THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: J3049/18

In the matter between:

IZAK BOSMAN MARAIS AND 56 OTHERS	**Applicant**
and	
SHIVA URANIUM (PTY) LTD (in business rescue)	**First Respondent**
CLOETE MURRAY	**Second Respondent**
CRISTOPHER MONYELA	**Third Respondent**
NATIONAL UNION OF MINEWORKERS	**Fourth Respondent**
ASSOCIATION OF MINEWORKERS AND CONSTRUCTION UNION	**Fifth Respondent**
INDUSTRIAL DEVELOPMENT CORPORATION OF SOUTH AFRICA	**Sixth Respondent**

Heard: **20 September 2018**

Delivered: **05 October 2018**

Summary: **Section 133(1) of the Companies Act – this Court has no jurisdiction to uplifting the moratorium on litigation against a company in business rescue.**

JUDGMENT

NKUTHA-NKONTWANA. J

Introduction

[1] The applicants approached the Court by way of urgency seeking leave to institute these proceedings against the first respondent, in business rescue, in terms of section 133(1)(b) of the Companies Act[1]. In the main application, the applicants seek an order directing the first respondent to pay all unpaid remuneration and employment benefit contributions due and payable to all the applicants.

[2] The application is opposed by the second and third respondents, who are the first respondent's Business Rescue Practitioners (practitioners), who take two points *in limine*. Firstly, the practitioners contend that this Court lacks jurisdiction to entertain the application to uplift the moratorium to institute legal proceedings against a company during business rescue proceedings in terms of section 131 of the Companies Act. Secondly, the practitioners contend that the matter is not urgent and therefore should be struck off the roll.

Background

[3] The first respondent is part of the broader Oakbay Investment Group of companies with the Gupta family as a main shareholder. Subsequent to the pulling out of the four major banks from any dealings with Gupta businesses, the Bank of Baroda was the only institution transacting with the first respondent. On 12 February 2018, the Bank of Baroda gave notice to leave South Africa to the Registrar of Banks, rendering the first respondent's continued business operations impossible. The first respondent's board of directors resolved to place it in business rescue proceedings as of 19 February 2018.

[1] Act 71 of 2008 as amended.

[4] The applicants are the first respondent's employees and their main impugn is that they have not been paid their remuneration for the months of July and August 2018. The practitioners concede the arrears in remuneration. The explanation given to the applicants, sent through text cell phone messages, for non-payment of salaries is that the practitioners are involved in attempts to secure financial assistance that would enable them to pay salaries. No further explanation is provided in these proceedings as the practitioners raised the legal points without filing an answering affidavit. Nonetheless, some of the applicants have since been paid 30% of the outstanding salaries.

Jurisdiction of this Court

[5] Chapter 6 of the CA which deals with business rescue proceedings[2] and section 128(1)(e) defines 'court' as follows:

> '…depending on the context, means, either –
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> (i) the High Court that has jurisdiction over the matter; or
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> (ii) either –
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> (*aa*) a designated judge of the High Court that has jurisdiction over the matter, if the Judge President has designated any judges in terms of subsection (3); or
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> (*bb*) a judge of the High Court that has jurisdiction over the matter, as assigned by the Judge President to hear the particular

[2] Section 128(1)(b) states: '"**business rescue**" means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for —
(i) the temporary supervision of the company, and of the management of its affairs, business and property;
(ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and
(iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company;'

> matter, if the Judge President has not designated any judges in terms of subsection (3)'

[6] Whilst section 128(3) states that '[f]or the purposes contemplated in subsection (1) (e) or in any other law, the Judge President of a High Court may designate any judge of that court generally as a specialist to determine issues relating to commercial matters, commercial insolvencies and business rescue.'

[7] Pertinently, section 133 provides:

> '133. General moratorium on legal proceedings against company
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> (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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> …
>
> (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.'

[8] It was accordingly submitted by the practitioners that the reference to 'court' in terms of section 133(1)(b) must be interpreted to mean High Court specifically and exclusively.

[9] The applicants on the other hand were adamant that this Court has jurisdiction to uplift the moratorium in terms of section 133(1)(b). They assert that their

claims for outstanding remuneration are rooted in the fundamental right which is offended by non-payment and as such this Court has jurisdiction in terms of section 157(1) and (2) of the Labour Relations Act[3] (LRA) which states:

> '**157 Jurisdiction of the Labour Court**
>
> (1) Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.
>
> (2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from –
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> (a) employment and from labour relations;
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> (b) any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer; and
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> (c) the application of any law for the administration of which the Minister is responsible.'

[10] The applicants submit, in the alternative, that to the extent that there is a conflict between the Companies Act and the LRA, section 210 of the LRA states that '[i]If any conflict, relating to the matters dealt with in *this Act*, arises between *this Act* and the provisions of any other law save the Constitution or any Act expressly amending *this Act*, the provisions of *this Act* will prevail.'

[11] Let me quickly dispose of the applicants' submission that there is a conflict between the Companies Act and the LRA. In *Sondamase and Another v*

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[3] Act 66 of 1995 as amended.

Ellerine Hodings Ltd and Another,[4] This Court, per Steenkamp J, referred with approval to the judgment in *Fabrizio Burda v lntegcomm (Pty) Ltd,*[5] stated:

> 'It does not appear to me that there is any conflict between s133(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 s133 of the Companies Act to dispute[s] arising out of the LRA, it appears to have been settled by the recent decision of the Supreme Court of Appeal in *Chetty t/a Nationwide Electrical v Hart and Another NNO* [2015 (6) SA 424 (SCA) paras 26-29]. In that case, the SCA interpreted s133 to place a moratorium, not only on legal proceedings in court, but even arbitration proceedings.'

[12] I align myself with the above interpretation.

[13] That takes me to section 157 of the LRA. The applicants' submission that this Court has previously assumed jurisdiction, particularly with reference to *Ellerine*, is untenable. Instead, in *Ellerine* the Court was never asked to uplift the moratorium. The applicants failed to refer me to any authority where this Court pronounced on this issue and I have not come across any either.

[14] The principles of interpretation summarised in *Joint Municipal Pension Fund v Endumeni Municipality*[6] referred to by Advocate Pottas, counsel for the practitioners, are trite. The Supreme Court of Appeal (SCA), per Wallis JA stated:

> 'The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. <u>Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to</u>

[4] (C669/2014) [2016] ZALCCT 53 (22 April 2016) at para 15.
[5] Case no JS 539/12 (29 November 2013) (per Maenetje AJ) at paras12-13.
[6] [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) at para [18].

which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.' (Emphasis added)

[15] In the present case, the mechanism of business rescue proceedings is one of the novelties introduced by the Companies Act and regulated in terms of chapter 6. The purpose 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] It is within this context that the section 133(1) moratorium must be understood, that is, to strike that balance or as eloquently put by Court in *Ellerine*:[8]

'The aim of this provision is clear. It is to create some breathing space for the business to be rescued and thus to put all legal proceedings on hold until the company may be brought back on track to continue with its business. *Henochsberg* explains:

'Section 133 makes provision for a general moratorium (in some jurisdictions and moratorium is known as a 'stay' or a 'stay of proceedings') on legal proceedings ... against the company ... while the company is subject to business rescue proceedings. The moratorium granted by this section is designed to provide the company with a breathing space while the business print rescue

[7] Section 7(k) of the Companies Act.
[8] *Supra* n 4 at para 12.

> practitioner attempts to rescue the company by designing and implementing a business rescue plan. This is a crucial element of any corporate rescue mechanism, as it allows the company sufficient breathing space to be able to find a solution to the financial problems it is experiencing at the time.'

[16] The essence of business rescue proceedings is to engender a rehabilitation of a financially distressed company through temporary oversight and management of its affairs, business and property; temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and a business rescue plan that will help to keep it afloat in a manner that balances the rights and interests of all relevant stakeholders.[9]

[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 section 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.

[18] Now let me explore the sustainability of the applicants' submission that in terms of section 157(2) this Court can exercise its concurrent jurisdiction with the High Court to grant the relief they are seeking in terms of section 133(1)(b). In this regard the applicants referred to *Gcaba v Minister for Safety and Security and Others,*[10] to support their assertions. Interestingly, the Constitutional Court in *Gcaba* decried litigations typified in this case. It was stated:

> 'The consequence of the finding that the conduct behind employment grievances like those of Ms Chirwa and the applicant is not administrative

[9] See section 128(1)(b) of the Companies Act.
[10] [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC); (2010) 31 ILJ 296 (CC); [2009] 12 BLLR 1145 (CC) at paras 69 -73

action, will substantially reduce the problems associated with parallel systems of law, duplicate jurisdiction and forum shopping. As found in *Chirwa*, the Labour Court and other LRA structures have been created as a special mechanism to adjudicate labour disputes such as alleged unfair dismissals grounded in the LRA and not, for example, applications for administrative review. The High Court adjudicates the alleged violations of constitutional rights, administrative review applications, and of course all other matters. This corresponds with a proper interpretation of section 157(1) and (2).

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 section 145. Section 157(1) should, therefore, be given expansive content to protect the special status of the Labour Court, and section 157(2) should not be read to permit the High Court to have jurisdiction over these matters as well.

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, section 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.

Therefore, section 157(2) should not be understood to extend the jurisdiction of the High Court to determine issues which (as contemplated by section 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 section 157(2)(a), (b) and (c).

Furthermore, the LRA does not intend to destroy causes of action or remedies and section 157 should not be interpreted to do so. Where a remedy lies in the High Court, section 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.'

[19] In the same manner that section 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, section 133(1)(b). As stated in *Gcaba*:[11]

'…another principle or policy consideration is that the Constitution recognises the need for specificity and specialisation in a modern and complex society under the rule of law. Therefore, a wide range of rights and the respective areas of law in which they apply are explicitly recognised in the Constitution. Different kinds of relationships between citizens and the state and citizens amongst each other are dealt with in different provisions. The legislature is sometimes specifically mandated to create detailed legislation for a particular area, like equality, just administrative action (PAJA) and labour relations (LRA). Once a set of carefully-crafted rules and structures has been created for the effective and speedy resolution of disputes and protection of rights in a

[11] *Supra* at para 56.

particular area of law, it is preferable to use that particular system.' (Emphasis added)

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

[21] In my view, the interpretation advocated by the applicants that this Court has concurrent jurisdiction in terms of section 157(2) to venture into matters pertaining business rescue proceedings is untenable. However, this Court's jurisdiction in employment related claims remains intact.

Urgency

[22] Alternatively, this application must fail on urgency. The applicants have a substantial redress in due course. In terms of section 135 of the Companies Act, 'any unpaid amount of remuneration, reimbursement for expenses or any other amount relating to employment that becomes due and payable by a company to an employee during that company's business rescue proceedings, the amount so owing is regarded as post-commencement finance' and would be paid in priority to other claims.

[23] In essence, the applicants' interests are not under any threat as the provisions of chapter 6 confer better benefits than those provided for under the provisions of the Insolvency Act.[12] As it were, the practitioners have since made some payments towards arrears in salaries. Therefore, to persist with this application on urgent basis is patently ill-conceived.

Conclusion

[12] *Henochsberg* on the Companies Act, 71of 2008 (Vol 1).

[24] In the circumstances, this Court has no jurisdiction to uplift 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[13](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).

<u>Costs</u>

[25] On the issue of costs, it is well known that costs do not necessarily follow the result in this Court, especially if the parties are in a persisting relationship as typified in the present case.

[26] In the circumstances, I make the following order:

<u>Order</u>

1. The application is struck off the roll.

2. There is no order as to costs.

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

[13] Act 75 of 1997 as amended.

<u>Appearances</u>

For the Applicant:	Advocate A Mosam
Instructed by :	Gani Mayet Attorneys
For the Respondent:	Advocate R Pottas
Instructed by:	JI Van Niekerk Inc