IN THIS ISSUE

EMPLOYMENT
RETRENCHMENT ALERT **SERIES**

The Employment Practice is doing a series of Alerts focused on Retrenchment, against the backdrop of the tough economic climate.

CONSULTING WHEN THE TRADE UNION WON'T PLAY BALL?

The on-going poor economic climate has compelled many employers to contemplate retrenchments in order to remain profitable.

Once retrenchment notices are issued in terms of s189(3) of the Labour Relations Act, No 66 of 1995 (LRA), the consultation process commences, which begins with the employer inviting affected parties to consult on the statutorily prescribed issues listed in the notice.

In the absence of a collective agreement on the issue, the consultation process is usually held between the employer and the registered trade union whose members are likely to be affected by the predicted retrenchments. As such, meaningful consultations are vital in ensuring the fairness of the retrenchment process.

With this overarching requirement, employers can ill afford to short circuit the consultation process; however, in some instances employers are faced with hostility in that unions and employee representatives threaten and undermine consultations in an attempt to stop or delay the anticipated retrenchments.

The following question then arises: Will a court overturn the retrenchment process due to an incomplete or improper consultation process? The Labour Court and Labour Appeal Court have grappled with this very question over recent years. We highlight some of these important cases below:

***Chester Wholesale Meats (Pty) Ltd v National Industrial Workers Union of SA & others* (2006) 27 ILJ 915 (LAC)**

In this case, the union had frustrated the consultation process from November until April of the following year. The Labour Appeal Court held that, in the circumstances, the employer was fully entitled to retrench the employees and that the retrenchment was procedurally fair.

***Simelane and Others v Letamo Estate* (2007) 28 ILJ 2053 (LC)**

The following year, the Labour Court was confronted with a similar set of facts to the *Chester* case: The union had delayed the consultation process for five months. The union had also insisted on financial records before it would engage further in the consultation process. In order to ensure that the consultation process was not delayed, the employer made its bookkeeper available to the union as it did not have recent financial records. The union rejected this solution.

The union's refusal resulted in the employer eventually retrenching the affected employees. The fairness of the retrenchment was challenged in the Labour Court. In considering the matter, the Labour Court held that s189(2) of the LRA imposes a dual duty to consult, not only on the employer, but on the union as well; the union has a duty to attempt to preserve jobs in the interests of its members.

As a result of the union's failure to carry out its duty, the Labour Court found that the employer had proven that it had a fair reason to retrench. From a procedural perspective, the court held that the financial statements were not relevant in this particular case and that the union's unnecessary demand was aggravated by the union's failure to refer a s16 dispute for the disclosure of the financial statements. Furthermore, the unions refusal to have unlimited access to the employer's bookkeeper had been unreasonable and on this basis the union was found to have a recalcitrant attitude which entitled the employer to take the decision to retrench when it did.

continued

Importantly, the Labour Court held that the employer's failure to consult on all of the issues in the s189(3) notice was excusable because the union had frustrated the consultation process.

***Smith and Others v Courier Freight* (2008) 29 ILJ 420 (LC)**

In this case, the Labour Court was, again, faced with similar facts: The employer held several consultation meetings and minutes of each session were taken. The consultation process ran for a period of nine months and throughout this time, the minutes reflected that the union was not prepared to consult, intentionally shifting the goal posts to avoid a proper consultation.

The Labour Court held that the union had deliberately frustrated the employer's endeavours to consult and done so to the detriment of its members, despite repeated and genuine attempts by the employer to engage with the union. The Labour Court held that the employer was entitled to make the retrenchments as the consultation process could not continue indefinitely. The retrenchments were therefore found to be both procedurally and substantively fair.

***Association of Mineworkers and Construction Union and Others v Sunduka Coal (Pty) Ltd* (2013) 34 ILJ 1519 (LC)**

In this more recent judgment, the Labour Court had to determine whether the employer's large scale retrenchment process was fair.

Given the large scale nature of the retrenchment, a facilitator was appointed under the auspices of the CCMA and five facilitation meetings were held. Throughout the facilitation process, AMCU refused to deal with the substantive issues and delayed the process by raising technical objections.

By the third facilitation meeting an agreement had been reached with the other consulting union. AMCU, however, only submitted its first proposals in the fourth meeting.

The employer issued notices of retrenchment. This prompted AMCU to launch an application in the Labour Court in terms of s189A(13), seeking an order for the employer to comply with a fair retrenchment process.

Although the employer refused to disclose financial statements which were relevant to the present retrenchment, the Labour Court held that this should not have prevented AMCU from conditionally consulting on the other substantive issues while it simultaneously fought the issue of disclosure.

The Labour Court finally held that although the employer did not escape criticism, its failures did not compare to the dilatory and evasive strategy pursued by AMCU. Thus the retrenchment process was found to be procedurally fair.

Lessons to take away from these cases

Given these decisions, employers are reminded that the consultation process should be embarked upon in a bona fide manner, with the intention to fully disclose information that is relevant to the retrenchment process.

Where the consultation process is met with dilatory conduct, employers should record this in full (preferably in minutes). Employers should also ensure that union representatives are invited to the consultation process, and that these representatives are given all the necessary and relevant information.

Nicholas Preston

THE XXI WORLD CONGRESS OF THE INTERNATIONAL SOCIETY FOR LABOUR AND SOCIAL SECURITY LAW IS TAKING PLACE IN CAPE TOWN FROM 15 TO 18 SEPTEMBER 2015, HOSTED BY THE SOUTH AFRICAN SOCIETY FOR LABOUR LAW (SASLAW) AND PROUDLY SPONSORED BY CLIFFE DEKKER HOFMEYR AND DLA PIPER AFRICA.

The 21st World Congress promises to provide a platform for a stimulating discussion on labour and social security law in a global environment where sustained economic and social uncertainty appears to have become the norm.

The main keynote speakers are Professor Alain Supiot, Doctor in Law at the Collège de France in Paris and Professor Sir Bob Hepple, Emeritus Master of Clare College at the University of Cambridge.

VIEW FULL PROGRAMME HERE > DOWNLOAD

CLICK HERE FOR MORE INFORMATION.

CHAMBERS GLOBAL 2014 - 2015 ranks our Employment practice in Band 2: Employment.

Aadil Patel ranked by CHAMBERS GLOBAL 2015 in Band 2: Employment.

Hugo Pienaar ranked by CHAMBERS GLOBAL 2014 - 2015 in Band 2: Employment.

Fiona Leppan ranked by CHAMBERS GLOBAL 2015 in Band 4: Employment.

CONTACT US

For more information about our Employment practice and services, please contact:

Aadil Patel
National Practice Head
Director
T +27 (0)11 562 1107
E aadil.patel@dlacdh.com

Michael Yeates
Director
T +27 (0)11 562 1184
E michael.yeates@dlacdh.com

Anli Bezuidenhout
Associate
T +27 (0)21 481 6351
E anli.bezuidenhout@dlacdh.com

Gillian Lumb
Regional Practice Head
Director
T +27 (0)21 481 6315
E gillian.lumb@dlacdh.com

Faan Coetzee
Executive Consultant
T +27 (0)11 562 1600
E faan.coetzee@dlacdh.com

Khanyisile Khanyile
Associate
T +27 (0)11 562 1586
E khanyisile.khanyile@dlacdh.com

Johan Botes
Director
T +27 (0)11 562 1124
E johan.botes@dlacdh.com

Kirsten Caddy
Senior Associate
T +27 (0)11 562 1412
E kirsten.caddy@dlacdh.com

Katlego Letlonkane
Associate
T +27 (0)21 481 6319
E katlego.letlonkane@dlacdh.com

Mohsina Chenia
Director
T +27 (0)11 562 1299
E mohsina.chenia@dlacdh.com

Nicholas Preston
Senior Associate
T +27 (0)11 562 1788
E nicholas.preston@dlacdh.com

Thandeka Nhleko
Associate
T +27 (0)11 562 1280
E thandeka.nhleko@dlacdh.com

Fiona Leppan
Director
T +27 (0)11 562 1152
E fiona.leppan@dlacdh.com

Lauren Salt
Senior Associate
T +27 (0)11 562 1378
E lauren.salt@dlacdh.com

Sihle Tshetlo
Associate
T +27 (0)11 562 1196
E sihle.tshetlo@dlacdh.com

Hugo Pienaar
Director
T +27 (0)11 562 1350
E hugo.pienaar@dlacdh.com

Ndumiso Zwane
Senior Associate
T +27 (0)11 562 1231
E ndumiso.zwane@dlacdh.com

BBBEE STATUS: LEVEL TWO CONTRIBUTOR

JOHANNESBURG
1 Protea Place Sandton Johannesburg 2196, Private Bag X40 Benmore 2010 South Africa
Dx 154 Randburg and Dx 42 Johannesburg
T +27 (0)11 562 1000 **F** +27 (0)11 562 1111 **E** jhb@dlacdh.com

CAPE TOWN
11 Buitengracht Street Cape Town 8001, PO Box 695 Cape Town 8000 South Africa
Dx 5 Cape Town
T +27 (0)21 481 6300 **F** +27 (0)21 481 6388 **E** ctn@dlacdh.com

DLA CLIFFE DEKKER HOFMEYR