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EMPLOYMENT

Employment laws in light of COVID-19: Are they equipped for disaster situations?

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There are numerous publications that have been posited to suggest what employers should do about the current COVID-19 pandemic.

This article is not intended to repeat nor counter the views already expressed by other people. We all agree that we are facing a catastrophic pandemic. A disaster of its own kind.

At the time of writing this article, there were approximately 1 237 420 confirmed COVID 19 cases along with 67 260 deaths globally. These are just some of the devastating social consequences of the virus. I am however interested in the legal questions relating to the nationwide lock-down and its impact in the employment context.

What are the legal consequences of the lock-down as a result of COVID-19 in an employment context?

The very foundation of the employment relationship is about the rendering of services by an employee, and payment in return for those services by an employer. Generally speaking, the current COVID-19 crisis has caused for employees to stop rendering services to their employers. Therefore, the question is whether those affected employers are obliged to pay those employees who are no longer rendering services to them. The answer is simply that the employment relationship becomes suspended due to vis major. Simply put, there is an intervening impossibility of performance which leaves both the employer and employee unable to meet their obligations.

As a result, the suspension of an employment relationship has dire financial consequences for both the employer and the employee who will not be receiving income as a result of the lock-down. This further creates a disastrous knock-on effect on a country's economy.

However; what is expected, although not as a result of any legal obligations, is that those employers who can afford to continue paying employees who are not rendering services should allow those employees to take annual leave which they are statutorily entitled to. On the other hand, those employers who cannot afford the aforementioned could approach financial institutions for financial assistance on favourable terms.

Should the lockdown period be extended and cause for the employees to exhaust their leave days, those employees should be allowed to further invoke their other leave days (e.g. compassionate leave, sick leave, annual leave, etc.). If the employees have exhausted all of their leave, the employer may have to resort to allowing the employees to take negative leave. Simply put, the employer would be advancing the employees with leave days that are not due to them yet.

On the other hand, those employers who cannot afford the aforementioned could approach financial institutions for financial assistance on favourable terms. Moreover, apart from approaching financial institutions, it is my view that if there ever was a critical time for employers to approach the pension fund for financial assistance this is the time. It should however be those employers who are capable of reliably paying back the borrowed money who should be allowed to engage the pension fund.

The review of employment laws post the COVID-19 pandemic

Our laws were not designed for situations like the current. The establishment of the Temporary Employee / Employer Relief Scheme (TERS) is in no doubt capable of having immense potential with regards to reducing the adverse consequences of COVID-19. However, I am not convinced that it can address the crisis completely.

The Basic Conditions of Employment Act 75 of 1997 (BCEA) stipulates the minimum conditions of employment; it provides amongst other things, that the annual leave that an employee is entitled to take is 15 working days per annum (21 ordinary days) – this is in terms of section 20. Section 21 further provides that an employer is obliged to pay the employee for those leave days.

Therefore; it is high time that legislation be either amended or enacted to compel employers to deduct two leave days, from the 15 that is due to an employee, so as to put them into what is termed a leave bank. This would be a scheme whereby you have both contributors (those who qualify), and donors. The donors, in part, would consist of executives who do not qualify to benefit under scheme but rather make a donation towards those employees who would be most at risk of socio-economic devastation following a disaster. Furthermore, those employees who qualify and are contributors to the scheme would also have the option of donating to fellow co-workers.

It is important to note that this does not mean the employee forfeits the two leave days. The employee, to the extent that the leave bank reserve remains unused, would be entitled to a pay out of the monetary equivalent of the banked days in the event of them leaving the employer. Those who have donated their own leave days would not be entitled to the aforementioned pay out. In other words, donated leave days cannot be claimed back.

Alternative to the leave bank, the employer should be required by statute to deduct money from the employee in the same way that is done for medical aid or the Unemployment Insurance Fund (UIF). That money should then go towards a dedicated disaster management fund that can act as a reserve to offset the financial implications of any disaster that may arise.

Notwithstanding the above, it is likely that there may be those employers who may not survive the adverse effects of COVID-19 or any other disaster for that matter. On the other hand, there will be those businesses that survive this disaster period although with long term operational effects. These effects may require measures such as downsizing for example.

Therefore, the question that arises is how should an employer manoeuvre the provisions of sections 189 and 189A of the Labour Relations Act 66 of 1995 (LRA). Section 189 deals with dismissals based on operational requirements and provides, *inter alia*, that the employer must engage in consultations with the relevant parties (e.g. trade unions/employees likely to be affected by the dismissals) when that employer contemplates dismissing one or more employees based on operational requirements. Section 189A(7)(a) further provides that a 60 day consultation period must elapse before an employer can issue a notice of termination of employment. This 60 day consultation requirement may be too cumbersome for employers who are rendered unable to afford those employees who come back to work following the lock-down. Consequently, it is proposed that the aforementioned legislative provisions be reviewed to create a dispensation that will accommodate a more flexible section 189 and 189A process caused by a direct result of a disaster.

Equally so, collective agreements entered into by employers/employer's organisations and trade unions should also be reviewed in light of this disaster. Such a review should address what happens in a disaster situation, in particular, what happens to the leave bank and/or disaster management fund.

Disaster risk insurance by the government of the Republic of South Africa

At governmental level, it is high time that there be an establishment of a disaster risk financing and insurance fund. Having read the Disaster Management Act 57 of 2002, there is no reference to such a fund whereas other countries have similar fund reserves that come in handy in times of disaster. An example would be the Caribbean Catastrophe Risk Insurance Facility Segregated Portfolio (CCRIF SPC), which was created to release funds on occurrence of a triggering event such as calamity caused by rainfall or wind speed.

In a paper titled Disaster Risk Financing and Insurance: Issues and results, by authors Daniel Clarke & Others, the following is stated:

"Through financial protection against disaster risks, countries receive timely and targeted assistance, thereby reducing the economic and human costs associated with disasters. In the aftermath of a disaster, a sluggish reconstruction process may lead to significant economic costs as the provision of public services is interrupted and business opportunities are lost. Delays in relief can unleash epidemics that worsen the immediate cost of destruction. This interruption may have effects on poverty levels, as those that are vulnerable are pushed into poverty. It may also create irreversibility in child schooling and health. Evidence shows that immediate assistance following disasters is crucial in reducing the economic and human costs of disasters. Financial protection against disasters can assist countries in reducing their dependence on post-disaster budget reallocation and emergency calls for donor assistance. To finance the immediate needs following a disaster, countries often continue to rely on ad-hoc budget reallocation and the provision of humanitarian aid. However, by diverting public spending away from other budgeted lines, needs in other sectors of the economy remain unmet." The establishment of a Disaster Risk Financing and Insurance Strategy can reduce countries' dependence on budget reallocation and humanitarian assistance, thereby achieving a more timely disaster response, safeguarding the public budget from post-disaster expenditure, uncoupling humanitarian response from media coverage, and providing the type of assistance the country requires. Managing disaster risks well requires strong leadership by a

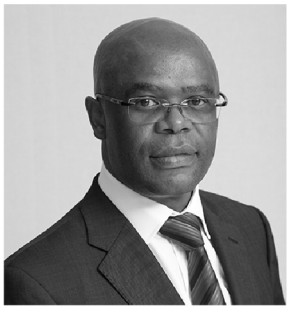
country's ministry of finance and clear risk ownership. Disaster risk financing and insurance brings together disaster risk management, fiscal risk and budget management, public finance, private sector development, and social protection. Strong stewardship by the ministry of finance in coordination with other public agencies is crucial to successfully advance this agenda. The private sector represents a key counterpart for successful disaster risk financing and insurance."

Conclusion

It is clear, from the abovementioned, that at a national level we need disaster risk financing and insurance. It is not to suggest that this financing and insurance arrangement will ameliorate all the issues, but rather alleviate a lot of the adverse effects associated with the occurrence of a disaster. Furthermore, government should be alive to the very real possibility of having to deal with yet another disaster in future. Measures such as a disaster risk financing and insurance fund will aid in providing government with the capacity to better deal with such situations from a socio-economic standpoint.

In the employment context, a leave bank arrangement may further serve to alleviate situations arising out of exceptional personal circumstances. It is important to note that not everyone can afford to have income protection from institutions such as the Professional Provident Society (PPS), although the PPS does not cover loss of income as a result of a vis major. It is still important to emphasise that where an employee finds themselves in a position where they have to take unpaid leave for example, a leave bank system would provide much needed relief where extenuating circumstances allow. Alternatively, fellow co-workers could assist by transferring their own leave bank benefit to the affected employee.

Consequently, it is important to ensure that both employers and employees are adequately taken care of in times of disaster. Government needs to be proactive and employers/employer's organisations and trade unions need to be flexible and creative in their collective bargaining to better prepare and be equipped for disaster situations. It is this type of action that will increase our mitigation of the adverse socio-economic effects associated with grave adversities such as COVID-19.



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