BUSINESS RESCUE, RESTRUCTURING & INSOLVENCY AND EMPLOYMENT LAW **ALERT**

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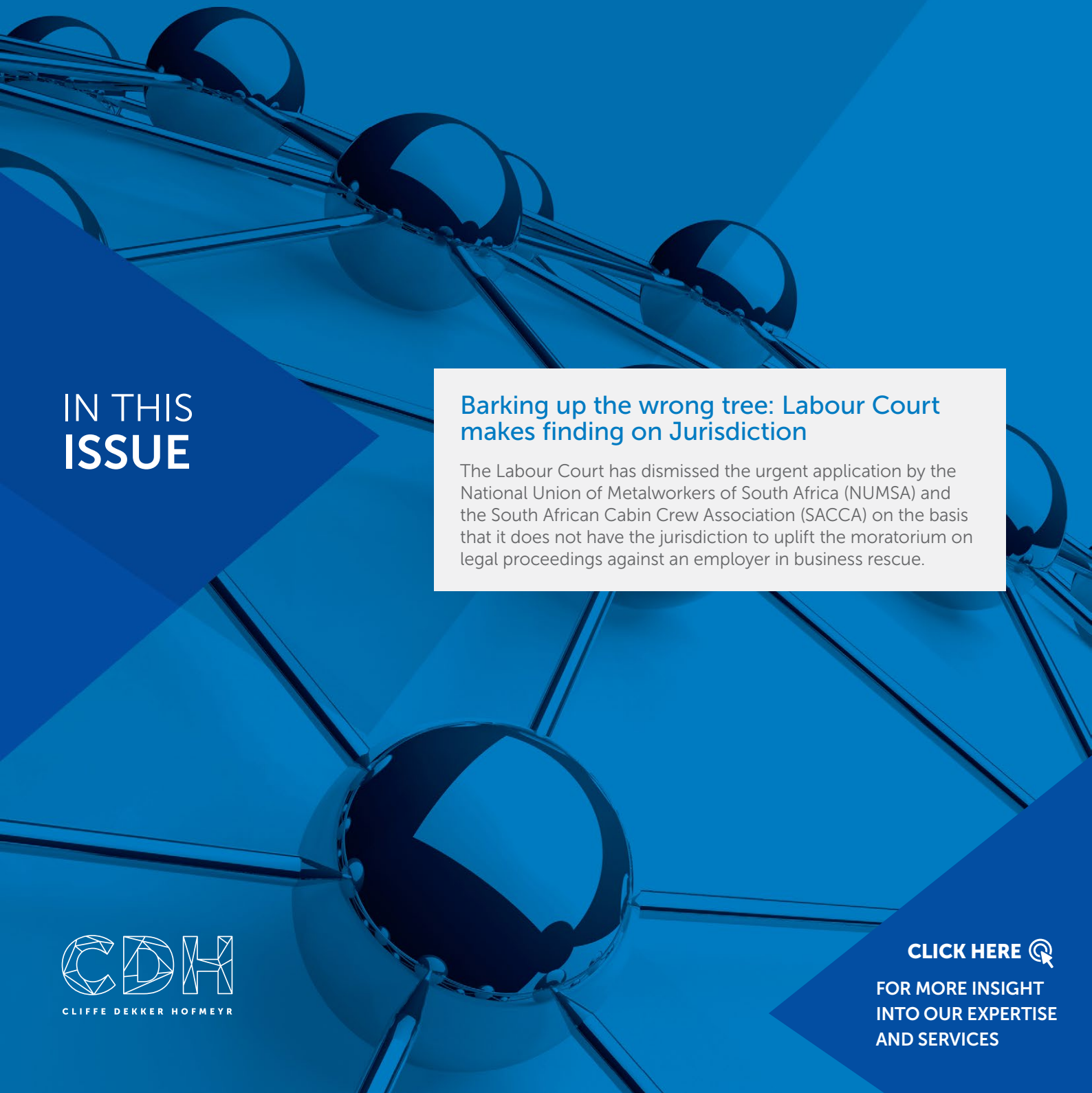

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On 8 February, 2021, the Labour Court (LC) handed down judgment in the next instalment of the seemingly continuous employment-related disputes which have arisen between NUMSA, on the one hand and South African Airways (SAA) on the other, during the currency of SAA's business rescue. However, this time the LC was prevented from diving into the substantive merits of the claim brought against SAA by NUMSA. The LC was instead required to fully ventilate the technical point of whether it even had jurisdiction to entertain the dispute considering the moratorium imposed in respect of legal proceedings against a company in business rescue.

Ultimately, the LC dismissed the application on the basis that it was not persuaded that it had jurisdiction over their claims.

Background

As has been widely reported on by now: SAA was placed under business rescue in December 2019. The cumulative impact of a business which was already ailing prior to COVID-19, together with the subsequent business-halting COVID-19 restrictions resulted in most SAA employees not being paid their remuneration since June 2020. After the adoption of SAA's business rescue plan in July 2020, the Department of Public Enterprises (DPE), acting as representative for the sole shareholder of SAA (being South African government), facilitated a settlement agreement (the Agreement) between SAA and 3,599 of its 4,597 employees.

In terms of the Agreement, these employees were paid three months' salary, arrear backpay of a 5.9% lump sum and a bonus payment for the 13th cheque in full and final settlement of their claims to the full remuneration due to them in terms of their employment contracts. In other words, these 3,599 SAA employees contractually waived their right to claim the rest of the outstanding remuneration due to them in terms of their employment contracts.

The applicants in this case formed part of a group of employees that declined the settlement proposal.

Motivated by perceptions of unequal treatment, amongst other things, NUMSA and SACCA brought the urgent application before the LC in which it claimed the payment of the same package that was paid to the employees who settled their claims by entering into the Agreement, to their members who had not entered into the Agreement. However, they demanded this payment without waiving any further claim for the rest of their outstanding remuneration.

To support their claim, firstly, they contended that SAA acted unlawfully by failing to abide by section 32(3)(a) of the Basic Conditions of Employment Act (BCEA). This section requires an employer (SAA) to pay remuneration not later than seven days after the completion of the period in which it becomes payable.

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As SAA's business rescue practitioners did not consent in writing to the legal proceedings before the LC, the LC turned to consider whether it qualified as a 'court' for the purposes of section 133 of the Act.

Secondly, the applicants contended that they were also entitled to payment of the same package (which was paid to those employees who settled) without compromising their claim to the balance of the remuneration, as in terms of the Companies Act, claims for remuneration which become payable during business rescue proceedings must be treated equally. On this contention, the fact that the applicants were not prepared to waive their rights to the balance of the renumeration owed to them, cannot impede their right to equal treatment in this regard.

Thirdly, it was also contended that to treat the applicants differently on account of electing not to accept the settlement offer (and thus preserving their right to claim the full amount of arrear salaries) amounts to discrimination on account of the applicants exercising their rights as set out in the LRA.

The DPE also showed interest in the matter and brought an application to be joined to the proceedings as the fourth respondent. Although this application was opposed, the court ultimately found that the DPE could validly be joined as the fourth respondent on grounds as set out in section 146 of the Companies Act 2008 (the Act) which provided that each shareholder of a company has the right to notice of, and participation in, any court proceedings arising during the business rescue of the company. The DPE was accordingly allowed to intervene and be joined as a matter of right, without having to show any sufficient interest in or prejudice in the outcome of the proceedings.

Moratorium on legal proceedings against SAA

Section 133 of the Act imposes a moratorium on legal proceedings against a company in business rescue. Consequently, during the moratorium, no legal proceedings may be instituted or continued against the company unless:

(a) the business rescue practitioner has consented thereto in writing; or

(b) the court has given leave to commence or continue legal proceedings against the company.

As SAA's business rescue practitioners did not consent in writing to the legal proceedings before the LC, the LC turned to consider whether it qualified as a 'court' for the purposes of section 133 of the Act. To that end, the LC referred to the applicable definition of 'court' in section 128 of the Act; and found that it made specific reference to the High Court, and to designated or assigned judges of the High Court.

Based on this definition, the LC found that the Legislature made it clear that the supervision of business rescue proceedings falls within the exclusive jurisdiction of the High Court; and accordingly, only the High Court is empowered to uplift the moratorium on legal proceedings against SAA. The LC held that this is so even for employment-related matters under the BCEA, where the LC has exclusive jurisdiction to deal with the merits of a claim.

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The LC further found that, regardless of whether or not the moratorium on legal proceedings against SAA had been lifted, it still did not have jurisdiction to deal with the merits of many of NUMSA and SACCA's claims.

The LC further commented that it is appropriate for the High Court to have exclusive jurisdiction in this regard, as it is best placed to weigh up the rights and interests of all the stakeholders - comprising of more than just employees - in an application for leave to commence legal proceedings against the company in business rescue.

The LC clarified that employees are still free to commence legal proceedings in the LC against their employer that has been placed under business rescue, but they must do so subject to the provisions of section 133 of the Act. This means that they must either obtain written consent from the business rescue practitioners or leave from the High Court to commence such legal proceedings in the LC, before actually doing so.

Claims relating to business rescue practitioners' conduct

The LC further found that, regardless of whether or not the moratorium on legal proceedings against SAA had been lifted, it still did not have jurisdiction to deal with the merits of many of NUMSA and SACCA's claims.

One of the causes for complaint raised by NUMSA and SACCA was that of the payment of the settlement amounts by the business rescue practitioners (BRP), after the commencement of business rescue proceedings. NUMSA and SACCA sought to raise the argument that such a payment constituted a breach in terms of section 135(3) in that the BRPs failed to treat all claims contemplated in section 135(1) equally. However, the court found that these amounts were made available to the practitioners, by a lender, on the condition that they were exclusively used for the settlement payments.

The conduct complained of was therefore that of the BRPs, and not the employer. The lawfulness thereof accordingly had to be determined in accordance with the provisions of the Act which regulate business rescue proceedings, and not any of our employment-related legislation. The LC therefore concluded that the lawfulness of the practitioners' conduct, or any alleged noncompliance with the business rescue plan or the Act, did not fall to be determined by it but instead by the High Court.

Conclusion

In conclusion, the LC has highlighted that while striking a balance between the interests of employees, as stakeholders in the business; and the business itself, is necessary, the LC does not have jurisdiction, without leave of the High Court or consent of the business rescue practitioners to lift the moratorium on legal proceedings against a company in rescue in accordance with section 133 of the Act.

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The court held that the offer to settle a claim for some seven months remuneration by accepting payment of three months' pay, in full and final settlement, was made to all of the affected employees (including the applicants).

In dealing with the alleged breach of section 32(3)(a) of the BCEA, the LC held that this provision prescribed that remuneration must be paid not later than seven days after completion of the period in which the remuneration is payable and when it is owing. Where remuneration becomes due and payable during business rescue proceedings, and it is not paid to the employees, this is to be regulated by section 135 of the Act, which establishes an order of preference as between employees and other creditors.

Regarding the applicants' contention that they have been discriminated against, this contention was rejected. The court held that the offer to settle a claim for some seven months remuneration by accepting payment of three months' pay, in full and final settlement, was made to all of the affected employees (including the applicants). It therefore cannot be said that there is any discrimination against those employees who refused to compromise their claims. As such, there is nothing improper or unlawful about any agreement to compromise a claim for remuneration.

As for the applicants, they are still able to enforce their claims in due course for the full amount of arrear salaries (subject to the provisions of the Act).

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