



LABOUR LAW TEAM

Legal Update

11 June 2020

Our Cox Yeats Labour Law Team is committed is committed to keeping you informed on developing legal issues.

Digital conferencing platforms and labour dispute resolution

“The new normal” has become a catch phrase in response to life during and after Covid-19. The national lockdown, especially during risk-adjusted levels 5 and 4, caused South African business and industry to grind to a halt. Out of this lockdown phenomenon (and notably, for those who had the means) arose widespread use and the embracing of digital conferencing platforms, such as Microsoft Teams, Skype for Business and Zoom.

Pre-covid-19 labour dispute resolution mechanisms in South Africa were based heavily on physical human interaction. Typically, all disciplinary hearings in the workplace were held in person, even if one participant had to travel a distance to attend. The resolution of serious mutual interest disputes would often see a delegation from management travel a few hundred kilometres to address the employees’ grievances or demands at the company’s manufacturing plant. Certainly, CCMA and bargaining council dispute resolution processes were often referred by an aggrieved employee physically attending the CCMA or bargaining council helpdesk to lodge their dispute. This level of physical human interaction can best be illustrated by reflecting on the sheer numbers of employers, employees, trade union officials and lawyers descending on the CCMA’s offices, for example, in Pretoria, Johannesburg, Benoni, Cape Town and Durban for conciliation and arbitration, and often times those parties cramming into a hearing room.

Another important labour dispute process relying heavily on this physical human interaction is CCMA facilitation in large-scale retrenchments (known as section 189A retrenchments). Attending the Labour Court for more serious issues also took place in person. The new normal obviously does not accord with any of the examples given above.

To their credit, the CCMA and the Labour Courts have been relatively quick to respond. While the CCMA closed during the height of the hard lockdown, in a Directive issued on 8 May 2020 (under Regulations issued in terms of Disaster Management Act, 2002), the CCMA prudently acknowledged that the CCMA’s response was “grounded in the projection of a prolonged period of lockdown resulting from the Covid-19 pandemic. Albeit that the President of

the Republic of South Africa may announce changes to the levels of lockdown, the extent to which the need for social distancing and other health and safety regulations will remain in place require strict efforts to minimise exposure to the infection”.

The Directive openly encourages the conducting of CCMA processes, such as applications, arbitrations, conciliations and inquiries by arbitrator:

- telephonically or through a digital online platform that is to the satisfaction of the CCMA or the commissioner;
- video conferencing facilities, and
- proceeding at the employer’s premises (subject to conformity to the occupational health and safety standards set out in Covid-19 Occupational Health and Safety Measures in Workplaces published in terms of section 27(2) of the Disaster Management Act.

Electronic signatures (as defined in the Electronics Communications and Transactions Act, 2002) may also be appended to documents such as referral forms and settlement agreements.

With regard to arbitrations and inquiries by arbitrators, the Directive provides that the parties must hold a pre-arbitration conference and deal with the following additional matters:

- whether the parties are prepared to proceed with the arbitration at the employer’s premises;
- whether the parties are prepared to proceed with the arbitration by means of a video conferencing facility; and
- should the parties not agree to these two options, the reasons for such non-agreement;
- specify the applicable video conferencing facility to be utilised for the arbitration;
- in the event that a witness does not have access to video conferencing facilities, agreement on how such evidence will be placed before the commissioner;

This additional information as contained in the pre-arbitration minute should also include any other information the CCMA or a commissioner may require in order to exercise a discretion as to how the arbitration is to be conducted in order to eliminate or limit the risk of physical proximity among the persons involved.

Furthermore, the CCMA Directive has specifically addressed the protocol to be followed in video conference hearings (albeit in respect of arbitrations and inquiries by arbitrators), including:

- ensuring there is no ambient noise in the background;
- participants must mute their microphones when not speaking;
- the commissioner shall invite parties to speak;
- participants shall remain in the hearing and leave it only when the proceedings have concluded, or as directed by the commissioner;
- where the CCMA is not the host of the video conference and is thus not able to record the proceedings using the chosen online facility, the party hosting the video conferencing session must record the session and submit the audio file at the close of proceedings to a stipulated e-mail address for retention by the CCMA; and

- a signed statement of confirmation that the recording has not been tampered with in any way must accompany the recording.

Most recently, with effect from 8 June 2020, the CCMA launched a free digital platform for CCMA users to refer conciliation and arbitration disputes and make enforcement and condonation applications to the CCMA. The digital referral and application platform is accessible via the CCMA website and the CCMA Facebook page. It is hoped that the digital platform will eliminate or drastically reduce the numbers physically attending the CCMA offices to lodge their labour disputes.

However, the CCMA Directive does not seem to have directly addressed the question of CCMA facilitation in section 189A large-scale retrenchments. Many businesses were already embarking on section 189A large-scale retrenchments (owing to adverse market conditions) before the occurrence of Covid-19 and national lockdown. The hard lockdown commencing at midnight on 26 March 2020 brought such consultations to a halt. It has been widely reported in the media that since the implementation of the national lockdown (and resultant economic distress), the CCMA has received a deluge of applications for facilitation in section 189A large-scale retrenchments.

One of such section 189A facilitation processes interrupted by the national lockdown occurred between South African Breweries (SAB) and Food and Allied Workers' Union (FAWU). While the CCMA proposed other methods by which the facilitation could continue, including the use of Zoom, FAWU flatly refused this method of consultation, opting to suspend the consultations until the end of the lockdown period. On 8 May 2020, FAWU launched an urgent application in the Labour Court asserting that the section 189A consultation process was procedurally unfair and that SAB should be interdicted and restrained from implementing or giving effect to any retrenchments already announced in April 2020 or implementing any further retrenchments without "*further facilitation by the CCMA; [and] without the physical attendance of FAWU's representatives in such facilitated consultation process*".

Judge Moshwana of the Labour Court delivered his judgment on 28 May 2020 in FAWU v SAB and Solidarity (J435/20). Of importance to this article is the judge's categorical approval of Zoom, stating that "*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.*" (In a twist of irony, FAWU's own urgent application was ventilated before Judge Moshwana via Zoom.)

It is clear that the law now permits and encourages labour dispute resolution to be advanced through digital conferencing platforms. There is no apparent reason why this should not extend to internal disciplinary or grievance processes. However, be aware that the virtual interaction amongst multiple parties in consultations and the virtual presentation of a disciplinary hearing or arbitration remotely via digital conferencing platforms will require the acquisition and honing of new skills by users. In the early days of employing digital conferencing platforms in labour dispute resolution, employers may need to consider providing unions, shop stewards and employees with technological support.

AUTHORED BY: ALEXANDER ROCHER is a consultant with the firm and has specialised in Employment and Labour Law since January 2005. He advises and represents corporate clients in all facets of employment law, both individual and collective disputes, such as dismissals, unfair labour practices, employment equity litigation, retrenchments,

transfers of businesses, implementing changed working conditions, mutual interest disputes, strike management, strike interdicts, collective agreement disputes and demarcation disputes.

Should you require any assistance in this regard, Alexander can be contacted on :



ALEXANDER ROCHER

Consultant

Tel: 031 – 536 8500

Cell: 082 380 6562

Email: arocher@coxyeats.co.za



Visit us at: www.coxyeats.co.za

DURBAN OFFICE:

Tel: 031 536 8500 | **Fax:** 031 536 8088

Address: Ncondo Chambers, Vuna Close,
Umhlanga Ridge, Durban, 4320

JOHANNESBURG OFFICE:

Tel: 010 0155 800

Address: 4 Sandown Valley Crescent, Sandton, 2196



If you have received this Legal Update in error, or wish to unsubscribe from the mailing list, please click [here](#).

Disclaimer: *The information contained herein is for general guidance only and is not intended as legal advice. Should readers require legal advice on any relevant issue, they are requested to consult a Cox Yeats professional.*