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Guidelines on using ZOOM for Retrenchment Consultations



The Johannesburg Labour Court has ruled that retrenchment negotiations can take place using Zoom or similar video-conferencing facilities.

We have previously published related articles on this topic such as '*Dealing with overcoming unforeseen delays during a retrenchment consultation*', '*Tips when dealing with a retrenchment process*', and '*Whether an employer may require you to re-apply for your job during a retrenchment process*'.

In this blog we will look at more specifics around using ZOOM for retrenchment consultations and use various case law examples for ease of reference and interpretation.

Case law: FAWU vs South African Breweries:

In the recent case of **FAWU vs South African Breweries (J 435/20) JHB LC (SAB case)** heard on 20 May 2020, the Court had to rule on the acceptability of a fundamentally new and unique method of conducting consultations in relation to retrenchment.

Historically, a consultation process during a retrenchment was held face to face with all the affected employees and/or the trade union and the employer. *Due to the Covid-19 pandemic and the need to adhere to social distancing*, the court had to determine whether the consultation process would be acceptable if conducted on a digital platform, in this instance, Zoom.

- The Court in the **SAB case** held that “section 189 of the LRA, first requires contemplation and thereafter **an obligation to consult**. The section directs what must happen in the **consultation process**. In subsection 189(2), the consulting parties are obliged to engage in a meaningful joint consensus seeking process, which is aimed at reaching consensus on appropriate measures. Therefore, a consultation would be compliant when there is **evidence of attempts to reach consensus** on the listed appropriate measures”.
- The court, in the **SAB case**, had relied on the case of **SAA v Bogopa and Others (2007) 11 BLLR 1065 (LAC)**, which held that, “when an employer invites an employee or employees or his or their trade union to consult and the employee(s) or the trade union either rejects or ignores such invitation, or initially participates but later abandons the process due to no fault of the employer, the dismissal cannot be said to be procedurally unfair, if the employee is subsequently dismissed without consultation or without a completed consultation process”.

Is a Zoom meeting the New Type of Normal?

- The court, in the **SAB case**, held in paragraph 25 that, “the outbreak of Covid-19 ushered the new normal. Zoom as an application precedes the outbreak of Covid-19. It is just that it was not conveniently used and if used, it was used in a parsimonious fashion. The LRA does not prescribe the form which the consultation process must assume. In section 189 one observes traces of a consultation by correspondence – section 189(6)(b). It would not be incongruous to conclude that a consultation process may fairly be undertaken through correspondence. The difficulty here is that normally, consultation takes a form of physical meetings. However, when the new normal presents itself, it does not follow that the commanded consultation can no longer happen”.

- The Court, in the SAB case, went on to hold that, *“with the new normal – lockdown period during Covid-19 pandemic – zoom is the appropriate form in which meetings can take place. What is involved in this period is the health and safety issue. Thus, the usage of the zoom application is not panoply. It is a necessary tool to ensure that restrictions like social distancing as a measure to avoid the spread of the virus are observed. Much as the applicant has its convenient preferences, those preferences are self-serving and are ignorant of the bigger issue of health and safety. Therefore, in my view, there is nothing procedurally unfair if a consulting party suggests the usage of the zoom application or some other form of video conferencing. This accords with the new normal and is actually fair. The appointed facilitator, who possesses powers to make a final and binding ruling on procedure was not averse to the zoom application”*.

In conclusion

The court, in the SAB case, finally concluded that, *“to that I say anywhere where technology is employed, even in a physical meeting, where a presentation to be made on a projector fails, it is expected of teething problems to emerge. However, such would not relegate the technology to obsolescence to a point of any form of unfairness. In my view, the applicant’s (employees) complaint of procedural unfairness in this regard is lacking in merit.”*

We at SERR Synergy fully support this judgement as a victory and confirmation of the methodology and tools that we have been using even prior to the lockdown. *We are fully committed to embrace technology and the most innovative means to save an employer time, money and resources*, instead of employing the most archaic ways of handling labour relations. We will continue to improvise and manoeuvre to adhere to labour legislation during and after the lockdown to assist employers to survive and once again prosper.

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