no pay is a common one. The employee does not do work because of his fault. The load shedding induced no work; no pay is an example where the employee does not work because of no fault of her own. This chapter will focus on deriving principles of no work, no pay from unlawful strikes jurisprudence. The chapter will further focus on no work, no pay in a no-fault situation, the case of COVID-19 and no work, no pay in a no-fault and load shedding.

3.2 Deriving principles of no work, no pay from unlawful strikes jurisprudence

The principle of no work, no pay has found much attention in South Africa, particularly in the context of labour relations strikes. [111] While the situation of unlawful strikes is mostly because of the deliberate decision of the employees, it can provide insight into situations where the employee does not work because of no fault of her own. As a matter of the general tenets of employment relationships, employees are compensated for services rendered.[112] Consequently, employers are not required to pay employees

[111] Van Niekerk, A Law@Work (LexisNexis 2019).
[112] Section 67(3) of the Labour Relations Act, 1996.

who engage in the unlawful strike. The freedom of strike is enshrined in the Constitution of the Republic of South Africa, 1996 (the Constitution).[113] The right to strike is vital to preserving workers' rights and interests not only under domestic or national laws but also under international law. The right to strike is a fundamental social right and one of the labour rights recognised by Section 23(2) of the Constitution. However, it is not absolute.

The Labour Relations Act governs labour-related issues such as the right to strike, consequences for participating in an unlawful strike by employees, and protection granted to those who participate in a protected strike within the workplace.[114] Section 64(1) of the LRA gives effect to Section 23(2)(c) of the Constitution, as both provisions afford the employee the right to strike, and we know that the right is afforded to employees only, not to any other persons.[115]

The LRA does not impose criminal sanctions on strikers who do not comply with its provisions; instead, it protects strikers from dismissal and civil action if they comply with the requirements of the statute and deprives them of protection (i.e., from disciplinary action or dismissal) if they do not.[116] As a result, there is a distinction between 'protected' and 'unprotected' strikes and protest action – those in compliance with the statutory provisions are protected, while those who do not comply are not.[117] Strikes are defined in the Labour Relations Act as:

> "The partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed

[113] See ILO Conventions 87 and 98.
[114] Section 23(2)(c) of the Republic of South Africa Constitution, 1996.
[115] Botha, M.M 'Responsible Unionism during Collective Bargaining and Industrial Action: Are We Ready Yet?' (2015) *De Jure Law Journal* 328-350.
[116] Masombuka, S. M 'Exploring Legal Alternatives to Remedy Problems Associated with Prolonged and Lengthy Strikes in South Africa' (Doctoral dissertation, North-West University 2015).
[117] Grogan, J. *Workplace Law* (Juta 2009).

by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to work in this definition includes overtime work, whether it is voluntary or compulsory".[118]

Hence, a work stoppage must meet at least certain requirements to be considered a strike: there must be a stoppage of work, it must be by more than one employee acting in concert, it must be to remedy a grievance or resolve a dispute, and the issue in dispute must concern 'a matter of mutual interest between employer and employee'[119].

The employment relationship is a reciprocal one between the employer and the employee. The employer undertakes to provide work and remuneration, and the employee tenders services in terms of the employment contract. If either party breaches the contract by not tendering their performance in terms of the contract, the non-breaching party cannot be compelled to tender their counterperformance. This is in terms of the *exception, non adempleti contractus.*[120] In terms of this principle of the law of contract, a party to a contract of a reciprocal nature can raise this defence if sued under the contract when the claimant has not performed.[121]

The LRA guarantees the right to strike, and once a strike attains a protected status, it does have several legal consequences that flow from such status,

[118] Section 213 of the Labour Relations Act, 1995.
[119] Makhakhe, N 'The Role of Strike Action in Collective Bargaining with more emphasis on South African Labour Relations' (Doctoral dissertation, North-West University 2005).
[120] Coovadia, M 'The Effect of the Principle of Reciprocity on the exceptio non adimpleti contractus in Light of the Constitution: A South African Perspective' (LLM Thesis, University of Johannesburg 2018).
[121] Hutchison, A 'Reciprocity in Contract Law' (2013) *Stellenbosch Law Review* 3-30.

such as the no work, no pay principle that applies during a protected strike.[122]

Everybody participating in a strike must fall under the definition of employee in Section 213 of the LRA. Employees participating in a protected strike are protected if they exercise compliance with the LRA from the strike's commencement to the end. In the matter of *Transport and Allied Workers Union of South Africa obo Ngedle v Unitrans Fuel and Chemical,*[123] the Constitutional Court stated that any protected strike that is being conducted in a manner that exceeds the statutory boundaries of the LRA turns into an unprotected strike, and strikers engaged in such a strike will therefore not be protected in terms of Section 67 of the LRA.[124]

The employer has a right to dismiss employees who participate in a strike that does not conform to the terms of Section 68(5) of the Labour Relations Act 1 (LRA).[125] The Labour Appeal Court (LAC) confirmed in *National Union of Metalworkers of South Africa (NUMSA) v. CBI Electric African Cables,*[126] that the illegality of the strike is not “a magic wand which, when raised, renders the dismissal of strikers fair." [127] As a result, it was noted that the determination of the substantive fairness of a dismissal pursuant to a strike must be undertaken in two stages: firstly, in terms of item 6 of the Code of Good Practice: Dismissal, Schedule 8 of the LRA (Code), where a strike-related inquiry takes place, and secondly, in accordance with item 6 of item 75 of the Code, where the inquiry into the misconduct per se takes place.

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[122] Lephoto, M ‘The Use of Replacement Labour during Strike Action in South Africa and Canada: A Legal Analysis’ (Doctoral dissertation, North-West University 2019).

[123] *Transport and Allied Workers Union of South Africa obo Ngedle V Unitrans Fuel and Chemical (Pty) Ltd.* 2016 37 ILJ 2485 (CC).

[124] *Transport and Allied Workers Union of South Africa obo Ngedle V Unitrans Fuel and Chemical (Pty) Ltd.* 2016 37 ILJ 2485 (CC).

[125] Grogan, J *Workplace Law* (Juta 2009).

[126] *National Union of Metalworkers of South Africa (NUMSA) v CBI Electric African Cables (*2009) JOL 23228 (MEIBC).

[127] *National Union of Metalworkers of South Africa (NUMSA) v CBI Electric African Cables (*2009) JOL 23228 (MEIBC).

Although the law provides employees with the right to strike both in terms of the Constitution and in terms of the LRA, the LRA does also recognise the employer's rights in this circumstance, namely:

> "Participation in a strike that does not comply with the provisions of this chapter or conduct in contemplation or in furtherance of that strike may constitute a fair reason for dismissal. In determining whether or not the dismissal is fair, the Code of Good Practice: Dismissal in Schedule 8 must be taken into account".[128]"

The fact that employees have embarked on an unprotected strike means that they have unilaterally breached their contract in that they withheld their labour without any proper justification in law.[129] Hence, the law will then intervene to regulate what transpires from the moment the employees embark on their unprotected strikes in the sense that from that moment in time, the employer is entitled to not comply with the terms of the contract of employment since the employees breached the contract of employment. In other words, the employer is entitled to apply the principle of no work, no pay, until it has decided whether or not to dismiss those employees. Depending on the circumstances of each individual case, the employees' violation of the contract would be regarded as having severed the relationship between the employer and employees, to the extent that the contract is cancelled.[130]

Even if the strike action is a go-slow, the no work, no pay principles apply since employees are not entitled to partial remuneration because partial performance is a breach of contract. The court grounded this reasoning on

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[128] Item 6 of Schedule 8 of the Labour Relations Act, 1995.

[129] Van Heerden, A 'Unprotected Strike Action in South Africa' (LLM Thesis, University of Cape Town 2019).

[130] Raligilia, K. H & Bokaba, K. M 'Breach of the Implied Duty to Preserve Mutual Trust and Confidence in an Employment Relationship: A Case Study Of Moyo v Old Mutual Limited' (22791/2019) ZAGPJHC 229 (30 July 2019) (2021) *Obiter* 714-719.

the exception of *non adempleti contractus* in *3M SA Pty Ltd v SACCAWU & others.*[131] The court based this principle on the *exception non adempleti contractus*. In the abovementioned case, the court was tasked with an appeal against the order that the appellant pay second to further respondents' remuneration for a stipulated period in which they were locked out of the company's premises. The lockout was held to be an unprotected one. A cross-appeal was lodged against the court's refusal to order payment of remuneration for an additional period on the ground that the claim in respect of that period had been prescribed. In the court a quo, both the appeal and cross-appeal had to fail, and with regard to the main appeal, it was noted that as the workers had tendered their services for the period in question, they were entitled to be paid.

In this Court, the appellant has been substantially successful because the court reduced the period in respect of which remuneration is to be paid to the employees from 14 days to 9 days, and it has successfully resisted the cross-appeal that would have had such remuneration increased by that due in respect of an additional nine days. In these circumstances, it seems that the appellant is entitled to the costs of the appeal. During the appeal, an appellant's appeal was successful, the order of the court a quo was amended, the cross-appeal was also dismissed, and further, the respondents were ordered to pay the appellant's costs of the appeal and the cross-appeal jointly and severally, the one paying, the others to be absolved.

If a party to a reciprocal contract is sued under the contract and the claimant fails to comply, a party might invoke this defence. The employee had engaged in a go-slow over a wage dispute. After three days, the employer notified strikers that if they were unwilling to provide their services in full, they would not be compelled to tender them at all. Three weeks later, the

[131] *3M SA Pty Ltd v SACCAWU & others* (2001) 22 ILJ 1092 (LAC).

workers tendered their services unconditionally, but the company continued to exclude them from the workplace until the wage dispute was resolved a fortnight after that. Workers claimed that they were entitled to be paid from the moment they decided to return to work. The court held that the employer was entitled to reject the workers' tender of service and withhold their wages until they abandoned the go-slow.[132] If there is a concerted withholding of labour, and if the employees later return to work by "suspending" their strike, they are conveying that they do not waive the unconditional right to strike which previously accrued to them, as stated in the *National Union of Metalworkers of South Africa v Trenstar (Pty) Ltd.*[133]

There is no strike as defined during the suspension period, only an unqualified right to strike. If employees stop their strike and the employer accepts their tender of services, the employer cannot refuse to pay them because they are still on strike. In coming to this conclusion, the courts' reasoning seems to be based on the application of Section 67(3) and the reciprocal nature of the employment contract, in that once the employer accepts the employee's services, regardless of whether or not they might have suspended their strike or that the strike has ended, he has to tender his performance in terms of the contract, failure of which might make him the one who is breaching the contract.

A protected strike results in a situation wherein the employees are temporarily relieved of their obligation to render their services in terms of the employment contracts and the employer is temporarily relieved of its obligation to remunerate employees. Because employees have the right to strike, this right is limited to the extent that it may not be exercised beyond the bounds of the law and the parameters the employer and employee may consent to when engaging in a strike. It is obvious that participating in an

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[132] Grogan, J *Workplace Law* (Juta 2009) 391.

[133] *National Union of Metalworkers of South Africa v Trenstar (Pty) Ltd. (*2023) JOL 58654 (CC).

unlawful strike can have severe consequences. In some cases, employers might impose harsh sanctions, such as applying the principle of no work, no pay, which is enshrined in Section 67(3) of the LRA, which states that an employer is not required to compensate an employee for services that the employee does not provide during the protected strike. The same is true during an unprotected strike. [134]

An unlawful strike denotes a situation wherein the strike does not comply with the provisions of the Labour laws, such as proper notice that shows in the case of the *Transport & General Workers Union & others v De la Rey's Transport (Pty) Ltd*[135] the strikers breached a collective agreement and gave the company no warning whatsoever of their action and court held that they were fairly dismissed, another related case to the concept of proper notice of strike to the employer is the one for Coin Security Group (Pty) Ltd.[136] The court held that the union official knew the strike was unprotected. Even though the strikers might not have known that the strike was unprotected, they stood to gain collectively from it and could not claim to be absolved because the union's gamble had failed.

It is also important to note that participation in unlawful strikes breaches the contract. When employees engage in an unlawful act, employment is considered to be suspended, which means that employees are not fulfilling their obligations, and as such, the employers are not obliged to provide wages for that period.[137]Employers have a right to seek remedies against employees who participated in an unlawful or unprotected strike, which may include the deduction of wages for the strike period. Such deductions must

[134] Odeku, K. O 'An Overview of the Right to Strike Phenomenon in South Africa' (2014) *Mediterranean Journal of Social Sciences* 695.
[135] *National Union of Metalworkers of South Africa v. Trenstar (Pty) Ltd* (2023) JOL 58654 (CC).
[136] *Coin Security Group (Pty) Ltd. v. Adams (*2000) 21 ILJ 924 (LAC).
[137] Grogan, J *Workplace Law* (Juta 2009) 390.

be proportional to the duration of the strike.[138] Hence, it may happen that the employer should not deduct a full day's wages for a few hours of absence but rather calculate the deduction based on the actual time not worked. This is because the employer is entitled to apply Section 67(3) of the LRA to refuse to pay the striking employees for their strike.[139]

In *Nkutha and Others v Fuel Gas Installations (Pty) Ltd*,[140] Basson J stated the learned judge said: "In the event, the refusal of employees to work in response to a failure on the part of the employer to perform its obligations, such as paying the employees for services rendered, is a lawful refusal in that it does not amount to a breach of contract under common law." [141] In other words, the employees are legally entitled to refuse to carry out their side of the employment contract. In fact, the employer is breaching the employment contract by unlawfully failing to perform its reciprocal obligation(s).

Given these legal foundations, the lawful entitlement of employees to refuse to work must, in my judgment, be distinguished from a strike, where the concerted refusal to work by employees' amounts to an unlawful breach of contract under common law. In fact, a strike that amounts to an unlawful breach of contract (under common law) can be labelled as misconduct for the dismissal of the strikers involved. [142] Although there is an overlap between individual and collective labour law, the division is justified conceptually and in principle. The rules of individual labour law are concerned with the rights and duties of individual parties to the employment relationship. On the other hand, collective labour law regulations recognise that in modern industrial society, employers and employees represent

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[138] Section 34(1) (b) of the Basic Conditions of Employment Act, 1997.
[139] Section 67(3) of the Labour Relations Act, 1996.
[140] *Nkutha and others v Fuel Gas Installations (Pty) Ltd* (1999) JOL 5848 (LC) 165.
[141] *Nkutha and others v Fuel Gas Installations (Pty) Ltd* (1999) JOL 5848 (LC) 165.
[142] Menzi, D. M., 'A Critical Analysis of the Law on Strikes in South Africa' (LLM Thesis, University of KwaZulu-Natal 2014).

different and conflicting interest groups that seek to promote and preserve their interests. [143]

Then, it becomes clear that only those employees have genuinely gone on strike, regardless of whether it is protected. As a result, employees who still tender their performance during a strike will be entitled to receive their pay as if there were no strike. This indicates that the law is attempting to strike a balance by exempting those who choose not to participate in the strike, regardless of their union memberships, from being clothed with the same consequences as those participating in the strike. Thus, by selectively punishing only those striking employees, although the purpose of any strike is to try to get the employer to yield to the demands of the employees, the employer uses this principle of no work, no pay as one of his bargaining chips. This exemplifies the most practical application of the country's no work, no pay philosophy. This is even though there is still an unexplored section of the principle, such as the one described above, which is the subject matter of this study.

3.3 No work, no pay in a no-fault situation: The case of COVID-19

South Africa has been one of the countries affected most adversely by the Covid-19 pandemic.[144] Like most governments worldwide, South Africa implemented measures such as national lockdowns, quarantines, and social distancing to establish the essential health infrastructure to delay and minimise the spread of the virus.[145] The adopted restrictions caused the closure of businesses, and many employees could not perform their normal jobs. South Africa's initial lockdown, which began on March 26, 2020, and

[143] Grogan,J *Workplace Law (*Juta 2009).

[144] Mbunge, E 'Effects of COVID-19 in the South African Health System and Society: An Explanatory Study, Diabetes & Metabolic Syndrome' (2020) *Clinical Research & Reviews* 1809-1814.

[145] Moonasar Pillay,A 'COVID -19: Lessons and Experience from South Africa's First Surge' (2021) *BMJ Global Health*.

lasted for five weeks, was relatively stringent by international standards, making no allowance for non-essential activities outside the home. Then, a phased easing of restrictions was introduced at five levels. [146] COVID-19 has an impact on the employment relationship between employers and employees because employees were forced to physically not come to work. [147] The law requires that if an employee is not at work and their absence is occasioned by something other than taking any form of leave available to those employees, the employer is not entitled to remunerate employees.

The principle of no work, no pay is a part of our labour law and common law and is rooted in one of the core principles of the employment relationship, which is that an employee has an obligation to place his or her services at the employer's disposal and the employer has an obligation to remunerate the employee for such services. When an employee elects not to tender any of their services to an employer without a valid reason, including but not limited to sick leave, annual leave, maternity leave, or family responsibility leave, the employer must remunerate the employee. After all, what would the employer be remunerating the employee for if the employee had not offered their services to the employer? This is compatible with the *exception non adimpleti contractus* defence in terms of the law of contracts. [148]

This approach becomes difficult to navigate when the employee is not at work and cannot render their services. However, the employee's non-attendance is due to circumstances beyond the employee's control. There is a common law argument that no work, no pay will only apply where an employee has elected not to render their services to an employer and that by virtue of the employment agreement, written or otherwise, the employer

[146] Zungu, S. H 'Coronavirus in South African Workplaces: the Safety, Remuneration, and Retrenchment of Employees during the Lockdown' (LLM Thesis, University of KwaZulu-Natal 2020).

[147] Ndlovu, L., & Tshoose, C. I COVID-19 and Employment Law in South Africa: Comparative Perspectives on Selected Themes (2021) *South African Mercantile Law Journal* 25-55.

[148] Hutchison, A Reciprocity in Contract Law (2013) *Stellenbosch Law Review* 3-30.

is still obligated to remunerate the employee. Though this argument is hard to monitor and frequently places additional strain on employers, the question of whether the employee genuinely elected to stay away from work or was forced to stay away is a conundrum in and of itself.

The question is whether employees are legally entitled to be paid when they have been absent from work for reasons beyond their control and in circumstances where they are simply prevented from physically reporting for duty, such as was the case with the COVID-19 global pandemic and whether such non-appearance or not working as a result of unforeseen circumstances on both the employer and employees' part would constitute a breach of contract of employment.

The principle of reciprocity applies in contracts of employment; a failure by one party to perform his or her obligations entitles the other party to withhold their counter-performance (*exception non adimpleti contractus),* and the principle of no work, no pay is confirmed by Section 67(3) of the LRA when it states that an employer is not legally obliged to remunerate an employee for services that the employee does not render.

In Macsteel Service Centres SA (Pty) Ltd v NUMSA and others,[149]like other businesses during the nationwide lockdown, which commenced at midnight on March 26, 2020, and as the applicant is not an essential service, it ceased all operations as of March 27, 2020. This caused a serious economic blow for the applicant, as it suffered a total loss of business and turnover. During the initial period of the lockdown, the applicant placed all its employees on special leave and paid the employees their full salaries and benefits for March and April 2020. The applicant did not require its employees to take their annual leave during this period, and their leave

[149] *Macsteel Service Centres SA (Pty) Ltd v NUMSA and Others* [2020] JOL 47372 (LC).

credits remain intact, nor did the applicant apply the principle of no work, no pay.

The applicant's case is that it did not anticipate that the three-week lockdown period would be extended, and when that happened, it sent a communication to its employees on April 16, 2020. The same communication was sent to the first respondent (NUMSA) on April 17, 2020. In the said communication, the applicant indicated that the COVID-19 epidemic had a devastating impact. The applicant suffered a total loss of business and turnover and would suffer substantial losses in 2020. The applicant stated that its cash reserves and monthly cash flow must be managed carefully, as the applicant expected a substantial cash shortfall at the end of May 2020.

As a result, the Applicant announced emergency measures that would come into effect on May 1, 2020, which include that all employees will be required to take a 20% reduction in salary, initially for three months (May, June and July 2020), and this will be reviewed on an ongoing basis, Commission earners will be required to take a 20% reduction on their basic pay, initially for three months (May, June and July 2020) and this will be reviewed on an ongoing basis. The applicant said that they will not be in a position to pay any salary increases to employees in July 2020; no salary increases will be awarded to any employee who is promoted for the remainder of 2020, and acting allowances will be paid to those qualifying individuals where applicable, but they will be required to take a 20% reduction in salary, initially for three months (May, June, and July 2020), and this will be reviewed on an ongoing basis.

The applicant further stated that the company would not be in a position to pay any bonuses/incentives to non-scheduled employees for the remainder of 2020, and this will be reviewed on an ongoing basis, and that the company reserved its rights in relation to the MEIBC's Exemption Policy with

regard to the leave enhancement pay in relation to scheduled employees as the applicant will not be able to afford the December payment. The employer promised to continue applying TERS on behalf of the employees.

On May 21, 2020, NUMSA addressed a letter to the applicant stating that the applicant's unilateral decision to implement a 20% salary reduction, notwithstanding the fact that NUMSA and other employees objected, was unlawful. NUMSA referred a dispute to the MEIBC, and the referral was served to the applicant on May 25, 2020. The nature of the dispute is classified as a 'unilateral change to terms and conditions of employment', and the outcome required is for the *status quo* to remain with respect to all the terms and conditions of employment. The court had to consider the applicability of the principle of no work, no pay, and directed as follows:

> "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".

It can be accepted that the court's ruling, in so far as it concludes that the employees who rendered no service are not entitled to remuneration, is correct. However, given that the court did not expand further as to why it concluded that the principle of no work, no pay is applicable to the extent that no qualification can be made on the principle is wanting, in light of the fact that the principle does not render all other laws obsolete. Ironically, most public servants during the COVID-19 global pandemic were not working, yet they still received their salaries. The reason why that was the position is because it is understood that the employees were in a position to tender their services to the employer, and the employer decided that

these employees should not come to work until further notice. Had the employer given instructions that the employees should come to work, the employees would have tendered their services in terms of their employment contract with the employer.

The only likely reason why the government, as the employer of public servants, dictated that its employees should not come to work was probably because it had foreseen that it would not be in a position to provide a safe working environment for the employees; hence, it decided that they should not come and gave some of them the directive to work from home, as was the case with the judiciary and many other government departments.

Nonetheless, employers will be able to defend the adoption of the no work, no pay principle as a result of the Labour Court decision in *the MacSteel* case, which resulted from the immense financial impact of the lockdown and the strict restrictions the government regulated during the lockdown. Employers will be able to justify implementing the no work, no pay principle. On the same day, the Johannesburg High Court ruled in the case of *Mhlonipheni v Mezepoli Melrose Arch and Others*[150] that employees employed by the *Mezepoli* and *Plaka* chain of restaurants were in a position to tender their services during the Level 5 and Level 4 stages of the national lockdown, and therefore their salaries were due and payable by the employer.[151] The employer was seen as indebted, and as they indicated that they were not in a financial position to pay the relevant funds, they were placed into business rescue.

The High Court further held that the regulations for Stage 5 of the National Lockdown were very clear in that employers could not hide from their obligation to pay the salaries of their employees "because the list of "essential services" under the Alert Level 5 Regulations included the

[150] *Mhlonipheni v Mezepoli Melrose Arch and Others* (2020) JOL 47359(GJ).
[151] *Mhlonipheni v Mezepoli Melrose Arch and Others* (2020) JOL 47359(GJ).

implementation of payroll systems to ensure timely payments to workers." [152] The Court in *Mhlonipheni* held that the employees' salaries were due and payable given that the employees were in a position to tender their services, given that the National Lockdown made it very clear that employers could not hide from their obligation to pay their employees' salaries. It is probably only through the application of the limitation clause in terms of Section 36 of the Constitution that the courts may interpret the right to fair labour practice in terms of Section 23 of the Constitution to mean that employees are not entitled to receive remuneration in circumstances wherein they could not tender their services due to a non-fault situation on the part of neither the employer nor them.

As a result, the right to fair labour practices will affect how courts read individual employment contracts. Contracts or contract conditions that are contrary to the spirit of the Constitution or that prevent or limit fundamental rights guaranteed in the Constitution may be set aside as void. [153] As a result, it can be contended that the court can make use of this provision, depending on the circumstances of each case, that the employees are entitled to receive any remuneration in non-fault situations wherein they did not tender their services.

In the case of *Boyd v Stuttaford & Co*[154] the court had to decide whether an employee was entitled to be paid his wages for the period he had been absent from work.[155] The employee had fallen at work, which was claimed to be an uncontrollable accident that prevented the employee from providing their services to the employer. The court held that payment was not due to the employee, as the employee had not rendered any service to the employer. However, the employee could have opted to use the

[152] *Mhlonipheni v Mezepoli Melrose Arch and Others* (2020) JOL 47359(GJ).
[153] Mupangavanhu, Y 'Fairness as a Slippery Concept: The Common Law of Contract and the Consumer Protection Act 68 of 2008' (2015) *De Jure Law Journal* 116-135.
[154] *Boyd v. Stuttaford & Co.,* 1910 AD 100.
[155] *Boyd v. Stuttaford & Co.,* 1910 AD 100.

Compensation for Occupational Injuries and Diseases Act 1993 to claim compensation.[156] Even though there seems to be a stalemate regarding the no work, no pay principle, especially during the National Lockdown, there can be arguments in favour and against both the *Macsteel* and *Mhlonipheni* judgments. Thus emphasising the conundrum with which we are faced in this study and that is still to be faced by potential labour law litigants in the future.

3.4 No work, no pay in a no-fault situation: load-shedding

Electricity outages in South Africa cause numerous disturbances in many facets of life, including labour. [157] Since the implementation of load-shedding in South Africa in 2018, the unemployment rate has increased, and load-shedding hurts the employment relationship between the employer and employee, as employees are expected to tender their services at their employers' disposal due to their contractual obligations, which arise from the parties employment contracts. According to statutory labour regulations such as BCEA and the Labour Relations Act,[158] the employer's primary duty is to remunerate an employee instead of employees rendering services to their employers. The same labour laws allow employers not to pay employees if they fail to tender their service to the employer, even if there is no fault on the part of any party to the contract of employment.[159]

The employer can deduct under Section 34(1)(b) of the BCEA, which allows employers to take an employee's salary from a collective agreement, a court order, or an arbitration award if compelled or permitted by law. This permits

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[156] *Boyd v. Stuttaford & Co.,* 1910 AD 100.
[157] Du Venage, G 'South Africa Comes to Standstill with Eskom's Load-shedding' (2020) *Engineering & Mining Journal* 18.
[158] Grogan J *Workplace Law* (Juta 2009) 60.
[159] Sections 22, 23 of the BCEA, and Section 67 of the Labour Relations Act, 1996.

a deduction without the requirements of a written agreement or compliance with the additional limitations on deductions for loss or damage imposed in Section 34(2) of the BCEA. According to Magena AJ of the Labour Court in *Stein v Minister of Education and Training and Others,*[160] the respondents had to determine whether they violated Section 34 of the BCEA while making the deductions when the employee was not on unpaid leave. Section 34 of the BCEA requires an employer to obtain consent from an employee before making decisions. In the abovementioned cases, the employer notified the employee that the days he was absent from work without completing the leave forms stipulated by the employer's policy would be treated as urgent leave and obtained approval of deductions from the employee's salary by removing the account where the employer overpaid the amount overpaid to the employee.

In *Sibeko v CCMA,*[161] the first respondent appointed the applicant on a fixed-term basis. After a restructure, his fixed-term contract was extended, but a lower salary was payable. The applicant signed the new contract but indicated he believed he should receive a higher salary. Although he was informed that this was impossible, he received a higher salary for a few months. This payment was made in error. Upon discovering the error, the first respondent deducted the overpayment from the applicant's salary. In this case, the court held that an employer is entitled to deduct the relevant amount from salaries in cases of overpayment through error. The applicant had made out no case to ground the relief sought. The application was dismissed by Revelas J, who addressed a situation involving overpayment, stating:

[160] *Stein v Minister of Education and Training and Others* (2021) JOL 53504 (LC).
[161] *Sibeko v CCMA* (2001) JOL 8001 (LC).

> "It is true that, in terms of the Basic Conditions of Employment Act, an employer may not deduct amounts from an employee's salary or remuneration without the employer's consent. However, if an employee was overpaid in error, the employer has the right to change the income to reflect what was agreed upon between the parties in the employment contract without the employee's consent".[162]

In *Stein v Minister of Education and Training and Others*,[163] Mangena AJ decided that the employer was legitimate in deducting the applicant's pay for the days he did not work.[164]If one were to make use of the judgment of *Mhlonipheni*, it would be accepted that the employer is required to pay the employees in a load-shedding situation, which renders the employees unable to perform any work at all. On the other side, if one were to accept the court's strict approach in *MacSteel*, it would be accepted that in such a situation, the employer is not obliged to pay the employees, even though they came to work to tender their services to the employer.

As a result, it becomes prudent that one always try to choose between these two opposing approaches, depending on the circumstances of every case. It furthermore becomes prudent to question whether Section 23(1) of the Constitution could be of any assistance in remedying the situation in this regard. Section 23(1) provides that "everyone has the right to fair labour practice." The word everyone includes both the employer's and employees' who are parties to employment contracts.

In *Concorde Plastics (Pty) Ltd v National Union of Metal Workers of SA*,[165] it was held that the court passes a moral judgment in determining whether

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[162] *Sibeko v CCMA* and Others(2001) JOL 8001 (LC).
[163] *Stein v Minister of Education and Training and Others* (2021) JOL 53504 (LC).
[164] *Stein v Minister of Education and Training and Others* (2021) JOL 53504 (LC).
[165] *Concorde Plastics (Pty) Ltd v National Union of Metal Workers of SA* 1997 11 BCLR 1624 (LAC).

a particular practice constitutes an unfair labour practice.[166] Therefore, a statutory definition of an unfair labour practice must be interpreted and applied in accordance with the spirit, purport, and objects of the fundamental rights guaranteed by the Constitution. It is uncertain what type of value judgment will ensure fairness and how it should be done.[167]

3.5 Conclusion

The principle of no work, no pay, to which section 67(3) of the LRA gives effect, means "an employer is not obliged to remunerate an employee for services that the employee does not render during a protected or protected lock-out".[168] The same applies to an unprotected strike. If the employee does not tender her services during the currency of a protected strike, the employee will not be entitled to payment of her remuneration. However, should the employee opt to come to work during a strike, they will be entitled to receive their salary. Thus, emphasising the reciprocal nature of the employment relationship provides us with a practical outlook on applying the *adempleti contractus*.[169]

Applying the principle of no work, no pay might look straightforward at first glance. However, when one dwells deep into all the practical scenarios that might ensue, it becomes apparent that the application is not as straightforward as it might look. As might have been seen in the two judgments of *Mhlonipheni* and *MacSteel*, it is not as straightforward as one might have thought. As such, it then raises the question of how this

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[166] *Concorde Plastics (Pty) Ltd v National Union of Metal Workers of SA* 1997 11 BCLR 1624 (LAC).

[167] *Concorde Plastics (Pty) Ltd v National Union of Metal Workers of SA* 1997 11 BCLR 1624 (LAC).

[168] Sections 22, 23 of the BCEA, and Section 67 of the Labour Relations Act, 1996.

[169] Coovadia, M 'The Effect of the Principle of Reciprocity on the *exceptio non adimpleti contractus* in Light of the Constitution: A South African Perspective' (LLM Thesis, University of Johannesburg 2018).

conundrum could be resolved, whether by the strict approach of the *Macsteel* case or the less strict approach of the *Mhlonipheni* case. After all, it is in the public's interest to clarify what the law prescribes, which could have been resolved by either party in the two cases mentioned above by appealing the judgment to the LAC or the Constitutional Court. Unfortunately, that did not happen. However, it could be averred that the best approach would be one that would consider the circumstances of each case, coupled with the application of the individual member's right to have fair labour practice.

However, should the abovementioned potential solution be applied, a great deal of caution would have to be exercised by the courts in the sense that should the courts just deal with the potential problems prevailing in those particular cases, we might land back in the very situation we find ourselves in at the present moment, which is uncertainty. Henceforth, it may furthermore be averred that while the above potential solution might help to remedy the conundrum we have at the current moment, extensive guidelines need to be created, whether by means of amending the current labour regulations to take cognisance of this conundrum, or the courts can establish proper guidelines by means of handing down an outstandingly well-written judgment in respect of this conundrum should it be ceased with this opportunity ever again.

CHAPTER 4: CONCLUSIONS AND RECOMMENDATIONS

4.1 Introduction

As demonstrated in previous chapters, there is inconsistency in the interpretation and application of the principle of no work, no pay in situations of no fault of the employer or employee. The situation is also not covered by the existing labour legislation either. It is, therefore, ideal for the courts and the legislature to cure or, at the very least, provide useful guidelines that will help both the courts in interpreting and applying the principle to the citizens, more especially the employer and employees, in having clarity as to what such a situation as the one that is caused by the intermittent supply of electricity (load-shedding). Hence, the purpose of this chapter is to formulate the conclusion and make recommendations, if any, to the subject matter of this study.

The chapter is structured in such a way that it enlists the key findings of the study first, and then it will seek to reflect on the purpose of the study and proceed to make recommendations, if any, to help solve the conundrum so raised by the advent of load-shedding.

4.2 Reflection on the purpose of the study: research questions and the hypothesis

The operationalisation, through various statutory provisions and international conventions, of the common law principle of no work, no pay has had several effects on the applicability and interpretation of the principle.[170] The advent of load-shedding has introduced a new twist to applying the principle because it creates an undesirable situation when

[170] Budiman, K., & Hoesin, S. H 'Workers Legal Protection in the Implementation of No Work,No Pay Principles Wages in Furlough Off Status during C0VID-19 Pandemic' (2023) *The International Journal of Politics and Sociology Research* 11.

employees come to work.[171] However, due to intermittent electricity supply, the employees cannot tender their services to the employer. This study set out to investigate the principal question of whether the employer is bound to remunerate the employee under these circumstances. Hence, they are questioning the application of the accepted common law principle of no work, no pay. The answer to the abovementioned questions requires an analysis of the current accepted common law principle of no work, no pay and how this principle came to be accepted as one of the rudimentary principles of our law, both in terms of the common law and the statutory provisions.

Furthermore, courts have applied and interpreted the principle, emphasizing situations wherein employees come to work to tender their services. However, due to a non-fault situation, the employees cannot tender their services to the employer. It means that the employer has no obligation to pay an employee who has not worked, regardless of whether it was the employee's fault. The principle of no work, no pay applies. Therefore, the employee who did not work during load-shedding is not entitled to payment. However, on the other hand, this means that when work hours are lost, at no fault of the employee, like in a case of load-shedding, the no work, no pay principle does not apply. The employer must pay the employee. The employer is responsible for providing work.

4.3 Key findings of the study

Only recently has the concept of work come to be associated with regular, paid employment.[172] Employment contracts, or labour law in general, can

[171] Staff,W '*Work From Home and Load Shedding are Putting Business at Huge Risk in South Africa'*. <https://businesstech.co.za/news/technology/680989/work-from-home-and-load-shedding-are-putting-businesses-at-huge-risk> assessed on 28 December 2023.

[172] Edgell, S *The Sociology of Work: Continuity and Change in Paid and Unpaid Work* (Sage 2020).

be traced back to the “Gold and Diamond Rush” era in South Africa when enormous groups of workers arrived on the mining sites of the Witwatersrand, Kimberly, and Pilgrim’s Rest, wherein employees worked and stayed in deplorable conditions.[173] The employment contract is the foundation of the relationship between the employer and employee, but the principles of contract law only apply to a limited extent to this relationship.[174] In terms of the employment relationship, labour law is protective and softens the idea of contract law. Employment contracts have played an important part in the evolution of the notion of no work, no pay.[175] This is because these contracts specify the terms and conditions of employment, such as the rate of compensation, working hours, and the responsibilities and duties of both the employer and the employee.

In terms of common law, it is a basic norm that parties to a contract must execute concurrently unless the parties have agreed otherwise or the *naturalia* of the transaction in question requires otherwise.[176] It is a natural condition of employment contracts that the employee performs first before the employer can be forced to deliver his counter-performance under the provisions of the employment contract. As a result, the employer is only required to pay the wage or compensation after the period.

The no work, no pay principle is a key premise in employer-employee relationships, implying that employees will not be paid for time they do not work.[177] In the future, if an employee fails to show up for work, they will not be paid. This is because the idea is based on the concept of fair exchange, which states that the employer is under no duty to pay them if an employee

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[173] Du Plessis, JV *A Practical Guide to Labour Law* (LexisNexis 2019).

[174] Rapatsa, M ‘‘Contract of Employment, Statutory Provisions and Collective Bargaining in Protecting Workers’ Labour Rights’ (2014) *Journal of Business Management and Social Sciences Research* 5-14.

[175] Tenza, M Is the Employer Compelled to Provide Safe Working Conditions to Employees during a Violent Strike? (2022) *Law, Democracy & Development* 256-285.

[176] Hutchison, D *The Law of Contract* (Oxford 2017).

[177] Tenza, M ‘The Effects of Violent Strikes on the Economy of a Developing Country: A Case of South Africa’ (2020) *Obiter* 519-537.

does not work. One might also argue that the point of departure under South African law is that contracts must be honoured.

The International Labour Organisation does not address the no work, no pay principle. Despite the fact that the ILO does not directly address the principle, the ILO has issued various agreements and guidelines related to wages and labour rights that can indirectly influence the principle's application.[178]

The ILO's main instruments on freedom of association are the Freedom of Association and Protection of the Right to Organise Convention[179] and the Right to Organise and Collective Bargaining Convention, 1949.[180] In interpreting these fundamental instruments, it has been held that the right to freely bargain with employers and their organisations about wages and working conditions is a fundamental aspect of freedom of association and that trade unions should be able to exercise this right.[181] As such it can be argued that the ILO envisaged that such situations might occur and that in the occurrence of such situations as in the present subject matter, the trade unions, as representatives of the employees, might be able to assist the employees by representing the employee's perspective on the subject matter. This would be to argue that the employees should be paid in the non-fault situations.

The common law, the Constitution and Labour legislation impact the employment relationship. While common law has a smaller impact than labour legislation, this is largely because the common law principles previously applicable to employment relations have been codified through statutes. Employers and employees have certain common law rights and

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[178] Zvidzayi, T 'Compliance with International Standards on Compensation for Occupational Injuries and Diseases by Zimbabwe and South Africa' (LLM Thesis,University of the Western Cape 2015).

[179] 1948 (No. 87).

[180] 1949 (No. 98).

[181] Budeli, M 'Understanding the Right to Freedom of Association at the Workplace: Components and Scope' (2010) *Obiter* 16-33.

associated duties, even protected by labour legislations such as the LRA and BCEA.[182] Employees must promptly communicate with their employers about their availability to work during power outages, and they must notify their employers about any issues that may impede their productivity or work performance. Employees are responsible for adhering to the working arrangements established by their employers and following the directions and guidelines provided by their employers. Employees must make reasonable efforts to accomplish productive work during an outage, if possible, and to ensure that they can perform their tasks even when offline or focus on work unaffected by the lack of electricity.

The principle of no work, no pay has gained much attention in South Africa, especially during labour relations strikes. While most unlawful strikes result from employees' purposeful actions, it can provide insight into cases where the employee does not do the task through no fault of her own. Employees are compensated for services done as a common concept of employment relationships. As a result, employers are not compelled to pay employees who participate in the unlawful strike.[183]

One of the nation's most negatively impacted by the COVID-19 outbreak is South Africa. Due to that, South Africa has introduced some laws that will help lessen the spread of the virus and build the necessary health infrastructure. Many personnel could not carry out their regular duties because of the adopted restrictions, which led to the closure of many companies. The issue is whether employees who miss work due to uncontrollable circumstances or who are physically unable to report for duty

[182] Rapatsa, M.; 'Contract of Employment, Statutory Provisions and Collective Bargaining in Protecting Workers' Labour Rights' (2014) *Journal of Business Management and Social Sciences Research* 5-14.

[183] Odeku, K. O., 'An Overview of the Right to Strike Phenomenon in South Africa' (2014) *Mediterranean Journal of Social Sciences* 695.

during the COVID-19 pandemic are legally entitled to compensation. [184] It is also unclear if such non-appearance or failure to report due to unforeseeable circumstances that affect both the employer and the employee would be considered a breach of the employment contract.

The COVID-19 pandemic has impacted the employment relationship between employers and employees. This is because employees were required to miss work physically. As mandated by the law, an employer is not allowed to pay an employee if the reason for their absence from work is something other than using any of the leave options accessible to them. The High Court of Johannesburg held in *Mhlonipheni v Mezepoli Melrose Arch and Others*[185] that workers could offer services during level 5 and 4 stages of the nationwide lockdown, and as a result, their salaries were due and payable by the employer.

The Labour Court also decided the matter in *Macsteel Service Centres SA (Pty) Ltd v NUMSA & Others*.[186] The case concerned *Macsteel's* urgent request to try to stop Numsa from going on strike. In March and April 2020, *Macsteel* was able to pay all employees' salaries, and in May, June, and July of the same year, 80% of staff salaries. They subsequently used the TERS to cover the remaining amount. The court declared that *Macsteel* was not required by law to compensate the workers who were not authorised to work and further stated that employees who rendered no service, albeit through no fault of their own or due to circumstances beyond their employer's control, such as the global COVID-19 pandemic or national state of disaster, are not entitled to remuneration, and *MacSteel* could have implemented the no work, no pay principle.

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[184] Zungu, S. H 'Coronavirus in South African Workplaces: The Safety, Remuneration, and Retrenchment of Employees during the Lockdown' (LLM Thesis,University of Kwazulu Natal 2020).

[185] *Mhlonipheni v Mezepoli Melrose Arch and others* (2020) JOL 47359 (GJ).

[186] *MacSteel Service Centres SA (Pty) Ltd v NUMSA and Others* (2021) 12 BLLR 1235 (LC).

Power outages in South Africa cause severe disruptions in many aspects of life, severely affecting employment relationships. Load shedding has a detrimental influence on the employer-employee relationship.[187]

As a result, employees are expected to render their service at their employer's disposal, and employers are, in terms of the law, required to pay employees for services rendered. If the *Mhlonipheni* judgment is used, it is accepted that the employer is required to pay employees in a load-shedding situation even when load-shedding makes employees unable to perform any work at all, whereas if the strict approach of the court in *MacSteel* is used, it is accepted that the employer is not obliged to pay the employees, regardless of whether they come to work to offer their skills to the employer. In comparing the COVID-19 and electricity outages situation, one has to understand that in the COVID-19 situation, employees were prohibited from coming to work, but with electricity outages, employees can come to work, but due to no fault of either employer or employee, they are unable to perform their work.

4.4 Recommendations

Given that the principle of no work, no pay forms part of South African labour laws and has been incorporated into our labour laws through statute as one of the natural principles of our employment contracts, in order to mend the current situation that South Africa is facing of an electricity outage wherein employers and employees are in non-fault scenarios, it is important to note some of the recommendations that will come up with a solution because both parties to the employment contract are free to bind themselves in any

[187] Moore, E. O 'Exploring the Experience of Load Shedding on the Employment Relationship of Fuel Retailers in the North West Province' (LLM Thesis, University of North-West 2022).

way they see fit, as long as it comes within the bounds of what is legally acceptable in our legal framework in South Africa.

Another recommendation is that parties consider including a clause in the employment contract that caters to a situation where employees do not come to work because of no fault of their own. Nothing prevents the parties to an employment contract from including clauses that deal with non-fault situations such as load shedding.[188] For example, the parties could agree that the employer will be obligated to pay the employees for the hours they spent idling at work during load shedding, that the employees will use the load-shedding period for other purposes, or that they can work from home. In other words, the parties to the employment contract can modify their employment contract to suit any situation that may arise.

In that case, the parties to the employment contract will be bound to follow the provisions of their contract, and if one party fails to perform in accordance with the provisions of the contract, the non-defaulting party will be free to request the termination of the employment contract or the *exception non-adimpleti-contractus* defence under our contract law.[189]

Given that load-shedding has become part of the country's reality, it would be natural to establish a legislative framework that regulates the repercussions of load-shedding, whether they are labour law particular or general. However, because the topic of this study is labour-related, it is recommended that a clause in the Basic Conditions of Employment Act address how such circumstances should be handled.

For clarity, the provision should seek to prescribe how such non-fault situations are to be dealt with. However, given that what may constitute non-fault situations may include some situations that may not necessarily constitute non-fault situations in a year or two, it would be preferable if the

[188] Hutchison, A Reciprocity in Contract Law (2013) *Stellenbosch Law Review* 3-30.
[189] Hutchison, A Reciprocity in Contract Law (2013) *Stellenbosch Law Review* 3-30.

provision could also prescribe guidelines as to how the courts, if faced with a possible situation, could best categorise it and then develop the law in accordance with the prevailing conditions at the time.

The two court judgements, *MacSteel* and *Mhlonipheni*, show that the court's understanding of this principle is inconsistent. As a result, it is sad that the Labour Appeal Court, or SCA, was never given the opportunity to explore such non-fault-like situations to clarify what the court could aver is reasonable and just in these circumstances. The problem is that both courts in *MacSteel* and *Mhlopheni* have decided the matter correctly. In light of the foregoing, it may be recommended that the circumstances of each case be considered. The general position should be that the employee's salary is due and payable once the employee is in a position to tender their services and the employee is in a reasonable position to accept their services. What will constitute a suitable position in which to accept the employees' services? The facts of individual instances will determine this.

However, if the employees tender their services and the employer is not in a reasonable position to accept the tender of their services, the employer cannot be required to pay these employees; after all, the employer is in the business of making money, not donating money. Furthermore, there should be reasonable methods for the employer to improve his conditions to accept the employees' services. Moreover, it should be noted that all of the above recommendations could be implemented at the same time. However, if this is not possible, either of the solutions could be applied to the prevailing circumstances of each case to remedy the conundrum at hand.

4.5 Conclusion

In conclusion, a proper analysis of the *MacSteel* and *Mhlonipheni cases* could reasonably answer the questions posed by this study. Both of these judgments contribute to the current uncertainty concerning the non-fault

situation posed by the intermittent electricity supply. The Court in *Mhlonipheni* held that "the employees' salaries were due and payable given that the employees were in a position to tender their services, given that the national lockdown made it very clear that employers could not avoid paying their employees' salaries."[190] However, on the same day, the Court in *MacSteel* opined that "the reality in law is that 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."[191] These two judgments are not necessarily conflicting in the sense that one could be considered the general rule and the other the exception to the general rule. Hence, the *Mhlonipheni* case should be the general rule, and the *MacSteel* case, with slight modifications, should be the exception to the general rule.

The slight modification to the exception should be that the employer must have taken reasonable steps to ensure that he is in a reasonable position to accept the employees' services. In light of our subject matter, this might include the employer investing in reasonable backup solar energy or backup generators to ensure that the employee who comes to work can tender their services to the employer. After all, this will be mutually beneficial for both employer and employee. This is because the employers will be able to not only accept the employees' services but also sustain production, and the employees will be entitled to receive their salaries for the work they have rendered to the employer.

Hence, nothing precludes the parties to an employment contract from having a provision that specifically deals with how the parties' obligations

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[190] *Mhlopheni v. Mezepoli Melrose Arch and others* [2020] ZAGPJHC 136 (3 June 2020).
[191] *MacSteel Service Centres SA (Pty) Ltd v NUMSA and Others* (2021) 12 BLLR 1235 (LC).

will be adversely affected by the intermittent electricity supply. In light of all the teachings brought about as a result of COVID-19, the parties could, for example, have a provision to the effect that the employee will work from home in the event of there being stage 6 of load-shedding which will adversely affect the office, or that the employee will do site visits during the period of load-shedding.

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