Reportable

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

Case no: D1051/19

JOSE FILIPE PERREIRA DA SILVA CRISTELO MARQUES First Applicant

SOOBRAMONEY RAMSAMY PILLAY Second Respondent

NGENANI CAIPHUS NGUBO Third Applicant

MSAWENKOSI MUSA MHLONGO Fourth Applicant

NOLAN RAMSAROOP Fifth Applicant

ZESHA RAMRATHAN Sixth Applicant

TERRY-LLOYD ESTMENT Seventh Applicant

and

GROUP FIVE CONSTRUCTION (PTY) LTD

(under supervision) First Respondent

PETER VAN DEN STEEN *N.O.* Second Respondent

DAVE LAKE *N.O.* Third Respondent

Date of hearing: 24 July 2019

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Date of judgment: 25 July 2019

Summary: (*urgent application for payment of severance pay to employees retrenched during business rescue proceedings- Labour Court having no jurisdiction to uplift moratorium on legal proceedings-power belongs to the High Court exclusively*)

JUDGMENT[1]

LAGRANGE J

Introduction

[1] This is an application for the urgent payment of severance pay brought by seven former employees of the first respondent, Group Five Construction ('Group 5'). The business rescue practitioners (BR practitioners), being the second and third respondents, opposed the application.

[2] It is common cause between the parties that the severance pay is due and owing to the applicants. However, the BR practitioners contend firstly that the application is not urgent and secondly that the labour court does not have the jurisdiction to entertain an application of this nature in the absence of the written consent of the practitioners or with the leave of the High Court.

Urgency

[3] The applicants were all retrenched on 30 April 2019. They have only launched this application on or about 10 July more than two months later. They maintain that they were entitled to receive their statutory severance payments under section 41 of the Basic Conditions of Employment Act 75 of 1997 ('the BCEA'), upon termination. Strictly speaking, severance pay is not one of the items mentioned as payable on termination in section 40, though section 41 stipulates it is payable to persons who are dismissed for operational reasons.

[1] Patent grammatical and typographical errors rectified on 28/11/19

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[4] The applicants contend that the application is urgent because they have been financially prejudiced because the income had been terminated and the BR practitioners have not advised them when they will pay them. No indication is given in the papers however of the particular financial circumstances of the applicants and in the absence of such information the court cannot assume that their predicament is more exceptional than any other person who has lost their employment. Ordinarily, non-payment of remuneration is not considered a self-evident justification for launching urgent proceedings to recover it.

[5] In the circumstances, though the court is sympathetic to employees who have lost their remuneration through no fault of their own, the applicants had not provided the court with grounds of exceptional economic hardship that might warrant the court deviating from the normal rule. Consequently, I am not persuaded that the application is urgent and accordingly the matter would be struck off the roll for lack of urgency, if this court had jurisdiction to entertain the application. However, in view of my conclusion below, it is not competent for the court to consider the application in the first place.

Jurisdiction of Labour Court to Hear Application

[6] The BR practitioners maintained that the court could not even hear such an application are the difficulties presented by section 133 (1) of the Companies Act, 71 of 2008, because it deals with the court's jurisdiction to even entertain such an application in the first place. Section 133 states:

> **133 General moratorium on legal proceedings against company**
>
> (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;
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> (d) criminal proceedings against the company or any of its directors or officers;

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> (e) proceedings concerning any property or right over which the company exercises the powers of a trustee; or
>
> (f) proceedings by a regulatory authority in the execution of its duties after written notification to the business rescue practitioner.
>
> (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.

[7] The applicants argue that this provision has no application to their claim because section 136 (1)(b) of the Companies Act provides that:

> (1) Despite any provision of an agreement to the contrary-
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> (b) any retrenchment of any such employees contemplated in the company's business rescue plan is subject to section 189 and 189A of the Labour Relations Act, 1995 (Act 66 of 1995), and other applicable employment related legislation.

[8] Reading this together with section 210 of the Labour Relations Act 66 of 1995 ('the LRA'), the applicants contend that this subordinates the provisions of 133 (1) to the requirements of the BCEA and to the provisions of the LRA. As authority for this argument they rely a number of submissions, which are dealt with below.

[9] The applicants cite a dictum in ***National Union of Metal Workers of South Africa obo Members v Motheo Steel Engineering CC***[2], in which the court held:

> (1) In terms of section 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 section 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.

[2] [2014] JOL 32257 (LC)

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[10] This principle was applied in the same dispute by an arbitrator considering the referral of a claim of unfair dismissal for operational reasons to arbitration. The arbitrator found that the referral did not amount to prohibited legal proceedings under section 133 (1) of the Companies Act.[3]

[11] The applicants also argue that because section 136(2A) exempts employment contracts from the BR practitioners' powers to suspend obligations owed by Group 5 at the time of the commencement of business rescue proceedings, it follows that it could not have been intended that if the BR practitioners have an obligation to pay employees of the company while still employed, they would have no obligation to pay them their severance benefits when they lose their jobs. In support of this argument the applicants cite the case of ***Solidarity Obo BD Fourie & Others v Vanchem Vanadium Products (Pty) Ltd and Others; In re: National Union of Metalworkers (NUMSA) Obo Members v Vanchem Vanadium Products (Pty) Ltd and Another***[4], in which it was held:

> (36) Section 136(2) permits a BRP to suspend obligations owed by the company at that time business rescue proceedings commenced. Section 136(2A) exempts employment contracts from this power of suspension. Once again, the provisions deal with the suspension of obligations, but are silent on the question of the lawful termination of obligations. Considering the section as a whole it seems the primary object of the section was to prevent the unilateral variation of company obligations by a BRP, but to permit the BRP to suspend the performance of certain contractual obligations except those relating to employees. It does not seem to be directed at preventing the lawful termination of obligations including employment contracts. Consequently, I am not persuaded that the provisions of section 136 effectively outlaws any retrenchments taking place except in terms of an approved business plan.

11.1 Section 136 (2) and (2A) of the Companies Act read:

> (2) Subject to subsection (2A), and despite any provision of an agreement to the contrary, during business rescue proceedings, the practitioner may-
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> (a) entirely, partially or conditionally suspend, for the duration of the business rescue proceedings, any obligation of the company that-

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[3] ***National Union of Metalworkers of South Africa obo four members v Motheo Steel Engineering CC*** **[2014] JOL 32256 (MEIBC)** at para 4.1

[4] 1.1 (J385/16 & J393/16) [2016] ZALCJHB 106 (22 March 2016)

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(i) arises under an agreement to which the company was a party at the commencement of the business rescue proceedings; and

(ii) would otherwise become due during those proceedings; or

(b) apply urgently to a court to entirely, partially or conditionally cancel, on any terms that are just and reasonable in the circumstances, any obligation of the company contemplated in paragraph (a).

(2A) When acting in terms of subsection (2)-

(a) a business rescue practitioner must not suspend any provision of-

(i) an employment contract; or

(ii) an agreement to which section 35A or 35B of the Insolvency Act, 1936 (Act 24 or 1936), would have applied had the company been liquidated;

(b) a court may not cancel any provision of-

(i) an employment contract, except as contemplated in subsection (1); or

(ii) an agreement to which section 35A or 35B of the Insolvency Act, 1936 (Act 24 of 1936), would have applied had the company been liquidated; and

(c) if a business practitioner suspends a provision of an agreement relating to security granted by the company, that provision nevertheless continues to apply for the purpose of section 134, with respect to any proposed disposal of property by the company.

[Emphasis added]

However, what is notable about section 136 (2A) (a) (i) is that the prohibition against the BR practitioners varying the employer's obligations to employees is confined to contractual obligations only. It does not necessarily follow that the debts incurred in respect of statutory obligations towards employees are to be treated similarly. If it were the case, then it begs the question why the legislature did not speak about a prohibition against the suspension of any or all obligations owed by the employer to employees. I am not persuaded that this advances the applicant's argument.

[12] In addition, the applicants contend that the moratorium in section 133 (1) cannot be imposed because it conflicts with the enforcement of rights emanating from the LRA and the BCEA. However, since the decisions above which the applicants have relied on there had been other judicial pronouncements which do not support the dictum in *Motheo*. Most

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importantly, in ***Chetty t/a Nationwide Electrical v Hart and Another NNO***[5], the SCA held that, considered purposively, the reference to ' legal proceedings' in s133(1) included arbitrations:

> [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 wellbeing of the company and its ability to regain its financial health. 25 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, 26 an interpretation of s 133(1) that excludes them from the moratorium on legal proceedings against financially distressed companies would significantly hinder its attainment.
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> [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 B 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.

[5] 2015 (6) SA 424 (SCA)

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[13] The same logic would be applicable to labour court proceedings, and was applied by the labour court in ***Fabrizio Burba v Integcomm (Pty) Ltd***.[6] The court also went further and held that the only court which could give permission to proceed against a company under business rescue, in the event that the BR practitioner does not consent to such proceedings, is the High Court. Maenetje AJ, pointed out that in the definition of a 'court' in section 128 (e) of the Companies Act, the only court contemplated was a High Court.[7]

[14] I accept that the SCA did not have to expressly consider the effect of section 210 of the LRA, and neither was it considered in *Burba,* but in ***Marais and Others v Shiva Uranium (Pty) Ltd (In Business Rescue) and Others*** [8] Nkutha-Nkontwana J considered in great detail whether the powers of the Labour Court under section 157(2) of the LRA should not be read to extend to matters where the High Court has been granted exclusive jurisdiction, such as those matters pertaining to business rescue in chapter 6 of the Companies Act.[9]

[15] In ***Sondamase and Another v Ellerine Hodings Ltd and Another*** [10] , which was also cited approvingly in *Shiva Uranium,* Steenkamp J endorsed the reasoning in Burda and found that there was no conflict between section 133(1)(a) of the Companies Act and the dispute resolution provisions of the LRA. He further went on to observe that the judgment in *Chetty* settled any doubt that might have arisen from conflicting judgments about the application of section 133 to disputes arising out of the LRA. The judge concluded that:

> [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

[6] JS539/12 (29 November 2013) unreported at paras [12] to [13]

[7] At paras [14] –[16].

[8] (2019) 40 ILJ 177 (LC); [2019] 5 BLLR 472 (LC)

[9] At paras [18] – [20].

[10] (C669/2014) [2016] ZALCCT 53 (22 April 2016)

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period of business rescue operations. That does not appear to me to be in conflict with the provisions of the LRA.

[16] In the light of the decisions in *Chetty, Burda, Sondamase* and *Shiva Uranium* it seems that the weight of authority is against this court assuming the mantle of the High Court to uplift the moratorium on legal proceedings imposed by section 133 (1). That is not to say that justified circumstances may exist for the High Court to do so in instances where permission to uplift the moratorium has been refused by the business practitioner. But that is not a claim that can be pursued in this court.

[17] In conclusion, I am satisfied this court does not have the power to order the payment of severance pay to the applicants, which would entail it implicitly uplifting the moratorium on legal proceedings. I note in passing that in terms of s 41 of the BCEA the Labour Court is not the statutorily designated forum that would deal with these claims unless they arise in the context of determining a dispute over the unfair dismissal of employees for operational reasons. The ordinary forum for pursuing severance pay claims is in fact through arbitration.

Costs

[18] The respondents had pushed for costs on a punitive scale on the basis that the applicants have no prospect of success given the weight of jurisprudence. I accept that the applicants might have been inclined to be more circumspect about proceeding after receiving the correspondence from the respondents before the respondents filed their answering affidavit. However, the judgments in favour of the respondents did not address any of the precedents pointing against them, and the applicants' case was not self-evidently unarguable. In the circumstances the most equitable and appropriate cost order will be to make the parties bear their own costs.

Order

[19] The application is dismissed.

[20] No order is made as to costs.

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Lagrange J

Judge of the Labour Court of South Africa

Appearances

For the applicants	I Veerasamy & W N Shapiro instructed by McGregor Erasmus Attorneys
For the respondents	B Pistorius & G Fourie SC instructed by Werksmans Attorneys.

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