REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 669 / 2014

In the matter between:

Xolani SONDAMASE	First Applicant
Themba MRUQULI	Second Applicant
and	
ELLERINE HODINGS LTD	First Respondent
(in business rescue)	
ELLERINE FURNISHERS (PTY) LTD	Second Respondent
(in business rescue)	

Heard: 18 March 2016

Delivered: 22 April 2016

Summary: Special pleas – lack of jurisdiction over unfair labour practice claim; legal moratorium on proceedings against company in business rescue; prescription. Companies Act 71 of 2008 s 133(1) considered.

JUDGMENT

STEENKAMP J

Introduction

[1] The two applicants in this matter are former employees of Ellerine Furnishers (Pty) Ltd (the second respondent). They referred a claim to this Court alleging:

1.1 Discrimination;

1.2 Unfair labour practice; and

1.3 Victimisation.

[2] Ellerine Furnishers, as well as its holding company, Ellerine Holdings Ltd (the first respondent), are in business rescue. They have raised a special plea that, in terms of s 133(1) of the Companies Act[1], there is a legal moratorium on the commencement and continuation of legal proceedings against them.

[3] Ellerines also raise two further special pleas:

3.1 This Court does not have jurisdiction over an unfair labour practice claim; and

3.2 Insofar as the employees' claim relates to alleged underpayments between 2008 and 2011, this portion of their plea has prescribed.

[4] The third and fourth respondents have been joined to the proceedings as the joint business rescue practitioners for Ellerines. All the respondents are represented by the same attorneys of record.

Background facts

[5] The two employees were dismissed for operational requirements in November 2014. Prior to that, in June 2014, they had lodged a grievance alleging discrimination, victimisation and unfair labour practices. They referred a dispute to the CCMA in July 2014. It was not resolved at conciliation. They referred their dispute to this Court and delivered a statement of claim on 8 August 2014. On 7 August 2014 Ellerines

[1] Act 71 of 2008.

Furnishers (EF) commenced business rescue proceedings. On 21 August Ellerines Holdings (EH) followed suit.

[6] After an interlocutory order for joinder and substation, the respondents raised an exception. The employees delivered an amended statement of claim in June 2015. They persisted with a claim of discrimination; and further alleged an unfair labour practice in terms of s 186(2) of the Labour Relations Act.[2]

[7] The respondents raised the three special pleas referred to above, and delivered a notice to the employees to remove various causes of complaint relating to the particularity of their claim. The employees – now represented by Salie attorneys – delivered a second amended statement of claim on 8 September 2015. They persisted with their claims of discrimination as well as an unfair labour practice in terms of s 186(2) of the LRA.

[8] The respondents raised the three special pleas referred to above, as well as a fourth plea that the applicants had delivered their second amended statement of claim ten days late and had not applied for condonation. In argument Mr *Masher*, for the respondents, did not persist with that plea. I granted condonation.

The primary special plea: s 133 of the Companies Act

[9] It is common cause that Ellerines (both EF and EHL) were placed in business rescue in August 2014.

[10] Section 133 of the Companies Act provides:

> "**133. General moratorium on legal proceedings against company**
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> (1) During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except-
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> (a) with the written consent of the practitioner;

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[2] Act 66 of 1995 (the LRA).

(b) with the leave of the court and in accordance with any terms the court considers suitable;

(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;

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

(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."

[11] In this case, the business practitioners have not consented to the legal proceedings against either company proceeding during the business rescue proceedings; in fact, they actively oppose it. It seems clear that, in terms of s 133(1) of the Companies Act, the applicant cannot proceed with the claim at this stage.

[12] The aim of this provision is clear. It is to create some breathing space for the business to be rescued and thus to put all legal proceedings on hold until the company may be brought back on track to continue with its business. Henochsberg[3] explains:

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

[3] *Henochsberg on the Companies Act, 71 Of 2008* (Vol 1) at 478.

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

[13] Mr *Masher* drew the court's attention to the unreported case of *Fabrizio Burda v Integcomm (Pty) Ltd*[4] where this extract was quoted with approval in this Court and the learned acting judge went on to say:

> "The words 'legal proceedings… in any forum' [in s 133(1)] are wide in their scope. They do not limit the type of legal proceedings nor the forum in which they may be brought. Unfair dismissal proceedings in this Court no doubt constitute legal proceedings. The current proceedings before this court for reinstatement and/or compensation, i.e. the payment of money. The purpose of the stay of legal proceedings is to afford business rescue an opportunity to turn the fortunes of the company around."
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> …
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> "In the circumstances, the unfair dismissal proceedings cannot be proceeded with except with the written consent of the business rescue practitioner or with the leave of the court."

[14] I am in respectful agreement with this judgement. I do not agree with the interpretation that there is a conflict between the Companies Act and the LRA in this regard and that the LRA prevails – a reading that would hold that proceedings in this court in terms of the LRA are not stayed.[5]

[15] It does not appear to me that there is any conflict between s 133(1)(a) of the Companies Act and the dispute resolution provisions set out in the LRA. And in so far as there has been conflicting jurisprudence on the application of s 133 of the Companies Act to dispute arising out of the LRA, it appears to have been settled by the recent decision of the Supreme Court of Appeal in *Chetty t/a Nationwide Electrical v Hart and another NNO.*[6] In that case, the SCA interpreted s133 to place a

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[4] Case no JS 539/12 (29 November 2013) [per Maenetje AJ] paras12-13.

[5] See *NUMSA v Motheo Steel Engineering* (case no J 271/14), unreported, 7 February 2014.

[6] 2015 (6) SA 424 (SCA) paras 26-29.

moratorium, not only on legal proceedings in court, but even arbitration proceedings. Cachalia JA took a purposive approach:

> "[26] But the question the respondent is unable to answer is why the lawmaker would want the company to provide details of all proceedings, including arbitration proceedings, to a practitioner, but exclude arbitrations from the ambit of the moratorium and the obligation to obtain a practitioner's consent in s 133(1)(a). After all the outcome of an arbitration by way of award is usually that the losing party has to pay a sum of money, which is the outcome of most court actions involving commercial disputes. In my view the answer lies in properly understanding the purpose of these provisions as they apply to business rescue proceedings and the consequences that flow from the parties' contending interpretations.
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> [27] Section 5(1) of the Act directs that its interpretation and application must give effect to the purposes stated in s 7. Section 7(k) is relevant here. It says that one of these purposes is to:
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> '. . . provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders . . .'
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> [28] Section 128(1)(b) of the Act defines business rescue to mean proceedings that facilitate the rehabilitation of a financially distressed company by providing, amongst other things, for the temporary supervision and moratorium on the rights of claimants, and the development and implementation of a plan to rescue the company. The obvious purpose of placing a company under business rescue is to give it breathing space so that its affairs may be assessed and restructured in a manner that allows its return to financial viability. The requirement for the practitioner's consent to be obtained is to give him the opportunity, after his appointment, to consider the nature and validity of any existing or pending claim and how it is to be dealt with, for example by settling it or continuing with the litigation. In particular, the practitioner's concern is directed at assessing how the claim will impact on the well-being of the company and its ability to regain its financial health. A general moratorium on the rights of creditors enforcing their rights against the company is therefore crucial to achieving this objective. And given the ubiquitous use of arbitrations to resolve commercial disputes, an interpretation of s 133(1) that excludes them from

the moratorium on legal proceedings against financially distressed companies would significantly hinder its attainment.

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

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

[17] The first special plea is upheld. The remaining claims in this matter are suspended until such time as the business rescue proceedings are finalised.

[18] I refer to "the remaining claims" because this Court does not have jurisdiction over the unfair labour practice claim; and part of the employees' claim has prescribed. I will now deal with those aspects.

<u>Second special plea: jurisdiction</u>

[19] The employees persist with their claim of an unfair labour practice. This Court does not have jurisdiction over unfair labour practice claims.[7] In terms of s 191 of the LRA, if there is a dispute relating to an unfair labour

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[7] Cf Du Toit et al *Labour Relations Law : A Comprehensive Guide* (6 ed 2016 LexisNexis) at 189.

practice, the employee alleging unfair labour practice must refer the dispute to the CCMA or the relevant bargaining council for conciliation; and if conciliation fails, to arbitration.

[20] Before its amendment that came into effect on 1 January 2015, s 158(2)(b) of the LRA read:

> "(2) If at any stage after a dispute has been referred to the Labour Court, it becomes apparent that the dispute ought to have been referred to arbitration, the Court may –
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> (a) stay the proceedings and refer the dispute to arbitration; or
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> (b) with the consent of the parties and if it is expedient to do so, continue with the proceedings with the Court sitting as an arbitrator, in which case the Court may only make an order that a commissioner or arbitrator would have been entitled to make."

[21] The amended subsection does not apply to disputes that were referred before 1 January 2015. The amended subsection does away with the requirement of consent and states that, if it is expedient to do so, the Court may continue with the proceedings.

[22] In this case, the parties have not agreed for the Court to continue with the proceedings as envisaged by s 158(2)(b) before its amendment. This Court does not have jurisdiction to adjudicate the unfair labour practice claim.

Third special plea: prescription

[23] The employees allege that Ellerine Furnishers underpaid them from 2008 to 2014. They were paid in accordance with a collective agreement between EF and the majority trade union, SACCAWU.

[24] In terms of s 11 of the Prescription Act[8], a debt[9] prescribes after three years from the date that the debt is due.

[25] In *Umgeni Water v Mshengu*[10] the SCA held that in his ordinary meaning, a debt is due when it is immediately claimable by the creditor and, as its

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[8] Act 68 of 1969.

[9] subject to certain exceptions that are not applicable here.

correlative, it is immediately payable by the debtor. In other words, the debt must be one in respect of which the debtor is under an obligation to pay immediately. A debt can only be said to be claimable immediately if a creditor has the right to institute an action for its recovery. In order to be able to institute an action for the recovery of a debt, a creditor must have a complete cause of action in respect of it.

[26] The employees claim that Ellerines Furnishers underpaid their commission from 2008 to 2014. Ellerines would have been required to pay that portion of the remuneration at the time that it was due and payable. In terms of s 32 of the Basic Conditions of Employment Act[11] an employer must pay an employee within seven days after the completion of the period for which the remuneration is payable. In this case, the employees were paid monthly. A new cause of action therefore arose no later than seven days after the end of each month in which they were allegedly underpaid. Part of their claim for underpayment has prescribed as they did not bring any claims in respect of the alleged underpayment for the periods 2008 to August 2011 within three years.

[27] In any event, the employees seem to accept that they were paid in accordance with a collective agreement between the company and their trade union, SACCAWU. If they are disputing the interpretation or application of that collective agreement, they should have referred a dispute to the CCMA in terms of s 24 of the LRA. This Court does not have jurisdiction over the interpretation or application of a collective agreement.

Conclusion

[28] The respondents' special pleas are upheld. That does not leave the employees without any remedies. The remaining claims before this Court are merely suspended pending the finalisation of the business rescue proceedings. They could refer their unfair labour practice dispute to the CCMA, together with an application for condonation. And they may decide

[10] 2010 (2) All SA 505 (SCA).

[11] Act 75 of 1997 (BCEA).

to pursue their claim for short payment for the periods that have not prescribed.

[29] With regard to costs, I take into account that the applicants are two individual employees who were retrenched after these disputes arose; and that they only obtained the services of an attorney after some time. In law and fairness, I do not consider a costs order to be appropriate.

Order

[30] I therefore make the following order:

30.1 The respondents' special pleas are upheld.

30.2 The claims against the respondents are suspended until such time as the business rescue proceedings against Ellerine Furnishers and Ellerine Holdings are finalised.

30.3 This Court does not have jurisdiction to adjudicate the applicants' unfair labour practice claim.

30.4 The claims for underpayment from 2008 to 7 August 2011 have prescribed.

Anton Steenkamp
Judge of the Labour Court of South Africa