THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 894/2022

In the matter between:

ISLANDSITE INVESTMENTS 180 (PTY) LTD	**APPELLANT**
and	
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	**FIRST RESPONDENT**
IQBAL MEER SHARMA	**SECOND RESPONDENT**
NULANE INVESTMENTS 204 (PTY) LTD	**THIRD RESPONDENT**
KURT ROBERT KNOOP NO	**FOURTH RESPONDENT**
JOHAN LOUIS KLOPPER NO	**FIFTH RESPONDENT**
ISSAR GLOBAL LTD	**SIXTH RESPONDENT**
ISSAR CAPITAL LTD	**SEVENTH RESPONDENT**
TARINA PATEL-SHARMA	**EIGHTH RESPONDENT**

Neutral citation: *Islandsite Investments 180 (Pty) Ltd v National Director of Public Prosecutions and Others* (Case no 894/2022) [2023] ZASCA 166 (1 December 2023)

Coram: GORVEN, MOTHLE and MEYER JJA and KATHREE-SETILOANE and UNTERHALTER AJJA

Heard: 3 November 2023

Delivered: 1 December 2023

Summary: Company Law — restraint order under the Prevention of Organised Crime Act 121 of 1998 – authority to represent company in business rescue – directors have no such authority – authority residing with business rescue practitioners.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (Musi JP, sitting as court of first instance):

1 The appeal is dismissed.

2 The directors of Islandsite Investments 180 (Pty) Ltd, Ms Ragavan and Mr Chawla, are directed to pay the costs of the appeal jointly and severally, the one paying, the other to be absolved.

JUDGMENT

Gorven JA (Mothle and Meyer JJA and Kathree-Setiloane and Unterhalter AJJA concurring)

[1] At all material times, the appellant, Islandsite Investments 180 (Pty) Ltd (the company) has been in business rescue in terms of Chapter 6 of the Companies Act 71 of 2008 (the Act). The fourth and fifth respondents on appeal were appointed business rescue practitioners (the BRPs). The first respondent, the National Director of Public Prosecutions (the NDPP), launched an application in the Free State Division of the High Court of South Africa, Bloemfontein, (the high court) in terms of s 26(3) of the Prevention of Organised Crime Act 121 of 1998 (the POCA litigation). It was brought on an *ex parte* basis, without prior notice to the company, the BRPs or the other respondents. The high court granted a provisional restraint order in respect of property of the company and also of the second, third, sixth,

seventh and eighth respondents. When reference is made to the POCA litigation in this judgment, it is to the provisional restraint order proceedings only. It goes no further.

[2] The order prompted the directors of the company (the directors) to appoint a firm of attorneys, BDK Attorneys, purporting to do so on behalf of the company. Those attorneys delivered a notice of intention to oppose and an answering affidavit, deposed to by one of the directors. This sought to oppose the confirmation of the provisional restraint order on behalf of the company. Attorneys appointed by the BRPs also delivered an affidavit. In it, the BRPs indicated that there was a dispute between the directors and the BRPs as to which of them was authorised to represent the company in the POCA litigation.

[3] In response, the NDPP launched an application in terms of Uniform rule 7(1).[1] This allows a party to dispute the authority of attorneys who purport to represent another party. The directors opposed that application, again purporting to represent the company. The application proceeded on the issue of whether the directors, on the one hand, or the BRPs, on the other, had the requisite authority to appoint attorneys to represent the company. The matter was dealt with without reference to the merits of the POCA litigation. The confirmation or otherwise of the provisional restraint order was held over pending the determination of the issue of representation.

[1] Rule 7(1) provides: 'Subject to the provisions of subrules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfied the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application.'

[4] On 11 August 2021, Musi JP granted the following order:

'1 BDK Attorneys do not have authority to act on behalf of the [company] in these proceedings.

2 The directors and or shareholders of the [company] have no standing to oppose these proceedings without the approval of the business rescue practitioners.'

The appeal against that order is before us with the leave of this court.

[5] The parties agreed that either the directors, or the BRPs, have the requisite authority to represent the company in the POCA litigation and not both of them.

[6] It is as well briefly to sketch the course of the POCA litigation. The court was approached on an *ex parte* basis and a provisional restraint order was granted by way of a rule *nisi* with interim relief. Parties were called upon to show cause why the provisional restraint order should not be made final. That is the stage reached by the present POCA litigation. Should a final order be made, that would restrain the property, pending a criminal trial and any subsequent order confiscating the restrained property. Thus, the restraint order, even if dubbed final, is temporary and designed only to ensure that the property is not dissipated should a conviction ensue and, in addition, an order is thereafter granted confiscating the property in question. If neither eventuates, the restraint order will be discharged.

[7] The point of departure in this matter is s 66(1) of the Act, which reads:

'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 is a general provision. In general terms, then, and unless other parts of the Act provide otherwise, the directors have authority to represent the company. In the

present matter, the question is whether the provisions of chapter 6 of the Act concerning business rescue do so.

[8] The contention of the directors was that they alone have authority to represent the company in the POCA litigation. While they accepted that the BRPs were authorised to perform certain functions under the business rescue provisions of the Act, this did not extend to the POCA litigation.

[9] Their point of departure was the definition of 'business rescue' in s 128 of the Act:

'"business rescue" means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for-

(i) the temporary supervision of the company, and of the management of its affairs, business and property;

(ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and

(iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.'

They submitted that the POCA litigation did not 'facilitate the rehabilitation' of the company. It was thus not 'business rescue related litigation'. The function of representing the company cannot be said to be part of the temporary supervision of the company, or of the management of its affairs, business, and property. The authority of the BRPs is limited to day to day management of the company and the compilation of a business rescue plan. Beyond those narrow functions, they have no authority. Accordingly, the BRPs have no authority to act on behalf of the company

in the POCA litigation. The default position set out in s 66(1) prevails and the authority of the directors to represent the company remains intact.

[10] The directors set some store by *Ragavan and Others v Optimum Coal Terminal (Pty) Ltd and Others*.[2] In that matter, Tegeta Exploration and Resources (Pty) Ltd (Tegeta) was in business rescue. It was a creditor of Optimum Coal Terminal (Pty) Ltd (OCT) which was also in business rescue. The business rescue practitioners of OCT published a business rescue plan. The directors of Tegeta contended that they had a right to vote on the plan. This court rejected that argument, finding that it was the business rescue practitioners who enjoyed that right. In arriving at this conclusion, this court held that the 'temporary supervision of the company'[3] and 'full management control'[4] included the right to vote on the plan.

[11] Despite that outcome, the directors relied on a *dictum* in *Ragavan*. This was:

'. . . whether or not the board retains any power on strategic matters of the company during business rescue is a matter we do not need to determine because, as I have explained, the practitioner enjoys the power to vote as a creditor on the debtor's plan.'[5]

They submitted that this meant that they retained power on 'strategic matters of the company during business rescue'. But that does not properly understand the *dictum*. It simply recognised a category of decision making power but found it unnecessary to decide who enjoyed this power.

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[2] *Ragavan and Others v Optimum Coal Terminal (Pty) Ltd and Others* (*Ragavan*) [2023] ZASCA 34; 2023 (4) SA 78 (SCA).
[3] Provided for as part of the definition of 'business rescue' in s 128(1)*(b)*.
[4] Granted to the BRPs by s 140(1)*(a)* of the Act.
[5] *Ragavan* para 26.

[12] They also relied on two *dicta* of this court in *Tayob and Another v Shiva Uranium (Pty) Ltd and Others*.[6]

'Unless indicated otherwise, "company" must bear its ordinary meaning and the same meaning as in s 129, that is, the company represented by its board.'[7]

and:

'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". 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.'[8]

The directors sought support from these *dicta* for their contention that they retained the authority to represent the company in the POCA litigation. But these *dicta* simply give effect to the default position set out in s 66(1), and dealt with above. A similar submission had been advanced in *Ragavan* in support of the contention of those directors that they had the right to vote on the business rescue plan of OCT. Referring to *Tayob*, this court gave that argument short shrift:

'In that matter, the court had to address a narrow issue of who of the board or an affected person represented "the company" in appointing a new practitioner in terms of s 139(3) of the Act, in situations where a practitioner dies, resigns, or is removed from office. The court held that the appointment of a practitioner did not fall within the "full management powers" or authority of a practitioner. In that case, the power of the board was found in s 139(3) and was not expressly

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[6] *Tayob and Another v Shiva Uranium (Pty) Ltd and Others* (*Tayob*) [2020] ZASCA 162.
[7] *Tayob* para 20.
[8] *Tayob* para 25. Reference omitted.

qualified. In other words, that function fell outside the ambit of the authority of a practitioner and could not be subject to the approval of a practitioner as contemplated in s 137(2)*(a)* of the Act.'[9]

[13] In *Tayob*, the company in question had been placed in voluntary business rescue. As such, the directors were empowered and obliged, in terms of s 129(3), to appoint BRPs. Although they had done so, the BRPs had resigned and a court order had replaced one of them, and directed that the Companies and Intellectual Property Commission (the Commission) appoint another. After this, one of the two replacement BRPs intended to resign. Prior to resigning, that BRP and the remaining one had resolved to appoint another to replace the resigning BRP. On a construction of s 129(3), this court held that the power to appoint BRPs rested with the directors and not with the BRPs. It was found that s 129(3) specifically granted them that power.

[14] The issue remains whether, in the circumstances of this matter, the Act 'provides otherwise'. This requires construing the provisions of the Act concerning the respective authority of the BRPs and directors during business rescue. The approach to that exercise is well established:

'Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is "essentially one unitary exercise".'[10]

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[9] *Ragavan* para 27.
[10] *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; 2014 (2) SA 494 (SCA); [2014] 1 All SA 517 (SCA) para 12. References omitted.

[15] The context under POCA has already been set out. Specific provisions of chapter 6 of the Act concerning business rescue bear on the respective roles of directors and BRPs in the business rescue process. The definition of business rescue in s 128 of the Act connotes proceedings to facilitate the rehabilitation of a company. The goal of those proceedings is rehabilitation. In order to achieve that goal, those proceedings provide for the temporary supervision of the company by persons other than the directors. The only qualification to the word 'supervision' is that it is temporary. It is temporary because the rehabilitation or otherwise of the company is time-bound. It is not the supervision which must be demonstrated, at every point, to advance the rehabilitation of the company. That would be a recipe for contestation for every decision and would result in the paralysis of the process of business rescue. It is supervision in every respect. In addition, the management of the company's affairs, business and property are part of the process. It is implicit in the definition that the BRPs are the persons engaged in the supervision of the company.

[16] Section 137(2) provides, in its material parts:

'During a company's business rescue proceedings, each director of the company-

(a) must continue to exercise the functions of director, subject to the authority of the practitioner;

(b) has a duty to the company to exercise any management function within the company in accordance with the express instructions or direction of the practitioner, to the extent that it is reasonable to do so'.

The first of these relates to the general functions of directors. They are obliged to continue to exercise these functions but can do so only 'subject to the authority' of the BRPs. This is clearly one of the provisions of the Act which qualifies the position of directors set out in s 66(1). Again, this does not delineate those functions of directors which are subject to the authority of the BRPs. The second relates to management functions. All of these must be exercised on 'the express instructions

or direction' of the BRPs. This also qualifies the provisions of s 66(1). In addition, in terms of s 142, the directors are obliged to surrender all books of the company and to provide information on material transactions, litigation and the assets and liabilities of the company to the BRPs.

[17] In contrast to the position of directors, the BRPs are clothed with a number of powers in the Act. In the first place, a BRP is defined as one appointed to 'oversee a company' during business rescue proceedings.[11] Once again, the word 'oversee' is not qualified. There is no mention as to what aspects of the company the BRPs are to oversee. Are they to oversee the company in every respect? That they have the power to do so is implicit in the definition. Another set of implicit powers are those in s 137(2), of assuming authority over the exercise by the directors of their general functions, and giving express instructions and direction to any management functions exercised by them.

[18] Along with these implicit powers, the Act grants explicit powers in s140, the material parts of which are:

'(1) 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;

(b) may delegate any power or function of the practitioner to a person who was part of the board or pre-existing management of the company;

. . .

(3) During a company's business rescue proceedings, the practitioner-

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[11] A business rescue practitioner is defined as 'a person appointed, or two or more persons appointed jointly, in terms of this Chapter to oversee a company during business rescue proceedings and "practitioner" has a corresponding meaning'.

(a) is an officer of the court, and must report to the court in accordance with any applicable rules of, or orders made by, the court;

(b) has the responsibilities, duties and liabilities of a director of the company, as set out in sections 75 to 77.'

The BRPs are thus accorded 'full management control of the company' in place of the board and management but may delegate any of their powers and functions to the directors or erstwhile management.

[19] Of further significance is that BRPs have the 'responsibilities, duties and liabilities of a director . . . as set out in sections 75 to 77'. Those sections deal with directors' personal financial interests, the standards of conduct of directors and the liability of directors, inter alia, for breaches of fiduciary duties. The BRPs are, in addition, officers of the court and obliged to report to the court in certain circumstances. They are obliged to report 'reckless trading, fraud or other contravention of any law relating to the company' to the appropriate authorities and to take remedial action.[12]

[20] In answer to the contention of the directors that the authority of the BRPs must be construed very narrowly, the NDPP referred to the reasoning in *Ragavan*. There, this court held that a wide meaning should be given to 'full management control' in the Act.[13] It went on to hold:

'The facilitation of the rehabilitation of a company expressly includes management of property. Everything that has to do with the company's debtors clearly falls within the category of management.' [14]

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[12] Section 141(2)*(c)*(ii).
[13] *Ragavan* para 16.
[14] *Ragavan* para 18.

This court held that, since s 133(1)*(a)* prohibits enforcement action against the company in relation to any property belonging to it, this 'reflects the practitioner's control in relation to the claims by third parties to the property of the company'.[15] The BRPs will have to consider the effect of the restrained property to determine whether the company is a candidate for rescue and how the restrained assets are to be dealt with in a business rescue plan. The POCA litigation implicates the property of the company directly. In addition, and as was held by the high court, a decision to enter into litigation on behalf of the company, whether as initiator or defender, has potential costs implications which bear on the property of a company.

[21] In *Tayob*, this court, for the purpose of that matter, distinguished between management and governance functions as follows:

'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.'

The directors submitted that defending the POCA litigation related to 'strategic matters of the company' and 'governance' rather than to the 'full management control'. But Part F of the Act, dealing with governance deals with compliance with the Memorandum of Incorporation and provisions of the Act relating to shareholder rights and resolutions, the calling and conduct of meetings, directors' powers and duties, eligibility, election and removal, the board and committees and their meetings. Those are governance matters dealt with in the Act. The NDPP contended that the decision to defend litigation is, in any event, a management power rather than one of governance. This appears to me to be correct but I find the distinction sought to be drawn between powers of management and governance of companies unhelpful in the present enquiry. As has already been pointed out, the enquiry is

[15] *Ragavan* para 19.

whether the provisions in the Act relating to business rescue provide an exception to the general provisions of s 66(1) regarding the powers of directors.

[22] An argument before us which was not foreshadowed in the heads, was that the POCA litigation may well have implications for the conduct of the impending criminal trial. The directors contended that, for that reason, only they could adequately protect the interests of the company. An example given was that, if they were allowed to represent the company in the POCA litigation, the BRPs might prejudice the right to silence of the company in the criminal matter. As indicated, the POCA litigation directly implicates the property of the company, which falls within the ambit of the authority of the BRPs. What must be borne in mind is that both the directors and the BRPs are enjoined to act in the best interests of the company. The first resort would be to explore whether the directors and the BRPs are able to agree on the conduct of the POCA litigation. If agreement cannot be reached, and if it can be shown that the BRPs had acted or were about to act in a manner which could be shown to prejudice the company, there are remedies available to interested parties such as directors.

[23] In the light of the provisions of the Act, there is no warrant for finding that the directors have the requisite authority to appoint attorneys to litigate on behalf of the company. The clear interpretation of the Act affords the BRPs that authority in the POCA litigation. This is, in particular, because property of the company is implicated in the POCA litigation. It follows that the order of the high court cannot be faulted. As a result, the appeal must be dismissed.

[24] The BRPs contended that they could authorise the directors to deliver an affidavit and present argument in the POCA litigation. That contention proceeds

from the premise that they have authority. It does not inform the issue in the rule 7 application which is limited to the question whether or not they have such authority. The contention goes to the question of the manner in which the BRPs exercise that authority. That enquiry does not fall within the ambit of the rule 7 application. It must be reserved for another day.

[25] The NDPP submitted that the directors, Ms Ragavan and Mr Chawla, should be directed to pay the costs of the appeal personally. It has been found that they had no authority to represent the company, which is nominally the appellant, and instruct the attorneys to appeal the judgment of the high court on its behalf. The directors did so without authority. If persons who are not authorised to do so, purport to appoint attorneys to represent a company, it can hardly be expected of the company to bear the costs flowing from that action. Notice was given to the directors that such an order would be sought. It is appropriate that they pay the costs of this appeal.

[26] In the result, the following order issues:

1 The appeal is dismissed.

2 The directors of Islandsite Investments 180 (Pty) Ltd, Ms Ragavan and Mr Chawla, are directed to pay the costs of the appeal jointly and severally, the one paying, the other to be absolved.

T R GORVEN

JUDGE OF APPEAL

Appearances

For appellant:	M R Hellens SC with D J Joubert SC
Instructed by:	Krause Attorneys, Johannesburg
	Honey Attorneys, Bloemfontein
For first respondent:	G Budlender SC
Instructed by:	State Attorney, Bloemfontein
For fourth and fifth respondents:	A E Bham SC with T Scott
Instructed by:	Smit Sewgoolam Incorporated, Johannesburg
	McIntyre van der Post, Bloemfontein