POWER OUTAGES – MUST EMPLOYEES BE PAID?

The recent power outages in the Western Cape have raised the question whether employees could insist on payment of their full salaries or wages if their working hours have been reduced as a result of such outages. As the employer is not at fault, one might think that the employer should be able to reduce the employees' pay in proportion to the reduced working hours. But this is no simple matter.

According to our Law of Contracts, a party can be relieved of its duty to perform if performance becomes impossible due to circumstances beyond its control. However, it would seem that in most instances the principle has different implications in the employment relationship. So what is the difference? In the case of a contract of employment, the employer's obligation to pay is generally not dependent on any work actually being performed. Instead, the normal rule is that the employer's obligation to pay arises once the employee has made his or her services available to the employer. The employer therefore has an obligation to pay even if the employee's services cannot be utilized due to circumstances beyond the employer's control, such as the power outages experienced recently.

If the nature of the contract is such that the employee is not paid for making his or her services available to the employer, but rather to complete a particular job, then the employer's obligation to pay only arises once that job has been completed. Similarly, if the employee is appointed on an "as and when the need arises" basis, then the employer will only have an obligation to pay if the impediment to the utilization of the employee's services arises during a specific period that the parties have already agreed upon that the services will be required. What can an employer do in the case of a normal employment contract?

In order to override the normal rule, an employer can enter into an agreement with its employees or their unions that the obligations of both parties be suspended for any period that performance becomes impossible due to circumstances beyond the control of both parties. If the employees or their unions refuse to agree, then there are two possible options. Firstly, the employer can declare a dispute that can eventually lead to a lock-out in order to compel the employees or their unions to agree. Alternatively, if a continuation of the power outages poses an operational threat to the employer, then the employer could embark on a retrenchment process in respect of those employees who refuse to agree. However, neither option will provide immediate relief and are costly and time consuming.

In some industries there are Bargaining Council agreements that deal with impossibility temporary lay-offs. In this case, such provision would prevail over the normal rule or any contrary agreement between the employer and its employees. Changes to such a provision can only take place at Bargaining Council level.