30 NOVEMBER 2021

DISPUTE RESOLUTION **ALERT**

IN THIS **ISSUE**

When two methods of appointment collide: Who retains the power to appoint a new practitioner on the resignation of a current practitioner?

Another piece of the business rescue puzzle was solved by the Constitutional Court (CC) in *Shiva Uranium (Pty) Limited (In Business Rescue) and Another v Tayob and Others* [2021] ZACC 40. No one disputes that the idea of business rescue, and its introduction into South Africa's company law, was a positive step. However, the implementation has not always been smooth and the business rescue provisions of the Companies Act 71 of 2008 (Act) have required an intense amount of interpretation by the courts.

CDH
CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA

Chambers Shortlisted Africa 2022

CLICK HERE
FOR MORE INSIGHT INTO OUR EXPERTISE AND SERVICES

When two methods of appointment collide: Who retains the power to appoint a new practitioner on the resignation of a current practitioner?

In this matter the CC had to consider who had the power to appoint a replacement business rescue practitioner if one or more of the appointed business rescue practitioners resign.

Another piece of the business rescue puzzle was solved by the Constitutional Court (CC) in *Shiva Uranium (Pty) Limited (In Business Rescue) and Another v Tayob and Others* [2021] ZACC 40. No one disputes that the idea of business rescue, and its introduction into South Africa's company law, was a positive step. However, the implementation has not always been smooth and the business rescue provisions of the Companies Act 71 of 2008 (Act) have required an intense amount of interpretation by the courts.

In this matter the CC had to consider who had the power to appoint a replacement business rescue practitioner if one or more of the appointed business rescue practitioners resign.

The provisions of the Act appear clear on this particular issue. In a voluntary rescue, initiated by board resolution via section 129 of the Act, the board is empowered to choose a new practitioner. In compulsory rescues, obtained by an affected party via court order, it is the affected party that brought the application who is empowered to choose the replacement practitioner.

The problem in this particular matter was that the factual matrix became somewhat complex.

The two sections at the forefront of this matter were section 139(3), read with section 130(6).

Section 139(3) reads as follows:

> "*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*" (emphasis added).

Section 130(6) deals with the successful challenge by affected parties of the appointment of practitioners by the directors of a company in the case of a voluntary rescue. If the court makes an order setting aside that appointment then:

> "*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*" (section 130(6)(a)) (emphasis added).

When two methods of appointment collide: Who retains the power to appoint a new practitioner on the resignation of a current practitioner?*...continued*

The Industrial Development Corporation of South Africa Limited (IDC), supported by other affected parties, applied to court for the removal of Knoop and Klopper in terms of section 130(1)(b) of the Act.

The facts

In summary, the facts of this case were as follows. The board of Shiva Uranium (Pty) Limited (Shiva) resolved to place the company into business rescue in terms of section 129 of the Act – i.e. the board initiated the voluntary rescue of Shiva. As such they were entitled to appoint the business rescue practitioners (section 29(3)(b)), which they did. Messrs Kurt Knoop (Knoop) and Louis Klopper (Klopper) became the practitioners in the Shiva rescue.

The Industrial Development Corporation of South Africa Limited (IDC), supported by other affected parties, applied to court for the removal of Knoop and Klopper in terms of section 130(1)(b) of the Act. The application was opposed by Knoop and Klopper. Before the court hearing, however, Knoop and Klopper resigned as Shiva's practitioners.

At the hearing the parties handed up a draft order to the presiding judge, which was granted (May 2018 Order). In the May 2018 Order the court, amongst other things, noted the resignation of Knoop and Klopper; substituted Knoop and Klopper with Mr Cloete Murray (Murray); and directed the Companies and Intellectual Property Commission (CIPC) to appoint an additional practitioner, acceptable to the IDC.

The CC confirmed that the May 2018 Order was in fact irregular. The reason for this will be explored further in another article. However, despite this irregularity, the May 2018 Order was not challenged or set aside. The CIPC then appointed a Mr Monyela to assist Murray with the Shiva rescue.

Some time later, Murray indicated his desire to resign as Shiva's business rescue practitioner. He and Monyela passed a resolution purportedly appointing a Mr Juanito Damons (Damons) as the replacement practitioner for Shiva who would assist Monyela.

Shiva's board instead passed a resolution appointing Messrs Mahomed Tayob (Tayob) and Eugene Januarie (Januarie) as the new practitioners for Shiva. From the content of the resolution the CC found that, although not explicit, it appeared that the board accepted Monyela would also remain as a practitioner.

Monyela lodged an objection with CIPC for the acceptance of the filing of the appointment of Tayob and Januarie. Proceedings were brought in the Companies Tribunal (Tribunal) to compel the CIPC to remove Tayob and Januarie as practitioners and appoint Damons in their stead. The Tribunal found in Monyela's favour.

Tayob and Januarie then launched an urgent application to interdict the CIPC from implementing the Tribunal's decision pending (i) a review of the Tribunal's decision; and (ii) a declaratory order directing that they and Monyela were Shiva's duly appointed practitioners. Damons and Monyela both opposed this application. The High Court dismissed Tayob and Januarie's application.

Tayob and Januarie appealed to the Supreme Court of Appeal (SCA). The parties agreed that the SCA should determine the substantive question of the validity of the appointment of Tayob and Januarie. It was the SCA's decision that led to the matter being before the CC.

When two methods of appointment collide: Who retains the power to appoint a new practitioner on the resignation of a current practitioner?*...continued*

The SCA therefore held that, in terms of section 139(3), if a company enters business rescue voluntarily in terms of section 129, the power to appoint a substitute, if the business rescue practitioner resigns, remains with the company.

SCA finding

The SCA rejected Monyela's argument that the power to appoint replacement practitioners lay with the practitioners themselves in terms of section 140(1)(a) of the Act.

The SCA held that this original argument was defective because section 140(1)(a) deals with the general powers and duties of the business rescue practitioner. These powers and duties related to the *"management"* of the company, in the sense of running the company on a day-to-day basis. In performing functions falling outside the ambit of *"management"*, directors were not subject to the authority of the business rescue practitioner. A decision taken by directors on behalf of the company to appoint a substitute practitioner in terms of section 139(3) was an act of governance falling outside the ambit of the practitioner's *"management"* of the company and the board therefore did not require the approval of the company's practitioners in order to appoint Tayob and Januarie as Shiva's business rescue practitioners.

Monyela presented a new argument, which he persisted with before the CC, that section 139(3) did not, upon Murray's resignation, confer a power of appointment on the company. He argued that the power resided with the creditors contemplated in section 130(6)(a), namely the holders of a majority of the independent creditors' voting interests represented in the proceedings before the High Court in the original appointment. Such creditors were said to fall within the ambit of the phrase *"or the creditor who nominated the practitioner"* in section 139(3). On the facts, so it was claimed, the IDC held the majority of the independent creditors' voting interests and had, through Murray and Monyela, appointed Damons.

The SCA rejected Monyela's argument. It found that section 139(3) regulated only two scenarios, in the alternative. If the company resolves to enter business rescue (voluntary rescue) then the power to appoint substitute practitioners lay with the company (the directors). If the company was placed into rescue as a result of a court application in terms of section 131 of the Act (compulsory rescue) then the power to appoint substitute practitioners remained with the affected party who brought the matter to court.

The SCA therefore held that, in terms of section 139(3), if a company enters business rescue voluntarily in terms of section 129, the power to appoint a substitute, if the business rescue practitioner resigns, remains with the company.

Before the Constitutional Court

Monyela sought leave from the CC on two bases: (i) that the Bill of Rights of the Constitution were being infringed; and (ii) an arguable point of law of general public importance.

The CC held that the matter did not engage its constitutional jurisdiction.

However, the court found that the issues did fall within the ambit of its general jurisdiction. This finding was based on the fact that business rescue proceedings are a common occurrence in corporate practice,

When two methods of appointment collide: Who retains the power to appoint a new practitioner on the resignation of a current practitioner?*...continued*

Statute interpretation requires that legal lacunas be avoided, especially if the legislative intent is clear and indubitable.

which serves an important economic and social goal. Rescues are an attempt to save financially distressed companies, enabling them to continue to contribute to the economy and avoid job losses. Business rescue practitioners are an essential element of the success of business rescue proceedings. It is therefore important that there should be transparency about the interpretation of the statutory provisions governing their appointment. The CC therefore considered the issues before it as of general public importance.

The CC then looked to the interpretation of the applicable business rescue sections of the Act.

The court found the reference to *"creditors"* in section 139(3) was unfortunate, as it did not cover all categories of the definition of an *"affected person"*. The CC ultimately found that the reference should read *"creditor or other affected person"*. It did so for the reasons outlined below.

In respect of compulsory business rescue, and in terms of section 131(1) an *"affected person"* is entitled to apply for the company to be placed in business rescue. Section 131(5) provides that if the court places the company in business rescue, it 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)"*. Such appointment is *"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"*. A practitioner appointed in the latter manner may be removed by order of court in terms of section 139(2).

If the practitioner appointed by the company in terms of section 129(1)(b) resigns, in terms of section 139(3) the company may appoint the substitute. By the same token, if the practitioner, appointed in terms of section 131(5), resigns it should be the *"affected person"* who applied for the company to be placed in business rescue that appoints a substitute.

To interpret otherwise would mean there is no provision for the appointment of a substitute where the person who applied for compulsory business rescue is not a creditor, and create a legal lacuna. Statute interpretation requires that legal lacunas be avoided, especially if the legislative intent is clear and indubitable. In such instances the court may expand the literal meaning of words and avoid the lacuna, which the court did.

When two methods of appointment collide: Who retains the power to appoint a new practitioner on the resignation of a current practitioner?*...continued*

The directors retain the right to appoint replacement practitioners (section 139(3)), while the affected rights remain with the directors to challenge these appointments (section 130(6)(a)).

Voluntary rescue

The CC then had to determine how these provisions, as interpreted, applied to the current factual scenario. Setting aside the fact that the May 2018 Order was defective, the question became, in a voluntary rescue:

- who had the power to appoint the replacement of a practitioner who was appointed by the court in terms of section 130(6)(a) (Murray);
- after an affected party (being the IDC) had successfully challenged the company appointed practitioners (Knoop and Klopper).

Is it the affected party or the company?

The court found that, because we were dealing with a voluntary rescue, where the company (the directors) had the original power to appoint practitioners, there needed to be a clear legislative choice that after a successful section 130(6)(a), the power to appoint replacement practitioners did not convert back to the company's directors.

In looking at other sections of the Act the court concluded that the power still remained with its directors. One of the key considerations was the reading of sections 5 and 7 of the Act.

Section 158 requires that a court must promote the spirit, purpose and objects of the Act.

Section 7(k) states that one of the Act's purposes is to *"provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders"*. Another purpose, as stipulated in section 7(l) is to *"provide a predictable and effective environment for the efficient regulation of companies"*.

It is clear from the business rescue provisions that rescues were meant to be expeditious. *"Given the desirability of the speedy and successful conclusion of business rescue proceedings, a court should prefer an interpretation which aids rather than impedes the attaining of this goal."*

The CC found that the SCA's interpretation that the power, in cases where practitioners who have been appointed by the court in terms of section 130(6)(a) resign, remains with the company's board gives effect to the stated purposes of the Act, and best promoted the spirit and purpose of the Act. It is *"quick and uncontentious"*, leaving no doubt as to who should make the appointment.

In a voluntary rescue, the balance of rights is retained with this interpretation. The directors retain the right to appoint replacement practitioners (section 139(3)), while the affected rights remain with the directors to challenge these appointments (section 130(6)(a)).

On this basis, the CC upheld the decision of the SCA and held that upon Murray's resignation the right to appoint his replacement vested in Shiva's board of directors and that Tayob and Januarie were validly appointed and dismissed Monyela's leave to appeal with costs.

Lucinde Rhoodie, Belinda Scriba and Simone Nel

OUR TEAM

For more information about our Dispute Resolution practice and services in South Africa and Kenya, please contact:

Tim Fletcher
Practice Head
Director
T +27 (0)11 562 1061
E tim.fletcher@cdhlegal.com

Thabile Fuhrmann
Chairperson
Joint Sector Head
Government & State-Owned Entities
Director
T +27 (0)11 562 1331
E thabile.fuhrmann@cdhlegal.com

Timothy Baker
Director
T +27 (0)21 481 6308
E timothy.baker@cdhlegal.com

Eugene Bester
Director
T +27 (0)11 562 1173
E eugene.bester@cdhlegal.com

Jackwell Feris
Sector Head
Industrials, Manufacturing & Trade
Director
T +27 (0)11 562 1825
E jackwell.feris@cdhlegal.com

Anja Hofmeyr
Director
T +27 (0)11 562 1129
E anja.hofmeyr@cdhlegal.com

Tobie Jordaan
Sector Head
Business Rescue, Restructuring & Insolvency
Director
T +27 (0)11 562 1356
E tobie.jordaan@cdhlegal.com

Corné Lewis
Director
T +27 (0)11 562 1042
E corne.lewis@cdhlegal.com

Richard Marcus
Director
T +27 (0)21 481 6396
E richard.marcus@cdhlegal.com

Burton Meyer
Director
T +27 (0)11 562 1056
E burton.meyer@cdhlegal.com

Rishaban Moodley
Sector Head
Gambling & Regulatory Compliance
Director
T +27 (0)11 562 1666
E rishaban.moodley@cdhlegal.com

Mongezi Mpahlwa
Director
T +27 (0)11 562 1476
E mongezi.mpahlwa@cdhlegal.com

Kgosi Nkaiseng
Director
T +27 (0)11 562 1864
E kgosi.nkaiseng@cdhlegal.com

Byron O'Connor
Director
T +27 (0)11 562 1140
E byron.oconnor@cdhlegal.com

Desmond Odhiambo
Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E desmond.odhiambo@cdhlegal.com

Lucinde Rhoodie
Director
T +27 (0)21 405 6080
E lucinde.rhoodie@cdhlegal.com

Clive Rumsey
Sector Head
Construction & Engineering
Director
T +27 (0)11 562 1924
E clive.rumsey@cdhlegal.com

Belinda Scriba
Director
T +27 (0)21 405 6139
E belinda.scriba@cdhlegal.com

Tim Smit
Director
T +27 (0)11 562 1085
E tim.smit@cdhlegal.com

Joe Whittle
Director
T +27 (0)11 562 1138
E joe.whittle@cdhlegal.com

Roy Barendse
Executive Consultant
T +27 (0)21 405 6177
E roy.barendse@cdhlegal.com

Jonathan Witts-Hewinson
Executive Consultant
T +27 (0)11 562 1146
E witts@cdhlegal.com

BBBEE STATUS: LEVEL ONE CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

JOHANNESBURG
1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN
11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI
Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114 E cdhkenya@cdhlegal.com

STELLENBOSCH
14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

CDH
CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA

GREENER ARBITRATIONS
DRIVING SUSTAINABLE CHANGE

As part of our firmwide greener living policy, CDH supports the campaign for Greener Arbitrations.