

DISPUTE RESOLUTION ALERT

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BUSINESS RESCUE, A CASE OF URGENCY AND UNPAID EMPLOYEES – A RECIPE FOR NEW LAW

The moratorium on legal proceedings during business rescue can be found in section 133(1) of the Companies Act, No 71 of 2008 (the Companies Act). Section 133(1)(a) and (b) states that, *inter alia*, no legal proceedings against the company or in relation to any property belonging to the company or lawfully in its possession, may be instituted or continued with unless the consent of the business rescue practitioner (BRP) or leave of the court has been obtained.

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The withdrawal of financial services by the major banks as well as the Bank of Baroda rendered Shiva's continued business operation impossible and, as a result, Shiva was placed under business rescue.

The employees further submitted, in the alternative, that section 210 of the LRA states that where there is a conflict between the LRA and another statute, the LRA takes preference.



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In *Izak Bosman Marais & 56 Others v Shiva Uranium (Pty) Ltd (in business rescue) & 5 Others* (case number J3049/18), the employees of Shiva Uranium (Pty) Ltd (in business rescue) (Shiva) approached the Labour Court on an urgent basis seeking leave in terms of s133(1) of the Companies Act to uplift the moratorium on legal proceedings by allowing the employees to institute proceedings against Shiva for an order directing Shiva to pay all unpaid remuneration and employment benefit contributions due and payable to them.

Shiva was part of the broader Oakbay Investment Group of companies, with the Gupta family being the main shareholder. The withdrawal of financial services by the major banks as well as the Bank of Baroda rendered Shiva's continued business operation impossible and, as a result, Shiva was placed under business rescue.

The BRPs opposed the application on the basis that *inter alia* the Labour Court lacked the necessary jurisdiction to entertain the application and uplift the moratorium. The BRPs submitted that

the reference to 'court' in s133(1) must be interpreted to mean a High Court specifically and exclusively.

The employees however submitted that the Labour Court has the requisite jurisdiction in terms of s157(1) and (2) of the Labour Relations Act, No 66 of 1995 (LRA), giving the Labour Court concurrent jurisdiction with the High Court in certain circumstances. The employees further submitted, in the alternative, that s210 of the LRA states that where there is a conflict between the LRA and another statute, the LRA takes preference.

In relying on the case of *Sondamase, and another v Ellerine Holdings and another*, the Labour Court held that no such conflict exists. It highlighted that s128(1)(e) of the Companies Act defines 'court' to mean High Court and a judge of the High Court being assigned by the Judge President. Accordingly, the Labour Court found that there was no doubt that s128 of the Companies Act means that the High Court has exclusive jurisdiction over matters relating to business rescue proceedings.



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This jurisdiction remains exclusively with the High Court.



In dealing with s157(2) of the LRA, the Labour Court held that this section:

“should not be understood to extend the jurisdiction of the High Court to determine issues which have been expressly conferred upon the Labour Court by the LRA, it should also not be understood to extend the jurisdiction of the Labour Court to deal with any other statutory remedies, pertinently, s133(1).”

In conclusion, this case makes it clear that despite s157(2) of the LRA, and the backbone of the issue being the employment relationship, the Labour Court has no jurisdiction to uplift the moratorium in accordance with s133(1) and grant the employees leave to litigate against a company during business rescue.

This jurisdiction remains exclusively with the High Court.

Julian Jones, Roxanne Wellcome and Courtney Jones

Tim Fletcher was named the exclusive South African winner of the **ILO Client Choice Awards 2017 – 2018** in the litigation category.



Richard Marcus was named the exclusive South African winner of the **ILO Client Choice Awards 2018** in the Insolvency & Restructuring category.

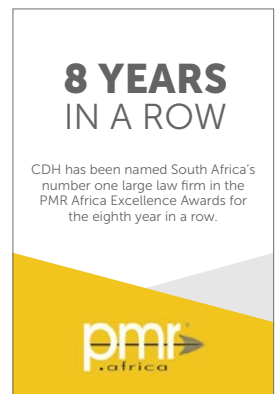
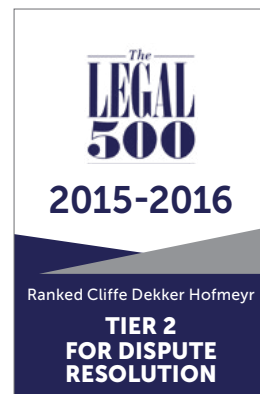


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