

Covid, Labour and the Court Judgement

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The coronavirus pandemic has caused havoc in labour markets around the world and Namibia was not spared. In order to avoid a massive health crisis, and knowing the limitation of public health care services, the Namibian government made the containment of the virus and the protection of lives its immediate priority. Through the introduction of the lockdown Namibia managed to contain infections for several months while the most effective social intervention during that time was the payment of an "Emergency Income Grant". As retrenchments set in, it became clear that households cannot rely merely on wage labour for their survival and that they needed direct cash transfers as a means for survival.

The covid-19 pandemic was, however, not the cause of our socio-economic problems but merely worsened an already existing crisis. A look at our employment and unemployment figures before covid already paints a bleak picture. In 2018, the unemployment rate stood at around 34% with the vast majority of employed persons earning below N\$ 5,000 per month. Young people and women were particularly harshly affected by unemployment and low wages.

Although there are no accurate data available yet, it is possible to sketch the likely impact of covid-19 and the lockdown. During stage 1 of the lockdown, virtually all sectors of the economy were affected although to different degrees. The least affected sectors in terms of loss of income and employment were the public sector (civil service and state-owned enterprises-SOEs), the financial sector, agriculture and the food supply stores but even here retrenchments took place.

Losses of jobs and income were particularly severe in sectors such as hospitality and tourism, construction, work in private households and informal trading where the effects of the lockdown were immediately visible. This affected Namibia's 72,000 household employees (domestic workers) as well as around 100,000 people working in aviation, hospitality and tourism. Hotels, restaurants, tour operators and airlines either had to suspend activities partially or in total. Similarly, construction which employed about 45,000 people in 2018 was severely affected by the lockdown while informal traders experienced huge losses of income.

Overall, thousands of jobs have been lost in these sectors but the ripple effects of the economic crisis have also reached other sectors such as fishing, mining, hardware stores and even the media houses which resorted to reduced working hours and incomes as well as retrenchments. The official figures of 4,460 retrenchments between 27 March and 12 June 2020 (New Era, 2 July 2020) are likely to only represent a fraction of the actual retrenchments that took place.

The Namibian Labour Act states that prior to any retrenchments, employers have to discuss with the affected employees and their trade unions how to avoid or at least

minimise retrenchments. This is meant to explore alternative options and to resort to retrenchments only as a last option. However, this provision is frequently violated in practice as many employers choose to merely notify their employees about retrenchments without making any serious attempts to avoid them. It is against this background that the Namibian President's State of Emergency Regulation 19 has to be seen. It was introduced to protect workers against dismissals and forced leave during the lockdown and although it was unlikely to halt all dismissals, it was expected to at least slow them down.

Employers' organisations and some individual companies took government to court and argued that Regulation 19 was unconstitutional. In their judgement of 23 June 2020, the judges declared that the President was not properly advised and that he should have personally presented the rationale for the regulations in court. The judges were not open to the argument that the lockdown was essential to stop the spread of the virus and that during the lockdown in March/April employees could not go to work but still needed their income to survive. Instead, the judges argued that the regulations were not justified to deal with the situation that has given rise to the state of emergency, namely the coronavirus. The judges conceded that during a state of emergency, the President can make regulation to protect national security, public safety and law and order but they interpreted this provision very narrowly and stated that it does not include the right to protect livelihoods as a result of the lockdown. This begs the question: how can public safety be protected without safeguarding incomes and livelihoods?

This judgement directly serves employers' interests and will make the enforcement of the provisions of the Labour Act even more difficult. Poor enforcement capacity coupled with weakened trade unions and the inherent power imbalances between workers and their employers, have already resulted in a desperate situation for many Namibian workers. The court judgement will embolden employers to dismiss and they are now even less likely to seriously consider other options.

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