THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: J 52/2024

in the matter between:

SOLIDARITY obo PUTTER **Applicant**

And

ANGLO BLACK (PTY) LTD **First Respondent**

DEON MARIUS BOTHA *N.O* **Second Respondent**

Heard: **22 February 2024**

Delivered: **04 March 2024**

This judgment was handed down electronically by consent of the parties' representatives by circulation to them by email. The date for hand-down is deemed to be 04 March 2024.

JUDGMENT

PRINSLOO, J

Introduction

[1] Mr Putter was employed by the First Respondent (Respondent) in November 2022 as a site manager. On 5 December 2023, all employees of the Respondent received a notice that due to the current financial and market-related constraints, management decided that the mine, Groenvlei Colliery, be placed *"on care maintenance (sic) till further notice".* The employees were

further informed that *"once offtake agreements have been concluded, all employees will be notified to return to site and resume their responsibilities".*

[2] Mr Putter was never invited to consult regarding the possibility of dismissal due to the Respondent's operational requirements, but he became aware of the fact that other employees were invited to a consultation meeting as part of the retrenchment process initiated in terms of section 189A of the Labour Relations Act[1] (LRA). The said invitation however did not provide a date or time for the proposed consultation meeting.

[3] On 20 December 2023 'all affected employees', including Mr Putter, received a 'notice of redundancy / retrenchment'. Mr Putter was informed that his position became redundant and that his employment would terminate on 31 December 2023. Mr Putter was dismissed for operational reasons, with no process being followed and no compliance with the provisions of sections 189 and 189A of the LRA.

[4] The Applicant, Solidarity acting on behalf of Mr Putter, addressed a letter to the Respondent on 3 January 2024, recording that no consultation process was followed and demanding that the Respondent withdraws Mr Putter's termination notice by Monday 8 January 2024, and that he be reinstated, and if the Respondent wanted to proceed with retrenchment, that a proper retrenchment process be followed in accordance with the applicable legal prescripts and that consultations be held. An undertaking was sought from the Respondent, by close of business on 8 January 2024, that the termination notice would be withdrawn and that a proper retrenchment process would be undertaken, failing which the Applicant would approach the Labour Court for relief.

[5] No undertaking was provided by close of business on 8 January 2024 and on 10 January 2024, Mr Putter consulted with the Applicant's legal representatives. On 10 January 2024, the Applicant's attorneys addressed a letter to the Respondents, seeking an undertaking that Mr Putter would be allowed back in its service until a proper retrenchment process was followed.

[1] Act 66 of 1995, as amended.

The Respondent was granted an opportunity to provide a written undertaking by 12 January 2024, failing which the Applicant would launch an urgent application.

[6] No response was received and on 19 January 2024, an application in terms of section 189A(13) of the LRA was filed. The section 189A(13) application was served and filed within the 30-day period prescribed in section 189A(17)(a) of the LRA. The matter was enrolled for hearing on 25 January 2024.

[7] A notice of opposition was subsequently filed by the Respondent's attorneys, Stroh Coetzee Inc., on Monday, 22 January 2024. Attached to the notice of opposition was confirmation that the Respondent was placed in business rescue in terms of Section 129 of the Companies Act[2]. The business rescue was registered at CIPC on 10 January 2024 and the effective date of commencement of the business rescue proceedings was recorded as being 8 January 2024.

[8] The Second Respondent, Mr Deon Marius Botha (BRP), was appointed as business rescue practitioner, effective from 17 January 2024.

[9] After becoming aware of the fact that the employer was placed in business rescue, it became prudent to join Mr Botha as a Respondent and an application for joinder was served and filed on Wednesday, 24 January 2024 when it became apparent that the BRP did not apply to intervene and/or be joined as a party to the urgent application.

[10] On 25 January 2024, the BRP was joined to the application as the Second Respondent and the matter was postponed and set down for hearing on 22 February 2024 to afford the BRP an opportunity to consider the matter and to make a decision in terms of section 141 of the Companies Act. Should the BRP decide to oppose the application, he was afforded an opportunity to file an answering affidavit.

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[2] Act No. 71 of 2008, as amended.

[11] On 20 February 2024, the BRP indicated that Mr Putter's retrenchment was completed during December 2023 whilst the *"company was only formally placed in business rescue on 10 January 2024"* and he stated that he *"is not prepared to consent to the current application in terms of Section 141"*.

[12] The matter was heard on 22 February 2024 without the BRP filing an answering affidavit.

<u>This application</u>

[13] The Applicant approached this Court in terms of the provisions of section 189A(13), challenging the procedural fairness of Mr Putter's dismissal. The relief sought is *inter alia* an order to declare that the Respondent has acted in a procedurally unfair manner when it dismissed Mr Putter for operational reasons, that the Respondent be ordered to reinstate Mr Putter and to initiate and continue with a meaningful joint consensus-seeking process as envisaged by section 189 of the LRA, alternatively that Mr Putter be compensated for his procedurally unfair dismissal. As the BRP was appointed and joined in these proceedings, any order to consult with Mr Putter, as envisaged in section 189 of the LRA, will be an order for the BRP to comply with.

[14] The Respondent's case is that this Court is divested of jurisdiction to entertain the current matter because it was placed in business rescue.

[15] The BRP's position is that, in terms of section 133 of the Companies Act there is a moratorium on legal proceedings. The BRP relied on *Marques and Others v Group Five Construction (Pty) Ltd and Others*[3] (*Marques*), where the court found that 'legal proceedings' included labour claims in the CCMA and other labour courts and that the Labour Court has no jurisdiction to uplift the moratorium on legal proceedings. It was also found that the moratorium in terms of section 133 was not in conflict with any of the terms of the LRA. While business rescue practitioners would need to ensure that, for example, any retrenchments are fair and compliant with the LRA and other applicable

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[3] [2019] ZALCJHB 330; (2020) 41 ILJ 677 (LC).

legislation, any retrenched employee would not be able to challenge the fairness of such dismissal or take any other legal action for as long as the employer remains in business rescue. The BRP is therefore not prepared to consent to the current application in terms of section 141.

[16] This is where the conundrum lies. On the one hand, the Companies Act provides for a moratorium on legal proceedings against a company under business rescue and on the other hand, the LRA provides for a *sui generis* remedy to approach this Court, within 30 days after retrenchment, in respect of procedural unfairness in a section 189A retrenchment.

The Labour Relations Act

[17] Section 189A(13) of the LRA provides as follows:

> 'If an employer does not comply with a fair procedure, a consulting party may approach the Labour Court by way of an application for an order —
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> *(a)* compelling the employer to comply with a fair procedure;
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> *(b)* interdicting or restraining the employer from dismissing an employee prior to complying with a fair procedure;
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> *(c)* directing the employer to reinstate an employee until it has complied with a fair procedure;
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> *(d)* make an award of compensation, if an order in terms of paragraphs *(a)*–*(c)* is not appropriate.'

[18] In *Banks and another v Coca-Cola SA - A Division of Coca-Cola Africa (Pty) Ltd*[4] the Court summarized the role of the Court in a section 189A(13) application as follows:

[4] [2007] ZALC 175; (2007) 28 ILJ 2748 (LC) at para 18.

'In short, the conclusion to be drawn from the wording of s 189A is that this court appears to have been accorded a proactive and supervisory role in relation to the procedural obligations that attach to operational requirements dismissals. Where the remedy sought requires intervention in the consultation process prior to dismissal, the court ought necessarily to afford a remedy that accounts for the stage that the consultation has reached, the prospect of any joint consensus-seeking engagement being resumed, the attitude of both parties, the nature and extent of the procedural shortcomings that are alleged and the like. If it appears to the court that little or no purpose would be served by intervention in the consultation process in one of the forms contemplated by s 189A(13)*(a)*, *(b)* and *(c)*, then compensation as provided by para *(d)* is the more apposite remedy.'

[19] In *SA Society of Bank Offices on behalf of Fourie v Nedbank Limited*[5] *(SASBO),* the Court held that:,

'The preamble to s 189A (13) makes clear that the court's intervention is limited to instances of a refusal or failure by the consulting employer to comply with a fair procedure. What the subsection seeks to accomplish, in the face of a prohibition on the right to strike over any dispute that concerns the procedural fairness of a retrenchment and the limitation on the right to refer a dispute of that nature to this court for adjudication in terms of s 191, is to extend to this court a supervisory role over the consultation process, with powers to intervene if and when necessary, and to craft remedies designed to address any procedural shortcoming that are found to exist. The section is not an invitation to consulting parties to use this court to micro-manage a consultation process – intervention ought to be limited to a substantial failure or refusal to comply with the relevant statutory requirements.'

[20] In *Steenkamp and Others v Edcon Limited*[6] *(Steenkamp II),* the Constitutional Court dealt *inter alia* with the questions of whether claims for relief for procedural unfairness in large-scale retrenchments can be dealt with *ex post*

[5] [2019] ZALCJHB 317; (2020) 41 ILJ 500 (LC) at para 14.
[6] (2019) 40 ILJ 1731 (CC).

facto and whether compensation for procedural unfairness can be claimed as a self-standing remedy in the context of large-scale retrenchments in terms of section 189A(13)*(d)* of the LRA.

[21] The Constitutional Court held that the LRA specifically provides for a dispute-resolution mechanism designed to deal with procedural flaws that arise during or immediately after the consultation process and to allow the Labour Court, acting as the guardian of the process, to set the consultation process back on track. The legal principles that emerged from *Steenkamp II* are clear and apply to all retrenchments in terms of section 189A of the LRA.

[22] What are those legal principles that emerged? The Constitutional Court, considering the nature, purpose and functioning of section 189A(13) held that:

> '[45] The LRA provides for a consultative framework within which employees facing possible retrenchment may participate in the consultation process in an attempt to either avoid a possible retrenchment or, where retrenchments are unavoidable, to participate in attempts to ameliorate the adverse effects of such a retrenchment.
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> [46] Where a retrenchment exercise involves a large number of employees, s 189A of the LRA applies. This section not only strives to enhance the effectiveness of the consultation process by providing for the appointment of a facilitator, but also provides for mechanisms to pre-empt and resolve disputes about substantive and procedural unfairness issues as and when they arise during the consultation process.
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> [47] A distinctive feature of s 189A(13) of the LRA is the separation of disputes about procedural fairness from disputes about substantive fairness. Disputes about substantive fairness may be dealt with by resorting to strike action or by referring a dispute about the

substantive fairness of the dismissals to the Labour Court in terms of s 191(11) of the LRA.

[48] Disputes about procedural fairness have been removed from the adjudicative reach of the Labour Court and may no longer be referred to the Labour Court as a distinctive claim or cause of action that a dismissal on the basis of operational requirements was procedurally unfair.'

[23] The Constitutional Court made it clear that although a clear policy decision has been made to remove claims of procedural unfairness from the *ex post facto* jurisdictional competence of the Labour Court, employees are not left without a remedy as they may approach the Labour Court in terms of section 189A(13) of the LRA for an order compelling the employer to comply with a fair procedure. Where employees have already been dismissed, the Labour Court has the additional power in terms of section 189A(13)(c) of the LRA to reinstate such an employee to allow for the consultation process to run its course. Only where these orders are not appropriate, may the Labour Court, where it is appropriate to do so, order compensation in terms of subsection (d).

[24] Where procedural irregularities arise, the process provided for in section 189A(13) of the LRA allows for the urgent intervention of the Labour Court to correct any such irregularities as and when they arise so that the integrity of the consultation process can be restored and the consultation process can be forced back on track. Where the prescribed time limits set out in section 189A(17) are not adhered to, the Labour Court may, on good cause shown, condone the failure to adhere to the strict time limits.

[25] The primary purpose of section 189A(13) is to allow for early corrective action "*to get the retrenchment process back onto a track that is fair*". Paragraphs (a)-(d) establish a hierarchy of appropriate relief and only where it is not appropriate to grant an order in terms of paragraphs (a)-(c) may an order for compensation be granted in terms of paragraph (d).

[26] The Applicant approached this Court on an urgent basis in terms of the provisions of section 189A(13) of the LRA, seeking an order that the Respondent /BRP be ordered to reinstate Mr Putter and to initiate and continue with a meaningful joint consensus-seeking process as envisaged by section 189 of the LRA, alternatively that he be compensated for his procedurally unfair dismissal.

[27] The Applicant must establish facts to show that there has been a substantial failure or refusal to comply with the requirements of section 189 of the LRA before he can seek intervention in terms of section 189A(13).

[28] The Applicant's version, that Mr Putter was never invited to consult about the possibility of dismissal due to the Respondent's operational requirements and that he was merely informed that his position became redundant and that his employment would terminate on 31 December 2023, is not disputed. The version that Mr Putter was dismissed for operational reasons, with no process being followed and no compliance with the provisions of sections 189 and 189A of the LRA is not challenged and I cannot but find that Mr Putter is entitled to approach this Court for relief, as provided for in section 189A(13).

[29] The question is: what relief can this Court grant Mr Putter in view of the fact that the Respondent has been placed in business rescue? This question calls for a consideration of the provisions of the Companies Act.

<u>The Companies Act</u>

[30] Section 5 of the Companies Act provides for the general interpretation of the said Act and provides *inter alia* that it must be interpreted and applied in a manner that gives effect to the purposes set out in section 7.

[31] Section 7 provides for the purposes of the Companies Act and section 7(k) provides for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders.

[32] Business rescue is regulated under Chapter 6 of the Companies Act and it refers to proceedings that are carried out for the rehabilitation of a financially distressed company by providing *inter alia* for the temporary supervision of the company, its management, affairs, business and property, for an automatic and general moratorium on the rights that any claimant may have against the company and for the development and implementation of a plan to rescue the company.

[33] The purpose of Chapter 6 is to provide for the "*efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders",*[7] whilst the fundamental purpose of business rescue is to "*prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources*"[8].

[34] Once business rescue proceedings commence, there is an automatic and general moratorium on legal proceedings or executions against the company.[9]

[35] Section 133 of the Companies Act provides as follows:

> (1) 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—
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> *(a)* with the written consent of the practitioner;
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> *(b)* with the leave of the court and in accordance with any terms the court considers suitable;
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> *(c)* as a set-off against any claim made by the company in any legal proceedings, irrespective of whether those proceedings commenced before or after the business rescue proceedings began;

[7] Section 7(k) of the Companies Act.
[8] FH Cassim, MF Cassim, R Cassim et al, '*Contemporary Company Law*', 2ed, Juta at p 862.
[9] Cassim et al *Contemporary Company Law* at p 878.

(d) criminal proceedings against the company or any of its directors or officers; or

(e) proceedings concerning any property or right over which the company exercises the powers of a trustee….

(2) During business rescue proceedings, a guarantee or surety by a company in favour of any other person may not be enforced by any person against the company except with leave of the court and in accordance with any terms the court considers just and equitable in the circumstances.

(3) If any right to commence proceedings or otherwise assert a claim against a company is subject to a time limit, the measurement of that time must be suspended during the company's business rescue proceedings.'

[36] Reference to 'court' in section 133(1)(b) has been interpreted to mean 'High Court' specifically and exclusively.

[37] The Companies Act does not define the phrase "*legal proceedings*" as provided for in section 133, however, academics have expressed the view that the clear intention of the provision is to "*cast the net as wide as possible in order to include any conceivable type of action against the company*…"[10]

[38] The Supreme Court of Appeal (SCA) in *Chetty t/a Nationwide Electrical v Hart and Another NNO*[11], held as follows in respect of its analysis of the meaning of the phrase "*legal proceedings*" in terms of section 133:

'To conclude this analysis, the phrase 'legal proceeding' may, depending on the context within which it is used, be interpreted restrictively, to mean

[10] P Delport, '*Henochsberg on the Companies Act 71 of 2008',* LexisNexis South Africa at p 526.
[11] [2015] ZASCA 112; 2015 (6) SA 424 (SCA) at para 35.

court proceedings or, more broadly, to include proceedings before other tribunals, including arbitral tribunals. The language employed in s 133(1) itself suggests that a broader interpretation commends itself, an approach with which academic commentators concur. Contextual indications in s 142(3)(b), and the importance of reading these provisions consistently, also support this interpretation. And finally, the purpose of the provision, which is to give breathing space to the practitioner to get the company's financial affairs in order, also requires it to be construed widely because arbitrations, like court proceedings, also involve diversion of resources — both time and money — that may hinder the effectiveness of business rescue proceedings. To construe it narrowly, as the court *a quo* did, and as the respondent contends we should, would be at odds with its language, defeat its purpose and lead to insensible and impractical consequences.'

[39] In *Timasani (Pty) Ltd and another v Afrimat Iron Ore (Pty) Ltd*[12] *(Timasani):*

'Section 133 must be read as a whole: the different subsections of a provision dealing with the same subject matter must not be considered in isolation but read together so as to ascertain the meaning of the provision. Section 133 (1) is a general moratorium provision that applies in relation to the assets and liabilities of the company at the stage when business rescue comes into effect. It protects the company against legal action in respect of claims in general, save with the written consent of the business rescue practitioner and failing such consent, with the leave of the court. This Court has stated the purpose of section 133 (1) as follows:

"It is generally accepted that a moratorium on legal proceedings against a company under business rescue is of cardinal importance since it provides the crucial breathing space or a period of respite to enable the company to restructure its affairs. This allows the practitioner, in

[12] [2021] 3 All SA 843 (SCA) at para 25.

conjunction with the creditors and other affected parties, to formulate a business rescue plan designed to achieve the purpose of the process."'

[40] Academics have also theorised that 'legal proceedings' would conceivably include proceedings before bodies such as the Consumer Commission and the Competition Commission.[13]

Conflict between the Companies Act and the LRA

[41] The relevant provisions of section 5 of the Companies Act provide as follows:

'(4) If there is an inconsistency between any provision of this Act and a provision of any other national legislation—

(a) the provisions of both Acts apply concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second; and

(b) to the extent that it is impossible to apply or comply with one of the inconsistent provisions without contravening the second—

(i) any applicable provisions of the –

…

(bb) Labour Relations Act, 1995 (Act No. 66 of 1995);

prevail in the case of an inconsistency involving any of them, except to the extent provided otherwise in section 49(4).

[13] Henochsberg ibid at p 526.

[42] Section 210 of the LRA provides that, if any conflict arises relating to matters dealt with in the LRA and the provisions of any other law, save for the Constitution, the provisions of the LRA will prevail.

[43] The question of whether the provisions of section 133 of the Companies Act conflict with the dispute resolution procedure set out in the LRA has been considered by the Courts.

[44] In *Burba v Integcomm (Pty) Limited*[14] (*Burba*), the applicant employee had referred an unfair dismissal dispute following his dismissal for operational requirements. His referral was served and filed in June 2012. In July 2012 the respondent employer delivered its statement of defence opposing the applicant's claim and on 11 September 2012, by way of court order, the respondent employer was placed in business rescue in terms of Chapter 6 of the Companies Act. The referral to this court was made some three months before the High Court order was made. The High Court *inter alia* ordered that "*during business rescue proceedings no legal proceedings, including enforcement action against [the respondent employer]… may be commenced or proceeded with in any forum except… with the written consent of the aforesaid [BRP]; with the leave of the court and in accordance with any terms the court considers suitable*…"

[45] The Labour Court in *Burba*, having considered the contents of the High Court order, the wording and purpose of section 133 and the interpretation of the phrase 'legal proceedings' as contained in *Henochsberg* held that:

> 'In the circumstances, the unfair dismissal proceedings cannot be proceeded with except with the written consent of the business rescue practitioner or with the leave of the Court.'[15]

And further that:

[14] Unreported judgment under case no JS539/13 delivered on 29 November 2013.
[15] Ibid at para 14.

> 'It follows then that as the unfair dismissal proceedings in this Court are covered in the words "legal proceedings … in any forum" in section 133(1) of the Companies Act, the proceedings must be stayed and not proceeded with except… with the written consent of the BRP; or with the leave of the High Court that granted the High Court order…'[16]

[46] The unfair dismissal proceedings in *Burba* were therefore stayed pending fulfilment of the exceptions as set out in section 133(1), which included a High Court order granting leave to proceed with the litigation.

[47] Shortly after *Burba* was decided, the Labour Court in *National Union of Metal Workers of South Africa obo Members v Motheo Steel Engineering*[17] (*Motheo Steel*) was again approached to determine whether an application brought against a company in business rescue was stayed in accordance with section 133. The Court (per Lagrange J) held that:

> 'In terms of s 210 of the Labour Relations Act, 66 of 1995 a matter dealt with in that Act prevails over the provisions of any other law save the Constitution or any Act expressly amending it. I am satisfied that s 133(1) of the Companies Act 71 of 2008 does not expressly amend the provisions of the LRA, and insofar as it might otherwise prevent legal proceedings without the leave of a court or the relevant business rescue partner, it does not prevent the applicant bringing this application.'

[48] In effect, in *Motheo Steel* the Court accepted that the provisions of section 133 did not prevent the applicant from approaching the Labour Court on application.

[49] Although not decided in the context of dismissal, *Sondamase and Another v Ellerine Holdings Ltd and Another*[18] (*Sondamase*), provided guidance in determining labour disputes in the case of business rescue proceedings. In *Sondamase,* the applicant employees had lodged a grievance alleging discrimination, victimisation and unfair labour practices and referred their

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[16] Ibid at para 17.
[17] [2014] ZALCJHB 315 (7 February 2014) at para 1.
[18] [2016] ZALCCT 53 (22 April 2016) at paras 15 – 16.

dispute to the CCMA in July 2014. Their dispute was unresolved at conciliation and the employees referred their matter to the Labour Court on 8 August 2014. On 7 August 2014, Ellerines Furnishers commenced with business rescue proceedings and on 21 August 2014, Ellerines Holdings did the same. The respondents raised a special plea that section 133 of the Companies Act had placed a general moratorium on all legal proceedings, including the proceedings before the Labour Court and that, as no consent has been provided by the BRP nor had the High Court granted an order allowing the employees to proceed with their dispute, the dispute before the Labour Court had been suspended.

[50] The Court agreed with the judgment of *Burba* and upheld the special plea. On the issue of whether section 133(1)(a) gives rise to a conflict with the dispute resolution provisions of the LRA, the Court answered this in the negative:

> ‘[15] It does not appear to me that there is any conflict between s 133(1)(a) of the Companies Act and the dispute resolution provisions set out in the LRA. And in so far as there has been conflicting jurisprudence on the application of s 133 of the Companies Act to dispute arising out of the LRA, it appears to have been settled by the recent decision of the [SCA] in [*Chetty*]. In that case, the SCA interpreted s133 to place a moratorium, not only on legal proceedings in court, but even arbitration proceedings. Cachalia JA took a purposive approach:
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> > “[26] But the question the respondent is unable to answer is why the lawmaker would want the company to provide details of all proceedings, including arbitration proceedings, to a practitioner, but exclude arbitrations from the ambit of the moratorium and the obligation to obtain a practitioner's consent in s 133(1)(a). After all the outcome of an arbitration by way of award is usually that the losing party has to pay a sum of money, which is the outcome of most court actions involving commercial disputes. In my view the answer lies in properly understanding the purpose of these

provisions as they apply to business rescue proceedings and the consequences that flow from the parties' contending interpretations.

[27] Section 5(1) of the Act directs that its interpretation and application must give effect to the purpose stated. Section 7(k) is relevant here. It says that one of these purposes is to:

> "...provide for the efficient rescue, and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders…"

[28] Section 128(1)(b) of the Act defines business rescue to mean proceedings that facilitate the rehabilitation of a financially distressed company by providing, amongst other things, for the temporary supervision and moratorium on the rights of claimants, and the development and implementation of a plan to rescue the company. The obvious purpose of placing a company under business rescue is to give it breathing space so that its affairs may be assessed and restructured in a manner that allows its return to financial viability. The requirement for the practitioner's consent to be obtained is to give him the opportunity, after his appointment, to consider the nature and validity of any existing or pending claim and how it is to be dealt with, for example by settling it or continuing with the litigation. In particular, the practitioner's concern is directed at assessing how the claim will impact on the well-being of the company and its ability to regain its financial health. A general moratorium on the rights of creditors enforcing their rights against the company is therefore crucial to achieving this objective. And given the ubiquitous use of arbitrations to resolve commercial disputes, an interpretation of s 133(1) that excludes them from the moratorium on legal proceedings against financially distressed companies would significantly hinder its attainment.

[29] In my view once this purpose of business rescue - to give the practitioner breathing space - is properly understood, it becomes apparent that only an interpretation that includes arbitrations within, instead of excluding them from, the meaning of legal proceedings in s 133(1), allows this provision to be read harmoniously with s 142(3)(b). Such a reading is in line with the well-known canon of statutory construction, which is that if by any reasonable construction the two can be made to be compatible, not contradictory, that is the interpretation that should be given. There can be no reason why s 142(3)(b) obliges the company to provide details of arbitrations to the practitioner other than because they are also legal proceedings - as contemplated in s 133(1) - that may have a bearing on its financial viability and of which the business rescue practitioner must be cognisant."

[16] By suspending the legal proceedings in this case and giving the respondents the breathing space contemplated by the Companies Act, the employees are not deprived of their right to continue with their claim against the company at a later stage. The claim is only suspended during the period of business rescue proceedings. That does not appear to me to be in conflict with the provisions of the LRA.'

[51] The court concluded that the suspension of the applicant employees' claims did not leave them without remedies as, once the moratorium is lifted, they could pursue their claims.

[52] The applicants in *Marais and 56 others v Shiva Uranium (Pty) Limited (in business rescue) and others*[19] *(Marais),* approached the court seeking leave to uplift the moratorium placed in terms of section 133(1)(b) and in the main application, the applicants sought an order directing the respondent to pay all unpaid remuneration and employment benefits. The applicants argued that section 157 clothed the Labour Court with jurisdiction to uplift the moratorium

[19] [2018] ZALCJHB 346 (LC); (2019) 40 ILJ 177 (LC).

as their claims against the respondent were rooted in the fundamental right which was offended by the non-payment of their remuneration and employment benefit contributions. In the alternative, they argued that where there existed a conflict between the provisions of section 133 and the LRA, the provisions of the LRA would prevail.

[53] On the issue of a conflict between the provisions of section 133 of the Companies Act and the LRA, the Labour Court in *Marais* agreed and aligned itself with the position adopted in *Sondamase,* which held that there existed no conflict between section 133 of the Companies Act and the LRA.

[54] The Court followed the positions set out in *Burba* and *Sondamase* and concluded that:

> 'In the circumstances, this Court has no jurisdiction to lift the moratorium in accordance with section 133(1)(b) and grant the applicants leave to litigate against the first respondent during the business rescue proceedings. However, to the extent that this Court has jurisdiction to deal with the applicants' claims in terms of the Basic Conditions of Employment Act ("the BCEA"), the application stands to be struck off the roll and could only be re-enrolled with the leave granted in terms of section 133(1)(a) or (b).'[20]

[55] In *Marques*[21], Lagrange J acknowledged that in view of further judicial pronouncements and the decisions in *Chetty*, *Burda*, *Sondamase* and *Marais,* the weight of authority is against this court assuming the mantle of the High Court to lift the moratorium on legal proceedings imposed by section 133(1). The aforesaid authorities did not support the dictum in *Motheo Steel.* The court held further: "*that is not to say that justified circumstances may exist for the High Court to do so in instances where permission to lift the moratorium has been refused by the business practitioner. But that is not a claim that can be pursued in this court*".

[20] Ibid at para 24.
[21] *Marques ibid* at para 13.

[56] In *NUMSA and another v South African Airways SOC Ltd and others*[22] (*SAA*), the Labour Court per Van Niekerk J (as he was then) considered the effect of the section 133 moratorium on legal proceedings. In *SAA,* the BRPs had not been approached for consent to uplift the moratorium, the High Court had not been approached to grant leave to that effect and the notice of motion in the proceedings did not seek an order uplifting the moratorium. The court considered the aforementioned authorities, including *Motheo Steel* and held as follows:

> '[16] The weight of authority thus suggests that a party seeking to initiate proceedings that concern an employment-related claim against a company in business rescue, over which this Court has jurisdiction, must secure the written consent of the business rescue practitioner or obtain the leave of the High Court to institute those proceedings, even if this Court has exclusive jurisdiction to entertain the merits of the claim. To the extent that the applicants rely on *NUMSA v Motheo Steel* J271/2014 (7 February 2014), where the court held that s 133(1) of the Companies Act did not preclude a party from bringing an application in the Labour Court, that is not a position that has been followed; indeed, the same judge decided *Marques*, which as indicated above, takes a contrary view. I am not persuaded that, as the applicants submit, all of these cases were wrongly decided.
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> [17] … The applicants contend that in any event the issue in dispute lies within the employment sphere, given that the primary cause of action is located in s 32 of the BCEA, with the remaining causes of action (including the reliance on s 135 of the Companies Act) being secondary. While it is correct that s 77(1) of the BCEA provides that this Court has exclusive jurisdiction in respect of all matters in terms of the BCEA, it does not necessarily follow that this Court, even as a court with equal standing and status as the High Court, is empowered to lift the moratorium on legal proceedings against the company in business rescue as contemplated by s 133 of the

[22] [2021] ZALCJHB 6 (LC); 2021 (4) SA 575 (LC) at paras 16 – 17.

> Companies Act. The definition in s 128 makes a clear and specific reference to the High Court and to designated or assigned judges of that court. Chapter 6 of the Companies Act makes clear that the supervision of business rescue proceedings falls within the jurisdiction of the High Court. Had the legislature intended that in an employment-related matter involving a company in business rescue this Court was empowered to lift the moratorium by granting leave for the institution of proceedings, this Court would have been so empowered. The demarcation established by ch 6 recognises that business rescue proceedings affect the rights of a number of parties beyond the employment relationship, and in particular shareholders and other creditors. The High Court is best placed to balance the rights and interest of all the relevant parties in any application for leave to commence legal proceedings or enforcement action against a company in business rescue. Contrary to what the applicants submit, ch 6 of the Companies Act does not insulate labour-related matters and claims, to be treated as if the provisions of the Chapter relating to business rescue and its management do not apply. The Chapter should be read in harmony with labour legislation, so as to best achieve both the purposes of business rescue and the primary objects of labour legislation.'

[57] In summary: The position accepted by this Court is that there is no conflict between the Companies Act and the LRA that would bring section 210 of the LRA into play. Chapter 6 of the Companies Act does not oust the jurisdiction of the Labour Court where this Court has jurisdiction in respect of claims arising under the LRA as it does no more than impose a general moratorium on legal proceedings against a company in business rescue. Employees remain at liberty to institute proceedings in the Labour Court against an employer that has been placed in business rescue and in respect of which this Court has jurisdiction, but they must do so subject to section 133 of the Companies Act.

<u>Analysis</u>

[58] Mr Bekker on behalf of the Applicant submitted that should relief not be granted to Mr Putter, he would be forever non-suited. This is so because the aim of Section 189A(13) is to bring the consulting parties into a negotiation phase and to ensure compliance with a fair procedure during such a consultation process. *In casu*, Mr Putter was retrenched shortly before the Respondent was placed in business rescue and he had to approach this Court within a period of 30 days. There would be no use in *"suspending"* the application during the period of business rescue proceedings since the horse would then have bolted.

[59] The BRP did not give consent for the current proceedings and the only other available option is for the Applicant to approach the High Court, for an order to lift the general moratorium. Mr Bekker further submitted that section 133 of the Companies Act effectively prevents the Applicant from bringing a section 189A application directly to the Labour Court, without the consent of the BRP or the leave of the High Court. According to Mr Bekker, this creates an obvious dichotomy and results in a situation where section 133 of the Companies Act conflicts with the provisions of the LRA.

[60] The Applicant's argument is that the general moratorium afforded to a company in business rescue should not be extended to procedural challenges under Section 189A(13) of the LRA. This will allow employees to exercise their rights in terms of Section 189A(13) expeditiously and without incurring the additional burden of approaching the High Court to lift the moratorium. Mr Putter seeks reinstatement in order for a fair process to be followed after his procedurally unfair retrenchment. The current issue does not relate to any unpaid amount of remuneration or reimbursement for expenses or any other amount owed relating to employment that becomes due and payable during a business rescue process. It relates to procedural unfairness and this Court's jurisdiction to ensure compliance with the general scheme of the LRA.

[61] Where Section 189A applies, employees are precluded from raising procedural fairness challenges in a dispute in terms of section 191(5) of the LRA. Section 189A(13) is a specific avenue for dealing with disputes concerning an employer's non-compliance with a fair procedure.

[62] The arguments advanced by Mr Bekker cannot be accepted for a number of reasons.

[63] Firstly, this Court cannot ignore the aforesaid authorities, and where the authority is from a higher Court, this Court is bound by it. This Court can deviate from the authorities when the facts are clearly distinguishable or when the authorities are clearly wrong. *In casu* the facts are not distinguishable, in any event not to the extent that it warrants a deviation from the existing authorities and in my view, the authorities are not wrong.

[64] Secondly, this Court cannot ignore the purpose of section 133, namely to give breathing space to the BRP to get the company's financial affairs in order, with the intended suspension of legal proceedings, which inevitably involve the diversion of resources — both time and money — that may hinder the effectiveness of business rescue proceedings. Although Mr Bekker argued that the current issue does not relate to any amount owed relating to employment that becomes due and payable during a business rescue process, instead it relates to procedural unfairness and this Court's jurisdiction to ensure compliance with the general scheme of the LRA, the reality is that Mr Putter seeks retrospective reinstatement, with full remuneration and benefits, and for the BRP to consult with him in a joint consensus-seeking process, as envisaged in section 189 of the LRA. The relief sought, if granted, will inevitably involve the diversion of resources (time and money) and would undermine the purpose of section 133 of the Companies Act.

[65] Thirdly, the court in *Marais, Marques* and *SAA* have made it clear that the Labour Court does not have the jurisdiction to uplift a moratorium placed on labour-related legal proceedings in terms of section 133 as such jurisdiction rests solely with the High Court. The court in *Marais*, quoted with approval in *SAA*, stated as follows:

> [17] The legislature has made express provision for a forum to deal with litigation emanating from the business rescue proceedings. Section 128(1)(e) not only defines 'court' to mean the High Court that has

jurisdiction over the matter, but a judge of the High Court as designated or assigned by the Judge President. The Judge President of the High Court has power to designate any judge of the High Court as a specialist to determine issues relating to, *inter alia*, business rescue in terms of s 128(3). It is without doubt that when it comes to matters relating to business rescue proceedings, the High Court, not any other court, has exclusive jurisdiction.

….

[19] In the same manner that s 157(2) should not be understood to extend the jurisdiction of the High Court to determine issues which have been expressly conferred upon the Labour Court by the LRA, it should also not be understood to extend the jurisdiction of the Labour Court to deal with any other statutory remedies, pertinently, s 133(1)(b)…

[20] In the present case, chapter 6 specifically constitutes a set of carefully-crafted rules to provide for efficient business rescue proceedings and central to that object is the moratorium in terms of s 133(1). Therefore, the High Court or designated specialist or assigned judge of the High Court has exclusive jurisdiction.'[23]

[66] In *Gcaba v Minister for Safety & Security & others,* the Constitutional Court held that:

'[70] Section 157(1) confirms that the Labour Court has exclusive jurisdiction over any matter that the LRA prescribes should be determined by it. That includes, amongst other things, reviews of the decisions of the CCMA under s 145. Section 157(1) should, therefore, be given expansive content to protect the special status of

[23] *Marais* supra at paras 17 and 19 – 20.

the Labour Court, and s 157(2) should not be read to permit the High Court to have jurisdiction over these matters as well.

[71] Section 157(2) confirms that the Labour Court has concurrent jurisdiction with the High Court in relation to alleged or threatened violations of fundamental rights entrenched in chapter 2 of the Constitution and arising from employment and labour relations, any dispute over the constitutionality of any executive or administrative act or conduct by the state in its capacity as employer and the application of any law for the administration of which the minister is responsible. The purpose of this provision is to extend the jurisdiction of the Labour Court to disputes concerning the alleged violation of any right entrenched in the Bill of Rights which arise from employment and labour relations, rather than to restrict or extend the jurisdiction of the High Court. In doing so, s 157(2) has brought employment and labour relations disputes that arise from the violation of any right in the Bill of Rights within the reach of the Labour Court. This power of the Labour Court is essential to its role as a specialist court that is charged with the responsibility to develop a coherent and evolving employment and labour relations jurisprudence. Section 157(2) enhances the ability of the Labour Court to perform such a role.

[72] Therefore, s 157(2) should not be understood to extend the jurisdiction of the High Court to determine issues which (as contemplated by s 157(1)) have been expressly conferred upon the Labour Court by the LRA. Rather, it should be interpreted to mean that the Labour Court will be able to determine constitutional issues which arise before it, in the specific jurisdictional areas which have been created for it by the LRA, and which are covered by s 157(2)(a), (b) and (c).

[73] Furthermore, the LRA does not intend to destroy causes of action or remedies and s 157 should not be interpreted to do so. Where a

> remedy lies in the High Court, s 157(2) cannot be read to mean that it no longer lies there and should not be read to mean as much. Where the judgment of Ngcobo J in Chirwa speaks of a court for labour and employment disputes, it refers to labour and employment related disputes for which the LRA creates specific remedies. It does not mean that all other remedies which might lie in other courts like the High Court and Equality Court, can no longer be adjudicated by those courts. If only the Labour Court could deal with disputes arising out of all employment relations, remedies would be wiped out, because the Labour Court (being a creature of statute with only selected remedies and powers) does not have the power to deal with the common law or other statutory remedies.'

[67] In the same manner that section 157(2) of the LRA should not be understood to extend the jurisdiction of the High Court to determine issues which have been expressly conferred upon the Labour Court by the LRA, it should also not be understood to extend the jurisdiction of the Labour Court to deal with any other statutory remedies specifically reserved for the High Court, pertinently, section 133(1)(b) of the Companies Act.

[68] Fourthly, the moratorium on legal proceedings provided for in subsection (1)(*a*)-(*e*) is not an absolute bar to legal proceedings but merely serves as a procedural limitation on a party's rights of action.

[69] Chapter 6 of the Companies Act does not oust the jurisdiction of the Labour Court where this Court has jurisdiction in respect of claims arising under the LRA as it does no more than impose a general moratorium on legal proceedings against a company in business rescue. Employees remain at liberty to institute proceedings in the Labour Court against an employer that has been placed in business rescue and in respect of which this Court has jurisdiction, but they must do so subject to section 133 of the Companies Act.

[70] It is clear that the general moratorium created by this section applies only for the duration of the company's business rescue proceedings.

[71] In *Timasani,* it was confirmed that:

> 'The general moratorium in section 133(1) is a defence *in personam*: it is a personal, temporary benefit in favour of a company undergoing business rescue that cannot be utilised indefinitely to delay the claims of creditors or result in the extinction of their claims. Indeed, and as stated, legal proceedings in relation to those claims may be initiated or continued with the consent of the BRP or leave of the court.'[24]

[72] Fifthly, the Applicant's argument that the general moratorium afforded to a company in business rescue should not be extended to procedural challenges under Section 189A(13) of the LRA, is not sustainable as the Court made it clear that in *SAA* that the demarcation established by Chapter 6 recognises that business rescue proceedings affect the rights of a number of parties beyond the employment relationship, and in particular, shareholders and other creditors. The High Court is best placed to balance the rights and interest of all the relevant parties in any application for leave to commence legal proceedings or enforcement action against a company in business rescue. Chapter 6 of the Companies Act does not insulate labour-related matters and claims, to be treated as if the provisions of the Chapter relating to business rescue and its management do not apply. The Chapter should be read in harmony with labour legislation, so as to best achieve both the purposes of business rescue and the primary objects of labour legislation. If it was the intention of the legislature to insulate labour-related disputes, it would have been stated so in the applicable legislation.

[73] Lastly, the Applicant's argument is that should relief not be granted to Mr Putter, he would be forever non-suited because the aim of Section 189A(13) is to ensure compliance with a fair procedure during a peremptory consultation process. This argument does not hold water.

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[24] *Timasani supra* at para 28.

[74] Section 189A(13) provides for an order to reinstate an employee to allow for the consultation process to run its course but it also provides, where such an order is not appropriate, for the Labour Court, to order compensation in terms of subsection (d). If legal proceedings are suspended for the period of business rescue, Mr Putter is not forever non-suited. The LRA provides for an order for compensation for procedural unfairness, when appropriate. In fact, Mr Putter prayed for compensation as an alternative remedy.

[75] In the circumstances, this Court has no jurisdiction to lift the moratorium in accordance with section 133(1)(b) and effectively grant the Applicant leave to litigate against the Respondent or BRP during the business rescue proceedings. However, to the extent that this court has jurisdiction to deal with Mr Putter's claim in terms of section 189A(13) of the LRA, the application stands to be struck off the roll and could only be re-enrolled with the leave granted in terms of section 133(1)(a) or (b), alternatively after the conclusion of the business rescue process.

[76] I am mindful of the fact that the outcome of this application is unfortunate for Mr Putter and that creates an awkward situation, where there is an obvious conundrum. This kind of conundrum arises where the laws overlap and the possibility exists that all the labour law ramifications (especially where procedural fairness is challenged in a large-scale retrenchment) in the case of business rescue might not have been anticipated, thought through or considered. Unfortunately, the legislator did not insulate or ringfence a dispute in terms of section 189A(13) in the Companies Act and until there is an amendment to the law, the position will remain as unsatisfactory as it currently is.

[77] In the premises, I make the following order:

<u>Order</u>

1. The application is struck off the roll;

2. There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

<u>Appearances:</u>

For the Applicant: Advocate W Bekker

Instructed by: Serfontein Viljoen and Swart Attorneys