Facing employee retrenchments? Key legal considerations

By Hugo Pienaar and Abigail Butcher

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Economists have very recently predicted that South Africa has a 45% risk of entering into a recession. Such a recession would come at the worst time for the country's economic recovery. The many businesses that are in survival mode and the employees who have been under the constant threat of job losses occasioned by the Covid-19 pandemic and the adverse effects of load shedding will be the primary casualties.

Image source: Andriy Popov – 123RF.com

Should a recession of this magnitude indeed be experienced, sadly, employers will most probably need to embark on huge retrenchment exercises in order to protect the job security of the majority of their workforce and the fiscal sustainability of their business operations.

Below, we outline some basic historic lessons from the courts on the laws surrounding retrenchments.

Operational requirements

It must be noted that a retrenchment can only be embarked upon for genuine operational requirements. This means for economic, technological, structural or similar reasons.

It is important to note that, in any restructuring exercise, there is only a duty to consult which does not extend to a duty to negotiate – this is an important distinction to be drawn and impacts significantly on employers' and employees' rights.

The most common mistake employers make is to confront unions or their employees with a *fait accompli* – this means that the notice of retrenchment generally incorrectly refers to the employer's decision to retrench and an invitation to consult about the impact of the retrenchment only. It is necessary for unions and employees to also be afforded an opportunity to make proposals with regard to the employer's decision to embark on a retrenchment exercise prior to any final decision made on retrenchment.

Employers cannot utilise the retrenchment process to address or resolve issues relating to, for instance, poor performers or misconduct.

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Financial disclosure

In addition, employers must consider the real rationale for a retrenchment, insofar as such a rationale will determine the likelihood of disclosure of financial information. Should any proposed retrenchment be based on economic reasons, there is a likelihood that disclosure of financial information will be required – albeit in a confidentially protected environment, to the extent possible.

Where employers are required to disclose financial information, they should implement the necessary measures to protect the confidentiality of this information. Any proposed retrenchments based on other grounds, such as the need to restructure, will ordinarily not require the disclosure of financial information, but may require the disclosure of other information relating to an employer's operations.

The next risk employers often face regards the selection criteria used to determine which employees are identified for retrenchment. Employers, in the absence of sound legal advice, often use a subjective selection criterion that can create further litigation and unnecessary workplace conflict. It is important that the selection criteria is not limited to only "LIFO" (last in, first out), and that it is agreed and/or applied objectively. An objective criterion may be used to retain the most suitably qualified employees, especially at a more senior level.

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Severance pay

The payment of severance pay remains a contentious issue and employers are obliged to pay the minimum severance pay ie. one week's remuneration for every completed year of service, or the minimum set out in a particular collective agreement. The practice is to pay more when the business is not financially distressed, but this is not a requirement. In this regard, it is important to note that the calculation of the severance pay is based on an employee's remuneration which is

the “cost to company” package of an employee.

Employers are also encouraged, but not mandated, to consider offering retrenched employees training at designated or registered training institutions. This will assist retrenched employees to acquire further skills after their retrenchment. Needless to say, employers should generally make these contributions directly to a registered and accredited institution where retrenchees can access this opportunity.

Employers should not embark on a retrenchment exercise as a mechanical checklist and should enter into a *bona fide* consultation process with the union, where relevant, or employees. This, *inter alia*, means that employers should carefully consider any proposals made by the unions or employees and, should they not accept these , provide reasons for the rejection.

Lastly, where employers embark on a large-scale retrenchment, the process can be better managed and regulated when a facilitator has been appointed to oversee the consultation process.

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