

EMPLOYMENT

# South African Airways in Business Rescue – No retrenchments until the business rescue plan requires it

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On 9 July 2020, the Labour Appeal Court (“**Labour Appeal Court**”) handed down the much anticipated judgment relating to the embattled South African Airways, and the dispute between the business rescue practitioners of the national carrier and the unions about when an entity in business rescue can commence a retrenchment exercise. The Labour Court had originally found that the business rescue practitioners are only legally entitled to commence a retrenchment consultation process in terms of section 189 the Labour Relations Act (“**LRA**”), after it has set out that retrenchments may be necessary in its business rescue plan. The business rescue practitioners continued to dispute that this was legally required, and sought the matter to be clarified on appeal.

However, similarly to the reasoning of the original court, the Honourable Judge Phatsoane in the Labour Appeal Court was of the view that the answer lies in the proper interpretation of section 136 of the Companies Act, which requires that “*any retrenchment of ...employees contemplated in the company’s business rescue plan is subject to section 189 and 189A of the Labour Relations Act, and any other employment legislation.*”

The unions in the matter argued that the existence of the business rescue plan, and the need for retrenchments being set out in the plan, is a precondition for the commencement of a retrenchment exercise under the LRA and that only when the business rescue plan is finalised may employees be retrenched in accordance with section 189 of the LRA. The crux of the counsel’s argument is:

*“this was the only “sensible” and “business – like” meaning that could be attributed to the subsection [136(1)(b)] because a BRP cannot decide precisely who to retrench until it is known how the company will be restructured and saved through a business rescue plan. If this was not the case...then conceivably employees would be retrenched only to find that the business rescue plan, in a final form, required them to be retained and that another distinct group of employees be retrenched....[T]o implement retrenchments in order to inform the shape and content of the future business rescue plan would be to put the cart before the horse and permits unlawful “pruning” of the business in order to achieve a future outcome (which may potentially also constitute an automatically unfair dismissal in terms of s 187(1)(g) of the LRA).*

The Labour Appeal Court agreed and held that the issuing of section 189 retrenchment notices by the BRPs, prior to the business rescue plan being tabled, was premature and procedurally unfair and had to be withdrawn. This finding was largely based on an approach that the “*primary aim of a business rescue is to rescue the entire company or corporate entity and not only the successful parts...[and] this includes the preservation of jobs*”.

The Labour Appeal Court further confirmed the Labour Court’s position that a BRP is not prohibited from unilaterally offering voluntary severance packages to employees.

Although this approach is problematic for the timing of the business rescue process, the reasoning adopted by the courts makes sense as the business rescue plan would explain the need for retrenchment as an attempt to better the fortunes of the company and ultimately rescue the company. The ultimate purpose of section 136 is to protect the interests of employees

during business rescue proceedings. Logically, the court excluded voluntary separation programs from this requirement, as these are retrenchment exercises which side-step and which do not require the commencement or following of a section 189 process.

Although the rights of the business rescue practitioner to retrench employees in an entity, which is in business rescue remain applicable in terms of the LRA, the BRP can now only do so after the proposal has been set out in the business rescue plan. At least, the Labour Court had held, it was not required that the business rescue plan be adopted or accepted, and instead the court opined that *"it may well be that the production of a business rescue plan, even in draft form is sufficient."* However, unlike the Labour Court, the Labour Appeal Court did not give guidance as to whether the plan should be in draft form or finalised. As such, the approach adopted by the Labour Court should be followed.

Nevertheless, from a business rescue perspective the judgment has devastating implications, especially as business rescue practitioners are appointed when the business is fighting for survival, but now has an additional period of time to wait before it can begin the necessary consultation process to affect any restructuring.

An additional issue for consideration is that section 189 requires an employer to issue the section 189(3) notices when it contemplates dismissal; the ruling in the SAA case would place an employer in business rescue in contravention of this duty, by making it have to wait for the business rescue plan to be presented although the court found that the contemplation of dismissal can only arise once provided for in the business rescue plan, a semantically convenient if not necessarily correct skirting of this fundamental issue. This remains a contradiction which was not addressed by the Court.

At present, it is critical for business rescue practitioners to realise that they will have to follow the approach adopted by the Labour Appeal Court in this case, and wait until retrenchments are proposed in the first tabling of the business rescue plan. Only thereafter can they issue the section 189 notices to start the consultation process. The need to have a first draft of the business rescue plan out quickly is now more important than ever.



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