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THE LAW OF RETRENCHMENT: S 189A FACILITATION – The impact of facilitation in large –scale retrenchments.

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'A lot of companies have chosen to downsize, and maybe that was the right thing for them. We chose a different path. Our belief was that if we kept putting great products in front of customers, they would continue to open their wallets.' – Steve Jobs (1955-2011)

CHAPTER 1

Introduction

Employers trapped in economic difficulties or facing tough business challenges often wave the wand of retrenchment in the hope that the problem will go away. This often leads to workers unexpectedly finding themselves unemployed and queuing at the unemployment offices. In 2002, legislative provisions were introduced into the statute dealing specifically with large-scale retrenchments,¹ allowing the parties to appoint an external facilitator to facilitate the retrenchment process. Although this new retrenchment process for large scale retrenchments is reflected relatively clear in and simple in the statute, this dissertation will focus on large-scale retrenchment process and highlight the positive impact facilitation, as an option,² has introduced.

According to Statistics South Africa, the latest unemployment figures for 2013 reached an unprecedented all time high of 24,7 per cent, which roughly equates to 4,6 million people, eligible to be employed. Employment in the formal sector contracted by 0.3 percent (25 000 jobs) and in the informal sectors 0.6 percent (13 000 jobs), between the fourth quarter of 2012 and the first quarter of 2013. The statistics further indicate that the South African economy shed approximately one million jobs during the recession.³

With these startling figures, the thought of retrenchment is no longer just a statistical number but a reality and in response to the current economic onslaught, NEDLAC,⁴

¹ Section 189A of the Labour Relations Act 66 of 1995.

² Section 189A(3) of the labour Relations Act 66 of 1995.

³ Available at <http://www.statssa.gov.za/> and at <http://www.timeslive.co.za/local/2013/05/06/south-african-unemployment-hits-4.6-million-stats-sa>.

⁴ National Economic Development and Labour Council Act 35 of 1994.

in their framework document⁵ had this to say about large-scale retrenchments in South Africa:

Employers and Labour will be encouraged to explore all possible alternatives to retrenchments. They will be encouraged to utilize facilitation by the CCMA⁶ as provided for in section 189 and 189A of the LRA.⁷ The parties agree to explore ways to strengthen the CCMA⁸ in regard to its role in avoiding retrenchments.⁹

Retrenchment in South Africa has always been regarded as an acceptable ground for dismissal but despite the legislative guidelines in our labour laws, the process of retrenchment is often fraught with conflict between the employer and the employees or their representative. This dissertation will further question whether the facilitation process will positively impact on the parties engaged in large-scale retrenchment.

Section 189 of the LRA¹⁰ codifies retrenchment and is read in conjunction with The Code of Good Practice on Dismissal Based on Operational Requirements.¹¹ These sections provide a codified, relatively simple and clear process to be followed, however with the introduction of third party facilitation,¹² it will be difficult for employers not to discharge the 'focus' principle of retrenchments i.e. meaningful joint consensus seeking solutions. In 2002, s 189¹³ was amended by the inclusion of a new section, s 189A, 'dismissal based on operational requirements' by employers with more than 50 employees, covering large scale retrenchments¹⁴ The intention was that, it should be done in such a way, that the retrenchment process would promote job retention and job creation, rather than reach finality by way of adjudication.¹⁵ This process in essence allows the parties to appoint a CCMA¹⁶

⁵ FRAMEWORK FOR SOUTH AFRICA'S RESPONSE TO THE INTERNATIONAL ECONOMIC CRISIS, 19 February 2009. Available at www.gov.za/documents/download.php?f=96381.

⁶ Commission for Conciliation, Mediation and Arbitration.

⁷ Labour Relations Act 66 of 1995.

⁸ Commission for Conciliation, Mediation and Arbitration.

⁹ FRAMEWORK FOR SOUTH AFRICA'S RESPONSE TO THE INTERNATIONAL ECONOMIC CRISIS, 19 February 2009 at par 4.4. Available at www.gov.za/documents/download.php?f=96381.

¹⁰ Labour Relations Act 66 of 1995.

¹¹ Published under GN 1517 in GG 20254 of July 1999.

¹² See par below.

¹³ LRA 66 of 1995.

¹⁴ Section 45 of Act 12 of 2002.

¹⁵ Labour Relations Amendment Bill, 2000 Explanatory Memorandum at par 42.4.

¹⁶ Commission for Conciliation, Mediation and Arbitration.

commissioner to facilitate the retrenchment process. The purpose of this new section, according to the Explanatory Memorandum to the LRA amendments,¹⁷ was to enhance the effectiveness of consultations in large scale retrenchment exercises.¹⁸

According to the accompanying memorandum to this amendment, trade unions argued that their input was critical, 'in the manner that companies conduct the consultation process in retrenchment exercises'.¹⁹ It was also argued that proper meaningful consultations were often circumvented in that the decision to retrench had already been taken by the company. These consultations often dealt with adversarial issues and the real purposes to explore alternatives to retrenchment were poorly canvassed. It was also pointed out that that the consulting parties often argued about the disclosure of information,²⁰ a requirement within Section 189 of the LRA.²¹ This amendment now gives unions the option to strike against retrenchments that can be used as a method to place pressure on employers not to retrench on a large scale.²² Large scale retrenchment will now be subjected to both sections 189 and 189A.²³

With this amendment and the Facilitator Regulations²⁴ parties are subjected to third party CCMA²⁵ facilitation of up to four facilitation meetings.²⁶ According to the Oxford²⁷ dictionary, facilitate²⁸ used as a verb, is defined as to 'make (an action or process) easy or easier'. The meaning of 'easy' however does not necessarily mean that the process will be with lesser protection against retrenchment, but with an emphasis on a more thorough and 'step by step' process.

¹⁷ Labour Relations Amendment Bill, 2000 Explanatory Memorandum.

¹⁸ Labour Relations Amendment Bill, 2000 Explanatory Memorandum at par 42.2.

¹⁹ Labour Relations Amendment Bill, 2000 Explanatory Memorandum at par 42.1.

²⁰ Labour Relations Amendment Bill, 2000 Explanatory Memorandum at par 42.1.

²¹ Labour Relations Act 66 of 1995.

²² Labour Relations Act 66 of 1995 Section 189A(7)(b)(i).

²³ Labour Relations Act 66 of 1995.

²⁴ Published under GN 1445 in GG 25515 of 10 October 2003.

²⁵ Commission for Conciliation and Arbitration.

²⁶ Facilitation Regulation 6 (1).

²⁷ Pocket Oxford Dictionary sixth addition.

²⁸ Derived from the Latin word *facilis*, meaning easy.

This paper will present an analysis of large-scale retrenchment facilitation arguing that the codified facilitation procedures will give true meaning to the constructive engagement implicit in the retrenchment process i.e. that the need to retrench by the employer is *bona fide*; that the procedure to be followed is fair, that the selection of any employee to be retrenched is done on objective grounds and that the process provides for a layer of protection in cases of large scale retrenchments. It is further the view that s 189A²⁹ will provide a benchmark in the development of *jurisprudence* on dismissal for operational requirement procedures.

A short statistical overview of S189 A facilitation and the resultant effect on job losses between 2010 and 2013 in the Western Cape

Since the introduction of the facilitation process, a remarkable reduction in job losses through large-scale retrenchments has been recorded. Although the requirement that employers were to report large-scale retrenchments to the Minister of Labour³⁰ was ultimately not included into the statute, the various CCMA³¹ regions report quarterly statistics to the national office.³² Included in these statistics *inter alia* are the number of cases facilitated, the number of retrenchments and the number of jobs saved in the various industries as a result of facilitations.³³

Reflecting on these statistics it can be noted that over the last 4 years, the CCMA³⁴ in the Western Cape facilitated more than 54 cases³⁵ with a total number of 12 680 employees affected, resulting in 3841 (or 30.2 per cent) jobs being 'saved' (number of employees not retrenched) at the end of the process. The highest number of facilitations was in 2013 with 1999 jobs that were saved. This indicates that 69 per cent of potential retrenchments was averted and it can be concluded that when

²⁹ Labour Relations Act 66 of 1995.

³⁰ Labour Relations Amendment Bill, 2000 Explanatory Memorandum at 42.5.

³¹ Commission for Conciliation, Mediation and Arbitration.

³² Internal operational directive.

³³ See summary of statistics in **Annexure A** from 2010 to 2013.

³⁴ Commission for Conciliation, Mediation and Arbitration.

³⁵ The actual number of cases facilitated and excludes cases withdrawn.

retrenchments are facilitation in terms of s 189A,³⁶ on average 30 per cent of affected employees might just find themselves not retrenched. This is certainly a positive indication.

Whilst it is apparent that facilitation save jobs, the retrenchment process in terms of s189 and s 189A³⁷ must be carefully observed.

CHAPTER 2 : RETRENCHMENT

Dismissal Based on Operational requirements

This section will explore the meaning of dismissal and how it is relates to dismissals based on operational requirements.

Without reference to whether a dismissal is fair or not, the Labour Relations Act³⁸ defines a dismissal in terms of s186,³⁹ as follows:

1. The employer terminated a contract of employment.
2. The employer did not renew, or renewed a fixed term contract of employment on less favorable terms, when the employee had an expectation that the contract would have been renewed.
3. A female employee is refused to return to work after she had taken maternity leave.
4. An employer offered a selected number of employees from a bigger group of employees to be re-employed after they have been dismissed for similar reasons.

³⁶ Labour Relations Act 66 of 1995.

³⁷ Labour Relations ASct 66 of 1995.

³⁸ Act 66 of 1995.

³⁹ Read in conjunction with the definition of a dismissal in terms of Section 213 of the LRA.

5. An employee resigns due to pressure from an employer.⁴⁰
6. An employee resigns, after being automatically transferred due to a business transfer, because the new employer provided less favorable terms than before the transfer.⁴¹

The dismissals referred to above may be with or without notice. It is however expressly required in terms of the LRA⁴² that a retrenchment dismissal be given with notice as contemplated in the Basic Conditions of Employment Act.⁴³ The BCEA⁴⁴ requires one weeks' notice if the employee has been employed for less than six months, two weeks' notice if the employee has been employed for more than six months but less than a year, and four weeks' notice if the employee has been employed for more than a year. A collective agreement with a trade union may vary these time frames, however it cannot reduce the notice period to less than 2 weeks for employees with longer than twelve months service.⁴⁵

Retrenchment is a form of dismissal defined in S 186 (1)(a) of the LRA⁴⁶ and states that 'Dismissal means that an employer has terminated a contract of employment with or without notice'. Retrenchment can therefore be classified as a dismissal with notice at the behest of the employer. This paper will not deal with the fairness aspect of all the types of dismissals referred to above; only a dismissal based on operational requirements will be discussed.

The date of dismissal is relevant in terms of this section.⁴⁷ Section 190⁴⁸ states that the date of dismissal as 'the earlier of (a) the date on which the contract terminated; or (b) the date on which the employee left the service of the employer'.

⁴⁰ Also known as a 'constructive' dismissal.

⁴¹ Section 197 and section 197A of the Labour Relations Act 66 of 1995 describe a business transfers under these circumstances.

⁴² Section 189A(7)(a) of Act 66 of 1995.

⁴³ Section 37 of Act 75 of 1997.

⁴⁴ Basic Conditions of Employment Act 75 of 1997.

⁴⁵ Section 37(2)(a) and (b) of the Basic Conditions of Employment Act.

⁴⁶ Act 66 of 1995.

⁴⁷ See S189A time frames below.

The test for substantive fairness in retrenchments

It is obvious from the provisions of the Labour Relations Act⁴⁹ that any dismissal must be done fairly this includes retrenchment dismissals. The statutory requirements are reflected in s 192(2),⁵⁰ requiring that the employer must be able to prove on a balance of probabilities,⁵¹ that the reason for dismissal was fair. Section 188⁵² sets the general provision of fairness and deems a dismissal unfair if the employer fails to prove that it is based on the employer's operational requirements and that it was done in a fair procedure read together with the relevant 'Code of Good Practice'.⁵³

In addition, s 189A(19) provide a deeming provision in cases of large scale retrenchments. It reads as follows:

In any dispute referred to the Labour Court in terms of section 191(5)(b)(ii) that concerns the dismissal of the number of employees specified in subsection (1), the Labour Court must find that the employee was dismissed for a fair reason if -

- (a) the dismissal was to give effect to a requirement based on the employer's economic, technological, structural or similar needs;
- (b) the dismissal was operationally justifiable on rational grounds;
- (c) there was a proper consideration of alternatives; and
- (d) selection criteria were fair and objective.⁵⁴

In one of the earlier decisions about the substantive fairness of retrenchment, the Labour Appeal Court found that '... it is not the court's function to decide whether it was the best decision under the circumstances, but only whether it was a rational, commercial decision, properly taking into account what emerged during the consultation process'.⁵⁵

⁴⁸ Labour Relations Act 66 of 1995.

⁴⁹ Act 66 of 1995.

⁵⁰ Labour Relations Act 66 of 1995.

⁵¹ This standard of proof was formulated by Lord Denning in *Miller v Minister of Pensions* [1947] 2 All ER, and followed by our courts since. It means that 'it must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say "we think it more probable than not", the burden is discharged, but if the probabilities are equal it is not.'

⁵² Labour Relations Act 66 of 1995. Section 188 regard a dismissal if the employer fails to prove that the dismissal relates to the the employer's.

⁵³ Section 188(1) and (2) of the Labour Relations Act 66 of 1995.

⁵⁴ Section 189A(19) of the Labour Relations Act 66 of 1995.

⁵⁵ *SACTWU & others v Discreto* [1998] 12 BLLR 1228 (LAC) at 1230.

Cases that followed departed from this tolerance given to employers and in the *Algorax*⁵⁶ case, the court had this to say:

... sometimes it is said that a court should not be critical of the solution that an employer has decided to employ in order to resolve a problem in his business because it normally will not have business knowledge or expertise with which the employer as a business person may have to deal with problems in the workplace. This is true. However, it is not absolute and should not be taken too far. Whenever the Labour Court or this court is seized with a dispute about the fairness of a dismissal, it has to determine the fairness of the dismissal objectively. The question whether the dismissal was fair or not must be answered by the court. The court must not defer to the employer for the purpose of answering that question ... In other words, it cannot say that the employer thinks it is fair, and therefore, it is or should be fair.⁵⁷

This viewpoint was followed by some further cases⁵⁸ setting the principle that the court will not hesitate to intervene if found that the reasons and process are not 'fair'.

Comparing the fairness aspect in large-scale retrenchments with single or 'small' retrenchments, the adjudication excludes procedural issues.⁵⁹ Despite this exclusion, it can be argued in conclusion that with the scrutiny of a facilitator in large scale retrenchments, the test for fairness will be best developed through a thorough process, such as the facilitation process in s189A⁶⁰ retrenchments. It therefore follows that if the employer can prove that the reason for dismissal is a *bona fide* operational requirement and that a fair process had been followed, the dismissal will not be regarded as an unfair dismissal.

⁵⁶ *CWIU & 7 Others v Algorax (Pty) Ltd* [2003] 11 BLLR 1081 (LAC).

⁵⁷ *CWIU & 7 Others v Algorax (Pty) Ltd* [2003] 11 BLLR 1081 (LAC) at 1101 H-J.

⁵⁸ *General food Industries Ltd v FAWU* [2004] 7 BLLR 667 (LAC) at para 55 and *Enterprise Foods (Pty) Ltd v Allen and Others* [2004] 7 BLLR 659 (LAC) at para 17.

⁵⁹ Section 189A(18) of the Labour Relations Act 66 of 1995.

⁶⁰ Labour Relations Act 66 of 1995.

Definition of operational dismissals

Dismissals based on operational requirements are most commonly referred to as a retrenchment. The LRA⁶¹ only refer to this as 'dismissal based on operational requirements'⁶² and define it as 'requirements based on the economic, technological, structural or similar needs of an employer.'⁶³

The Code of Good Practice on Dismissal Based on Operational Requirements⁶⁴ defines economic reasons as 'those that relate to the financial management of the enterprise', technological reasons as the 'introduction of new technology which affects work relationships either by making existing jobs redundant or by requiring existing employees to adapt to the new technology or a consequential restructuring' and structural reasons as the 'redundancy of posts consequent to a restructuring of the employer's enterprise'.⁶⁵ South Africa is a member state of the ILO,⁶⁶ the definition used in the LRA⁶⁷ is encapsulated in Part 11 of Convention 158,⁶⁸ and is recognised as an accepted ground for an employer to terminate a contract of employment.

The terminology retrenchment and redundancy are both referred to in the LRA.⁶⁹ In *Hlongwe & another v Plastix (Pty) Ltd*⁷⁰ the court drew a distinction between 'redundancy' and 'retrenchment'. In this case the court identified redundancy in cases of the introduction of technology or restructuring of the business and retrenchment in cases of economic downturn. In a further case, the appeal court followed a more narrow application including both concepts. The court said the following: 'to cut down, to reduce, the number of employees because of redundancy,

⁶¹ Labour Relations Act 66 of 1995.

⁶² Section 189 of the Labour Relations Act 66.

⁶³ Section 213 of the Labour Relations Act 66 of 1995, Definitions.

⁶⁴ Published under GN 1517 in GG 20254 of July 1999.

⁶⁵ Item 1 of The Code of Good Practice on Dismissal Based on Operational Requirements.

⁶⁶ International Labour Organisation.

⁶⁷ Act 66 of 1995.

⁶⁸ International Labour Convention, Termination of Employment Convention, 1982 (No. 158).

⁶⁹ Act 66 of 1995.

⁷⁰ (1990) 11 ILJ 171 (IC)

a superfluity of employees in relation to the work to be performed'.⁷¹ In yet another case,⁷² the industrial court identified three types of dismissals that may arise out of employer's operational requirements. They were identified as retrenchments, redundancies and transfers.

In conclusion, despite the debate over a clear definition, the true reasons for operational requirement dismissals will ultimately be dealt with extensively during the facilitation process and thereafter scrutinised by the labour courts.

Section 189 of the Labour Relations Act

The statutory requirements for retrenchment are set out in s 189 of the Labour Relations Act.⁷³ As mentioned earlier,⁷⁴ the process to be followed in cases of retrenchment are clearly codified and the current section reads as follows:

- (1) When an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult-
 - (a) any person whom the employer is required to consult in terms of a collective agreement;
 - (b) if there is no collective agreement that requires consultation –
 - (i) a workplace forum, if the employees likely to be affected by the proposed dismissals are employed in a workplace in respect of which there is a workplace forum; and
 - (ii) any registered trade union whose members are likely to be affected by the proposed dismissals;
 - (c) if there is no workplace forum in the workplace in which the employees likely to be affected by the proposed dismissals are employed, any registered trade union whose members are likely to be affected by the proposed dismissals; or
 - (d) if there is no such trade union, the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose.
- (2) The employer and the other consulting parties must, in the consultation envisaged by subsections (1) and (3), engage in a meaningful joint consensus-seeking process and attempt to reach consensus on -
 - (a) appropriate measures-
 - (i) to avoid the dismissals;
 - (ii) to minimise the number of dismissals;
 - (iii) to change the timing of the dismissals; and
 - (iv) to mitigate the adverse effects of the dismissals;

⁷¹ *Consolidated Frame Cotton Corporation Ltd v The President, Industrial Court and others* (1986) 7 ILJ 487 (A) at 494A.

⁷² *Durban Integrated Municipal Employees Society v Tongaat Town Board* (1993) 2 LCD 54 (IC).

⁷³ Act 66 of 1995.

⁷⁴ See introduction section above.

- (b) the method for selecting the employees to be dismissed; and
 - (c) the severance pay for dismissed employees.
- (3) The employer must issue a written notice inviting the other consulting party to consult with it and disclose in writing all relevant information, including, but not limited to-
- (a) the reasons for the proposed dismissals;
 - (b) the alternatives that the employer considered before proposing the dismissals, and the reasons for rejecting each of those alternatives;
 - (c) the number of employees likely to be affected and the job categories in which they are employed;
 - (d) the proposed method for selecting which employees to dismiss;
 - (e) the time when, or the period during which, the dismissals are likely to take effect; the severance pay proposed;
 - (g) any assistance that the employer proposes to offer to the employees likely to be dismissed;
 - (h) the possibility of the future re-employment of the employees who are dismissed;
 - (i) the number of employees employed by the employer; and
 - (j) the number of employees that the employer has dismissed for reasons based on its operation requirements in the preceding 12 months.
- (4) (a) The provisions of section 16 apply, read with the changes required by the context, to the disclosure of information in terms of subsection (3).
- (b) In any dispute in which an arbitrator or the Labour Court is required to decide whether or not any information is relevant, the onus is on the employer to prove that any information that it has refused to disclose is not relevant for the purposes for which it is sought.
- (5) The employer must allow the other consulting party an opportunity during consultation to make representations about any matter dealt with in subsections (2), (3) and (4), as well as any other matter relating to the proposed dismissals..
- (6) (a) The employer must consider and respond to the representations made by the other consulting party and, if the employer does not agree with them, the employer must state the reasons for disagreeing.
- (b) If any representation is made in writing, the employer must respond in writing.
- (7) The employer must select the employees to be dismissed according to selection criteria-
- (a) that have been agreed to by the consulting parties; or
 - (b) if no criteria have been agreed, criteria that are fair and objective.⁷⁵

As noted above, the LRA⁷⁶ compels the employer to engage with the other consulting party to consult and attempt to reach consensus on a number of topics listed in subsections 2 and 3.⁷⁷ Because the process requires consultation and agreement is not a legal requirement, it is within this process where the parties often reach 'deadlock' and the intention of the consultation process is lost. It is after all this process that should lay the foundation for the parties to engage meaningfully to avoid any dismissals and to address the companies operational needs.

⁷⁵ Section 189 of the Labour Relations Act 66 of 1995.

⁷⁶ Act 66 of 1995.

⁷⁷ Labour Relations Act 66 of 1995.

Section 189A

Supported by NEDLAC,⁷⁸ s 189A⁷⁹ was introduced into the Labour Relations Act in 2002,⁸⁰ regulating large-scale retrenchments.

With the introduction of facilitation for large-scale the rules of engagement became more stringent in that third party intervention now oversees the consultative process. In a sense, a protective layer is now added to s 189.⁸¹ Large-scale retrenchments will be subjected to both sections ie they should be read in conjunction with each other. Section 189A⁸² 'adds on' rather to replace the s 189⁸³ process. It is however not clear what the financial complications will be for employers, most likely already under economic pressure, to accommodate this process.

Section 189A⁸⁴ reads as follows:

This section applies to employers employing more than 50 employees if -

- (a) the employer contemplates dismissing by reason of the employer's operational requirements, at least –
 - (i) 10 employees, if the employer employs up to 200 employees;
 - (ii) 20 employees, if the employer employs more than 200, but not more than 300 employees;
 - (iii) 30 employees, if the employer employs more than 300, but not more than 400, employees.
 - (iv) 40 employees, if the employer employs more than 400, but not more than 500, employees; or
 - (iv) 50 employees if the employer employs more than 500 employees; or
 - (b) the number of employees that the employer contemplates dismissing, together with the number of employees that have been dismissed by reason of the employer's operational requirements in the 12 months prior to the employer issuing a notice in terms of section 189(3), is equal to or exceeds the relevant number specified in paragraph (a).
- (2) In respect of any dismissal covered by this section -

⁷⁸ National Economic Development and Labour Council Act 35 of 1994.

⁷⁹ Labour Relations Act 66 of 1995.

⁸⁰ Section 189A inserted by s 45 of Act 12 of 2002. Nedlac negotiates consensus on social and economic policies and legislation, before draft legislation goes to Parliament. legislation goes to Parliament.

⁸¹ Labour Relations Act 66 of 1995.

⁸² Labour Relations Act 66 of 1995.

⁸³ Labour Relations Act 66 of 1995.

⁸⁴ Labour Relations Act 66 of 1995.

- a. an employer must give notice of termination of employment in accordance with the provisions of this section;
 - b. despite section 65(1)(c), an employee may participate in a strike and an employer may lock out in accordance with the provisions of this section;
 - c. the consulting parties may agree to vary the time periods for facilitation or consultation.

- (3) The Commission must appoint a facilitator in terms of any regulations made under subsection (6) to assist the parties engaged in consultations if -
 - (a) the employer has in its notice in terms of section 189(3) requested facilitation; or
 - (b) consulting parties representing the majority of employees whom the employer contemplates dismissing have requested facilitation and have notified the Commission within 15 days of the notice.

- (4) This section does not prevent an agreement to appoint a facilitator in circumstances not contemplated in subsection (3).
- (5) If a facilitator is appointed in terms of subsection (3) or (4) the facilitation must be conducted in terms of any regulations made by the Minister under subsection (6) for the conduct of such facilitations.
- (6) The Minister, after consulting NEDLAC and the Commission, may make regulations relating to -
 - (a) the time period and the variation of time periods, for facilitation;
 - (b) the powers and duties of facilitators;
 - (c) the circumstances in which the Commission may charge a fee for appointing a facilitator and the amount of the fee; and
 - (d) any other matter necessary for the conduct of facilitations.

- (7) If a facilitator is appointed in terms of subsection (3) or (4), and 60 days have elapsed from the date on which notice was given in terms of section 189(3) -
 - (a) the employer may give notice to terminate the contracts of employment in accordance with section 37(1) of the *Basic Conditions of Employment Act*; and
 - (b) a registered trade union or the employees who have received notice of termination may either –
 - (i) give notice of a strike in terms of section 64(1)(b) or (d); or
 - (ii) refer a dispute concerning whether there is a fair reason for the dismissal to the Labour Court in terms of section 191(11).

- (8) If a facilitator is not appointed -
 - (a) a party may not refer a dispute to a council or the Commission unless a period of 30 days has lapsed from the date on which notice was given in terms of section 189(3); and
 - (b) once the periods mentioned in section 64(1)(a) have elapsed –
 - (i) the employer may give notice to terminate the contracts of employment in accordance with section 37(1) of the *Basic Conditions of Employment Act*; and
 - (ii) a registered trade union or the employees who have received notice of termination may -
 - (aa) give notice of a strike in terms of section 64(1)(b) or (d); or
 - (bb) refer a dispute concerning whether there is a fair reason for the dismissal to the Labour Court in terms of section 191(11).

- (9) Notice of the commencement of a strike may be given if the employer dismisses or gives notice of dismissal before the expiry of the periods referred to in subsections (7)(a) or (8)(b)(i).
- (10)(a) A consulting party may not –
- (i) give notice of a strike in terms of this section in respect of a dismissal, if it has referred a dispute concerning whether there is a fair reason for that dismissal to the Labour Court;
 - (ii) refer a dispute about whether there is a fair reason for a dismissal to the Labour Court, if it has given notice of a strike in terms of this section in respect of that dismissal.
- (b) If a trade union gives notice of a strike in terms of this section –
- (i) no member of that trade union and no employee, to whom a collective agreement concluded by that trade union dealing with consultation or facilitation in respect of dismissals by reason of the employers' operational requirements has been extended in terms of section 23(1)(d), may refer a dispute concerning whether there is a fair reason for dismissal to the Labour Court;
 - (ii) any referral to the Labour Court contemplated by subparagraph (i) that has been made is deemed to be withdrawn.
- (11) The following provisions of Chapter IV apply to any strike or lock-out in terms of this section:
- (a) Section 64(1) and (3)(a) to (d), except that –
 - (i) section 64(1)(a) does not apply if a facilitator is appointed in terms of this section;
 - (ii) an employer may only lock out in respect of a dispute in which a strike notice has been issued;
 - (b) subsection (2)(a), section 65(1) and (3);
 - (c) section 66, except that written notice of any proposed secondary strike must be given at least 14 days prior to the commencement of the strike;
- (b) sections 67, 68, 69 and 76.
- (12) (a) During the 14-day period referred to in subsection (11)(c), the director must, if requested by an employer who has received notice of any intended secondary strike, appoint a commissioner to attempt to resolve any dispute between the employer and the party who gave the notice, through conciliation.
- (b) A request to appoint a commissioner or the appointment of a commissioner in terms of paragraph (a) does not affect the right of employees to strike on the expiry of the 14-day period.
- (13) If an employer does not comply with a fair procedure, a consulting party may approach the Labour Court by way of an application for an order –
- (a) compelling the employer to comply with a fair procedure;
 - (b) interdicting or restraining the employer from dismissing an employee prior to complying with a fair procedure;
 - (c) directing the employer to reinstate an employee until it has complied with a fair procedure;
 - (d) make an award of compensation, if an order in terms of paragraphs (a) to (c) is not appropriate.
- (14) Subject to this section, the Labour Court may make any appropriate order referred to in section 158(1)(a).
- (15) An award of compensation made to an employee in terms of subsection (14) must comply with section 194.
- (16) The Labour Court may not make an order in respect of any matter concerning the disclosure of information in terms of section 189(4) that has been the subject of an arbitration award in terms of section 16.
- (17) (a) An application in terms of subsection (13) must be brought not later than 30 days after the employer has given notice to terminate the employee's

- services or, if notice is not given, the date on which the employees are dismissed.
- (b) The Labour Court may, on good cause shown, condone a failure to comply with the time limit mentioned in paragraph (a).
- (18) The Labour Court may not adjudicate a dispute about the procedural fairness of a dismissal based on the employer's operational requirements in any dispute referred to it in terms of section 191(5)(b)(ii).
- (19) In any dispute referred to the Labour Court in terms of section 191(5)(b)(ii) that concerns the dismissal of the number of employees specified in subsection (1), the Labour Court must find that the employee was dismissed for a fair reason if -
- (e) the dismissal was to give effect to a requirement based on the employer's economic, technological, structural or similar needs;
 - (f) the dismissal was operationally justifiable on rational grounds;
 - (g) there was a proper consideration of alternatives; and
 - (h) selection criteria were fair and objective.
- (20) For the purposes of this section, an 'employer' in the public service is the executing authority of a national department, provincial administration, provincial department or organisational component contemplated in section 7(2) of the Public Service Act, 1994 (promulgated by Proclamation No. 103 of 1994).⁸⁵

Reflecting on the above statutory requirements, it provides for a clear, predetermined procedural aspect when dealing with large-scale retrenchments. This is evident in the comparison between a s 189 process and a s 189A⁸⁶ process as discussed below.

CHAPTER 3 : SECTION 189A FACILITATION

Facilitator regulations

Soon afterwards the promulgation of s 189A,⁸⁷ regulations for the conduct of facilitations, was published.⁸⁸ This code provides the CCMA⁸⁹ with guidelines on the facilitation of large-scale retrenchments facilitated by them.

⁸⁵ Section 189A of the Labour Relations Act 66 of 1995.

⁸⁶ Labour Relations Act 66 of 1995.

⁸⁷ Labour Relations Act 66 of 1995.

⁸⁸ Facilitation Regulations Published under GN R1445 in GG 25515 of 10 October 2003.

⁸⁹ Commission for Conciliation, Mediation and Arbitration.

Once a request for facilitation is made, the CCMA⁹⁰ will inform the parties in writing within seven days of receiving the application for facilitation document,⁹¹ providing the name of the facilitator and the date of the first facilitation meeting.

The following encapsulates these regulations:

1. The first facilitation meeting:

During the first facilitation meeting, the facilitator is required to facilitate an agreement between the parties on the following:

- a) the procedure to be followed;
- b) the date of any additional facilitation meetings; and
- c) the information that the employer is required to disclose.

A facilitator may conduct up to four facilitation meetings with the parties. The director of the CCMA⁹² may however give permission for any additional meetings to be held and agreed upon.

2. The Powers and duties of the facilitator:

The facilitator chairs the meeting between the consulting parties and may decide on any issue of procedure that arises in the course of meetings between the parties. The legal effect of some of these procedural rulings will be pointed out in chapter 5 below. The facilitator's decisions regarding the procedure for conducting facilitation, including the date and time, is binding on the parties.

In the event that there is a dispute about the disclosure of information, the facilitator may then make an order directing an employer to make such disclosure.

⁹⁰ Commission for Conciliation, Mediation and Arbitration.

⁹¹ CCMA Form 7.20.

⁹² Commission for Conciliation, Mediation and Arbitration.

3. The status of the facilitator:

Facilitation is done on a *with prejudice* basis, but parties can agree in writing that parts of the meetings be done on a *without prejudice* basis. The latter may not be disclosed in any court proceedings, nor can the facilitator be called to give evidence of the facilitation proceedings.

If a facilitator is appointed, the employer may not retrench within the 60 day period. After the 60 days has lapsed, the employer may give notice of retrenchment in terms of the contract of employment or in terms of the Basic Conditions of Employment⁹³ to the employees affected or their respective representatives. The union may then on the other hand give notice to strike or alternatively, decide to refer a dispute concerning the substantive fairness of the retrenchment to the Labour Court.⁹⁴

Large scale retrenchments without a facilitator

Although large-scale retrenchments as set out above follows the provisions of s189A, employers (or employees) may opt not to follow the facilitation option. This would mean that the facilitation part of the process would be excluded, however the consulting parties will still have to observe the provisions of s 189 and the relevant sections of s 189A.⁹⁵

If none of the parties request a facilitator, s 189A requires that a minimum period of 30 days, calculated from the date on which the employer gave notice in terms of s 189(3) must have elapsed before a dispute about the contemplated dismissal may be referred to the CCMA⁹⁶ or a council for conciliation⁹⁷. Section 64(1)(a)⁹⁸

⁹³ Section 37 of Act 75 of 1997.

⁹⁴ Section 189(7) of the Labour Relations Act 66 of 1995.

⁹⁵ Labour Relations Act 66 of 1995.

⁹⁶ Commission for Conciliation, Mediation and Arbitration.

⁹⁷ Section 189A(8)(a) of the Labour Relations Act 66 of 1995.

⁹⁸ Labour Relations Act 66 of 1995.

prescribes a minimum of 30 days. Section 189(A)(8)⁹⁹ provides that the employer may not dismiss until the 30-day conciliation period has elapsed. This means that the soonest that an employer would be able to dismiss will be after the expiry of both the 30-day periods, i.e. 60 days from the date on which it gave notice in terms of s 189(3)¹⁰⁰ of contemplating a large-scale dismissal. Once the 60-day period has expired, the employer may give notice of termination of dismissal of the selected employees to be retrenched. Minimum notice must be observed in terms of s 37(1) of BCEA.¹⁰¹ Section 189A¹⁰² must for obvious reasons be read in conjunction with s 189.¹⁰³

Reflecting on the above, some key process comparatives between a s 189¹⁰⁴ consultative process and, s 189A,¹⁰⁵ can be made:

1. Once a facilitator is appointed, the consultation process will consist of a minimum of four consultation meetings within a period of 60 days. Without a facilitator, no minimum number of consultation meetings is prescribed under a normal s 189¹⁰⁶ process. It could therefore be argued that without facilitation, an employer can very well 'speed up' the process and conclude retrenchment well within 60 days. The facilitation option will ensure the parties remain engaged.
2. Notice of termination can only be given after 60 days have lapsed from the date of the original s 189 (3)¹⁰⁷ notice that was issued to employees. Notice during a normal s 189 process can be given at any stage once the topics for consultation as envisaged in s 189 (2) and (3)¹⁰⁸ have been covered. The facilitation option here provides for a 'buffer period' before the employer can issue notice of termination.

⁹⁹ Labour Relations Act 66 of 1995.

¹⁰⁰ Labour Relations Act 66 of 1995.

¹⁰¹ Basic Conditions of Employment Act 75 of 1997.

¹⁰² Labour Relations Act 66 of 1995.

¹⁰³ Labour Relations Act 66 of 1995.

¹⁰⁴ Labour Relations Act 66 of 1995.

¹⁰⁵ Labour Relations Act 66 of 1995.

¹⁰⁶ Labour Relations Act 66 of 1995.

¹⁰⁷ Labour Relations Act 66 of 1995.

¹⁰⁸ Labour Relations Act 66 of 1995.

3. During the facilitation process the facilitator can make an almost immediate ruling on a dispute relating to the disclosure of information.¹⁰⁹ Without facilitation a dispute about the disclosure of information must follow the normal dispute process through the legal system,¹¹⁰ which may derail and upset the consultation process. Facilitation, in this instance, provides for a quicker and cost saving alternative.
4. If a facilitator is appointed, an unfair retrenchment dispute¹¹¹ may not be referred unless the stipulated 60 day period had lapsed. The difference therefore is that a retrenchment dispute cannot be referred whilst consulting during a s 189A process, whereas a retrenchment dispute can be referred at any point during a normal s 189 consultation process. Without facilitation the door remains open at any point for an employee or its representative to refer a dispute that could again derail the consultative process envisaged in s 189(2).¹¹² Facilitation again ensures the parties remain engaged with each other before declaring disputes irrationally or emotionally.
5. At the conclusion of a facilitation process, a dispute about the fairness of the procedure cannot be referred to the labour court. Only a dispute about substantive issue i.e. the reason for the retrenchment may be referred. Disputes about the fairness of the procedure as well as the reasons for the retrenchment may be referred in case of a normal S 189¹¹³ retrenchment process. Facilitation in this case ensures that the procedural issues are taken care of, cutting down on unnecessary disputes about procedures.
6. Protected strike action¹¹⁴ may commence at the conclusion of the process under facilitation. The right to strike is not given as an option at the conclusion of a normal S 189 retrenchment process. It is important to point out that if a party

¹⁰⁹ Facilitation Regulation 5.

¹¹⁰ Section 189(4)(b).

¹¹¹ Schedule 4 of the Labour Relations Act, dispute flow diagram 13.

¹¹² Labour Relations Act 66 of 1995.

¹¹³ Labour Relations Act 66 of 1995.

¹¹⁴ Section 189A (8)(b)(ii).

decides to follow the strike option, a dispute about the fairness may not be referred to the labour court.

Whilst applying the formulations of the statutory provisions, employers should keep a watchful eye on the guidelines provided in the Code of Good Practice on Dismissal Based on Operational Requirements.¹¹⁵ The Code recognises the right of an employer to dismiss (retrench) employees if the reason is based on economical, technological, structural or similar needs. The code further recognise that retrenchment is categorised, as a 'no fault' dismissal i.e. the employee is not responsible for the termination of employment.

The Code places a particular onus on the employer to explore alternatives to dismissals and further that the employees affected by retrenchment are treated fairly. Both procedural and substantive obligations are placed on the employer according to the Code. The Code highlights that the purpose of consultation is to participate in a joint consensus seeking exercise, to reach agreement if possible and for the process to commence as soon as possible. Further guidelines are that the employer must disclose all relevant information, that the topics for consultation provided in S 189(3) should not be a closed list and that the employer should keep an open mind on any viable alternative proposals.

The guidelines in the Code clarifies that the period of consultation is not prescribed but that the consultation process should at least provide for an opportunity to meet and report back to employees, to meet with the employer and request, receive and consider information. Urgency of the retrenchments should not hinder proper consultations, however the Code recognises that the process may become more truncated. Meetings must take place as frequently as practically possible.

The Code further provides detailed guidelines on the selection of employees that may be retrenched. Selection criteria may not be used if it infringes on fundamental rights according to the Code, for example selecting only part time employees to be retrenched might discriminate against women, since women predominantly occupy

¹¹⁵ Published under GN 1517 in GG 20254 of July 1999.

part time work. Fair selection criteria according to the Code include length of service, skills and qualifications. The general neutral selection test however is the 'last in first out' (LIFO) principle. Exceptions to the LIFO¹¹⁶ principle are provided for in the Code; these are affirmative action measures¹¹⁷ and in the event that an employee's retrenchment would be detrimental to the business. The Code however cautions the use of these exceptions.

The Code reflects on the minimum severance pay¹¹⁸ and points out that an employee may not be entitled to severance pay if the employee refuses a reasonable alternative offer of employment. Reasonable alternatives according to the code, is firstly the reasonableness of the offer and factors such as pay, job security and status and secondly the employee's personal circumstances. This will be discussed in more detail below.

Lastly the Code requires that the offer of future re-employment in the event a suitable position becomes available be raised as part of the consultation process.

The dispute process: section 189 v section 189A

Section 189:

Section 191 of the Labour Relations Act¹¹⁹ makes provision for a dismissed employee to refer a dispute, within 30 days, to the CCMA.¹²⁰

In the event that the 30-day time period has expired, the employee may make an application for condonation and must show good cause as to the reason for the late referral.¹²¹ A copy of the referral, in the prescribed form,¹²² must be served on the

¹¹⁶ Last In First Out.

¹¹⁷ See selection criteria below.

¹¹⁸ In terms of the Basic Conditions of Employment Act 75 of 1997, an employee is entitled to one week's wages for each completed year of service.

¹¹⁹ Act 66 of 1995.

¹²⁰ Commission for Conciliation Mediation and Arbitration or and accredited Statutory Council (such as a Bargaining Council).

¹²¹ Section 191(2) of the Labour Relations Act 66 of 1995 read in conjunction with Rule 31 of the Rules for the Conduct of Proceedings before the CCMA.

employer and thereafter filed at the CCMA.¹²³ The CCMA¹²⁴ will then issue a set down notice and then attempt to resolve the dispute through conciliation on the set date. If the parties fail to resolve the matter or if the matter remains unresolved after 30 days of the date of the dispute referral, a certificate stating that the matter remains unresolved will be issued.¹²⁵ In the event that the employee fail to attend the conciliation, the matter may be removed from the CCMA¹²⁶ case roll, however on the if the employer fails to attend, the matter may proceed.¹²⁷ Once the aforementioned process has been completed and the parties remain 'in dispute', the aggrieved party may then refer the matter to the Labour Court within 90 days.¹²⁸

Section 189A:

Firstly it is important to note that the Labour Court will not adjudicate the procedural aspect of large-scale retrenchments.¹²⁹ In the event the employer party fails to follow a fair procedure during the consultation proceedings, a dissatisfied and aggrieved consulting party may approach the Labour Court for relief. The relevant relief is stated as follows:

- (a) compelling the employer to comply with a fair procedure;
- (b) interdicting or restraining the employer from dismissing an employee prior to complying with a fair procedure;
- (c) directing the employer to reinstate an employee until it has complied with a fair procedure;
- (d) make an award of compensation, if an order in terms of paragraphs (a) to (c) is not appropriate.¹³⁰

It is therefore clear that during large-scale retrenchments, employees may approach the court for relief if an employer was planning to circumvent some of the provisions

¹²² Form LRA 7.11.

¹²³ Commission for Conciliation Mediation and Arbitration.

¹²⁴ Commission for Conciliation Mediation and Arbitration.

¹²⁵ Section 191(5) of the Labour Relations Act 66 of 1995.

¹²⁶ Commission for Conciliation Mediation and Arbitration.

¹²⁷ Rule 30 of the Rules for the Conduct of Proceedings before the CCMA.

¹²⁸ Section 191(12) of the Labour Relations Act 66 of 1995 however suggests that if the retrenchment was for a single employee only, thn the matter must proceed to arbitration. This principle was confirmed in *Rand Water v Bracks NO & others*(2007) 28 ILJ 2310 (LC).

¹²⁹ Section 189(18) of the Labour Relations Act 66 of 1995.

¹³⁰ Section 13 of the Labour Relations Act 66 of 1995.

of s 189(3) of the Labour Relations Act.¹³¹ Once notice of retrenchment is given at the end of the facilitation process, the aggrieved party can either approach the Labour Court or issue notice of strike action.

Reflecting briefly on the dispute procedures above, s 189A¹³² would bypass the initial dispute procedures through the CCMA conciliation process as in the case of 'small' scale retrenchments, excelling to finality faster. An international comparison is discussed in the chapter below.

CHAPTER 4 : INTERNATIONAL COMPARATIVE VIEW

A comparative view on large-scale retrenchment procedures in the United Kingdom

In the United Kingdom, under the Employment Rights Act 1996, redundancy arises when employees are dismissed because:¹³³

1. the employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was so employed; or
2. the employer has ceased, or intends to cease, to carry on the business in the place where the employee was so employed; or
3. the requirements of the business for employees to carry out work of a particular kind has ceased or diminished or are expected to cease or diminish; or
4. the requirements of the business for the employees to carry out work of a particular kind, in the place where they were so employed, has ceased or diminished or are expected to cease or diminish.

The statutory obligation for employers to consult employee representatives about the impact of collective redundancies is triggered when more than 20 employees are likely to be retrenched.¹³⁴ Consultation must start expediently and must commence

¹³¹ Act 66 of 1996.

¹³² Labour Relations Act 66 of 1995.

¹³³ Section 139(1).

¹³⁴ Section 188 of the Trade Union and Labour Relations Act 1992 as amended.

at least 30 days before the first dismissal takes effect if 20 to 99 employees are to be made redundant over a period of 90 days or less and at least 45 days before the first dismissal takes effect if 100 or more employees are to be made redundant at one establishment over a period of 90 days or less.¹³⁵

The Information and Consultation of Employees Regulations 2004 were introduced on 6 April 2005 and apply to businesses with 50 or more employees.¹³⁶ The regulations give employees the right, subject to certain conditions, to request that their employer sets up or changes arrangements to inform and consult them about issues in the organisation. The requirement to inform and consult employees does not operate automatically. It can occur either by a formal request from employees for an agreement, or by employers choosing to start the process.

This directive further requires that employers must disclose in writing to the appropriate representatives the following information concerning proposals for redundancies so that they can play a constructive part in the consultation process:

1. the reasons for the proposals,
2. the numbers and descriptions of employees it is proposed to dismiss as redundant,
3. the total number of employees of any such description employed at the establishment in question,
4. the way in which employees will be selected for redundancy,
5. how the dismissals are to be carried out, taking account of any agreed procedure, including the period over which the dismissals are to take effect,
6. the method of calculating the amount of redundancy payments to be made to those who are dismissed and
7. in cases of agency workers: the number of agency workers, where they are working and the type of work they are doing.

¹³⁵ Section 188 (1A).

¹³⁶ Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community. Under the Directive, EU Member States must comply with the requirement that all undertakings with at least 50 employees (or establishments with at least 20 employees) must inform and consult employee representatives about business developments, employment trends and changes in work organisation.

The findings of the 2004 Workplace Employment Relations Survey (WERS04)¹³⁷ showed that the impact of the ICE Regulations¹³⁸ had not resulted in an upturn in the proportion of workplaces covered by joint consultative committees. Further research by EMAR¹³⁹ found in some initial studies that with the introduction of the Information and Consultation of Employees Regulations 2004, senior management in organisations engaged seriously with representative bodies, however there are a number of reported instances where the representative bodies had little or no impact on management decisions and implementation thereof. The study indicated that the consultation practice however was evolving.¹⁴⁰

In terms of the Trade Union and Labour Relations (Consolidation) Act 1992¹⁴¹ it is envisaged that the consultation process cover the following:

- (2) The consultation shall include consultation about ways of—
 - (a) avoiding the dismissals,
 - (b) reducing the numbers of employees to be dismissed, and
 - (c) mitigating the consequences of the dismissals,
 and shall be undertaken by the employer with a view to reaching agreement with the appropriate representatives.
- (3) In determining how many employees an employer is proposing to dismiss as redundant no account shall be taken of employees in respect of whose proposed dismissals consultation has already
- (4) For the purposes of the consultation the employer shall disclose in writing to the appropriate representatives—
 - (a) the reasons for his proposals,
 - (b) the numbers and descriptions of employees whom it is proposed to dismiss as redundant,
 - (c) the total number of employees of any such description employed by the employer at the establishment in question,
 - (d) the proposed method of selecting the employees who may be dismissed,
 - (e) the proposed method of carrying out the dismissals, with due regard to any agreed procedure, including the period over which the dismissals are to take effect and
 - (f) the proposed method of calculating the amount of any redundancy payments to be made (otherwise than in compliance with an obligation imposed by or by virtue of any enactment) to employees who may be retrenched.

¹³⁷ The 2004 Workplace Employment Relations Survey (WERS 2004) was the fifth in a series of surveys that aimed to provide a nationally representative account of the state of employment relations and working life inside British workplaces available at <http://www.wers2004.info/index.php>. Also see <https://www.gov.uk/government/publications/the-2004-workplace-employment-relations-survey-wers>.

¹³⁸ The Information and Consultation of Employees Regulations 2004.

¹³⁹ Employment Market Analysis and Research, Implementing information and consultation: early experience under the ICE Regulations available at <http://www.cipd.co.uk>.

¹⁴⁰ See Executive summary. Available at <http://www.cipd.co.uk>.

¹⁴¹ Section (2) to (4).

- (5) That information shall be given to each of the appropriate representatives by being delivered to them, or sent by post to an address notified by them to the employer, or (in the case of representatives of a trade union) sent by post to the union at the address of its head or main office.
- (5A) The employer shall allow the appropriate representatives access to the affected employees and shall afford to those representatives such accommodation and other facilities as may be appropriate.

Reflecting on the above, it is clear that the consultative process covers very similar topics as in the South African statute, however the following are some of the main differences:

1. In the United Kingdom, it seems that large-scale retrenchment procedures are only triggered when the employer employs more than 50 employees and envisage the retrenchment of more than 20 employees. Here, facilitation procedures will be triggered when an employer employing more than 50 employees envisage the retrenchment of approximately 10 per cent of its workforce.¹⁴² Despite the aforementioned, Section 189A(4)¹⁴³ states that ‘this section does not prevent an agreement to appoint a facilitator in circumstances not contemplated by subsection (3).’ It therefore means that facilitation may be requested even in so called ‘small’ retrenchments.
2. There is no statutory provision in the United Kingdom for the option to appoint third party facilitation¹⁴⁴ and it seems that employers are only bound by the disclosure provisions and consultation topics and with the provisions of the Information and Consultation of Employees Regulations (2004). In terms of the s 189A¹⁴⁵ facilitation process the facilitator has powers to make rulings on what needs to be disclosed and direct the procedural aspects of the consultation meetings.

¹⁴² Section 189A (1) provides for a sliding scale approach. See above.

¹⁴³ Labour Relations Act 66 of 1995.

¹⁴⁴ Third party intervention is however available once the parties are in dispute through the Dispute Tribunal Services and regulated and supervised by the Administrative Justice and Tribunals Council in the United Kingdom.

¹⁴⁵ Labour Relations Act 66 of 1995.

3. There are no minimum or maximum number of facilitation meetings required in the United Kingdom, whereas s 189A¹⁴⁶ requires up to four facilitation meetings.
4. In the United Kingdom, there are no statutory provisions in large-scale retrenchment procedures that triggers retrenched employees to either embark on strike action or to follow the litigation route. Here, retrenchees are given an option of either industrial action or referral to the Labour Court. Once the strike route however is chosen, retrenched employees would not be able to approach the court for relief.

In conclusion it can be said that whilst legislation in the United Kingdom provides for statutory consultation with representative bodies when large-scale retrenchments are envisaged, no procedures have been developed such as a statutory facilitation provision in terms of S 189A of the LRA.¹⁴⁷

CHAPTER 5 : THE CONSULTATION PROCESS

This chapter will analyse the consultation process and identify some aspects that may help to understand how facilitation can assist parties engaged in large-scale retrenchments

Introduction

According to Thomson and Benjamin,¹⁴⁸ the overriding purpose of retrenchment procedures and provisions of the law are to –

- allow business to adjust employment levels to keep them competitive and viable;
- allow business to close altogether and discharge an entire workforce when circumstances so dictate;
- oblige employers to engage with their workforce and their representatives over restructuring plans (to test the rationality of the plans, to modify them for the better and to pacify employees);
- ensure that employees are fairly treated in the process and its outcome; and

¹⁴⁶ Labour Relations Act 66 of 1995.

¹⁴⁷ Labour Relations Act 66 of 1995.

¹⁴⁸ Thomson and Benjamin *South African Labour Law* vol 1.

- avoid industrial strife on the issue.¹⁴⁹

In order for the above to materialise and as mentioned earlier, once an employer wishes to embark on a retrenchment exercise, consultation with the affected employees or their representatives is vital. Section 189 (2) and (3)¹⁵⁰ provides for the basic topics to be consulted on and what needs to be disclosed to the other parties. The topics up for discussion are listed as follows:¹⁵¹

1. Measures to avoid, minimise the number, change the timing and mitigate the effect of the retrenchments.
2. The method of selecting the affected employee/s.
3. Severance pay to be paid.

Adequate information is a vital component for meaningful consultations. The information that needs to be disclosed are listed in the Labour Relations Act,¹⁵² but not limited to, as the following:¹⁵³

1. Reasons for the retrenchments.
2. The alternatives that the employer considered before deciding to retrench.
3. The number of the employees affected.
4. Selection criteria for selecting the affected employees.
5. Timing of the retrenchments.
6. Severance pay.
7. Assistance that the employer can offer to affected employees.
8. Future re-employment possibilities.
9. The number of the total workforce.
10. Number of workers retrenched over the last 12-month period.

Due to the nature and content of some of these topics it is anticipated that consultation can create heated debate and argument. After all, retrenchment is

¹⁴⁹ Thomson and Benjamin *South African Labour Law* vol 1, AA1-508

¹⁵⁰ Labour Relations Act 66 of 1995.

¹⁵¹ Section 189(2) and (3) of the Labour Relations SAct 66 of 1995.

¹⁵² Act 66 of 1995.

¹⁵³ Section 189(3) of the Labour Relations Act 66 of 1995.

regarded as a 'no fault' dismissal i.e. the employee did not do anything wrong to be dismissed. It is therefore understandable that employees and their trade unions would not likely agree to be retrenched and will put up fierce defense that may save them from being dismissed. It is submitted that the option of facilitation will assist parties better in this regard.

Section 189A(18)¹⁵⁴ also has relevance here, in that the Labour Court may not adjudicate a dispute about the procedural fairness of a retrenchment, only the substantive part. This is somewhat contradictory to our jurisprudence on the topics that suggest that procedural and substantive fairness in operational requirements are well intertwined.¹⁵⁵

Once the facilitation process has been concluded in good faith, the courts will be hesitant to intervene as was the case in *NUMSA and 24 Others v Greenfields Labour Hire cc and Another*¹⁵⁶. In this case the applicant employees were informed of retrenchments through their union. Several meetings were held between the applicant union and the respondent. After deadlocking, the parties decided to refer the matter to the CCMA¹⁵⁷ for facilitation. The facilitator held several meetings with the parties and at the second last meeting the parties agreed on the selection criteria and the procedure to be followed if a dispute arose.

The last meeting was held in the absence of the facilitator and the parties agreed on the names of the employees to be retrenched, severance pay, recall procedure, the type of assistance to be given by the employer and the employees that were to be retained. The union, thereafter, wrote a letter to the employer proposing the substitution of some of the employees to be retained. The union also submitted a list of nine employees who were prepared to take a voluntary retrenchment package. The employer then replied that it needed to reconsider its position and ultimately accepted the request to retain a further four employees. It also gave a notice for

¹⁵⁴ Labour Relations Act 66 of 1995.

¹⁵⁵ In *Unitrans Zululand Pty (Ltd) v Cebukulu* [2003] 7 BLLR 688 (LAC) at 702 the court expressed the view that substantive and procedural fairness are inextricably linked.

¹⁵⁶ (2004) ILJ 558 (LC).

¹⁵⁷ Commission for Conciliation, Mediation and Arbitration.

retrenchment and stated that it would only be able to pay the statutory minimum severance pay.

The union then declared a dispute and the matter was referred to the Labour Court after the employer informed the union that it would be paying the retrenched employees the following day. The union argued that the retrenchments were unfair because the employer had failed to consult fully regarding the selection procedure, recalling of employees once there was work available and voluntary retrenchments.

The court held that, based on the evidence presented, that the consultation process was adequate and complied with the requirements of s 189.¹⁵⁸ The application was dismissed and the applicant was ordered to pay the costs.

The decision to retrench and when to commence the consultation process

The LRA¹⁵⁹ requires that the employer must start consulting when retrenchment is 'contemplated.'¹⁶⁰ Although there is much debate whether contemplation comes before the decision to retrench had been taken or after, the employer must still be in a position to be convinced otherwise or be able to 'change its mind' during consultation with the other parties. The employer should not enter the consultation process with 'its mind made up.'¹⁶¹

Grogan¹⁶² suggests that:

The word contemplates suggest that the employer should notify the workforce of the possibility of retrenchment as soon as management has decided in principle to adopt a policy (be it rationalization, restructuring, the sale of part of the business) which could conceivably result in retrenchment.¹⁶³

¹⁵⁸ Labour Relations Act 66 of 1995.

¹⁵⁹ Act 66 of 1995.

¹⁶⁰ Section 189(1).

¹⁶¹ See *Mabaso & others v Universal Product Network (Pty) Ltd* (2003) 24 ILJ 1532 (LC) and *Enterprise Foods (Pty) Ltd v Allen and others* (2004) 25 ILJ 1251 (LAC) where the employer decided to close the business before commencing with the consultation process.

¹⁶² John Grogan *Workplace Law* 10 ed (2007).

¹⁶³ John Grogan *Workplace Law* 10 ed (2007) 276.

When the employer extensively consulted with affected employees before the s 189(3)¹⁶⁴ notice was issued, the Labour Appeal Court found that it was not necessary to have consulted over the issues that had already been covered.¹⁶⁵

The consultation process must be undertaken before the final decision to retrench is taken.¹⁶⁶ Sufficient notice must then be given in writing and should contain enough information that will enable the parties to engage effectively. This does however not mean that the employer must follow the list of disclosures in S189(3)¹⁶⁷ to the letter.¹⁶⁸

Du Toit¹⁶⁹ points out that ‘where termination of employment results from a deliberate decision of the employer – for example, to restructure the business “the duty [to consult] arises when the employer, having foreseen the need for it, contemplates changes which might affect the job positions of certain employees”’.¹⁷⁰ In conclusion it seems that the *jurisprudence* suggests the principle ‘sooner rather than later should be adopted.

An interesting situation arises if the employer commences with the consultation process in terms of s 189¹⁷¹ but at a later stage realise that the process should be under the auspices of s 189A as the number of retrenchments increased beyond the statutory threshold in terms of s 189A?¹⁷² This was the case in *Continental Tyre SA (Pty) Ltd v NUMSA*.¹⁷³ In this case, the employer commenced retrenchment in one department under s 189¹⁷⁴ but before the completion of the retrenchment exercise, a

¹⁶⁴ Labour Relations Act 66 of 1995.

¹⁶⁵ *Nehawu & others v University of Pretoria* (2006) 27 ILJ 117 (LAC).

¹⁶⁶ See for example *Goldfields Trust (Pty) Ltd., & Another v Stander and Others* [2002] 9 BLLR 797 (LAC) [2002], where Zondo JP concluded: “In those circumstances I am satisfied, like the court a quo, that a final decision of the respondents was taken before the consultation process was initiated and that, for that reason, the consultation process that took place in this matter did not comply with the requirements of section 189. This rendered the dismissal procedurally unfair”, at 806 A-C.

¹⁶⁷ Labour Relations Act 66 of 1995.

¹⁶⁸ *Chester Wholesale Meats (Pty) Ltd v NIWUSA & others* (2006) 27 ILJ 915 (LAC).

¹⁶⁹ D du Toit ‘et al’ *Labour Relations Law, A Comprehensive Guide* 5ed (2006).

¹⁷⁰ D du Toit ‘et al’ *Labour Relations Law, A Comprehensive Guide* 5ed (2006) 435.

¹⁷¹ Labour Relations Act 66 of 1995.

¹⁷² Labour Relations Act 66 of 1995.

¹⁷³ (2008) 29 ILJ 2561 (LAC).

¹⁷⁴ Labour Relations Act 66 of 1995.

sudden drop in demand resulted in further retrenchments in another department. As the number of possible retrenchments exceeded the statutory threshold, the employer issued new notices under s 189A.¹⁷⁵ The Labour Court granted an interdict and redirected the parties to consult in terms of s 189A.¹⁷⁶

On appeal, the court disagreed with the court *a quo* in that the employer had already almost completed the consultations in terms of s 189¹⁷⁷ and that at the time the employer issued the 189A¹⁷⁸ notices, the employer had not yet reached the statutory threshold. The court however made clear that under normal circumstances s 189 and s189A¹⁷⁹ should not run concurrently.

The interplay between Facilitation, Conciliation and Mediation

As stated earlier, facilitation is used to make a process easier.¹⁸⁰ In terms of s 189A facilitation,¹⁸¹ Thomson states that '*[T]he facilitator's job is to act as a resource to the consultative process. Clearly the first prize is to assist the parties in arriving at a full agreement in relation to the operational needs of the employer and the employment implications for staff.*'¹⁸² Facilitation can therefore be seen as a process by which a third party assists to coordinate the activities of parties, assists parties to prevent and minimise tension or conflict and contributes in keeping the discussion productive, enabling the parties to reach an agreement, similar to the process of mediation.

According to Boyle,¹⁸³ 'Mediation is a decision making process in which the parties are assisted by a third person (the mediator), who attempts to improve the process of decision-making and to assist the parties reach an outcome to which each of them

¹⁷⁵ Labour Relations Act 66 of 1995.

¹⁷⁶ Labour Relations Act 66 of 1995.

¹⁷⁷ Labour Relations Act 66 of 1995.

¹⁷⁸ Labour Relations Act 66 of 1995.

¹⁷⁹ Labour Relations Act 66 of 1995.

¹⁸⁰ See introduction section above.

¹⁸¹ LRA 66 of 1995.

¹⁸² Thomson and Benjamin *South African Labour Law* vol 1, AA1-519.

¹⁸³ Lawrence Boule and Allan J Rycroft *Mediation: Principles, Process and Practice* (1997) 7.

can assent.¹⁸⁴ Moore¹⁸⁵ defines mediation as ‘the intervention into a dispute or negotiation by an acceptable, impartial, and neutral third party who has no authoritative decision making power to assist disputing parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute.’¹⁸⁶

Conciliation is defined in s 135 of the Labour Relations Act¹⁸⁷ and requires a commissioner to resolve a dispute by applying mediation, fact-finding applications and may make suggestions to the parties. It is therefore evident that conciliation can include mediation as a method to resolve a dispute.

There are many similarities between facilitation and mediation, however with one fundamental difference - facilitation is normally suggested *before* a dispute and mediation is normally suggested *after* a dispute. In both facilitation and mediation, a third person is assigned to manage the process of communicating and decision-making. Facilitation however aims to help individuals and groups reach an agreement from the beginning of the process, before a conflict arises.

Van der Merwe¹⁸⁸ makes the following distinction between mediation and facilitation. He points out that ‘facilitation is restricted to one aspect of mediation’ namely communication between the parties with no suggested solutions. He states that facilitation deals primarily with ‘technical’ issues rather than ‘moral’ issues, with the ‘*process* of improvement of communication, rather than the *goal* of reaching a solution’.

The mediator on the other hand is motivated to reach that solution. He states that the mediator ‘can claim neutrality regarding the stands taken by conflicting parties, but not regarding the outcome of the exercise’. He further points out that communication for the mediator is a ‘means to an end’ but for the facilitator, ‘facilitation of communication is an end in itself.’ Lastly, he remarks interestingly ‘that facilitation

¹⁸⁴ Lawrence Boulle and Allan J Rycroft *Mediation: Principles, Process and Practice* (1997) 7.

¹⁸⁵ CR Moore *The Mediation Process: Practical Strategies for Resolving Conflict* 2nd ed (1996).

¹⁸⁶ CR Moore *The Mediation Process: Practical Strategies for Resolving Conflict* 2nd ed (1996) 14.

¹⁸⁷ Act 66 of 1995.

¹⁸⁸ Hendrik W. van der Merwe, FACILITATION AND MEDIATION IN SOUTH AFRICA: THREE CASE STUDIES. Available at http://www.gmu.edu/programs/icar/pcs/vander~1.htm#N_4_.

can take the form of shuttle diplomacy', meaning that the parties do not have to meet in one room together, but mediation he states 'usually refers to a meeting where the parties meet physically in the presence of the mediator.'

It can therefore be said that although mediation and facilitation have some distinct differences, both processes have third party intervention to resolve an issue between two parties.

How facilitation works under the auspices of s 189A

Facilitation Regulation 8 states that the CCMA¹⁸⁹ must maintain a panel of facilitators, made up of commissioners that has 'proven knowledge, experience and expertise in conciliation, mediation or facilitation of labour disputes.'¹⁹⁰ One would, in order to serve on a panel of facilitators, expect that the facilitator be well adverse with pre and post dispute processes.

In terms s 189A,¹⁹¹ the facilitator is largely restricted to the powers set out in the facilitation regulations. The powers and duties of a facilitator in terms of the Facilitation Regulations read as follow:

- (1) Unless the parties agreed otherwise, the facilitator may-
 - (a) chair the meeting between the parties;
 - (b) decide on any issue of procedure that arises in the course of meetings between the parties;
 - (c) arrange further facilitation meetings after consultation with the parties.
 - (d) direct that the parties engage in consultations without the facilitator being present.
- (2) A decision by a facilitation in respect of any matter concerning the procedure for conducting the facilitation, including the date and time of meetings, is final and binding.
- (3) By agreement between the parties, the facilitator may perform any other function.¹⁹²

Further power bestowed upon the facilitator by these Regulations is that the facilitator can make an order relating to the disclosure of information that is relevant to the facilitation.¹⁹³

¹⁸⁹ Commission for Conciliation, Mediation and Arbitration.

¹⁹⁰ Facilitation Regulation Regulation 8.

¹⁹¹ Supplemented by the Facilitation Regulations.

¹⁹² Facilitation Regulation 4.

¹⁹³ Facilitation Regulation 5.

Applying the above guidelines, it seems somewhat limited in terms of what the facilitator can and cannot do. In the case of *National Union of Mineworkers v Commission for Conciliation Mediation and Arbitration and Others*,¹⁹⁴ the court shed some important light on the subject. In this case the company contemplated retrenchments across a number of operations and requested facilitation in terms of S189A.¹⁹⁵ During the first meeting, the fourth and the fifth respondents objected to the facilitation covering all the employer's business operations and requested that separate facilitations should be held for each of the operations. The company on the other hand argued that each of the business operations form part of the same employer and that it should not be separated. The facilitator then adjourned the meeting and prepared *inter alia* the following outcome report:

The argument of AMCU and UASA that they view every operation of BECSA to be autonomous and that each should have its own consultation separate from others seems to me informed by section 213 of the NRA regarding the definition of workplace. The definition of workplace in terms of the Act states that workplaces under the same employer will be regarded as separate and if they are independent by virtue of their size, organisation and functions. It is therefore apparent that the argument of AMCU and UASA that they understand BECSA to be a holding operation with autonomous operations will have to be given consideration in making a ruling on this matter... Each operation of BECSA that is affected by the purported operational requirements must be consulted separately as an autonomous operation as per the definition of the workplace in terms of section 213 of the Act.¹⁹⁶

Unsatisfied with this ruling, the Labour Court was approached for an interdict in terms of S 158(1) of the Labour Relations Act.¹⁹⁷

In the judgment, Steenkamp J, pointed out that 'the process of facilitation introduced by s 189¹⁹⁸ of the LRA is *akin*¹⁹⁹ to the conciliation process described in s 135 of the Act.'²⁰⁰ He also supported the view by Thomson and Benjamin that '*[T]he facilitator's job is to act as a resource to the consultative process. Clearly the first prize is to assist the parties in arriving at a full agreement in relation to the operational needs of the employer and the employment implications for staff.*'²⁰¹

¹⁹⁴ [2011] 7 BLLR 713 (LC).

¹⁹⁵ Labour Relations Act 66 of 1995.

¹⁹⁶ *National Union of Mineworkers v Commission for Conciliation Mediation and Arbitration and Others* [2011] 7 BLLR 713 (LC) at [4].

¹⁹⁷ Act 66 of 1995.

¹⁹⁸ Labour Relations Act 66 of 1995.

¹⁹⁹ My emphasis.

²⁰⁰ *National Union of Mineworkers v Commission for Conciliation Mediation and Arbitration and Others* [2011] 7 BLLR 713 (LC) at [9].

²⁰¹ Thomson and Benjamin *South African Labour Law* vol 1, AA1-519.

The court ultimately ruled that the facilitator operated *ultra virus* in that he 'was not empowered to make a binding ruling as to the level at which consultations in terms of s 189 should be held.'²⁰²

Two important relevant observations can be made from this judgment:

1. The facilitation process is similar to that of a conciliation process.
2. The facilitator cannot make decisions based on substantive issues of the retrenchment case.

Following from this, it would be important then to scrutinize the conciliation process²⁰³ under the auspices of the CCMA.²⁰⁴ Section 135 is the starting point for a dispute to be conciliated in terms of the Labour relations Act.²⁰⁵ The relevant sections read as follows:

- (1) When a dispute has been referred to the Commission, the Commission must appoint a commissioner to attempt to resolve it through conciliation.
- (2) The appointed commissioner must attempt to resolve the dispute through may agree to extend the 30-day period.
- (3) The commissioner must determine a process to attempt to resolve the dispute, which may include
 - (a) mediating the dispute;
 - (b) conducting a fact-finding exercise; and
 - (c) making a recommendation to the parties, which may be in the form of an advisory arbitration award.

Sections 142 of the Labour Relations Act²⁰⁶ gives commissioners appointed to resolve dispute through conciliation certain powers. The powers in S 142(1) is stated as follows:

- (1) A commissioner who has been appointed to attempt to resolve a dispute may-
 - (a) subpoena for questioning any person who may be able to give information or whose presence at the conciliation or arbitration proceedings may help to resolve the dispute;
 - (b) subpoena any person who is believed to have possession or control of any book, document or object relevant to the resolution of the dispute, to appear before the commissioner to be questioned or to produce that book, document or object;
 - (c) call, and if necessary subpoena, any expert to appear before the commissioner to give evidence relevant to the resolution of the dispute;

²⁰² *National Union of Mineworkers v Commission for Conciliation Mediation and Arbitration and Others* at [11].

²⁰³ S 135 of the Labour Relations Act 66 of 1995.

²⁰⁴ Commission for Conciliation, Mediation and Arbitration.

²⁰⁵ Act 66 of 1995.

²⁰⁶ Act 66 of 1995.

- (d) call any person present at the conciliation or arbitration proceedings or who was or could have been subpoenaed for any purpose set out in this section, to be questioned about any matter relevant to the dispute;
- (e) administer an oath or accept an affirmation from any person called to give evidence or be questioned;
- (f) at any reasonable time, but only after obtaining the necessary written authorisation-
 - (i) enter and inspect any premises on or in which any book, document or object, relevant to the resolution of the dispute is to be found or is suspected on reasonable grounds of being found there; and
 - (ii) examine, demand the production of, and seize any book, document or object that is on or in those premises and that is relevant to the resolution of the dispute; and
 - (iii) take a statement in respect of any matter relevant to the resolution of the dispute from any person on the premises who is willing to make a statement; and
- (g) inspect, and retain for a reasonable period, any of the books, documents or objects that have been produced to, or seized by, the Commission.²⁰⁷

Reflecting on these functions and powers, the conciliation process is a powerful process similar to the facilitation process, which focuses on communication between two parties reaching their own agreement on a matter. The crisp issue here is that it does not really matter if the case is about an existing dispute, what matters is that a CCMA²⁰⁸ commissioner will be the third party facilitator initiating the opposite parties to engage with each other in the attempt to reach agreement.

The Dynamics of the Parties in Alternate Dispute Resolution Processes.

The process of facilitation is one of the main components in ADR²⁰⁹ processes, which denotes all forms of dispute resolution other than litigation through the courts. There can be no doubt that parties to the 'dispute', the employer that wants to retrench on the one side and the union representing its members that may potentially be retrenched on the other, will have their own strategies, mindsets, attitude etc. when they enter the process, that could potentially influence the outcome.

As an ADR process, Macfarlane²¹⁰ recognises these dynamics and argues that 'disputants themselves, and how they make sense of their own conflicts, are the

²⁰⁷ Labour Relations Act 66 of 1995.

²⁰⁸ Commission for Conciliation, Mediation and Arbitration.

²⁰⁹ ADR is the generally accepted acronym for Alternative Dispute Resolution.

²¹⁰ (2001) 46 McGill L.J. 663.

most important variables in settling disputes, rather than the rational, predictive model that most legal scholarships emphasise.’ In conclusion Macfarlane suggests by understanding more about dispute behaviour and patterns of the response to conflict will enable parties to determine when intervention is necessary and when the process is ready for settlement. She points out lessons to be learned, firstly that preparation should go beyond conventional approaches, secondly that face-to-face meetings should take place and lastly the timing.²¹¹ Her analysis suggests that by looking at alternate and subtler signals indicating ripeness to settle in an earlier stage of the dispute and thereby using this deeper understanding of why people settle, taking full account of the other parties’ expectations and social reality. Although it is recognised that the process of facilitation is not a dispute resolution process in terms of the Labour Relations Act,²¹² it can be argued that the parties enter the facilitation process with a mindset that if there are no resolution, a dispute about the possible retrenchments may well be the result. Section 189A²¹³ is a statutory process placing parties before a facilitator to facilitate a potential dispute. It is with these preconceived mindsets in place that a facilitator would be best placed to deal with these mindsets and ‘feelings’ during a large-scale retrenchment process.

The consulting Parties

Section 189 of the LRA²¹⁴ initiated the process by instructing the employer that when retrenchments are contemplated, consultation must commence with:

- (a) any person whom the employer is required to consult in terms of a collective agreement;
- (b) if there is no collective agreement that requires consultation –
 - (i) a workplace forum, if the employees likely to be affected by the proposed dismissals are employed in a workplace in respect of which there is a workplace forum; and
 - (ii) any registered trade union whose members are likely to be affected by the proposed dismissals;
- (c) if there is no workplace forum in the workplace in which the employees likely to be affected by the proposed dismissals are employed, any registered trade union whose members are likely to be affected by the proposed dismissals; or

²¹¹ (2001) 46 McGill L.J. at 708.

²¹² Act 66 of 1995.

²¹³ Labour Relations Act 66 of 1995.

²¹⁴ Labour Relations Act 66 of 1995.

- (d) if there is no such trade union, the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose.²¹⁵

Whilst it is relatively obvious with whom the employer must consult with, some practical and far-reaching consequences may arise when consulting parties enter into agreement. Section 10 of the Facilitation Regulations stipulate that:

If employees who are likely to be affected by a proposed dismissal are represented in a facilitation by more than one consulting party, an agreement must be concluded by the consulting parties representing the majority of the employees concerned, for purposes of section 189(2) of the Act or these regulations.'

This could therefore have the effect that an employer can enter into a retrenchment agreement with a group of individual employees, being the majority of the employees represented, and a minority trade union being 'tagged along' without agreeing to the terms of the retrenchment agreement.

Lastly, representation²¹⁶ by the parties during these proceeding under the auspices of the CCMA²¹⁷ is well regulated in terms of the Rules of Conduct of Proceedings before the CCMA²¹⁸ read in conjunction with the Facilitation Regulations.²¹⁹

According to these rules and regulations there appears to be no limitation on legal representation²²⁰ during facilitation proceedings. It can therefore be concluded that 'any' representative may represent consulting parties during facilitation proceedings, thereby bringing further dimensions to the process.

²¹⁵ Section 189(1).

²¹⁶ Rules for the Conduct of Proceedings Before the CCMA GN R1448 in GG 25515 of 10 October 2003.

²¹⁷ Commission for Conciliation Mediation and Arbitration.

²¹⁸ Commission for Conciliation Mediation and Arbitration.

²¹⁹ GN R1445 in GG 25515 of 10 October 2003.

²²⁰ Rule 25 regulates legal representation in proceedings before the Commission for Conciliation, Mediation and Arbitration. Legal representation is not permitted in conciliation proceedings and conditionally permitted during arbitration proceedings related to misconduct dismissals.

CHAPTER 6 : CONSULTATION TOPICS

Measures to avoid and minimize the number of retrenchments

The LRA²²¹ requires the consulting parties to engage with each other in an attempt to avoid retrenchments all together. It therefore seems that the parties should ideally explore other possibilities to address the employer's predicament and to find alternatives. The principles set in *Atlantis Diesel Engines*²²² probably best illustrate this topic. The Labour Appeal Court found in this case that the purpose of consultations are for the employer to be able to explain the need to retrench and for the parties to look at alternatives in order to minimize or avoid any retrenchments.

Re-employment

Consulting parties must cover the possibility of possible future re-employment²²³ in the event that the economic crisis are over or if the employer has repositioned its business successfully and recruitment would be a necessity.

Caution should however be exercised in the event that the employer has dismissed a number of employees for same or similar reasons and only re-employ some,²²⁴ as this will be regarded as a dismissal. It would also be regarded as an unfair labour practice if the employer fails to re-employ a retrenched employee in terms of an agreement.²²⁵ It would therefore be wise to observe this regulation and detail the exact agreement in this regard in detail, stating who's responsibility it would be to maintain a contact details of the employee and the timeframe when the employee would be offered the right of first refusal for re-employment.²²⁶

²²¹ Section 189(2)(a)(i) of the Labour Relations Act 66 of 1995.

²²² *National Union of Metal Workers of SA v Atlantis Diesel Engines (Pty) Ltd* (1993) 14 ILJ 642 (LAC).

²²³ Section 189(3)(h) of the Labour Relations Act 66 of 1995.

²²⁴ Section 186(1)(d) of the Labour Relations Act 66 of 1995.

²²⁵ Section 186(2)© of the Labour Relations Act 66 of 1995.

²²⁶ In practice, a periods of between six and twelve months are acceptable.

Other alternatives

Some of the other more obvious alternative measures are:

1. Redeployment of employees in other or alternate positions. Whilst this can be a viable option to avoid retrenchments, should the redeployment be in a position that is not similar to the position that employees occupied prior to the redeployment, agreement must be obtained from the affected employees. If no agreement is obtained, the employees may claim a unilateral change in conditions of employment, which could be seen as unlawful.²²⁷
2. Placing a moratorium on new recruitment.
3. Reduction or elimination to overtime work.
4. Reduction or elimination of labourbroking.²²⁸
5. The working of short time or a reduction in working hours.
6. The redistribution of work.²²⁹

Measures to change the timing of the retrenchments

The timing of the retrenchments is an important factor for any employee that stands to be retrenched. Not only could this impact on the consultation process, it could be of valuable importance to the employee, allowing time rearrange the employee's life. There is however no obligation on the company to change the timing of the retrenchment in the absence of a valid reason, resulting in a drawn out delayed process. A case in point is the matter between *Forecourt Express (Pty) Ltd v SATAWU & others*.²³⁰ The Labour Appeal Court did not support the court *a quo*'s view that the employer should have postpone the retrenchments as requested by the union in order for the employer to gain an understanding of the 'new' business.²³¹

²²⁷ Section 64(4) of Labour Relations Act 66 of 1995 give employees the right to strike if the dispute is about unilateral changes in conditions of employment as well as the right to have the conditions restored for a period of 30 days.

²²⁸ Also referred to as 'Outsourcing.'

²²⁹ Known as 'Job sharing.'

²³⁰ (2006) 27 ILJ 2537 (LAC).

²³¹ *Forecourt Express (Pty) Ltd v SATAWU & others* (2006) 27 ILJ 2537 (LAC) at [46].

The court pointed out that the employer was well aware of the financial status of the new business and therefore found that such a request, to postpone the retrenchment, should be criticized.

In conclusion it would be important to cross reference the topics for consultation as to ensure that the process is not unnecessarily fast tracked and the purpose of consultation is not sidestepped by simply 'sticking' to the implementation date. After all, the timing of retrenchment is one of the listed topics up for discussion.²³²

Measures to mitigate the adverse effects of the retrenchments

When it becomes clear that retrenchment is unavoidable, effected employees should be given an opportunity to make proposals to the employer in this regard. This could be proposals relating to future re-employment, opportunity for time off to 'seek employment or to attend interviews and the possibility for the employer to assist with securing employment elsewhere if possible.²³³ In practice, the possibility of granting an employee the right to be re-employed, when a suitable vacancy may arise within an agreed period of time,²³⁴ is a real factor in mitigating the effect of a retrenchment. It is however recommended not to keep the time – period indefinite.

Further assistance could be in the form of making a telephone or facsimile available to retrenched employees or offering assistance with compiling, updating *curriculum vitae* for retrenched employees or possibly contacting the employee's main creditors, to advise them that the employee under question had been retrenched.

²³² Section 189(2)(iii) of the Labour Relations Act 66 of 1995.

²³³ In *Sikhosana & others v Sasol Synthetic Fuels* (2000) 21 *ILJ* (LC) the court observed that there is no duty on the employer to actively seek employment on behalf of the employee.

²³⁴ S 189(3)(h) of the Labour Relations Act 66 of 1995. It is however recommended not to leave the time period for re-employment open and indefinite.

Selection criteria

Section 189(7) (7) requires that the employer must select the employees to be dismissed according to selection criteria that have been agreed upon or in the absence of an agreed selection criteria that is fair and objective. The Code of Good Practice on Dismissal Based on Operational Requirements²³⁵ suggests the following:

(7) If one or more employees are to be selected for *dismissal* from a number of employees, this Act requires that the criteria for their selection must be either agreed with the consulting party or if no criteria have been agreed be fair and objective criteria.

(8) Criteria that infringe a fundamental right protected by *this Act* when they are applied, can never be fair. These include selection on the basis of union membership or activity, pregnancy, or some other unfair discriminatory ground. Criteria that are on the face of it neutral should be carefully examined to ensure that when they are applied, they do not have a discriminatory effect. For example, to select only part-time workers for retrenchment might discriminate against women, since women are predominantly employed in part-time work.

(9) Selection criteria that are generally accepted to be fair include length of service, skills and qualifications. Generally the test for fair and objective criteria will be satisfied by the use of the "last in first out" (LIFO) principle. There may be instances where the LIFO principle or other criteria needs to be adapted. The LIFO principle for example should not operate so as to undermine an agreed affirmative action programme. Exceptions may also include the retention of employees based on criteria mentioned above which are fundamental to the successful operation of the business. These exceptions should however be treated with caution.²³⁶

The LIFO principle is prescribed in the absence of any other criteria. Having said this, it would be permissible to retain employees for example with a skill that is vital to the business of the employer despite their years of service or their production output and work record, subject that these principles are equally applied.²³⁷ Care must be taken when using selection criteria not to infringe on employee's fundamental rights for example selecting based on sex or union membership.²³⁸ An employer selecting employees to be retrenched is not exempt from other fairness provisions of the law and s 186 states the following:

- 1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is-

²³⁵ Published under GN 1517 in GG 20254 of July 1999.

²³⁶ Item (7),(8) and (9) of The Code of Good Practice on Dismissal Based on Operational Requirements.

²³⁷ *NUM & others v Anglo American Research Laboratories Pty (Ltd)* [2005] 2 BLLR 148 (IC).

²³⁸ See The Code of Good Practice on Dismissal Based on Operational Requirements Item 8.

- (a) that the employee participated in or supported, or indicated an intention to participate in or support, a strike or protest action that complies with the provisions of Chapter IV;⁵⁰
- (b) that the employee refused, or indicated an intention to refuse, to do any work normally done by an employee who at the time was taking part in a strike that complies with the provisions of Chapter IV or was locked out, unless that work is necessary to prevent an actual danger to life, personal safety or health;
- (c) to compel the employee to accept a demand in respect of any matter of mutual interest between the employer and employee;
- (d) that the employee took action, or indicated an intention to take action, against the employer by-
 - (i) exercising any right conferred by this Act; or
 - (ii) participating in any proceedings in terms of this Act;
- (a) the employee's pregnancy, intended pregnancy, or any reason related to her pregnancy;
- (b) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility;
- (c) a transfer, or a reason related to a transfer, contemplated in section 197 or 197A; or
- (d) a contravention of the Protected Disclosures Act, 2000, by the employer, on account of an employee having made a protected disclosure defined in that Act.²³⁹

So, despite using seemingly objective selection criteria within a restructuring process, it should always be subject to fairness.

Bumping

Bumping occurs where an employee whose job is made redundant bumps another employee, not affected by the retrenchment exercise originally, out of their job so that the employee who was bumped is the one who is actually being retrenched. Bumping can be 'sideways' i.e. taking a position on a similar level elsewhere in the business or 'downwards' by taking up a position at a lower level in the business.

The authority set in the *Karachi v Porter Motor Group*²⁴⁰ case would probably best illustrate the principles of bumping. In this case the employer entered into a restructuring exercise, resulting in some retrenchments. The principle of bumping as selection criteria was agreed with the trade union and the employee in question was

²³⁹ Labour Relations Act 66 of 1995.

²⁴⁰ [2002] 4 BLLR 357 (LAC).

offered a lower position with a reduction in earnings of R800.00 per month. The employee rejected this alternative on the grounds that on a horizontal line in the business there was an employee with shorter service that she could bump, resulting in a reduction of only R200.00 in earnings. The employer did not accept this argument and retrenched the employee. The employee challenged the retrenchment and the Labour Court found that her retrenchment was unfair. On appeal, the Labour Appeal Court found that the ruling of the Labour Court was correct and dismissed the appeal. In doing so the court laid down the following principles when bumping is used in a retrenchment process:

1. the employer must consult with the affected employees or their representatives when contemplating using bumping,
2. in bumping, the LIFO²⁴¹ principle is used as a point of departure, employees with longer service will receive preference,
3. sideways bumping should be considered before bumping downwards,
4. when bumping is applied, it should be done in a way that minimizes disruption for the employer, 'balancing' the principle of fairness,
5. the unit within which bumping is effected may be ring-fenced by the placement of geographical boundaries, thus avoiding the proverbial 'musical chairs' principle,
6. the number of employees possibly affected should be identified and their mobility and career paths, redeploying the affected employees most effectively, will identify the limitations,
7. the retention of skill should be considered when bumping is applied and
8. where the employee is prepared to accept a downgrade in work or status, vertical bumping should be observed.

Severance pay

The payment of severance is a means to mitigate the unpleasant experience of the retrenched employee. The Basic Conditions of Employment²⁴² sets the minimum

²⁴¹ Last In First Out.

²⁴² Act 75 of 1997.

severance pay to be paid to retrenched employees i.e. one week for each completed year of service.²⁴³ The relevant section reads as follows:

- (1) For the purposes of this section, “operational requirements” means requirements based on the economic, technological, structural or similar needs of an employer.
- (2) An employer must pay an employee who is dismissed for reasons based on the employer’s operational requirements 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.
- (3) The Minister may vary the amount of severance pay in terms of subsection (2) by notice in the Gazette. This variation may only be done after consulting NEDLAC and the Public Service Co-ordinating Bargaining Council established under Schedule 1 of the Labour Relations Act, 1995.
- (4) An employee who unreasonably refuses to accept the employer’s offer of alternative employment with that employer or any other employer, is not entitled to severance pay in terms of subsection (2).
- (5) The payment of severance pay in compliance with this section does not affect an employee’s right to any other amount payable according to law.
- (6) If there is a dispute only about the entitlement to severance pay in terms of this section, the employee may refer the dispute in writing to—
 - (a) a council, if the parties to the dispute fall within the registered scope of that council; or
 - (b) the CCMA, if no council has jurisdiction.
- (7) The employee who refers the dispute to the council or the CCMA must satisfy it that a copy of the referral has been served on all the other parties to the dispute.
- (8) The council or the CCMA must attempt to resolve the dispute through conciliation.
- (9) If the dispute remains unresolved, the employee may refer it to arbitration.
- (10) If the Labour Court is adjudicating a dispute about a dismissal based on the employer’s operational requirements, the Court may inquire into and determine the amount of any severance pay to which the dismissed employee may be entitled and the Court may make an order directing the employer to pay that amount.²⁴⁴

The Labour Relations Act²⁴⁵ however requires that the payment of severance pay form part of the consultation process, in other words although the Basic Conditions of Employment Act²⁴⁶ prescribes a minimum payment, it should be raised for discussion between the parties. It therefore follows that when the parties agreed to a higher severance payment, the higher amount should be paid despite the statutory minimum of one week per completed year of service.²⁴⁷ Severance pay is paid in addition to any other statutory payments, i.e. leave and notice that becomes due at termination of employment. The calculation of severance pay is based on the employee’s basic rate at the time of the retrenchment and if employees received

²⁴³ Section 41 of the Basic Conditions of Employment Act 75 of 1997.

²⁴⁴ Section 41 of the Basic Conditions of Employment Act 75 of 1997.

²⁴⁵ Act 66 of 1995.

²⁴⁶ Act 75 of 1997.

²⁴⁷ This principle was confirmed in *SACTWU v Derman Fashions* [1997] 2 BLLR (CCMA).

fluctuation in their pay, their calculation is based on the average of the preceding thirteen weeks.²⁴⁸ Although the Basic Conditions of Employment Act prescribe severance to be calculated on continuous completed years of service, s 84(1) of the Basic Conditions of Employment Act,²⁴⁹ employees with a break in service of less than twelve months will not be disqualified to have their years of service before the break, recognised.

Employees will not qualify for severance pay if affected employees unreasonably refuse offers of alternative employment. The reasonableness of the offer of alternative employment will depend on factors such as status, remuneration, etc. and will be subject to scrutiny.²⁵⁰ An offer of alternate employment for which the employee may not be suitably qualified, will not suffice.²⁵¹

The latest view adopted by our Labour Courts is that an offer of employment must be made from the employer executing the retrenchment and that the intention of the legislature for the purposes of the payment of severance pay, is to secure alternative employment.²⁵² In this case, retrenched workers accepted alternate employment with a contractor who provided a service to the employer. Once transferred, these employees claimed severance pay from the employer. The Labour Appeal Court held that the employees had suffered no losses and to order the employer to pay severance pay would discourage employers during retrenchments to attempt securing alternative employment. If an employee therefore finds alternate employment on its own, the employer would not be exempt to pay severance pay.²⁵³

Similarly if employees are transferred in terms of Section 197(4)²⁵⁴ from one employer to the next employer, there will be no break in service and employees may not claim severance pay from the transferring employer.

²⁴⁸ Section 35(4)(a) of the Basic Conditions of Employment Act.

²⁴⁹ Act 75 of 1997.

²⁵⁰ *Sayles v Tartan Steel CC* [2000] 2BLR 162 (LAC).

²⁵¹ *Lakomski v TTS Tool Technic Systems (Pty) Ltd* (2007) 28 ILJ (LC).

²⁵² *Irvin and Johnson Ltd v CCMA and Others* (2006) 27 ILJ 935 (LAC).

²⁵³ *McDonald & another v Shoprite Checkers* (2005) 26 ILJ 168 (CCMA) at 174.

²⁵⁴ Labour Relations Act 66 of 1995.

In *NASSAWU and Others v Peerwood Investments (Pty) Ltd t/a Wolf Security and another*,²⁵⁵ a set principle was observed that in the event a retrenched employee accepts the quantum of severance pay, the right to pursue an unfair dismissal claim will not be waived.

A further limitation of payment of severance pay is when the employee reaches his normal or agreed retirement age. A dispute about payment of severance pay may be referred to the CCMA²⁵⁶ however any payment beyond the statutory minimum cannot be made²⁵⁷

In conclusion, the payment of severance pay is a means to mitigate the effect of a retrenchment in the absence of any viable alternatives.

Disclosure of information

It can be argued that in order to consult meaningfully in a retrenchment exercise, the retrenched employees or their representatives would need information in order to make decisions and provide meaningful input. Section 189(3) requires the employer to issue written notification to employees or their representatives affected by retrenchment to consult and to disclose in writing all relevant information, including but not limited to:

- (a) the reasons for the proposed dismissals;
- (b) the alternatives that the employer considered before proposing the dismissals, and the reasons for rejecting each of those alternatives;
- (c) the number of employees likely to be affected and the job categories in which they are employed;
- (d) the proposed method for selecting which employees to dismiss;
- (e) the time when, or the period during which, the dismissals are likely to take effect; the severance pay proposed;
- (g) any assistance that the employer proposes to offer to the employees likely to be dismissed;
- (h) the possibility of the future re-employment of the employees who are dismissed;
- (i) the number of employees employed by the employer; and

²⁵⁵ [2009] 3 BLLR 229 LC.

²⁵⁶ Section 41(6) of the Basic Conditions of Employment Act 75 of 1997.

²⁵⁷ PPAWU v Plett Timbers (Pty) Ltd [1997] 2 BLLR 228 (CCMA).

- (j) the number of employees that the employer has dismissed for reasons based on its operation requirements in the preceding 12 months.

Although the provisions of Section 16²⁵⁸ deals with the disclosure of information relating to organisational rights and collective bargaining, and such disclosures need not be in writing, s 189²⁵⁹ does however require that the disclosure must be in writing in the context of retrenchments. The content of the information that needs to be disclosed must be measured against the relevancy and the purpose. For example, where an employer decided to retrench based on its financial position, the employer needs to disclose such information and that the decision to retrench is made on a bona fide economic rationale.

During s 189A²⁶⁰ facilitation, there can be no argument that the commissioner will not keep a close eye on the requirement that all relevant information should be disclosed. It is after all one of the functions of a facilitator to arbitrate in the event that there is a dispute about the disclosure of information. One of the facilitation tools that the CCMA²⁶¹ uses in facilitating large-scale retrenchments is the introduction of a 'framework document'.²⁶² This document encapsulates and sets out the topics for discussion.²⁶³ It therefore follows that with facilitation; there will be minimum risk to the affected employees and their representatives and that all relevant information will not be withheld, haltering endeavors to make informed decisions within the retrenchment process.

²⁵⁸ Labour Relations Act 66 of 1995.

²⁵⁹ Labour Relations Act 66 of 1995.

²⁶⁰ Labour Relations Act 66 of 1995.

²⁶¹ Commission for Conciliation, Mediation and Arbitration.

²⁶² This terminology is used by the ccma facilitators, requesting the employer party to produce a comprehensive document setting out and disclosing all the relevant information in line with the requirements of S 189 (3) of the LRA. See example Annexure A.

²⁶³ See consultation topics above.

Training Lay-off scheme as alternative

According to the DOL,²⁶⁴ the Training Layoff Scheme was introduced and presented to the public in 'response to the international economic crisis' to the way that South Africa should respond to the economic challenges.

The scheme acknowledged the importance of training and skills development and introduced it as follows:

Training and skills development need to be prioritized, quality improved and the learnership programmes enhanced. In addition to other measures to avoid retrenchment, one further option that the parties will consider is training layoffs, financed by the National Skills Fund (NSF) and Sector Education and Training Authorities (SETAs), for workers whose employers would ordinarily retrench them and which can be introduced on terms that would keep them in employment during the economic downturn, but re-skill them as an investment for the future economic recovery.²⁶⁵

The training Layoff Scheme is in essence a voluntary temporary suspension from work, as an alternative to dismissal, enabling potential retrenched to go on training programs in the anticipation that when they return to work, the operational crises will be over in order for them to continue with their employment.

The aim of this program is therefore not to retrench workers during a time of economic downturn, but rather aim to retain employment and avoid retrenchments, improve skills, support business to survive and place workers and companies in a better position to shield off possible future economic pressures.

During the layoff period, employees²⁶⁶ will be able to attend training programs with the relevant SETA²⁶⁷ and will qualify for a training allowance payment of at least 50 per cent of their basic wage up to a maximum of R6239 per month. According to the DOL,²⁶⁸ the National Jobs Fund, provided financial assistance to the scheme with an

²⁶⁴ Department of Labour A Guide to the Training Lay off Scheme. Available at www.labour.gov.za/DOL/documents/.../guide-to-training-lay-off-scheme.

²⁶⁵ Department of Labour A Guide to the Training Lay off Scheme. Available at www.labour.gov.za/DOL/documents/.../guide-to-training-lay-off-scheme at 1.

²⁶⁶ The scheme is limited to employees earning up to R180000 per annum.

²⁶⁷ Sector Education and Training Authority established in terms of the Skills Development Act 31 of 2003 as amended.

²⁶⁸ Department of Labour.

initial two and a half billion rand. The scheme can be used for example in combination with 'short time' however the detail of a lay off plan will be contained within an agreement between workers or their represented trade union and the company.

Any agreement to participate in the scheme will be facilitated and overseen by the CCMA²⁶⁹ and ultimately approved by the Department of Labour. According to the facilitator guide,²⁷⁰ during facilitation in terms of Section 189A,²⁷¹ a facilitator is obliged to present the Training Layoff Scheme for the consulting parties to consider. There are however two more scenarios whereby a Training Layoff Scheme might be introduced. Parties that did not involve the CCMA²⁷² in a dispute or process could firstly request the commission²⁷³ for assistance in terms of S 150,²⁷⁴ resulting in a training layoff and secondly, a training layoff could be as a result of a training layoff agreement that was concluded between parties.

In conclusion it can be said that although the scheme is open to any business in distress, it is best design as an alternative to retrench, keeping workers employed during economic downturn.

Although the government presented this program as a 'rescue plan' in response to the current economic crisis, the success of the plan is unfortunately disappointing.

Results from a preliminary assessment of training and retraining programs implemented in response to the Great Recession²⁷⁵ revealed a disheartening effect that the training lay off scheme achieved:

The following explanations were given for the low participation rate in the scheme (7,246 as of January 2011) in comparison to the more than 1 million jobs that have been lost:

- the scheme was implemented too late. After planning and piloting, the programme was not implemented until January, 2010;

²⁶⁹ Commission for Conciliation, Mediation and Arbitration.

²⁷⁰ Commission for Conciliation, Mediation and Arbitration Facilitator Guide.

²⁷¹ Labour Relations Act 66 of 1995.

²⁷² Commission for Conciliation, Mediation and Arbitration.

²⁷³ Commission for Conciliation, Mediation and Arbitration.

²⁷⁴ Labour Relations Act 66 of 1995.

²⁷⁵ International Labour Office *Preliminary assessment of training and retraining programs implemented in response to the Great Recession* Employment Working Paper 122 (2012).

- many of those laid off were low-skilled, young, short-term contract staff, for whom the Scheme is not designed to assist.²⁷⁶

In August 2013, statistics indicated that only twenty-three companies with 3 273 employees were currently participating in the training layoff scheme.²⁷⁷

According to the UIF annual report,²⁷⁸ a high-level leadership team was put in place to investigate measures that will improve the scheme's implementation and remove unnecessary take-up constraints. The Minister of labour and higher education concurred on the following amendments during the 2010/11 financial year:

- Distress due to economic conditions to be delinked from the global economic crises
- The upper income limit of employees earning up to R180 000 a year to participation be suspended
- Increasing the limit of the allowance from 50% to 75% of the salary with the retention of a cap of R9 358 per month
- The period of the Training Lay-Off Scheme is increased to a maximum of six months.²⁷⁹

According to the report, during 2012 and 2013, 'additional improvements were made on the scheme, which included the involvement of Productivity SA to assist eligible companies with turnaround solutions'.

It is unfortunate that the Training Lay Off Scheme has not taken off as anticipated. Some hope is now placed on the CCMA's job saving strategy²⁸⁰ to provide a more optimistic solution.

²⁷⁶ At 59.

²⁷⁷ Department of Labour deputy director-general Sam Morotoba in a briefing statement to the Parliament Portfolio committee. Available at <http://www.bdlive.co.za/national/labour/2013/08/14/uif-idc-initiative-yields-more-than-40000-jobs>.

²⁷⁸ UIF annual report 2012/1013 at Part F.

²⁷⁹ UIF annual report 2012/1013 at Part F.

²⁸⁰ The plan sets out the Goals and Strategic Objectives, Key Performance Areas and Targets for the CCMA for 2011 to 2015. Available at [http://www.ccma.org.za/UploadedMedia/CCMA Portfolio Committee Presentation 18APR2012 Version FINAL FINAL.pptx](http://www.ccma.org.za/UploadedMedia/CCMA%20Portfolio%20Committee%20Presentation%2018APR2012%20Version%20FINAL%20FINAL.pptx).

CHAPTER 7 : RETRENCHMENTS AND THE RIGHT TO STRIKE

Industrial action

The general right to strike is observed in terms of s 23(2)(c) of the constitution,²⁸¹ read in conjunction with s 36.²⁸²

Prior to the inclusion of s 189A in the statute, employees did not have any right to strike over a retrenchment dispute. The dispute had to be referred for conciliation to the CCMA²⁸³ and accordingly, adjudication by the Labour Court. Section 189A (8)(b)(ii)²⁸⁴ give employees the right to strike once 30 days have lapsed from the date notice was given to the employees in terms of s 189(3).²⁸⁵ It is however important to note that the employees have the option to strike or to refer the dispute to the Labour Court. Once referred to the Labour Court for adjudication, strike action will no longer be permitted but on the other hand, if the employees have opted to strike, the dispute may not be referred to the Labour Court.²⁸⁶ The main difference between s 189 and s 189A with regards to industrial action is that s 189A gives employees power through industrial action in order to discourage the employer to retrench.

Retrenchment

Section 67(4) of the Labour Relations Act²⁸⁷ prohibits the dismissal of an employee for participating in a protected strike and renders this dismissal automatically unfair.²⁸⁸ However s 67(5) permits retrenchment and states that it '...does not preclude an employer from fairly dismissing an employee...' if the reason for the dismissal is 'based on the employer's operational requirements.'²⁸⁹ In *SA Chemical*

²⁸¹ The Constitution of The Republic of South Africa Act 108 of 1996.

²⁸² The limitation clause in the constitution.

²⁸³ Commission for Conciliation, Mediation and Arbitration.

²⁸⁴ Labour Relations Act 66 of 1995.

²⁸⁵ Labour Relations Act 66 of 1995.

²⁸⁶ Section 10(a) of the Labour Relations Act 66 of 1995.

²⁸⁷ Act 66 of 1995.

²⁸⁸ Section 187(1)(a) of the Labour Relations Act 66 of 1995.

²⁸⁹ Section 67(5) of the Labour Relations Act 66 of 1995.

Workers Union & Others v Afrox Ltd,²⁹⁰ the Labour Appeal Court was faced with this situation.

The facts were briefly as follows. Afrox consulted extensively with the trade union over proposed changes in the shift system for their drivers. This was to reduce excessive overtime and the cost associated with it. Unfortunately no agreement on the changes shift system could be reached, the union declared a dispute and gave notice of a strike. During the strike, the parties participated in a process of mediation in an attempt to reach agreement on the shift system. The employer however made it clear from the onset that if the mediation process would fail, retrenchments would follow. No agreement could be reached and the employees were ultimately retrenched. The court ruled in favor of Afrox in that the employer dismissed for operational requirements and not because employees participated in strike action. In conclusion Froneman DJP had this to say:

On the facts established by the evidence on record Afrox discharged the onus of showing that it dismissed the dismissed employees for a fair reason based on its operational requirements, and not for the reason that they participated in, or supported, the protected strike then in operation.²⁹¹

In conclusion it can be said that an employer may retrench striking employees if the reason for the retrenchment is based on *bona fide* operational requirements.

CHAPTER 8 : CASE STUDY

A case study on the effectiveness of facilitation

The following case study will show how facilitation assisted the parties during a very challenging time for the business and for a comparative large number of employees, facing possible retrenched. The number of retrenchments was drastically reduced and the parties reached consensus after only three meetings, with fourth facilitation meeting being utilized in the signing of the agreement.

²⁹⁰ (1999) 20 ILJ 1718 (LAC).

²⁹¹ *SA Chemical Workers Union & Others v Afrox Ltd* (1999) 20 ILJ 1718 (LAC) at [55].

In the matter between *Standard Profil SA (Pty) Ltd and Numsa*²⁹² the employer envisaged the retrenchment of 70 employees. Facilitation was requested and on conclusion of the consultation process, agreement was reached and only ten out of the original 70 employees were selected to be retrenched.

In this case the employer, Standard Profil South Africa, had over a period of ten months worked hard and diligently to install the necessary capacity, train the necessary staff and optimize the production rate required to meet their customer, Volkswagen South Africa's, stringent cost, delivery and critical quality standards for the supply of the Polo 250 sealing system components. Unfortunately the many initiatives introduced to reach an acceptable run rate did not have the desired effect and the company continued to make losses and did not post any profit from the start up in 2011.

In addition to their challenges, the market slump in Europe, Japan and the UK where a large proportion of these vehicles were exported, resulted in a drop of orders, reducing demand by approximately 23 per cent. This led to an urgent need for retrenchment.

Alternatives that the employer considered before embarking on large scale retrenchments were the implementation of short time, cancellation of labour broking employment and natural attrition.

One of the facilitation tools that the CCMA²⁹³ uses in facilitating large-scale retrenchments is the introduction of a 'framework document'.²⁹⁴ This document encapsulates and sets out the topics for discussion.²⁹⁵

The key points contained in the 'framework document' reflected the following:

²⁹² Held at the CCMA in Cape town under Case Number WECT4982-13.

²⁹³ Commission for Conciliation, Mediation and Arbitration.

²⁹⁴ This terminology is used by the CCMA facilitators, requesting the employer party to produce a comprehensive document before the commencement of the first facilitation meeting setting out in writing and disclosing all the relevant information in line with the requirements of S 189 (3) of the LRA.

²⁹⁵ See consultation topics above.

1. The reasons for the proposed retrenchments inclusive of a production schedule forecast and financial information.
2. The alternatives that the company considered prior to embarking on the retrenchment exercise.
3. The proposed selection criteria that the company proposed as well as a total staff complement list detailing position and year's service.
4. The proposed severance pay in the event of retrenchment.

In this case the 'framework document' provided all the necessary information in writing, enabling the consulting parties to apply their mind to meaningful and affective solutions and not spending time on procedural and other adversarial topics during the process. As mentioned, final agreement was reached after only three meetings and a retrenchment agreement²⁹⁶ was signed at the fourth meeting.

Reflecting on the agreement, it is clear that the parties meticulously covered all the 'topics for consultation' as per Section 189(3) of the Labour Relations Act,²⁹⁷ resulting in a detailed, well-crafted agreement.

The agreement was encapsulated under headings as follows:

Introduction and background

The Company lodged a S189A application with CCMA on account of the Company's operational requirements. The CCMA facilitated the process.

The parties have reached agreement regarding the retrenchment of certain of its employees in terms of the conditions set out below. The original number of employees affected was 70 (seventy) and the final number of employees affected is now 10 (ten). This resulted in 60 (sixty) jobs being saved.

The selection criteria are based on the LIFO principle with retention of skill.

A schedule of the members to be retrenched is set out in **Annexure A**, together with a breakdown of the retrenchment monies. **Annexure B** identifies the Employees to possibly participate in a Training Lay-Off Scheme.

A list of 9 (nine) members selected from **Annexure A** will be guaranteed employment at Grace Staffing at a reduced hourly rate of 30% (thirty per cent), however not less than the applicable rate prescribed by the MIBCO. This list will reflect as **Annexure C**.

²⁹⁶ See copy of agreement Annexure B.

²⁹⁷ Act 66 of 1995.

NOTICE AND ENTITLEMENTS FOR ANY EMPLOYEE RETRENCHED WITHIN THIS PROCESS.

The Company will pay to each of the employees to be retrenched the following:

Salary up to and including 27 May 2013;
 Accrued leave due as at 27 May 2013;
 Notice pay in terms of the contract of employment of the individual employee;
 Severance pay equal to two weeks' wages for each completed year of service for the first four years of service, and one week's wages thereafter; provided that two weeks' retrenchment pay calculated on a pro-rata basis after only four months' employment in the first year of employment shall be applicable;
 Leave bonus pay as per the MIBCO main agreement.
 Payment, subject to a SARS Tax Directive and or less applicable SARS Income tax, shall be made by no later than 14 (fourteen) days after the employee's last working day.
 Application for a tax directive shall be made by the Company
 The Company shall apply, on the Member's behalf, for the withdrawal of any provident fund benefits.

Training Lay-OFF

Employees listed in **Annexure B**, shall participate in the Training Lay - Off Scheme under the auspices of the CCMA, subject to the following:
 Approval by the CCMA, DOL and relevant SETA.
 The training program/s must be relevant to the operational needs of the Company.
 The duration of the lay-off shall run any time between 27 May 2013 and 30 November 2013.

Employees participating in the Scheme shall not be required to tender their services after 27 May 2013 unless it is for training purposes in terms of the Scheme.
 In the event that the 'VW 240 line' is not confirmed for production by 30 November 2013, then the employees identified in **Annexure B** shall be retrenched with effect from 1 December 2013 read in conjunction with par. 2 above.

Notwithstanding the above, employees will recommence their employment at any time before 30 November 2013 in the event that the 'VW 240 line' is confirmed and ready for production.

Future re employment

Should a suitable vacancy become available within 12 (twelve) months from date of signature of this agreement, retrenched employees (excluding voluntary retrenchments) shall have the right of first refusal. The Company shall undertake to notify suitable employees and should no reply be forthcoming within 14 (fourteen) days of notification, the Company shall take it that the employee is not interested in the position.

Documentation and paperwork

The Company shall furnish each of the employees who is retrenched with a certificate of service (confirming the dates of employment, position and salary), all statutory paperwork (UIF) and provident fund paperwork.

Full and Final Settlement

It is recorded that this agreement is in full and final settlement of any and all disputes and/or claims; of whatsoever nature which NUMSA (or its Members) and the non-union

members may have against the Company (including its employees) arising out of either their employment or the termination thereof.

Whole Agreement

This agreement constitutes the whole agreement between the parties as to the subject matter hereof and no agreements, representations or warranties between the parties regarding the subject matter hereof other than those set out herein are binding on the parties.

Variation

No addition to or variation, consensual cancellation or novation of this agreement and no waiver of any right arising from this agreement or its breach or termination shall be of any force or effect unless reduced to writing and signed by all the parties or their duly authorised representatives.²⁹⁸

Reflecting on this agreement, it is clear that the parties meticulously covered most of the topics for consultation as per Section 189(3) of the Labour Relations Act.²⁹⁹

In conclusion it can be said that:

- 1) Without facilitation there would not have been a request by the facilitator for a 'framework document', setting out in writing a detailed solid platform to start meaningful consultations from.
- 2) Given the large number of employees to be retrenched, the time frame in which this matter was concluded, the logistical aspects and the resultant agreement, it would have been difficult and arguably impossible to have reached a similar agreement without third party facilitation.

²⁹⁸ Extracted from the actual agreement reached.

²⁹⁹ Act 66 of 1995.

CHAPTER 9 : CONCLUSION

The main argument made out in this paper suggesting that facilitation is effective, mends perfectly with the key objectives of the CCMA's³⁰⁰ job saving strategies. The key strategies were set out as follows:³⁰¹

- a) Promotion of employment security - the need to assist businesses in distress and save jobs;
- b) Use of a holistic approach in every situation of employment insecurity;
- c) Building partnerships with other institutions and government departments and
- d) Capacity building of commissioners and users.

In addition to this focus, a recent survey report to the ILO³⁰² on assessing the effectiveness by the CCMA,³⁰³ Prof P Benjamin had this to say:

Its development of an integrated job saving strategy has resulted in the CCMA playing an innovative role in coordinating the responses of a wide range of public institutions with the capacity to assist to enterprises in distress and their employers. These initiatives point to the further contribution it will make in the years to come.³⁰⁴

Interpreting the above statements, it can be said that in the event retrenchments are subject to s 189A³⁰⁵ facilitation, serious and determined focus will be placed on facilitation procedures by the CCMA³⁰⁶ facilitating commissioners, ensuring absolute compliance with our labour laws. The same can unfortunately not be said for retrenchments without facilitation and may just leave employees and employers to their own misfortune.

³⁰⁰ Commission for Conciliation, Mediation and Arbitration.

³⁰¹ The plan sets out the Goals and Strategic Objectives, Key Performance Areas and Targets for the CCMA for 2011 to 2015. Available at [http://www.ccma.org.za/UploadedMedia/CCMA Portfolio Committee Presentation 18APR2012 Version FINAL FINAL.pptx](http://www.ccma.org.za/UploadedMedia/CCMA%20Portfolio%20Committee%20Presentation%2018APR2012%20Version%20FINAL%20FINAL.pptx).

³⁰² International Labour Organisation.

³⁰³ Commission for Conciliation, Mediation and Arbitration.

³⁰⁴ P Benjamin, Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA), working paper 47, ILO. Available at http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/publication/wcms_210181.pdf.

³⁰⁵ Labour Relations Act 66 of 1995.

³⁰⁶ Commission for Conciliation, Mediation and Arbitration.

With the aforementioned focus, the codified process under the auspices of s 189A³⁰⁷ facilitation, overseen by a professional CCMA³⁰⁸ commissioner, and the statistical evidence that facilitation reduces final retrenchments, employees affected by large scale retrenchments can rest assured that they will be protected by this, ensuring that fairness will prevail when companies embark on large-scale retrenchments.

³⁰⁷ Labour Relations Act 66 of 1995.

³⁰⁸ Commission for Conciliation, Mediation and Arbitration.

Annexure A

Summary of statistics submitted by the Commission for Conciliation, Mediation and Arbitration to the National Head Office in Johannesburg.

Period 2010

Sector	Number of employees likely to be affected	Total Retrenchments	Jobs Saved
Business Professional	4	3	1
Chemical	451	385	46
Clothing/Textile	1729	1475	244
Communications	921	919	8
Educators	48	14	34
Fishing	25	0	25
Food and Beverage	37	11	26
Furniture	25	23	2
Health	83	26	57
Hospitality	7	7	0
Metal	414	242	188
Parastatals	90	25	24
Retail	90	55	35
Safety and Security	300	300	0
TOTAL	4224	3485	690

Period 2011

Sector	Number of employees likely to be affected	Total Retrenchments	Jobs Saved
Business Professional	244	166	78
Clothing/Textile	648	478	170
Communications	1153	998	155
Financial	70	0	70
Food and Beverage	38	9	29
Hotel	70	42	28
Liquor	87	60	27
Metal	323	253	70
Motor	7	6	1
Retail	327	299	28
TOTAL	2967	2311	656656

Period 2012

Sector	Number of employees likely to be affected	Total Retrenchments	Jobs Saved
Banking	87	87	0
Building/Construction	45	34	11
Business/Professional	483	258	144
Clothing/Textile	1590	1387	203
Communication	13	0	13
Electrical	18	10	8
Food/Beverage	45	33	12
Leather	19	18	1
Metal	50	0	50
Metal Engineering	120	80	0
Motor	60	60	0
Paper/printing	63	19	44
Retail	10	0	10
TOTAL	2603	1986	496

Period 2013

Sector	Number of employees likely to be affected	Total Retrenchments	Jobs Saved
Agriculture	488	69	419
Building / Construction	163	9	156
Business Professional	289	88	201
Chemical	48	34	14
Clothing	848	5	843
Clothing / Textiles	7	7	0
Communications	27	23	4
Computing	6	5	1
Food / Beverage	386	244	57
Health (private)	16	15	1
Hotel	53	8	45
Metal	240	174	76
Motor	101	32	68
Religious	28	0	28
Retail	79	57	22
Trade Union	11	10	1
Transport	96	33	63
TOTAL	2886	813	1999

BIBLIOGRAPHY

Cases

- SACTWU & others v Discreto* [1998] 12 BLLR 1228 (LAC).
CWIU & 7 Others v Algorax (Pty) Ltd [2003] 11 BLLR 1081 (LAC).
General food Industries Ltd v FAWU [2004] 7 BLLR 667 (LAC).
Enterprise Foods (Pty) Ltd v Allen and Others [2004] 7 BLLR 659 (LAC).
Consolidated Frame Cotton Corporation Ltd v The President, Industrial Court and others (1986) 7 ILJ 487 (A).
Durban Integrated Municipal Employees Society v Tongaat Town Board (1993) 2 LCD 54 (IC).
Unitrans Zululand Pty (Ltd) v Cebukulu [2003] 7 BLLR 688 (LAC).
NUMSA and 24 Others v Greenfields Labour Hire cc and Another (2004) ILJ 558 (LC).
Mabaso & others v Universal Product Network (Pty) Ltd (2003) 24 ILJ 1532 (LC).
Nehawu & others v University of Pretoria (2006) 27 ILJ 117 (LAC).
Goldfields Trust (Pty) Ltd & Another v Stander and Others [2002] 9 BLLR 797 (LAC).
Chester Wholesale Meats (Pty) Ltd v NIWUSA & others (2006) 27 ILJ 915 (LAC).
National Union of Mineworkers v Commission for Conciliation Mediation and Arbitration and Others [2011] 7 BLLR 713 (LC).
Continental Tyre SA (Pty) Ltd v NUMSA (2008) 29 ILJ 2561 (LAC).
National Union of Metal Workers of SA v Atlantis Diesel Engines (Pty) Ltd (1993) 14 ILJ 642 (LAC).
Forecourt Express (Pty) Ltd v SATAWU & others (2006) 27 ILJ 2537 (LAC).
Sikhosana & others v Sasol Synthetic Fuels (2000) 21 ILJ (LC).
NUM & others v Anglo American Research Laboratories Pty (Ltd) [2005] 2 BLLR 148 (IC).
Karachi v Porter Motor Group [2002] 4 BLLR 357 (LAC).
SACTWU v Dermal Fashions [1997] 2 BLLR (CCMA).
Sayles v Tartan Steel CC [2000] 2BLR 162 (LAC).
Lakomski v TTS Tool Technic Systems (Pty) Ltd (2007) 28 ILJ (LC).
Irvin and Johnson Ltd v CCMA and Others (2006) 27 ILJ 935 (LAC).
McDonald & another v Shoprite Checkers (2005) 26 ILJ 168 (CCMA).
NASSAWU and Others v Peerwood Investments (Pty) Ltd t/a Wolf Security and another [2009] 3 BLLR 229 LC.
PPAWU v Plett Timbers (Pty) Ltd [1997] 2 BLLR 228 (CCMA).
SA Chemical Workers Union & Others v Afrox Ltd (1999) 20 ILJ 1718 (LAC).

Statutes

Labour Relations Act 66 of 1995.

The Constitution of the Republic Of South Africa Act 108 of 1996.

The Basic Conditions of Employment Act 75 of 1997.

Facilitation Regulations Published under GN 1445 Published under GG 25515 of 10 October 2003.

Code of Good Practice on Dismissal Based on Operational Requirements Published under GN 1517 in GG 20254 of July 1999.

Rules for the Conduct of Proceedings Before the CCMA GN R1448 Published under GG 25515 of 10 October 2003.

Labour Relations Amendment Bill, 2000 Explanatory Memorandum.

International Statutes

Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002.

International Labour Convention, Termination of Employment Convention, 1982 (No. 158).

Sources

A van Niekerk 'et al' *Law @ Work* 1ed (2008).

CR Moore *The Mediation Process: Practical Strategies for Resolving Conflict* 2ed (1996).

D du Toit 'et al' *Labour Relations Law, A Comprehensive Guide* 5ed (2006).

Employment Market Analysis and Research, Implementing information and consultation: early experience under the ICE Regulations. Available at <http://www.cipd.co.uk>.

FRAMEWORK FOR SOUTH AFRICA'S RESPONSE TO THE INTERNATIONAL ECONOMIC CRISIS, 19 February 2009. Available at www.gov.za/documents/download.php?f=96381.

Hendrik W. van der Merwe, FACILITATION AND MEDIATION IN SOUTH AFRICA: THREE CASE STUDIES. Available at http://www.gmu.edu/programs/icar/pes/vander~1.htm#N_4.

John Grogan Dismissal Discrimination & Unfair Labour Practice (2005).

John Grogan *Workplace Law* 10 ed (2007).

Lawrence Boulle and Allan J Rycroft *Mediation: Principles, Process and Practice* (1997).

Ronald Bernikow Ten Years of the CCMA – An assessment for labour, Law Democracy & Development, Special Addition (2007)

Thomson and Benjamin *South African Labour Law* vol 1.

The 2004 Workplace Employment Relations Survey in the UK (WERS 2004). Available at <http://www.wers2004.info/index.php>.

Tapiwe Gandidze, Dismissals for Operational Requirements, Law Democracy & Development, Special Addition (2007).

Thulane Ngele and Maarten Erasmus, THE ADEQUACY OF THE CURRENT SOCIAL PLAN TO ADDRESS RETRENCHMENT CHALLENGES IN SOUTH AFRICA. Available at <http://sajhrm.co.za>.