Welcome to the latest edition of the McDermott Will & Emery Global Employment Law Update. The purpose of this publication is to provide you with concise summaries of many of the laws and court decisions from 2020 that significantly affect employers and employees all over the world. No publication has ever captured all new employment law developments from every single country. However, our effort to create the most comprehensive global employment update ever assembled has resulted in updates from 53 countries.
Many of the updates presented in this publication describe changes in the law that are well known to lawyers and human resources professionals from those countries, but are lesser known in other parts of the world. Our aim is to provide you and your colleagues with a useful reference guide to significant changes in employment law all across the globe. Furthermore, we hope this guide—and other specially designed products we create for our clients—will serve as a tool to assist multi-national businesses in their ongoing struggle to maintain a consistent global corporate culture amidst an ever-changing landscape of local employment laws.

Local employment lawyers from each country, who are either McDermott lawyers or part of McDermott’s Global Employment Law Network, prepared these updates. We select each law firm participating in our network based on their outstanding local reputation and, in most cases, our prior experiences in working with them. Participants in the network work closely with McDermott lawyers on client projects, article writing, seminar and webinar presentations as well as signature client events.

We hope you find this update informative and useful. We welcome your comments and suggestions for future publications.

Russia

SIGNIFICANT CHANGES TO THE RUSSIAN LABOUR CODE

The COVID-19 pandemic accelerated the switch to new forms of work and the need to adopt flexible work styles for the future. New Russian legislation, effective as of January 1, 2021, significantly changed the Russian Labour Code and introduced different types of remote and combined work, allowing far more flexibility to employers than in the past. The new legislation also sets out additional regulations on managing employee workflow electronically.

As of January 1, 2021, employees can work remotely on a permanent or temporary basis. Temporary remote employment can either be continuous for a maximum period of six months or periodic (i.e., a combination of remote and in-office work). Further, in exceptional cases, such as a natural or industrial disaster or workplace accident, or based on the decision of federal or local authorities, an employer can temporarily transfer employees to a remote work regime without the employees’ consent. Any temporary transfer to a remote work regime must be documented. Such documentation must include: (a) grounds for the temporary transfer; (b) list of employees put on remote work; (c) duration of the transfer to remote work; (d) a plan outlining the ways employees can fulfill their work duties and reimbursement of employee equipment and other work-related expenses; and (e) a plan that outlines the details of remote work (i.e., work hours and methods of communication employees are expected to use while working remotely). Once the temporary transfer period ends, employers must bring the employee back to work in-office and the employee must return to the office. The law further outlines certain remote work conditions. For example, employee salaries cannot be reduced because they are working remotely, all communication time is to be logged as work time and the employer is expected to provide all work equipment. (More information available here.)
IP ISSUES LINKED TO REMUNERATION FOR EMPLOYEE PATENTABLE OBJECTS

As a general business rule, employers in Russia hold exclusive rights to patentable objects (i.e., inventions, utility models, industrial designs) created by their employees during the course of their work. The employer, however, must follow certain procedures to formalize its right to the patentable object: First, the employer must identify the employee as responsible for creating the patentable object, either by including this job responsibility in the employee’s contract or job description or specifying the patentable object’s creation as one of the employee’s tasks. Then, the employer must file an application for a patent, transfer the right to obtain a patent for the employee’s invention, or inform the employee about the confidential nature of the patentable object within four months from the date that the employee notifies the employer of their invention (i.e., when the employee completed the project). Once the employer completes this second step, the employee has a right to receive remuneration for the creation of the patentable object above and beyond their salary.

Decree (No. 1848) passed on November 16, 2020, and which took effect on January 1, 2021, establishes new rules that cover employee remuneration of such patentable objects. The Decree increases the minimum amount of employee remuneration for the employer’s use of such objects—from one to three average salaries for work-related inventions, and from one to two average salaries for utility model or industrial design per each year of use. The new rules apply unless different terms are otherwise agreed to in writing between the employer and employee. In light of this, employers should review and revise existing agreements with employees, if necessary. (More information available here.)

SUPREME COURT REVIEWS DISMISSAL PRACTICE

The Russian Supreme Court reversed several lower court cases on various employment issues, including, but not limited to, cases on staff redundancy and violation of the Russian Labour Code. For example, in a staff redundancy case, the Supreme Court reversed two lower court decisions in favor of an employer who had dismissed an employee for staff redundancy, claiming that there were no vacant positions in the employee’s branch of the company at the time of dismissal. The Supreme Court disagreed, ordering a retrial based on its holding that a branch is a subdivision of a company and, as such, the employer should have identified all vacant job roles throughout all of the company’s branches.

In another case, the Supreme Court emphasized that it would not be possible to dismiss an employee for absenteeism where the employer verbally approved the employee’s remote employment.

DIGITAL REGISTER OF WORK EXPERIENCE

Russia's Electronic Recording Law became effective as of January 1, 2020. Under the law, employers must record all information about labor activities of their employees in electronic form and submit this information to the Pension Fund of the Russian Federation (PFR). For those employees hired for the first time after December 31, 2020, labor books will be maintained in electronic form only. However, employees
who requested that their records be kept in hard copy form before December 31, 2020, will enjoy that right even after subsequent employment. All data submitted to the PFR will be available only to governmental bodies. The Electronic Recording Law is intended to mitigate the risks of potential disputes with dismissed employees about a failure to provide or tardy provision of a labor book and simplify document flow. (More information available here.)

**NEW RULES FOR SEVERANCE PAYMENTS**

On August 13, 2020, new rules came into force regarding severance payments provided where employees were terminated due to business liquidation or redundancy. Where an employee is terminated due to liquidation, all severance payments must be made before liquidation is complete. Employees are entitled to a severance payment of one month’s salary, to be paid on the last day of work. Employees may also apply for monthly payments covering the period during which they search for jobs. Under the new rules, employees must apply for these payments within 15 days after the second month from the date of dismissal and, again, after the third month from the date of dismissal. [check with local counsel to make sure this is correct] The employer, in turn, must pay the employee within 15 calendar days from the date of the employee’s application for such payments. If an employee finds a job before the end of a month, the employee will be paid a pro rata share. Employer payouts are monthly, but the employer may, at any time and within its discretion, pay out the above-mentioned monthly payments in a one-time lump sum payment amounting to two months’ salary. (More information available here.)

**Saudia Arabia**

**AMENDMENT TO THE IMPLEMENTING REGULATIONS OF THE LABOR & WORKMEN’S LAW**

The year began with COVID-19, and the Saudi Arabian Ministry of Human Resources & Social Development (MHRSD) quickly issued an amendment on April 6, 2020, to add a new Article 41 to the Implementing Regulations (IRs) of the Labor & Workmen’s Law (LWL). In essence, the new IRs Art. 41 explains LWL Art. 74.5 (which states that force majeure is a valid reason for termination of employment) in the context of COVID-19.

The new IRs Art. 41 becomes applicable in cases where the Kingdom has adopted, on its own accord or based on recommendations of a recognized international organization, specific actions resulting in a requirement to reduce working hours of employees. When this occurs, in essence there are three “hurdles” that must be overcome as an alternative prior to termination of employment on the basis of force majeure:

1. Reducing the employee's salary in correspondence with a reduction in the employee's working hours;

2. Putting the employee on annual leave as part of their annual leave entitlement; or
3. Putting the employee on unpaid leave.

The amendment is vague and refers to a period of no more than six months during which these measures may be applied, but does not specify clearly when that six-month timeframe begins—i.e., from the date of the government’s adoption of pandemic measures or from the date of agreement of temporary contract terms.

EXPLANATORY NOTE TO IRS ART. 41

Following issuance of the new IRs Art. 41, the MHRSD issued a formal guidance note clarifying the amendment on May 3, 2020.

The guidance note clarified that force majeure is an extreme situation where performance of the contract by one party is rendered permanently impossible due to unforeseen circumstances. Therefore, the period of six months referred to under IRs Art. 41 is essentially an examination period to determine whether the circumstance affecting the performance of the employment contract is in fact a permanent situation (in which case termination for force majeure is permissible), or instead is just a temporary condition.

In addition, the guidance note clarified that a reduction in salary and working hours may not exceed more than 40% of the employee’s total wage, and that the employee may not refuse this temporary measure for a period of up to six months so long as the reduction in wage does not exceed more than 40%.

With respect to the option for annual leave, the guidance note confirmed the position of LWL Art. 109 that it is the employer’s right to determine the dates of the employee’s annual leave regardless of the existence of any force majeure circumstances and, therefore, the employer may on its own accord require the employee to exhaust their annual leave allotment during the six-month force majeure examination period; however, since the employee’s entitlement is a fully paid annual leave, the guidance note clarified that the employee must be paid during the annual leave on the basis of the full wage which preceded the force majeure circumstances (i.e., not on the basis of salary reduced by 40%).

Finally, unpaid leave is permitted under LWL Art. 116 but must be agreed to by the employee. The employer cannot force the employee to take unpaid leave but should offer it to the employee during the force majeure period as an alternative to termination of employment.

In sum, the guidance note clarifies that termination of employment on the basis of force majeure under LWL Art. 74.5 is impermissible unless: (a) the force majeure circumstances have continued for more than six months; (b) the parties have exhausted all three alternative options to termination; and (c) the employer has not taken advantage of government subsidies (whereby the General Organization of Social Insurance paid partial salaries of a certain number of Saudi Arabian employees, if the employer applied for such aid).

In the event of any impermissible termination of employment, the employee is entitled to the indemnities and penalties set out in the law, which shall be based on the employee’s full wage that pre-existed the force majeure circumstances.
REFORMATION OF EXPATRIATE LABOR

Under Saudi Arabia’s kafala (sponsorship) system, expatriate employees are required to be sponsored by a local company registered in Saudi Arabia. The sponsor is deemed the employer for all intents and purposes under the LWL and is granted significant control over the employee. For example, the employee may need to obtain the employer’s permission to transfer sponsorship to a different employer, for an exit visa to leave the Kingdom and so on.

Traditionally, the kafala system has been criticized by human rights and employee rights organizations because the potentiality for abuse of power can arise. Highly skilled and educated expats (whom the Kingdom seeks to attract in line with Vision 2030) often refuse job offers in the Kingdom due to the kafala system and for this reason many headquarters with significant business in the Kingdom are actually located in Dubai.

In November, MHRSD announced a reformation of the kafala system and that a new system for expatriate workers would be put in place by March 2021. Under the new law, among other things, expatriate employees will be free to transfer jobs after completing one year of service with the original employer and will not need the employer’s permission for an exit visa to leave the Kingdom.

SAUDIZATION OF IT SECTOR

“Saudization” is a colloquial term to describe the Kingdom’s general agenda to train, develop and enhance the Kingdom’s local citizenry and to decrease the unemployment rate of local citizens. Saudization is in essence a balancing act between the local workforce and the expat workforce. The agenda of Saudization is implemented in a multitude of different ways, including targeting certain types of work for a ban on foreign recruitment. For example, cashier jobs at retail sales outlets was one of the main jobs previously dominated by foreign expatriate labor, which was Saudized; therefore, only Saudi nationals may work in these positions.

On October 5, 2020, the MHRSD announced Saudization of IT jobs in the private sector, which applies to all entities who employ five or more people in any IT-related function. The affected areas include telecommunication engineers, computer and network engineers, software development specialists, technical support staff, business analysts and software programmers.

A minimum wage for those employed in this sector has also been set. It will start at 7,000 riyals for specialist professions and 5,000 riyals for technical professions.

SAUDIZATION OF ACCOUNTING JOBS

On December 23, 2020, the MHRSD issued a Ministerial Decision on the Saudization of accounting jobs in the private sector. The rule is applicable to companies where five or more employees work in accounting jobs.

The rule also sets a minimum salary to be paid to Saudi Arabian accountants; otherwise, they will not be counted toward the employer’s Saudization ratio in the
Nitaqat system, which classifies companies on a color-coded scale based on the proportion of Saudis employed in the total workforce. The minimum salary is 6,000 riyals per month for Bachelor's degree holders and 4,500 riyals per month for Diploma holders.

**PROBABLE SAUDIZATION OF MARKETING JOBS**

On October 26, 2020, the MHRSD signed a cooperation agreement with the Human Resources Development Fund (or Hadaf) and the Marketing Association to train, qualify and employ nationals in marketing professions in the private sector.

This is currently an informal arrangement to grow and incentivize the participation of Saudi Arabian citizens in these jobs. However, this is likely the first step toward a formal Saudization of the marketing sector by law, similar to that which was applied to the IT and accounting sectors in 2020.

**WAGE PROTECTION SYSTEM**

Under the Wage Protection System (WPS), which was originally introduced in August 2013, employers are required to deposit employees’ salaries into in-Kingdom bank accounts. However, the WPS was implemented in stages, beginning with the largest organizations with the largest numbers of employees.

The 17th and final stage of WPS was implemented on December 1, 2020, whereby the smallest employers with four or fewer employees became subject to the requirement to deposit employees’ salaries into in-Kingdom bank accounts.

**PART-TIME WORK REGULATIONS**

On May 9, 2020, MHRSD approved the rules for part-time work, which came into effect in July 2020.

The new rules define part-time work where the working hours are less than half of the normal working hours of the company, noting that only Saudi employees are considered for purposes of the rules.

Saudi nationals working part-time will be included in the calculation of Saudization levels in the company according to the Nitaqat system and they will be registered with the General Organization for Social Insurance as part-time employees.

**SELF-EMPLOYMENT REGULATIONS**

Because of a robust labor law and protection of employee rights, Saudi Arabia does not have a well-defined independent contractor regime in place for individuals who seek to work in a freelance capacity and not under an employment contract. However, on December 13, 2020, the Ministry of Commerce announced they have issued the rules regulating the free professions or self-employment which include classifying them into three groups including practitioners, specialists and experts.

Essentially, a freelancer or independent contractor must register as such with
www.freelance.sa and obtain a printout license from MHRSD. On the portal, the applicant will choose the nature of services they wishes to provide. If the nature of the services is such that an additional license is required (e.g., a physician, accountant, lawyer, engineer, etc.), then the applicant must upload proof of the same to obtain the required printout. Note that non-Saudis generally may not engage in freelancing and independent contracting, because they are only permitted to work for the sponsor.

This is a welcome development for companies in Saudi Arabia who are apprehensive of working with freelancers and independent contractors temporarily, as the labor law could apply to the relationship if the services extend for more than 90 days. Such companies should conduct a due diligence on freelancers and independent contractors, including examination of the www.freelance.sa printout.

**Serbia**

**LEGISLATION**

**Law on Agency Employment**

After years of legal vacuum, the first Law on Agency Employment in Serbia started applying as of March 1, 2020, and finally introduced the legal framework for staff leasing of employees. The law regulates the conditions under which staff leasing is possible, the rights and obligations of agency workers, the equal status of agency workers and comparable employees, the conditions for licensing of staff leasing agencies, and the relation between agency and user employer, as well as their liability towards the agency workers. (More information available [here](#).)

The Rulebook on Preventive Measures for Safe and Healthy Work to Prevent the Occurrence and Spread of an Epidemic of Infectious Diseases

The Rulebook closely regulates preventive measures, which employers are obliged to apply to prevent the occurrence and spread of infectious diseases and eliminate the risks for safe and healthy work of employees, as well as other persons in the work environment, when the competent authority declares an epidemic of infectious diseases. Among other things, the Rulebook inter alia stipulates that employers are obliged to adopt a “Plan of Implementation of Measures for Preventing the Occurrence and Spread of an Infectious Disease Epidemic,” which represents an integral part of the risk assessment act in terms of the law regulating safety and health at work.

The official version of the Rulebook on Preventive Measures for Safe and Healthy Work to Prevent the Occurrence and Spread of an Epidemic of Infectious Diseases (in Serbian) is available [here](#).

**COVID-19 State Aid**

During 2020, the Serbian government issued several regulations that determined the
conditions and criteria for using the state aid for remedying the negative effects and serious disruptions to the economy caused by the COVID-19 pandemic. The main aid instruments were direct grants for payment of employees' salaries and postponement of salary tax and social contributions. This aid was granted to all Serbian resident legal entities and entrepreneurs as well as branch offices and representative offices of non-resident legal entities.

Slovenia

LEGISLATION

COVID-19-Related Interim Measures

Because of the COVID-19 epidemic, many labour-related interim measures were adopted, such as payment of a crisis allowance to certain employees who are working during the epidemic, subsidized reduction of working hours, extension of the period to use annual leave, partial reimbursement of salary compensation for employees who were ordered to wait for work at home, and exemption from payment of social security contributions.

Short summaries of all adopted COVID-19 related interim measures (in English or Slovene, as available) are available at:


Full texts of Anti-Corona Acts are available at:

Amendments to the Employment Relationships Act

In addition to many interim measures related to the pandemic, the seventh Anti-Corona Act, adopted on December 29, 2020, permanently amended Article 89 of the Employment Relationships Act. Pursuant to the amendment, an employer may terminate an employment contract on 60 days’ notice without stating a justified reason (cause) if the employee qualifies for an old-age pension in accordance with the Pension and Disability Insurance Act. The amendment has been criticized by legal experts and trade unions, as it may result in forced retirement and, as such, may constitute a violation of human rights and principles.

The official consolidated version of the Employment Relationships Act (in Slovene) is available here.

COURT DECISIONS

Carryover of Annual Leave (Supreme Court of the Republic of Slovenia, ref. no. VIII Ips 42/2019 dated January 14, 2020)

Pursuant to the fourth paragraph of Article 162 of the Employment Relationships Act, annual leave that was not used before the end of the calendar year or by June 30 of the following calendar year because of employee illness, injury, maternity or childcare leave, may be used by December 31 of the following calendar year. According to the recent judgment of the Supreme Court of the Republic of Slovenia, this rule shall not be applicable if the employee was not given an actual opportunity to use the annual leave by December 31 of the following year. In such cases, the employee is entitled to use any remaining part of annual leave even after December 31 of the following year. (More information available here.)

Non-Compete Clause (Supreme Court of the Republic of Slovenia, ref. no. VIII Ips 7/2020 dated June 9, 2020)

The Supreme Court of the Republic of Slovenia established that the autonomy of the contractual parties with regard to the conclusion of a non-compete clause is limited in such a manner that the parties are not allowed to agree on a non-compete clause
that includes an employee's unconditional obligation to refrain from engaging in competitive activities and an employer's conditional obligation to pay the compensation for compliance with a non-compete clause. The Supreme Court of the Republic of Slovenia stated that it would be against the principle of equality if the obligation to pay the compensation for compliance with a non-compete clause was conditioned on an employee's ability to demonstrate his unsuccessful efforts in finding alternative employment comparable to his average monthly salary before termination of the employment contract. (More information available [here](#).)


In the present case two companies cooperated based on a contract on provision of services. The services were performed by an employee of the contracting company who later filed a lawsuit seeking a determination of the existence of an employment relationship with the company for which he was performing services on behalf of his employer. The Higher Labour and Social Court adjudicated that the elements of employment relationship may exist between the employee and the company for which he is performing services, despite the fact that the employee is already employed with the contracting company. The Higher Labour Court did not render a substantive decision on the matter; it only returned the case to the first instance court, which ruled in favor of the employee in October 2020. (More information available [here](#).)

**South Africa**

**NEW AMENDMENTS REGARDING PARENTAL LEAVE TAKE EFFECT**

New amendments regarding parental leave (including adoption and surrogacy) provided for in the South African Labour Laws Amendment Act, 2018 and incorporated into the Basic Conditions of Employment Act, 1997 (the BCEA) took effect as of January 1, 2020.

Under Section 25A of the BCEA, an employee who becomes a new parent is entitled to at least 10 consecutive days of parental leave, which may commence on the day that the employee’s child is born, the date that the adoption order is granted, or the date that the child is placed in the care of a prospective adoptive parent by a competent court, whichever date occurs first. Section 25B of the BCEA gives an employee who is an adoptive parent of a child below the age of two the right to adoption leave of at least 10 consecutive weeks or parental leave in terms of Section 25A. Under Section 25C of the BCEA, employees who are commissioning parents in a surrogate motherhood agreement are entitled to either commissioning parental leave of at least 10 consecutive weeks or parental leave of at least 10 consecutive days. The commissioning parents can elect which of the parents will take which leave. Parental, adoption and commissioning parental leave will be unpaid but employees can submit claims to the Unemployment Insurance Fund to qualify for payment for such leave. It is important to note that the previously existing family responsibility leave provisions (save for leave when a child is born) remain intact and, in addition to the above new types of leave, employees remain entitled to take family responsibility leave in instances where the employee’s child is sick or in the event of a death in their immediate family. (More information available [here](#).)
PROTECTION OF PERSONAL INFORMATION ACT 4 OF 2013 (POPIA)

The majority of the provisions of the Protection of Personal Information Act 4 of 2013 (POPIA) came into effect on July 1, 2020. POPIA was promulgated in 2013 to give effect to the constitutional right to privacy. This includes protection against the unlawful collection, retention, dissemination and use of personal information. POPIA aims to protect personal information in accordance with international regulations by imposing minimum conditions for the processing of personal information. Additionally, POPIA regulates the flow of personal information outside of the borders of the Republic of South Africa and establishes the Information Regulator, an independent juristic body tasked with implementing POPIA and the Promotion of Access to Information Act. POPIA requires employers to implement policies, which ensure that employee and client personal information is handled and processed in accordance with the law and the new provisions of POPIA. Parties who process personal information are required to be fully compliant with POPIA by July 1, 2021. POPIA is similar, with a number of important exceptions, to the EU's General Data Protection Regulation (GDPR). (More information available here.)

EMPLOYERS FACING CHANGED OPERATIONAL REQUIREMENTS MAY DISMISS EMPLOYEES WHO REFUSE TO NEW TERMS AND CONDITIONS OF EMPLOYMENT

In the case, National Union of Metal Workers of South Africa and Others v. Aveng Trident Steel (a division of Aveng Africa (Pty) Ltd) and Another (CCT178/19) [2020] ZACC 23, the Constitutional Court critically analyzed Section 187(1)(c) of the Labour Relations Act 66 of 1995 (the LRA). This section provides that it is automatically unfair for an employer to dismiss an employee as a consequence of the employee’s refusal to accept the employer’s demand relating to a matter of mutual interest between them. The correct interpretation of the section has been the subject of much debate. In particular, courts have grappled with the extent to which employers can lawfully and fairly dismiss employees who refuse to agree to changes to terms and conditions of their employment, in light of this provision. The Constitutional Court distinguished Section 187(1)(c) from dismissals for operational requirements in terms of Section 189 of the LRA. After lengthy litigation in the Labour Court and the Labour Appeal Court, the Constitutional Court upheld the reasons and findings of the Labour Court and Labour Appeal Court, finding that in the event that an employer’s genuine, justifiable and commercially sound operational requirements (i.e., retrenchment or redundancy) require that an employee agree to new terms and conditions of employment, the employer is entitled to dismiss employees who do not agree to such new terms and conditions. This would not constitute an automatically unfair dismissal as contemplated by Section 187(1)(c) of the LRA because the real reason for the dismissal is not the employee’s refusal to accept a demand but is based on the employer’s real business needs. However, employers must be able to prove that the dismissal was necessitated by the employer’s genuine operational requirements. (More information available here.)

CONSTITUTIONAL COURT UPHOLDS DOMESTIC WORKERS’ RIGHTS

This judgment in Mahlangu & Another v. Minister of Labour and Others [2020] ZACC 24 has been lauded as a landmark victory for domestic workers in South Africa, who
have historically been one of the most marginalized groups in society. The Constitutional Court found that South Africa was party to various international instruments that protected domestic workers’ rights to equality and accordingly, it was inexplicable that they were excluded from benefits under the Compensation for Occupational Injuries and Diseases Act, No 130 of 1993 (COIDA). The Constitutional Court also considered the purpose of COIDA being a vital piece of social legislation, which gives effect to the constitutional right to social security. It considered that domestic workers are a particularly vulnerable group in South African society because of the intersection of their race, gender and class. The Constitutional Court, having considered relevant international instruments, constitutional values and the circumstances of South Africans, concluded that no legitimate objective is served by excluding domestic workers from COIDA, and that Section 1(xix)(v), excluding domestic workers, was unfairly discriminatory and declared it unconstitutional with retroactive effect from April 27, 1994. (More information available here.)

BUSINESSES CANNOT RETRENCH EMPLOYEES DURING BUSINESS RESCUE PROCEEDINGS

South African Airways (SAA) was placed in business rescue on December 5, 2019, following years of mismanagement and financial difficulty. During the course of business rescue proceedings, the business rescue practitioners (BRPs) issued notices under Section 189A of the LRA, informing employees that SAA was contemplating retrenchment. An application was brought before the Labour Court in National Union of Metalworkers of South Africa (NUMSA) obo Members and Another v. South African Airways (SOC) Ltd and Others [2020] 6 BLLR 588 (LC), seeking an order declaring the issuing of Section 189A notices unlawful or unfair, on the basis that they were issued prior to the publication of a business rescue plan. The Labour Court was required to determine whether it was procedurally unfair to issue Section 189A notices prior to the publication of a business rescue plan per the terms of the Companies Act 71 of 2008 (Companies Act). The Labour Court held that the wording of Section 136(1) of the Companies Act indicated that employees’ jobs could not be terminated in the course of business rescue proceedings, except in the course of natural attrition or by employee consent. Accordingly, the business rescue proceedings effectively placed a moratorium on retrenchments until a business rescue plan is published and the retrenchments are included in the plan. The Labour Court held that where there is an interpretation of Section 136 that promotes job security, that interpretation ought to be preferred. The effect of this judgment is that a BRP is not entitled to retrench employees in the absence of a business rescue plan. This places the BRP in the unenviable position of being unable to retrench employees during the business rescue process, thus making it more difficult to effectively rescue a distressed business as envisioned in the Companies Act. (More information available here.)

LABOUR APPEAL COURT CLARIFIES FACTORS OF WHEN RETRENCHEP EMPLOYEE IS STATUTORILY ENTITLED TO A SEVERANCE PACKAGE

Section 41(1) of the BCEA provides that a retrenched employee is entitled to severance pay equal to at least one week’s remuneration for every year of completed service with the employer. This obligation to pay severance pay is curtailed by the
provisions of Section 41(4) of the BCEA, which provides that a retrenched employee is not entitled to severance pay if that employee unreasonably refuses an offer of alternative employment. The Labour Appeal Court, in Edward Lemley v. Commission for Conciliation Mediation and Arbitration & Others (PA6/2018) [2020] ZALAC 6; (2020) 41 I.L.J 1339 (LAC); [2020] 7 BLLR 676 (LAC), found that the purpose of Section 41(4) of the BCEA is clear and that the reasons why the legislature included the limitation on severance pay was to incentivize an employer to provide alternatives to employment and accordingly limit job losses due to retrenchment. The Labour Appeal Court confirmed the principle of Section 41(4) of the BCEA and that the question of whether an employee is entitled to a severance package is not only determined by considering the reasonableness of the employer’s offer alone but must also taken into account (i) the reasons why the employee refused the alternative employment, and (ii) the employee’s conduct when refusing the offer of alternative employment. (More information available here.)

UNIONS LIMITED TO TERMS OF THEIR GOVERNING CONSTITUTIONS

Section 4(1)(b) of the LRA provides that "every employee has the right to join a trade union, subject to its constitution." In National Union of Metal Workers of South Africa v. Lufil Packaging (Isithebe) [2020] ZACC 7, the Constitutional Court was required to decide whether the National Union of Metal Workers of South Africa (NUMSA) was entitled to organizational rights at Lufil’s workplace and, more specifically, whether the union was entitled to represent members who did not qualify as members under the terms of its constitution. The Constitutional Court ruled in favor of Lufil and held that NUMSA is bound by its own constitution and has no powers beyond what is contained therein. It could not be accepted that this interpretation was an infringement of the right to freedom of association, since nothing prevented NUMSA from amending its constitution so long as it complied with its governing amendments. The Constitutional Court held that a union’s constitution is not only a contract between the union and its members, but is also a source of information to employers in the industries in which the unions operate. It would violate the constitutional values of accountability, transparency and openness if unions were allowed to act outside of the scope of their constitution. (More information available here.)

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