

23 NOVEMBER 2015

EMPLOYMENT ALERT

IN THIS ISSUE

WHAT HAPPENS WHEN AN EMPLOYER'S OFFER ALTERNATIVE TO RETRENCHMENT IS NOT ACCEPTED TIMEOUSLY?

May an employer retrench its workers, after making an offer alternative to retrenchment, where the offer was not accepted by a certain date? This was the issue in *DB Contracting North CC v National Union of Mineworkers and Siphon Nkabinde and 105 Others* (Case No. JA 113/13).

WHAT HAPPENS WHEN AN EMPLOYER'S OFFER ALTERNATIVE TO RETRENCHMENT IS NOT ACCEPTED TIMEOUSLY?

NUM's Negotiator did not protest the retrenchment and merely discussed other aspects of implementing the retrenchment.

At no stage did NUM's Negotiator oppose the retrenchment. Based on this evidence, the resolute condition of acceptance that would've prevented retrenchment was never met.

May an employer retrench its workers, after making an offer alternative to retrenchment, where the offer was not accepted by a certain date? This was the issue in *DB Contracting North CC v National Union of Mineworkers and Siphon Nkabinde and 105 Others* (Case No. JA 113/13).

The appellant (DB) was a subcontractor of JJ Cables Jointing CC (JJ). JJ lost a large contract with Eskom, which led to DB being unable to pay its wage bill. This was made worse by the stipulated industry increase in wages. On 30 July 2009, DB commenced a formal retrenchment process. At the third meeting between DB and the employee's union, National Union of Mineworkers NUM, the parties agreed to change the termination date to 4 December 2009. However, DB offered to retain the workers if they agreed to being paid at the lower hourly rate, if the offer was accepted by 4 December 2009. The parties agreed that this was a reasonable alternative to retrenchment. DB alleged that the offer was not accepted by 4 December 2009 and thus proceeded to retrench the workers. NUM disputed this.

The majority judgment found that the offer had been rejected for the following reasons:

- i. The court reasoned that if a meeting with workers had taken place between 13 November and 4 December 2009, and Bengaqula (NUM's Negotiator) was given a mandate to accept the offer, there was no reason for him to wait until the meeting on 4 December to notify DB.
- ii. NUM's Negotiator testified that, en route to the meeting, he was phoned by a worker who accused him of selling them out as they were receiving dismissal notices, which indicated that he had agreed to retrenchment instead of notifying DB of the workers' acceptance.

- iii. At the meeting, NUM's Negotiator did not protest the retrenchment and merely discussed other aspects of implementing the retrenchment.
- iv. In a letter to DB dated 7 December 2009, he accused DB of sending out dismissal notices after the meeting, which contradicted his evidence that dismissal notices were distributed before the meeting took place.

At no stage did NUM's Negotiator oppose the retrenchment. Based on this evidence, the resolute condition of acceptance that would've prevented retrenchment was never met.

The parties had to adduce evidence, upon which they could rely, from the facts. NUM alleged that it had accepted the offer before 4 December 2009 but failed to provide evidence that it did so. DB was therefore entitled to believe that there was no such timeous acceptance.

This judgment strengthens the employer's position in retrenchment proceedings. Where an employer makes a reasonable alternative offer to retrenchment, the other consulting party must provide clear acceptance of the offer to prevent retrenchment from occurring. It is also worthwhile noting that an offer of wage payments below the minimum prescribed industry rates may be a valid alternative to retrenchment, where the parties agree to it.

Mohsina Chenia and Louis Botha



**NEW
RELEASE**

Employment Retrenchment Guideline

Answering your pertinent questions around consultations, large-scale retrenchments, facilitation vs non-facilitation, selection criteria, voluntary separation packages and vacancies-bumping.



CLICK HERE TO FIND OUT MORE

2014

**RANKED #1 BY DEALMAKERS
FOR DEAL FLOW 6 YEARS IN A ROW**

1st in M&A Deal Flow, 1st in M&A Deal Value,
1st in General Corporate Finance Deal Flow.

2013

1st in M&A Deal Flow, 1st in M&A Deal Value,
1st in Unlisted Deals - Deal Flow.

2012

1st in M&A Deal Flow, 1st in General Corporate
Finance Deal Flow, 1st in General Corporate Finance
Deal Value, 1st in Unlisted Deals - Deal Flow.

2011

1st in M&A Deal Flow, 1st in M&A Deal Value,
1st in General Corporate Finance Deal Flow,
Legal Advisor - Deal of the Year.

DealMakers

2013

**HIGHEST
RANKING**

of Client Satisfaction
amongst African Firms

Legal Week

WE SECURED THE BIG

5

We are the No.1 Law firm for
client service excellence
FIVE YEARS IN A ROW



2014

#NO1DEALPARTNER

No. 1 LAW FIRM
by M&A DEAL COUNT in
Africa and the Middle East

No. 1 AFRICAN LAW FIRM
by M&A DEAL VALUE
with 9.2 Billion USD
worth of deals



CHAMBERS GLOBAL 2014 - 2015 ranks our Employment practice in Band 2: Employment.

Aadil Patel ranked by CHAMBERS GLOBAL 2015 in Band 2: Employment.

Hugo Pienaar ranked by CHAMBERS GLOBAL 2014 - 2015 in Band 2: Employment.

Fiona Leppan ranked by CHAMBERS GLOBAL 2015 in Band 4: Employment.



OUR TEAM

For more information about our Employment practice and services, please contact:



Aadil Patel
National Practice Head
Director
T +27 (0)11 562 1107
E aadil.patel@cdhlegal.com



Faan Coetzee
Executive Consultant
T +27 (0)11 562 1600
E faan.coetzee@cdhlegal.com



Anli Bezuidenhout
Associate
T +27 (0)21 481 6351
E anli.bezuidenhout@cdhlegal.com



Gillian Lumb
Regional Practice Head
Director
T +27 (0)21 481 6315
E gillian.lumb@cdhlegal.com



Kirsten Caddy
Senior Associate
T +27 (0)11 562 1412
E kirsten.caddy@cdhlegal.com



Khanyisile Khanyile
Associate
T +27 (0)11 562 1586
E khanyisile.khanyile@cdhlegal.com



Mohsina Chenia
Director
T +27 (0)11 562 1299
E mohsina.chenia@cdhlegal.com



Nicholas Preston
Senior Associate
T +27 (0)11 562 1788
E nicholas.preston@cdhlegal.com



Katlego Letlonkane
Associate
T +27 (0)21 481 6319
E katlego.letlonkane@cdhlegal.com



Fiona Leppan
Director
T +27 (0)11 562 1152
E fiona.leppan@cdhlegal.com



Ndumiso Zwane
Senior Associate
T +27 (0)11 562 1231
E ndumiso.zwane@cdhlegal.com



Thandeka Nhleko
Associate
T +27 (0)11 562 1280
E thandeka.nhleko@cdhlegal.com



Hugo Pienaar
Director
T +27 (0)11 562 1350
E hugo.pienaar@cdhlegal.com



Jaydev Thaker
Associate
T +27 (0)11 562 1281
E jaydev.thaker@cdhlegal.com



Samiksha Singh
Director
T +27 (0)21 481 6314,
E samiksha.singh@cdhlegal.com



Sihle Tshetlo
Associate
T +27 (0)11 562 1196
E sihle.tshetlo@cdhlegal.com



Michael Yeates
Director
T +27 (0)11 562 1184
E michael.yeates@cdhlegal.com

BBBEE STATUS: LEVEL TWO CONTRIBUTOR

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

©2015 0814/NOV