Load Shedding in the workplace: Negotiate back the power

by Kellie-Kirsty Hennessy & Johanette Rheeder

It has become common place in South Africa to work in a dimly lit room or have equipment die in the middle of a production line, as you realise once again, Eskom has switched the power off. Sometimes the App on your cellular phone correctly supplies you with the planned power cuts, which is little comfort for the fact that your equipment is not working and your business is grinding to a halt during a production shift or day. Employees either idle the time away or are sent home pending the power cuts. Your entire work force is in an instant made redundant for the duration of the power cut. This is but one of the direct effects on your business, not taking into consideration the loss of production time, the cost of generators and petrol or diesel (for those who can afford it), the loss of customers and clients, increase in base line and production cost and time whilst sitting in hours of traffic or waiting for public transport or equipment failure due to the constant cut in power - to name but a few.

The obvious question to be asked is to what extend can I make my labour requirements flexible enough to weather the loss of electricity through load shedding as it is here to stay! Would it be possible to share the "losses" with those who works for me?

Remuneration – Can it be deducted or amended?

"Remuneration" is defined by the Basic Conditions of Employment Act, 75 of 1997 (BCEA) as any payment in money or kind or both, made or owed to a person for working for another person. "Wage" is defined as the *amount of money* paid or payable to an employee in respect of ordinary hours of work or the hours an employee works in a day or a week.

As a starting point, the founding principle which both employers and employees need to understand is that when the power is cut, remuneration is still due as the rationale behind this is the common law obligation created by virtue of an employment contract – the employee agrees to provide personal service and the employer has the obligation to remunerate for services rendered. If the employee offers his service by being at work, he has complied with his common law duty.

Section 34 of the (BCEA) deals with the deductions an employer is permitted make from remuneration (The employee who works less than 24 hours per month or to an employer who employs fewer than 5 employees are *excluded*). This section (34(1)) determines that an employer may not deduct remuneration unless the employee agrees to the deduction of a debt in writing, or it is permitted in terms of a law, collective agreement, court order or arbitration award. Since the deduction will not be a debt, the deduction must be in terms of a law, collective agreement, court order or arbitration award.

There is no requirement that an employer has a duty to actually provide work.[1] The reality is thus clear: Without any agreement to the contrary, (which must be obtained in a collective agreement), when the power goes off and work cannot be done, the fact that the employee is present to tender personal services means the employer is obligated to pay for that time.

Employers who want to pursue this avenue will have to engage unions on the shop floor or in a Bargaining Council and seek agreement as to how remuneration can be deducted to counter act load shedding.

Does the principle of "no work no pay" apply?

This principle applies where the employee does not tender his service for a reason permitted in law such as a protected strike or where the employee absconds or is absent without leave. The principle applies based on the conduct of the employee – which entails withholding services. In this instance the employee is not withholding service.

Can the Employer then change the employment contract to make provision for time off during load shedding?

Regulation of work time is contained in chapter two of the BCEA. This chapter does not apply to senior managerial employees, sales staff who travels to clients and regulates their own time of work and employees who work less than 24 hours per month. Certain sections are also excluded from applying to employees who earn more than the statutory benchmark of section 6(3). This chapter deals with ordinary hours of work, overtime, averaging of hours of work, compressed work week.

It is trite that, under the common law, an employer is not permitted to unilaterally change the terms of an employment contract with an employee. In a load shedding context these "*terms of employment*" may be any unilateral change to ordinary hours of work, varying shift rosters, mealtimes, overtime work, changing an employee's work place during times of load shedding. Employees should be aware that any attempt by an employer to unilaterally change any conditions of employment is *unlawful* and in breach of the employment contract, even the BCEA. The employer runs the risk of a damage claim or even a constructive dismissal claim.

An employer who wants to change ordinary hours of work and overtime to suit load shedding during any work day or work week, will have to negotiate those changes, either with the employees or with the unions and agree to those changes contractually or in a collective agreement. Compressing of a work day up to 12 hours may be agreed to for days not affected by load shedding or if a collective agreement can be reached, then hours of work can be averaged over 4 months in terms of section 12. For employees not covered by these sections, the normal common law principles will apply.

What to do then? Negotiate

It is important for employers to avoid these breaches or unintended unilateral changes to employment contracts by negotiation with your staff as to what will happen during load shedding. This may save the business and reduction of staff at a later stage. As captains of industry, good faith

negotiation is key to the survival of your business. It is in the best interests of both employers and employees to enter into "good faith" and proper negotiation on the terms of employment relating to load shedding, seeking practical solutions to counter load shedding effects such as reduction in staff. Employees should also understand that low productivity and output due to down time may be a reality which might be affecting the operational requirements of the employer's business. Employers drastically affected may need to consult with employees using the mechanisms of section 189 or 189A (whichever is relevant) to reduce employees.

However, even if employers can cite sound commercial reasons for the suggested changes to terms and conditions, employees may still not agree to the changes. Where a deadlock is reached the employees can even go on strike after following proper procedures in terms of the LRA. Employers must also be mindful not to make a demand for employees to accept these changes as it may be seen as conduct to compel employees to accept a demand, running the risk of a section 187 automatic unfair dismissal. It is automatically unfair to dismiss an employee who refuses to accept a demand in respect of matters of mutual interest. An employer guilty of this conduct may be liable for up to 24 months compensation.

Can I ask employees to make up the lost time?

Any suggestion that employees must work beyond their normal hours of work, to make up for lost time, is "overtime" and is governed by Section 10 of the Basic Conditions of Employment Act ("BCEA"). Overtime must be arranged by prior agreement and employers must remunerate employees at 1.5 times the normal hourly rate. Furthermore, any suggestion that an employee must take their meal time during load shedding should be aware of Section 14 (3) of the BCEA, which states an employee must be remunerated for any portion of a meal interval that is in excess of 75 minutes, unless the employee lives on the premises at which the workplace is situated. This is not exactly practical for load shedding in which may last up to 4 hours! As stated above, averaging of work time or compressing a work week may also be agreed to either in an agreement or a collective agreement (sec 11 and 12).

Another option would be to negotiate with employees fluctuating weekly rest periods. In as far as employers can determine the days of load shedding, employees may be given off to accommodate a weekly rest period. In this regard section 15 of the BCEA must be considered.

Employees may also be requested and agreed with to work the load shedding time in as overtime over weekends or public holidays. The overtime regulations of section 10 should be considered in this regard, unless the overtime stipulations of section 10 have been altered via a collective agreement reached in a Bargaining Council.

What can I agree with my employees?

It is suggested to take a leaf out of the Metal and Engineering Industries Bargaining Council Main Agreement which allows employees during a scheduled load shedding to be paid short time for work done in that day per hour; alternatively, in unplanned load shedding, to be allowed to go home with an instruction to return to work on return of power and paid only for 4 hours of work done that day. Alternative suggestions could be to encourage personnel to work from home and submit time sheets and records of work done. Employers should also update employment contracts for *future* employees to provide for an agreed stipulation on remuneration, work time, overtime, reduction in hours, short time or shifts, during load shedding.

The unavoidable - retrenchment

Section 189 and 189A regulates retrenchment for operational requirements. Load shedding may cripple the employer who needs to drastically reduce work force due to loss of contracts, production, revenue etc. Alternatives to retrenchment such as short time may be considered and agreed to, to avoid retrenchment. The process of section 189 or 189 A must be considered and applied.

Conclusion

Consultation with current employees is imperative. Each business is unique as to how it operates and the dynamics within it.

As said by a wise sage - "*In life you don't get what you deserve, you get what you negotiate.*"[2]

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[1] See *Toerien v Stellenbosch University* (1996) 17 ILJ 56 (C) at 60 D. [*Note- This principle is subject to certain exceptions regarding the unique nature of work agreed upon such as payment on commission.*

[2] by Krishna Sagar.