

10 JULY 2020

# BUSINESS RESCUE, RESTRUCTURING & INSOLVENCY AND EMPLOYMENT ALERT

## IN THIS ISSUE

### A Balancing Act: The Labour Appeal Court gives final verdict on *SAA (in business rescue) v NUMSA* employee retrenchment appeal

With the business rescue proceedings of the National Air carrier publicly on display, it is no surprise that the matter between South African Airways (SAA) and NUMSA, previously before the Labour Court (LC), and now the Labour Appeal court (LAC), has caught the attention of many South Africans.

## A Balancing Act: The Labour Appeal Court gives final verdict on SAA (*in business rescue*) v NUMSA employee retrenchment appeal

In an attempt to rescue the business, the SAA BRPs issued s189/189A notices in terms of the LRA.

With the business rescue proceedings of the National Air carrier publicly on display, it is no surprise that the matter between South African Airways (SAA) and NUMSA, previously before the Labour Court (LC), and now the Labour Appeal court (LAC), has caught the attention of many South Africans.

As has been discussed in a previous article by CDH, the LC, and now the LAC, had before them the question as to whether a business rescue practitioner (BRP) could commence with retrenchment proceedings under section 189 of the Labour Relations Act 66 of 1995 (the LRA) prior to the adoption of a business rescue plan as contemplated in section 150 of the Companies Act 2008 (the Act).

Both courts had to consider the interpretation of section 136 of the Act, as well as consider the balance of rights of all stakeholders, including employees, in a business rescue process, as contemplated in the Act and the LRA.

In an attempt to rescue the business, the SAA BRPs issued s189/189A notices in terms of the LRA.

The effect of such, a section 189/189A notice, is to indicate to employees that that SAA is contemplating dismissals based on its operational requirements (i.e. that retrenchments may follow). The notice invites the impacted employees to consult with SAA on a prescribed list of topics which include measures to avoid the retrenchments.

NUMSA refused to participate in the section 189/189A process, and brought an application before the LC seeking a declarator that SAA and the BRP's issuing of the section 189/189A notices to the

employees was unlawful, alternatively, unfair, as this had come prior to the publication of the business rescue plan as contemplated in section 150 of the Act. The union further demanded that the notices be withdrawn, and the consultation process suspended until such time that a business rescue plan is published.

The LC ultimately found in favour of NUMSA.

As a result of the far-reaching effects that such a judgment could have on retrenchments in a business rescue setting, and the business rescue procedure as a whole, SAA and its BRPs took the decision on appeal, on the grounds that the LC had incorrectly interpreted section 136 of the Act and that the interpretation used by the LC imposed additional rights and obligations on the employers and employees over and above those imposed by the LRA.

The appellants also highlighted that the court a quo had wrongfully granted relief to the union from the provisions of section 133(1) of the Act which ordinarily prohibits legal proceedings against a company in business rescue without written consent of the BRPs.

The LAC, although having noted that many of the issues before it had now become moot (academic) due to the publication of the business rescue plan, in the interests of justice, continued to determine the issues raised before it.

In dealing with the grounds of appeal before it, the main appeal being that of the interpretation of section 136(1)(b) of the Act, the LAC ultimately upheld the LC's decision and dismissed the appeal, thus finding that in the considering section 136

## A Balancing Act: The Labour Appeal Court gives final verdict on SAA (*in business rescue*) v NUMSA employee retrenchment appeal...continued

The decision reached by the LC and now the LAC has ultimately set a precedent of a creation of a moratorium on retrenchments when business rescue proceedings have commenced and before the adoption of a business rescue plan.

of the Act, the main objective of a business rescue is to provide for the efficient rescue and recovery of a financially distressed company, while balancing the rights and interests of all relevant stakeholders which included that of employees.

The court found that the success of rescuing the whole company naturally included the preservation of jobs. While the court sought to promote the constitutional right to security of employment, this finding has far reaching effects for both business rescue and retrenchment proceedings going forward, as this ultimately shifts the discretion of an employer to contemplate retrenchment. Previously, the commencement of the consultation process was dictated by when an employer contemplates retrenchment. During business rescue proceedings and following the judgment, however, the need to retrench must be rooted in the business rescue plan.

The court concluded with dealing with the issue of voluntary severance packages and found that there would be no reason as to why the BRPs could not unilaterally offer voluntary severance packages to the employees in the circumstances.

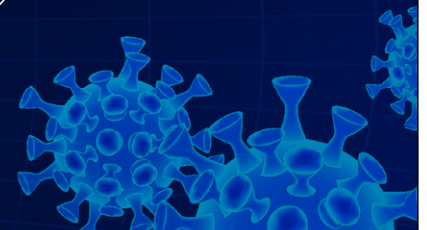
The decision reached by the LC and now the LAC has ultimately set a precedent of a creation of a moratorium on retrenchments when business rescue proceedings have commenced and before the adoption of a business rescue plan. This could bring about some uncharted challenges for BRPs going forward as they will have to continue to balance the rights of all affected persons, which includes employees, creditors and shareholders; while endeavouring to rescue a business in financial distress.

As a business in financial distress navigating through a multitude of obstacles in trying to balance the rights of all stakeholders, where a business in rescue is to contemplate retrenchment as a means of corporate restructure/reorganisation it is clear from the judgment above that voluntary severance packages should be considered, prior to that of retrenchment, in an attempt to balance the conflict between the BRPs duties to balance the rights of all affected persons and applying fair labour practices.

*Tobie Jordaan, Anli Bezuidenhout and Jessica Osmond*

## CDH'S COVID-19 RESOURCE HUB

Click here for more information 



## OUR TEAM

For more information about our Business Rescue, Restructuring & Insolvency sector and services, please contact:



**Tobie Jordaan**  
Sector Head  
Business Rescue, Restructuring  
& Insolvency  
T +27 (0)11 562 1356  
E [tobie.jordaan@cdhlegal.com](mailto:tobie.jordaan@cdhlegal.com)



**Thabile Fuhrmann**  
Chairperson  
Director  
Dispute Resolution  
T +27 (0)11 562 1331  
E [thabile.fuhrmann@cdhlegal.com](mailto:thabile.fuhrmann@cdhlegal.com)



**Richard Marcus**  
Director  
Dispute Resolution  
T +27 (0)21 481 6396  
E [richard.marcus@cdhlegal.com](mailto:richard.marcus@cdhlegal.com)



**Kgosi Nkaiseng**  
Director  
Dispute Resolution  
T +27 (0)11 562 1864  
E [kgosi.nkaiseng@cdhlegal.com](mailto:kgosi.nkaiseng@cdhlegal.com)



**Mongezi Mpahlwa**  
Director  
Dispute Resolution  
T +27 (0)11 562 1476  
E [mongezi.mpahlwa@cdhlegal.com](mailto:mongezi.mpahlwa@cdhlegal.com)



**Lucinde Rhoodie**  
Director  
Dispute Resolution  
T +27 (0)21 405 6080  
E [lucinde.rhodie@cdhlegal.com](mailto:lucinde.rhodie@cdhlegal.com)



**Belinda Scriba**  
Director  
Dispute Resolution  
T +27 (0)21 405 6139  
E [belinda.scriba@cdhlegal.com](mailto:belinda.scriba@cdhlegal.com)



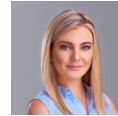
**Andrew MacPherson**  
Senior Associate  
Dispute Resolution  
T +27 (0)21 481 6359  
E [andrew.macpherson@cdhlegal.com](mailto:andrew.macpherson@cdhlegal.com)



**Pauline Manaka**  
Senior Associate  
Dispute Resolution  
T +27 (0)21 481 6395  
E [pauline.manaka@cdhlegal.com](mailto:pauline.manaka@cdhlegal.com)



**Vincent Manko**  
Senior Associate  
Dispute Resolution  
T +27 (0)11 562 1660  
E [vincent.manko@cdhlegal.com](mailto:vincent.manko@cdhlegal.com)



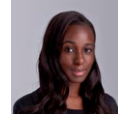
**Kylene Weyers**  
Senior Associate  
Dispute Resolution  
T +27 (0)11 562 1118  
E [kylene.weyers@cdhlegal.com](mailto:kylene.weyers@cdhlegal.com)



**Ngeti Dlamini**  
Associate  
Dispute Resolution  
T +27 (0)21 481 6474  
E [ngeti.dlamini@cdhlegal.com](mailto:ngeti.dlamini@cdhlegal.com)



**Courtney Jones**  
Associate  
Dispute Resolution  
T +27 (0)11 562 1731  
E [courtney.jones@cdhlegal.com](mailto:courtney.jones@cdhlegal.com)



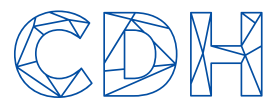
**Johanna Lubuma**  
Associate  
Dispute Resolution  
T +27 (0)11 562 1735  
E [johanna.lubuma@cdhlegal.com](mailto:johanna.lubuma@cdhlegal.com)



**Stephan Venter**  
Associate  
Dispute Resolution  
T +27 (0)11 562 1750  
E [stephan.venter@cdhlegal.com](mailto:stephan.venter@cdhlegal.com)



**Jessica Osmond**  
Candidate Associate  
Dispute Resolution  
T +27 (0)11 562 1067  
E [jessica.osmond@cdhlegal.com](mailto:jessica.osmond@cdhlegal.com)



CLIFFE DEKKER HOFMEYR

## 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



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



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



**Jose Jorge**  
Director  
T +27 (0)21 481 6319  
E jose.jorge@cdhlegal.com



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



**Sean Jamieson**  
Senior Associate  
T +27 (0)11 562 1296  
E sean.jamieson@cdhlegal.com



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



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



**Bheki Nhlapho**  
Senior Associate  
T +27 (0)11 562 1568  
E bheki.nhlapho@cdhlegal.com



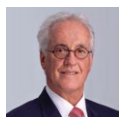
**Gillian Lumb**  
Director  
T +27 (0)21 481 6315  
E gillian.lumb@cdhlegal.com



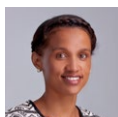
**Avinash Govindjee**  
Consultant  
M +27 (0)83 326 5007  
E avinash.govindjee@cdhlegal.com



**Asma Cachalia**  
Associate  
T +27 (0)11 562 1333  
E asma.cachalia@cdhlegal.com



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



**Riola Kok**  
Consultant  
T +27 (0)11 562 1748  
E riola.kok@cdhlegal.com



**Tamsanqa Mila**  
Associate  
T +27 (0)11 562 1108  
E tamsanqa.mila@cdhlegal.com



**Thabang Rapuleng**  
Director  
T +27 (0)11 562 1759  
E thabang.rapuleng@cdhlegal.com

### BBBEE STATUS: LEVEL TWO CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

### PLEASE NOTE

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

### STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.  
T +27 (0)21 481 6400 E cdh Stellenbosch@cdhlegal.com

©2020 9132/JULY

