DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

08/05/2020 K. Ndongeni
DATE SIGNATURE

THE JUDICIARY · REPUBLIC OF SOUTH AFRICA ·

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

Reportable

Case no: J424/20

In the matter between

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA obo MEMBERS	First Applicant
SOUTH AFRICAN CABIN CREW ASSOCIATION obo MEMBERS	Second Applicant

and

SOUTH AFRICAN AIRWAYS (SOC) LIMITED (In Business Rescue)	First Respondent
LES MATUSON *N.O*	Second Respondent
SIVIWE DONGWANA *N.O*	Third Respondent
AVIATION UNION OF SOUTH AFRICA	Fourth Respondent

NATIONAL TRANSPORT MOVEMENT	Fifth Respondent
SOUTH AFRICAN AIRLINE PILOTS ASSOCIATION	Sixth Respondent
SOUTH AFRICAN TRANSPORT AND ALLIED TRADE UNION	Seventh Respondent
SOLIDARITY	Eighth Respondent
NON-UNIONISED EMPLOYEES	Ninth Respondent
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	Tenth Respondent

Heard: 7 May 2020 via Zoom

Delivered: This judgment is handed electronically by circulation to the parties' legal representatives by email, and release to the court's library and SAFLII. The date and time for hand-down is deemed to be 14h00 on 8 May 2020.

Summary: Section 189A (13) of the LRA empowers this court to intervene in retrenchment processes and make orders to ensure that any retrenchment ultimately meets the requirements of fair procedure. The applicant unions rely on s 136 (1) of the Companies Act to contend that the consultation process commenced by the business rescue practitioners at SAA on 9 March 2020 is procedurally unfair because they issued an invitation to consult in terms of s 189 (3) of the LRA before the presentation of a business rescue plan. It is common cause that no business rescue plan has been presented. The crisp issue is whether s 136 (1) (b) of the Companies Act permits a business rescue practitioner to retrench employees only as part of a business rescue plan and on presentation of that plan, or whether a retrenchment process may be initiated in the absence of a business rescue plan. Held: that on a proper interpretation of s 136 (1), a business rescue practitioner may initiate a retrenchment process

only once a business rescue plan that contemplates retrenchments has at least been presented. In the absence of a business rescue plan, the issuing of notices commencing a consultation process over proposed retrenchments is procedurally unfair.

JUDGMENT

VAN NIEKERK J

Introduction

[1] This application raises a question that can be simply stated, but which is less easily capable of determination. The issue is this – can a business rescue practitioner appointed under the Companies Act dismiss employees for reasons related to operational requirements before a business rescue plan that contemplates retrenchments has been prepared and presented? The answer to that question depends on the meaning of a section in the Companies Act that extends protection to workers during business rescue proceedings.

[2] The first respondent (SAA) and the second and third respondents (the business rescue practitioners) submit that there is no bar to them retrenching SAA employees prior to the preparation of a business plan; the applicants (the unions) contend that any notice of commencement of consultations in terms of s 189 (3) of the LRA is invalid unless and until a business plan has been presented; alternatively, that the issuing of any notice in the absence of a business plan is unfair. The unions seek orders to the effect that SAA and the business rescue practitioners withdraw the s 189 (3) notices and suspend the current consultation process until they have prepared and presented a business rescue plan. They also seek an order directing SAA and the business rescue practitioners not to terminate the services of any SAA employee in terms of s 189 of the Labour Relations Act (LRA).

Jurisdiction

[3] To the extent that the unions seek to have s 189 (3) notices declared unlawful and invalid because they contravene s 136 (1) of the Companies Act, SAA and the business rescue practitioners submit that this court has no jurisdiction to consider the lawfulness or otherwise of a party's compliance with the provisions of the Companies Act. As a matter of law, that is correct – generally speaking, this court's jurisdiction is limited to disputes arising within the scope of the LRA or some other statute that specifically confers jurisdiction on the court, usually in relation to disputes between employer and employee. In any event, as the Constitutional Court held in *Steenkamp and Others v Edcon Ltd* (2016) 37 *ILJ* 564 (CC)), in claims brought under the LRA, this court's jurisdiction is concerned with the fairness of employer conduct, not its validity.

[5] Despite much having been said on this issue in the papers before me, the dispute about jurisdiction was resolved on the basis of the unions' confirmation that the present application was filed in terms of S 189A (13) of the LRA, and that the basis for the relief sought was that the issuing of a notice of invitation to consult in the present circumstances was unfair.

[6] Section 189A (13) reads as follows:

> (13) 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 –
>
> (a) compelling the employer to comply with a fair procedure;
>
> (b) interdicting or restraining the employer from dismissing an employee prior to complying with a fair procedure;
>
> (c) directing the employer to reinstate an employee until it has complied with a fair procedure;
>
> (d) make an award of compensation, if an order in terms of paragraphs (a) to (c) is not appropriate.

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 is a real-time supervisory role by this court over the consultation process, with powers to intervene if and when necessary, and to craft a remedy designed to address any procedural shortcoming that is found to exist.

[7] The only question that the court need determine, therefore, is whether the unions are entitled to relief in terms of s 189A (13); in other words, whether they have established that the retrenchment process on which SAA has embarked is procedurally unfair.

[8] Section 189A (14) provides that the court may make any appropriate order referred to in s 158(1) (a) of the LRA. That section confers a broad range of powers on the court, including the right to grant urgent interim orders, interdicts and declaratory orders. In the present instance, the unions have narrowed the scope of the relief that they seek to an order that the issuing of the s 189 (3) notice be declared unfair and set aside.

Factual background

[9] The future looks bleak for SAA, to say the least. Matters have reached a point where the business rescue practitioners now say that only two options remain - a winding-down process that involves the termination of employment of employees by agreement, or in the absence of agreement, liquidation. It is not disputed SAA has been under severe financial stress for a number of years, a consequence that the unions say is the result of incompetent and corrupt management. This is not disputed by SAA or the business rescue practitioners, save that they record that the behaviour of the trade unions, including the applicants, has in addition to whatever other challenges may have befallen SAA, exacerbated SA's financial woes.

[10] In recent years, SAA has survived only because its sole shareholder, the government of South Africa, has injected vast quantities of cash into the business. After various attempts at a restructuring of the business and the

initiation of a retrenchment process in late 2019, on 5 December 2019, SAA was placed under voluntary business rescue. The second and third respondents were appointed as business rescue practitioners. After their appointment, they discovered that SAA was haemorrhaging money and took a number of steps to reduce costs, including the closure of routes and the reduction of the number of flights.

[11] On 6 February 2020, the business rescue practitioners decided to reduce flights and services on several international, regional and domestic routes. This measure was intended to conserve cash and extend the availability of funds during the business rescue period. At that stage, the intention was to present a business rescue plan to creditors at the end of February 2020.

[12] In mid-February 2020, the unions filed an urgent application in this court, contending that the decision to reduce flights and services was null and void because the business rescue practitioners had failed to comply with s 189 of the LRA and in particular, because they had failed to issue a notice of invitation to consult as provided in subsection (3). The application was dismissed. My colleague Moshoana J held that although it was clear on the papers before him that the business rescue practitioners had accepted that job loss was inevitable, they had not yet contemplated dismissals. (The 'contemplation' of a dismissal triggers the statutory requirement to issue a s 189 (3) notice.) In effect, the court held that the application was premature. In coming to that conclusion, the court had particular regard to the fact that at that stage, the business rescue practitioners had not yet presented a business rescue plan.

[13] On 9 March 2020, the business rescue practitioners issued a notice of invitation to consult over proposed retrenchments, commonly referred to as a 'section 189(3) notice'. The effect of that notice, given the scale of the proposed retrenchment and the size of SAA's business, was to trigger a 60-day period during which consultation should take place. In terms of s 189A, an employer issuing a s 189(3) notice in these circumstances is precluded from issuing any notice of termination of employment prior to the expiry of the 60-day period. In the present case, that period expires today, 8 May 2020. To avoid confusion,

on 13 March 2020, the business rescue practitioners withdrew the s 189(3) notices issued in November 2019 and confirmed that the process initiated by the notice issued on 9 March 2020 initiated a new and entirely different consultation process.

[14] The business rescue practitioners state that the circulation of the first draft of their business rescue plan was scheduled to take place during the week commencing 16 March 2020. That intention was overtaken by the unanticipated and game-changing event of the Covid-19 pandemic. On 15 March 2020, the president declared a national state of disaster in terms of the Disaster Management Act. Lockdowns, prohibitions on travel and restrictions on movement resulted in flight cancellations, the grounding of aircraft and the closure of airports world-wide. In consequence, the business rescue practitioners were required to assess the implications of Covid-19 for SAA's business, and revisit the proposed restructuring options that they had identified.

[15] On 20 March 2020, the business rescue practitioners requested and were granted a further extension to 29 May 2020 for the publication of a business rescue plan.

[16] In its s 189 (3) notice, SAA had agreed to the appointment of a facilitator to manage the consultation process. Facilitators were provided by the CCMA in the form of two senior commissioners. The first meeting was to have taken place on 20 March 2020, but did not proceed on account of the size of the venue and difficulties in applying social distancing measures. The meeting was rescheduled to 23 March 2020. The unions refused to participate in the meeting, because among other objections, they refused to consult via videoconference.

[17] On 23 March 2020, the unions addressed correspondence to the business rescue practitioners in which the unions recorded that they were of the view that the consultation process was premature as the business rescue practitioners had not yet published a business rescue plan. The correspondence also contained a demand for information, which the business

practitioners were prepared to disclose through a virtual data room and subject to confidentiality undertakings. On the same day, bilateral meetings were held between the CCMA commissioners and each of the consultation parties, on an individual basis. The unions attended these meetings subject to the reservation of their rights. A formal consultation meeting was scheduled for 26 March 2020. The unions indicated that they would not be attending that consultation. Later that day, the unions addressed correspondence to the CCMA commissioners objecting to the consultation continuing at all during the course of the national lockdown. They sought to proceed only after 16 April 2020, being the date on which it was initially envisaged that the lockdown would be lifted. The business rescue practitioners responded by stating that on account of SAA's precarious financial position, it was essential that the consultation process continue, despite the lockdown. After the CCMA commissioners initially took the view that facilitated consultations could not continue during the lockdown, the commissioners reconsidered their position and agreed to facilitate a meeting to be held by way of video teleconference on 1 April 2020. In the interim, on 30 March 2020, the unions addressed correspondence to the business rescue practitioners emphasising that their position was that in the absence of a business rescue plan, the s 189 process was premature and that they would not proceed with the process as there had been no proper disclosure of information to them.

[18] As matters transpired, NUMSA did not attend the plenary session held on 1 April 2020. Facilitated consultation sessions continued on 13 April 2020 14 April 2020, 20 April 2020 and 22 April 2020. The unions did not attend the sessions and withdrew from the consultation process entirely.

[19] On 23 April 2020, the business rescue practitioners communicated their position to all affected parties, including employees. That communication records that following the notification from government on 10 April 2020 that no further funding would be provided or made available to the business rescue practitioners to develop and implement a business rescue plan which would have contemplated a restructuring of SAA to maximise the likelihood of the airline continuing on a solvent basis, or at a minimum on a care and

maintenance basis, until travel bans were lifted. The practitioners had concluded that only two options remained available to them. As I have indicated, the first is that in the absence of further funding, they could develop a business rescue plan which secures a better return for SAA's creditors than would result from its immediate liquidation. This option entailed a winding down process which would envisage the termination of employment of employees by agreement (with severance packages being agreed) and a sales process being undertaken that would ultimately result in a distribution of proceeds to affected parties. This option was sustainable provided that agreement could be reached with employees. Secondly, in the absence of any agreement with employees, the business rescue practitioners noted that they would be unable to continue with the business rescue process and would have to file an urgent application for an order placing SAA in liquidation. The business rescue practitioners recorded that they had presented a draft collective agreement to all unions and representatives of non-unionised employees on 17 April 2020 and advised them that agreement needed to be reached by 24 April 2020. The date for acceptance was later extended to 8 May 2020.

[20] In the answering affidavit, the business rescue practitioners recorded the current state of affairs in the clearest terms:

> The current position is, therefore, that the business rescue practitioners are unanimously of the view that there are only two options communicated on 23 April 2020 which can be pursued: the development of a plan which results in a better return for affected persons or a liquidation. If employees accept the first option of a better return, the BRP's will reflect this in the plan which we intend to distribute to the affected parties for consultation soon.

[21] The final version of the collective agreement records that it is unlikely that SAA's solvency would be restored and that the parties agree that the termination of employment of employees, defined to mean all employees of the company, will be terminated by mutual agreement, on account of SAA's operational requirements, with effect from 30 April 2020. The agreement makes provision

for a retrenchment package, payable on certain conditions relating to the assets being realised at a value capable to cover the retrenchment packages.

[22] In further developments over the weekend prior to the hearing, on 3 May 2020, the business rescue practitioners addressed a letter to all trade unions and non-unionised employee representatives recording that the Minister of Public Enterprises had indicated that he and the Department of Public Enterprises were exploring funding options for SAA, including discussions with unions starting a new competitive South African airline in future. The minister had requested the business rescue practitioners to afford trade unions and non-unionised employee representatives a further extension until 11 May 2020 to confirm their acceptance of the retrenchment agreement. The business rescue practitioners agreed to grant a further extension until 10:00 hours on 8 May 2020 but reserved their rights to offer the retrenchment agreement to employees for individual acceptance from 8 May 2020 to 11 May 2020. They proposed that terminations of employment for operational reasons (where agreements had not been reached collectively or individually) 'may take place on or after 12 May 2020. In the event that funding is obtained from the shareholder that would permit such process to take place, individuals who have collectively and individually accepted the termination and severance provisions would have their position safeguarded by the escape clause so that there is no prejudice in doing so. The business rescue practitioners stated that the deadline of 11 May 2020 would be the last day in which the retrenchment agreement remained open for acceptance and no further extensions would be likely.

[23] An email was addressed to employees on 4 May 2020 in which they were advised of the status of the draft collective agreement. The email records that non-unionised management representatives had accepted the agreement in principle and that managers would be signing in their individual capacities, where applicable. The non-unionised non-management representatives declined to sign the agreement, other unions advised that they had been afforded insufficient time to consider the offer and obtain a mandate from their members. The email records that the unions party to the present case had refused to engage on the terms of the agreement and had filed the present

application in this court. The business rescue practitioners noted that they would be opposing the application strenuously because if it were to succeed, it would further contribute to the financial and other challenges faced by SAA and thereby prejudice all SAA employees' rights and benefits.

[24] What has complicated matters somewhat is a parallel process in which the shareholder (the government), unions and other stakeholders have been engaged in discussions which have led to a framework agreement called a "Leadership Compact". The terms of this agreement are that the parties would in principle cooperate with one another with the purpose of preserving SAA's business in one form or another. The compact has been made subject to the agreement of the business rescue practitioners and confirmation that the s 189 retrenchment process is suspended. The business rescue practitioners aver that although there has been general agreement among the parties to the compact on the general idea of saving the business, there are no credible or concrete proposals that have been put forward about how the business should be saved, nor are there any realistic proposals as to how this would be funded. The business rescue practitioners aver further that in the absence of any firm or realistic proposals, they are not in a position to consent to the suspension of the retrenchment process or to incorporating any aspect of the compact into the business plan. I need not be concerned with this issue since it is only peripherally related to the s 189A retrenchment process. In the present instance, this court is concerned only with the procedural fairness of that process and not with any other process or the merits of any proposals or agreements that have emerged from it.

Relevant legal principles

[25] I have recorded the purpose and scope of the court's powers under s 189A (13) to intervene in consultation proceedings. The present case turns on an interpretation of s 136 of the Companies Act, 71 of 2008. Section 136 reads as follows:

> 136. (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 section 189 and 189A of the Labour Relations Act, 1995 (Act No. 66 of 1995), and other applicable employment related legislation.

Analysis

[26] In *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC), the Constitutional Court set out the canons of interpretation of statute in the modern era:

> [28] A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:
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> (a) that statutory provisions should always be interpreted purposively;
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> (b) the relevant statutory provision must be properly contextualised; and
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> (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).

[27] When a fundamental right is at stake, s 39(2) of the Constitution imposes an obligation on this court when interpreting any legislation to promote the spirit, purport and objects of the Bill of Rights. The primary trigger for the application of s 39(2) is thus whether the provision in question implicates or affects a right in the Bill of Rights. In those instances, there is a duty to apply s 39(2). In *Fraser v*

ABSA Bank Limited 2007 (3) SA 484 (CC), Froneman J described the import of s 39 (2) as establishing *"a mandatory constitutional cannon of statutory interpretation"*. Therefore, *"courts must at all times bear in mind the provisions of section 39(2) when interpreting legislation"* (see *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) at para 88).

[28] The present matter implicates a right in the Bill of Rights, namely the right to fair labour practices (see s 23 (1) of the Constitution). As far back as 2003, the Constitutional Court recognised that an element of that right is the right to security of employment. The court described it as a *"core value"* of the LRA, the statute that primarily gives effect to s23 of the Constitution (see *National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town and Others* 2003 (3) SA 1 (CC), at para 42). Section 39(2) of the Constitution is thus of necessity implicated, and s136 (1) of the Companies Act must thus be read purposively in the light of the provisions of the Constitution. In short, if there is an interpretation of s 136 (1) that better promotes the preservation of work security, that interpretation ought to be preferred.

[29] The preamble to s 136 (1) records that during a company's business rescue proceedings, employees employed by the company immediately before the beginning of those proceedings continue to be employed on the same terms and conditions. That is the default position. It is a position that acknowledges that the commencement of business rescue proceedings does not in itself prejudice an employee's conditions of service, including his or her work security. Paragraphs (a) and (b) are exceptions to the default position. The first exception (subparagraph (i)) applies during the course of business rescue proceedings and relates to changes that occur '*in the ordinary course of attrition*'. The OED (2ed) defines 'attrition' to include '*the gradual reduction of the workforce by employees leaving and not being replaced rather than by redundancy*'. Similarly, Barker and Holtzhausen *South African Labour Glossary* (Juta 1996) 'attrition of labour' to mean '*A natural decrease in the labour force of an enterprise resulting from, inter alia, that is, retirement or voluntary resignation of employees*'. What is common to these definitions is the exclusion of retrenchment (what the LRA refers to as 'dismissal for a reason related to an employer's operational requirements').

There is no room here, contrary to what SAA and the business rescue practitioners contend, to expand the scope of attrition to include a dismissal for operational reasons. That is a dismissal without fault, at the initiative of the employer, and is neither ordinary nor what is ordinarily meant by attrition.

[30] The second exception envisaged by subparagraph (ii) is agreement on a change to existing terms and conditions of employment. Changes to existing terms and conditions of employment can be effected either through the mechanism of a collective agreement (see s 23 (3) of the LRA), or in terms of agreement between the company in business rescue and the employee concerned. What this exception envisages is a change to terms and conditions of employment (which would include a termination of employment) by consent.

[31] In short, unless an event that qualifies as a change of terms and conditions of employment either by the ordinary course of attrition or by the employee's consent, there is complete protection against employees during business rescue proceedings.

[32] A termination of employment on account of operational requirements may be effected by agreement. For example, a voluntary retrenchment or termination by mutual consent on agreed terms is by definition a change to terms and conditions of employment. This then raises the reach of paragraph (b) which makes specific reference to retrenchment, and as recorded above, regulates '*any retrenchment of any such employees* [i.e. those employed by the company immediately before the beginning of business rescue proceedings] *contemplated in the company's business rescue plan* ... (own emphasis).

[33] Mr Ngcukaitobi SC, who appeared for the unions, submitted that under subparagraph (b), there is no longer a strong entrenched protection of labour standards, as there is in subparagraph (a). Instead, he contended that subparagraph (b) applies after the business rescue proceedings have ended. When this occurs is to be determined from s 132 (2) of the Companies Act, which in this case would the time at which a business rescue plan has been proposed and rejected and no affected person has acted to extend the business rescue proceedings, or where the business rescue plan has been adopted and the

business rescue practitioner has subsequently filed a notice of substantial implementation of that plan.

[34] Section 136 (1) (b) makes reference to '*any retrenchment … contemplated in the company's business rescue plan*'. Given that it is common cause in the present case that no business rescue plan has been presented to any of the affected parties, it is not necessary for me to decide whether the end of the business rescue process, as defined in s 132, triggers the right to commence a retrenchment process. It may well be that the production of a business rescue plan, even in in draft form is sufficient. But I agree with counsel's submission that the 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) requires that any need to retrench must necessarily be rooted in the business rescue plan. It is the contemplation at that point that there is a prospect that employees will be retrenched as an element of the plan that brings s 189 and 189A of the LRA into play. There is no provision in s 136 (1), or anywhere else in chapter 6 of the Companies Act, that empowers a business rescue practitioner to retrench employees in the absence of a business rescue plan. To the extent that Mr Redding SC, who appeared for SAA and the business rescue practitioners submitted that an interpretation of s 136 (1) as contended for by the unions would elevate the interests of employees above those of other stakeholders in the form of shareholders and creditors, the unashamed purpose of s 136 is to protect employee interests during business rescue proceedings. That is a purpose consistent with the constitutional protection of the right to fair labour practices and in particular, the right to security of employment. While s 136 might not provide for an absolute moratorium of retrenchment during business rescue proceedings, it locates the right to retrench in the business plan. It follows that the giving of any notice to commence a consultation process in terms of s 189 or s 189A of the LRA, given by a business rescue practitioner in the absence of a business rescue plan, would be premature and thus constitute an act of procedural unfairness.

[35] SAA and the business rescue practitioner is urged me to apply the approach referred to by my colleague Lagrange J in *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 (J385/16 & J393/16) [2016] ZALCJHB 106 (22 March 2016). at paragraph 35 of the judgment, Lagrange J said:

> [35] On a proper construction of s 136(1) it seems to me to consist of two distinct parts. Subsection (1)(a) affirms the continuity of existing employees' terms and conditions of employment and subsection (1)(b) obliges the business rescue practitioner to conduct any retrenchment in the business rescue plan in compliance with the relevant provisions of the LRA pertaining to retrenchments. It is the reference to changes occurring in the "ordinary course of attrition" that might be seen as a basis for interpreting the section to provide a guarantee of continuity of employment and not merely the preservation of conditions of employment. If this interpretation is correct, what is anomalous is why subsection (1)(b) was not worded in the form of an exception to subsection (1)(a) rather than simply an additional self-standing provision preserving the rights of employees retrenched under a business rescue plan, to be retrenched only in accordance with the applicable provisions of the LRA. Alternatively, subsection (1) (a) ought to have stated that the prohibitions it contains are subject to subsection (1)(b). In the absence of such qualifications to either sub clause, the two provisions are irreconcilable unless the phrase "ordinary course of attrition" is interpreted to include all forms of lawful termination, including retrenchment.

[36] And at paragraph 36:

> [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.

[37] The *Vanchem* judgment was delivered in circumstances where a s 189A process had commenced prior to the employer party being placed in business rescue. It was only by means of an eleventh hour amended notice of motion that the union challenged the lawfulness of the retrenchments by introducing a completely new cause of action based on the contention that retrenchments could only occur in terms of an approved business plan. The court expressly refused to entertain the new cause of action, but went on to note that even if it had agreed to do so, it would nonetheless have dismissed the claim for the reasons set out for in the extracts from the judgment recorded above. In other words, the passages from the judgment on which SAA and the business rescue practitioners rely, do not form part of the *ratio decidendi* and the court's observations on the interpretation of s 136 have no binding quality as judicial precedent. Indeed, the court said as much. Even if I were to regard the *Vanchem* judgment as relevant in the present circumstances, it would seem to me that the value of the judgment is in identifying the potential conflict that may exist between paragraphs (a) and (b) of subsection 136 (1). But statutes must not be construed to create absurdities, and where there are anomalies, they should be reconciled. For the reasons stated above, s 136 (1) should be construed so as to provide continuity of employment in business rescue proceedings, subject to natural attrition and the variation of any conditions of employment by agreement, and to locate the right to terminate employment for reasons related to operational requirements in the terms of a business rescue plan.

[38] 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 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.

[39] The unions did not seriously press the relief sought in relation to the training lay-off scheme that was the subject of the 2019 retrenchment process, which was withdrawn on 13 March 2020. It is not necessary for me to make any decision in respect of that claim.

[40] It follows that the unions are entitled to the alternative relief sought in paragraph 2 of the notice of motion. The remedy I intend to grant is one that serves to rectify the act of unfairness complained of, i.e. the premature issuing of s 189 (3) notices.

[41] Neither party sought an order for costs.

I make the following order:

1. The second and third respondents' conduct in issuing a189 (3) notice of invitation to consult is procedurally unfair.
2. The second and third respondent are directed to withdraw the notices.
3. Nothing in this order precludes the second and third respondents from offering, nor any employee of the first respondent from accepting, any offer of voluntary retrenchment.

André van Niekerk

Judge of the Labour Court of South Africa

Appearances

For the Applicant:	T Ngcukaitobi SC
Instructed by:	Minnaar Niehaus Attorneys
For the first, second and third Respondents:	A Redding SC, with V Ndebele
Instructed by:	Edward Nathan Sonnenbergs Inc Attorneys