



FOCUS

FROM POWERFUL
PARTNERSHIPS COME POWERFUL
SOLUTIONS

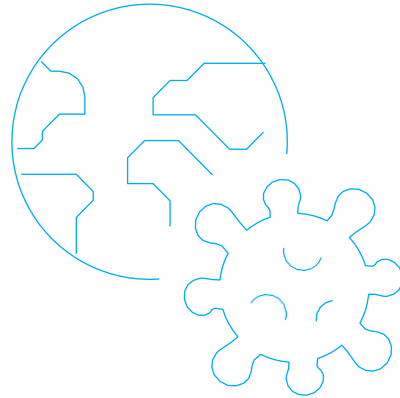
RETRENCHMENTS IN THE TIME OF COVID-19

The legal partner
for your business.

cliffedekkerhofmeyr.com


CLIFFE DEKKER HOFMEYR

INTRODUCTION



SOUTH AFRICAN ECONOMIC LANDSCAPE

PROJECTED RECESSION



REDUCTION IN GDP



UNEMPLOYMENT ROSE TO 30% AND EXPECTED TO POSSIBLY RISE TO 50%

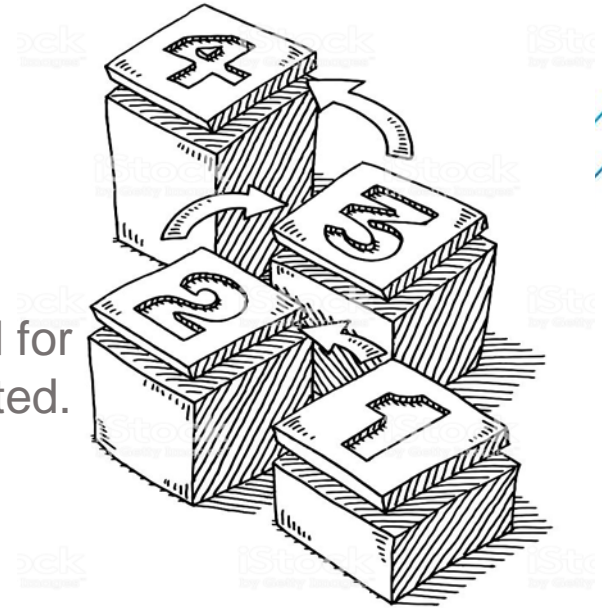


NATIONAL TREASURY ESTIMATE 2 MILLION JOBS COULD BE LOST AS A RESULT OF COVID-19, OTHER ESTIMATES ARE HIGHER

**LARGE SCALE
RETRENCHMENTS - NOTICE
PERIODS, SEVERANCE PAY
AND FACILITATION
THABANG RAPULENG**

§ 189A – LARGE SCALE RETRENCHMENTS

- S 189A regulates **large scale** retrenchments
- Consultation process i.t.o. s 189(3) conducted by a **facilitator**
- S 189A(3) requires a **60 - day consultation period** for large scale retrenchment where facilitator is appointed.
- Consultation is compulsory.

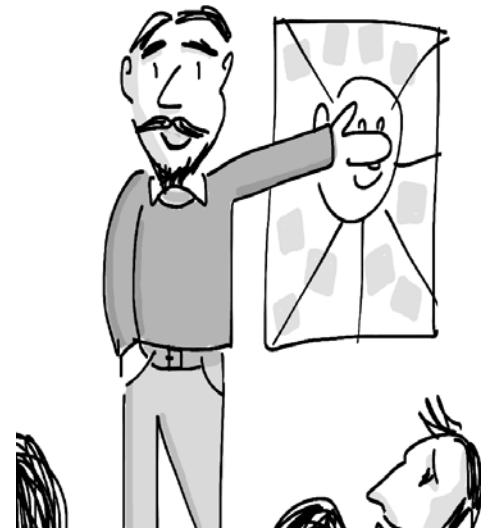


FACILITATION

- CCMA facilitator to assist parties in consultations if –
 - Requested by the employer; or
 - Requested by any of the consulting parties.

EDCON V STEENKAMP AND OTHERS (2015) 36 ILJ 1469 (LAC)

- If a facilitator is not appointed – can terminate after 30 days
- If a facilitator is appointed – can only terminate after 60 days



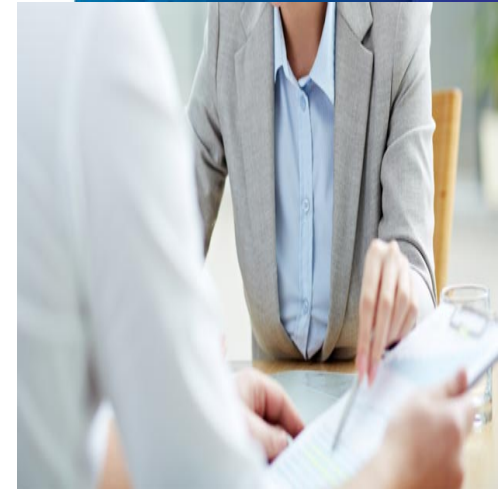
AVOIDING RETRENCHMENT TIMING – WHEN TO INTRODUCE VSP'S

SACU AND ANOTHER V TELKOM SA SOC LIMITED (2020) ZALCJHB 56

- Employer introduced VSP before consultations on retrenchment consultations began
- VSP invitation was presented before the employer shared the proposed new structure.

Court held that –

*“... Even if a party has reservations about whether there is a need for retrenchment, **it must be prepared to engage in consultations on alternatives. Nothing prevents a party from engaging on a provisional basis**, by making it clear upfront that its consent to the adoption of certain alternative measures is subject to it being persuaded that retrenchments would otherwise be required”*



AVOIDING RETRENCHMENT TIMING - VOLUNTARY SEPARATION

NUMWSA OBO MEMBERS AND ANOTHER V SOUTH AFRICAN AIRWAYS (SOC) LIMITED (IN BUSINESS RESCUE) AND OTHERS (J424/20) [2020] ZALCJHB 70 (8 MAY 2020)

- Employer introduced voluntary separation agreements during a business rescue proceeding
- The court was called to decide on the wisdom on the employer to initiate voluntary separation agreements in the process of business rescue proceedings.
- Would such an agreement constitute a dismissal?

Retrenchments



AVOIDING RETRENCHMENT

TIMING - VOLUNTARY SEPARATION CONTINUED...

“There was some debate during the hearing on voluntary separation packages. As I understand the position, there is currently an offer open to SAA employees to accept voluntary retrenchment on the terms specified. Some of them have accepted. To the extent that the unions contended that any moratorium on retrenchments during business rescue proceedings prohibited a business rescue practitioner from seeking to secure voluntary retrenchments , there is no basis for that proposition either in s 189 of the LRA... Nothing prevents an employer from offering a voluntary severance package as a measure to avoid retrenchment. If a voluntary severance package is offered and accepted as a means to avoid the need to or even contemplate retrenchment, **the contract of employment is terminated by mutual agreement and there is no dismissal**”

Retrenchments

SEVERANCE PAY

SEVERANCE PAY AS A STATUTORY REQUIREMENT

"An employer must pay an employee who is dismissed for reasons based on the employer's operational requirements or whose contract of employment terminates or is terminated in terms of section 38 of the Insolvency Act, 1936 (Act No. 24 of 1936), severance pay equal to at least one week's remuneration for each completed year of continuous service with that employer, calculated in accordance with section 35. "Whether any employee, employer, class of employees or class of employers, is or was employed or engaged in a sector or area."



EXEMPTION FROM SEVERANCE PAY

- *Statutory exemption- unreasonable refusal of alternative*
- *S41(3) ministerial variation – form 6 of the BCEA*
- *Exemptions contained in collective agreements*



EXEMPTIONS

SELECTION CRITERIA

GILLIAN LUMB



CLIFFE DEKKER HOFMEYR

IMPORTANCE OF SELECTION CRITERIA

SINGH V MONDI PAPER (D582/98) [1999] ZALC 174 (15 DECEMBER 1999)

"Apart from attempting to seek alternatives to dismissal or measures to avoid dismissal, when only some of a group of employees are equally likely to be retrenched, the selection process must rank as the most fundamental issue for scrutiny in order to determine whether the dismissal was fair or not. An employer can get everything else right but if the selection process, during which the employees who were ultimately dismissed is found to be unfair and subjective, the entire process is flawed thereby."

SELECTION CRITERIA OPTIONS



Section 189(7) of LRA:

- Agreed selection criteria; or
- Fair and objective criteria.



LIFO – Last in first out
Skills retention
Experience
Qualifications
Combination approach



SELECTION CRITERIA

**CAN POOR PERFORMANCE,
MISCONDUCT OR AFFIRMATIVE
ACTION BE USED?**



Retrenchments

SELECTION CRITERIA

SA BREWERIES (PTY) LTD V LOUW (2018) 39 ILJ 189 (LAC)

- Past performance
- Distinction between selection criteria and competitive process for appointment to new post
- Redundant position – dislocated employee, not automatically retrenched

Retrenchments



SELECTION CRITERIA

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA AND OTHERS V COLUMBUS STAINLESS (PTY) LTD

- Combination approach – conduct, experience, skill, adaptability, attitude, potential



SELECTION CRITERIA

FOOD AND ALLIED WORKERS UNION OBO KAPESI AND OTHERS V PREMIER FOODS T/A BLUE RIBBON SALT RIVER (2012) 33 ILJ 1729 (LAC)

- Prior misconduct
- Distinction: no-fault dismissal vs dismissal for misconduct

Retrenchments



AFFIRMATIVE ACTION AS SELECTION CRITERIA



***ROBINSON & OTHERS V PRICE
WATERHOUSE COOPERS [2006] 5
BLLR 504 (LC)***

SELECTION CRITERIA - BUMPING

- Do not overlook bumping –
 - Vertical and horizontal



CHANGE OF TERMS AND CONDITIONS OF EMPLOYMENT

PROF HUGO PIENAAR



DISPUTE OF RIGHT

VERSUS



DISPUTE OF INTEREST



DEFINITION OF OPERATIONAL REQUIREMENTS

“operational requirements” means requirements based on the economic, technological, structural or similar needs of an employer

ETSOS



DISPUTES OF MUTUAL INTEREST AND AUTOMATICALLY UNFAIR DISMISSALS

- *s187 (1): “A dismissal is automatically unfair if an employer, in dismissing the employee, acts contrary to section 5 and, if the reason for the dismissal is –*
- *(c) a refusal by the employee to accept a demand in respect of any matter of mutual interest between them and their employer;”*
- *s67(5) of the LRA: “subsection (4) does not preclude an employer from fairly dismissing an employee in accordance with the provisions of Chapter VIII for a reason related to the employee’s conduct during the strike, or for a reason based on the employers operational requirements.”*
- *S188 (1)(a)(ii): “A dismissal that is not automatically unfair, is unfair if an employer fails to prove that the reason for the dismissal is a fair reason based on the employers operational requirements.”*

Retrenchments in
the time of
COVID-19



Retrenchments in
the time of
COVID-19

FRY'S METALS (PTY) LTD V
NUMSA AND OTHERS [2003]
2 BLLR 140 (LAC)



FRY'S METALS (PTY) LTD V NUMSA AND OTHERS [2003] 2 BLLR 140 (LAC)

- Changes to:
 - Shift arrangements; and
 - Removal of transport subsidy

- *“The findings in Fry Metals that s187(1) of the LRA does not prevent employers from dismissing on operational grounds employees who do not accept proposals to amend terms and conditions of employment is however on safer ground.”*

Retrenchments in
the time of
COVID-19



**NATIONAL UNION OF METAL
METALWORKERS OF SOUTH AFRICA AND
ANOTHER V AVENG TRIDENT STEEL (A
DIVISION OF AVENG AFRICA PROPRIETARY
LIMITED) AND OTHERS (2019) 40 ILJ 2024
(LAC)**

Retrenchments in
the time of
COVID-19

NATIONAL UNION OF METAL METALWORKERS OF SOUTH AFRICA AND ANOTHER V AVENG TRIDENT STEEL (A DIVISION OF AVENG AFRICA PROPRIETARY LIMITED) AND OTHERS (2019) 40 ILJ 2024 (LAC)

- Aveng considered dismissals for operational requirements for the reasons set out below.
- Aveng needed to:
 - reducing costs to maintain profit margins.
 - Restructure.
 - Realign its businesses.
 - Improve productivity.
- Changes: review organizational structures and combine functions.
 - Redefine some job descriptions.
 - Mothball underutilized equipment;
 - Review 257 LDC's; and
 - To review employee transport benefits.

Retrenchments in
the time of
COVID-19

NATIONAL UNION OF METAL METALWORKERS OF SOUTH AFRICA AND ANOTHER V AVENG TRIDENT STEEL (A DIVISION OF AVENG AFRICA PROPRIETARY LIMITED) AND OTHERS (2019) 40 ILJ 2024 (LAC)

“The Labour Court held that the proposal to alter job descriptions was an appropriate measure aimed at avoiding or minimizing the number of dismissals and thus the dismissal was for a fair reason. Aveng was faced with operational difficulties and the only viable answer to its conundrum was to restructure and redesign the jobs.”

Retrenchments in
the time of
COVID-19

NATIONAL UNION OF METAL METALWORKERS OF SOUTH AFRICA AND ANOTHER V AVENG TRIDENT STEEL (A DIVISION OF AVENG AFRICA PROPRIETARY LIMITED) AND OTHERS (2019) 40 ILJ 2024 (LAC)

- “*The test for determining the true reason is that laid down in SA Chemical Workers Union v Afrox Ltd.*”
- Legal causation: was the refusal, the main dominant, proximate or most likely cause of the dismissal?

Retrenchments in
the time of
COVID-19

NATIONAL UNION OF METAL METALWORKERS OF SOUTH AFRICA AND ANOTHER V AVENG TRIDENT STEEL (A DIVISION OF AVENG AFRICA PROPRIETARY LIMITED) AND OTHERS (2019) 40 ILJ 2024 (LAC)

- *“Aveng’s viability was at stake, proceeding with a bargaining power play either an offensive lock-out without replacement labour or unilateral implementation of the changes, was not a realistic option.”*
- *“The primary purpose of Aveng in making the proposal was not to grasp an advantage in the wage bargain, it was rather to restructure for operational reasons to ensure Aveng’s long term survival. The proposal was not made at the expense of the existing wage levels.”*

Retrenchments in
the time of
COVID-19

**NATIONAL UNION OF METAL METALWORKERS OF
SOUTH AFRICA AND ANOTHER V AVENG TRIDENT
STEEL (A DIVISION OF AVENG AFRICA
PROPRIETARY LIMITED) AND OTHERS (2019) 40 ILJ
2024 (LAC)**

“The failure of the employees to accept the proposals engendered an insurmountable operational requirements problem that constituted a fair reason for dismissal.”

Retrenchments in
the time of
COVID-19

NATIONAL UNION OF METAL METALWORKERS OF SOUTH AFRICA AND ANOTHER V AVENG TRIDENT STEEL (A DIVISION OF AVENG AFRICA PROPRIETARY LIMITED) AND OTHERS (2019) 40 ILJ 2024 (LAC)

“The dominant reasons or proximate cause for the dismissal of the employees, therefore, was Aveng’s operational requirements, which underpinned the entire process throughout 2014 and 2015 and informed all the consultations regarding the changes to terms and conditions of employment. The employees dismissal accordingly fell within the zone of permissible dismissals for operational requirements and did not fall foul of section 187(1)(c) of the LRA. ”

Retrenchments in
the time of
COVID-19

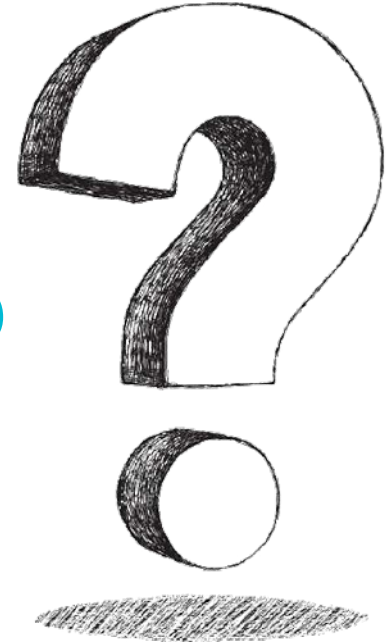
OPTIONS TO CONSIDER

- *No offer?*
- *Unilateral Change?*
- *Severance Pay?*



Retrenchments in
the time of
COVID-19

QUESTIONS





FOCUS

FROM POWERFUL
PARTNERSHIPS

COME POWERFUL
SOLUTIONS

THANK YOU

The legal partner
for your business.

cliffedekkerhofmeyr.com


CLIFFE DEKKER HOFMEYR