DISPUTE RESOLUTION

BUSINESS RESCUE, RESTRUCTURING & INSOLVENCY

NEWSLETTER

Volume 18 | 19 April 2021

INCORPORATING
KIETI LAW LLP, KENYA

Tobie Jordaan
Sector Head
Director

Business Rescue, Restructuring & Insolvency

As the Easter weekend coincided with CDH's financial year end, we were given the opportunity to rest and appreciate the hard work and dedication that went into successfully getting us through this unprecedented and incredibly challenging previous year.

We are happy to announce that, despite the many obstacles which had to be overcome, we are back and ready to take on the next financial year with as much resilience and ingenuity which has historically characterised our firm. And we are not alone, as we are proud to further announce that CDH has joined forces with Nairobi-based boutique corporate law firm, Kieti Law LLP (Kieti). In the current incredibly challenging economic climate, this partnership results in significantly better offerings being available from both firms as we become better placed to assist our clients in capitalising on the economic opportunities present in both Eastern and Southern Africa.

In particular, we are pleased to welcome Sammy Ndolo, Desmond Odhiambo and Christine Mugenyu into the CDH Business Rescue, Restructuring & Insolvency Sector. Confident in the value which our new colleagues will add, we look forward to working with them in extending the Sector's service offering into East Africa.

Back in South Africa, we continue to monitor the developments in the SAA business rescue process. While there was hope that the state-owned airline would be taken out of rescue at the end of March, it seems that the ongoing disputes with the SAA Pilots Association (SAAPA) continue to delay the process. In response to the lockout implemented by the airline, SAAPA's members have started to strike to prevent the lockout being lifted in respect of certain pilots who are necessary to get the airline back into the air. At an executive level, SAA has further announced that Thomas Kgokolo has been appointed as its interim CEO; and charged with the responsibility of navigating the airline out of business rescue and into the hands of its interim management and board.

It seems that the SA Post Office (Sapo) has officially joined the growing list of state-owned entities that have been declared insolvent by the Auditor General. Sapo's annual financial year report revealed that its financial losses have significantly widened over the past year, as it records financial losses of

BUSINESS RESCUE, RESTRUCTURING & INSOLVENCY

NEWSLETTER

Volume 18 | 19 April 2021

Tobie Jordaan
Sector Head
Director

Business Rescue, Restructuring & Insolvency

R1,76 billion. Sapo's CEO, Nomkhita Mona, has however responded that she is confident that there is still opportunity to build a world-class and commercially viable postal service. As with our other struggling state-owned entities road to recovery, we look forward to monitoring what steps will be taken to attempt to return Sapo back to solvency.

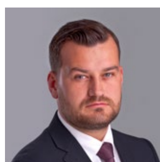
On a lighter note, in the face of the near-detrimental challenges posed to airlines by COVID-19, we have seen a number of airlines seek to adapt by bettering their offerings to passengers. In the spirit of remaining relevant and attractive to prospective passengers, South Africa's newest airline, Lift, announced a dog-friendly booking option which allows passengers to travel with their dogs in the aircraft's cabin. We can't help but wonder what COVID-19 safety protocols will be applicable to our furry friends as they take to the skies.

Continuing in the spirit of partnership, in this month's newsletter we have joined forces with our Employment Law colleagues to consider whether employees' terms and conditions of employment are really set in stone during business rescue; in light of the Constitutional Court's recent findings in *National Union of Metal Workers of South Africa and Others v Aveng Trident Steel (a division of Aveng Africa (Pty) Ltd) and Another* 2020 ZACC 23 and the provisions of section 136 of the Companies Act 71 of 2008.

Now that Government has concluded further agreements for a wider vaccine roll-out, and the Easter third wave angst seems to have subsided, it appears that everyone has gone back to the drawing board to focus on strategising the ways in which businesses are going to overcome the current difficult economic conditions. Having started the new financial year with our esteemed Kenyan colleagues amongst our ranks, the CDH Business Rescue, Restructuring & Insolvency Sector looks forward to continuing to assist our clients with forging forward with success.

Tobie Jordaan
Sector Head and Director

PRIMARY CONTACTS



Tobie Jordaan
Sector Head
Director
T +27 (0)11 562 1356
M +27 82 417 2571
E tobie.jordaan@cdhlegal.com

Richard Marcus
Director
T +27 (0)21 481 6396
M +27 82 902 9437
E richard.marcus@cdhlegal.com

Kgosi Nkaiseng
Director
T +27 (0)11 562 1864
M +27 76 410 2886
E kgosi.nkaiseng@cdhlegal.com

Employees Terms and Conditions of Employment – Are they written in stone under section 136 of the Companies Act

With the uptick in business rescues over the last year in South Africa, largely owing to the COVID-19 pandemic and the repercussions thereof, we have seen the courts grappling with many aspects of Chapter 6 of the Companies Act 71 of 2008 (the Act). A pertinent issue that has been at the fore of late is the interplay between the duties of a business rescue practitioner (BRP) in rehabilitating the business, and that of the rights of employees in the business rescue process.

In considering a BRP's task and obligation of having to balance the rights of all stakeholders, with further impositions of the decisions which have arisen out of labour laws in respect of employees' rights during this process, this task has become more onerous over the years as the law continues to develop.

Section 136 (1)(a)(ii) of the Act essentially provides that the terms and conditions of employment for the employees of a company under rescue may not be amended during business rescue, except where the employees have agreed to such amendment in accordance with the applicable labour laws. At first glance, it seems clear that a BRP is entirely prevented from effecting changes to the terms and conditions of employment for the employees of a company under rescue. However, in the recent case of *National Union of Metal Workers of South Africa and Others v Aveng Trident Steel (a division of Aveng Africa (Pty) Ltd) and Another* 2020

Volume 18 | 19 April 2021

Employees Terms and Conditions of Employment – Are they written in stone under section 136 of the Companies Act....*continued*

ZACC 23 (*Aveng*), the Constitutional Court (CC), outside a business rescue, confirmed that employers may, in certain circumstances, change the terms and conditions of their employees' employment where there is a genuine operational requirement, and as an alternative to retrenchment.

In this article we consider whether the CC's findings in *Aveng* creates an exception to the seeming prohibition contained in section 136(1)(a) of the Act, by allowing a BRP, when stepping into the shoes of the employer, to implement changes to terms and conditions of employment during business rescue, and if so, under what circumstances.

In *Aveng* the employer experienced economic difficulties and needed to restructure its business in order to survive and remain profitable. As part of its restructuring, it entered into a retrenchment process under section 189A of the Labour Relations Act (LRA). It was not sufficient for the employer to merely reduce its staff compliment, but it required an improvement in productivity and a lower cost base. During the retrenchment consultation process, the employer presented NUMSA with a new business model including redesigned jobs, which would mean changing the employees' terms and conditions of employment, as an alternative cost-saving measure to retrenchment. The consultation process was fraught with delays and obstacles which subsequently led to the employer and NUMSA reaching an impasse as to acceptable alternatives to retrenchment. The employer proceeded to implement the proposed change in the terms and conditions and dismissed those employees who did not accede to the new terms on the basis of its operational requirements.

Aggrieved by the employer's actions, NUMSA pursued legal recourse. It claimed that the employees were dismissed because they refused to accept the employer's demand in respect of a matter of mutual interest (changes to service conditions) and that the dismissal was accordingly automatically unfair under section 187(1)(c) of the LRA. After being heard by both the Labour Court and the Labour Appeal Court (LAC), the matter proceeded to the CC. Ultimately, the CC found, given the particular circumstances, that where an employer has dismissed its employees as a result of their refusal to accept proposed changes to their terms and conditions of employment, as an alternative to retrenchment and as part of a business restructuring to meet its operational needs, such dismissal will be for a fair reason; and not constitute a contravention of section 187 (1)(c) of the LRA.

Employees Terms and Conditions of Employment – Are they written in stone under section 136 of the Companies Act....*continued*

It is important to note that in the *Aveng* case the new operating model and redesigned jobs did not result in a reduction of remuneration for the employees.

In handing down this judgement, the CC made the following noteworthy remarks in respect of implementing changes to terms and conditions of employment as a result of a section 189 process:

- In an ever-changing economic climate characterised by increasing global competition, operational reasons not only relate to the downsizing of the workforce, but also to restructuring the manner in which an existing workforce carries out its work.
- Restructuring entails a number of possibilities, including shift system duties; adjusted remuneration; and merging of jobs or duties. Generally, businesses that adapt quickly will survive and prosper. Those that do not, will decline and fail.
- Realising its predicament, the employer in *Aveng* engaged with its employees through NUMSA regarding a change in the terms and conditions through a structured consultative process.

A BRP should be aware that a change to terms and conditions of employment may be considered and could be necessary during a business rescue. Employees may also reject such proposed changes.

However, just as in *Aveng*, the commercial reality remains that such changes may be necessary in order for the company to be rescued. In our experience, in many instances a change to service conditions of employees is a viable option in a rescue.

However, the question is whether, in view of the provisions of section 136(1)(a), a BRP is prevented from unilaterally implementing such changes where they are genuinely operationally required and have been rejected by the employees? The CC in *Aveng* specifically dealt with employers' (as opposed to BRPs') ability to unilaterally implement changes to the terms and conditions of employees' employment, and was accordingly not faced with considering what impact (if any) section 136(1)(a) of the Act had on this ability.

Considering that the BRP effectively steps into the shoes of the employer during business rescue, and that the purpose of business rescue is to restructure the company in accordance with its operational requirements, we are of the view that where an employer is entitled to unilaterally implement changes to terms and conditions of employment as an alternative to retrenchment; that a BRP has the same prerogative and is not constrained by section 136(1)(a) of the Act. This is especially so, since a company under business rescue is more likely to have genuine and *bona fide* economic reasons to do so.

Accordingly, a BRP should be entitled, under certain circumstances, to unilaterally implement a change in the terms and conditions of employment where:

- they have proposed a change in the terms of conditions of employment as an alternative to retrenchment to the employees, during an exhaustive consultative process; and
- such changes are genuine and arise from *bona fide* operational requirements of the company under rescue.

CDH was involved in the *Aveng* matter from the stage of the Labour Court through to the CC as the second affected employer.

Considering the now well-known LAC finding in *South African Airways (SOC) Limited and Others v National Union of Metalworkers of South Africa obo Members and Others* [2020] JOL 47663 (LAC) (SAA) that a retrenchment process may only be embarked on during business rescue where it has been contemplated in the business rescue plan, if a BRP foresees that a change in the terms and conditions of the employees' employment may be necessary during business rescue, the BRP must ensure that the possibility of a retrenchment is provided for in the business rescue plan, as a change to conditions of service occurs within such process.

The number of recent cases emanating out of the Labour Courts highlights the importance of a BRP also considering our employment laws, at the early stages of the overall business analysis when planning possible rescue scenarios.

Tobie Jordaan
Sector Head

Imraan Mahomed
Director

Jaden Cramer
Associate

Jessica Osmond
Associate

Joshua Geldenhuys
Candidate Attorney

OUR TEAM

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

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

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

Sammy Ndolo
Managing Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E sammy.ndolo@cdhlegal.com

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

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

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

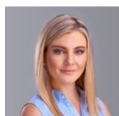
Desmond Odhiambo
Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E desmond.odhiambo@cdhlegal.com

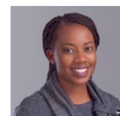
Lucinde Rhoodie
Director
Dispute Resolution
T +27 (0)21 405 6080
E lucinde.rhoodie@cdhlegal.com

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

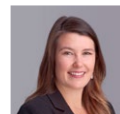
Ngeti Dlamini
Senior Associate
Dispute Resolution
T +27 (0)21 481 6474
E ngeti.dlamini@cdhlegal.com

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


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


Nomlayo Mabhena
Associate
Dispute Resolution
T +27 (0)11 562 1743
E nomlayo.mabhena@cdhlegal.com

Christine Mugenyu
Associate
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E christine.mugenyu@cdhlegal.com


Jessica Osmond
Associate
Dispute Resolution
T +27 (0)11 562 1067
E jessica.osmond@cdhlegal.com

Stephan Venter
Associate
Dispute Resolution
T +27 (0)11 562 1750
E stephan.venter@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

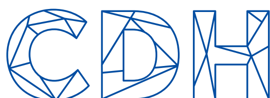
NAIROBI

CVS Plaza, Lenana Road, Nairobi, Kenya. PO Box 22602-00505, Nairobi, Kenya.
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114 E cdhkenya@cdhlegal.com

STELLENBOSCH

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

©2021 9937/APR



INCORPORATING
KIETI LAW LLP, KENYA