



IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

Reportable

Case no: J424/20

In the matter between:

**SOUTH AFRICAN AIRWAYS (SOC)
LIMITED (In Business Rescue)**

First Applicant

LES MATUSON N.O

Second Applicant

SIVIWE DONGWANA N.O

Third Applicant

And
**NATIONAL UNION OF METALWORKERS
OF SOUTH AFRICA obo MEMBERS**

First Respondent

**SOUTH AFRICAN CABIN CREW
ASSOCIATION obo MEMBERS**

Second Respondent

AVIATION UNION OF SOUTH AFRICA

Third Respondent

NATIONAL TRANSPORT MOVEMENT

Fourth Respondent

**SOUTH AFRICAN AIRLINE PILOTS
ASSOCIATION**

Fifth Respondent

**SOUTH AFRICAN TRANSPORT AND
ALLIED TRADE UNION**

Sixth Respondent

SOLIDARITY

Seventh Respondent

NON-UNIONISED EMPLOYEES

Eighth Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Ninth Respondent

Delivered: This judgment is handed down electronically by circulation to the parties' legal representatives by email, and release to the court's library and SAFLII. The date and time for hand-down is deemed to be 12:00 on 25 May 2020.

RULING: APPLICATION FOR LEAVE TO APPEAL

VAN NIEKERK J

[1] This is an application for leave to appeal against the whole of the court's judgment delivered on 8 May 2020.

[2] The test to be applied is established by s 17 (1)(a) of the Superior Courts Act, 10 of 2013. That provision reads as follows:

Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

- (a) (i) the appeal would have a reasonable prospect of success; or
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgements on the matter under consideration...

- [3] The applicants contend that there is a reasonable prospect that the factual matrix would receive a different treatment or that there is legitimate dispute on the law. Further, they contend that the matter is of significant public interest and substantial importance to the parties and that deciding as it did, the court came to a conclusion in conflict with an earlier judgment of this Court.
- [4] Much of what the applicants have submitted in support of the present application concerns the nature of business rescue, and seeks to place s 136 (1) of the Companies Act in the context of the policy that underlies business rescue and business rescue proceedings. But for the injunction that the language of the provision itself must be read in context and with due regard to both the purpose of the provision and that a sensible and business like meaning is to be preferred (see *Natal Joint Municipal Pension Fund v Edumeni Municipality* 2012 (4) SA 593 (SCA)), this material is hardly relevant. What was at issue is the meaning to be accorded s 136 (1) and more narrowly, whether the wording of s 136 (1) (b) precludes a business rescue practitioner from issuing a s 189 (3) notice before the preparation of a business plan. It is not for the Court to adopt an interpretation that best suits the applicants' conceptions of the nature and purpose of business rescue. The same applies to the commentaries on the judgment to which the applicants refer – these are, for the most part, self-interested and self-serving, and premised on the assumption that courts must necessarily bridge interpretational gaps and address anomalies only by adopting constructions that somehow promote the institution of business rescue and the interests of business rescue practitioners. If the statutory provisions that regulate business rescue are unworkable, that is a matter for the legislature to resolve.

Until then, the Court is bound to apply the text, interpreted as necessary in accordance with the applicable canons of interpretation.

- [5] Section 17 of the Superior Courts Act provides that conflicting judgments on the matter under consideration is a ground for leave to appeal. In the present instance, although the judgment in *Vanchem Vanadium Products (Pty) Ltd and others: In re National Union of Metalworkers (NUMSA) obo members v Vanchem Vanadium Products (Pty) Ltd and Another* (J385/16 and J 393/16 [2016] ZALCJHB is distinguishable (for the reasons set out in the judgment that is the subject of the present application), and while the court's finding in that case on the meaning of s 136 (1) is clearly *obiter*, the conclusion reached is one that stands in conflict with the finding of this court. Further, the present case raises a constitutional issue; in particular, the proper interpretation of s 136 (1) of the Companies Act in the context of the constitutional right to fair labour practices. For these reasons, leave to appeal ought to be granted.
- [6] In so far as the first and second respondents contend that any appeal is moot on account of a memorandum of understanding signed by the Minister of Public Enterprises and the second and third applicants, I do not understand the terms of that memorandum finally to resolve the issue of any possible retrenchments, or the timing of a s 189 (3) notice. The dispute between the parties may have been paused, but it remains live.

I make the following order:

1. Leave to appeal is granted, costs to be costs in the appeal.

André van Niekerk
Judge of the Labour Court