IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: JS720/21

In the matter between:

SOLIDARITY obo MEMBERS **Applicant**

and

SAHARA AFRICAN AVIATION OPERATIONS (PTY) LTD **Respondent**

Heard: **7 to 11 August 2023 and 1 December 2023**

Delivered: **22 February 2024**

Summary: Supervening impossibility – consequent to COVID-19 regulations – not self-created or due to fault or foreseeable – employer absolved from contractual obligations – reciprocity of employment contracts – lay-offs resulted in 'no work - no pay'.

Contractual claim – any contention based on fairness requirements in terms of the LRA is misplaced.

Shifren principle — electronic consent meets the requirement of Shifren principle. Tacit agreement – unequivocal conduct, the parties gave rise to the inescapable inference that there was in fact *consensus ad idem* – since the enquiry is fact-specific, there could be a period of time in the chain of events where the conduct of the parties does not evince an unequivocal assent to the prevailing conditions so as to support an allegation that there was a tacit agreement or acquiescence.

JUDGMENT

NKUTHA-NKONTWANA, J

<u>Introduction</u>

[1] In 2020 and 2021, the dominant content of the news channels was the apprises on the outbreak and spread of the coronavirus disease 2019 (COVID-19), which wreaked havoc across the globe, causing death and disruption on a scale that could not have been anticipated, resulting in a global pandemic. The global disaster that was brought about by the COVID-19 pandemic could be aptly summed up by the famous aphorism attributed to Lenin: "*there are decades where nothing happens; and there are weeks where decades happen*".[1] There were momentous humanitarian, health and economic challenges that emerged. The resultant impact of the COVID-19 pandemic offered many unique challenges in the labour market globally. This litigation epitomises the aftermath of some of those challenges.

[2] The applicant (Solidarity) is acting on behalf of its members, alleging that the respondent (Sahara) breached their contracts of employment by unilaterally reducing their salaries and placing them on an indefinite lay-off during the period of mandatory lockdown and the period thereafter, consequent the COVID-19 pandemic. It seeks an order directing Sahara to comply with its members' contracts of employment and make payment of what it claims are the outstanding salary amounts owed.

[3] Initially, there were ten of its members in this action. However, seven of them have since pulled out. Persisting with the claim are Messrs Clinton Berry (Berry), Marcel Dieter Ortmann (Ortmann) and John Abraham van der Merwe (van der Merwe) jointly referred to as the applicant employees.

[4] Mr Berry is still employed by Sahara. Mr Berry signed a new contract of employment with Saraha on 25 September 2021. Similarly, Mr van der Merwe signed a new contract of employment with Sahara on 17 December 2021, the remuneration terms of which were implemented from 1 September 2021. However, he resigned in February 2023. Up until 1 September 2021 when the new contracts of employment took effect, Sahara paid Messrs Berry and van der Merwe a reduced ("*COVID-19-impacted*") salary. Mr Ortmann resigned on 8 June 2021. Up until the time of Mr Ortmann's resignation, Sahara, likewise, paid him a COVID-19-impacted salary.

[1] See: K D Ewing, Lord Hendy, "*Covid-19 and the Failure of Labour Law: Part 1"* QC Industrial Law Journal 2020 49 (4) at pp 497–538.

<u>Factual background</u>

[5] Sahara is a specialist aviation leasing company that leases aircraft to airlines, non-governmental organisations and foreign state departments, particularly in Africa and the Middle East. Since its contracts are based outside of South Africa, Sahara provides a full crew of pilots, flight attendants and engineers to its clients. Ordinarily, a crew would spend a month or two on-tour in another country and a month off-tour back in South Africa.

[6] Mr van der Merwe was employed by Sahara on a permanent basis since June 2014. He held the position of a pilot captain in terms of a written contract of employment. At the beginning of 2020, as a senior captain, he was earning a fixed monthly salary in the amount of $8 000.00, irrespective of whether he was on-tour or off-tour.

[7] Mr Ortmann was employed in December 2017 on a permanent basis and held the position of a pilot first officer, grade 11, in terms of a written contract of employment. At the beginning of 2020, as a first officer, he was earning an on-tour salary of $3 800.00 and an off-tour salary of $2 000.00, calculated *pro rata* according to the number of days worked on-tour or off-tour in a given month.

[8] Mr Berry was employed on 3 October 2016 on a permanent basis; holding the position of an aircraft maintenance engineer per the written contract of employment. At the beginning of 2020, as an aircraft maintenance engineer, he was earning an on-tour salary of R30 000.00 and an off-tour salary of R40 000.00, calculated *pro rata* according to the number of days worked on- or off-tour in a given month. In addition, Sahara also paid Mr Berry $150.00 per day as subsistence whilst on-tour.

[9] All the applicant employees' contracts of employment contain similar terms with the following pertinent clauses:
'This contract shall be the entire agreement between the parties and no alteration, variation and/[or] addition shall be of any force and effect unless it is placed in writing and signed by both parties.

The Company reserves the right to review the contract through a process of consultation as may be required. The Company further reserves the right to implement workplace policies and procedures which are to be recognised by the Employee.'[2]

[10] In March 2020, the spread of COVID-19 took the global stage and most countries began to close their borders and suspend international and domestic flights. South Africa was not spared. On 15 March 2020, the COVID-19 pandemic was declared a national disaster and a compendium of extraordinary measures to combat this grave public health emergency were unveiled.

[11] On 23 March 2020, a nationwide lockdown for 21 days was declared in terms of the Disaster Management Act[3] (National Disaster Act) which was effective from midnight on 26 March 2020. During the hard or level 5 lockdown, all South Africans were required to stay at home and businesses shut down, except for the categories of businesses and employees who were regarded as necessary and essential in the response to COVID-19. The national borders and points of entry, including airports, were closed and international and domestic flights were suspended. Only emergency international travelling was allowed per the National Disaster Act and related regulations.

[12] While the government was enjoined to take drastic measures in response to the global health catastrophe, it was alive to the consequent economic downturn and its adverse effect on business and job security. In response, the government introduced economic measures and interventions. These included a special dispensation for companies that were in distress because of COVID-19 that allowed employers to claim, on behalf of their laid-off employees, salary payment through the Unemployment Insurance Fund's (UIF) Temporary Employer-Employee Relief Scheme (TERS) to avoid retrenchments. The Minister of Employment and Labour issued various COVID-19 TERS directives which set out the requirements to access the COVID-19 TERS benefits.

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[2] See: applicant employees' respective contracts of employment, respondent's bundle pp 8, pp 22 and pp 170.
[3] Act 57 of 2002.

[13] On 9 April 2020, the announcement was made that, per the advice of the National Coronavirus Command Council, the national lockdown would be extended for a further two weeks and the lockdown measures would remain in force until the end of April 2020. Given the reality that hard lockdown could not be sustained indefinitely, given its adverse effect on the economy and labour market, the lockdown restrictions were eased gradually and in a phased manner. On 1 May 2020, the country was placed on level 4 alert, which allowed some businesses to resume operations under specific conditions, including that they would not be able to return to full production and the workforce would only be able to return in limited batches. On 1 June 2020, the country moved to level 3 alert and the restrictions were significantly relaxed.

[14] It is within this context that the impugned decision by Sahara to reduce the applicant employees' salaries and/or place them on an unpaid lay-off is interrogated.

[15] It is common cause that on 20 March 2020, Sahara sent a communication to the crew, in which it was stated that the crew would receive their full salary for March 2020, however from the next pay cycle starting on 26 March 2020, on-tour salaries would be reduced by 30% and off-tour salaries would be reduced by 20%.

[16] On 23 March 2020, some employees received telephone calls from Sahara, indicating that employees would be placed on temporary lay-off. That was followed by a communication to that effect to the affected employees, indicating that the lay-offs would take place as of 26 March 2020 and would be for an indefinite period, until further notice.

[17] On 24 March 2020, Sahara sent out Air Maestro[4] notifications to its engineers and crew, respectively. The engineers were notified that on-tour salaries would be reduced by 25% for senior engineers and 24% for the other engineers, with effect from the end of the March 2020 salary pay-run. The crew was notified that a 30%

[4] Air Maestro is the software system that is used by Sahara for a variety of functions such as flight logs, safety alerts, communicating with staff, etc.

reduction for on-tour salaries, and a 20% reduction for off-tour salaries would take effect from the end of March 2020 and not from April as was previously communicated. The crew was further notified that the off-tour salaries would be reduced to 50%, down from 80%, for the payment period of 26 March 2020 to 26 April 2020.

[18] On 26 April 2020, an Air Maestro notification was sent to all employees, stating that all the employees who had not been temporarily laid-off would only receive 50% of their salaries whilst on-tour and 50% of the normal subsistence allowance whilst on contract, for April 2020.[5] Sahara registered the laid-off employees for the COVID-19 TERS benefits. Subsequently, they never received any salaries from Sahara.

[19] On 22 October 2020, a grievance was submitted to Sahara on behalf of the pilots in relation to the changes in their terms and conditions of employment. On 11 February 2021, Solidarity intervened and sent a letter to Sahara on behalf of its members regarding the changes in their salaries and the indefinite period of the lay-off without consultation and in contravention of their contracts of employment. On 9 August 2021, Solidarity instituted the present action.

<u>Issues to be decided</u>

[20] The issues to be decided are outlined in the pre-trail minute as follows:

'5.1 Whether the Respondent breached the members' employment contracts.

5.2 Whether the Respondent must comply with the employment contracts and make payment of outstanding salaries.

5.3 …

5.4 In addition the Respondent contends that the Court is required to determine:

5.4.1 Whether the Respondent's payment obligations in terms of the Applicant's members' contracts of employment became impossible, alternatively partially impossible to fulfil, before performance has been made and, if so, whether the Respondent is excused from liability for the period of impossibility; and

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[5] See: Pre-trial minute, pleadings bundle pp 53 para 3.10; Respondent's document bundle pp 195.

5.4.2 Whether the Applicant's members agreed to an amendment to their terms and conditions of employment.'[6]

[21] Sahara's defences are that:

21.1 Total performance by the applicant employees and Sahara in terms of the employment contracts became temporarily impossible, alternatively partially impossible;

21.2 Mr van der Merwe and Mr Ortmann expressly, alternatively tacitly, agreed to changes to their terms and conditions of employment; and

21.3 Mr Berry tacitly agreed to the changes to his terms and conditions of employment.

<u>Supervening impossibility of performance</u>

[22] Ms Lisa Constable (Ms Constable), the only witness called by Sahara, testified that she holds the position of a Responsible Person Operating (RPO). Sahara's services comprise aircraft, crew, maintenance and insurance leasing. Sahara employs pilots, engineers, administrative staff, hangar staff, four managers and there are two executives. In March 2020, they had a 87-person staff complement and by June 2021, there were 56 employees as 31 people had resigned. Currently, there are 80 employees.

[23] Sahara's aircraft fly outside of South Africa. Before the COVID-19 pandemic (pre-COVID) they were flying in Gabon, Iraq, Mozambique, Sudan and the Comoros. Consequent to COVID-19, four contracts ended. Currently, they are flying in Iraq, Mozambique, Zimbabwe, Haiti/Dominican Republic and the DRC. During the contract with the client, the aircraft stays at the base of operations, which is outside of South Africa.

[24] Sahara has a hangar at Kruger Mpumalanga International Airport (Kruger). The scheduled maintenance of 500 hours of A&C checks (heavy maintenance) usually takes place at Kruger. Currently, this maintenance is being performed at the

[6] See: Pre-trial minute, pleadings bundle, pp 68 para 5.

bases in Iraq and Haiti/Dominican Republic. Line maintenance consists of pre and post-flight snag and defect rectification. It is scheduled weekly or every 75 hours and is performed by engineers on the base daily.

[25] It is not contested that COVID-19 made global news as early as January 2020. Ms Constable testified that Sahara started to see dramatic changes around mid-March 2020 when it received a travel advisory published by the Department of International Relations & Cooperation (DIRCO) referring to the closure of borders. Sahara accordingly notified its crew. There was a dramatic drop in flights as clients were cancelling flights because no one was buying tickets. Even though they were not sure what was happening at that time, they anticipated a severe impact.

[26] On 20 March 2020, an Air Maestro notification was sent to Sahara's pilots, crew and engineers regarding a cut in their salaries from the upcoming payroll. On 24 March 2020, Sahara was in talks with its clients about *force majeure* and the cancellation of contracts was threatened with immediate effect as they were seeing similar restrictions on international and local travel in their own countries.

[27] On 24 March 2020, further notice to staff was posted to say that the salary cuts would be implemented retrospectively. Therefore, from 26 February 2020 in the case of the flight crew and 1 March 2020 in the case of the engineers. The off-tour salaries were cut to 50% for the next payment period.

[28] On 1 April 2020, all non-essential staff were temporarily laid off, including crew and engineers who were off-contract in South Africa. From 26 April 2020, on-tour salaries were cut to 50%. Only the cleaners at Sahara did not have their salaries cut. Also, there was a young couple who worked for Sahara, the husband was a junior engineer on a fairly low salary and the wife was an admin clerk, earning about R12 000.00 per month. Sahara decided to pay the wife her full salary when the husband was off-tour around mid-June 2020 because he was laid off and not earning a salary.

[29] According to Ms Constable, Sahara's operations were negatively impacted by the COVID-19 pandemic as the countries where it operates implemented movement and air service restrictions. The applicant employees readily conceded during cross-

examination that South Africa promulgated the various regulations in terms of the National Disaster Act, pertinently the national lockdown that shut down the country and prohibited movement of people, save for the essential and permitted services with effect from 26 March 2020.

[30] Consequently, the Minister of Transport issued related directives, prohibiting all domestic and international flights. On 31 March 2020, evacuation flights commenced, subject to the Minister of Transport's special authorisation. Yet, commercial international flights were still prohibited. It was only in August 2020 that limited commercial international flights were allowed, subject to the Minister of Transport's authorisation. The flight ban on international flights was only lifted on 1 October 2020 in South Africa.

[31] Ms Constable was adamant that Sahara's clients stopped paying it and there was a danger of the contracts being cancelled from one day to the next. The clients had stopped paying Sahara because they were not generating any income. On the mining contract, there were discussions regarding *force majeure*. The scheduled airlines in Sudan, Comoros and Mozambique had to stop selling tickets because there were no flights. Most of the flights in those countries were wound down. In Gabon, it was the commencement of the contract. In starting a contract there was typically a massive cash outlay for the client. There was a need to start operating as quickly as possible and obtain approvals for the two aircraft. However, the whole operation was disrupted by the COVID-19 pandemic. This evidence was not contested.

[32] Ms Constable conceded during cross-examination that the decision to reduce salaries and lay-off employees was not preceded by a formal consultation with the affected employees. However, she was clear that the drastic changes were dictated by circumstances which were unprecedented and uncertain. Nonetheless, the employees were kept in the loop and allowed to raise their concerns which they did not, up until October 2020.

[33] Solidarity disputes that there were travel restrictions in Gabon, Sudan, Mozambique, the Comoros and Iraq where Sahara operates. That is so despite the

evidence of Ms Constable and documentary evidence that these countries, like all other countries globally, implemented COVID-19 restrictions on the movement of people and international flights. Moreover, the applicant employees readily conceded during cross-examination that the operations of Sahara were impacted by the travel restrictions, particularly in countries where they were posted while on-tour between March 2020 and September 2020.

[34] It is common cause that during that period, Sahara could not perform a crew swap and, as a result, Messrs van der Merwe and Berry were stuck in Gabon and Iran, respectively. Mr Ortmann could not be rostered on-tour as he was off-tour during the hard lockdown and ban on international flights in South Africa. Indeed, as contended by Solidarity, Ms Constable conceded that Sahara's operations did not completely cease notwithstanding the lockdown regulations in respective countries where the respondent operated for the period between March 2020 to September 2020. She was however steadfast that the work was seriously reduced, a fact conceded by both Messrs Mr van der Merwe and Berry. Ms Constable's evidence on the travel and movement restrictions in other countries can summarised as follows:

34.1 In Mozambique, from March 2020 there were government-imposed restrictions in terms of the various Presidential Decrees which declared, *inter alia*, a state of emergency, suspension of the issuance of entry visas, the cancellation of visas already issued and the partial closure of national borders. Travel across the border was permitted only for "*matters of State interest*", humanitarian support, health and cargo transportation.[7]

34.2 In Comoros, on 30 March 2020, the President announced the closure of the borders of that country in the face of the COVID-19 pandemic.[8]

34.3 In Gabon, on 11 May 2020, the Government lifted the state of emergency which was enforced since April 2020. However, the following, *inter alia*, continued: a curfew; a ban on both national and international passenger flights; and a ban on interprovincial commuters.[9] On 30 June 2020, most of the lockdown measures were lifted which resulted in the restoration of interprovincial commuting and limited

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[7] See respondent's document bundle pp 275, 303-305.
[8] See respondent's document bundle p 275.
[9] See respondent's document bundle p 291.

movement of international flights, the easing of the night curfew hours and the re-opening of hotels and restaurants.[10]

34.4 In Iraq, incoming and outgoing flights were suspended between 17 March 2020 and 24 March 2020, a curfew was declared and strict movement restrictions were implemented. These were extended on several instances up until 10 August 2020. On 23 July 2020, international airports in Baghdad were opened for commercial flights.[11]

34.5 In Sudan, on 31 March 2020, there were movement restrictions implemented, including a curfew and a lockdown up until 7 July 2020. As of 23 July 2020, Khartoum International Airport was partially opened for international flights which included scheduled cargo flights; humanitarian aid and technical and humanitarian support flights and flights of companies operating in the oil fields.[12]

[35] Mr van der Merwe testified that he was on-tour in Gabon in March 2020 when COVID-19 struck. Gabon was placed on a lockdown and consequently was stuck on-tour in Gabon for five months. He conceded that he could not dispute the accuracy of the reports on the travel ban in all the countries where Sahara had its operations. He could also not dispute the accuracy of the Sahara's evidence that, whilst in Gabon, he flew not more than 11 hours from 26 March 2020 up to and including 30 June 2020 as opposed to the required 80 hours per month. The 11 hours were made of the flights that took place in June 2020 which means there were no flights in April 2020 and May 2020. In June 2020, he flew less than 14% of the hours he would otherwise have flown under normal circumstances. Yet, he was remunerated 50% of his on-tour salary, each month, up until his return to South Africa.

[36] Equally, Mr Berry testified[13] that, in March 2020, he was in Sudan when COVID-19 struck and the world went on lockdown. He was stuck in Sudan until August 2020 as travel between countries was prohibited. After two months, only local flights were permitted and the situation changed between August or September 2020. He could not dispute the correctness of the information presented by Sahara

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[10] See respondent's document bundle p 296.
[11] See respondent's document bundle pp 287-288.
[12] See respondent's document bundle p 340.
[13] Mr Berry testified virtually over Microsoft Teams per the agreement between the parties as he was on-tour abroad. Even though his connection was not the best, he was able testify and be cross-examined to the extent practicable.

detailing the extent of the mobility restrictions in Sudan. In fact, he admitted that Sahara could not get him out of Sudan earlier, even when his mother passed away. While he was expected to work five to six days per week in terms of per the contract with the client, he was constrained to concede that he worked reduced hours between 26 March 2020 to 31 July 2020. He could not dispute Sahara's record showing that he worked a total of 40/41 days in 4 months.

[37] Mr Ortmann testified that he finished a four-week tour in Mozambique on 26 March 2020. Towards the end of the month, he received the first notice of salary cuts with no prior consultation process, nor was there an attempt to engage with him. His salary was "docked" for work done whilst he was in Mozambique. On 2 April 2020, he was served a notice to place him on a temporary layoff for an indefinite period without pay.

[38] He was next rostered on-tour from 30 June 2020 in Mozambique for a crew swop to relieve the crew that stuck in Mozambique since the end of March 2020. He crossed through the land border on 30 June 2020 and flew to Maputo on 1 July 2020. Normally he would have flown commercially to Maputo; however, due to ban on international flights, he could not fly from South Africa to Mozambique.

[39] His tour in Mozambique came to an end on 7 August 2020. He thereafter ferried an aircraft back to the Comoros on 21 September 2020. He was on-tour in Comoros until the end of November 2020. He conceded during cross-examination that he was aware that he would be earning a COVID-19-impacted salary whilst on-tour. He received a subsistence allowance from Sahara's clients.

[40] It is not disputed that Sahara had received permission from DIRCO to successfully conduct the crew swaps between June 2020 and September 2020 because international flights were still prohibited.

[41] The essence of Sahara's first defence is that the COVID-19 pandemic and the consequent restriction of movement of people and the ban on international flights in South Africa and in all of the countries it operated in 2020 rendered it impossible or partially impossible for it to honour its employees' contracts of employment.

[42] It is well accepted that, as a general rule, the impossibility of performance brought about by *force majeure* or *casus fortuitus* will excuse the performance of a contract.[14] As observed by the Supreme Court of Appeal (SCA) in *Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal*[15], *"…[t]he rule will not avail a defendant if the impossibility is self-created; nor will it avail the defendant if the impossibility is due to his or her fault*".[16] The enquiry is fact-specific and entails delving into the nature of the contract, the relationship between the parties, the context of the case and the nature of the impossibility invoked by the defendant, in order to decide whether a case has been made to justify the application of the rule.[17]

[43] The test is objective or absolute and not relative. Impossibility must be and it must be applicable to everyone and not personal to the defendant. Moreover, to be successful, the defendant must show that the change of circumstances which resulted in the impossibility was neither foreseeable nor foreseen.[18] In *Frajenron (Pty) Ltd v Metcash Trading Limited and others*[19], Vally J aptly expounded the thesis behind this doctrine as follows:

'The reasoning underlying the doctrine is that <u>the need or demand for justice requires that the law excuses non-performance because not to do so would effectively be punishing a party that wants to, but cannot, perform its obligations through no fault or neglect of its own, and in conditions whereupon, by exercising reasonable and prudent care *ab initio* it could never have foreseen that circumstances preventing it from performing would come to prevail. It is a valuable rule. It demonstrates that the law is alive to the fact that not every future fact, circumstance or eventuality is foreseeable even by the most prudent and cautious of persons (the officious bystander).</u> Importantly though, the future fact, circumstance or eventuality must not result from the default or neglect of the party failing to perform

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[14] *Herman v Shapiro & Co* 1926 TPD 367 at 373; *Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* [2008] ZASCA 27; 2008 (4) SA 111 (SCA) (*Transnet*) at para 28.
[15] *Transnet supra.*
[16] Id; see *also King Sebata Dalinyebo Municipality v Landmark Mthatha (Pty) Ltd* [2013] ZASCA 91; [2013] 3 All SA 251 (SCA) at para 28; *South African Forestry Co Ltd v York Timbers Ltd* [2004] ZASCA 72; 2005 (3) SA 323 at para 23; *Unibank Savings and Loans (formerly Community Bank v Absa Bank* 2000 (4) SA 191 (W) at subpara 9.2; *Frajenron (Pty) Ltd v Metcash Trading Limited and others* [2019] ZAGPJHC 428; 2020 (3) SA 210 (GJ) (*Frajenron)* at para 13.
[17] Id.
[18] *Frajenron supra* at para 14.
[19] Id.

as per the terms of the contract. After all, the law is unquestionable that no person should be allowed to benefit from his own wrongful act or omission.' [Own emphasis]

[44] In the present instance, the defence of supervening impossibility relates to the period between 26 March 2020 and 30 September 2020, at least. Sahara disavowed reliance on financial inability to pay full salaries for the period between 23 March 2020 and 30 September 2020. It concedes, though, that it was under financial pressure. The main thrust of Sahara's defence is that it was legally impermissible and consequently impossible for the employees to render services in terms of their contract of employment. The impossibility was not created by the COVID-19 pandemic, but rather by the restrictions placed on the movement of people and the ban on international flights in South Africa and all the other countries where it operated.

[45] As mentioned above, Mr Ortmann, who was off-tour, accepted that he could not exit South Africa to be rostered on-tour due to the ban on international flights. While Messrs van der Merwe and Berry, who were on-tour, equally accepted that their movement was affected and could not be relieved due to the international travel ban in Gabon and Sudan. They also conceded that the workload was reduced significantly due to COVID-19 restrictions up until Sahara was able to perform a crew swap in June 2020 and August 2020, respectively.

[46] Granted, the applicant employees may have been ready and willing to work per their contracts of employment, like all the employees in South Africa and elsewhere globally, their tender could not be effected due to the COVID-19 stringent regulations that restricted the movement of people and air travel, both local and international.

[47] It is not Solidarity's case that there were other commercial aviation companies that were allowed to fly to and out of South Africa, save for those permitted by the Minister of Transport to attend to evacuation or deliver essential cargo. Equally, there were country-specific COVID-19 regulations in Mozambique, Comoros, Iran, Sudan and Gabon that were promulgated, *inter alia*, curfews, and temporary bans on international flights. Consequently, the tender and performance of their duties in the

respective countries by employees on-tour were significantly curtailed. Thus, in my view, the impossibility was not peculiar to Sahara.

[48] The COVID-19 pandemic could not have been anticipated by Sahara or other employers globally. Likewise, the responses by the respective countries in closing the borders, limiting movement and enforcing travel bans on international flights from 26 March 2020 to 30 September 2020 were unforeseeable. At that stage, operations that were not essential were debarred per the relevant regulations and resulted in performance in terms of the applicant employees' contracts of employment being rendered impossible by operation of law.

[49] In *Glencarol (Pty) Ltd v National Bargaining Council for the Clothing Manufacturing Industry (Northern Chamber) and another*[20] (*Glencarol*), referred to by Sahara, Van Niekerk J, as he then was, confronted with a case of supervening impossibility in the context of employment contracts, made the following observations:

'[11] In his contribution to *Liber Amicorum Manfred Weiss* (eds. Olivier, Smit and Kalula, Juta 2021) entitled 'Termination of employment due to supervening impossibility of performance' Prof (now Judge) Avinash Govindjee reflects on the challenges presented by the Covid pandemic to employment relationships. He notes that '[t]he declaration of a national state of disaster and promulgation of regulations to address the coronavirus pandemic initially resulted in performance in terms of the vast majority of employment contracts being "impossible" to some extent', and that 'the situation was probably best understood as a form of temporary (subjective) impossibility of performance based on the temporary incapacity of certain employees to attend work safely to fulfil their contractual obligations while the Covid – 19 situation persisted' (at 291). He submits that it is at least arguable that for the period of incapability, employers were not obliged to pay wages or, put another way, since the affected employees could not tender their services lawfully, the employer's obligation to pay wages was effectively suspended. Judge Govindjee makes reference to *Macsteel Service Centres (Pty) Ltd v National Union of Metalworkers of SA and Others* [2020] ZALCJHB 129 at para 82, where this court said the following:

[20] [2022] ZALCJHB 353; (2023) 44 ILJ 563 (LC) (*Glencarol*) at paras 11 and 15.

'The reality in law is that the employees who rendered no service, albeit to no-fault of their own or due to circumstances outside of 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'.'

The principle may be different where the employer may have been permitted to trade in some form during the national lockdown, but elected not to do so on account of anticipation that trading would not be profitable (see *Matshazi v Mezepoli Melrose Arch (Pty) Ltd & another* [2020] ZAGPJHC 136). That was not the case in the present instance.

…

[15] …The employees' contracts of employment were thus suspended for the period of the hard lockdown. That relieved the applicant, for that period, of any obligation to remunerate any employee, or to implement any terms and conditions of employment that were dependent on physical presence in the workplace. It follows that clause 4 of the collective agreement, as well as clause 14, both of which establish levels of remuneration and other conditions of employment and incorporated as they are into the relevant contracts of employment, were suspended. The applicant cannot therefore be said to have breached the collective agreement by refusing to bring into account the period of absence occasioned by the lockdown into the calculation of bonus payments or accrued annual leave.' [Own emphasis]

[50] The impossibility and/or partial impossibility could not be attributed to any of Sahara's actions. By the same token, as stated in *Glencarol,* the employer's obligation to pay wages was effectively suspended consequent to COVID-19 restrictions between 26 March 2020 and 30 September 2020, at most, in terms of relevant regulations. To the extent that contracts of employment involve reciprocity, the applicant employees' readiness or willingness to render their service does not assist their case because they could not make good on their tender during the COVID-19 lockdown. Sahara could, therefore, not be faulted for the decision to lay-off the affected employees and implement a 'no work - no pay' principle.

[51] Solidarity takes issue with the fact that Sahara's operations did not shut down completely. True, but that only relates to Messrs van der Merwe and Berry. They both conceded that due to the partial impossibility in Sudan and Gabon, they worked

significantly reduced hours and were paid 50% of their salaries. The notion of partial impossibility is succinctly explained in *Christie's Law of Contract in South Africa*[21], relied on by Sahara, as follows:

'The effect of partial impossibility depends on whether an obligation that is divisible from the rest of the contract has become altogether impossible of performance or whether an obligation forming an indivisible part of the contract has become impossible of full performance. In the former case the divisible contract must be divided, the impossible part being discharged and the rest remaining in operation; in the latter case the creditor may have the option of cancelling the contract or accepting the reduced performance in exchange for a reduced counter-performance.'[22]

[52] Messrs van der Merve and Berry did not challenge the reduction of their salaries through internal procedures for the intervening period. Instead, they both rendered limited services, to the extent permitted in terms of the regulatory framework in Gabon and Sudan, respectively. Sahara could not have allocated more work as the restrictions were legally imposed and consequently made performance in terms of the contacts of employment partially impossible. The same applies to Mr Ortmann who had agreed to be rostered on-tour in Mozambique to attend to a crew swap. It is not disputed that, in June 2020, the travel bans were still operative in that country which made it partially impossible to render his services.

<u>Hearsay evidence and section 210 of the LRA</u>

[53] I deem it appropriate to quickly dispose of Solidity's contention that Sahara's evidence in relation to COVID-19 regulations in Mozambique, Comoros, Iran, Sudan and Gabon is hearsay and should be rejected. This, in my view, is a late attack that is mooted in Solidarity's heads of argument, instead of being properly traversed during trial, a conduct that was discouraged by the LAC in *Exxaro Coal (Pty) Ltd and another v Chipana and others*[23]. Nonetheless, as mentioned above, the evidence in

[21] R H Christie, G B Bradfield, '*Christie's Law of Contract in South Africa*', 7th ed LexisNexis, at p 550 .
[22] Id; see *Joubert v Bester* 1977 (4) SA 560 (T) at 568B; *Cave t/a The Entertainers and The Record Box v Santam Insurance Co Ltd* 1984 (3) SA 735 (W) at 747B–H; *Bob's Shoe Centre v Heneways Freight Services (Pty) Ltd* 1995 (2) SA 421 (A) at 428F–431C.
[23] [2019] ZALAC 52; (2019) 40 ILJ 2485 (LAC) at paras 23 - 24.

question was readily conceded by the applicant employees during cross-examination. Thus, this impugn is untenable and stands to be rejected.

[54] Moreover, there is no merit in Solidarity's alternative argument that section 210 of the Labour Relations Act[24] (LRA) finds application in this matter.[25] The applicant employees' claim, as I understand, is contractual in terms of the common law. This Court is duly exercising its concurrent jurisdiction with the civil court in terms of section 77(3) of the Basic Conditions of Employment Act[26] (BCEA). It, therefore, stands to reason that, by contending that Sahara's conduct in unilaterally amending the applicant employees' contracts of employment offended its obligation to act in a procedurally and substantively fair matter in terms of the LRA, Solidarity clearly conflates the legal principles applicable.

[55] Solidarity's reliance on the dictum *in Staff Association for the Motor and Related Industries (SAMRI) v Toyota* of *SA Motors (Pty) Ltd*[27] is an obvious misdirection. In that matter, the employees who were alleging a unilateral change to their terms and conditions of employment had availed themselves to the provisions of section 64(4) and (5) of the LRA[28]. Revelas J aptly observed that:
'What is relevant in this matter before me, is that the applicant has declared a dispute which has not yet been resolved and which is pending at the CCMA. Section 64(4) precluded the employer from continuing with the conduct complained of, which the employees have referred to the CCMA. The employees are therefore entitled, if this conduct amounts to a variation of the terms and conditions of their employment,

[24] Act 66 of 1995, as amended.
[25] Section 210 of the LRA provides:
'If any conflict, relating to the matters dealt with in this Act, arises between this Act and the provisions of any other law save the Constitution or any Act expressly amending this Act, the provisions of this Act will prevail.'
[26] Act 75 of 1997, as amended
[27] 1997 (18) ILJ 374 (LC).
[28] Section 64(4) and (5) provides:
'(4) Any employee who or any trade union that refers a dispute about a unilateral change to terms and conditions or employment to a council or the Commission in terms of subsection (1) (a) may, in the referral, and for the period referred to in subsection (1)(a) —
(a) require the employer not to implement unilaterally the change to terms and conditions of employment; or
(b) if the employer has already implemented the change unilaterally, require the employer to restore the terms and conditions of employment that applied before the change.
(5) The employer must comply with a requirement in terms of subsection (4) within 48 hours of service of the referral on the employer.'

to request the employer to refrain from doing so or to restore the situation in terms of this section. If this request is not adhered to, the employees are entitled to approach the Labour Court to compel the employer to adhere to the request.'[29]

[56] In essence, the court's intervention was limited to granting an interim order that reinstated the status *quo ante* pending the outcome of the CCMA conciliation. In the event that the dispute remained unresolved after conciliation, the employees would have been free to embark on a strike[30]; alternatively, to pursue a contractual claim. It follows Solidarity's reliance on LRA is misplaced.

<u>Shifren principle/Tacit agreement/ acquiesce</u>

[57] The next enquiry pertains to Sahara's defence that the applicant employees tacitly agreed to the changes to their terms and conditions of employment. Alternately, that they acquiesced. Solidarity, on the other hand, argued that Sahara is bound by the Shifren principle.

[58] It is common cause that as from 1 October 2020, the restrictions on movement and air travel were slowly uplifted. In South Africa, international flights were permitted for the first time. Still, Sahara did not adjust salaries to reinstate the pre-COVID-19 salaries. As a result, on 22 October 2020, the pilots lodged a collective grievance about the persistent salary reduction and lay-offs that were implemented without consultation with affected employees.

[59] On 9 November 2020, Sahara conducted a survey on the Air Maestro system to establish which pilots were willing to be rostered to fly on-tour on the COVID-19-impacted salary and/or be rostered on-tour to Iran, Blad Air Base. Messrs Ortmann and van der Merwe gave an affirmative answer to the first question, indicating a willingness to be rostered on a COVID-19-impacted salary. Mr Ortmann was not agreeable to being rostered to Iran.

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[29] Id at para 378E-G.

[30] See: *Macsteel Service Centres SA (Pty) Ltd v National Union of Metalworkers of SA and others* [2020] ZALCJHB 129; (2020) 41 ILJ 2670 (LC), where the court refused to interdict a strike consequent to the employer's unilateral action to reduce salaries during the COVID-19 lockdown period.

[60] Mr Ortmann testified that he agreed to be rostered on a COVID-19-impacted salary because of financial reasons after he had been laid off for about four months. Had he refused, he would have been laid-off. Thus, he had no option but to agree. Similarly, Mr van der Merwe, testified that he had no option but to accept being rostered on a COVID-19-impacted salary rather than risk being laid off and not earn a salary at all. Thus, absent a consultation, the survey was nothing but an ultimatum.

[61] Sahara disputes that it pressured the pilots to agree to COVID-19-impacted salaries. Ms Constable testified that the survey was for the purposes of planning the roster since it was understood from the grievance that there were people who were not willing to work for 50% of their salaries. So, they were trying to plan accordingly. She denied that it was an ultimatum. Instead, it was a choice whether the pilots were willing to work on a reduced salary or wait and hope that things would change.

[62] Mr Berry was not part of the survey since he is an engineer. He was adamant that he did not agree to a COVID-19-impacted salary hence he joined Solidarity which then represented him in all the discussions. Sahara, on the other hand, contends that Mr Berry's conduct in accepting to be rostered on-tour on a COVID-19-impacted salary constitutes a tacit agreement to the changes to his terms and conditions of employment. The same is contended in respect of Messrs Ortmann and van der Merwe, that for the period between 1 October 2020 and 9 November 2020, that the tacitly agreed to the COVID-19-Impacted salary.

[63] On 11 February 2021, Solidarity addressed a letter of complaint to Sahara on behalf of the members who were pilots. It is clear from the letter that reduction of salaries and extended layoffs were the main issues as they were effected without consultation and allegedly breached the provisions of their members' employment contracts. Following a virtual meeting between Solidarity and Sahara on 1 March 2021, Solidarity consulted with its members and gave feedback to Sahara on 16 March 2021. The following concerns were communicated:

63.1 While members were prepared to accept a draconian reduction in their salaries and lay-offs cooperatively due to the COVID-19 pandemic, they never anticipated them to be permanent as they had been in place for 11 months at that time.

63.2 On 24 March 2020, the members' salaries were unilaterally and retrospectively reduced by 30% despite their entitlement to full salaries because of the services rendered.

63.3 The placing of members on lay-off was not acceptable, even though the members had accepted the position cooperatively, Sahra failed to adjust their position despite the fact that it was a material breach of the employment contracts.

[64] Solidary proposed the following measures to correct the breach of the employment contracts of its members:

64.1 Sahara pays its members the shortfall of the March 2020 salaries by the end of March 2021.

64.2 Sahara pays its members a full salary while on-tour with effect from March 2021.

64.3 Sahara terminates the temporary lay-offs with immediate effect and implements no less than 50% of members' contractual salaries while off-tour.

64.4 Sahara sources economical training opportunities for their members.

[65] On 18 March 2021, Sahara responded as follows:

'We continue to suffer significant financial impact to our business and to date we have not secured any new contracts. Our situation remains as it was on 1 March 2021.

Those employees who have indicated that they are willing to work on a reduced salary will continue be rostered to work per our operational requirements. Those employees who are not on duty will continue to be laid off.

We reiterate that all employees continue to be free to seek alternative employment whether freelance or permanent.

We will review the situation on month-to-month basis and provide feedback where relevant and in the event the circumstances change. We cannot predict how long these measures will remain in force.'[31]

[31] See: Applicants 'reduced bundle, p88.

[66] It is clear from Sahara's response that it was alive to the fact that, as from 1 October 2020, its conduct was not covered by the COVID-19 regulations. In fact, it was no longer the travel restrictions that informed its decision to persist with salary cuts and lay-offs therefrom. In the words of Ms Constable, it was due to financial reasons and to avoid retrenchments. The upshot of this assertion is that Sahara concedes that it failed to comply with its contractual obligations due to operational requirements.

Shifren principle

[67] Solidarity contends that the employment contracts at issue are subject to a non-variable clause and that, without a written agreement to amend the terms therein and signed by the parties, any changes effected unilaterally constitute a breach of contract. Based on the principles outlined in *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en andere*[32], the standard non-variation clause is referred to as "*the Shifren clause*". Solidarity contends that the applicant employees' contracts of employment could not be amended unilaterally by Sahara on the basis of the Shifren principle.

[68] The following cautionary remarks by the SCA per Cachalia JA, in *Spring Forest Trading CC v Wilberry (Pty) Ltd t/a Ecowash and another*[33], referred to with approval in *Schloemann v Goldstone Resources Ltd*[34], holds true:

'…that when parties impose restrictions on their own power to vary or cancel a contract… they do so to achieve certainty and avoid later disputes. The obligation to reduce the cancellation agreement to writing and have it signed was aimed at preventing disputes regarding the terms of the cancellation and the identity of the parties authorised to effect it. Our courts have confirmed the efficacy of such clauses.'[35]

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[32] 1964 (4) SA 760.
[33] 2015 (2) SA 118 (SCA) (*Spring Forest Trading*).
[34] [2018] ZALCCT 40; [2019] JOL 42240 (LC)
[35] Id at para 75 - 77; *Spring Forest Trading supra* at para 13.

[69] Yet, despite the Shifren principle, the SCA accepted, with reference to the provisions of the Electronic Communications and Transactions Act[36] (ECTA), the cancellation of the agreement by way of electronic signatures, stating that:

'The approach of the courts to signatures has therefore been pragmatic, not formalistic. They look to whether the method of the signature used fulfils the function of a signature – to authenticate the identity of the signatory – rather than insist on the form of the signature used.'[37]

[70] There is no reason why a pragmatic not a formalistic approach to signature should not be adopted in the present instance, especially since electronic communication is now a primary medium of communication in the wake of the COVID-19 pandemic.

[71] Sahara is adamant that Messrs Ortmann and van der Merwe consented in writing when they participated in the 9 November 2020 survey. This evidence was not seriously contested. As mentioned above, Messrs Ortmann and van der Merwe testified that they accepted the reduced salary in order to avoid being laid off. In my view, they made a conscious election to continue to be rostered and earn a reduced salary. To the extent that their election was communicated in writing, I agree with Sahara that it must be accepted that it met the requirements of the Shifren principle.[38]

[72] In any event, in my view, the application of the Shifren principle in the context of employment contracts is open to question. I say so because, generally, an inflation-related salary increase is effected without a written amendment to the

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[36] Act 25 of 2002.
Section 12 of the ECTA provides:

> 'A requirement in law that a document or information must be in writing is met if the document or Information is –
> (a) in the form of a data message; and
> (b) accessible in a manner usable for subsequent reference.'

Section 1 of the ECTA defines a data message as "*data generated, sent, received or stored by electronic means*".
Section 13(1) of the ECTA provides:

> 'Where the signature of a person is required by law and such law does not specify the type of signature, that requirement in relation to a data message is met only if an advanced electronic signature is used.'

[37] *Spring Forest Trading* at para 26.
[38] See: *Sihlali v SA Broadcasting Corporation Ltd* [2010] ZALC 1; (2010) 31 ILJ 1477 (LC).

contract of employment. That is, in essence, what transpired in the present instance. The applicant employees conceded that all the salary adjustments prior to 2020 were effected without amending their contracts of employment in writing. To my mind, to insist on rigid construction of the Shifren clauses as contended by Solidarity is unbusinesslike and would definitely lead to absurdity.[39]

Tacit agreement or acquiesce

[73] A tacit agreement is defined as an implied contract or a contract by conduct or a contract implied from the facts and circumstances.[40] In order to establish a tacit agreement, it is necessary to allege and prove unequivocal conduct which is capable of no other reasonable interpretation and that the parties intended to and did in fact contract on the terms alleged.[41] The test is succinctly explicated in *Standard Bank of South Africa Ltd and another v Ocean Commodities Inc and others*[42] as follows:
'In order to establish a tacit contract it is necessary to show, by a preponderance of probabilities, unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged. It must be proved that there was in fact *consensus ad idem*.'

[74] Otherwise stated, since a party that invokes a tacit agreement bears the onus, that party is enjoined to produce evidence of the conduct of the parties which justified a reasonable inference that the parties intended to, and did, contract on the terms alleged, in other words, that there was, in fact, *consensus ad idem*.[43]

[75] In the present instance, Sahara asserts that Messrs Ortmann, van der Merwe and Berry acted in such a way as to lead a reasonable person to the conclusion that they temporarily agreed to the reduction in their salaries. All the work they performed from April 2020, when they were able to perform, was undertaken knowing that they

[39] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) at para 18.
[40] See; *Christie's Law of Contract* 5ed at pp 81 - 90; and D Hutchison, C Pretorius, et al, '*The Law of Contract in South Africa*' at pp 240 - 241.
[41] See: *Triomf Kunsmis (Edms) Bpk v AE & CI Bpk en andere* 1984 (2) SA 261 (A) at 267; *Butters v Mncora* 2012 (4) SA 1 (SCA) at para 18; *Festus v Worcester Municipality* 1945 CPD 186 (C).
[42] 1983 1 SA 276 (A) at 292B.
[43] See: *Gordon Lloyd Page & Associates v Rivera* 2001 1 SA 88 (SCA) 95J-96A.

would receive COVID-19-impacted salaries. When given instructions by the employer or their managers they responded positively. For example, in WhatsApp conversations, Mr Ortmann and Mr Berry replied by sending "*thumbs up*" messages. Also evidenced from the screenshots of WhatsApp conversations, they followed up on being rostered. Mr Berry, in fact, participated in organising who should be rostered. This evidence was not disputed.

[76] The applicant employees readily conceded that, when the changes were introduced in March 2020, they were positive and did not complain, although they were unhappy with the salary reduction. They accepted that the drastic measures were necessary in the wake of the COVID-19 pandemic. According to Messrs Ortmann and van der Merwe, the reason they lodged the grievance in October 2020 was because Sahara was not reverting to pre-COVID-19 salaries.

[77] Notwithstanding lodging the grievance, in November 2020, Messrs Ortmann and van der Merwe went ahead and consented to being rostered on COVID-19-impacted salaries. They were rostered accordingly and never challenged the turn of events up until Solidarity's intervention on their behalf on 11 February 2021. Notably, in Solidarity's letter of 16 March 2021, it was conceded that the applicant employees "*had accepted the position cooperatively*", that is, the changes in their terms and conditions of employment.

[78] In fact, as correctly contended by Sahara, Solidarity accepted that there was an agreement on the COVID-19-impacted salary, hence it directed its efforts on the period from March 2021, save for the salary deductions in March 2020. The applicant employees were constrained to concede that Solidarity acknowledged, on their behalf, that they had agreed to the temporary changes. As a result, it proposed a return to the pre-COVID-19 salaries with effect from March 2021.

[79] Mr Ortmann resigned on 8 June 2021, alleging that he could not live on the reduced salary as he ran out of savings. He conceded during cross-examination that he had agreed to the reduced salary. While, Mr Berry's conduct clearly evinced an assent to the changed terms and conditions of employment. Throughout 2020, he continued to avail himself to be rostered on-tour on a COVID-19-impacted salary.

[80] In my view, the evidence and the probabilities considerably favour Sahara's version that after the introduction of COVID-19-impacted salaries and lay-offs in March 2020 and, particularly, from October 2020 to March 2021, the applicant employees conducted themselves in a manner that gave rise to the inescapable inference that there was, in fact, *consensus ad idem* to the temporary implementation of COVID-19-impacted salaries and lay-offs. The fact that the applicant employees were unhappy with the turn of events is inconsequential because, in determining whether a tacit contract was concluded, a court has regard to the external manifestations and not the subjective workings of minds.[44]

[81] The converse is true when it comes to the period commencing from March 2021 until September 2021, consequent to the intervention of Solidarity. It is clear from Solidarity's letter that the applicant employees were no longer prepared to assent to the changes and proposed a reinstatement of the pre-COVID salaries with effect from the end of March 2021.

[82] While it is true that the claim before this Court is purely contractual, it is important to interrogate the context that prevailed at the time. When the COVID-19 pandemic first hit, employers had no choice but to urgently make difficult decisions to shut down operations completely or partially and lay-off some or all employees. Government intervention through TERS COVID-19 benefits was introduced to alleviate the financial impact of COVID-19 on employees who had suffered a loss of income due to temporary lay-offs. It was expected that employers would benefit from the relief that was extended and to re-call the employees to work when time allowed, without terminating their employment. Nonetheless, TERS COVID-19 regulations did not absolve employers from their contractual obligations in terms of the common law.

[83] It is common cause that Solidarity subsequently referred a dispute to the CCMA, challenging the unilateral change to terms and conditions of employment of their members. As a result, Sahara commenced a retrenchment process which

[44] *Golden Fried Chicken (Pty) Ltd v Sirad Fast Foods CC and others* 2002 (1) SA 822 (SCA) at 825D - F.

resulted in the retrenchment of the surplus crew. The applicant employee survived the retrenchment.

[84] Sahara's efforts to avoid retrenchment by implementing salary cuts and lay-offs were obviously unsuccessful. Consequent to the retrenchment of the surplus crew, it is not inconceivable that Solidarity and the applicant employees expected that the *status quo ante* would be reinstated because the extra burden had been discharged.

[85] Based on the evidence for the period commencing in March 2021 until September 2021 (in relation to Messrs Berry and van der Merwe; and March 2021 to June 2021, Mr Ortmann's date of resignation), I am persuaded that the probabilities do not support Sahara's version that the applicant employees tacitly agreed to the protraction of the unilateral changes to their terms and conditions of employment. Also, since there is no incontrovertible evidence that the applicant employees accepted the turn of events by acting in a manner that evinced an intention to waive their rights to avail themselves to contractual recourse, Sahara's defence of acquiesce is untenable.[45]

[86] Lastly, there is no evidence before this Court to justify the decision by Sahara to unilaterally dock the applicant employees' salaries for the services they had duly rendered before 26 March 2020 when COVID-19 regulations took effect.

<u>Conclusion</u>

[87] In all the circumstances, Solidarity failed to make a case to sustain the relief sought on behalf of the applicant employees, only in relation to the period between 26 March 2020 to February 2021. Accordingly, its claim in this regard stands to be dismissed. Even so, Solidarity's claim in relation to the docking of the applicant employees' salaries for the period before 26 March 2020 and the reduction of

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[45] See: *BMW (SA) (Pty) Ltd v National Union of Metalworkers of SA and another* (2019) 40 ILJ 305 (LAC) at para 41; *Legal Aid SA v Theunissen* (2020) 41 ILJ 625 (LAC); *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) at paras 101 and 102.

salaries for the period between 1 March 2021 to 31 August 2021 must succeed. In essence, Sahara should pay the pre-COVID-19 salaries per the applicant employees' contracts of employment for the period 26 March 2020 and the period between 1 March 2021 to 31 August 2021. To the extent that the applicant employees did receive the COVID-19 impacted salaries and TERS benefits, where applicable, Sahara should accordingly pay the shortfall in salaries due to the applicant employees for the relevant periods.

Costs

[88] Given the fact that both parties are partially successful, it follows that each party should pay its own costs.

[89] In the circumstances, I make the following order:

Order

1. Solidarity's claim in relation to the period between 26 March 2020 to February 2021 is dismissed.
2. Solidarity's claim in relation to the docking of the applicant employees' salaries for the period before 26 March 2020 and the reduction of salaries for the period between 1 March 2021 to 31 August 2021 is upheld.
3. Sahara shall pay the shortfall in salaries due to the applicant employees for the periods mentioned in paragraph 2 above within 20 days of this order.
4. There is no order as to costs.

P Nkutha-Nkontwana
Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate C Dames

Instructed by: Serfontein, Viljoen & Swart Attorneys

For the Third Respondent:	Advocate JD Withaar
Instructed by:	Richard Spoor Inc