Court trips up employers that omit retrenchment procedure

When an employer contemplates retrenching employees it is required by the Labour Relations Act (LRA) to first consult about this prospect before making any decision to retrench. Should the employer fail to engage in proper pre-retrenchment consultations and the employees are forcibly retrenched this will normally result in an unfair dismissal finding against the employer.

There are a number of reasons that retrenchment consultations may fail to take place or may fail to comply with the requirements of the LRA. These include:

The employer may have urgent reasons for needing to retrench such as:
Dire financial circumstances threatening the immediate survival of the business
A pressing need to get rid of employees pending a hastily arranged takeover by another entity. The prospective buyer may have set a very tight deadline for the date of the takeover and may have made it a condition of the deal that workforce numbers be reduced before the conclusion of the sale
The employer may have no money to pay salaries during a consultation exercise (which exercise may be very protracted especially where the employer has more than 50 employees). The employer may therefore need to curtail retrenchment consultations.
The employer was unaware of its legal obligation to consult with the employees/union. Some employers are aware of the requirement to consult but are not aware of the role of the union or of the extent of the consultation requirements. It is not likely that any of these reasons will suffice as an acceptable excuse for the employer's failure to consult. This is because employers are required to find out about what they do not know.

In the case of Dr J Le Grange vs Dr GB Visser (Lex Info 18 November 2024. Labour Appeal Court case numberJA101/23) Dr Visser had employed Dr Le Grange but decided to terminate her employment when he lost the contract on which she was working. The Labour Court decided that Le Grange had referred her dispute prematurely during her notice period.

The Labour Appeal Court found that section 191(2)(a) permitted the employee to refer her dispute once receiving notice of termination and that her referral had therefore not been premature. The LAC further found that, while the employer had had a valid reason for retrenching the employee, he had not followed any retrenchment procedure at all. The LAC therefore ordered the employer to pay the employee compensation equal to six months' remuneration.

This outcome highlights the need for employers to understand and implement statutory procedures, especially those pertaining to retrenchments. The Court's heavy compensation order is a warning to employers that they must ensure that their decision makers must be trained in labour law procedure.