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Business rescue process: Don't disregard the rights of employees

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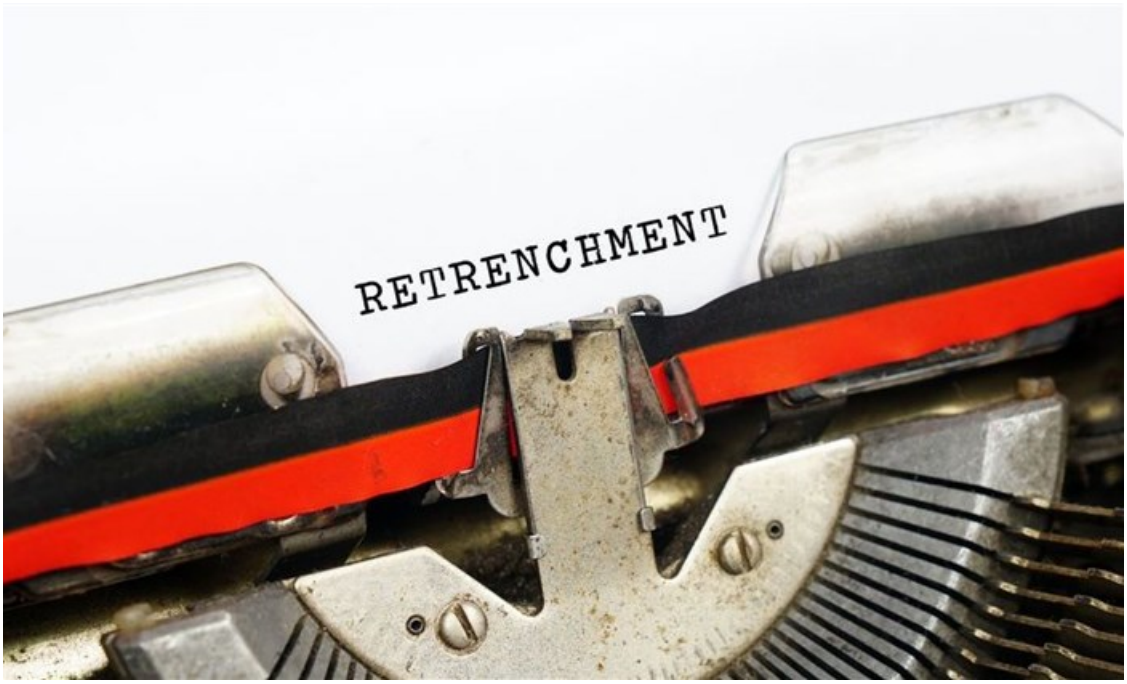
Companies in business rescue have plenty of worries to preoccupy them but legal challenges over retrenchments are not usually at the top of the list. After all, such companies are insulated from legal action - including claims from employees - through the moratorium on legal proceedings provided for in section 133 of the Companies Act, 2008.



This moratorium provision, intended to allow a business some breathing space to regain its financial viability, should not lull employers into complacency. There are still avenues employees can pursue to assert their rights to a fair retrenchment process.

With business rescue cases escalating amid the fallout from the Covid-19 pandemic, employers would be well advised to familiarise themselves with the legal lie of the land on retrenchments during business rescue.

The moratorium and employment disputes

It is not unusual for a struggling business in the midst of business rescue proceedings to seek to retrench employees to save on labour costs. For their part, employees have limited leeway to challenge such retrenchments. Under the Companies Act, to bring a claim against an employer in business rescue, the employees must either have written permission from the business rescue practitioner or apply to the High Court to have the moratorium on legal proceedings lifted.

Over the years, some trade unions have attempted to challenge the applicability of the moratorium to employment disputes. They have done so on the basis of section 210 of the Labour Relations Act (LRA), which states that when it comes to employment matters, if there is any conflict between the LRA and another law (except the Constitution or a law that expressly amends the LRA), then the provisions of the LRA must prevail.

The argument goes that the moratorium in the Companies Act conflicts with the dispute resolution provisions of the LRA, which must accordingly prevail. This would mean that the moratorium cannot extend to LRA disputes.

This is not how the courts have tended to see the issue, however.

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Courts find no general conflict between the two laws

To date, only a couple of decisions have come down in support of the view that the Companies Act moratorium clashes with the LRA and that the moratorium does not prevent a union from bringing an unfair dismissal claim on behalf of its members.

However, the more common view which has been expressed by the Labour Court is that there is no conflict between the moratorium provisions of the Companies Act and the dispute resolution provisions of the LRA.

The latest decision of this kind was the Labour Court's ruling of 8 February 2021 in the South African Airways (SAA) case. This decision suggests that the moratorium in the Companies Act does indeed apply to employment-related claims. Further, it confirms that only the High Court can lift the moratorium on legal proceedings – even where the Labour Court has exclusive jurisdiction to hear the merits of the claim.

But there is one aspect around the moratorium that has not yet been considered by the courts: whether or not the moratorium specifically applies to a claim brought under section 189A(13) of the LRA.

This section creates a specific avenue for dealing with disputes around an employer's alleged non-compliance with a fair procedure in the context of a 'large-scale' retrenchment process. In such circumstances, to bring the parties back on track, an urgent application for relief may be lodged with the Labour Court.

In the context of business rescue, the question that arises is: What impact does the moratorium on legal proceedings have on employees' rights to a fair retrenchment process? Going further, how does the moratorium affect employees' ability to bring claims in terms of this section of the LRA?

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Procedural fairness in business rescue

The closest this question has come to being aired in court was in 2020 when SAA's business rescue practitioners appealed to the Labour Appeal Court over the timing of retrenchments in relation to the publication of the business rescue plan.

The Labour Appeal Court refused to entertain the business rescue practitioners' arguments about the moratorium because they had not raised this during the Labour Court proceedings.

While our Labour Court has not yet been required to decide on this issue, there may be scope to argue that the moratorium on legal proceedings should not extend to procedural challenges under section 189A(13) of the LRA.

Part of the rationale for the view that there is no general conflict between the moratorium and the LRA is that employees are not deprived of their rights to continue with their claims against the company at a later stage – their claims are only suspended during the business rescue proceedings.

This rationale may not hold true for claims in terms of section 189A(13), because such claims generally cannot be brought at a later stage. Doing so would defeat the purpose of the provision – to bring the consulting parties back on track while they are consulting.

Claims for compensation are possible

However, where the employer has been under business recue, the Labour Court may well be prepared to entertain section 189A(13) claims that are brought after the retrenchment process.

While the primary purpose of section 189A(13) is to compel compliance during consultation, an award of compensation may be made if there is no other appropriate relief.

This means it is possible for retrenched employees to bring a claim for compensation against an employer that was under business rescue during retrenchment consultations, provided the claim is made within 30 days after the conclusion of business rescue proceedings.

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Also the moratorium is not an absolute bar to section 189A(13) claims. Business rescue practitioners may well provide their written consent to claims that will have no significant effect on the company's ability to regain its financial health.

Employees and trade unions also have the (more expensive) option of approaching the High Court to lift the moratorium so that a section 189A(13) claim may be pursued in the Labour Court.

Venturing into new territory

The interplay between company law and employment law in the business rescue context is still fairly new territory for our courts and it remains to be seen how they will deal with section 189A(13) claims.

In the meantime, employers in business rescue should not be complacent or disregard the rights of employees. Even if the risk of urgent applications is reduced due to the hurdles potentially created by the moratorium provision of the Companies Act, there are still avenues available to employees to seek relief.

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