


06

LEGAL
CONSEQUENCES:
EFFECTS ON
EMPLOYMENT AND
OTHER CONTRACTS


WERKSMANS
ATTORNEYS

in collaboration with

proudly presents

Contract



Presented by

Dr Eric Levenstein

Effect of business rescue on employees

01

The status and participation of employees

02

Effect of business rescue on contracts

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Suspension or cancellation of contracts

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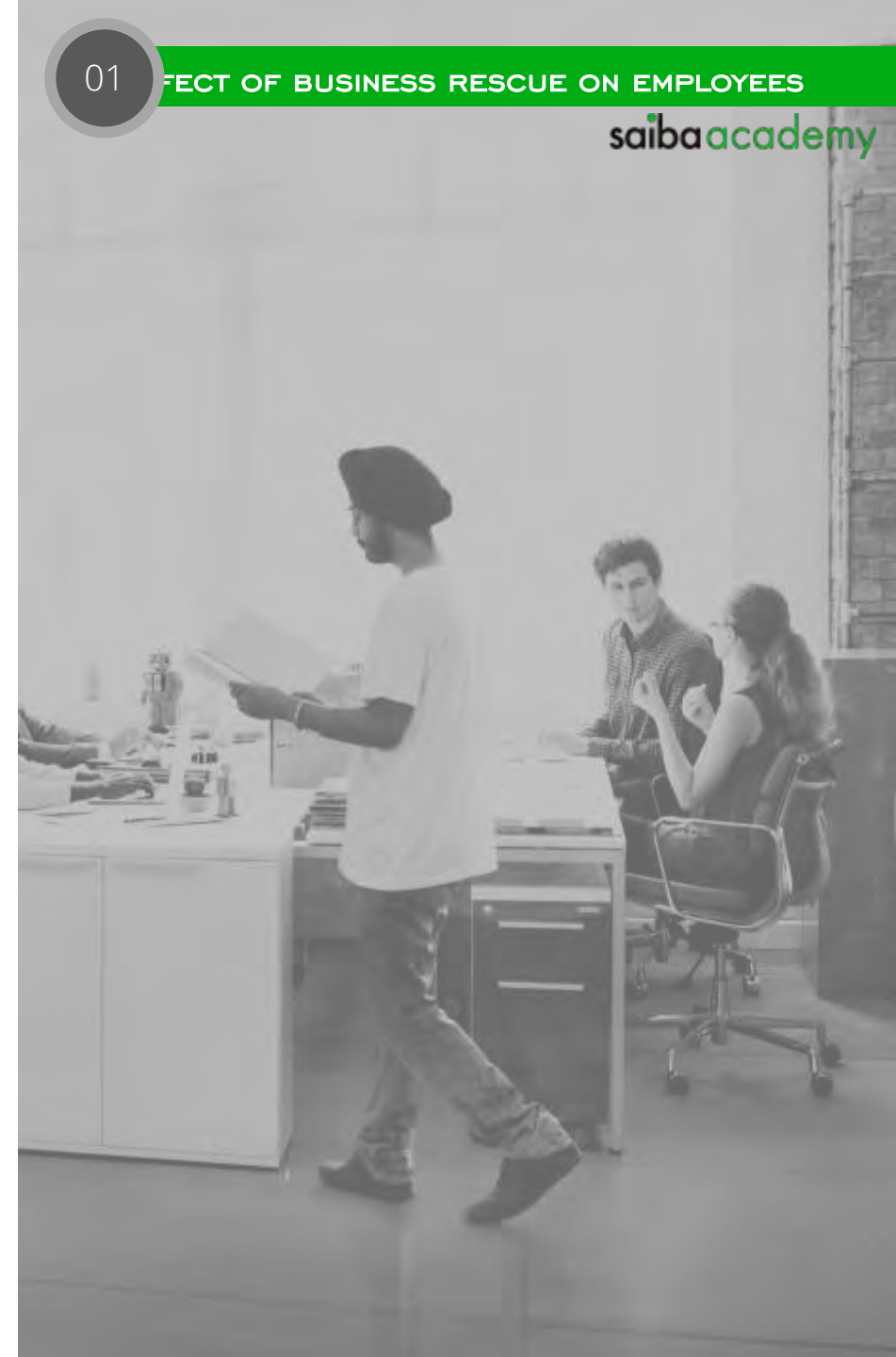
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Effect of business rescue on employees

- A proper balance must be struck between the needs of employees and the interests of creditors and other stakeholders
- Employees are included in the definition of affected person and one of the major objects of business rescue is to preserve employment
- Employees rank as "superpriority" creditors in the ranking of claims. Claims by employees are considered and ranked as Post-Commencement Finance
- Employees have an opportunity to participate in the business rescue proceedings and are in a better position overall, in comparison with liquidation
- Employees are entitled to –
 1. notice of each court proceeding, decision, meeting or other relevant event
 2. participate in the business rescue and related matters
 3. form a committee (employees' representative committee)
 4. be consulted by the business rescue practitioner during the development of the business rescue plan
 5. be present and make submissions at the meeting of creditors when the plan is voted on
 6. vote with creditors to approve the business rescue plan
 7. if the plan is rejected, propose the development of an alternate plan or present an offer to acquire the interests of one or more affected persons



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- Section 136(1)(a) – during business rescue proceedings, employees of the company immediately before the beginning of those proceedings continue to be so employed on the same terms and conditions
- This is subject to 2 exceptions –
 1. Changes in employment, terms and/or conditions may occur in the ordinary course of attrition; or
 2. The employees and the company, in accordance with applicable labour laws, may agree on different terms and conditions of employment.



Retrenchments of employees – Section 136(1)(b)

- Section 136(1)(b) – any retrenchment of any such employees contemplated in the company's business rescue plan is subject to section 189 and 189A of the Labour Relations Act 66 of 1995 ("LRA")
- The interpretation of this section was dealt with by the Labour Court in **National Union of Metalworkers of South Africa (NUMSA) obo Members & Another v South African Airways and Others (J424/20: 8 May 2020)** and was confirmed on Appeal to the Labour Appeal Court
- the Labour Court was tasked with determining whether business rescue practitioners could dismiss employees on the basis of operational requirements, in terms of section 189 of the LRA, before a business rescue plan contemplating such retrenchments has been prepared and presented
- Held – business rescue practitioners may not initiate retrenchment processes before a business rescue plan providing for such retrenchments has, at least, been presented
- Held – consultation process over proposed retrenchments was found to be procedurally unfair because proposed retrenchments were not in terms of a business rescue plan



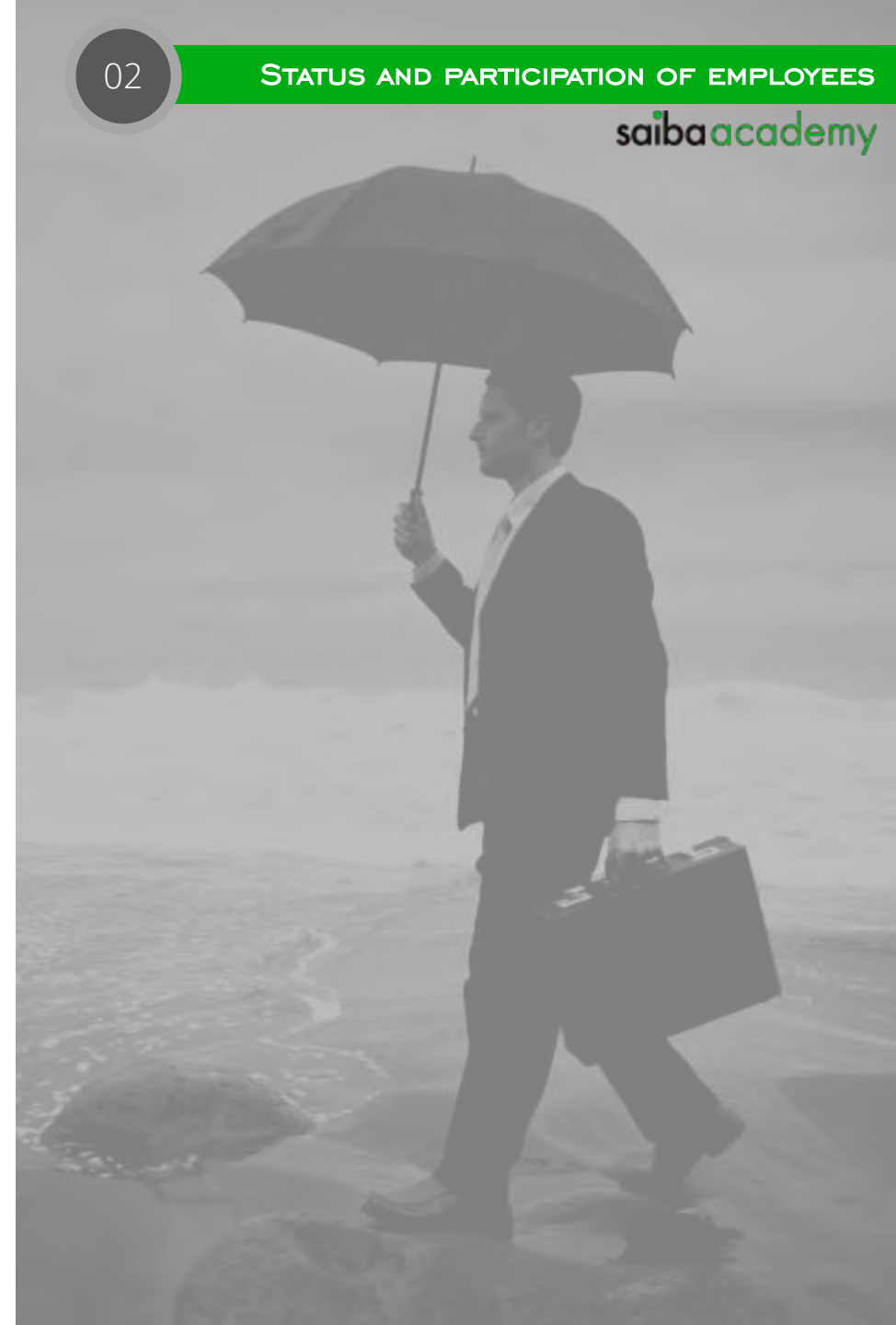
The status and participation of employees

- Section 136(2)(a) – during business rescue proceedings, the business rescue practitioner may not suspend any provision of an employment contract
- This ensures that job preservation remains paramount, and that employees as the lifeblood of the company are retained, in order to facilitate the rescue process
- Employees are in a better position under business rescue than they would be in a liquidation
- Employee participation in the business rescue process is provided for in section 144(1) of the Companies Act
- Section 144(1) – during business rescue proceedings, any employees of the company represented by a registered trade union may exercise any rights set out in Chapter 6 of the Companies Act collectively through their trade union and in accordance with applicable labour law
- Where the employees are not represented by a registered trade union, such employees may elect to exercise any rights set out in Chapter 6 either directly, or by proxy through an employee organization or representative
- Trade unions are able to apply to the court for compulsory business rescue (as affected persons in terms of section 128(1)(a)) and are entitled to demand access to a company's financials for this purpose (section 31(3))



The status and participation of employees

- Section 144(2) – if an employee had any employment related claims in existence immediately prior to the commencement of business rescue proceedings, such employee would qualify as having a statutorily "preferred" unsecured claim
- The pre-commencement employees are treated as "preferred unsecured creditors"
- Therefore employees must be paid in preference over other unsecured (concurrent) creditors
- Section 148 – the business rescue practitioner must convene a meeting of employee representatives within 10 business days after his or her appointment
- The business rescue practitioner must offer all employees an opportunity to appoint an employee's representative committee and confirm whether there is a reasonable prospect of rescuing the company
- The business rescue practitioner must properly engage with employee representatives from the outset



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Section 133(1) of the Companies Act

- During business rescue proceedings, no legal proceeding against the company, including enforcement action, or in relation to any property belonging to the company, or lawfully in its possession may be commenced in any forum **except** –
 - with the written consent of the practitioner,
 - with the leave of the court and in accordance with any terms the court considers suitable,
 - as a set-off against any claim made by the company in any legal proceedings, irrespective of whether those proceedings commenced before or after the business rescue proceedings began,
 - criminal proceedings against the company or any of its directors or officers.

Cloete Murray No & Another v First Rand Bank Limited t/a Wesbank 2015 (3) SA 438 (SCA)

- the cancellation of an agreement during business rescue does not constitute “enforcement action” or “legal proceedings” and is not caught by the moratorium. Confirmed by the SCA on appeal – 26 March 2015



Contracts and the moratorium

LA Sports 4X4 Outdoor CC & Another v Broadsword Trading 20 Proprietary Limited and Others (A513/2013) [2015] ZAGPPHC 78 (26 February 2015)

- cancellation of a contract during business rescue does not constitute legal proceedings or enforcement actions as contemplated in s133(1) – it is a juristic act
- Section 133(1) imposes a general moratorium which prohibits the commencement of legal proceedings against the company and does not prohibit the performance of juristic acts
- rights under a contract do not constitute property in the possession of the company

178 Stanfordhill CC v Velvet Star Entertainment CC (1506/15) [2015] ZAKZDHC 34 (1 April 2015)

- landlord validly cancelled the lease agreement and was entitled to evict the tenant despite the operation of business rescue



Contracts and the moratorium

Barloworld South Africa Proprietary Ltd v Blue Chip Mining & Drilling (Pty) Ltd & 2 Others (unreported NCK case no.332/2015 19 March 2015) (Northern Cape)

- Barloworld leased equipment to Blue Chip
- Held - termination of the rental agreement was permissible as it did not constitute legal proceedings or enforcement action and did not require leave of the court in terms of the moratorium
- Barloworld was entitled to the return of the movable property despite the operation of the moratorium, because upon termination the property was not lawfully in the possession of the company

Southern Value Consortium v Tresso Trading 102 (Pty) Ltd (Klopper and Another as Intervening Business Rescue Practitioners) (16139/2015) [2015] ZAWCHC 174 (23 November 2015)

- Facts - Tresso Trading (tenant) operated its business from premises owned by Southern Value Consortium (landlord). Tresso Trading fell into arrears with its rental payments, the landlord cancelled the lease (May 2015) and Tresso Trading filed for business rescue (September 2015). The landlord applied for eviction of Tresso Trading
- Held – a company in business rescue that unlawfully occupies premises after a lease has been validly cancelled cannot rely on the moratorium against legal proceedings to justify its illegal occupation nor on section 134(1)(c) of the Companies Act
- It could not have been the Legislature's intention that the company in business rescue would restructure its affairs by utilising assets to which it has no lawful claim



Contracts and the moratorium

Kythera Court v Le Rendez-Vous Café t/a Newscafe Bedfordview
(In Business Rescue) (2016/11853) [2016] ZAGPPHC 172 (22
June 2016)

- Facts - Kythera (landlord) leased premises to Newscafe Bedfordview (tenant) which fell into arrears with its rental before business rescue. Kythera was placed in business rescue in December 2015. Kythera cancelled the lease (March 2016) and applied for eviction of Newscafe
- Held – company in business rescue cannot rely on the moratorium against legal proceedings when it is in unlawful possession of property and vindicatory proceedings or proceedings for the repossession or attachment of property in the unlawful possession of a company in business rescue would be permissible



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- The business rescue practitioner can suspend or cancel prejudicial contracts that have a detrimental effect on the company's viability, solvency, or ability to trade effectively
- Section 136(2) - Practitioner may -
 - entirely, partially or conditionally suspend, for the duration of the proceedings, any obligation of the company that -
 - ❖ arises under an agreement to which the company was a party at the commencement of the proceedings; and
 - ❖ would otherwise become due during those proceedings; or
 - apply **urgently** to court to entirely, partially or conditionally cancel, on any terms that are just and reasonable in the circumstances, any agreement to which the company is party.
- In this regard, the counter-party can only assert a claim for damages (a concurrent claim) and not specific performance.
- Contracts can be cancelled (entirely, partially, or conditionally) only if the business rescue practitioner applies to court on an urgent basis
- Cancellation will be ordered by the court only if the grounds for cancellation are just and reasonable
- The opportunity to cancel contracts allows the business rescue practitioner to extricate the company from onerous contractual provisions that are preventing the company from becoming a successful concern



Suspension or cancellation of contracts

BP Southern Africa (Pty) Ltd v Intertrans Oil SA (Pty) Ltd and Others 2017 (4) SA 592 (GJ) [Van der Linde JJ]

- Facts – Business Rescue Practitioners suspended the company's obligations in terms of a Branded Distribution Agreement with the company's supplier of some 16 years. That included its obligation to buy product exclusively from BP; to use BP's branding; to use BP's equipment; and to pay rental in respect of the premises which it occupies
- Held - if a Business Rescue Practitioner suspends an obligation of the company in business rescue, a creditor who had reciprocal obligations would have available to it the exceptio non adimpleti contractus (the right to withhold performance of a reciprocal obligation) and, if the normal rules of materiality and contractual notices applied, the normal right of cancellation similarly applies
- Therefore - the Business Rescue Practitioners' suspension of the company's obligations entitled the creditor to withhold product, access to the leased premises and equipment, and to cancel the relevant agreement on appropriate notice

Homez Trailers and Bodies Proprietary Limited v The Standard Bank of South Africa Limited (35201/2013) [2013] ZAGPPHC 465 (27 September 2013)

- Bank suspended, and the court agreed that the bank was entitled to suspend, the use of the overdraft facility
- Practitioner can only suspend the obligations of the company in distress and cannot force the counterparty to perform if it is entitled to terminate or suspend an obligation





End of Unit 06



THANK YOU

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