THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 336/2019

In the matter between:

MAHOMED MAHIER TAYOB	**FIRST APPLICANT**
EUGENE JANUARIE	**SECOND APPLICANT**

and

SHIVA URANIUM (PTY) LIMITED (IN BUSINESS RESCUE)	**FIRST RESPONDENT**
CHRISTOPHER KGASHANE MONYELA	**SECOND RESPONDENT**
JUANITO MARTIN DAMONS	**THIRD RESPONDENT**

Neutral citation: *Tayob and Another v Shiva Uranium (Pty) Ltd and Others* (Case no 336/2019) [2020] ZASCA 162 (8 December 2020)

Coram: CACHALIA, SALDULKER, VAN DER MERWE and SCHIPPERS JJA and POYO-DLWATI AJA

Heard: 18 November 2020

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. It has been published on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 14h00 on 8 December 2020.

Summary: Company law – business rescue supervision under Companies Act 71 of 2008 – business rescue practitioner appointed by board of company in terms of s 129(3)*(b)* – resignation of practitioner – board's power to appoint substitute under s 139(3) not subject to authority or approval of practitioner.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mosopa AJ sitting as court of first instance):

1 The applications for condonation are granted and the applicants are directed to pay the costs thereof on an unopposed basis.

2 The application for leave to appeal is granted and the costs thereof are costs in the appeal.

3 The appeal is upheld.

4 The order of the court a quo is set aside and replaced with the following:

'(a) It is declared that the applicants were validly appointed as business rescue practitioners of the first respondent.

(b) The second and third respondents are jointly and severally directed to pay the costs of the application.'

5 The second and third respondents are jointly and severally directed to pay the costs of the appeal.

JUDGMENT

Van der Merwe JA (Cachalia, Saldulker and Schippers JJA and Poyo-Dlwati AJA concurring)

[1] The principal issue in this matter is whether the board of directors of the first respondent, Shiva Uranium (Pty) Ltd (in business rescue) (Shiva), validly appointed the first applicant, Mr Mahomed Mahier Tayob, and the second applicant, Mr Eugene Januarie, as business rescue practitioners (practitioners). The Gauteng High Court, Pretoria (the high court) held that it had not and refused leave to appeal to this court. The applicants' application for condonation for their delay and for leave to appeal was referred for oral argument in terms of s 17(2)*(d)* of the Superior Courts Act 10 of 2013.

The parties were also directed to be prepared to address this court on the merits of the appeal. They were called upon to do so at the hearing before us.

[2] The material facts of the matter are the following. On 20 February 2018, the board of directors of Shiva (the board) resolved in terms of s 129(1) of the Companies Act 71 of 2008 (the Act) to place Shiva under business rescue supervision. Shiva is a 'large company' as defined in reg 127 of the Companies Regulations, 2011[1] as amended (the regulations). In terms of reg 127, only a 'senior practitioner'[2] may be appointed as the practitioner for a large company. The board simultaneously appointed Mr Louis Klopper and Mr Kurt Knoop as the practitioners for Shiva. Both qualified as senior practitioners.

[3] On 23 March 2018, however, the Industrial Development Corporation of South Africa Limited (IDC), a creditor of Shiva, launched an application in the high court for the removal of Messrs Klopper and Knoop and for the appointment of Mr Cloete Murray in their stead. The application came before Ranchod J, who made an order on 31 May 2018. The order recorded that Messrs Klopper and Knoop had resigned as the practitioners of Shiva on the same date. The court appointed Mr Murray as the substitute senior practitioner. It also 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 hereto, the Commission appointed the second respondent, Mr Christopher Kgashane Monyela, on 1 June 2018. In terms of reg 127, Mr Monyela was a 'junior practitioner'[3] and could only act for a large company as an assistant to a senior practitioner.

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[1] The Companies Regulations, 2011 were made in terms of s 223 of the Act and published under GN R351, *GG* 34239, 26 April 2011.

[2] 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.

[3] In terms of reg 127(2)*(c)*(ii) '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 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

[4] On 18 September 2018, Messrs Murray and Monyela resolved, apparently in anticipation of the resignation of Mr Murray, to appoint the third respondent, Mr Juanito Martin Damons, as his substitute. Mr Murray resigned the following day. In terms of a resolution passed on 22 September 2018, however, the board appointed the applicants as practitioners for Shiva together with Mr Monyela.[4]

[5] In terms of s 129(4)*(a)* of the Act, notice of the appointment of a practitioner by a company has to be given by filing a prescribed form with the Commission.[5] As a result of the foregoing, a prescribed form in terms of which Messrs Murray and Monyela gave notice of the appointment of Mr Damons, was presented to the Commission for filing. A director of Shiva, in turn, submitted the prescribed notification of the appointment of the applicants. The Commission, in essence, accepted the notification of the appointment of the applicants and refused to accept the notification in respect of Mr Damons.

[6] This caused Mr Monyela, purportedly also acting for Shiva, to urgently approach the Companies Tribunal[6] to overturn the decisions of the Commission. On 27 November 2018 it directed the Commission to accept the filing of the notification in respect 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 an 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, to be instituted within ten days of the order, for the following relief:

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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.

[4] The record contains the signed board resolution, as well as the confirmatory affidavits of the directors of Shiva. In the papers in the court a quo and (faintly) in argument before us, it was nevertheless questioned whether the resolution had been taken. In terms of the well-known applicable rules this clearly did not raise a genuine dispute of fact.

[5] In terms of reg 123(3), which provides: 'A Notice of Appointment of a Business Rescue Practitioner by the company, as contemplated in section 129(3), must be in Form CoR 123.2, and filed in accordance with section 129(4)*(a)*.'

[6] Established in terms of s 193 of the Act.

'2.1 The Companies Tribunal of the Republic of South Africa's decision dated 27 November 2018 is reviewed and set aside; and

2.2 A declaratory order in terms of Section 21(1)(c) of the Superior Courts' Act, 10 of 2013 declaring the applicants and the second respondent the duly and lawfully appointed business rescue practitioners of the first respondent.'

[7] The applicants cited several respondents in the application, including Shiva, Mr Monyela, Mr Damons, the Commission and the Companies Tribunal. Mr Monyela and Mr Damons opposed the application and purported to do so also on behalf of Shiva. For reasons that shall become apparent, I hereafter refer to Mr Monyela and Mr Damons collectively as the respondents. As I have indicated, the court a quo (Mosopa AJ) dismissed the application with costs.

[8] It was rightly common cause that the court a quo erred in refusing leave to appeal on the ground that its order was not appealable. It is trite that an order refusing (as opposed to granting) an interim interdict is generally appealable. The respondents accepted that the delay in launching the application for leave to appeal had been satisfactorily explained. It follows that the merits of the proposed appeal would be determinative of the application for leave to appeal.

[9] It is unnecessary to consider the order of the Companies Tribunal. This is so for two reasons. The first is that the issues before the Companies Tribunal related only to whether proper notification had been given in terms of the regulations. In its judgment, the Companies Tribunal made it clear that it could not and did not determine the substantive validity of the respective appointments. Secondly, the order was rendered moot by subsequent developments. During argument before us, the respondents sensibly proposed that this court issue a declaratory order, in accordance with its conclusion on the validity of the appointment of the applicants, rather than issue an interim interdict pending an application to be instituted. The applicants accepted the proposal with appreciation. We are satisfied that it is in the interest of justice to give effect to this agreement.

[10] In the result, the merits turn on the source of the power to appoint a substitute in the event of the death, resignation or removal from office of a practitioner. The respondents correctly accepted that the Act does not confer any power on a practitioner to appoint another practitioner. It follows that Messrs Murray and Monyela had no authority to appoint Mr Damons and that his purported appointment was invalid *ab initio.*

[11] In the answering affidavit the respondents contended in the court a quo that in appointing a substitute, the board had to act with the approval of the practitioner of Shiva and that such approval had not been obtained. In the main, the contention was based on the provisions of s 137(2) of the Act. The court a quo based the dismissal of the application on the acceptance of this contention.

[12] Before us the respondents raised a new argument. They submitted that only the IDC had the power to appoint a substitute for Mr Murray, to the exclusion of the board. The argument was based thereon that the IDC had recommended the appointment of Mr Murray. As I have said, however, the central question is whether the applicants are correct that only the board had the power to appoint them as practitioners for Shiva.

[13] There are two pathways to business rescue supervision under the Act. A company may voluntarily begin business rescue proceedings by adopting a resolution in terms of s 129(1). In the absence of such a resolution, an affected person may apply to a court for an order placing the company under supervision and commencing business rescue proceedings. The Act defines 'affected person' and it includes a creditor.[7]

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[7] Section 128(1)*(a)*:
'(1) In this Chapter—
(*a*) **"affected person",** in relation to a company, means—
(i) a shareholder or creditor of the company;
(ii) any registered trade union representing employees of the company; and
(iii) if any of the employees of the company are not represented by a registered trade union, each of those employees or their respective representatives.'

[14] Section 129(3)*(b)* of the Act provides that within five days of the adoption and filing (with the Commission) of a resolution under s 129(1), the company must appoint a business rescue practitioner who satisfies the requirements of s 138 and who has consented in writing to accept the appointment. If the board fails to comply with this provision, its resolution to begin business rescue proceedings lapses and is a nullity.[8] There is no doubt that such an appointment must be made by the board of a company.

[15] On the other hand, when the court makes an order placing a company under business rescue in terms of s 131(4)*(a)*, s 131(5) applies. It provides:

'If the court makes an order in terms of subsection (4) (*a*), the court may make a further order appointing as interim practitioner a person who satisfies the requirements of section 138, and who has been nominated by the affected person who applied in terms of subsection (1), subject to ratification by the holders of a majority of the independent creditors' voting interests at the first meeting of creditors, as contemplated in section 147.'

[16] Section 130 of the Act deals with objections to a resolution under s 129. In terms of s 130(1)*(b)*, an affected person may apply to a court for an order setting aside the appointment of a practitioner on the grounds that he or she: does not satisfy the requirements of s 138; is not independent of the company or its management; or lacks the necessary skills, having regard to the company circumstances. Section 130(6)*(a)* provides:

'If, after considering an application in terms of subsection (1) (*b*), the court makes an order setting aside the appointment of a practitioner—

(a) the court must appoint an alternate practitioner who satisfies the requirements of section 138, recommended by, or acceptable to, the holders of a majority of the independent creditors' voting interests who were represented in the hearing before the court.'

[17] In terms of s 139(1) of the Act, a practitioner may only be removed from office by a court order in terms of s 130 or as provided for in s 139. Section 139(2) provides that upon the request of an affected person, or on its own motion, the court may remove

[8] Section 129(5)*(a)*.

a practitioner from office on any of the grounds tabulated in subsecs 139(2)*(a)*-*(f)*. Section 139(3) reads:

'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.'

[18] In my opinion s 139(3) does not apply when the court sets aside the appointment of a practitioner under s 130(1)*(b)*. The language of s 130 and s 139(3) in the context of s 139(1) makes it quite clear that s 130 provides for separate procedures which, in a case of the setting aside of the appointment of a practitioner, oblige the court to appoint an alternate practitioner in terms of s 130(6)*(a)*. This is underscored by the punctuation in s 139(3), as well as the phrase 'the creditor who nominated the practitioner'. No nomination takes place in terms of s 130(6). Such a nomination is made under s 131(5). Professors Piet Delport and Quintus Vorster correctly point out that the word 'creditor' in s 139(3) should be read as 'affected person'.[9]

[19] In context the two options indicated by the phrase 'as the case may be', relate to the appointments under ss 129 and 131 respectively. In the result I hold that if a practitioner dies, resigns or is removed from office under s 139(2), a substitute must be appointed by the board of a company or by the affected person that made the nomination in terms of s 131(5), whichever is applicable. It is a fresh appointment by a company in terms of s 139(3) that is (again) subject to objection under s 130(1)*(b)*. Therefore, quite apart from the factual obstacles in its way,[10] the respondents' new argument in this court is untenable.

[20] The final question is whether the board had to act 'subject to the authority of the practitioner' in appointing a substitute. In my view the question must be answered in the negative. Unless indicated otherwise, 'company' must bear its ordinary meaning

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[9] P Delport and Q Vorster *Henochsberg on the Companies Act 71 of 2008* (2018) Vol 1 at 491.

[10] As I have indicated, the order of Ranchod J did not in terms remove Mr Klopper and Mr Knoop from office and there was no evidence that the IDC complied with the requirements of s 130(6)*(a)* in respect of voting interests.

and the same meaning as in s 129, that is, the company represented by its board. There are no indications to the contrary. In fact, as I shall show, the context strongly supports the conclusion that s 139(3) provides a board with the unfettered power to appoint a substitute practitioner.

[21] It must be emphasised that s 139(3) also makes the appointment of a new practitioner obligatory in the envisaged circumstances. In many cases only one practitioner is appointed for a company. If two or more are appointed, they have to act jointly, in the same manner as joint trustees and liquidators. It follows that if a practitioner dies, resigns or is removed from office, there would either be no practitioner in office to authorise a board to act under s 139(3) or the remaining practitioner(s) would have no authority to act. The remaining practitioner may be a junior practitioner in respect of a large company. Thus, the interpretation of the court a quo that a board is to act in terms of s 139(3) with the approval of the practitioner of the company, would render the provision quite unworkable.

[22] Section 66(1) of the Act provides:

'The business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise.'

This wide provision clearly includes the power or function to appoint a substitute practitioner. It was not suggested that Shiva's Memorandum of Incorporation was in any way relevant.

[23] During (temporary) business rescue supervision, therefore, a board retains all its powers and functions except to the extent that the Act expressly or by necessary implication provides otherwise. This may be contrasted with the position pertaining to voluntary and involuntary winding-up of an insolvent company. There the powers and duties of the directors are terminated.[11] The main object of the business rescue

[11] *Henochsberg* Vol 2 APPI-94(10) and 99.

process, after all, is to render the company a successful concern under the management or direction of its board. The power of the board under s 139(3) is not expressly qualified. Thus, the narrow question is whether any provision of the Act by necessary implication requires the approval of the practitioner for the appointment of a substitute practitioner.

[24] Section 140(1)*(a)* of the Act provides:

'During a company's business rescue proceedings, the practitioner, in addition to any other powers and duties set out in this Chapter—

(a) has full management control of the company in substitution for its board and pre-existing management.'

The word 'management' is not defined in the Act. Consequently, it must be ascribed its ordinary meaning, that is, to be in charge of or to run a company, particularly on a day-to-day basis. To appoint a substitute practitioner (who will then be in full management control of the company) is rather a function of governance and approval thereof is not in my view a management function.

[25] As I have said, the court a quo based its decision to dismiss the applicants' application essentially on the provisions of s 137(2)*(a)* of the Act. It provides that during a company's business rescue proceedings, each director of the company must continue to exercise the functions of a director, 'subject to the authority of the practitioner'.[12] Subsection 137(2)*(a)* must, of course, be read with the provisions of Chapter 6 of the Act and those of s 140 in particular. They circumscribe the ambit of the authority of the practitioner. Any function of a director that falls outside of that ambit, cannot be subject to the approval of the practitioner. It follows that s 137(2)*(a)* only affects the exercise of the functions of a director in respect of matters falling within the ambit of the authority of the practitioner. As I have shown, the appointment of a practitioner does not fall within the powers or authority of a practitioner.

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[12] It is noteworthy that s 137(2)*(a)* refers to the exercise of the functions of a director not the powers and functions of the board of directors.

[26] For these reasons I hold that the finding of the court a quo that the absence of the approval of the practitioner rendered the appointment of the applicants void, was wrong.[13] It follows that the application for leave to appeal must be granted and the appeal upheld. The applicants are entitled to their costs in the court a quo and in this court. As Mr Monyela and Mr Damons had no authority to act for Shiva in either court, costs should not be ordered against it. The respondents did not oppose the applicants' applications for condonation.[14] The applicants must bear the costs of these applications on an unopposed basis.

[27] The following order is issued:

1 The applications for condonation are granted and the applicants are directed to pay the costs thereof on an unopposed basis.

2 The application for leave to appeal is granted and the costs thereof are costs in the appeal.

3 The appeal is upheld.

4 The order of the court a quo is set aside and replaced with the following:

'(a) It is declared that the applicants were validly appointed as business rescue practitioners of the first respondent.

(b) The second and third respondents are jointly and severally directed to pay the costs of the application.'

5 The second and third respondents are jointly and severally directed to pay the costs of the appeal.

C H G VAN DER MERWE

JUDGE OF APPEAL

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[13] The dictum in *Van Jaarsveld NO v Q-Civils (Pty) Ltd* [2017] ZAFSHC 53 para 20 therefore also went too far.

[14] Apart from the application for condonation of the late filing of the application for leave to appeal the applicants also applied for condonation for the late filing of their replying affidavit and heads of argument.

Appearances:

For applicants:	P F Louw SC (Heads prepared by S J van Rensburg SC)
Instructed by:	Aphane Attorneys, Pretoria
	Honey Attorneys, Bloemfontein
For respondents:	M v R Potgieter SC
Instructed by:	Smit Sewgoolam Inc., Saxonwold
	McIntyre Van der Post, Bloemfontein