

SAA retrenchment process heads to Labour Appeal Court

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On Friday 8 May 2020, Labour Court Judge Andre van Niekerk delivered a devastating blow to the national airline's "premature" retrenchment process, which is set out to affect at least 5,000 employees. The airline's business rescue proceedings, which commenced in December 2019 and have been ongoing for five months, have yet to yield any solidified plan of action as to how South Africa's national treasure can be restored to its former glory.



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Addressing the appointed business rescue practitioners (BRPs) Leslie Matuson and Siviwe Dongwana, Judge van Niekerk ordered that the practitioners withdraw the retrenchment notices issued to the airline's almost 5,000 employees. This comes after the Labour Court found that the retrenchment notices were procedurally unfair under section 136 of the Companies Act.

Turning to the wording and interpretation of section 136 of the Companies Act, Van Niekerk stated that BRPs could only commence a retrenchment process once a business rescue plan had been presented to affected parties, which included SAA employees, representative trade unions (Numsa and SACCA), creditors and other interested parties. Van Niekerk reiterated that section 136 of the Companies Act ought to be read together with the Bill of Rights, which affords employees the right to fair labour practices and the preservation of job security.

“ Section 136(1)(b) requires that any need to retrench must necessarily be rooted in the business rescue plan. It is the contemplation at that point that there is a prospect that employees will be retrenched as an element of the plan that brings section 189 and the 189A of the Labour Relations Act into play. There is no provision in section 136(1), or anywhere else in chapter 6 of the Companies Act, that empowers a business rescue practitioner to retrench employees in the absence of a business rescue plan. ”

Following an initial agreement to publish the business rescue plan by February 2020, the BRP duo have twice requested further extensions in their deadlines in order to furnish consulting and affected parties with the final business rescue plan.

When asked to justify their reasons for the delay in publishing the plan, the BRP duo stated that they lacked the liquidity to fund the subsequent phases of the business rescue process. This comes after the R5.5 billion awarded to the duo by commercial banks and the Development Bank of Southern Africa to assist the ailing airline meet its working capital

requirements during the restructuring process, was depleted. In April 2020, the BRP duo requested further funding from government in the region of 7-10 billion. This request was subsequently rejected.



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Numsa and SACCA have welcomed the ruling, seeing it as yet another bite at the cherry in an attempt to resuscitate the ailing airline.

In a surprise turn of events and following a consideration of Van Niekerk's judgment, the Labour Court has granted the BRP duo leave to appeal Van Niekerk's judgment. Substantiating their grounds of appeal, the duo contended that "given the disputes of law, ... there is a reasonable prospect that the facts would receive a different treatment by the Labour Appeal Court".

In addition to the aforementioned, the duo argued that

“ the matter is of significant public interest and importance and that the judgment in the Labour Court is in conflict with an earlier judgment of the same court. ”

Considering past instances of business rescue, it is apparent that in some cases of business rescue, retrenchments can occur prior to the acceptance of the final business rescue plan.

Commenting on the appeal, the BRP duo stated that: "Our position in seeking leave to appeal on the basis that another court may come to a different decision has been accepted by this ruling. We will seek an urgent date for the matter to be heard by the Labour Court."

The decision to appeal Van Niekerk's judgment has come as a shock to interested parties including Numsa and SACCA. Unions as well the Minister of Public Enterprise Pravin Gordhan, have not welcomed this decision, stating that it is yet another instance of poor management of the R5.5 billion provided by government to the airline for funding of the business rescue process. The court action is set to cost the already crippled airline a substantial amount of money as its restructuring and retrenchment resources continue to run dry.

With no contingency funding plan currently in place, the BRP duo are expected to table a final business rescue plan by 29 May 2020. This is in addition to a plan currently being compiled by Minister Gordhan, together with Unions, which will seek to propose a restructured airline or new state-owned airline.

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