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COVID-19 - NUMSA v SAA – The death knell to successful business rescue?

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On Friday, 8 May 2020, the Labour Court upheld an urgent application by the National Union of Metalworkers of South Africa (NUMSA) and the SA Cabin Crew Association (the Unions) against South African Airways (SAA) and its business rescue practitioners (BRPs) and ordered that it was procedurally unfair to retrench employees ***before*** a business rescue plan contemplating such retrenchments was published and adopted.

Business rescue has as its purpose the recovery of financially distressed companies in a manner that balances the rights and interests of ***all*** stakeholders, being creditors, shareholders, employees and registered trade unions. Where it is impossible to return the company to solvency, the secondary aim is to achieve a better return for stakeholders, including employees, than the immediate liquidation of the company would have yielded.

The Unions argued that section 136(1)(b) of the Companies Act 71 of 2008 (the Companies Act) only empowers the SAA BRPs to commence with and effect retrenchments if such retrenchments were "*contemplated in the company's business rescue plan*". Since the SAA business rescue plan had not yet been published or adopted, any attempt to retrench employees was found to be in breach of section 136(1)(b) of the Companies Act.

The Labour Court considered the matter from the vantage point of the Constitutional right to fair labour practices, which is embodied in the Labour Relations Act (LRA). The Labour Court reasoned that if there was an interpretation of section 136(1)(b) that better promotes the preservation of work security, then that interpretation ought to be preferred. Although this is a laudable ideal it is, in our view, wrong in law. The real question should be whether section 136(1)(b) could be interpreted in line with the LRA and if not, whether a limitation of the Constitutional protections were reasonable (an inquiry which the Labour Court did not make).

It was not considered by the Labour Court that, in terms of section 140(1)(a) of the Companies Act, the SAA BRPs have full managerial control of SAA in substitution of its board of directors and pre-existing management and this is ***in addition*** to any powers given to them under the Companies Act. As such, unless the Companies Act expressly provided to the contrary, the SAA BRPs could, just like the SAA board of directors, commence and implement retrenchments provided that they comply with the LRA when doing so.

In our view, section 136(1)(b) does no more than to state the obvious. Since an adopted business rescue plan is binding on all affected persons, section 136(1)(b) simply ensures that the adopted business rescue plan does not give the company the right to retrench employees without following the procedures set out in the LRA. In other words, it merely reaffirms the right to fair retrenchments and, in this regard, limits what the business rescue plan can achieve. It does not create a moratorium on retrenchments before the business rescue plan is published and adopted.

In addition, the Labour Court confirmed that nothing prevents a BRP from offering voluntary severance packages to avoid retrenchment before the business rescue plan is published. This does not make sense because, in the context of business rescue, the mere fact that voluntary severance packages have been offered (as an alternative to retrenchment) is indicative that retrenchments were already contemplated (but outside of a published and adopted business rescue plan). The interpretation of section 136(1)(b) does not properly balance the interest of ***all*** stakeholders in the business rescue process and in fact may well prejudice the rights of employees to participate in meaningful consultations with a view to finding alternatives to their retrenchment (as the delay in doing so may overtake the available options).

This judgment unfortunately gets it wrong. Employees are still protected against unfair retrenchments but such protection does not equate to a moratorium against retrenchments until the business rescue plan (expressly including retrenchments) is adopted.

It is by no means an overstatement to say that the *NUMSA v SAA* judgment, if not urgently overturned on appeal, will render the majority of business rescues unlikely to succeed. At a time when we expect many businesses to become financially distressed as we grapple with the impacts of COVID-19, this is another disruption-event to contend with.

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