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EMPLOYMENT

South African Airways – Business rescue practitioners hold the reins

4 March 2020 *4 min read*

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The fate of South African Airways remains inscrutable, and recently there appears to have been some division between the management of SAA and the newly appointed business rescue practitioners, as to the best way to rationalise SAA's operations to ensure its continued operation. Management and labour have expressed dissatisfaction at the recent announcement by the business rescue practitioners to cancel a limited number of domestic routes. There is an apparent tension between the operational decisions of the business rescue practitioners and management, which may still claim to know its business better than an outsider.

With regard to the impact of the business rescue process on employment, on the one hand the good news for labour and for unions, is that the appointment of the business rescue practitioners has no impact whatsoever on the underlying contracts of employment, and the employment relationships continue with the legal entity in business rescue continues as if business rescue had not happened at all. As such, employees who are employed by a company that is placed into business rescue remain employed and remain entitled to protection from unfair dismissal, unfair labour practice and other rights guaranteed by the Labour Relations Act, 66 of 1995, and also for their employer to continue complying with the Basic Conditions of Employment Act, 75 of 1997. Additionally, all other labour laws and protections remain in full effect. This is unlike the case when a company is placed into court ordered liquidation, in which event the contracts of employment are immediately suspended by operation of law, employees are not entitled to any payment of salary, and expire within 45 days of the date of being placed into liquidation.

However, there is one large caveat. In terms of the newly introduced business rescue provisions of the Companies Act, 71 of 2008, namely section 133, which provides that "during business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except with the written consent of the practitioner, or the leave of the court". These provisions, referred to as the "breathing space moratorium", in that they are recognised by the courts to be necessary to provide the stressed business with breathing space to deal with its operational issues, without having to be exposed to legal claims, also apply to labour claims. This much is confirmed by the decision of the Labour Court in recent challenge to Group Five Construction during its ongoing business rescue proceedings, in which the courts found that "legal proceedings" include labour claims in the CCMA or Labour Courts, and that this moratorium, originating in the Companies Act, is not incompatible with the LRA. As such, although the business rescue provisions would be required to ensure that, for example, any retrenchment of employees to alleviate economic operational requirements is fair and compliant with the requirements of section 189 or 189A of the LRA, any retrenched employees would not be able to challenge the fairness of any such dismissals, or take legal action to compel their employer to make payment of the statutory severance payments, or even salaries if they go unpaid, for so long as the employer remains in business rescue. A slight consolation to the above is that if "any remuneration, reimbursement for expenses or other amount of money relating to employment" becomes owing to employees during the business rescue proceedings, these monies are regarded as post-commencement financing and are preferent above any unsecured claims against the company, and will ordinarily be dealt with in the approved business rescue plan.

The business rescue practitioners have the legal right to direct the affairs of the company in business rescue, and the board of directors and other management loses a significant degree of control and decision making ability. Coupled with the moratorium against legal proceedings,

the business rescue practitioners hold a powerful position to make whatever arrangements they believe are necessary to save the distressed company.

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