DLA CLIFFE DEKKER HOFMEYR

EMPLOYMENT ALERT

10 September 2012

NOTIFICATION TO 'AFFECTED PARTIES' IN TERMS OF THE BUSINESS RESCUE PROVISIONS IN THE COMPANIES ACT 71 OF 2008

Business Rescue is an innovation of the Companies Act, No 71 of 2008 (Act) and aims to create a system of corporate rescue, which is sensitive to the needs of the modern economy (DTI Policy Paper 'South African Company Law for the 21st century: Guidelines for corporate reform' GN 1183 of June 2004: GG 26495 paragraph 4.6.2.).

This 'rescue' procedure entails the reorganisation of a distressed company's affairs in order to restore it to a profitable entity (Cassim (2011)144). In terms of s131(1) of the Act:

- 'an affected person may apply to a court at any time for an order placing the company under supervision and commencing business rescue proceedings.'
- an Applicant in terms of subsection (1) must –
  - serve a copy of the application on the company and the commission; and
  - notify each affected person of the application in the prescribed manner.

A distinction is made in s131(2) between service of the application on the company and the commission and notification of the application to affected parties in the prescribed manner. The terms 'affected parties' is defined in s128(1) (a) of the Act and includes trade unions and employees who are not represented by a trade union. According to regulation 124 of the Companies Regulations, 2011 the term 'notify' entails that a copy of the court application must be delivered to each affected person known to the applicant in accordance with regulation 7. Due to the novel nature of business rescue proceedings in South Africa it is essential to look at how the courts will interpret this section of the Act.

In the recent decision of *Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group Ltd* and *Another (Advantage Projects Managers Pty Ltd intervening) 2011 (5) SA 600 (WCC)*, the court questioned the appropriateness of the requirement in regulation 124 that the full application must be delivered to each affected party. The court added that to notify someone of an application would be to tell the person that the application had been launched. According to Acting Judge Owen Rogers, the fact that regulation 124 requires service of the whole application on all affected parties: "might travel beyond what might be lawfully prescribed under s131(2)(b)".

In *Cape Point Vineyards*, no formal notification of the application to commence business rescue proceedings was given to the trade unions or the employees. The distressed company, Pinnacle Point Group is a holding company and it was submitted in a supplementary affidavit that Pinnacle Point Group itself only has 11 employees. It was confirmed under oath by the Chief Financial Officer of Pinnacle Point Group that all the employees were aware of the application. The court held that the fact that the employees were aware of the application was sufficient to meet the notification requirements of the Act. From a critical perspective it can be argued that as there were only 11 employees it would not have been burdensome to deliver a copy of the application to each employee. Courts in the future may differ from the flexible approach in the Pinnacle Point Case.

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In terms of s131(8)(b), once the business rescue order is granted the courts must notify each affected person within five business days of the order. In *Cape Point Vineyards* the court ordered that the employees of the distressed company must be notified of the business rescue order by way of attaching a copy of this order to the company's notice board, alternatively a prominent and visible place at the offices of the company situated at its principal place of business.

It may well be sufficient compliance to inform the employees and the trade unions of the application and where a copy could be obtained.

Faan Coetzee and Carien van der Linde

ACQUISITION OF SHARES NOT A TRANSFER AS A GOING CONCERN

The Labour Appeal Court (LAC) confirmed that the acquisition of the share capital of a business is not akin to the transfer of the business as a going concern. The Court considered this issue when hearing arguments by a retrenched employee as to why he alleged his dismissal was automatically unfair.

The Labour Relations Act, No 66 of 1995 (LRA) listed various types of dismissal that should attract the full wrath of the law, so to speak. The legislature provided that dismissals for reasons relating to, among others, discrimination (gender, race, religion, age, marital status and so forth), participation in strike action and/or after making a protected disclosure (whistle-blowing) cannot be valid and deserve greater compensation than other categories of unfair dismissal. Employees who have been dismissed for an automatically unfair reason are entitled to compensation of up to 24 months and are not subject to the normal 12 month cap on compensation for other unfair dismissals. This same s187 of the LRA also provides that a dismissal is automatically unfair where it was as result of a transfer of a business or service as a going concern.

In *Long v Prism Holding & another (LAC case number JA 39/10, judgment delivered 6 March 2012)*, the LAC confirmed that the acquisition of the share capital of Prism by Net 1 did not amount to a transfer of a business as a going concern. Prism still existed as a separate legal entity, now owned by Net 1. The LAC referred, with approval, to the judgment by Zobdo J (as he then was) in *Ndima and Others v Waverly Blankets Ltd [(1999) 6 BLLR 577 (LC) at 591, para 66]* where the judge stated that the transfer of 'possession and control of a business' are two 'separate concepts' - and that transfer of possession and control do not trigger the operation of s197 of the LRA.

The intention of s197 is to protect employment and to facilitate the transfer of a business. Where business changes shareholders, the entity does not change, only the shareholders do. The identity of the employer remains the same. The consequences of a transfer of a business that s197 seeks to address do not arise in respect of a change in shareholding: the employment contracts between the employees and employers carry on unaltered where there is a change in shareholding. The provisions of s197 of the LRA do not find application under these circumstances as there is no protection required by the employees (or facilitation of the transfer required by the employers).

The LAC held that the retrenchment of the employee was not automatically unfair as there had not been a transfer of the business in terms of s197. Accordingly, the dismissal was not in contravention of s187(1)(g). The LAC held, though, that the dismissal was procedurally unfair and awarded the employee three months' remuneration as compensation.

Claimants seeking to establish that their dismissal was automatically unfair must produce sufficient evidence linking their dismissal to a prohibited reason, listed in s187(1) in order to succeed with their claim.

Johan Botes

We are hosting a seminar on Wednesday, 19 September 2012 in our Sandton office.

Adam Hartley, from DLA Piper UK, will be discussing second generation outsourcing from an international perspective and how other jurisdictions have applied it.

To attend the event, please send an email to jhbevents@dlacdh.com

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