REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No

28/7/2022
DATE

SIGNATURE

Case No.: 2021/31083

In the matter between:

CAPE 26 (PTY) LIMITED	Applicant
and	
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	First Respondent
ALL AFFECTED PERSONS	Second Respondent
CAPE 26 (PTY) LIMITED	Third Respondent

JUDGMENT

This judgment is deemed to be handed down upon uploading by the Registrar to the electronic court file.

Gilbert AJ:

1. On 30 June 2021, when Mahomed Mahier Tayob ("Tayob"), ostensibly as the business rescue practitioner of Cape 26 (Pty) Limited ("the Company"), launched these proceedings seeking that the period in which a business rescue plan must be published be extended by the court as provided for in section 150(5)(a) of the Companies Act, 2008, he knew that his status as business rescue practitioner, and indeed whether the Company was under business rescue, was challenged and subject to serious factual dispute.

2. Tayob did not in his founding affidavit adduce any evidence of a witness that had any personal knowledge of the facts surrounding the factual dispute.

3. That foreseen factual dispute, unsurprisingly, manifested itself on 12 July 2021 when David Bannai ("Bannai") a shareholder of the Company opposed the application as one of the affected parties. In support of his position, Bannai produced evidence under oath in an answering affidavit of facts surrounding the factual dispute by witnesses with personal knowledge, including that of a director (or previous director, depending on which way the factual dispute goes), Boris Bannai, by way of a confirmatory affidavit.

4. Tayob filed a replying affidavit that further intensified the factual dispute whether the Company was in business rescue and whether he had been appointed the practitioner. Again Tayob did not adduce admissible evidence under oath of a witness with personal knowledge relating to the factual dispute.[1]

[1] The email of a Chris Nel as relied upon by Tayob in reply is hearsay evidence in that, assuming that Nel had personal knowledge of what he records in the email, Nel does not give any evidence under oath in these proceedings, such as confirming under oath the contents of his email.

Notwithstanding this entrenched factual dispute, Tayob persisted in his replying affidavit with the relief, which relief is predicated on the factual dispute being resolved in his favour.

5. The application was referred to case management as a designated commercial matter. Throughout the case management Tayob persisted in seeking the relief. Notably, the case management judge, when issuing a directive on 10 May 2022 that the case management was complete and so application could be made for the hearing of the application on the opposed roll, recorded that the Tayob as the applicant had made the election not to apply to have the matter referred for the hearing of oral evidence.

6. It is clear that Tayob elected to proceed with this application on motion on an opposed basis notwithstanding the clear factual dispute that Tayob had anticipated from the outset and which he readily accepts persisted throughout these proceedings, and still persists.

7. Having made this election to press on with the application on motion notwithstanding the factual dispute, on the morning of the hearing of the application before me Tayob sought a postponement *sine die* on the basis that the factual dispute first needed to be resolved, and that this would be determined in litigation before other courts. Tayob also argued that he first needs to be furnished with various documents that he is seeking in those other proceedings in his ostensible capacity as practitioner, and which, he argued, would have a bearing on the factual dispute.

8. I refused the postponement, and indicated that my reasons would follow, as would my order in relation to the costs of the postponement. I then proceeded to hear the main application.

9. As stated, Tayob, ostensibly as the practitioner, seeks an extension of the statutory period in which a business rescue plan must be published in terms of section 150(5) of the Companies Act.

10. The Companies and Intellectual Property Commission ("the CIPC") is cited as the first respondent and the affected persons in the Company are cited collectively as the second respondent.

11. There does not appear to be any real dispute that Bannai as a shareholder is an affected party and so was entitled to participate in, and oppose, these proceedings.[2] Section 146(b) of the Companies Act expressly affords a shareholder the entitlement to participate in any court proceedings arising during the business rescue proceedings. And should the Company not be in business rescue, as asserted by Bannai, he as a shareholder has a sufficient interest in these proceedings to oppose the application. Tayob has in any event effectively cited Bannai as a respondent and so Bannai is entitled to oppose the proceedings.[3]

12. Bannai in his opposing affidavit disputes that the Company is under business rescue and that Tayob is the appointed business rescue practitioner on the

---

[2] Section 146(b) of the Companies Act.

[3] *Van Staden NO and others v Pro-Wiz Group (Pty) Ltd* 2019 (4) SA 532 (SCA), para 13.

basis that the resolution resolving that the Company voluntarily begin business rescue proceedings and be placed under supervision business rescue[4] was not a valid resolution of the Company as it was not adopted by the board of directors of the Company. That resolution[5] is signed on 8 January 2021 by a Mr F K Taukobong as the director of the Company, who the parties refer to as "King", and is filed with the CIPC on 11 January 2021.[6]

13. This resolution, signed by King alone, purports to be a resolution of the board of the Company on the basis that King is the sole director of the Company.

14. Although the resolution does not expressly appoint Tayob as the business rescue practitioner[7], it does purport to confer the authority on King to nominate and appoint the practitioner, which he then apparently does.[8]

15. Bannai contends that King had been removed as a director and therefore could not have adopted the resolution. Bannai continues that even if King was still a director, he was not the only director as his father Boris Bannai ("Boris") remains a director.

16. The position adopted by Bannai is a simple one -Tayob cannot seek the relief that he does of the court to extend the period for publishing a business rescue

[4] As envisaged in terms of section 129(1)(a).

[5] Ata page 07-23 (360).

[6] Form CoR 123.1 at 01-21 (21).

[7] As envisaged in terms of section 129(3)(b).

[8] This appears from the statutory form CoR123.2 dated 14 January 2021 at indexed page 01-22 (22).

plan if the Company is not in business rescue and, it follows, if he is not the business rescue practitioner.

17. The approach taken by Tayob in his replying affidavit, although recognising the factual dispute that cannot be resolved on motion, is to fob off this challenge as being an attempt to delay and frustrate the proceedings. The heads of argument filed on his behalf also fob off this challenge by submitting that this challenge as to the validity of the resolution "*do not however have any bearing on the relief sought by the applicant*" and "*[t]he opposing papers do not contribute anything to the merit and/or argument of application in the relief sought by the applicant*".

18. It is difficult to see how an admitted factual dispute as to whether the Company is in business rescue and whether Tayob is the business rescue practitioner can have no bearing on the relief sought and does not contribute to a determination of whether Tayob is entitled to the relief that he seeks. In any event, Tayob's seeking of a postponement on the basis that this factual dispute first needs to be resolved is self-destructive of this argument.

19. Bannai was not content that he oppose the application solely as an affected person but instead sought ostensibly on behalf of the Company to intervene in the application and as the Company to oppose the relief sought by Tayob. On 4 October 2021, the court granted the Company at the instance of Bannai leave to intervene in the application. It is not clear to me that Bannai and his attorneys were necessarily authorised to so seek to intervene on behalf of the Company given the factual disputes, but in my view this issue need not be considered

further in that Bannai in his capacity as a shareholder in any event was entitled to oppose these proceedings.

20. There is no dispute that there are serious factual disputes in relation to the shareholding and directorship of the Company. One group of stakeholders contend for a particular shareholding and directorship whilst another group of stakeholders contends otherwise. Tayob admits as much, such as in his replying affidavit in paragraph 4.13 where he states that the issue surrounding the directors and removal of directors remains in dispute and in paragraph 6.3.5 where he says unequivocally that "*[t]he directorship is riddled with factual disputes*".

21. During the argument of the postponement application and in motivation thereof, my attention was directed to various court proceedings in other courts such as in the Northern Cape Division, Kimberley and in the Free State Division in which the issue of Tayob's *locus standi* as the business rescue practitioner may be determined as part of those proceedings.

22. I enquired of counsel whether there were specific proceedings that had been launched such as by way of declarator in relation to Tayob's status as the business rescue practitioner. Neither counsel were able to point me to any declaratory relief specifically aimed at resolving that dispute but only to various other pending matters before the court where that issue may be determined as part of the relief sought in those matters.

23. Counsel for Bannai, Mr Smit, directed my attention to paragraph 7.13 of Tayob's founding affidavit in these proceedings where Tayob had already, in June 2021, over a year ago, acknowledged the challenge to his status and specifically recorded under oath that he had instructed counsel to prepare an application to court to deal *inter alia* with his appointment as the business rescue practitioner. That affidavit was deposed to on 25 June 2021. Mr Smit also directed my attention to the notice of motion in the Northern Cape Division, Kimberley under case number 381/2022 dated 23 February 2022 in which Tayob sought interim relief "*pending the determination of the legal status of [the Company]*".[9] Notwithstanding these clear indications by Tayob that he would be seeking the appropriate relief to resolve the issue of his status as practitioner and of the Company, he has not done so.

24. Mr Van Rensburg SC for Tayob submitted that it was not necessarily for his client Tayob as the ostensible business rescue practitioner to apply for such relief and that the disputing parties, such as Bannai, should have done so by counter-applying for relief to the effect that the Company was not under business rescue and that Tayob was not the practitioner.

25. I have considerable difficulty with this submission. It is for Tayob as the applicant to establish his *locus standi*. Tayob has known for over a year, since at least June 2021, that his status as business rescue practitioner was disputed and he himself stated under oath that he had instructed counsel to approach court to resolve that issue. A year later and still Tayob has not initiated such

[9] Prayer 1 of Part B of the notice of motion, at 23-42.

proceedings to determine his status. Instead Tayob persisted, until the last minute, in these proceedings in seeking relief that was predicated on a factual finding in his favour that the Company was in business rescue and that that he was the practitioner.

26. It is not unjustifiable to draw the inference that Tayob is content that the uncertainty in relation to his status persists. Why he may be so content is not for the court to speculate upon, but it would be expected of someone in the position of Tayob to have been far more vigorous in resolving the issue of his status.

27. If not already self-evident, the timing of Tayob's last minute application for the postponement of his own application on the morning of the hearing before me, is remarkable. As stated, this matter was effectively a commercial matter allocated by the Deputy Judge President for case management before a judge. That case management took place before Vally J and which case management concluded by at least 10 May 2022 when a case directive was issued by Vally J that case management had been completed and that application could be made for this matter to be heard. As, as stated above, that directive records that Tayob as the applicant had made the election not to apply to have the matter referred for the hearing of oral evidence.

28. The case management having been completed, the matter was allocated to me albeit a commercial matter for hearing in the opposed court. It would have been expected of Tayob as the applicant to have long before the matter had been enrolled for hearing before me and certainly before the day of the hearing itself

to seek a postponement of his own application. Tayob as the applicant in a commercial matter that had been case managed to the point of it about to be heard on its merits effectively sought to derail his own application at the last minute. In the circumstances, Mr Smit's submission that Tayob was seeking to "*engineer*" the postponement does have merit.

29. Mr Van Rensburg SC submits that Tayob had recently changed attorneys to A. Mothilal Attorneys ("AMA") and that this should be taken into account. Mr Smit countered that apart from these attorneys having already been engaged by Tayob in the other litigation before the courts months ago, as appears from the legal proceedings described in the postponement application, regard must be had to a letter annexed to the postponement application from these newly appointed attorneys dated 14 July 2022 addressed to Bannai's attorneys, Cliffe Dekker Hofmeyr Attorneys ("CDH"). That letter records that Tayob had now formed the view that notwithstanding the case management of the matter, this application was not ripe for hearing as there were proceedings pending in other courts regarding the status of the business rescue proceedings, and that this application must be postponed.[10] The letter further records that a practice note would be filed to this effect.

30. It is not clear to me how at only this stage Tayob can form the view that these proceedings were not ripe for hearing because of other proceedings that had been pending before the courts for many months. By all accounts Tayob through his legal representatives participated in the case management of this

[10] Annexure "I" at 23-234.

application without raising such concerns. The appointment of new attorneys of record, even assuming that they were not otherwise involved in the dispute, does not constitute adequate explanation.

31. CDH reverted that same day 14 July 2022 disputing that the matter was not ripe for hearing, pointing out that counsel for Tayob had at the last case management meeting specifically record that the matter was ripe for hearing, and that a joint practice note had been filed from which it was clear the matter was ripe for hearing and no objection was raised that it was not ripe for hearing. CDH recorded that in those circumstances a postponement would be opposed.

32. Although Tayob had already decided on 14 July 2022 to seek a postponement and knowing that Bannai would oppose that postponement, he nonetheless did not launch the postponement application until the morning of the hearing, on 21 July 2022. Neither was an updated practice note filed on his behalf. This too fortifies the inference that Tayob was seeking to engineer the postponement of his own application.

33. Mr Van Rensburg SC for Tayob submitted that there can be no prejudice in postponing the application. The prejudice is that parties had agreed that the matter was ripe for hearing and Tayob had led not only Bannai and his legal representatives but also the court to believe that it was so. Significant effort has been expended, including by the court, to deal with this commercial matter which had been allocated to be heard on the opposed roll.

34. Of course, such prejudice as may be suffered by such inconvenience can in certain instances be addressed by an appropriate costs order.[11] Tayob did not tender any wasted costs that may arise from the postponement but was insistent that any costs arising from the postponement be costs in the cause.

35. In circumstances where Tayob has not furnished an adequate explanation for why he has sought his postponement so late in the day,[12] has not raised any reason for the postponement that was not already evident throughout the main application and has not tendered costs, I could not find that Tayob has shown good cause and that it would be in the interests of justice for the postponement to be granted.[13] And so I refused the postponement.

36. Turning to the merits of the application, unless Tayob can persuade the court that he had the necessary *locus standi* to launch these proceedings as the business rescue practitioner, he must fail. I say this because Tayob elected to approach this court ostensibly as the business rescue practitioner for the Company. As the applicant, it is incumbent upon him to demonstrate that he has the capacity to approach the court in the capacity that he asserts.

37. The factual dispute is which persons constituted the board of the Company as at January 2020. This factual dispute is relevant as it is only the board that could have resolved that Company voluntarily begin business rescue proceedings

---

[11] One of the factors identified in *Myburgh Transport v Botha trading as SA Truck Bodies* 199 (3) SA 310 (NmS), at 315F.

[12] Another of the factors identified in *Myburgh Transport above*, at 315D

[13] *National Police Service Union and others v Minister of Safety and Security* 2000 (4) SA 1110 (C), para 4.

and be placed under supervision business rescue. Without a valid resolution, that is the end of the matter and there is no need for an order setting aside the resolution in terms of section 130(1)(a) of the Companies Act.[14]

38. Just as any other factual dispute is to be resolved through the application of the usual *Plascon-Evans* rule, so too must any dispute in relation to Tayob's capacity. Tayob anticipated from the outset that there would be a live dispute in relation to his capacity. He already acknowledges this in his founding affidavit. Unsurprisingly, this dispute manifests itself in Bannai's opposition in his answering affidavit, and which, as set out above, Tayob again acknowledges in his replying affidavit. To remove any doubt the basis for the postponement that was sought before me was that this very dispute needed first to be resolved.

39. In these circumstances, this dispute was not only reasonably foreseeable but had been foreseen when Tayob launched these proceedings. He therefore instituted these proceedings at his peril.

40. To the extent that Tayob was of the view that he was nonetheless statutorily obliged to launch these proceedings for an extension of the period in which to publish the plan notwithstanding this foreseen dispute (in respect of which I make no finding), that does not explain why he persisted in filing a replying affidavit and in progressing the matter including through case management for

[14] *Panamo Properties (Pty) Ltd and another v Nel and others NNO* 2015 (5) SA 63 (SCA) para 23, rejecting the contrary approach in *DH Brothers Industries (Pty) Ltd v Gribnitz NO and Others* 2014 (1) SA 103 (KZP) para 16.

the hearing of the matter on an opposed basis and throughout, until the morning of the hearing, and which included agreeing that the matter was ripe for hearing. It should have been clear to Tayob almost from the outset that this factual dispute would first need to be decided and appropriate steps should have been taken then already by him to at least stay these proceedings pending the determination of that dispute. But Tayob did the opposite and advanced this matter to be designated and case-managed as commercial matter to the extent of agreeing that it was ripe for hearing, and that he would not be seeking a referral to oral evidence.

41. Tayob has therefore failed to establish that he has the requisite *locus standi* to have sought the relief and in the circumstances the application stands to be dismissed.

42. To be clear, in dismissing the application on the basis that Tayob has not demonstrated his status as the business rescue practitioner, I do so on the basis of the *Plascon-Evans* approach and so do not make a definitive finding in this regard. It therefore remains open for Tayob or any other party to resolve this issue by way of court proceedings, whether in the pending proceedings before the other courts or otherwise.

43. Mr Van Rensburg SC submitted that it was not open for the court to dismiss the application on the basis that Tayob has not demonstrated his standing unless and until Tayob's appointment as business rescue practitioner has been set aside. This was based on a further submission that the CIPC had in some or other manner taken a decision that constituted 'administrative action' as

provided for in the Promotion of Administrative Justice Act, 2000 ("PAJA") and that until that administrative action was set aside on review, the matter must be approached on the basis that Tayob's appointment as business rescue practitioner was valid, based upon the *Oudekraal* principle.[15]

44. Precisely what decision had been taken by the CIPC that would constitute administrative action is not clear, which is unsurprising given that neither counsel could direct me to this being an issue raised in the papers in the main application.

45. In my view, the court cannot engage in a consideration as to whether what the CIPC may or may not have done in relation to whatever documents had been filed with it that gave rise to Tayob's ostensible appointment as business rescue practitioner constituted administrative action that is liable to be set aside under PAJA.[16] Although Mr Van Rensburg SC sought to place reliance on what the CIPC says in a letter dated 28 February 2022 as apparent support for his argument, this letter features for the first time as an annexe to the postponement application filed on the morning of the hearing. It can hardly in those circumstances cannot form the foundation of Mr Van Rensburg's argument, which was not foreshadowed in the affidavits in the main application. It would be unfair to both Bannai and to the CIPC itself to advance an entirely

---

[15] *Oudekraal Estates (Pty) Limited v City of Cape Town and Others* 2004 (6) SA 222 (SCA), para 26.

[16] The analysis by Wallis JA in paragraphs 39 and 40 in *Knoop and Another NNO v Gupta (Tayob Intervening)* 2021 (3) SA 135 (SCA) arriving at the conclusion in paragraph 41 that business rescue proceedings are an entirely private process involving the company, the practitioner and all affected persons and that *"[t]he role of the CIPC is simply to hold the public record of the company's status"* does not bode well for the merits of this argument but I make not finding in this regard.

new argument of some complexity in this fashion, and in which the CIPC would have a direct interest.

46. Nonetheless, should I be incorrect in dismissing the application on this basis, there is a further difficulty that presents itself. Assuming in favour of Tayob that the Company is in business rescue, the Company's employees, its creditors and its shareholders are all entitled to notice of these proceedings, as expressly provided for in sections 144(3)(a), 145(1)(a) and 146(a) of the Companies Act respectively. There is no evidence on the court file that there has been compliance with these notice requirements. This deficiency should have been readily evident to a person in the position of Tayob, a senior business rescue practitioner who is legally represented, and the relevant evidence placed before the court before the hearing of the matter. This requirement of notice to affected parties is a bedevilling issue in many applications and it could hardly come as a surprise that this issue was raised by the court

47. This non-compliance too constitutes a further basis for the dismissal of the application.

48. The question of costs remains.

49. Bannai has succeeded in his opposition and so is entitled to costs, both in relation to the main application and the postponement application.

50. As I have found that Tayob has not demonstrated that he is the duly appointed business rescue practitioner, costs cannot be awarded against him in that capacity, or as against the Company. Where a person approaches court on

behalf of a litigant and then cannot demonstrate that he or she had the capacity or authority to do so, where that very issue is before the court, that person can be held liable for costs personally.[17] In my view, this is an appropriate case where Tayob is to pay the costs personally, on this basis.

51. Mr Van Rensburg SC sought to prevail upon me that it would be unfair to Tayob to carry the costs as, he submitted. Tayob was acting in good faith on the belief that he is the practitioner. Tayob was alive to the dispute to his status but persisted in seeking the relief that he did until the last minute. He cannot be heard to complain that he is held personally liable for those costs when it transpires that he could not establish his alleged status. As I have found that Bannai has succeeded in opposing these proceedings, in my view it would unfair for Bannai not to be able to recover his costs. And as those costs cannot be ordered against the Company as Tayob has not established that he litigates on behalf of the Company, in weighing up any comparative unfairness to the parties, the scale is in favour of Bannai as the successful party.

52. This is fortified by the manner in which Tayob has gone about litigating his application, including in his failed last-minute attempt to postpone the matter. I do not go so far as to find that Tayob has acted in bad faith (for example, it may ultimately transpire that he is the appointed practitioner, and so I decline Mr Smit's request that the costs be ordered on a punitive attorney and client scale) but the manner in which he has gone about the litigation does not engender

[17] See *Francarmen v Gulmini* 1982 (2) SA 489 (W) at 489F. See also the previous edition of *Henochsberg on the Companies Act*, Vol 2 at 1034(2).

sympathy for his position when it comes to my exercise of the discretion in relation to costs.

53. I do not know whether Tayob obtained some form of indemnity from those who ostensibly sought to appoint him but he cannot have reasonably have expected to litigate risk-free in the manner that he has.

54. As it is unclear given the dispute in relation to the directorship whether the Company is properly authorised these proceedings, I make no order in relation to its costs.

55. The following order is made:

55.1. The application is dismissed.

55.2. The costs of David Bannai as a second respondent are to be paid by Mahomed Mahier Tayob personally, which includes the costs of the postponement application dated 21 July 2022.

Gilbert AJ

Date of hearing: 21 July 2022

Date of judgment:	28 July 2022
Counsel for the applicant:	Advocate S J van Rensburg SC
Instructed by:	A Mothilal Attorneys Inc
Counsel for the second respondent (David Bannai) and the third respondent:	Advocate M Smit
Instructed by:	Cliffe Dekker Hofmeyr