



AIPSA 1ST ANNUAL INSOLVENCY CONFERENCE

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LABOUR LAW LEGISLATION AND ITS IMPACT ON INSOLVENCY PRACTICE AND THE REALISATION OF BUSINESSES AS GOING CONCERNS

BY SONIA DE VRIES





1. INTRODUCTION

- ❖ Right to fair labour practices – Section 23 of the Constitution of the Republic of South Africa, 108 of 1996
- ❖ NATIONAL ENTITLED WORKERS' UNION v CCMA (2003) 3 ILV 2335 (LC)
- ❖ Imperatives
 - ❖ to create and maintain employment
 - ❖ Address the inadequate protection of vulnerable employees
 - ❖ Encourage alternatives to unemployment due to insolvency
 - ❖ Provide certainty for employers and employees on their rights and obligations in insolvent circumstances
 - ❖ Eradicate poverty and create proper work for all
 - ❖ Promote economic growth and better living standards
- ❖ Inconsistencies between LRA and IA
- ❖ Amendments to Labour Relations Act, 66 of 1995 (LRA) and Insolvency Act, 12 of 2002 (IA)
- ❖ The Critics
- ❖ Business Rescue



2. PREVIOUS POSITION

- ❖ Employment terminated
- ❖ Limited claims against insolvent estate
- ❖ Conflict in operation of S197 of LRA and S38 of IA



3. PRESENT POSITION

S197A of LRA

Applies to transfers of business as a going concern:

- Where employer is insolvent, or
- A scheme of arrangement or compromise is being entered into

Consequences despite the provisions of the IA and in the absence of any contrary agreement (as per s197(6) of the LRA):

- Old employer is substituted by the new employer iro all existing employment contracts in existence immediately before the old employer's provisional winding up or sequestration (compare "date of transfer" – s197(2)(a))
- The rights and obligations between the old employer and the employees at the date of transfer remain between those parties



PRESENT POSITION CONT'D

- No conduct on the part of the old employer is considered to have been done by new employer
- Transfer of a contract of employment means continuity of employment
- The new employer has some flexibility regarding new terms and conditions for the transferred employees provided these are on the whole not less favourable than those of the old employer
- Collective agreements and arbitration awards in existence immediately before the old employer's provisional winding up or sequestration are enforceable against the new employer



PRESENT POSITION CONT'D

There is no obligation on the new employer to:

- Conclude an agreement with the employees (s197(7))
- Pay employees any leave pay accrued, severance pay or other contractual entitlements that accrued prior to the date of transfer

HUGO v SHANDELIER HOTEL GROUP CC (In Liquidation) on OS [2000] 9 BALR 1004 CCMA)

3.2 Section 38 of IA

- Has the effect of suspending contracts of employment from the date of the granting of the sequestration/winding-up order, including a provisional order
- Employees do not render services, are not remunerated nor do they accrue any employment benefits during the suspension period



PRESENT POSITION CONT'D

- Employees are entitled to claim unemployment benefits from date of that suspension as though they are unemployed
- The trustee/liquidator, finally appointed, may not terminate the employment of any employee unless he has consulted with
 - Persons designated in terms of a collective agreement
 - A work place forum; or
 - Affected employees and/or their trade unions; and consider any written proposals submitted, if any must be made in writing within 21 days of appointment of trustee/liquidator, or as agreed
(seemingly the 21 day period must expire before the trustee/liquidator can terminate)



PRESENT POSITION CONT'D

- Consultation is meant for the parties to engage in an attempt to reach consensus on appropriate measures to save or rescue the whole or part of the business by:
 - Sale of whole or part
 - Transfer in terms of s197A
 - A scheme or arrangement or compromise in terms of section 311 of the Companies Act
 - Or any other manner
- A creditor may attend that consultation process with the consent of the liquidator/trustee



PRESENT POSITION CONT'D

- Unless liquidator or trustee and an employee agree on continued employment, all suspended contracts automatically terminate 45 days after the date of the former's final employment
- An employee whose contract has been suspended or terminated has a claim against the insolvent estate for loss suffered as a consequence
- Employees whose contracts of service terminate or are terminated are entitled to severance benefits under s41 of BCEA from the insolvent estate.



4. CONSULTATION UNDER SECTION 38 OF THE IA

- ❖ Purpose
- ❖ Stakeholders
- ❖ Failure to consult?

5. SEVERANCE

- ❖ HAMMOND v L. SUZMAN DISTRIBUTORS (PTY) LTD (1999) 20 ILV 3010 (CCMA)
- ❖ Section 41 of the BCEA

6. TRANSFER AS A GOING CONCERN

- ❖ What does this mean?
- ❖ NATIONAL EDUCATION HEALTH & ALLIED WORKERS UNION v CAPE TOWN UNIVERSITY OF CAPE TOWN 2003 (3) SA 1 (CC)
- ❖ CEPPWAWU v CORDERO & ANOTHER [2008] JOL 21095 (LC) – 2nd Respondent contended for a sale of assets and therefore not a transfer under Section 197A



7. SALE OF SHARES

- ❖ NDIMA v WAVERLY BLANKETS LTD (1999) 6 BLLR 577 (LC)

8. ACTUAL OR COMMERCIAL INSOLVENCY?

- ❖ Insolvent but no order granted
- ❖ Section 197A - “is insolvent”



9. WHICH EMPLOYMENT CONTRACTS TRANSFER?

- ❖ Prior to sequestration / winding up
- ❖ After sequestration / winding up
- ❖ After commencement of creditors voluntary winding up



10. NOTICE OF SEQUESTRATION / WINDING UP

- ❖ Labour Relations Act – Section 197B
- ❖ Insolvency Act
- ❖ Companies Act
- ❖ Close Corporations Act
- ❖ Obligation to disclose financial difficulties
- ❖ Potential consequences of that disclosure
- ❖ Notice to employees and trade union



11. VOLUNTARY SEQUESTRATION / LIQUIDATION

- ❖ NATIONAL UNION OF LEATHER WORKERS v BARNARD AND PERRY NNO
2001 (4) SA 1261 (LAC)



12. APPOINTMENT OF TRUSTEE / LIQUIDATOR
13. STATUS OF CLAIMS
14. NON COMPLIANCE WITH LRA
15. FORA FOR DISPUTES
16. CONCLUSION