Restructuring and job security

Anton Roskam and Doris Tshepe investigate from a legal point of view possible ways to counter-act the job losses that result from business restructuring.

We often speak to union organisers and workers who want to try and interdict retrenchments. They are angry when we tell them that an urgent interdict will probably not be successful. They are despondent when the Labour Court rejects their urgent interdict application. Their sense of outrage is even greater when the Labour Court interdicts their attempts to engage in strike action over these matters.

Unions seem powerless in the face of the tidal waves of retrenchments that result from business restructuring. They blame the law and the Labour Courts. What are the answers?

The answers are not only legal; they are, in the main, economic. Unions must be equipped to challenge the restructuring and job losses that are taking place at each enterprise. In order to do this they need alternative ideas. But they also need to be able to create the legal space that allows them to advance their ideas and interests.

We want to add some thoughts to what labour's strategic programme to address restructuring and job losses could entail. These thoughts do not constitute a complete answer. We will concentrate on ways to create space for labour to campaign for its alternative ideas.

In most cases the process of dialogue between union and management is either confined to a consultative forum or a forum dealing with retrenchments. It is in the process of consulting about retrenchments and restructuring that unions feel weakest. The reasons for this vary, but include that some union organisers mistakenly believe that workers cannot strike about consultative issues. Other reasons relate to campaigning for appropriate collective agreements and the fact that unions do not have the resources, capacity, skills or expertise to contest complex restructuring models, for which management has usually hired expensive 'expert' consultants. These restructuring models are made all the more complex when restructuring and retrenchments are intertwined.

Multi-facetted strategy

Unions should not confine the programme for creating the legal space to advance

Column contributed by Cheadle, Thompson and Haysom

their ideas and vision to one front. A multi-facetted strategy is called for, which includes:

- creatively using the strike weapon about issues relating to the restructuring and retrenchments;
- relating to restructuring and job security;
- challenging some of the perspectives argued at (and adopted by some judges of) the Labour Court;
- campaigning for changes to the LRA, particularly section 189.

These strategies are not mutually exclusive, and indeed, it would be unwise to concentrate all the union movement's energy on one of them. We will consider each in turn. However, because so much has already been written about changes to section 189 of the LRA, we will concentrate on the first three.

The strike weapon

For some strange reason a notion has developed in union and management circles that workers cannot embark upon protected strike action about consultative issues, only negotiable ones. This is a fallacy – it is incorrect.

Protected strikes may take place about all matters that are of mutual interest between employer and employee except matters covered by section 65 of the LRA. Key amongst these exceptions are that workers may not strike if a party has the right to refer the matter for adjudication (ie to arbitration or the Labour Court) or the matter is already regulated by an agreement.

Therefore, even if management is 'consulting' about a matter, a union is not precluded or prevented from tabling a demand on the issue and referring a dispute in terms of the applicable dispute resolution procedures. Once the dispute resolution procedures are completed the workers may embark upon protected strike action in support of that demand.

The situation is trickier when it comes to strikes over restructuring issues that will lead to retrenchments because the LRA requires disputes about unfair retrenchments to be adjudicated upon (ie referred to the Labour Court). Management often tries to re-craft the dispute as one that is about retrenchments, which would make a strike unprotected.

The Labour Court, when assessing whether a strike is protected or not, will not simply look at the demands to ascertain the issue in dispute giving rise to the strike action. They will look at all relevant materials including minutes of meetings, correspondence, etc to see what the true issue in dispute is.

This means that unions must be careful about how they declare and process disputes because they are always in danger of having their strike action declared unprotected and interdicted.

However, strike action is certainly not precluded. Unions need to:

- identify early on in the process of engagement the issues that would be organisationally best to mobilise their membership on;
- carefully define the dispute so that the workers are not precluded by section 65 of the LRA from embarking on strike action;
- process the disputes timeously so that if there is a need to exercise power the union is able to call out a strike within as short a time as possible.

The kinds of issues that workers can strike about include:

- job security collective agreements;
- re-employment collective agreements;
- severance packages;
- private internal dispute resolution procedures;

- preferential tenders for retrenched workers;
- a ban on outsourcing, casualisation, alternatively arrangements relating to outsourcing and casualisation that protect workers' terms and conditions of employment, benefits, bargaining arrangements and health and safety conditions, etc.

There are many other issues that workers could strike over. All it requires is creativity.

Collective agreements

Linked to the creative use of the strike weapon is the demand for job security collective agreements.

The LRA provides for labour market flexibility in the sense that management and unions may conclude a collective agreement about virtually any matter of mutual interest. The concept 'matters of mutual interest between employer and employee' is very broad.

Therefore unions need not rely upon the LRA where it is not in their interests. They may propose and campaign for collective agreements that protect job security. When management refuses to sign the collective agreements unions may call for strike action that is in support of the collective agreement. Whether the collective agreement is concluded or not is a question of power.

But what should the collective agreements contain? The answer to this question is not easy. Collective agreements of this nature are complicated and difficult to draft. They require much thought and creativity.

Some of the issues that these collective agreements should cover include:

- what should be contained in a notice of possible restructuring and retrenchment;
- when should management inform unions of their intention to restructure;
- the information that should be disclosed to the union;
- resources, including the provision of expert consultants, that will be put at the union's disposal (at management's expense) to analyse the information;
- alternatives to retrenchment that must be considered by management before proposing the possible restructuring and retrenchments;
- legitimate reasons for dismissals for operational requirements, including

Retrenched workers should be confident that their union did all that was possible to save jobs.

what constitutes a substantively fair dismissal;
- when it is appropriate to outsource, if ever;
- the process of bargaining and disclosure of information that must take place before transferring employees in terms of section 197 of the LRA;
- the minimum conditions upon which transfers in terms of section 197 may take place, including the effect of such transfers upon employees' benefits (for example, pension and provident funds, medical aids, etc) and bargaining arrangements;
- a dispute resolution process in terms of which, for example, the substantive and procedural fairness of retrenchments may be tested by way of expedited mediation and arbitration before the dismissals take place, or, the business decision to retrench is adjudicated upon;
- the terms of re-employment of dismissed workers;
- severance payments and contributions to medical aids and housing subsidies for workers who are dismissed and remain unemployed;
- work security and training funds for employees who are retrenched.

Too often the restructuring and retrenchment process is dominated by management's proposals. All the union is left to do is haggle about the severance package and social plan. By being proactive workers could put in place job security agreements that make it more difficult for businesses to retrench without a genuine operational necessity. It may also open up the space for unions to contest the need for the retrenchments and propose alternatives. Businesses may then think twice about dismissing and will genuinely seek alternatives that cater for workers' job security interests.

The Labour Court

Management lawyers at the Labour Court are advancing a number of problematic arguments when it comes to retrenchments. Unfortunately these arguments seem to be increasingly accepted.

The first is that the Labour Courts tend to conflate the substantive fairness of a retrenchment with whether there is an operational requirement. Substantive fairness of a dismissal is much more than whether or not the dismissal is based upon an 'economic, technological, structural or similar need' of the employer.

Substantive fairness involves considering all relevant factors including:
- the context within which the retrenchments are taking place;
- the nature of the operational requirement;
- whether there was a rational and justifiable connection between the operational requirement and the dismissals;
- whether the dismissals were necessary;
- the impact of the dismissals on the dismissed employees;
- whether there were any reasonable alternatives, in particular whether there were less restrictive and less disadvantageous means to achieve the employer's purpose;
- whether the operational requirement giving rise to the dismissals was the fault of the employer;
- the extent, if any, to which the employer was able to foresee the operational reasons for the dismissals and whether the employer took any reasonable steps to prevent these operational reasons;
- whether the employer took any steps to minimise the disadvantage or harm caused to the dismissed employees and the reasonableness of these steps.

Unions must be careful about how they declare and process disputes to ensure protected strike action.

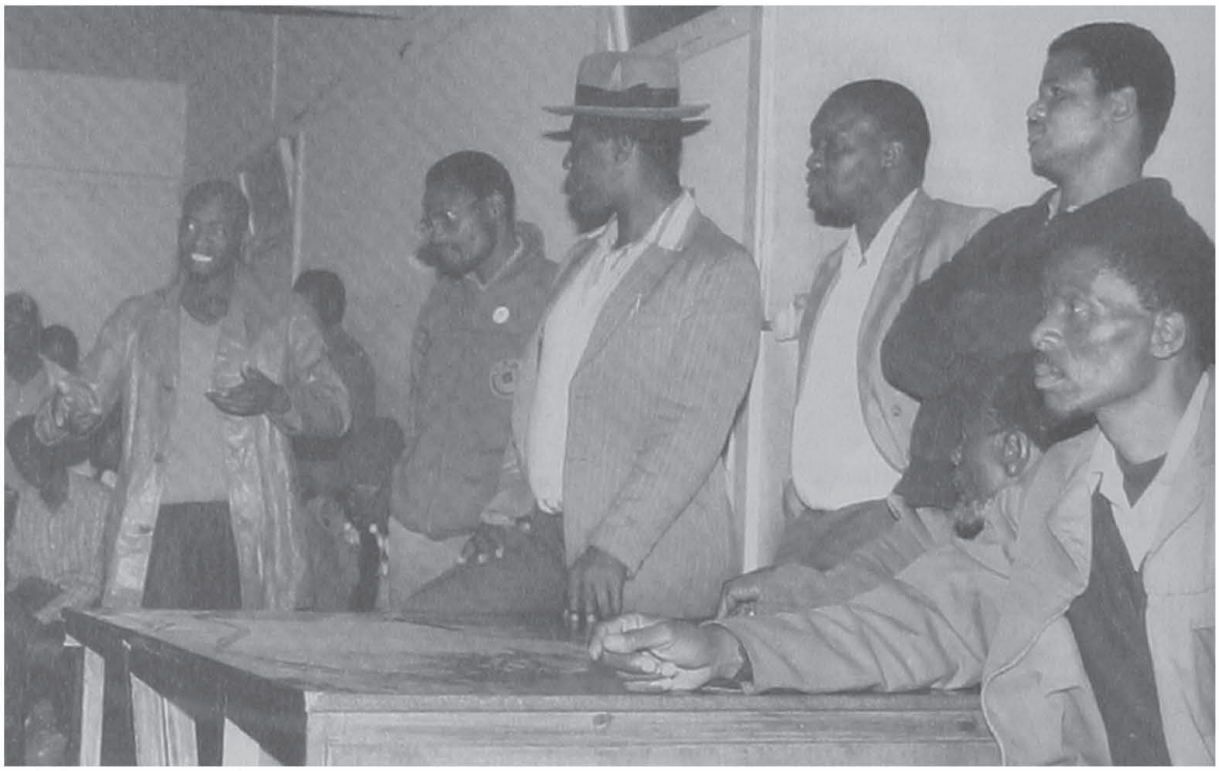
Unions and their lawyers need to raise these issues when challenging unfair retrenchments in the Labour Court. If they do not do this then we should not be surprised to find that the Labour Court adopts a very narrow interpretation of what constitutes substantive fairness, which in effect is whether or not there is a justifiable operational requirement.

The second argument often put forward by company lawyers is that workers who are to be retrenched should not be able to approach the Labour Court for an urgent interdict because they have an alternative remedy. That remedy is to declare a dispute, have it conciliated and then approach the Labour Court in the normal course.

At the request of management the Labour Court sometimes ignores the effect of a retrenchment before the matter eventually is adjudicated upon at the Labour Court, which can be in excess of two years. How does an employee pay a housing bond in the interim? How does a parent pay for school fees in the interim? How does a dismissed worker buy food for her dependant parents or children? These issues are for some judges irrelevant. The worker must simply cope until the trial in two years time.

Moreover, in many cases once the matter is heard at the Labour Court re-instatement is impossible or impracticable.

This is where workers feel the Labour Court is not even-handed. The Labour Court is willing to intervene and interdict a strike on an urgent basis. They do not tell the employer that it cannot interdict because it has an alternative remedy, namely to sue for damages in the normal course. But when it comes to retrenchments they send the workers away and in effect tell them to come back much later.



Unions need to find creative ways of challenging job losses resulting from restructuring.

Unions and their lawyers must vigorously contest this trend of denying workers the right to approach the Labour Court for an urgent interdict before a retrenchment takes place

The LRA

A lot has been said about section 189 of the LRA In principle the problems are threefold:

- No guidance is given to the Labour Court in the LRA or the Code of Good Practice on Dismissals (that is a schedule to the LRA) about what constitutes substantive fairness in the context of retrenchments This must be spelt out in greater detail.
- Management easily dominates the process of consultation in section 189 of the LRA Where possible, control of the process should be arrested from management and placed in the hands of neutral third parties.
- Workers are not able to exercise power about retrenchments, even where the disputes that manifest about the retrenchments involve restructuring issues about which there may be deep differences between unions and management.An example of this is privatisation or partial privatisation

Unions need to campaign for changes to the LRA.We suggest that the amendments to the retrenchment provisions concentrate on the problems referred to above.

Labour cannot rely upon possible changes to the law only to bail them out of the quagmire they find themselves in A multi-facetted strategy is necessary to create space to contest the restructuring process so that workers' interests, which presently relate to job security, are protected and advanced ★

Anton Roskam and Doris Tshepe are attorneys at Cheadle Thompson and Haysom Inc. The views expressed in this article are their own and not necessarily the views of the firm