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Restructuring, cost-containment and retrenchments – An overview

The covid-19 pandemic has led to drastic measures being implemented by governments around the world. South Africa is currently nearing the end of an extended 35-day lockdown which has placed substantial liquidity pressure on employers. Many are considering ways in which they can restructure their businesses to reduce their overhead expenses and ensure their competitiveness or, in some cases, their survival.

Cowan-Harper-Madikizela Attorneys has been advising clients on ways in which they could restructure their businesses while ensuring that they do not fall foul of the provisions of section 189 and 189A of the Labour Relations Act 66 of 1995, as amended ("the LRA"). Our focus ahs been on providing strategic advice relating to implementation and execution of these processes.

We have prepared a brief overview of some of the important considerations for employers who need to restructure their businesses or operations during the next few months. What is set out below is not intended to be a comprehensive guide on restructuring a business and you should take advice if you contemplate such an exercise, as the area is fraught with difficulty.

What alternatives should employers consider?

Employers should explore every reasonable avenue to avoid retrenching employees. South Africa already has an extremely high unemployment rate and retrenchments will place further strain on South Africa's economy and social welfare programmes. It should not be forgotten that the pandemic is an humanitarian crisis and business will need to continue, while being sensitive to the situation. It is likely that the Courts will deal severely with employers who have been too hasty in retrenching employees, particularly during the lockdown or in circumstances where other reasonable alternatives could have been implemented.

At the outset, employers should consider which of their operating costs could be reduced. Where possible, contracts with service providers should be renegotiated to obtain more favourable terms. The government has implemented a number of measures which could alleviate the financial burdens for employers, including deferred payment of PAYE, and these should be explored. Some of the relief funds, including those established by the UIF, may assist in shouldering a portion of costs of employment in the coming months. The TERS option is a new possibility which could be explored.

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A pressing concern for employers is liquidity and their salary or wage bill is a factor. Employees should be approached in order to discuss possible salary reductions, including forfeiting any bonuses, 13th cheques, increases or other benefits. To that end many employers are implementing salary reductions across the board. The foregoing of salary increases, even where already agreed, could be considered.

While these reductions may be temporary in nature, in some instances they may be indefinite for some employers who have over many years of collective bargaining become uncompetitive due to high labour costs. Early retirements, voluntary retrenchment and agreed terminations are also possible. Reaching agreement on such reductions is key to addressing the crisis quickly and to that extent honest and frank communication with employees should be encouraged.

What if employees do not agree to the changes proposed?

Where employees refuse to agree to reductions or changes to terms and conditions of employment, employers may be required to enter into a process in terms of section 189 or 189A of the LRA to effect those changes. This process entails a joint and meaningful consultation process in terms of which the employer and the affected employees seek to reach agreement on ways to avoid or delay the retrenchment of the affected employees and, if it cannot be avoided, ways in which the impact of the retrenchment can be minimised.

Section 189A provides for possible large-scale retrenchments and may be triggered depending on the number of employees affected by the process, relative to the total number of employees. In these circumstances, additional obligations are imposed on employers such as a mandatory consultation period of 60 days.

What should the s189(3) notice contain?

The notice must contain all of the information set out in section 189(3) of the LRA, including the reasons for the proposed dismissals, the selection criteria, the alternatives which have already been considered and the number of employees who are affected. The notice effectively serves as an invitation to consult with the employer on the proposed changes to terms and conditions of employment and should provide the employees with the necessary information to enable a proper consultation process.

To whom should the notice be issued and with whom must the employer consult?

The LRA prescribes a hierarchy of consulting partners as follows:-

- Any party with whom the employer is required to consult in terms of a collective agreement;
- If there is no such collective agreement, a workplace forum (if one exists) and any registered union whose members are likely to be affected by the process;
- If there is no workplace forum, any registered union whose members are likely to be affected by the process; and

- If there is no union at the workplace, the employees who are likely to be affected by the process.

What issues should be dealt with during the consultations?

Section 189(2) of the LRA requires the consulting parties to attempt to reach consensus on several issues, including appropriate measures to avoid retrenchments such as those set out above. Where they cannot be avoided, the LRA requires that parties seek to reach agreement on ways to minimise the number, change the timing and mitigate the adverse effects of retrenchments.

It is also necessary to consult on the selection criteria and the severance pay that must be paid to employees. In circumstances where sufficient cash is not available, employers will also need to consult on how those payments will be made.

What other options are available to employers?

Employers who are financially distressed could consider the option of business rescue, which could provide financially distressed employers with some breathing room to restructure their businesses. With the assistance of a business rescue practitioner, employers could investigate further ways in which their operations could be adjusted or reorganized to make them profitable in the post-lockdown world. Business rescue will not, however, absolve employers from having to pay their employees.

Employers should remember that their businesses are unique and should not adopt one-size-fits-all approaches to this problem. They will need to think outside of the box to implement appropriate measures. There are no 'quick-fixes' in surviving the covid-19 pandemic but proper strategic planning will reduce risk and go a long way to ensuring that employers are not bogged down by disputes in future months, when their focus will be on navigating a changed world.

Please contact us for more information on 011 783 8711 or visit our website at www.chmlegal.co.za. Our website is updated regularly with interesting articles on a variety of legal issues and you can also sign up to receive our newsletter.

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