



## GOBHOZA LEGAL PRACTICE

Attorneys, Conveyancers, Notaries, Arbitrators & Corporate Services

Kgale Mews, Plot 115, Unit 19,  
Gaborone International Finance Park.  
P O Box 26168 (Game City)  
Gaborone

74 081 221

3116371

[www.gobhozalegalpractice.co.bw](http://www.gobhozalegalpractice.co.bw)

[info@gobhozalegalpractice.co.bw](mailto:info@gobhozalegalpractice.co.bw)

### DISMISSAL BASED ON OPERATIONAL REASONS

#### (RETRENCHMENT)

A dismissal based on operational grounds is commonly known as "retrenchment." The law recognizes that the employer may terminate an employee's contract of employment for operational reasons. However, there are statutory and equitable requirements which must be adhered to by Employers. The are canvassed in the following paragraphs:

#### *i. Statutory Requirements:*

The statutory framework for a lawful implementation of retrenchment is provided by **SECTION 25 OF THE EMPLOYMENT ACT** (Cap 47:01).

The requirements are that:

- ❖ the employer must give notice of intention to retrench to the Commissioner of Labour and to every employee to be or likely to be affected;
- ❖ where reasonably practicable and subject to the need for efficient operation, ability, experience, skill and qualifications, selection should be in accordance with the principle of **FIRST-IN LAST-OUT (also known LIFO)**;
- ❖ where the employer again seeks employees in the occupations of the retrenched employees, priority of engagement shall be given, to such extent as is reasonably practicable, to employees who were retrenched.

**Managing Partner - Malcom T. Gobhoza - LLB (UB) (Arb); Dip (Finance) (CAMBRIDGE)**

**Consultant - Dr. Jimcall Pfumorodze - LLB (honours) (UZ); LLM (UWC) (University of Amsterdam Int. Trade, Investment & Bus. Law; LLD (UP)**

**Associate Attorneys - Palesa M. Katse LLB (UB)**

**| Tendai S. Goto - BA LLB (Rhodes)**

**| Faith Chizondo - LLB (UB)**

**Junior Attorneys - Carol K. Masoko - LLB (UB)**

**| Princess S. Dube - LLB (UB)**

**| Bathusi Tshwaedi- LLB (UB)**

The above mentioned are a summation of the statutory requirements that an employer must comply with before effecting any retrenchment process.

**ii. Equitable Requirements:**

Our courts have, in many instances held that although the Employment Act does not provide any procedure, save in Section 25, to be followed in a retrenchment exercise, the rules of natural justice or rules of equity, dictate that there must be a valid commercial reason for a fair retrenchment and that a fair procedure must also be followed in the execution of such retrenchment.

The applicable principles or guidelines for a fair retrenchment, that were summarised in the case of **MAKWINJA V KAGISO FUNERAL PARLOUR 2009 (1) BLR 188 ( IC)** are as follows:

- ❖ The employer must consider ways to avoid or minimize retrenchment;
- ❖ The employer must give sufficient prior warning to a recognized or representative trade union of the

pending retrenchment, and to the employee(s) likely to be affected by the retrenchment exercise;

- ❖ The employer must consult with such a trade union prior to the retrenchment;
- ❖ If no criteria has been agreed upon, the employer must apply fair and objective criteria;
- ❖ The employer must consult with the affected employee and consider any representations made on his/her behalf by the trade union;
- ❖ The decision to retrench must be reasonable, made in good faith and there must be a commercial rationale for the retrenchment.

**iii. Procedural Fairness:**

On procedural fairness, there has to be proper consultation. The Court of Appeal in the case of **BOIFANG MOTSWAGOLE v MOTIGANZ BOTSWANA (CACGB-182-20) UNREPORTED**, held that,

*“To the extent that there is no provision for consultation under the Employment Act, prior to termination of an employee’s contract, an employee’s entitlement to a pre*

**retrenchment hearing or consultation is well recognized in our law.”**

It was further emphasised in the abovementioned case that, the right to consultation imposes upon an employer, nothing more than the obligation to afford employees the opportunity of being heard before their employment is terminated.

In the event that an employee lacks interest or frustrates the process of consultation, such employee is deemed to have waived their right to consultation.

***iv. Substantive Fairness:***

Substantive fairness relates to the reason for the retrenchment. Such reasons must be cogent financial and organizational reasons. **SEE BOTSWANA POST v NWAKO 2018 ALL BOTS 307 (CA)**

The law recognizes that the employer may take steps to address his operational challenges even if such may result in employees losing jobs. The law also regulates the process the employer has to follow if he is to

terminate an employees' employment based on operational reasons. One such regulation imposed by the law is that **the decision to retrench must be reasonable and be based on a valid commercial reasons.**

Operational requirements have been described as the economic, technological, structural or similar needs of an employer. Economic needs of a business can be understood broadly as relating to all the needs which relate to the economic well being of a business.

**FOURIE v CONCOR BOTSWANA (PTY) LTD 2020 ALL BOTS 392 (IC)**

If you have interest in an in-depth discussion on this subject matter or any employment and labour issues, feel free to contact us at [info@gobhozalegalpractice.co.bw](mailto:info@gobhozalegalpractice.co.bw)  
[Tel: 3116371](tel:3116371)

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