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The Lock-out as a Tool for the Business Rescue Practitioner: The *Airline Pilots' Association of South Africa* Judgment

Stefan van Eck*
André Boraine**

Abstract

The South African Airways was placed under business rescue in December 2019. The appointed business rescue practitioners (BRPs) sought to terminate a collective agreement between the SAA and the pilots' trade union. Negotiations failed and the BRPs commenced with a lock-out. The court considered the provisions of the Companies Act and Labour Relations Act and concluded that the lock-out was a legitimate negotiating tool during business rescue. The authors question whether these Acts are appropriately aligned and they opine that the general principles pertaining to collective bargaining may not serve the aims of expeditious business rescue proceedings in all circumstances.

1 Introduction

The South African Airways (SAA), a state-owned company (SOC), was placed under business rescue in December 2019. The next 18 months saw strategic battles occurring between the business rescue practitioners (BRPs), the workers and the SAA. On the face of it, the trade unions representing the employees scored the first success.

In 2020, in *SA Airways (SOC) Ltd (In Business Rescue) & others v National Union of Metalworkers of SA obo Members & others* (the *SAA* case),[1] the Labour Appeal Court (LAC) confirmed the principle that BRPs are not entitled to proceed with a retrenchment process initiated in terms of the Labour Relations Act (LRA)[2] in the absence of a business rescue plan being concluded in terms of the Companies Act.[3] It is to be noted, though, that a reduction of the workforce is essential in many business rescue operations to save expenses and thus to assist the business

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[1] (2020) 41 *ILJ* 2113 (LAC).
[2] Act 66 of 1995.
[3] Act 71 of 2008.

in becoming financially viable again.[4] This victory for the workers stalled the retrenchment process in this case and prompted the BRPs to find other temporary solutions to rescue the ailing SAA.

In an attempt to persuade the SAA's employees to accede to its last offer, the BRPs implemented an offensive lock-out against the employees, which the latter resisted. The main issue was the terms and conditions of an existing collective agreement that was viewed as being too favourable to members of the South African Airways Pilots' Association (SAAPA — a branch of the Airline Pilots' Association of South Africa) and too burdensome on the SAA. In late December 2020, in *Airline Pilots' Association of South Africa v South African Airways SOC Limited and Les Matuson NO and Siviwe Dongwana NO*[5] (the *APA* case) the Labour Court concluded that the BRPs were within their rights to implement the lock-out.

This contribution considers whether Van Niekerk J was correct in his decision to permit a lock-out as a legitimate negotiating tool for BRPs. We also consider whether the LRA and the Companies Act are appropriately aligned and the potential positive and negative aspects of lock-outs during business rescue proceedings. However, before we commence with an analysis of the *APA* case, we provide a brief description of the statutory provisions relating to the business rescue process and lock outs in general.

We must point out that the rescue of the *SAA* deals with a special case of the rescue of a SOC. Nonetheless, this note will remain focused on the impact of the judgment on the application of the relevant legal principles relating to labour law in general, rather than discussing the intricacies of the rescue of SOCs as such.[6] Suffice it to say that the rescue of a SOC differs from the rescue of an ordinary company in that such a rescue also depends on the provisions of the Public Finance Management Act,[7] which may be at variance with the provisions of the Companies Act and may prevail in cases of irreconcilable inconsistencies.[8] A SOC, as in the case of the SAA, may receive financial support from government as its sole shareholder. Such support is usually not available to ordinary companies.

[4] In a publication relating to this judgment, the authors argued that a special dispensation regarding retrenchment is perhaps needed in the case of business rescue proceedings due to the prevailing special circumstances and the quest to try to save a business in financial distress, or at least a portion of it, with a view to saving at least some of the jobs. See, in this regard, the discussion in S van Eck & A Boraine 'Quo vadis ondernemingredding? *National Union of Metalworkers of South Africa obo Members v South African Airways (SOC) Limited (In Business Rescue)* saaknr J424/20 (AH)' (2020) 17 (2) *LitNet Akademies* 803.
[5] (2021) 42 *ILJ* 1087 (LC).
[6] For a note on the intricacies relating to SOCs, see E Levenstein 'The SAA business rescue process: A steep learning curve — lessons for SOEs' *https://www.werksmans.com/legal-updates-and-opinions/the-saa-business-rescue-process-a-steep-learning-curve-lessons-for-soes/*, accessed 7 May 2021.
[7] Act 1 of 1999.
[8] See Levenstein n 6 above and s 5(4)*(b)*(i)*(ee)* of the Companies Act.

2 The Goals of Business Rescue

In the case of the sequestration or liquidation of an insolvent employer, the trustee or liquidator of the insolvent enterprise is clothed with special statutory provisions in s 38 of the Insolvency Act[9] to deal with the contracts of employment that are initially suspended upon commencement of the liquidation or sequestration.[10] Unless such a business is sold as a going concern out of the insolvent enterprise, the existing contracts of employment will terminate finally.[11] When compared to business rescue, the employer company or close corporation to which the rescue procedure relates will be in financial distress, which is in many instances a precursor to insolvency. The main aim of the business rescue procedure is to try to save the entity so that it can continue as a profitable enterprise. The BRP is clothed with certain statutory powers to deal with various eventualities, amongst others, some onerous contracts, to the extent provided for in s 136 of the Companies Act. However, it is clear that the LRA will, as the law stands, trump the business rescue provisions of the Companies Act.[12]

The business rescue process has the objective of facilitating the speedy rehabilitation of a financially distressed company.[13] During the process, one or more BRPs temporarily take over the management of the company whilst a temporary moratorium is placed on the rights of claimants against the company. The BRP has the responsibility of developing and implementing a business rescue plan. Consensus must be sought on how the company can be rescued by restructuring its business, workforce and debt.[14] As witnessed in the *APA* case, this is by no means an easy task. The BRP needs statutory tools to assist with executing his or her duties.

Employees, registered trade unions representing employees of the company, shareholders and creditors are 'affected persons' during the business rescue proceedings and they have various rights throughout the process.[15] The business rescue process should ideally be an expeditious

[9] Act 24 of 1936.

[10] See J Kunst, A Boraine & D Burdette *Meskin: Insolvency Law* (LexisNexis 2020 update) para 5.21.10.

[11] For a discussion of s 38(9) of the Insolvency Act, read with s 197A of the LRA, see ibid paras 5.21.10.2-5.21.10.3.

[12] ibid para 18.9.

[13] Section 7*(k)* of the Companies Act lists efficient business rescue and recovery of financially distressed companies as one of the purposes of the Act. See also the definition of business rescue in s 128(1)*(b)* read with s 128(1)*(h)*. Business rescue may take two forms, namely, the maximisation of the likelihood of the company continuing on a solvent basis, or, if this is not possible, a better return for the creditors or shareholders, compared to what would result from the immediate liquidation of the company. Still, from the employees' point of view, the first aim should be the preferred option. See also Kunst, Boraine & Burdette n 10 above paras 18.2 and 18.3.2.

[14] s 128(1)*(b)* of the Companies Act.

[15] ibid s 128(1)*(a)*.

process not lasting longer than a period of three months.[16] In *Koen and Another v Wedgewood Village Golf and Country Estate (Pty) Ltd and Others*[17] the court stated that it is

> 'axiomatic that business rescue proceedings, by their very nature, must be conducted with the maximum possible expedition. In most cases a failure to expeditiously implement rescue measures when a company is in financial distress will lessen or entirely negate the prospect of effective rescue. Legislative recognition of this axiom is reflected in the tight timelines given in terms of the Act'.

The BRP is required, as soon as possible after appointment, amongst others, to investigate the company's affairs, business, property and financial situation, and thereafter consider whether there is any reasonable prospect of rescuing the company.[18] In order to provide some interim relief and breathing space for the company and for the BRP, s 133 of the Companies Act also provides for a general moratorium, bar prescribed exceptions, on the commencement or continuation of legal proceedings against such company in any forum.[19]

What is the position of employees during this process? The Companies Act provides that during a company's business rescue proceedings, all employees of the company must continue to be employed on the same terms and conditions, except to the extent that 'the employees and the company, in accordance with applicable labour laws, agree to different terms and conditions [of employment]'.[20] But, in general, during the process, the BRP may suspend any obligation of the company to which the company was a party at the commencement of the process.[21] The BRP may also, with court approval, on any just and reasonable terms, cancel any obligation of the company.[22] However, when acting in terms of s 136(2) 'a business rescue practitioner [may] not *suspend*' any provision of a contract of employment.[23] It is noteworthy that the meaning of the word 'suspend', compared to the wording of the LRA, became particularly relevant when the *APA* case was argued before Van Niekerk J.

[16] ibid s 132(3). In the *SAA* case n 1 above at para 33 the LAC held that the 'formulation of the business rescue plan is the central task of the BRP and that it must be developed with the greatest expedition is clear from a reading of s 150(5) of the Companies Act which provides that the business rescue plan must be published within 25 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'. See also E Levenstein *South African Business Rescue Procedure* (LexisNexis 2020 update) paras 5.5.1.1 read with 8.4.

[17] 2012 (2) SA 378 (WCC) para 10. See also Kunst, Boraine & Burdette n 10 above paras 18.2 and 18.5.2.

[18] s 141(2) of the Companies Act.

[19] See *NUMSA v South African Airways (SOC) Ltd and Others* [2021] JOL 49821 (LC) at paras 15 and 16 where the court held that only the High Court may grant such consent, even where legal redress is sought in the Labour Court.

[20] s 136(1)*(a)*(ii) of the Companies Act.

[21] ibid s 136(2)*(a)*.

[22] ibid s 136(2)*(b)*.

[23] ibid s 136(2A)*(a)*(i) (emphasis added).

Before we turn to the objectives of a lock-out, it must be noted that modern South African labour law aims to protect the rights of employees and employers. Section 23 of the Constitution and Chapter VIII of the LRA set out to improve security of employment. In this sense, business rescue has the same goal. However, the question remains whether labour law mechanisms such as strikes and lock-outs should apply in the same manner during business rescue. During this process, companies are in financial distress, which is a precursor to insolvency and the ultimate demise of the business.

Where a company is unable to pay its debts, it may be liquidated. As briefly mentioned above, the effects of insolvency law that follow liquidation bring into operation a different regime that ultimately automatically terminates the contracts of employment.[24] Given that a company subject to business rescue is most often under severe financial distress, if not actually insolvent, and given the limited time period available to restructure the business with a view to saving the business or at least part of it, it may be argued that the mechanisms provided by labour law should also be aligned with the aim of first trying to rescue at least some of the jobs. Any additional procedures, such as lock-outs, that are not appropriately aligned, and that extend the duration of the business rescue, may ultimately have a negative effect on saving the business. Whether the current dispensation relating to labour-related issues is adequately aligned with the business rescue procedure and its aims is a matter of policy. To achieve the optimal balance, the various interests of employees, creditors, shareholders and society at large must be weighed up against the respective aims of business rescue as well as the labour law provisions.

3 The Goals of the Lock-Out

The LRA defines a lock-out as 'the exclusion by an employer of employees from the employer's workplace, for the purpose of compelling employees to accept a demand ... whether or not the employer *breaches* those employees' contracts of employment'.[25] As discussed below, the meaning of the word 'breach' was contested in the *APA* case.

Strikes and lock-outs are loosely related to one another and mostly occur when a dispute of interest arises between an employer and an employee. Such disputes arise when either of the bargaining parties in a labour dispute attempts to bring about changes to existing rights

[24] A Boraine & S van Eck 'The New Insolvency and Labour Legislative Package: How Successful was the Integration?' (2003) 24 *ILJ* 1840-1868; T Joubert, S van Eck & D Burdette 'Impact of labour law on South Africa's new corporate rescue mechanism' (2011) 27 (1) *International J of Comparative Labour Law and Industrial Relations* 65-84.

[25] s 213 of the LRA (emphasis added).

and obligations during the process of collective bargaining.[26] More often than not, employees exercise their constitutional right to strike to force the employer to accept their wage demands.[27] Strikes and lock-outs could have the effect of increasing pressure that ultimately brings a dispute to an end, but they can also be time consuming. It is also not uncommon for employers to rely on their 'recourse' to lock-out non-striking employees in response to a strike.[28] Even though an express right to lock-out was omitted from the final Constitution, the Constitutional Court has accepted the lock-out as a legitimate collective bargaining tool.[29]

In short, a lock-out is an employer's weapon in response to a strike, using it to seek to compel its employees to accept its last stand in respect of any matter of mutual interest. However, in exceptional cases, employers may take the initiative by implementing a lock-out in the absence of a strike. This occurred in the *APA* case. In *Technikon SA v National Union of Technikon Employees of SA*[30] the court cautioned against the use of the term 'defensive lock-out' in instances where an employer locks out in 'response to a strike'. The court pointed out that the LRA does not differentiate between 'offensive' and 'defensive' lock-outs, but merely permits replacement labour to be used when a lock-out is 'in response of a strike'.[31]

A protected lock-out has the effect of preventing employees from exercising their common-law right to provide their services for a fee to the employer until they accede to the employer's demands.[32] As in the case of a strike, a protected lock-out does not lead to a breach of contract or a delict, and the no-work-no-pay principle applies.[33]

Before an employer may lock out its employees, the dispute should be referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) or a bargaining council. In addition, a certificate should be issued by the CCMA or a bargaining council indicating that the dispute has not been resolved, or that a period of 30 days has elapsed since the dispute was referred. The employer should inform the union or the

[26] D du Toit, S Godfrey, C Cooper et al *Labour Relations Law: A Comprehensive Guide* (LexisNexis 2015) 11 mention that whereas 'disputes of right' are suitable for adjudication, 'disputes of interest' are 'left to the parties to resolve through negotiation or the exercise of power'.

[27] Section 23(2)*(c)* of the Constitution states that every worker has the right to strike.

[28] Section 64(1) of the LRA stipulates that 'every employee has the right to strike and every employer has the recourse to lock-out' if a number of procedural requirements have been met.

[29] In *In re: Certification of the Constitution of the RSA, 1996* (1996) 17 *ILJ* 821 (CC) it was held that even though the lock-out is an acceptable collective bargaining instrument, it should not be seen as the equivalent of the strike weapon.

[30] (2001) 22 *ILJ* 427 (LAC) para 27.

[31] s 76(2) of the LRA.

[32] The requirements for a protected lock-out are discussed below.

[33] s 68(1)-(3).

employees about the lock-out in a written notice at least 48 hours before the start of the lock-out.[34]

Apart from these provisions, the LRA makes no mention of the implementation of strikes or lock-outs during the business rescue process.

4 Analysis of the *Airline Pilots' Association* Case

4.1 *Facts of the case*

When the SAA was placed under business rescue in December 2019, all operations were placed under the control of the appointed BRPs. A collective agreement between the applicant, the SAAPA, and the SAA recognised the SAAPA as the sole bargaining agent of all the pilots employed by the SAA and it also regulated their terms and conditions of employment.[35] Van Niekerk J noted that the agreement was 'perhaps unique in that it is not determinable on notice', as contemplated by s 23(4) of the LRA. The SAA was keen to renegotiate the terms of the agreement, but this apparently had been resisted by the SAAPA over many years.

Issues concerning the agreement came to a head following the initiation of the business rescue procedure. The business rescue plan contemplated the retrenchment of the majority of the employees of the SAA and the amendment of the terms and conditions of those employees remaining in its employ.[36] The SAAPA resisted all attempts to revise these terms and conditions. The BRPs consequently sought to terminate the collective agreement that existed between the parties. This, according to the court, ripened the issues into a formal dispute between the SAAPA on the one hand and the SAA and its BRPs on the other.

Due to the lack of progress in resolving the matter, the SAA issued a lock-out notice in terms of the LRA and referred the matter to the CCMA.[37] Subsequent negotiations failed. The LRA's 30-day notice period expired on 30 November 2020 and the SAA gave notice to the affected SAAPA members that they would be excluded from the workplace with effect from 12h00 on 18 December 2020 and until such time as they agreed to the demands of the SAA regarding their new terms and conditions of employment. The SAAPA did not contest the SAA's compliance with the LRA's s 64 requirements and the principle of no-work-no-pay became effective.[38]

[34] The requirements for a protected lock-out are similar to those that apply to a protected strike. Section 64 of the LRA stipulates that the dispute must have been referred to a bargaining council or the CCMA for conciliation, a certificate of non-resolution must have been issued, and 48 hours' written notice must have been given to the other party of the intention to commence with the lock-out.

[35] *Airline Pilots' Association* n 5 above para 2.

[36] ibid para 3.

[37] ibid para 4.

[38] ibid para 5.

4.2 *Was this a protected lock-out?*

The Association raised four grounds on which it argued that the lock-out was unprotected or, in the alternative, unlawful. Before dealing with the points raised by the Association, Van Niekerk J first considered the relevant legal principles pertaining to lock-outs. The judge highlighted the three elements of the definition of a lock-out, namely: the employer must exclude employees from the employer's workplace; the purpose of that exclusion must be to compel the employees to accede to a demand; and the demand must be in respect of any matter of mutual interest.[39]

Van Niekerk J confirmed that the procedural and substantive limitations on the right to lock-out mirror those that apply to strike action.[40] The consequences of protected strikes and lock-outs are also aligned. The principle of no-work-no-pay applies; the employer engaged in a protected lock-out enjoys indemnity against any delictual liability or liability for any breach of contract;[41] and no civil proceedings may be instituted against the employer who implements a procedural lock-out.[42]

The judge also quite correctly remarked that in spite of the lock-out not enjoying the same express recognition in constitutional terms as the right to strike as envisaged in s 23(2)*(c)* of the Constitution, this does not mean that the lock-out has no constitutional recognition.[43] Relying on *In re: Certification of the Constitution*,[44] the court acknowledged that the right to bargain collectively implies that each party to a collective bargaining relationship should have the right to exercise economic power against the other.

Thus, while the right to strike and the right to lock-out are not equal, through the right to engage in collective bargaining in terms of s 23(5) of the Constitution, employers do have at their disposal the means to exercise power through dismissal and through a lock-out. In light of this, Van Niekerk J accepted that an employer has a right to resort to so-called 'economic weapons', such as the lock-out procedure, in the collective bargaining process, and that it thus remains valid within South Africa's constitutional framework.

[39] See also *Technikon SA* n 30 above.

[40] This includes the limitations in ss 64 and 65. As mentioned in para 2 above, s 64 requires that prior to the strike and a lock-out the dispute should have been referred to a bargaining council or the CCMA for conciliation, a certificate of non-resolution should have been issued, and 48 hours' notice of the intention to strike or to lock out should have been given. Section 65 precludes strikes on the grounds, amongst others, that the parties are bound to a collective agreement prohibiting strike and lock-out action, that the dispute should be referred to arbitration, and that the employees are involved in an essential service.

[41] s 67(2) of the LRA.

[42] ibid s 67(4).

[43] *Airline Pilots' Association* n 5 above para 8.

[44] See n 29 above.

4.3 *Arguments of the Association and the SAA*

After the discussion of the principles in the previous section, the court directed its attention to the four grounds of the application to set the lock-out aside. In essence, the SAAPA attacked the legality of the lock-out as implemented in this instance.

It was argued, firstly, that the lock-out constituted an unlawful 'suspension' of the contracts of employment of those who were locked out, since it militated against s 136(2A) of the Companies Act.[45] In particular, the Association argued that the definition of the word 'suspend' included to 'halt temporarily'. By locking out the SAAPA's members, so the submission went, the SAA was depriving them of their rights to be remunerated in exchange for tendering their services. This, the Association argued, suspended members' employment contracts, thus breaching s 136(2A)*(a)*(i) of the Companies Act.[46] The SAA argued that the lock-out was not a suspension, but rather a breach of contract.[47]

With reference to the definition of 'lock-out' in the LRA, the court reiterated that the definition requires an exclusion from the employer's workplace, '*whether or not* the employer breaches employees' contracts of employment for the purpose of that exclusion'. The court further pointed out that an exclusion from the workplace may or may not constitute a breach of the employment contract, but no mention is made of the suspension of any of the terms of the contract.[48] The court also indicated that in South African law, a reading of the definitions of 'strike' and 'lock-out' and the protections extended by s 67 of the LRA to protected strikes and lock-outs make it clear that the model adopted by the legislature indemnifies breaches of the employment contract that a strike and a lock-out respectively may cause.

From the above it seems that the Companies Act and the LRA are perhaps not optimally aligned. It is doubtful that the legislature had (protracted) strikes and lock-outs in mind when it formulated the provisions dealing with the business rescue process. Nonetheless, Van Niekerk J made it clear that in his view, the prohibition on the suspension of employment contracts established by s 136(2A) of the Companies Act does in any event not apply to a lock-out, since s 136(1)*(a)*(ii) of the Companies Act specifically contemplates and permits changes to terms and conditions of employment in accordance with applicable labour laws.[49] In this context, the LRA recognises collective bargaining as a means of changing the terms and conditions of employment, and also expressly permits strikes by employees and lock-outs by employers

[45] ibid para 6 read with paras 9 to 11.
[46] ibid para 11.
[47] ibid para 12.
[48] ibid.
[49] ibid para 13.

as legitimate measures to press for agreement to proposed changes in employment conditions.

Therefore, the court viewed strikes and lock-outs as part and parcel of the collective bargaining process and concluded that these were 'essential elements of and integral to collective bargaining'.[50] In this regard, the Association also submitted that such a conclusion would undermine the purpose reflected in s 136(2A) of the Companies Act of protecting the work security of employees engaged in an enterprise that was under business rescue. However, the court responded by indicating that the protection was self-contained, in the form of the requirement that any agreement to any change in the terms and conditions of employment should be made 'in accordance with applicable labour laws'. So, the court argued, the rights of employees to security of employment and the terms and conditions of employment affected by business rescue proceedings were therefore not infringed and they enjoyed the same rights as any other employee.[51]

The court also pointed out that, on the approach advocated by the Association, there would be an inconsistency between the Companies Act and the LRA. In this regard, the court referred to s 5(4)*(b)*(i) of the Companies Act, which provides that in the case of any inconsistency between the Companies Act and, amongst others, the LRA, the provisions of the LRA would prevail. Section 210 of the LRA also confirms this principle, since it provides that if any conflicts relating to matters dealt with in the LRA arise between it and the provisions of any other law — excluding the Constitution — the provisions of the LRA will prevail. Thus, the *APA* case concluded that even if the lock-out did constitute a suspension from employment — which the court found was not the case — any prohibition on any suspension by a BRP of an employment contract in the terms of the Companies Act would be subject to the exercise of the employer's rights under the LRA.[52]

The Association's second attack on the lock-out was that there was no physical 'workplace' as envisaged in terms of the definition of a lock-out.[53] The argument therefore was that if there was no workplace, there could also be no exclusion from the workplace. In this regard, Van Niekerk J pointed out that there was no dispute that the operations of the SAA had been largely put on hold from 27 March 2020 in terms of the business rescue procedure. In considering the meaning of the term 'workplace' as defined in s 213 of the LRA, the court highlighted the words 'including ... *the place or places where the employees of an employer work*'.[54] The Association contended that since the SAA had ceased all

[50] The court relied on *SA Transport & Allied Workers Union & others v Moloto NO & another* 2012 (6) SA 249 (CC), (2012) 33 *ILJ* 2549 (CC).
[51] *Airline Pilots' Association* n 5 above para 13.
[52] ibid para 14.
[53] ibid para 6 read with para 16.
[54] ibid para 17.

operations and had been under business rescue for a year, there was no 'place or places where its members work[ed]'. In reaching his decision, Van Niekerk J was guided by case law. He pointed out that the definition had not previously been construed in such restrictive terms. In *NUCCAWU v Transnet Ltd t/a Portnet*,[55] for example, the court found that the denial of a right to be considered for day-to-day employment constituted a lock-out although this act did not necessarily entail a physical exclusion from the employer's workplace.

Furthermore, in *Amcu and Others v Chamber of Mines of South Africa and Others*[56] the Constitutional Court made it clear that the notion of a workplace is not geographically bound to a specific place.[57] Of significance to Van Niekerk J in this matter was the Constitutional Court's finding that the focus is on employees as a 'collectivity'.[58] Location is a relatively immaterial factor. Hence the court held that in this instance, the SAAPA's members continued to tender their services and they remained excluded from a workplace for the purposes of the definition of a lock-out.[59]

Thirdly, the Association contended that the lock-out notices were invalid because they contained demands that differed substantially from the referral of the dispute by the SAA to the CCMA.[60] On this point the court first noted that the LRA requires that the 'issue in dispute' must have been referred to conciliation, and that it is only the issue in dispute that may legitimately form the basis of any subsequent strike or lock-out.[61] On the facts, the issue in dispute was the proposed termination of the agreement and the negotiation of new terms and conditions of employment for the SAAPA's members. The court ruled that this was the dispute that was referred to conciliation and was the subject of the notice of lock-out. Hence the court was not prepared to adopt a narrow approach and confine legitimate industrial action to bargaining positions as they were recorded in CCMA referral forms. The court further found justification for this approach in the fact that collective bargaining was always a dynamic process and the bargaining positions would thus shift continually.

Finally, the Association relied on the so-called 'resolution of disputes collective agreement' and argued that the demands made by

[55] (2000) 21 *ILJ* 2288 (LC). At para 17 the court also referred to H Cheadle, B Conradie, T Cohen et al *Strikes and the Law* (Lexis Nexis 2017) 131 where the authors suggest that 'exclusion' can take various forms and is not necessarily confined to physical exclusion.

[56] 2017 (3) SA 242 (CC).

[57] *Airline Pilots' Association* n 5 above paras 24 and 29.

[58] See also S van Eck 'In the name of "workplace and majoritarianism": Thou shalt not strike — *Association of Mineworkers & Construction Union & others v Chamber of Mines & others* (2017) 38 *ILJ* 831 (CC) and *National Union of Metalworkers of SA & others v Bader Bop (Pty) Ltd & another* (2003) 24 *ILJ* 305 (CC)' (2017) 38 *ILJ* 1496.

[59] *Airline Pilots' Association* n 5 above para 17.

[60] ibid para 20.

[61] ibid para 21.

the SAA ought to be properly resolved in terms of this agreement.[62] The agreement provided that should a dispute arise relating to the interpretation or application of any collective agreement between the parties, that dispute should be resolved by a referral to conciliation, and if the dispute remained unresolved, by a referral to arbitration. The SAA's demand, the Association submitted, was for the termination of the agreement and the conclusion of a new collective agreement. In other words, it submitted that the true nature of the dispute concerned the issue of whether the agreement ought to be brought into operational use, ie that it should not be applied. That being so, the Association contended that s 65(1)*(b)* applied and precluded the SAA from resorting to any lock-out on the basis that it was bound by a collective agreement that required the matter to be referred to arbitration.

In ruling on this submission, the court referred to *Coin Security Group (Pty) Ltd v Adams & others*[63] and pointed out that it was a 'well-established principle that this court will look to the substance of a dispute to determine its true nature'. The court accepted that the SAA, through a process of collective bargaining, sought to induce an agreement by the applicant to cancel the agreement in its entirety and to secure an agreement on new terms and conditions of employment. The SAA did not dispute the validity of the agreement, nor its application for the period that it remained in force. This was manifestly not a matter that concerned the interpretation or application of the regulatory agreement, and the court therefore found no merit in this submission.[64]

In summary, the court held that the lock-out of the SAAPA's members did not constitute a suspension of their employment contracts. The exclusion constituted a breach of contract, but, because the lock-out was protected, the SAA was indemnified against any of the claims that would ordinarily flow from a breach of the employment contract. It followed that any limitations that the Companies Act imposes on a BRP to suspend any employment contract were not applicable.

In any event, as mentioned above, s 136(2A) of the Companies Act contemplates that agreed changes to conditions of employment may be secured during business rescue. Collective bargaining is a legitimate tool for gaining consent to changed terms and conditions. Integral to collective bargaining is the right to industrial action. A BRP may therefore engage in collective bargaining and initiate any legitimate economic pressure to press for proposed changes to employment terms. Furthermore, by virtue of s 5 of the Companies Act and s 210 of the LRA, the provisions of the LRA trump any such limitations, and thus entitle a BRP to lock out employees in terms of the LRA.

[62] ibid para 22.

[63] (2000) 21 *ILJ* 924 (LAC).

[64] *Airline Pilots' Association* n 5 above para 23.

5 Commentary and Conclusion

As discussed in the introduction, the SAA's employees gained the first success in the protracted strategic battle that occurred during the SAA's business rescue process. In the *SAA* case the LAC held that s 136 of the Companies Act imposed additional obligations on employers over and above those contained in s 189A of the LRA,[65] despite the fact that the LRA did not explicitly prohibit retrenchments during the twilight zone of businesses in distress. The LAC concluded that BRPs were not entitled to retrench workers before the business rescue plan had been finalised.

In the *APA* case, the Association again tried to gain the upper hand by relying on the provisions of the Companies Act to prohibit the BRPs from conducting a lock-out. It relied on the fact that the Companies Act prohibits the 'suspension' of contracts of employment during business rescue. Taking its cue from the LRA's definition of a lock-out, the Labour Court quite correctly concluded that the lock-out constituted a breach of contract, and not a suspension. With this as background, a number of points can be made about the rights of employees during the business rescue process.

Firstly, in what seems to be a developing trend in business rescue matters, contesting parties seek redress in either the Companies Act or the LRA, whichever best suits their case. This leads to a form of 'legislative shopping' between the two pieces of legislation. Contesting parties cherry pick between terms like 'suspension' and 'breach of contract'. However, this is where the trend stops. In some instances, litigants are successful in terms of the one Act, and in others, victory is achieved by using the other Act. What seems perplexing at first blush, though, is that in the *SAA* case the argument that the LRA trumps the Companies Act was not entertained, whereas it was accepted in the *APA* case.

Secondly, it may be argued that the provisions of the Companies Act and those of the LRA are not fully aligned when labour-related matters must be resolved in a business rescue scenario. Two aspects illustrate the point: the one aspect relates to the retrenchment of workers, and the other to the right to engage in strikes and lock-outs. The Companies Act makes provision for the conclusion of a business rescue plan which could set out the possibility of the dismissal of employees on operational grounds. That Act protects employees during the process of gaining consensus regarding the plan. Nonetheless, the LRA, which is the primary legislation dealing with the fair and unfair dismissal of employees, makes no mention of specific protections to be bestowed upon employees during the business rescue process.

The same applies to the second aspect. In its attempt to protect employees during the business rescue process, the Companies Act categorically states that employees' contracts of employment may not be suspended during the business rescue process. Contrary to this, the LRA

[65] *SAA* case n 1 above para 13.

permits a situation in terms of which employers may use the lock-out weapon to force their employees to accept the business rescue plan.

Thirdly, the business rescue process is designed to obtain a speedy resolution. The Companies Act requires that the BRPs should publish a business rescue plan within 25 business days after their appointment, bar any extension applied for.[66] In fact, the Companies Act envisages that a business rescue procedure should be concluded within a three-month period from its initiation, as discussed above. Therefore, decisions need to be finalised as soon as possible to ensure that the issues that gave rise to the company being in distress do not further worsen the precarious financial state of the company. It is submitted that opening the door to engaging in potentially protracted collective bargaining during the business rescue process, as was done in the *APA* case, could frustrate the goals of the expeditious process to ensure that either the business and some of its contracts of employment might be saved, or that the best returns could be secured subsequent to the liquidation of the business. It must, however, be conceded that a strike or lock-out could, in some instances, assist in increasing collective bargaining pressures that might expedite the resolution of a dispute. Nonetheless, collective bargaining processes are in our opinion more often than not drawn out, rather than expedited, by strikes and lock-outs.

Fourthly, it should be noted that the SAA saga is taking place in a situation where the South African government is the biggest shareholder and creditor of the SAA. The SAA's employees and their trade unions are undoubtedly acutely aware of the fact that the government has in the past provided additional funding to bail out this faltering company. Employees may therefore have unrealistic expectations about what they might gain from the business rescue process.

Fifthly, as things stand, it must also be accepted that the right to lock out could seemingly become a powerful tool in the hands of BRPs during the business rescue process. Especially in instances like this, where employees seek to rely on their statutory rights when the proverbial writing is on the wall, this may become an effective weapon that BRPs can use to break the deadlock when employees do not want to concede during the conclusion of the business rescue plan.

Finally, in the case of the full-blown insolvency of the employer, s 38 of the Insolvency Act allows for the termination of employment contracts in most cases. This trumps the aims of the LRA pertaining to job security in the final instance.[67] In view of the current provisions of the Companies Act, and the *SAA* and the *APA* judgments, it is clear that there is no special dispensation regarding lock-outs in the case of business rescue where the main goal should be to rescue as many jobs as possible. The reality is that the business rescue procedure relates to

[66] See s 150(5) of the Companies Act.

[67] See Kunst, Boraine & Burdette n 10 above para 5.21.10.

companies in dire financial circumstances and in many instances it is a final attempt to rescue such companies from final liquidation. Although the BRP is clothed with some suspension and cancellation powers to deal with obligations flowing from a variety of contracts, these powers do not extend to contracts of employment.

In conclusion, the *APA* case cannot be faulted for its legal interpretation of the right of the BRP to lock out employees during the process of business rescue. The Constitutional Court has quite correctly recognised lock-outs as a legitimate collective bargaining tool. In an attempt to break the deadlock between the SAAPA and the SAA, the BRPs probably had only this tool at their disposal, which inevitably caused a further (and probably costly) delay, given the litigation that followed. It is nevertheless submitted that the case under discussion is one more example which clearly indicates that the Companies Act and the LRA are perhaps not appropriately aligned in instances where a company is subject to business rescue with the aim of saving it or at least a part of it.

Significant gains have been made in improving the position of employees during insolvency and during business rescue proceedings. However, the lock-out and consequent litigation in the case under discussion delayed the business rescue process, potentially harming it. As stated above, stakeholders and the legislature should revisit the operation of some of the provisions of the Companies Act that relate to business rescue and those contained in the LRA dealing with the retrenchment of workers, and strikes and lock-outs, to ensure that the business rescue procedure functions optimally within the limited time periods provided for. It is submitted that both the Companies Act and the LRA could be amended to address disputes of interest that would perhaps be better suited to a business rescue scenario. Consideration could, for example, be given to limiting the right to strike and to lock-out to some extent. The Acts could provide for the obligatory inclusion in every business rescue plan of a clause that would compel the affected persons to refer any deadlock regarding disputes of interest to compulsory arbitration, which must take place within tight deadlines. Such a limitation on the rights to strike and lock-out could operate in a similar fashion as peace clauses in terms of collective agreements and compulsory arbitration in the instance of 'essential services' in terms of the LRA.[68] A failure to prevent delays caused by strikes and lock-outs may be detrimental to the business rescue procedure. To put it differently, the use of some of the labour-related mechanisms should possibly be realigned to coincide with the aims and goals of business rescue. What perhaps saved the day for the SAA rescue attempt was the fact that the government was prepared to subsidise the rescue effort. However, this will not be the case in ordinary business rescue situations where the government is not involved.

[68] See s 65(1) of the LRA.

Defining Discrimination on an Arbitrary Ground: A Discussion of *Minister of Justice & Correctional Services & others v Ramaila & others* (2021) 42 *ILJ* 339 (LAC)

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Abstract

This case note examines the interpretation given by the Labour Appeal Court (LAC) in *Minister of Justice and Correctional Services & others v Ramaila & others* to the term 'arbitrary ground', as contained in s 6(1) of the Employment Equity Act. Its conclusion is that the narrow approach adopted by the LAC was incorrectly decided. The court failed to interpret s 6(1) in a purposive manner, which requires a holistic consideration of the objectives of the EEA, a proper consideration of the constitutional rights promoted by the EEA, and a circumspect evaluation of international law.

1 Introduction

The purpose of the Employment Equity Act (EEA)[1] is to attain workplace equality by promoting equal opportunity and fair treatment in employment. This is achieved by eliminating unfair discrimination and by implementing affirmative action measures to redress the past disadvantages experienced in employment by designated groups.[2]

Section 6(1) of the EEA is instrumental in the achievement of workplace equity as it provides the grounds of differentiation upon which unfair discrimination in employment is prohibited. These grounds are categorised into two groups. The first is the prohibition of unfair discrimination on listed grounds. The second is the prohibition of unfair discrimination on unlisted grounds, which are construed as being analogous to the listed grounds.[3] This is in keeping with the interpretation of the equality clause contained in s 8(2) of the Interim Constitution (1993) and s 9(3) of the Constitution (1996).[4]

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[1] Act 55 of 1998.

[2] s 2 of the EEA.

[3] A van Niekerk, N Smit, M A Christianson, M McGregor & B P S van Eck *Law@Work* (LexisNexis 2018) 132. See also *Independent Municipal & Allied Workers Union & another v City of Cape Town* (2005) 26 *ILJ* 1404 (LC) (*IMATU*) para 89 and *National Union of Metalworkers of SA & others v Gabriels (Pty) Ltd* (2002) 23 *ILJ* 2088 (LC) (*Gabriels*) para 9.

[4] See *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) (*Harksen*) paras 40-50; *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) (*Prinsloo*) paras 28-29 and *Larbi-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another* 1998 (1) SA 745 (CC), 1997 (12) BCLR 1655 (CC) paras 19-20.