IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: JA32/2020

In the matter between:

SOUTH AFRICAN AIRWAYS (SOC) LIMITED	
(In Business Rescue)	**First Appellant**
LESLIE MATUSON N.O.	**Second Appellant**
SIVIWE DONGWANA N.O.	**Third Appellant**
and	
NATIONAL UNION OF METALWORKERS	
OF SOUTH AFRICA obo MEMBERS	**First Respondent**
SOUTH AFRICAN CABIN CREW	
ASSOCIATION obo MEMBERS	**Second Respondent**
AVIATION UNION OF SOUTH AFRICA	**Third Respondent**
NATIONAL TRANSPORT MOVEMENT	**Fourth Respondent**
SOUTH AFRICAN AIRLINE PILOTS	
ASSOCIATION	**Fifth Respondent**
SOUTH AFRICAN TRANSPORT AND	
ALLIED TRADE UNION	**Sixth Respondent**
SOLIDARITY	**Seventh Respondent**
NON-UNIONISED EMPLOYEES	**Eighth Respondent**
THE COMMISSION FOR CONCILIATION,	

MEDIATION AND ARBITRATION **Ninth Respondent**

Heard: **30 June 2020**

Delivered: **09 July 2020**

Coram: Phatshoane ADJP, Davis JA, Musi JA.

JUDGMENT

PHATSHOANE ADJP

[1] This appeal relates to the vexed question when may a business rescue practitioner commence retrenchment proceedings under s 189 of the Labour Relations Act, 66 of 1995 ("the LRA"). The answer lies in the correct interpretation of s 136(1)(*b*) of the Companies Act,71 of 2008 ("the Companies Act").

[2] The appeal, with the leave of the Labour Court (*per* Van Niekerk J), is against the whole of its judgment and order issued under Court Case No: J424/20 on 07 May 2020. The Labour Court found that the business rescue practitioners' (BRPs') conduct in issuing a notice in terms of s 189(3) of the LRA was procedurally unfair and directed that the concerned notice be withdrawn.

[3] The factual matrix culminating in this appeal has been set out in some detail in the judgment of the Labour Court. An abbreviated version will suffice. The financial woes experienced by the South African Airways (SOC) Limited ("SAA"), the first appellant, over a protracted period of time is a matter of public record. On 05 December 2019 SAA was placed under voluntary business rescue. Messrs Leslie Matuson and Siviwe Dongwana NNO, the second and third appellants, were appointed as the business rescue practitioners to oversee its affairs.

[4] On 11 November 2019, prior to the commencement of the business rescue proceedings, the SAA management proposed a reorganisation of its business in which it was envisaged that 944 employees of a workforce of about 4 700

may be dismissed for operational reasons. A retrenchment process commenced with the issue of a s 189(3) notice to the employees. The consultation process was initially deferred to January 2020, but after the appointment of the business rescue practitioners, it was aborted. The formal communication of the abandonment of that process was sent to the unions on 13 March 2020.

[5] The business rescue process has not proceeded smoothly. There is no dispute that after taking control of the business, the BRPs examined the business and found it haemorrhaging money unsustainably. The company was hit by a loss of confidence in its business by travel trade partners and customers. This required additional funding from outside investors. The BRPs took steps to alter business practices in early February 2020 by closing routes and reducing flights in order to decrease costs and to limit the "burn of cash" injection into the business as a measure of last resort.

[6] This reorganisation of the business was interpreted by NUMSA, the first respondent, and certain unions to be the commencement of a retrenchment process. As a consequence, the unions launched an urgent application on 09 February 2020 in the Labour Court under Case No: J149/20 which came before Moshoana J on 14 February 2020. They sought to interdict the mooted retrenchment as procedurally unfair on the basis that no notice in terms of s189(3) of the LRA had been issued by the employer. The application was dismissed on the basis that, at that stage, the BRPs had not yet contemplated dismissals for operational requirements and the retrenchment obligations imposed by the LRA on SAA had not yet arisen. During this application NUMSA argued that a retrenchment process had *de facto* commenced and that the BRPs ought to have issued a s 189 notice commencing the retrenchment. This argument was rejected by the Labour Court.

[7] On 09 March 2020 the BRPs issued a notice in terms of s 189/189A of the LRA in which they invited the employees and the unions to consult over the proposed retrenchments. The effect of that notice, in light of the scale of the proposed retrenchment and the size of SAA's business, ushered in a 60-day period during which consultation should take place. The notice highlighted that

SAA's business was not financially or economically viable and that the company required a fundamental restructuring of its business affecting potentially all 4 700 employees. In the envisaged structure 2 440 jobs would exist, comprising existing or newly restructured positions. It was anticipated that initial consultations would be held on 12 March 2020 and that the 60 day period for consultation as envisaged in s 189A of the LRA would end on 08 May 2020. Any termination notices would be issued with effect from 10 May 2020.

[8] On 15 March 2020, the President declared a National State of Disaster (NSD) due to the Covid-19 pandemic. Following this, on 19 March 2020, the BRPs issued a supplementary s 189/189A notice addressing the changed circumstances and the consequential impact on the aviation industry. It sought an agreement on certain short-time and related interventions. A revised intention to issue letters of dismissal by 31 March 2020 was recorded.

[9] NUMSA refused to participate in the s 189/189A consultation process whereas the BRPs pressed on in all earnest. On 30 April 2020, NUMSA and SACCA, the second respondent ("the unions"), launched an application in terms of s 189A(13) of the LRA in the Labour Court seeking a declarator, *inter alia*, that the SAA and BRPs' issuing of s 189/189A notice to the employees on 09 and 19 March 2020 was unlawful, alternatively, unfair because SAA and the BRPs had not presented the employees with a business rescue plan as contemplated in s 150 of the Companies Act. The unions also sought an order that the notices be withdrawn, alternatively, that the consultation process be suspended until the employees were placed in possession of a draft business rescue plan as contemplated in s 144(3)(d) read with s 150 of the Companies Act. The application was predicated on s 136(1)(*b*) of the Companies Act. Essentially, the unions contended that the BRPs could not commence the consultation process without having published a business rescue plan.

[10] At the time the application was launched in the Labour Court, the BRPs had not yet produced and published the business rescue plan as envisaged in s 150 of the Companies Act despite having been in the office for approximately five months. Several extensions for the publication of the plan were sought

and granted by the creditors. It is common cause, and in the public domain, that the BRPs published their long-awaited business rescue plan on Tuesday 16 June 2020.

[11] The Labour Court held that there was complete protection against the employees' dismissal during the business rescue proceedings and found that the present dispute implicated the right to fair labour practices as enshrined in the Bill of Rights. An important facet of this right is the right to security of employment. The Court held that s 136(1)(*b*) of the Companies Act had to be read purposefully in light of the constitutional provisions and that, properly construed, reference to "contemplated retrenchments in a business rescue plan" in s 136(1)(*b*) "*establishes precondition precedent for the commencement of any retrenchment process during business rescue proceedings*". Section 136(1)(*b*) required that any need to retrench had to be rooted in the business rescue plan.

[12] The Court found no provision in s 136(1) or in Chapter 6 of the Companies Act that empowered a business rescue practitioner to retrench employees in the absence of a business rescue plan. It concluded that, absent a business rescue plan, the issuing of the notices in terms of s189(3) of the LRA to commence the consultation was premature and amounted to procedural unfairness. As noted, it directed that the notices be withdrawn.

The grounds of appeal

[13] In a nutshell, the grounds of appeal are that the Labour Court erred in:

13.1 interpreting s 136 to mean that there is complete protection against employees' dismissal during the business rescue proceedings;

13.2 holding that the default position imposed by s 136 is that the retrenchment is excluded or prohibited until the development of a business rescue plan;

13.3 interpreting s 136 to impose additional rights and obligations on the employers and employees over and above those imposed by the LRA;

13.4 finding that the reference in s 136(1)(*b*) to "contemplated retrenchments" establishes a condition precedent to the commencement of any retrenchment process during the business rescue proceedings;

13.5 holding that a contemplated retrenchment may only be located in a business rescue plan;

13.6 not following the reasoning in *Solidarity obo BD Fourie and Others v Vanchem Vanadium Products (Pty) Limited and others*,[1] in particular, the finding in para 36 of that decision where Lagrange J held that the provisions of s 136 did not effectively outlaw any retrenchments taking place except in terms of a business rescue plan; and lastly

13.7 failing to find that the Court had no jurisdiction to grant the relief sought because s 133(1) of the Companies Act prohibited the legal proceedings against a company in business rescue without the written consent of BRPs; that the High Court had exclusive jurisdiction on the question of interpretation of Chapter 6 of the Companies Act.

[14] There are two aspects to the appeal that need to be considered first. These relate to the mootness of the application and the question of jurisdiction of the Labour Court.

Mootness of the application

[15] As already discussed, it is now publicly known that the BRPs published their business rescue plan on Tuesday 16 June 2020. The publication of the plan means that events have overtaken the initial move by the BRP 's to retrench. Therefore, the outcome of this appeal may have no practical effect. Be that as it may, irrespective of the mootness of the application between the parties *inter se*, it is necessary for this Court to consider the appeal because it raises novel legal issues which are of public importance. In addition, apart from the parties' general view that the matter be determined by this Court, there are three divergent decisions of the Labour Court on the interpretation of s 136 of

[1] J385/16 &J393/16) [2016] ZALCJHB 106 (22 March 2016).

the Companies Act. It is therefore manifestly in the interests of justice to resolve this legal question**.**

Jurisdiction of the Labour Court

[16] The proposition advanced on behalf of the BRPs, half-heartedly I should add, is that s 133(1) of the Companies Act prohibits any legal proceedings against a company in business rescue, in any forum, without the written consent of the business rescue practitioners, or the leave of the Court. It was further contended that, in the absence of consent, a litigant must obtain leave of the High Court which was not sought in this case. It was argued that the Labour Court has no inherent power to intervene in business rescue proceedings but the effect of the judgment of the Labour Court was to impose such a power.

[17] By means of s 133(1) the legislature intended to allow a company in distress the necessary breathing space by placing a moratorium on legal proceedings and enforcement action in any forum.[2] The approach adopted by the BRPs is problematic because they did not pertinently raise this objection before the Labour Court. The Labour Court was of the view that the aspect of jurisdiction had been resolved on the basis that the unions had confirmed that the application was filed under s 189A(13) of the LRA which conferred a supervisory role on the Labour Court over the retrenchment process with powers to intervene, where necessary, and to craft a remedy which would address any resultant procedural defects.

[18] In *Barkhuizen v Napier,*[3] the Constitutional Court pronounced:

> 'The mere fact that a point of law is raised for the first time on appeal is not in itself sufficient reason for refusing to consider it. If the point is covered by the pleadings, and if its consideration on appeal involves no unfairness to the other party against whom it is directed, this Court may in the exercise of its discretion consider the point…'

[2] *Cloete Murray NNO & Another v Firstrand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA) at 447I-448A para 40.
[3] 2007 (5) SA 323 (CC) at 336C-D para 39.

[19] Mr Redding, for the BRPs, submitted that the question of jurisdiction was not argued orally in the Labour Court although it remained an issue on paper which was advanced in written argument. Apparent from the answering affidavit the alleged non-compliance with s 133(1) was not properly pleaded by the BRPs. They perfunctorily stated therein that they had not been asked nor have they granted permission or consent for the launching of the application. They fully participated in the proceedings before the Labour Court without any demur despite the fact that their consent to the filing of the application had not been sought by their rival. This point ought to have been fully ventilated in the Labour Court. The belated attempt to raise it on appeal is unfair and prejudicial to the other parties to this dispute. All this militates against this Court's exercise of its discretion to consider the point. Therefore, the point is rejected.

[20] Mr Redding's further argument is that an application in terms of s189A(13) must be brought no later than 30 days after the employer has given notice to terminate employees' service or if notice is not given, the date on which the employee is dismissed. As at the date the application was launched, no notice of termination of any employee arising from the section 189/189A process had been given and no employee had been dismissed arising from that process. Mr Redding submitted that the giving of notice of termination of employment or actual dismissal as set out in s 189A(17) is a precondition for the Labour Court exercising its jurisdiction in terms of s189A(13). In the circumstances, he contended, the Labour Court did not have jurisdiction in terms of s189A(13).

[21] The following dictum in *Banks & another v Coca-Cola SA—A Division of Coca-Cola Africa (Pty) Ltd*[4] is apposite:

> '[17] The requirement in subsection (17) that an application be brought 'not later than 30 days after the employer has given notice to terminate the employee's services or, if notice is not given, the date on which the employees are dismissed', read with subsection (13), places what might be termed an 'outside limit' of 30 days post-dismissal or notice of dismissal within

[4] (2007) 28 ILJ 2748 (LC).

> which the application must be brought. However, the wording of the subsection and the structure of s 189A generally envisage that the court may be asked to intervene at any appropriate stage during a consultation process that has been initiated, or even prior to that, for example, when an employer purports to dismiss employees without commencing any consultation with them or their representatives.
>
> [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 9A(13)*(a)*, *(b)* and *(c)*, then compensation as provided by para *(d)* is the more apposite remedy.'

[22] This Court has on occasion dealt with the timeframes set out in s 189A(17) of the LRA in *Edcon Ltd v Steenkamp & others*[5] as follows:

> '..(T)hese time periods speak plainly to the intrinsic urgency of judicial intervention pursuant to s 189A(13), if a party wishes a procedural fairness dispute to be addressed. The relief that a court might grant in terms of s 189A(1)*(a)-(d)* must be understood in that context. The remedies are designed to be available when an aggrieved applicant brings the application by not later than 30 days after the notification of the possible retrenchment, and thus, 30 days before a dismissal notice may be given. The primary purpose is to get the retrenchment process back onto a track that is fair.' (My own emphasis)

[23] An application in terms of s 189A(13) of the LRA is triggered where an employer does not comply with a fair procedure. A consulting party may

[5] (2018) 39 ILJ 531 (LAC) at 539 para 24- this decision was upheld in *Steenkamp & others v Edcon Ltd* (2019) 40 ILJ 1731 (CC).

approach the Labour Court for an order, *inter alia*, compelling the employer to comply with a fair procedure. The Court would correct any procedural irregularity as and when it arises so that the integrity of the consultation process can be restored and the consultation process forced back on track.[6] The unions approached the Court on an urgent basis to vindicate their members' rights and had satisfied the jurisdictional requirement set out in s 189A(17) of the LRA. In the result, this legal point cannot be sustained and must also fail.

The main appeal (interpretation of s 136(1)(*b)* of the Companies Act)

[24] The relevant part of s 136 provides:

> **'**136 Effect of business rescue on employees and contracts:
>
> (1) Despite any provision of an agreement to the contrary-
>
> *(a)* during a company's business rescue proceedings, employees of the company immediately before the beginning of those proceedings continue to be so employed on the same terms and conditions, except to the extent that-
>
> (i) changes occur in the ordinary course of attrition; or
>
> (ii) the employees and the company, in accordance with applicable labour laws, agree different terms and conditions; and
>
> *(b)* any retrenchment of any such employees contemplated in the company's business rescue plan is subject to s 189 and 189A of the Labour Relations Act, 1995 (Act 66 of 1995), and other applicable employment related legislation.'

[25] Mr Redding contended that s 136 neither expressly nor by necessary implication aims to augment the LRA rights and protections, but rather preserves them. The moratoria provided for in Chapter 6 of the Act do not extend to the preservation of employment and the immunisation of employees from all dismissals, whether for misconduct or operational reasons. He further

[6] See *Steenkamp & others v Edcon Ltd* (2019) 40 ILJ 1731 (CC) at para 52 and authorities cited therein.

submitted that s 136(1)(*b*) provides that any retrenchment has to be in terms of the LRA (thus protecting the employees' LRA rights). In his view, this does not lead to a conclusion that there may be no retrenchment unless it is contemplated in a business rescue plan. The provision does not go so far as to state that the employer/BRP cannot initiate the retrenchment process until the plan has been devised, published or adopted. There was no clear commercial or other reason why the legislature would permit retrenchments, but limit it to cases where these dismissals were contemplated in a business rescue plan, the submission went.

[26] Mr Ngcukaitobi, for the unions, submitted that a business rescue plan under the Companies Act is a condition precedent to the commencement of the retrenchment process under the LRA. At the conclusion of the business rescue process, that is when a business rescue plan is finalised, employees may, under s 136(1)(*b*) be dismissed for operational requirements in accordance with the provisions of the LRA. He argued that this was the only "sensible" and "business-like" meaning that could be attributed to the subsection because a BRP cannot decide precisely who to retrench until it is known how the company will be restructured and saved through a business rescue plan. If this was not the case, he argued, then conceivably employees could be retrenched only to find that the business rescue plan, in final form, required them to be retained and that another distinct group of employees be retrenched. He further contended that to implement retrenchments in order to inform and shape the content of a future business rescue plan would be to put the cart before the horse and permits an unlawful "pruning" of the business in order to achieve a future outcome (which may potentially also constitute an automatically unfair dismissal in terms of s 187(1)(*g*) of the LRA).

[27] It would be wrong for courts to ignore the clear language of a statute under the guise of adopting a purposive interpretation, as doing so would be straying into the domain of the legislature.[7] In *Dadoo Ltd and Others v Krugersdorp Municipal Council*[8] Innes CJ enunciated the principle in these terms:

[7] *Smyth and Others v Investec Bank Ltd and Another* 2018 (1) SA 494 (SCA) at 509 para 45.
[8] 1920 AD 530 at 543.

> 'Speaking generally, every statute embodies some policy or is designed to carry out some object. When the language employed admits of doubt, it falls to be interpreted by the court according to recognised rules of construction, paying regard, in the first place, to the ordinary meaning of the words used, but departing from such meaning under certain circumstances, if satisfied that such departure would give effect to the policy and object contemplated. I do not pause to discuss the question of the extent to which a departure from the ordinary meaning of the language is justified, because the construction of the statutory clauses before us is not in controversy. They are plain and unambiguous. But there must, of course, be a limit to such departure. A Judge has authority to interpret, but not to legislate, and he cannot do violence to the language of the lawgiver by placing upon it a meaning of which it is not reasonably capable, in order to give effect to what he may think to be the policy or object of the particular measure.'

[28] For this reason the language adopted by the legislature remains the starting point for any interpretative inquiry. Where the words employed admit of more than one plausible interpretation, the purpose of the legislation must be employed as a tiebreaker. In the context of the Companies Act such an interpretative process must be applied in a manner that gives effect to the purposes set out in section 7.[9] In the case of s136 and the balance of the business rescue provisions, a key 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.[10] The statutory mechanism for the achievement of this purpose is contained in Chapter 6 of the Companies Act which governs business rescue and compromise with creditors. Business rescue is defined in the Act as 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

[9] Section 5(1) of the Companies Act 71 of 2008.
[10] Section 7(K) of the Companies Act 71 of 2008.

(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.[11]

[29] The primary aim of a corporate rescue procedure is not merely to rescue a company business or potentially successful parts of the business. The procedure aims to rescue the whole company or corporate entity.[12] This will naturally include preservation of jobs. Indeed one of the main drivers for the introduction of the business rescue regime in place of the system of judicial management was the rescue of an ailing business [13]and thus the retention of jobs. This gloss on the purpose of the business rescue provisions is captured by Prof Anneli Loubser and Mr Tronel Joubert as follows:[14]

> 'The preservation of jobs is widely regarded as one of the many economic and social benefits that could result from the successful rescue of a company or business…. the saving of jobs is a high priority for South Africa and the introduction of an effective and successful business rescue procedure was seen by government as an important measure to prevent further job losses. As was to be expected, the protection of the rights and interests of employees in the new business rescue proceedings were emphasised from the early stages of the corporate law reform process. It became evident that employees were to be regarded as stakeholders in a class of their own. In the Memorandum on the Objects of the Companies Bill 2008 it was stated that the new chapter 6 'recognises the interests of shareholders, creditors and employees'. The rest of this part of the document then continued by referring only to the protection of the interests of workers with no further mention of either the creditors or shareholders.'

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[11] Section 128(1)(*b*) of the Companies Act.
[12] See Companies and other Business Structures in South Africa, Dennis Davis *et al*, third Edition, Oxford Southern Africa, Chapter 12 at page 237.
[13] See Eric Levenstein Business Rescue Procedures.Lexis Nexis (looseleaf).
[14] Anneli Lobser & Tronel Joubert "the Role of Trade Unions and Employees in South Africa's Business Rescue Proceedings (2015) 36 ILJ 21.

It is against this purpose that s 136(1) ought to be construed.

[30] Section 136(1)(*a*) is clear and unambiguous. As the Court *a quo* correctly pointed out, employees in the employ of the company immediately before the business rescue proceedings continue to be employed on the same terms and conditions. There are three exceptions to this general protection that is offered to the employees; first, when changes occur in the ordinary course of attrition as in the case of dismissals for conduct or capacity, resignations, and retirements (s 136 (1)(*a*)(i)); and second, where the employees and the company, in accordance with applicable labour laws, agree on different terms and conditions of employment (s 136(1)(*a*)(ii)).

[31] The third exception, which is central to this appeal, is contained in s 136(1)(*b*). In terms of this provision, employees may be retrenched as contemplated in the company's business rescue plan. The section stipulates that:

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

The words *"contemplated in the company's business rescue plan,*" in my view, signifies the existence of a corporate rescue plan which would conceptualise the commercial rationale for the retrenchments of the employees. As I have indicated, the *raison d'être* for the enactment of s 136(1)(*b*) was to safeguard employees from being subjected to retrenchment without a business rescue plan.

[32] Section 150 makes it plain that the lawmaker intended that the rescue plan must precede any retrenchment and puts paid to any suggestion that the retrenchment process may commence without the plan. In terms of s 150(2) the business rescue plan must contain all the necessary information reasonably required to facilitate affected persons in deciding whether or not to accept or reject the plan, and must be divided into three Parts: Part A which sets out the background; Part B, proposals; whereas Part C, would contain the assumptions and conditions. Under this last rubric the plan must explain,

inter alia, what its effect will be on the number of employees and their conditions of employment. The proposed retrenchment of any employee would have to be disclosed in this part of the plan.

[33] To interpret s 136(1)(*b*) in the manner contended for by the BRPs would do violence to the language of the section. The argument that it ought to be interpreted as permitting the BRPs to commence with the retrenchment exercise in the absence of the rescue plan is incongruent with the statutory architecture of the corporate rescue process. The business rescue plan is intended to reorganise the business by crafting a roadmap aimed at salvaging an ailing company including preserving jobs. The formulation of a business rescue plan is the central task of the BRP and that it must be developed with the greatest expedition is made clear from a reading of s150(5) of the Companies Act which provides that the business rescue plan must be published within 25 business days after the date of the appointment of the BRP save where an extension had been granted by the court or the majority of creditors. It is clear from this provision that, as the business rescue plan must be published within a short period, retrenchments would be contained in the plan as opposed to a piecemeal reconstruction of the company which would allow a decision on retrenchments before the plan was published.

[34] Much store was also set by Mr Redding on the practical problems which in his view are posed by the Judgment of the Labour Court. He argued that insofar as a retrenchment process forms part of a business rescue plan its course and fate would be determined by the voters of the plan – not the management of the company or the BRPs. Once adopted, the plan must be implemented by the BRP as voted on and the BRP has no discretion to exercise. Mr Redding further argued that this would present a real difficulty as the responsibility for fair consultation, which requires an employer to respond and be flexible in respect of consultations on measures to avoid and minimise dismissals, would be a responsibility which, on the Labour Court's interpretation, falls upon a meeting of creditors, not the company's management or the BRP.

[35] In my view, the argument is somewhat misplaced because in terms of s 136(1)(*b*) the retrenchment process is subject to s 189 and 189A of the LRA

and other applicable employment-related legislation. Where the rescue plan, which contemplates retrenchments, has been approved the envisaged retrenchment would have to be conducted as prescribed in the LRA in the same way as any solvent company has to do. It is axiomatic that a BRP would have to assume control over that process.

[36] There was much debate about the role of section 39(2) of the Constitution of the Republic of South Africa, 1996 (Constitution) which fashions a mandatory constitutional canon of statutory interpretation.[15] It imposes an obligation on this Court "when interpreting any legislation" to "promote the spirit, purport and objects of the Bill of Rights". In *South African Police Service v Public Servants Association*[16] the Constitutional Court held that:

> 'Interpreting statutes within the context of the Constitution will not require the distortion of language so as to extract meaning beyond that which the words can reasonably bear. It does, however, require that the language used be interpreted as far as possible, and without undue strain, so as to favour compliance with the Constitution. This in turn will often necessitate close attention to the socio-economic and institutional context in which the provision under examination functions. In addition, it will be important to pay attention to the specific factual context that triggers the problem requiring solution.'

[37] Mr Redding noted that the constitutional right to fair labour practices as set out in s 23 of the Constitution balances the rights and interest of both the employers and the employees. It is not weighted only towards the employees and job security but recognises the employer's right to reorganise and manage its business.

[38] This Court held that where legislation has been enacted to give effect to a constitutional right, a party may not bypass that legislation and rely directly on the general provisions of constitutional right to fair labour practices in s 23 or the equality clause in s 9 of the Constitution.[17] This is in conformity with the

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[15] *Fraser v ABSA Bank Limited (National Director Of Public Prosecutions as Amicus Curiae)* 2007 (3) SA 484 (CC) para 43.
[16] 2007 (3) SA 521 (CC), [2007] 5 BLLR 383; [2006] ZACC 18) at para 20.
[17] *Safcor Freight (Pty) Ltd t/a Safcor Panalpina v SA Freight & Dock Workers Union*, (2013) 23 *ILJ* 335 (LAC) at para 18.

subsidiarity principle which provides that where legislation was enacted to give effect to certain constitutional rights, reliance must first be placed on the provisions of the specific legislation, and challenged if they do not adequately give effect to the constitutional rights in question.[18] The constitutional right to fair labour practices finds legislative expression in the LRA. Its scope covers the interests of both employers and employees.[19]

[39] There can be no question that s 23 recognises the rights of employers but simultaneously protects a range of rights of employees that are central to the democratic model promoted by the Constitution read as a whole. There is nothing in the interpretation that I have given to s136 of the Companies Act that is at war with the spirit, purport and objects of the Constitution. In addition, the interpretation that I have adopted to the wording of s136 is congruent with both the words employed by the legislature and the purpose it clearly had in mind when it enacted these provisions.

[40] On the basis of this analysis, no cogent criticism can be sustained on the Labour Court's conclusion that the issuing of the s 189 notice by the BRPs, absent the business rescue plan, was premature, unfair and had to be withdrawn. The concomitance thereof is that the appeal must fail.

The cross-appeal

[41] In the cross-appeal the attack on the judgment of the Labour Court is directed at the following passage:

> 'There was some debate during the hearing on voluntary separation packages. As I understand the position, there is currently an offer open to SAA employees to accept voluntary retrenchment on the terms specified. Some of them have accepted. To the extent that the unions contended that any moratorium on retrenchments during business rescue proceedings prohibited a business rescue practitioner from seeking to secure voluntary retrenchments, there is no basis for that proposition either in s 189 of the LRA or s 136 of the Companies Act. Nothing prevents an employer from offering a voluntary severance package as a measure to avoid retrenchment. If a

[18] *Baron and Others v Claytile (Pty) Ltd and Another* 2017 (5) SA 329 (CC) para 10.
[19] *Amcu and Others v Royal Bafokeng Platinum Ltd and Others* 2020 (3) SA 1 (CC) at 17 para 50.

> voluntary severance package is offered and accepted as a means to avoid the need to or even contemplate retrenchment, the contract of employment is terminated by mutual agreement and there is no dismissal. (See R le Roux *Retrenchment Law in South Africa* (Lexis-Nexis 2016) at p116-7) As I have indicated, s 136 (1)(*a*)(ii) contemplates a variation of terms of employment (including any termination of employment) by mutual consent.'

[42] It was argued for the unions that this finding by the Labour Court was incorrect because, when the voluntary severance packages were offered, the BRPs were already contemplating the dismissal of employees for operational reasons. Thus, the offer of voluntary severance packages was in effect a retrenchment and subject to a consultation process as envisaged in s 189 of the LRA.

[43] The Labour Court did not make any order regarding the offer of voluntary retrenchments packages. An appeal is by its nature directed at a wrong order and not at incorrect reasoning.[20] In any event, there is no reason in law why the BRPs could not unilaterally offer voluntary severance packages to the employees. The upshot of this is that the cross-appeal has no merit and must be refused.

[44] None of the parties requested costs.

In the result, I make the following order:

Order:

1. The appeal and the cross-appeal are dismissed.

2. No order is made as to costs.

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MV Phatshoane ADJP

[20] See *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at 308-9 para 85.

Davis JA and Musi JA concur in the judgment of Phatshoane ADJP

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