

## Amendments to the Labour Relations Act (Part 1)

The proposed amendments to the Labour Relations Act (the LRA) and the Basic Conditions of Employment Act (the BCEA) have finally been adopted by Cabinet after a year of negotiations in NEDLAC and the Millennium Labour Council and will in all probability be ratified in legislation later this year or at the first parliamentary sitting next year. While most of the proposed amendments are generally favourable for business people, especially those who run small businesses, the proposals also contain important and quite far-reaching amendments to the law in respect of staff reduction, the transfer and liquidation of businesses, and the definition of “employee”. In this article, we look at the amendments to the provisions of the LRA in respect of staff reduction, as well as the transfer and liquidation of businesses. The new definition of “employee” and other important amendments will be discussed in the next two installments.

Regarding staff reduction, a distinction will henceforth be made between large-scale and other cases of staff reduction. The former applies where employers who employ more than 50 employees, dismiss roughly ten percent or more of their work force during any 12 month period on operational grounds (i.e. for economic, technological, structural or similar reasons). In this case employees have the choice to strike about the *reasons* for the planned retrenchment (not the procedural fairness thereof) or to refer a dispute about it to the labour court for settlement. Once the choice has been made, they cannot change course.

By agreement, employers and employees (or their union) may request that a facilitator be appointed by the Commission for Conciliation, Mediation and Arbitration (the CCMA) who would assist parties to come to a peaceful compromise on the reasons for retrenchment, the number of employees involved, the criteria to be applied to select persons for retrenchment etc. Unless special circumstances apply that render urgent retrenchment essential, no notice of termination of service may be given within at least 60 days from the date on which notice of possible retrenchment was first given.

In the case of any other dismissal on operational grounds (e.g. where 50 or less persons are employed or the retrenchment affects less than 10% of the work force over a 12-month period), the existing arrangement w.r.t. staff reduction remains applicable. In other words, the reasons or process of retrenchment may not be the cause of a strike and all disputes in that regard must be referred to the Labour Court for settlement. There are however a number of additional requirements w.r.t. the process of consultation itself. The principal of these is that, as in the case with large-scale retrenchments, a period of at least 60 days must have expired from the date on which notice of retrenchment was first given, before notice of termination of service may be given to individuals. There is also an important amendment regarding the disclosure of information during the process of consultation. Currently the onus is on the union (or employees where there is no union) to show that the information requested by them for consultation purposes is relevant. Because the information is however under the employer’s control, it may be very difficult to discharge such onus. The onus is now shifted to the employer who would have to prove that the information requested and which the employer does not wish to disclose, is *not* relevant.

When it comes to the transfer of enterprises or parts of enterprises, business people often fail to consider the personnel implications and often disregard the provisions of the LRA on the protection of the rights of employees in the case of transfer. The current section 197 of the LRA, which governs this matter, certainly cannot serve as an example of clarity. The proposed amendments attempt to provide clarity. They stipulate that employees are entitled to be transferred with the business to the new owner, if the business is transferred as a “going concern” and moreover on conditions of employment that are not less favourable than those they enjoyed before transfer. If the new owner cannot or will not offer the same or equal conditions of employment, new conditions must be negotiated with the employees, *before* the transfer takes place. Those who refuse to be transferred on the new conditions, must either be accommodated by the “old” employer or be dismissed by him on his own operational grounds after a process of consultation. The same applies to employees who cannot be taken over by the new owner due to for example the fact that he already has a work force that is sufficient. What is however of crucial importance, is that these aspects need to be resolved before transfer takes place. Once transfer has taken place, e.g. because the effective date of the contract governing the transfer has already expired, it is too late: in terms of the provisions of section 197, transfer would have taken place automatically and the new owner may be saddled with too many staff, some of which may enjoy conditions of employment that the employer cannot afford or that are disproportionate to the conditions enjoyed by his own employees.

These amendments also significantly change the legal position w.r.t. insolvency. Currently a liquidation or sequestration order automatically terminates the employment contracts of affected employees. This holds far-reaching consequences for employees who may often only recover a small part of the monies owed to them. The new position will be that liquidation or sequestration would only give rise to the suspension of employment contracts. This would mean that the person who takes over the business, or the liquidator, as the case may be, must take responsibility for the employees. Should they decide to terminate their services, the normal rules for fair termination of service will apply.