

EMPLOYMENT

Turbulence in the Business Rescue of SAA – a new hurdle on the retrenchment track?

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On 08 May 2020, the Labour Court handed down what could be considered a seminal judgment on the issue of retrenchment in the context of business rescue proceedings.

The National Union of Metalworkers of South Africa and the South African Cabin Crew Association brought an urgent application before the Labour Court wherein the two unions sought to challenge the procedural fairness of the intended retrenchments at South African Airways (SOC) Limited ("**SAA**"). This was spurred on by the notice in terms of section 189(3) of the Labour Relations Act No. 66 of 1995 ("**LRA**") issued by SAA's business rescue practitioners on 09 March 2020.

The succinct question before the Labour Court was whether the issuing of the section 189(3) notice in the absence of a published and adopted business rescue plan (as envisaged in section 136(1)(b) of the Companies Act No. 71 of 2008) was in accordance with a fair procedure. Simply put, can the section 189 retrenchment process commence in the absence of a business rescue plan.

The Labour Court found that on a proper interpretation of section 136(1) of the Companies Act, a business rescue practitioner was not permitted to initiate the retrenchment process in the absence of a business rescue plan contemplating retrenchments. Thus, the issuing of the section 189(3) notice was procedurally unfair.

The Labour Court also found that there is nothing preventing an employer from offering voluntary severance packages as a measure to avoid retrenchments, prior to the adoption of a business rescue plan.

This judgment is problematic for the following reasons:

- The legal requirement to issue the section 189(3) notice is triggered by the contemplation of dismissal. The Labour Court has on previous occasions found that '*contemplation*' denotes a recognition by management that the business is ailing, an appreciation of the need to take remedial steps and the identification of retrenchment as a possible remedial measure. It must then be accepted that the institution of business rescue proceedings by a distressed company, in most cases, would be preceded by the contemplation of retrenchment.
- It is also perfectly plausible that a business rescue practitioner, in the course of carrying out his/her duties and prior to adoption of the business rescue plan, contemplates the dismissal of employees as a measure to reduce the company's expenses. Importantly, it is at the point of contemplation of the dismissals that the legal duty to commence the section 189 process arises.
- From a plain reading of section 136(1)(b) of the Companies Act, it cannot be said that the section contains a prohibition against the commencement of the retrenchment process in the absence of a business rescue plan. All that this section does, is to direct the business rescue practitioner's attention to the process set out in sections 189 and 189A of the LRA. This is to ensure that any retrenchments that may be contemplated in the business rescue plan, are carried out in accordance with the fair process outlined in sections 189 and 189A. It could not have been the intention of the legislature to deprive a distressed employer of business viability, business continuation and finality, by delaying the operation of section 189.

- The Labour Court's interpretation of section 136(1) of the Companies Act is at odds with section 189 of the LRA. In circumstances of a conflict between the LRA and the provisions of another statute (except the Constitution), section 210 of the LRA directs that the provisions of the LRA must prevail.
- In the circumstances, the business rescue practitioner effectively wears two hats. The first hat is that granted to him/her in terms of section 140(1) of the Companies Act (full management control of the company in substitution for its board and pre-existing management), and the second hat is his/her overarching duty to facilitate the rehabilitation of the company that is financially distressed, which includes the development of a business rescue plan. The first hat, in our view, permits the business rescue practitioner to commence the section 189 retrenchment process as the management of a company would and where dismissals are contemplated. In the ordinary course, the management of a company would be permitted to commence the section 189 process regardless of the existence of any plan.
- How then can it then be that adhering to the process set out in section 189 leads to procedural unfairness? Certainly, a fair procedure is one that complies with section 189.
- It is quite puzzling that the Labour Court finds, on the one hand, that an employer can offer employees voluntary severance packages to avoid retrenchment (prior to the adoption of the business rescue plan), and on the other that the retrenchment process cannot be commenced in the absence of a business rescue plan. These findings are mutually exclusive. Employees cannot be offered severance packages if dismissals are not contemplated, and the contemplation of dismissals would trigger section 189. Such a finding appears to bypass the section 189 process somewhat, and deprive a consulting party (employee) of the opportunity to consult on other measures to avoid dismissals or the terms, amounts and benefits to form part of the voluntary severance package.

In our respectful view, the Labour Court came to the wrong conclusion. The judgment is likely to negatively impact the financial viability of an employer that may already be in financial distress, by unnecessarily delaying the operation of section 189. This could also impact the potential success of the business rescue process and where urgent retrenchments need to be advanced prior to a plan being published.

On a separate but related note, there was no need for the business rescue practitioners to withdraw the section 189(3) notices already issued by SAA in November 2019 prior to their appointment. In our view, they could have stepped into the shoes of management and continued with the process that had already commenced, as they would have been entitled to do so by virtue of their section 140 powers.

It appears that the business rescue practitioners are applying for leave to appeal the judgment.



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