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18/03/2022

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: 62989/2021

(1)	REPORTABLE: YES /NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED: YES/ NO
2022	

18/3/2022

In the matters between: -

TAYOB, MAHOMED MAHIER N.O.

First Appellant

EUGENE JANUARIE N.O.

Second Appellant

and

**SHIVA URANIUM PROPRIETARY LIMITED
(IN BUSINESS RESCUE)**

First Respondent

JUANITO MARTIN DAMONS

Second Respondent

KGASHANE CHRISTOPHE MONYELA

Third Respondent

GEORGE VAN DER MERWE

Fourth Respondent

JOSEPH MTSHALI

Fifth Respondent

CLOETE MURRAY

Sixth Respondent

INDUSTRIAL DEVELOPMENT CORPORATION OF SOUTH AFRICA LIMITED **Seventh Respondent**

COMPANIES AND INTELLECTUAL PROPERTY COMMISSION **Eight Respondent**

JUDGMENT

MSIMANG, AJ

INTRODUCTION:

The Applicants have applied to this Court for an order in the following terms:

[1] That the Applicant's non-compliance with the Uniform Rules of Court relating to service of process and time frames be condoned and that the application be heard as one of urgency in accordance with Rule 6(12)(b);

[2] That it be declared that:

2.1 the first applicant is the only appointed business rescue practitioner of the first respondent;

2.2 the second applicant has been duly appointed as the first applicant's assistant and as junior business rescue practitioner of the first respondent;

2.3 the second and third respondents have not been duly appointed as business rescue practitioners for the first respondent;

2.4 the second and third respondents are not the business rescue practitioners of the first respondent;

[3] That the second and third respondents be interdicted from purporting to act or to act on behalf of the first respondent as business rescue practitioners;

[4] That the eighth respondent be ordered to reflect the first and second applicants as the business rescue practitioners of the first respondent, and no one else;

[5] That the second respondent and the third respondent each be ordered to:

5.1 hand to the applicants all correspondence, communications, memoranda, determinations and all other documents in whatsoever format produced by them or received by them or sent to third parties, including affected persons of the first respondent during the period that each gave out to be a business rescue practitioner of the first respondent;

5.2 pay over all funds received by them on behalf of the first respondent and held or controlled by them in any bank account allocated to the first respondent;

5.3 provide a written reconciliation detailing all financial transactions that they entered into on behalf of the first respondent during the period 18 September 2018 to date together with all source documents;

5.4 provide a comprehensive and detailed report as contemplated in section 132(3)(a) of the Companies Act 71 of 2008 for the period 18 September 2018 to date detailing all actions that they undertook with respect of the first respondent;

[6] That the fourth and fifth respondents be ordered to:

6.1 hand to the applicant all books and records pertaining to the first respondent whether in hard copy format or in electronic format;

6.2 in the event that any book or record is no longer in their possession, to state the whereabouts of such document by identifying such document, the date and time on which it was transferred to another person and the identity of such person;

6.3 deliver a statement of affairs of the first respondent as contemplated in section 142(3) of the Companies Act 71 of 2008 containing particulars of the items listed in subsections (a) to (f)

[7] That the sixth respondent be ordered to:

7.1 pay any and all funds currently held in ABSA Bank account numbers 4094464171 and 4096659166 into the first applicant's business bank account opened in relation to the first applicant under First National Bank account number 62927243238;

7.2 immediately pay over all and any funds that may be deposited into the said ABSA account numbers into the said First National Bank account number as and when such payments are received;

[8] That the said second to sixth respondents provide the information, documents, reports and declarations set out above to the applicants at the address of their attorney of record set out below and to the registrar of this Honourable Court within ten days of the date of any order made herein and to confirm on oath that they have complied with the said obligations;

[9] That the applicants be authorised to within ten days of the aforesaid date deliver a supplementary founding affidavit dealing with the documents, information and reports aforesaid and authorizing them to seek further or alternative relief;

[10] That the second and third respondents be ordered to pay the costs of this application on the scale of attorney and own client, the one paying the other to be absolved and that all other respondents be ordered to pay the costs of

the application together with the second and third respondents on the said scale should they oppose the relief sought;


THE FACTS

[11] This matter has a chequered history. It has its genesis on the 20 February 2018 when the Board of Directors of the 1st Respondent (Shiva Uranium (Pty) Ltd in Business Rescue) resolved in terms of Section 129(1) of the companies Act 71 of 2008 (“the Act”) to place Shiva under business rescue. The facts are succinctly set out in the matter of Tayob and Another v Shiva Uranium (Pty) Ltd and others and the matter of Shiva Uranium (Pty) Ltd v Tayob and others¹ and the matter of Shiva Uranium (Pty) Ltd v Tayob and others². The facts will be repeated in a nutshell for the sake of completeness.

[12] These matters related to the appointments of the applicants as business rescue practitioners of Shiva Uranium by its Board of Directors. The Board initially appointed Messrs Klopper and Knoop. The appointment of the latter was challenged by the Industrial Development Corporation which culminated with a court application for their removal and for the appointment of Murray Cloete and Kgashane Monyela in their stead.

¹ [2020] JOL 49101 (SCA)

² [2021] JOL 51531 (CC)



[13] The application for the removal of Messrs Klopper and Knoop was heard on the 31st May 2018 by Ranchod J. At the hearing, and prior to the matter being called, Messrs Klopper and Knoop resigned as business rescue practitioners for Shiva. The Court Order of Ranchod J recorded that Messrs Klopper and Knoop had resigned. The Court appointed Mr Murray as a senior business rescue practitioner and directed the Companies and Intellectual Property Commission ("The Commission") to, within 48 hours, appoint an additional practitioner, subject thereto that the appointment was acceptable to the IDC. Pursuant thereto on the 1st June 2018, the Commission appointed Mr Christopher Kgashane Monyela, the 3rd Respondent in this matter. In terms of regulation 127, Mr Monyela was appointed as a junior practitioner and could only act for a large company as an assistant to a senior practitioner.

[14] On the 18 September 2018 Mr Murray resigned but prior to doing so and in anticipation of his resignation Messrs Murray and Monyela resolved to appoint Mr Juanito Martin Damons who is the Second Respondent in this matter as a senior business rescue practitioner. The directors of Shiva did not approve the appointment of Mr Damons. On the 22 September 2018 the Board of Shiva passed the following resolution:

“WHEREAS Cloete Murray, the senior business rescue practitioner of the Company resigned as business rescue practitioner;

AND WHEREAS Mr Monyela is the remaining business rescue practitioner in the Company.

AND WHEREAS Mr Monyela being a junior business rescue practitioner has no authority to act as a business rescue practitioner in a Company, the Company wishes to appoint two further business rescue practitioners in the Company.

IT IS HEREBY RESOLVED THAT:

- 1. The Company shall, in terms of S139(3) appoint Mr Mahomed Mahier Tayob and Mr Eugene Januarie joint business rescue practitioner in the Company.*
- 2. Mr Goerge van der Merwe is hereby authorised by the Company to sign all documents and do all things necessary in order to give effect to the appointments of Mr Tayob and Mr Januarie”*

[15] Pursuant to the passing of the resolution, the directors of Shiva filed with the Commission a notice in terms of section 129(4)(a) for the appointment of the Applicants as business rescue practitioners which application was accepted by the Commission. Similarly, Messrs Murray and Monyela submitted a notice with the Commission for the appointment of Mr Damons as the business rescue practitioner which application was rejected.

[16] This caused Monyela, purportedly also acting for Shiva, to urgently approach the Companies Tribunal to overturn the decisions of the Commission. The Companies Tribunal, on the 27 November 2018, directed the Commissioner to accept the filing of the notification in respect

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of Mr Damons and in effect, to remove the notification in respect of the Applicants from its register. The Applicants, in turn, approached the court *a quo* on urgent basis for an order Interdicting the Commission from “implementing, enforcing and/or adhering to” the aforesaid order of the Companies Tribunal, pending the determination of an application where the following order was sought:

- “1. to review and set aside the decision of the Tribunal of the 27 November 2018.
2. a declaratory order in terms of section 21(1)(c) of the Superior Court’s Act, 10 of 2013 declaring the Applicants duly and lawfully appointed Business Rescue Practitioners of Shiva.”

[17] The matter was heard in the High Court Gauteng which dismissed the Application by Tayob and Januarie. The Applicants Appealed to the Supreme Court of Appeal. The latter court considered this matter from inception when the directors took the decision to place the company under business rescue through all the appointments of the Business Rescue Practitioners. The Court of Appeal declared that when Messrs Klopper and Knoop resigned Ranchod J could not order the appointment of Mr Murray and that the authority to do so vested with the directors of Shiva and that the appointment of the Applicants as the business rescue practitioners of Shiva was proper and valid.

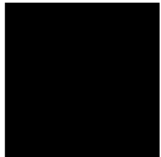
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[18] Mr Monyela was not happy with the outcome and filed an Application for Leave to Appeal in the Constitutional Court. The question before the Constitutional was *"Where there is a case of voluntary business rescue initiated in terms of section 129 of the Companies Act, a business rescue practitioner appointed by a court in terms of section 136(6)(a) in place of a company appointed practitioner resigns, who has the power to appoint the court-appointed practitioner's replacement? The answer depends on a proper interpretation of section 139(3) of the Act"*.

[19] The Constitutional Court concurred with the Supreme Court of Appeal's conclusion and held that upon Mr Murray's resignation the right to appoint his replacement vested in Shiva's board of directors and that Mr Tayob and January were validly appointed.

THE ISSUES

[20] The Joint Practice Note notes the primary dispute between the Applicants and the Second and Third Respondents as to who of them are the business rescue practitioners of the First Respondent. The appointment of Applicants as business rescue practitioners for the First Respondent was decisively decided by the Supreme Court of Appeal and the Constitutional Court. At the hearing of this matter all the Respondents represented conceded this fact and the appointment of the Applicants as business rescue practitioners is trite.



[21] The secondary dispute between the Applicants and the Seventh Respondent was settled by agreement in terms of the Draft Order that I made the Court Order when the matter was heard on the 18 February 2022.

[22] There are two issues that remain in dispute between the parties and they are:

22.1 the validity of the appointment of Kgashane Monyela as a business rescue practitioner in terms of the Court Order of Ranchod J dated 31 May 2018.

22.2 the appointment of Mr Damons, the Second Respondent as the business rescue practitioner by the directors of Shiva on the 2 September 2021

[23] The Orders of Supreme Court of Appeal and the Constitutional Court that the Applicants were properly appointed as business rescue practitioners for Shiva set aside the appointment of Mr Damons by Messrs Murray and Monyela.

[24] **The Appointment of Mr Monyela**

Mr Monyela was appointed in terms of the Court Order of Ranchod J dated the 31st May 2018 which stated the following:

“3.2. The Fourth Respondent is directed within 48 hours of this Order to appoint an additional business rescue practitioner, subject thereto that the appointment of such additional business rescue

practitioner is acceptable to the Industrial Development Corporation of South Africa Limited"

[25] Pursuant to this Court Order the Companies and Intellectual Property Commission appointed Mr Monyela on the 1st June 2018 as the business rescue practitioner for Shiva. Mr Monyela was appointed in terms of the Regulations³ to Companies Act and in particular in terms of Regulation 127(2)(c)(iii) as a junior practitioner⁴ as opposed to the appointment of Applicants who were appointed in terms of Regulation 127(2)(c)(i)⁵ as senior practitioner.

[26] The distinction is clear that the senior practitioner is in charge of the business rescue and that the junior practitioner is only an assistant.

[27] It was argued by Mr Louw SC, Counsel for the Applicants that the appointment of Mr Monyela in terms of the Order of Ranchod J should be set aside. It was pointed out to Mr Louw SC that the appointment of Mr Monyela was made by the Commissioner and not the Court. The

³ The Companies Regulations, 2011 were made in terms of s 223 of the Act and published under GN R351, GG34239, 26 April 2011.

⁴ In terms of reg 127(2)(c)(iii) 'junior practitioner' means a person who is qualified to be appointed as a business rescue practitioner in terms of s 138(1) and who, immediately before being appointed as a practitioner for a particular company, has either not previously engaged in business turnaround practice before the effective date of the Act, or acted as a business rescue practitioner in terms of the Act, or has actively engaged in business turnaround practice before the effective date of the Act, or as a business rescue practitioner in terms of the Act, for a combined period of less than 5 years.


⁵ In terms of reg 127(2)(c)(i) 'senior practitioner' means a person who is qualified to be appointed as a business rescue practitioner in terms of s 138(1) and who, immediately before being appointed as practitioner for a particular company, has actively engaged in business turnaround practice before the effective date of the Act, or as a business rescue practitioner in terms of the Act, for a combined period of at least ten years.

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appointment was, however, made as a result of the Court referral. He conceded that and argued that the referral ought to be set aside.

[28] The Supreme Court of Appeal did not address whether the appointment of Mr Monyela was proper as it was not requested to address this issue. The Constitutional Court did address the appointment of Mr Monyela and stated the following:

“[9] Following the resignation of Mr Knoop and Kloppe, the company’s board should have appointed the replacements. There should have been no substantive order in the section 130 application. But the order was made, it has not been set aside, and it was acted upon. Pursuant to the order, the CIPC appointed Mr Monyela as a junior practitioner to assist Mr Murray, and for several months Shiva’s business was under their control. There was no challenge to their appointment. The company’s board did not claim or exercise a right of appointment. In the circumstances, and in keeping with the way in which the subsequent litigation was conducted, the present application should be approached on the basis that Messrs Murray and Monyela were appointed by the Court in terms of section 130(6)(a)”⁶

⁶ Shiva Uranium (Pty) Ltd (In Business Rescue) and another
Tayob and others at Para [9]




[29] The directors of Shiva seem to have accepted the appointment of Mr Monyela. The resolution passed on the 22nd September 2018 which appointed the applicants mentioned Mr Monyela by name as a junior business rescue practitioner in the company and that the appointment of the applicants was in addition to the appointment of Mr Monyela.

[30] It was argued by Mr Louw SC that the order of Ranchod J should be a nullity as when the order was made the court had no authority to do so. He relied on the matter *Knoop NO v Gupta (Tayob as intervening Party)*⁷ where Wallis stated the following:

“[34] I am aware that some of the reasoning in Motala has been subjected to criticism by the Constitutional Court. However, it remains authority for the proposition that if a court “is able to conclude that what the court [that made the original decision] has ordered cannot be done under the enabling legislation, the order is a nullity and can be disregarded”. This principle can be invoked where the invalidity appears on the face of the order as in Motala and in this case. The suspension granted by the full court was therefore a nullity.”

[31] The Constitutional Court noted that there should not have been a substantive order in the section 130 but that it was made. The order has

⁷ [2020] JOL 49005 (SCA)



not been set aside and had been acted upon. There was no challenge to the appointment of Mr Monyela and that the application before that court should be approached as if Messrs Murray and Monyela were appointed by the court in terms of section 130(6)(a). I am bound by the decision of the Constitutional Court and cannot gainsay same.


[32] It was pointed out to Mr Louw SC that Mr Monyela was not appointed by the Court but by the Commissioner. The appointment of Mr Monyela does not appear *ex facie* the court order of Ranchod J. It appears that the principle in the Knoop N.O. v Gupta matter does not apply.

[33] The appointment of Mr Monyela as a junior business rescue practitioner for Shiva is valid until set aside by the court in terms of section 130 of the Act.

The Appointment of Mr Damons 2 September 2021

[34] It was argued, particularly, on behalf of the 4th and 5th Respondents that for the re-appointment of Mr Damons on 2nd September 2021 by themselves as the directors of Shiva is valid.

[35] The factual background to this appointment is that it apparently came to the attention of the 4th and 5th Respondent that the business rescue practitioner's licence of the 1st Applicant had expired. Pursuant thereto the directors of Shiva passed a resolution on the 2nd September 2021 noting



that the licence of Mr Tayob had expired and the directors resolved to appoint Mr Damons in terms of Section 129(3)(b) of the Act.

[36] At the hearing the 4th and 5th Respondents did not pursue that argument as it was obvious that it was an administrative error at the offices of the Commissioner. The argument was no longer persisted with and the argument that was proffered at the hearing was that the directors of Shiva are entitled to appoint several business rescue practitioners, more so that section 128(1)(d) made provision for the appointment of a person or two or more persons appointed jointly.

[37] They argued that while section 129(3) makes provision for an appointment within five days of filing of a resolution, that is not a bar to the subsequent appointment of another business rescue practitioner. Section 129 only contemplates the appointment of a business rescue practitioner at the commencement of the business rescue process. There is no merit in this argument. The reasons for the appointment of Mr Damons appears in the resolution of the 2nd September 2021 and that is to replace Mr Tayob as a result of the lapsing of his licence.

[38] The Act makes provision for removal and replacement of a practitioner in terms of the provisions of section 139 which provides as follows:

“139 (1) A practitioner may be removed only –

(a) by court order in terms of section 130; or

(b) as provided for in this section

(2) Upon request of an affected person, or on its own motion, the court may remove a practitioner from office on any of the following ground:

(a) Incompetence or failure to perform duties;

(b) failure to exercise the proper degree of care in the performance of the practitioner's functions;

(c) engaging in illegal acts or conduct;

(d) if the practitioner no longer satisfies the requirements set out in section 138(1)

(e) conflict of interest or lack of independence; or

(f) the practitioner is incapacitated and unable to perform the functions of that office, and is unlikely to regain the capacity within a reasonable time.

(3) The company, or the creditor who nominated the practitioner, as the case may be, must appoint a new practitioner if a practitioner dies, resigns or is removed from office, subject to the right of an affected person to bring a fresh application in terms of section 130(1)(b) to set aside that new appointment”.

- [39] The fourth and the fifth respondents were accordingly not entitled to appoint a new business rescue practitioner and the appointment of Mr Damons on the 2nd September 2021 be and is hereby set aside.

URGENCY

- [40] The respondent argued that there is no urgency in this matter. I do not share that sentiment as the first respondent was placed under business rescue in February 2018, and business rescue practitioners have not been put in a position to fulfil their mandate. It is imperative that they be permitted to do so urgently. I accordingly find that this matter is urgent.

[41] **COSTS**

41.1 The applicant sought an order for costs against the second and third respondents on punitive scale. The second respondent did not oppose the application and filed a notice to abide with the decision of the court. There should not be an order of cost against him.


41.2 The third respondent was entitled to oppose the application as the order sought was that he was not properly appointed as a business rescue practitioner which order is not granted. He was also not successful in some of his opposition to this application.


41.3 The only respondents that unsuccessfully oppose this application are the fourth and the fifth.

ORDER

Therefore I made the following order:

1. The applicant's non-compliance with the Uniform Rules of Court relating to service of process and time frames be condoned and that the application be heard as one of urgency in accordance with Rule 6(12)(b);
2. It is declared that:
 - 2.1 the first applicant and the second applicant are the appointed business rescue practitioners of the first respondent;
 - 2.2 the third respondent has been duly appointed as the first applicant's and the second applicant's assistant and as junior business rescue practitioner of the first respondent;
 - 2.3 the second respondent has not been duly appointed as business rescue practitioners for the first respondent;

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3. The second respondent be and is hereby interdicted from purporting to act or to act on behalf of the first respondent as business rescue practitioners;
 4. The first respondent be ordered to reflect the first and the second applicants and third respondent as the business rescue practitioners of the first respondent.
 5. The second respondent and the third respondent each is ordered to;
 - 5.1 hand to the applicants all correspondence, communications, memoranda, determinations and all other documents in whatsoever format produced by them or received by them or sent to third parties, including affected persons of the first respondent during the period that each gave out to be a business rescue practitioner of the first respondent;
 - 5.2 provide a written reconciliation detailing all financial transactions that they entered into on behalf of the first respondent during the period 18 September 2018 to date together with all source documents;
 - 5.3 provide a comprehensive and detailed report as contemplated in section 132(3)(a) of the Companies Act 71 of 2008 for the period 18



September 2018 to date detailing all actions that they undertook with respect to the first respondent;


6. The fourth and fifth respondents are ordered to:

6.1 hand to the applicants all books and records pertaining to the first respondent whether in hard copy format or in electronic format;

6.2 in the event that any book or record is no longer in their possession, to state the whereabouts of such document by identifying such document, the date and time on which it was transferred to another person and the identity of such person;

6.3 deliver a statement of affairs of the first respondent as contemplated in section 142(3) of the Companies Act of 2008 containing particulars of the items listed in subsections (a) to (f);

7. The said second to sixth respondents provide the information, documents, reports and declarations set out above to the applicants at the address of their attorney of record set out below and to the registrar of this Honourable Court within ten days of the date of any order made herein and to confirm on oath that they have complied with the said obligations;

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8. The applicants are authorized to within ten days of the aforesaid date deliver a supplementary founding affidavit dealing with the documents, information and reports aforesaid and authorizing them to seek further or alternative relief;
9. The fourth and fifth respondents are ordered to pay the costs of this application on the party and party scale, including the costs of two counsel.



MSIMANG J
ACTING JUDGE OF THE GAUTENG DIVISION/ PRETORIA

Heard on:

For the Appellants:

Instructed by:

For the Respondent:

Instructed by:

Date of Judgment: