

Business Rescue, Restructuring & Insolvency

ALERT | 27 March 2024



In this issue

SOUTH AFRICA

Unilateral decisions by business rescue practitioners: A make or break in the termination of business rescue proceedings

 [For more insight into our expertise and services](#)

Unilateral decisions by business rescue practitioners: A make or break in the termination of business rescue proceedings

Monyela N.O and Others v Tayob N.O and Others (2023/117272) [2024] ZAGPPHC 86 (2 February 2024) involved an application for leave to appeal a judgment granted in the urgent court.

The first respondent, Mr Tayob, was one of two appointed business rescue practitioners (BRPs) in the business rescue of Shiva Uranium (Shiva). One of the disputes before the urgent court was whether Tayob's filing of a notice of termination of business rescue (notice) at the Companies and Intellectual Property Commission (CIPC) was valid and therefore terminated the business rescue of Shiva.

Amongst others, Mr Januarie, the other BRP of Shiva, disputed the legality of the filing of the notice as it was a unilateral action taken by Tayob, and an action Januarie did not support. The urgent application before the court *a quo* sought to prevent the directors of Shiva from performing any of their director duties apart from what has been envisaged in Chapter 6 of the Companies Act 71 of 2008 (Companies Act) pending the outcome of the challenge of Tayob's unilateral decision.

The applicants, including Januarie, contended that Shiva was still in financial distress and therefore the filing of the notice of termination was not justified.

Issue before the court

One of the main questions before the court *a quo* was whether the notice of termination, unilaterally filed by Tayob, brought the business rescue proceedings to an end.

According to section 141(2)(b)(ii) of the Companies Act, BRPs can file a notice of termination of business rescue at any time during business rescue proceedings if the BRPs conclude that there are no longer reasonable grounds to believe that the company is financially distressed. Ultimately, this provision indicates that it is the filing of a notice of termination of business rescue that brings such proceedings to an end.

Section 132(2)(c) of the Companies Act specifies that BRPs conclude their role as BRPs by filing a notice of termination. This notice, as per section 141, can be filed after the practitioner has thoroughly investigated the company's affairs, business, property, financial status and assessed the prospects of rescuing the company. Additionally, section 141(2)(b) mandates that if, at any point during the business rescue process, the practitioner determines that the company is no longer financially distressed, they must notify the court, the company and all affected parties accordingly.

If the business rescue process was court-confirmed under section 130 or initiated through a court application under section 131, the practitioner must seek the court's approval to terminate the business rescue process or file a notice of termination.

In this instance, it would have been perfectly valid for the BRPs to file a notice of termination to bring the rescue to an end. The problem was that the notice of termination was not filed jointly by the BRPs, but by only one BRP, with the other BRP not in support of the filing.

**BUSINESS RESCUE, RESTRUCTURING & INSOLVENCY
ALERT**

Unilateral decisions by business rescue practitioners: A make or break in the termination of business rescue proceedings

CONTINUED



The court *a quo* found that the notice was in fact invalid as the Supreme Court of Appeal in *Shiva Uranium v Tayob* [2022] (3) SA 432 had confirmed that BRPs appointed in a joint capacity must act jointly. As the decision and actions taken by Tayob were unilateral, and not joint, the notice of termination and its filing at the CIPC were in fact invalid and the business rescue had therefore not come to an end as a result of Tayob's actions.

There were other challenges based on the process set out by the CIPC in terms of the filing of notices in the business rescue process. The court emphasised that the cessation of business rescue proceedings is determined by the filing of a notice of termination by the BRPs and is not reliant on the CIPC updating its records. The decisive factor is the formal filing of the notice by the BRPs to signify the conclusion of the business rescue process, on the basis that the filing of such notice is not illegal.

The court also *mero motu* ordered that, pending further proceedings, the BRPs were to file reports with the court regarding the business rescue process. The court found that it had the discretion to do this as the BRPs were incapable of making joint decisions. It was incumbent on the court to do what it was able to, to ensure the business rescue decisions were "*made in the best interests of the company and affected persons*".

Conclusion

Essential points highlighted in this judgment are that (i) a business rescue process involving joint BRPs requires decisions to be made jointly, and not at the unilateral discretion of one of the BRPs. Unilateral actions in the presence of other duly appointed BRPs constitute an unlawful act; (ii) CIPC directions and notices cannot override the provisions of the Companies Act; and (iii) the court has certain discretions which it will exercise for the sake of a more efficient business rescue, and for the best interests of the company and its affected persons.

**Belinda Scriba, Katekani Mashamba and
Makhosazana Nzimande**



OUR TEAM

For more information about our Business Rescue, Restructuring & Insolvency sector and services in South Africa and Kenya, please contact:



Sammy Ndolo

Managing Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E sammy.ndolo@cdhlegal.com



Timothy Baker

Director:
Dispute Resolution
T +27 (0)21 481 6308
E timothy.baker@cdhlegal.com



Richard Marcus

Director:
Dispute Resolution
T +27 (0)21 481 6396
E richard.marcus@cdhlegal.com



Vincent Manko

Director:
Dispute Resolution
T +27 (0)11 562 1660
E vincent.manko@cdhlegal.com



Mongezi Mpahlwa

Director:
Dispute Resolution
T +27 (0)11 562 1476
E mongezi.mpahlwa@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:
Dispute Resolution
T +27 (0)21 405 6080
E lucinde.rhodie@cdhlegal.com



Belinda Scriba

Director:
Dispute Resolution
T +27 (0)21 405 6139
E belinda.scriba@cdhlegal.com



Nomlayo Mabhena-Mlilo

Senior Associate:
Dispute Resolution
T +27 (0)11 562 1743
E nomlayo.mabhena@cdhlegal.com



Christine Mugenyu

Senior Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E christine.mugenyu@cdhlegal.com



Muwanwa Ramanyimi

Senior Associate:
Dispute Resolution
T +27 (0)21 405 6093
E muwanwa.ramanyimi@cdhlegal.com



Katekani Mashamba

Associate:
Dispute Resolution
T +27 (0)11 562 1392
E katekani@mashamba@cdhlegal.com



Claudia Moser

Associate:
Dispute Resolution
T +27 (0)21 481 6336
E claudia.moser@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.

PLEASE NOTE

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

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 cdh Stellenbosch@cdhlegal.com

©2024 13300/MAR