

Strategies to  
inspire, organise  
and represent  
workers.

# The Negotiator's Guide

**LRS** Labour  
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Service



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# 9

## Negotiating Retrenchment

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# Save Jobs...

- **Before a Section 189 is Issued**
- **Using Organising and Campaigning**
- **By Understanding Retrenchment Law and Processes**
- **Using the Temporary Employer/ Employee Relief Scheme (TERS)**
- **Through Business Turnaround or Improvement Solutions**
- **By Increasing the Revenue of the Company**
- **By Finding Finance**
- **By Reducing Company Expenses**
- **Through Shareholder Activism**
- **Through Business Rescue**
- **A Trade Union Checklist if Retrenchments Seem Unavoidable**

# A Trade Union Guide to Saving Jobs

A critical role of the trade union movement is to use its power to push business and government to take the necessary steps to stimulate the economy to create jobs and prevent retrenchments.

Even so, the trade union movement must make use of its own power and adopt other practical strategies to save jobs. This guide contains some ideas for trade unions to consider. It is a base upon which unions can build their own strategies.

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This guide is intended to help trade unionists think through a plan to save jobs at companies, and it describes strategies for minimising the impact of retrenchments when they are unavoidable.

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**This guide was authored by the South African Clothing and Textile Workers Union (SACTWU) at a time when the economy suffered several major shocks as a result of the COVID-19 global pandemic.** Many jobs have been lost, and many more are threatened. The ideas in this guide are useful for a crisis situation, but not limited to a crisis situation. It would be strategic to build these skills in your union, even when companies are doing relatively well.



# 1 Save Jobs before a Section 189 is issued

This section is about saving jobs by intervening before retrenchment proceedings are formally launched. Instead of simply trying to save jobs at the last minute through a retrenchment process, it is better to try to tackle problems in companies before retrenchment is announced.



**Operational requirements** means requirements based on the economic, technological, structural or similar needs of an employer.

Section 189 and 189a of the Labour Relations Act (LRA) allow employers to dismiss employees based on operational requirements, as defined in section 213 of the Labour Relations Act. The term "Operational requirements" means requirements based on the economic, technological, structural or similar needs of an employer.

It is the employer's responsibility to prove that a genuine operational requirement exists. This requires identifying warning signs or red flags of distress, and having a forum to meet regularly with management to identify, understand and solve problems upfront.

A first step in preventing retrenchments is to use the following red flags as an early warning system of distress. If you answer "YES" to some of these red flags, or if you notice that more of these red flags

start occurring over time, there is good reason to be concerned that job losses might happen. If so, it may be necessary to adopt some of the actions outlined later in this guide.

## **Step 1: Take the early warning system test for detecting companies in distress**

**Try to answer these questions about the company:**

- ?** Have orders in the company reduced in recent months?
- ?** Are machines standing idle (not being used) for long periods of time in the company?
- ?** Has the company lost a big client or a few clients recently?
- ?** Have customers been buying more imports and/or cheaper imports instead of your products?
- ?** Have working hours been reduced (less overtime/more short-time/layoffs/rotation)?
- ?** Has your company been experiencing late or slow deliveries?
- ?** Have workers been moved around in various departments because there is not enough work?

- ❓ Has management been complaining recently that the company is losing money?
- ❓ Has the company been trying to change anything to save costs?
- ❓ Has the company stopped repairing equipment, machinery, the building, toilets, etc. in order to save money?
- ❓ Has the company been experiencing lots of resignations from management and staff?
- ❓ Has the company asked workers to take early retirement?
- ❓ Has the company put a freeze on hiring?
- ❓ Has the company stopped paying bonuses or stopped any incentives?
- ❓ Has the company been complaining about rising costs?
- ❓ Have you been worried about the future of the company or workers' jobs?
- ❓ Has the sector been experiencing hardship/distress/job losses for a few years?
- ❓ Have you experienced any short payments or lack of payments of wages?
- ❓ Is the company late with its bargaining council levies, UIF payments, or other statutory payments?

- ❓ Has the company stopped its non-essential functions e.g. not buying supplies like stationery, toilet paper, tea and coffee?
- ❓ Have you heard rumours that the company may restructure or retrench?



Even if you answer "Yes" to only a few of these red flags, the company may be in distress and it may be necessary to intervene.

Now that you have taken the first step and scanned the company for red flags, it is important to continue your research before jumping to any conclusions.

## **Step 2: Understanding the reasons why you are seeing red flags**

Businesses can experience challenges for many reasons. It is important that we are able to identify some of the factors underlying the problems they face. In general, these problems can be caused by internal challenges within the company or external challenges due to other economic reasons, or a combination of the two.

Management often believe they know the cause of their problems, but they can be wrong. Trade unions can bring knowledge of the business from the ground up.



## Which of these factors apply to the company that you are concerned about?



### Internal factors causing company distress:

- ✓ Poor management
- ✓ Ineffective Board of Directors
- ✓ Uncompetitive product or services
- ✓ Inadequate financial control
- ✓ High-cost structure
- ✓ Outdated technology
- ✓ Lack of marketing or sales capabilities
- ✓ Excessive diversification – not enough focus
- ✓ Poor data management and ICT systems
- ✓ Poor decision-making regarding spending
- ✓ Inappropriate financial policies
- ✓ Overtrading
- ✓ Short-term thinking



### External factors causing company distress

- ✓ Poor economy
- ✓ Changes in market demand
- ✓ Availability of finance
- ✓ Technological change
- ✓ Government policy
- ✓ Competition
- ✓ Commodity prices
- ✓ Social change
- ✓ Environmental factors
- ✓ Exchange rates
- ✓ Industry factors

## Step 3: Decide on the most important interventions

**It is difficult to try to solve lots of problems at once as this reduces your chances of success. It is better to focus and identify one or two of the most important problems to solve, which would help save jobs and try to solve those first. Afterwards, you can move on to other problems.**



**It is better to focus and identify one or two of the most important problems to solve, which would help save jobs.**

### Example

*You reliably know that a company faces challenges around outdated technology, availability of finance, government policy and exchange rates. It is a great task to try to understand and solve all of these challenges at the same time.*

- You could focus on government policy if the union can influence policy.
- Or, you could focus instead on the challenge of available finance, understand what the need for finance is and explore the company's options.
- You may be able to link financing to addressing the challenge of outdated technology, but this will depend on the situation.
- If exchange rates are key to the company's success, then you might focus on this rather. Influencing the exchange rate is not a viable strategy, so the union might rather explore possibilities for limiting the financial risk of unfavourable exchange rates.



## 2 Save Jobs using Organising and Campaigning

Recognise that workers collectively have huge experience and knowledge of companies and their operations.

- **Tap into the knowledge** of the union workers by creating spaces where officials and worker leaders across different companies, and even sectors, can share experiences and ideas.

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- **Encourage the union** to create specialised units to support officials and workers dealing with struggling companies and retrenchments.

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- **Develop alliances** with worker-friendly NGOs and academic units and do your own research.

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- **Use resources to train worker** leaders and officials dealing with struggling companies and retrenchments.

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- **Use the internet**, online communications platforms and, where possible, face-to-face activities.

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- **Develop the skills** in the union to use online technologies.



# 3

## Save Jobs by Understanding Retrenchment Law and Processes

If retrenchment processes have started in a company, it is still possible to save jobs using the ideas in this guide. However, it is important to understand what the law says about retrenchment procedures.



### Retrenchment law

Most workers' rights in South Africa are covered by the Basic Conditions of Employment Act (BCEA) and the Labour Relations Act (LRA). Both acts deal with dismissals, but the LRA – specifically Sections 189 and 189A – deals with retrenchments.

According to Section 213 of the LRA, employers may dismiss employees based on operational requirements. This means the retrenchment must be based on "economical, technological, structural or similar needs of the employer".

However, the law also requires that employers must first consult with workers about the proposed retrenchments, should be able to prove there is a real "need" to retrench based on operational requirements,

and should meaningfully try to identify ways to prevent or reduce the job losses.

The retrenchment negotiation process is started when the employer issues a written notice to the affected workers and their representatives (unions).



**This notice must also be displayed on the company notice boards so that all workers can see it.**

This notice must also be displayed on the company notice boards so that all workers can see it.

The notice must indicate that the company is contemplating retrenchment (in other words, that it is not yet confirmed), and it must invite the workers and/or unions to consult on the proposal.

**By law, this notice must disclose certain important information, such as:**

- **the reasons** for the proposed dismissals.
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- **the alternatives** that the employer considered before proposing the dismissals, and the reasons for rejecting each of those alternatives. The employer usually keeps the alternatives to a minimum. In order to save jobs, unions should determine whether companies have actually implemented those alternatives well. Unions should also add other alternatives to the list, using ideas in this guide and any other ideas which are appropriate.

- **the number** of employees likely to be affected and the job categories in which they are employed.

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- **the proposed method** for selecting which employees to dismiss. This is often done on the Last-In, First Out (LIFO) principle in which the company proposes to retrench the newest employees first, but there are other models too.

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- **the time** when, or the period during which, the dismissals are likely to take effect.

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- **the severance** pay proposed. Companies usually simply offer the minimum outlined by the law: an amount calculated on paying one week for every year of service that a worker has worked (e.g. if you have worked for 10 years, you are paid the equivalent of 10 weeks of wages). Unions can seek more than this.

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- **any assistance** that the employer proposes to offer to the employees likely to be dismissed.

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- **the possibility** of the future re-employment of the employees who are dismissed.

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- **the number** of employees employed by the employer.

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- **the number** of employees that the employer has dismissed for reasons based on its operational requirements in the preceding 12 months.

Meetings are then held between the employer and the employees and/or unions to discuss the company's proposals about retrenchment and determine the opportunities to save jobs.



## Meaningful consultation

Section 189 of the LRA is clear that the employer and employees, and/or unions must conduct a meaningful and joint consensus-seeking process.

**At a minimum, this process should attempt to:**

**1) Identify and implement steps** that can be taken to avoid the loss of all the jobs. This is the first priority of consultation.

**2) If not all jobs can be saved**, it is important to identify:

- **measures to minimise** the number of job losses.
- **methods to change** the timing/date of the job losses.
- **steps to prevent** or reduce the bad effects of the loss of jobs on workers.

It is only once job losses are considered unavoidable that discussions should begin for:

- **choosing methods** for selection of employees to be dismissed;
- **seeking agreement** on the severance pay for dismissed employees; and
- **seeking any other ways** in which the hardship of workers can be minimised.



The employer is required to consider and respond in writing to proposals and matters raised by the employees.

The consultations and negotiations are supposed to be meaningful. This means the employer is required to consider and respond in writing to proposals and matters raised by the employees. It is useful for employees to raise as many alternatives as possible.

It is best for the employer to be transparent and open about any of the challenges they are facing. A lack of transparency – such as not sharing important information like company financials – prevents workers and unions from confirming the nature of the problems at the company, creates distrust, undermines meaningful consultation and can be a reason for unions to dispute the outcomes of retrenchments.





## How long is a retrenchment process?

Section 189A of the LRA indicates that, for **large retrenchments (above 50 employees)**, the services of the CCMA can be requested to facilitate consultation between employers and employees. It also indicated that such a process **should take a minimum of 60 days** and should include at least four consultation meetings.

**This guide can help you to identify meaningful processes and options for alternatives. Do not, however, expect employers to simply agree to more time - you may have to use pressure for this outcome.**

The consultation process can be longer (or shorter) if agreed upon by employers and employees or unions. It is also possible to meet much more regularly with the company in parallel to meetings with the CCMA. On average, across all retrenchments which use mediation by the CCMA, it seems this can often **help to save around 40% of jobs**.

The LRA does not define a minimum time period for consultation for smaller retrenchments (under 50 employees). **The law does require, however, that the discussions must be meaningful.** In practice, companies often try to finish their consultations in two or three weeks. But in order to comply with the law, the consultation process must be long enough to allow employers and employees time to properly and fully discuss alternatives to the proposed retrenchment.

If you think it is still possible to find alternatives and you believe that consultation has not been meaningful, it is possible to consult for longer.



## The outcomes of a retrenchment process

**Retrenchment outcomes can be challenged if they are procedurally or substantively unfair.**

The consultation process is supposed to be meaningful, BUT it is not required by law that employers and employees reach agreement. For this reason the LRA provides workers with tools – such as industrial action and legal processes (the CCMA or Labour Court) – to challenge retrenchment processes and outcomes.

Retrenchment outcomes can be challenged if they are procedurally or substantively unfair. In other words, if the correct processes have not been followed, or the reasons for retrenching are not strong, then there is a chance to contest the retrenchments legally.



# 4 Save Jobs using the Temporary Employer/ Employee Relief Scheme (TERS)

## Create space for other interventions

**The TERS can and should be combined with other tools so that companies emerge stronger at the end of their period of assistance.**

The TERS can be used to create time and space to help solve the problems in a business over a 6 to 12 month period. It is particularly useful if a business has not received orders and its finances are poor. The TERS can and should be combined with other tools so that companies emerge stronger at the end of their period of assistance.

The TERS we refer to is not the same as the COVID-19 TERS, which has been used for business support during lockdown. In fact, the original TERS has been running for about 10 years and was called the Training Layoff Scheme (TLS) until renamed in 2019.

## Benefits of the Temporary Employer/ Employee Relief Scheme

- TERS can be used for **short-time, layoffs**, proposed retrenchments and/or periods of financial distress.
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TERS provides temporary cost relief to the company for paying wages - it covers a significant part of payment of workers, who are paid by the UIF for a period of between 1 to 12 months.

- TERS **provides temporary cost relief** to the company for paying wages – it covers a significant part of payment of workers, who are paid by the UIF for a period of between 1 to 12 months. You can try to negotiate for the company to pay for the remaining 25% of workers' pay.
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- TERS can be **used in conjunction with** productivity or turnaround interventions and/or in conjunction with training and re-skilling paid for by the SETAs.
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- TERS is **coordinated by the CCMA**, and applications must be made to the CCMA. The UIF and SETAs are also involved as co-funders of wages and skills training.

## Criteria for TERS applications



### 1) Business distress must be evident:

a drop in revenue against a threshold used by the CCMA must be reflected in the audited financial statements or latest management accounts, AND labour costs must prove to be a high percentage of operational costs.



### 2) Employee distress must be evident –

a likelihood of retrenchment, short-time or any other layoff must exist.



### 3) Operational distress must be evident –

the prospects of future business are weak, the company is at risk, and workers are at risk of losing their jobs.



### 4) A turnaround strategy must be evident –

a plan for changing the fortunes of the company. The company must show that it has applied its mind and developed a plan for saving the company.

**Unions can play a role to ensure applications are processed quickly.**

**TERS should be used as a first option when businesses face challenges, as it provides temporary relief while other interventions can be made to solve the challenges of the business.**



# 5 Save Jobs through Business Turnaround or Improvement Solutions

**Companies are not always able to solve their own problems and may need external assistance to identify or find solutions.**

An outside 'expert' will not always suggest solutions that will save the most jobs. Unions and workers need to pay careful attention to ensure that external expert plans are job-saving or jobs-supporting, and not job-shedding plans.



## Public sector job-saving initiatives

Productivity SA is a government agency offering a specialised intervention for companies in distress called Business Turnaround Solutions.

This is a free service to help to diagnose company problems and create plans to solve them. Productivity SA provides consultants to struggling businesses. These consultants can advise on productivity interventions, profitability interventions, company performance interventions, marketing interventions, industrial relations management interventions and job security.

Interventions involve setting strategy, building quality management teams, acquiring new business and sales,

establishing sound capital structures, implementing processes and nurturing resources. All interventions should have job-saving as their core interest and objective.



## Private sector job-saving initiatives

A new service emerged from the COVID-19 crisis, called COVID-19 Business Rescue Assistance (COBRA). It is a service to South African businesses in distress to co-ordinate bank, government and stakeholder support through a structured support process based on the principles of business rescue, but without actually having to put companies into business rescue.

The assistance is achieved by the intervention of a COBRA mediator, and draws on the assistance of over 70 different organisations which have partnered with COBRA to support business turnaround and job retention. These organisations have a very wide range of specialisations – including finance, management, strategy, communications, marketing, ICT, analytics, property and HR – and the cost of these services can be negotiable depending on the level of distress in businesses.



## Bargaining councils

If there is a bargaining council in the sector, the union should explore what assistance the council can provide.

The nature of the economic crisis may be an opportunity for collective bargaining forums such as bargaining councils

to move away from narrow enforcement approaches and develop work programmes and institutions to support struggling companies and workers, possibly using themes identified in this Guide.



## Training of shop stewards and officials

It is useful to train shop stewards and union officials in the warning signs of business distress. Shop stewards and officials often know a great deal about the company, and this training will help them use that knowledge in the fight to save jobs.

***As with public sector initiatives, unions must insist that all private sector job-saving interventions have job-saving at the heart of everything that is done.***

Productivity SA, PTI, and the South African Restructuring and Insolvency Practitioners Association NPC (SARIPA) all offer relevant training. SARIPA has a membership of over 650 qualified Insolvency Practitioners, Business Restructuring Professionals, Chartered Accountants, Lawyers, Bankers, Academics, Tax Consultants and others involved in liquidation, insolvency and business rescue services. They are prepared to help train union shop stewards and officials in basic issues relating to business distress and in using business rescue and liquidation tools as ways in which to save jobs.

Training that helps shop stewards and officials to recognise company distress could strengthen the ability of unions to identify problems and use some of the available tools to deal with job losses.



# 6 Save Jobs by Increasing the Revenue of the Company

**A business cannot survive for long without enough customer orders (also known as demand). There are many ways to try to find orders for companies. Some of these approaches rely on the company doing more work to get orders, or improving their marketing or customer service. But it can be useful for unions to assist too. It gives us more power to try to find a successful outcome.**

You can use the checklists that follow as a guide to evaluate whether or not the company has explored their options properly.



## Approach existing customers

Has the company approached existing customers to determine whether they are able to place more orders with the company? Existing customers generally understand the company and may have goodwill towards it. They may therefore be willing to assist if it is done on the basis of saving jobs.

If existing customers do not have immediate orders to place, they may be willing to consider bringing forward later orders into the short term.

Existing customers may believe they cannot place more orders for a variety of reasons. Their reasons and obstacles should be explored if the union can offer to help try to overcome those obstacles.



## Approach ex-customers

Ex-customers also know the company and may be willing to consider helping in order to save jobs.

Remember, ex-customers may have terminated their supply relationships with the company for a range of challenging reasons – like losing their own orders or due to finding other suppliers which they prefer. These may be raised as concerns, and the union may have to consider whether these are concerns which can be addressed or confronted. It is best to approach large ex-customers who could potentially offer the best outcome.



## Find new business

Finding new business opportunities for a struggling company can take some time. It is best to try to do this as early as possible.



## Checklist:

Has the company explored these ideas for finding new customers or business?

- ✔ **If the company knows which new customers it wants** but is just not sure how to network with those customers or get their business, is it possible to solve this?

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- ✔ **Does the company use e-commerce** (such as online sales from its website or using online platforms)? If so, can it be improved further? If it is not currently used, can e-commerce be implemented?

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- ✔ **Is the company able to subscribe to market intelligence** databases to help find new potential customers?

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- ✔ **Can Proudly SA help** to network the distressed business to potential customers (if products are locally made)?

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- ✔ Can the **local procurement commitments** within the Government's Economic Recovery Plan be used to help find orders?

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- ✔ **Are there union-organised companies** locally, provincially or nationally which can become customers of the distressed company?

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- ✓ Can **employer organisations** introduce their members to the distressed company to explore becoming customers?

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  - ✓ Can other **employer associations** in other industries or Chambers of Commerce help network the distressed company to potential customers?

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  - ✓ **Can the SETAs be used** to link the distressed company to its list of subs-paying companies to explore becoming customers?

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  - ✓ Can some of the **largest customers in the industry** be approached to help the distressed company?

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  - ✓ Are there other known companies, organisations, movements, unions, communities and faith-based organisations in the area, city, province or country that are **potential customers** for the distressed business?

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  - ✓ Can you identify any current **government tender opportunities** for the company?

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  - ✓ Can the company **sell excess stock** by running specialised sales and using its networks and the networks of the union to seek customers?

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  - ✓ Can the company **consider export opportunities**? If so, could the following options be explored?

- (a) Export councils or the export promotion desk, Export Marketing and Investment Assistance (EMIA) of the Department of Trade, Industry and Competition (DTIC).
- (b) The Department of Trade, Industry and Competition's Trade and Export options.
- (c) Government could link the business with embassies and consulates as well as foreign economic representatives to help network the company to potential export customers.
- (d) The SA Chamber of Commerce and Industry or other associations could explore assistance to get the company into export markets.
- (e) Brand SA could explore overseas marketing opportunities for the company.
- (f) Explore export opportunities available due to the company's product, labour and sustainability standards.

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**Is the company losing customers** due to the challenge of illegal competition? This includes companies that sell products that are illegally imported, counterfeits or have incorrect standards. If this is the case, can this be addressed by customs action by SARS, tariff action by ITAC, or enforcement of correct standards by SA standards bodies?



## 7 Save Jobs by Finding Finance

**A business cannot survive without generating money. To be sustainable, it should earn at least the same, but preferably more, money than it spends.**

Sometimes businesses struggle to earn enough money to run their operations and pay their costs. Sometimes, although they have enough money to run the business, they need more money to invest in the business and grow it so that it stays competitive compared to other businesses.

### Distressed funding

**Distressed funding offers financing to businesses who are in financial trouble.**

**Consider these avenues for distressed funding:**



**There are a number of public and private financing options available to a struggling business:**

**Industrial Development Corporation (IDC) can provide distressed funding, grants (free money) and loans.**

**The UIF II Fund (in the IDC). Go to [www.idc.co.za/uif-ii](http://www.idc.co.za/uif-ii)**

**Go through Commercial Banks using National Treasury's loan guarantee scheme.**

[www.treasury.gov.za/comm\\_media/press/2020/COVID-19%20loan%20guarantee%20scheme%20FAQs%2026%20July.pdf](http://www.treasury.gov.za/comm_media/press/2020/COVID-19%20loan%20guarantee%20scheme%20FAQs%2026%20July.pdf)

## State funding and business support opportunities

- Department of Trade, Industry & Competition
- Department of Small Business Development
- Jobs Fund
- Small Enterprise Finance Agency
- Small Enterprise Development Agency
- National Empowerment Fund
- National Youth Development Agency
- Eastern Cape Economic Development Corporation
- Free State Development Corporation
- Gauteng Enterprise Propeller
- Gauteng Investment Centre
- KZN Growth Fund
- Ithala Development finance Corporation
- Trade & Investment KZN
- Limpopo Economic Development Agency
- Mpumalanga Economic Growth Agency
- North West Development Corporation
- WESGRO

## Private sector financial backing

Has the company approached financial associations to find financing opportunities?

Banking Association of SA

Association of Savings and Investment SA (ASISA)

SA Venture Capital Association (SAVCA)

SA SME Finance Association (SASFA)

# 8 Save Jobs by Reducing Company Expenses



## 1. Improve processes and reduce waste

**Companies often carry unnecessary operational costs because of poor decisions by management in the running of the company. Major improvements can often be made in reducing costs through collaborative processes and by simply improving the ways in which operations are run.**

Unions can play a role to identify and solve such issues. For instance, companies can run collaborative productivity interventions designed with the help of workers and unions. These should not reduce wages, should respect workers and advance decent work, and should use workers' knowledge and expertise to find ways to make production processes more efficient, but also better for workers.



There are other experts who can be considered to help in these kinds of projects, but our interest as unions and workers should always be that the methods of these experts support workers and working conditions. We cannot accept processes and outcomes that squeeze workers.

Of course, workers may want to seek productivity incentives over and above the base-wage, which can help to increase workers' wages further.



## 2. Labour costs

***Companies that are listed on the JSE are required to report on pay to executive and non-executive directors in their annual reports***

**Companies like to complain about the wage costs of their employees being too high. Their proposals often include: cutting workers' wages; implementing short-time, extended layoffs or unpaid leave; increasing or decreasing shifts and length of shifts; and/or changing overtime or weekend-work arrangements.**

It can, however, be useful for a business in distress if the **executives and senior management take a cut in their salaries and benefits**. Companies that are listed on the JSE are required to report on pay to executive and non-executive directors in their annual reports, and these reports can be requested if they are not already in the public domain.

It might also be possible to save money on salaries and labour costs by **reducing the number of managers and executives.**

There are other ways for a company to reduce the cost of the wage bill during a period of distress without actually impacting workers' wages. This can be done by **applying for the TERS for 6 to 12 months.** If workers' wages are not to be impacted, the company would simply need to pay the balance of the outstanding wages.

Another option to save on labour costs can include **placing a freeze on hiring new employees.**

If a company is saving on labour costs and has put workers on extended short-time or a layoff for more than six weeks (due to not having any work), it can also be possible for the **workers to receive UIF support** without being retrenched. This is done by using the reduced work provision of the UIF.



### 3. Combating corruption

**Corruption adds to the cost of running businesses. Unions can play a meaningful role in monitoring and combating corruption – whatever the source.**

# 9 Save Jobs through Shareholder Activism



## Appeal to shareholders to assist

**If the affected business is owned by one or more major shareholder/s, it may be possible to use shareholder activism as a tool to save jobs. For instance, you could write to the shareholder/s and urge them to support their subsidiary in the interests of preserving jobs.**

***You could write to the shareholder/s and urge them to support their subsidiary in the interests of preserving jobs.***

If the company or its shareholders are members of a business association, it may be a signatory to the Jobs Summit agreement of 2018 in which Organised Business committed to “do everything in their power to avoid retrenchments”.

This included using the TERS, using turnaround expertise, engaging with Productivity SA and others to implement interventions, implementing executive salary sacrifices, transferring affected employees to other jobs in the employer’s business or group, training or re-skilling employees to deploy elsewhere in the company or group and exploring mutual assistance amongst companies.

# 10 Save Jobs through Business Rescue and Liquidation

**Business rescue and liquidation are not words which workers and unions enjoy using. This is because, in our experience, the end result is usually that workers lose jobs, severance pay, and unpaid money still owed to them by the company, and do not get new jobs afterwards. It is the experience of unions and workers that both liquidation and business rescue have been heavily abused by employers (to avoid paying creditors like workers) and consultants (simply seeking to make money without apparent concern for workers and their jobs).**

**It is not legal for a business that is insolvent to continue to operate. It endangers the financial wellbeing of its workers, customers, suppliers and support organisations (like banks).**

Companies in this position can either enter business rescue or liquidation.

Although we may not like liquidation and business rescue, however, the reality is that they exist and will increasingly be used in the current economic crisis. We must therefore use our power to contest and shape them to have better outcomes for workers.

It is still possible, even if hard, to try to save jobs through both business rescue and liquidation.

Business rescue and liquidation occur when a company is in severe distress and does not have enough money to meet its financial obligations to its creditors (the companies and people, including

workers, to which it owes money) as they become due immediately or will reasonably not be able to do so within the next six months.

The company simply does not have the money internally and is unable to find the money elsewhere (such as from shareholders or financiers like banks). In this situation, a company is considered to be “insolvent” (without enough money or access to money to meet its current and short-term financial obligations).



## Business rescue

A company is placed into business rescue through an application to the court. These applications can be brought forward by the company or by its creditors (including workers and their unions).

It is possible for liquidation to be changed into business rescue instead. The Business Rescue process is enabled and outlined in the Companies Act.

If the court approves the business rescue application, an external professional (a Business Rescue Practitioner or BRP) is legally placed in charge of the business and takes over all decision-making powers with a mandate to attempt to turn the business around.

## In order to be successfully placed into business rescue:

### 1. There must be a “reasonable prospect”

of success in finding a solution to saving the business, and there must be the chance of a better outcome from business rescue than from liquidation.

*As an example*, if a liquidation would end up in the sale of the assets of the business by an auction and generate roughly 10% of the value of those assets, a business rescue needs to offer the creditors a better alternative. It needs to offer more than 10% and hopefully the outcome of saving the business and the jobs it provides.

### 2. There must be enough money to run the business rescue process.

This is called post-commencement finance. Business rescue is expensive. Even though the Companies Act sets maximum fees that can be charged by a BRP, these fees are still enormous by the standards of workers (ranging from a minimum of R1 250 per hour to a maximum of R25 000 per day). Post-commencement finance is usually funded by one or more of the creditors of the business. They will only fund it if they think there is a chance of success and if the business rescue process will produce a better outcome than liquidation for them.

## Objective of business rescue:

to restore the company to a healthier position so that it is solvent again.

The objective of liquidation is to sell the assets of the company and use the money to pay the creditors in terms of an order of preference.

***If a company is in business rescue, the employees and their representatives (unions) must be consulted on the turnaround plan.***

During the business rescue, the law protects the business from paying its outstanding debts while the BRP tries to find solutions to the problems of the company. This may include asking creditors to accept less money, and/or finding new business and customers, and/or renegotiating contracts, and/or re-organising the operations or structures of the company, and/or looking for new owners or finance, and/or possibly retrenching workers.

Business rescue is the last lifeline which is given to companies to try to turn them around and avoid being closed down and liquidated.

## **A successful business rescue can take two forms.**

**1. The company is saved and jobs are saved (either all or only some of the jobs).**

**2. The company itself is not saved, but the jobs of the workers are saved (either all or only some of the jobs) by transferring the workers into a new legal entity or company.**

***If a business rescue is unsuccessful, the company is moved into liquidation.***

There are many concerns with the business rescue process from a union perspective, including the fact that it does not necessarily save the jobs of workers, and that the fees of the BRP illustrate so strongly the massive problems regarding economic inequality.

**This guide describes several strategies that would help promote better outcomes of a business rescue process.**

Still, business rescue remains a fact of law at the moment, and while it does not always work, it can produce positive outcomes for workers.

In cases where companies enter business rescue, unions may wish to play a strong role. The union can try to identify business rescue practitioners who appear to be keen to save jobs and not simply make money. The union can insist that the outcome of business rescue saves jobs and do what they can to make this happen.



## Liquidation

Liquidation simply means that an insolvent company is closed down and has its assets (the things it owns) sold in order to generate money to pay creditors and settle its debts.

A company is placed into liquidation through an application to the court. This application can be brought forward by the company (through a resolution of its Director/s), by its creditors or by its shareholders.

Once an application for liquidation has been made to the court, the company is placed in provisional liquidation. At this stage, no creditors may bring legal action against the company and any legal action that already exists will be suspended.



The court appoints a liquidator that values the assets, engages with creditors, tries to collect any outstanding money owed to the company, sells the assets of the company, pays creditors and winds down the business.

**Liquidation  
is regulated  
by the  
Companies  
Act and the  
Insolvency  
Act.**

During a liquidation, workers are usually able to appoint a co-liquidator. This is because liquidators are appointed by value (the creditor which is owed the largest amount of money), and by volume (the creditor which represents the largest number of claims). The largest volume of creditors is often taken up by employees, if there are many of them in the company.

Unions who appoint liquidators should insist that everything possible is done to improve the outcome for workers in at least three ways.

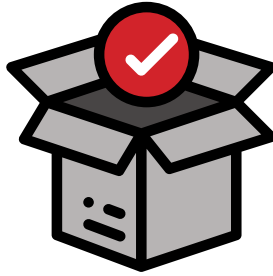
The liquidator should try to get as much money as possible from the liquidation so that the workers can get as much money as possible of what is owed to them.

The liquidator should try to secure a potential buyer of all the assets, or several potential buyers of the assets, who are willing to employ the workers of the liquidated company at equal or better wages and conditions of work than they enjoyed in their previous company.

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Unions should regularly assess whether the liquidator has interest from buyers in the assets of the company, and if necessary, unions should play a role to help find more potential buyers.

Unions should begin to identify liquidators who are more successful at these outcomes and try to use their services more often.



# Save Jobs.

## A Trade Union Checklist if Retrenchments Seem Unavoidable



### Speak to the company

- ?** Will the company place the workers on the TERS, or is the company willing to continue to keep the contracts of employment with the workers, but place them on UIF support using the reduced working time provision?

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- ?** Can workers be re-deployed within the company and/or, if necessary, reskilled for new positions?

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- ?** Can the company reduce immediate retrenchments through gradual natural turnover of employees over time as they retire (natural attrition), or offer early retirement to volunteering employees?

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- ❓ **Can the company provide a fund to reskill the workers** to help them seek new work, even if it cannot retain them?

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  - ❓ **Can the company actively assist the workers** to find secure alternative employment using their networks and connections?

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  - ❓ **Can the company help the workers to start a new company** and provide enterprise development support to it?

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  - ❓ **Can the company pay higher severance packages** to reduce the impact of retrenchment on the workers?

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  - ❓ **Can agreements be made** to revisit decisions pending changes in the business?



## Speak to shareholders

- ❓ **Can workers be redeployed** into other companies in the group?

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- ❓ **Can the shareholders provide finance** to reskill workers to help them find new work?

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- ❓ **Can the shareholders actively assist workers** to find secure alternative employment using their networks and connections (even if not in the group)?

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- ❓ **Can shareholders provide shares to retrenched workers,** over-and-above their severance pay, so that they have the opportunity for alternative income in the future?



## Speak to other companies

- ?** Do the employer association or business chamber know companies that could absorb the employees?

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- ?** Could competitors of the affected company absorb the employees?

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- ?** Could large customers or service providers to the affected company absorb the employees?

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- ?** Do the workers or union know other companies which are growing or more stable, which could absorb the employees?

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- ?** Do any large service providers of the union have opportunities to absorb the employees?



## Skills training

- ✓** Explore whether the Labour Activation Programme (LAP) of the UIF has opportunities to absorb the workers into programmes for retraining to earn a stipend.

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- ✓** Explore whether the [SETAs](#) have opportunities for the affected employees (such as stipend-paying learnerships), whether in the same industry or other industries.

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- ✓** Challenge retrenchments. Is there an opportunity to refer the matter to the [CCMA](#) or even the [Labour Court](#)?