



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 305/20

In the matter between:

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

First Applicant

CHRISTOPHER KGASHANE MONYELA

Second Applicant

and

MAHOMED MAHIER TAYOB

First Respondent

EUGENE JANUARIE

Second Respondent

JUANITO MARTIN DAMONS

Third Respondent

Neutral citation: *Shiva Uranium (Pty) Limited (In Business Rescue) and Another v Tayob and Others* [2021] ZACC 40

Coram: Madlanga J, Madondo AJ, Majiedt J, Mhlantla J, Pillay AJ, Rogers AJ, Theron J, Tlaletsi AJ and Tshiqi J

Judgments: Rogers AJ (unanimous)

Heard on: 19 August 2021

Decided on: 9 November 2021

Summary: Companies Act 71 of 2008 — business rescue — practitioner appointed in terms of section 130(6)(a) — resignation — section 139(3) — company to appoint substitute

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court):

1. The second applicant's application for leave to appeal is dismissed.
2. The second applicant must pay the first and second respondents' costs in this Court.

JUDGMENT

ROGERS AJ (Madlanga J, Madondo AJ, Majiedt J, Mhlantla J, Pillay AJ, Theron J, Tlaletsi AJ and Tshiqi J):

[1] In this application for leave to appeal, the question on the merits is this. Where, in the case of a voluntary business rescue initiated in terms of section 129 of the Companies Act¹ (Act), a business rescue practitioner appointed by a court in terms of section 130(6)(a) in place of the 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. The Supreme Court of Appeal held that the power of appointment resided with the company's board. The second applicant contends that it resides with the majority of the independent creditors' voting interests who were represented in the proceedings giving rise to the court's appointment in terms of section 130(6)(a).

¹ 71 of 2008.

[2] All statutory references in what follows are to the Act. It is doubtful whether the first applicant, Shiva Uranium (Pty) Limited (Shiva), is properly before us at the instance of the second applicant, Mr Christopher Monyela. Since Mr Monyela is properly before us, I treat him as the applicant.

Factual background

[3] In February 2018, Shiva's board resolved to place the company under business rescue and to appoint Messrs Kurt Knoop and Louis Klopper as its business rescue practitioners. The Companies Regulations² distinguish, for purposes of business rescue proceedings, between "large companies", "medium companies" and "small companies" and between a "senior practitioner", "experienced practitioner" and "junior practitioner".³ Shiva is a large company. In terms of the Companies Regulations, a junior practitioner or experienced practitioner may not be appointed as the practitioner of a large company except as an assistant to a senior practitioner.⁴ Messrs Knoop and Klopper were both senior practitioners.

[4] In March 2018, Shiva's largest independent creditor, the Industrial Development Corporation of South Africa Limited (IDC), launched an application in the High Court (Gauteng Division, Pretoria) in terms of section 130(1)(b)⁵ for the removal of Messrs Knoop and Klopper. Another creditor, Westdawn Investments (Pty) Limited, and a group of Shiva employees intervened to support the IDC's application. Messrs Knoop and Klopper opposed the application.

² Companies Regulations, 2011, GN R351 GG 34239, 26 April 2011, promulgated in terms of section 233 of the Act (Companies Regulations).

³ Regulation 127(2) of the Companies Regulations.

⁴ Regulations 127(3)(b) and 127(4)(b) of the Companies Regulations.

⁵ Section 130(1)(b) provides that after a company has adopted a resolution to place itself in business rescue, an affected person may apply to court for an order—

“setting aside the appointment of the practitioner, on the grounds that the practitioner—

- (i) does not satisfy the requirements of section 138;
- (ii) is not independent of the company or its management; or
- (iii) lacks the necessary skills, having regard to the company's circumstances.”

[5] 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.”

[6] On 31 May 2018, and shortly before the case was called, Messrs Knoop and Klopper resigned as Shiva’s practitioners. When the matter came before court, the parties handed up a draft order which Ranchod J made an order of court. It reads:

“Having read the papers and having heard counsel, the following order is made:

1. The applicants are granted leave to institute the applications under the above case number in terms of section 133(1)(b) of the Companies Act 71 of 2008 (‘the Companies Act’).
2. The Court notes the resignation of the second and third respondents [Messrs Knoop and Klopper] as the business rescue practitioners of the first respondent [Shiva] on 31 May 2018.
3. In substitution for the second and third respondents:
 - 3.1 The Court appoints Cloete Murray (‘Murray’), a senior business rescue practitioner.
 - 3.2 The fourth respondent [the Companies and Intellectual Property Commission (CIPC)] 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.
4. Costs of all parties under the above case number, including the costs of two counsel where so employed, shall be costs in the business rescue proceedings of the first respondent.”

[7] This order was irregular. The court's jurisdiction to appoint a substitute practitioner in terms of section 130(6)(a) is a power which exists only if, after considering an application in terms of section 130(1)(b), the court makes an order setting aside the appointment of a practitioner. The High Court did not make an order setting aside Messrs Knoop and Klopper's appointments. They resigned before the matter served before Ranchod J. This is not, as counsel for Mr Monyela sought to argue, to place form over substance. Whatever their motives, Messrs Knoop and Klopper in fact resigned. There is nothing in the papers to suggest otherwise, and the fact of their resignation was noted in the order. Because they had resigned, the High Court had no occasion to determine whether any of the grounds for removal listed in section 130(1)(b) existed, and in all likelihood Ranchod J did not make any such determination. Thus, the jurisdictional prerequisites for appointing a substitute practitioner in terms of section 130(6)(a) did not exist. It is doubtful, too, whether a court may delegate its power of appointment to the CIPC, as Ranchod J did in relation to the appointment of an additional practitioner.

[8] It was uncontentious before us that where a company-appointed practitioner resigns, the company through its board is the repository of the power to appoint a replacement. This power is to be found in section 139(3). It is convenient to quote the entire section, which is headed "Removal and replacement of practitioner":

- “(1) A practitioner may be removed only—
 - (a) by a 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 grounds:
 - (a) incompetence or failure to perform the duties of a business rescue practitioner of the particular company;
 - (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 that 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.”

[9] Following the resignation of Messrs Knoop and Klopper, the company’s board should have appointed their 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 a court in terms of section 130(6)(a).

[10] By September 2018 Mr Murray wanted to resign as Shiva’s practitioner. This meant that a senior practitioner had to be appointed in his place, since Mr Monyela, as a junior practitioner, could not complete the business rescue proceedings. To this end, on 18 September 2018 Messrs Murray and Monyela passed a resolution purporting to appoint the present third respondent, Mr Juanito Damons, as Shiva’s senior business rescue practitioner. Since part of the applicant’s case hinges on the capacity in which they passed this resolution, I note the following:

- (a) In its heading, the resolution was described as one “passed at a meeting held by the joint business rescue practitioners acting on behalf of Shiva

Uranium (Pty) Limited . . . having the full powers and authority as prescribed by the Companies Act 71 of 2008”.

- (b) The two persons present were described as “practitioners”.
- (c) Their resolution was set out in three numbered paragraphs.
- (d) The first numbered paragraph stated that Mr Murray voluntarily resigned, his letter of resignation being attached.
- (e) The second numbered paragraph stated: “The company will appoint [Mr Damons] as joint business rescue practitioner.”
- (f) The third numbered paragraph set out the reasons for Mr Damons’ appointment, in essence that the company required a senior practitioner and that Mr Damons’ appointment would be in the best interests of affected parties because of his extensive experience and the complexity of the matter.

[11] Immediately after the passing of this resolution, Mr Murray resigned and a filing was made with the CIPC in respect of Mr Damons’ appointment. This time, however, there was resistance. On 22 September 2018 Shiva’s board passed a resolution resolving to appoint the present first and second respondents, Messrs Mahomed Tayob and Eugene Januarie, as the company’s business rescue practitioners. They are both senior practitioners. Although the resolution is not explicit in this respect, the board appears to have accepted that Mr Monyela would remain as a practitioner, assisting the two new senior practitioners. Steps were taken to file these competing appointments with the CIPC.

[12] Mr Monyela, purporting to represent Shiva, lodged with the CIPC an objection to the acceptance of the filing of Messrs Tayob and Januarie’s appointments. In October 2018 Mr Monyela, on his own behalf and purportedly on behalf of Shiva, brought proceedings in the Companies Tribunal (Tribunal) to compel the CIPC to accept the filing of Mr Damons’ appointment and to remove the filing of Messrs Tayob and Januarie’s appointments. The Tribunal decided the case in Mr Monyela’s favour. The details of the proceedings in the Tribunal are not now relevant, because it is

accepted that the Tribunal could not decide the substantive question as to who had the power to appoint new practitioners. The Tribunal was concerned with the ensuing administrative processes.

Litigation history

[13] In December 2018 Messrs Tayob and Januarie launched an urgent application in the High Court (Gauteng Division, Pretoria) in which they sought to interdict the CIPC from implementing, enforcing or adhering to the Tribunal's decision pending proceedings (a) to have the Tribunal's decision reviewed and set aside and (b) for an order declaring that they, together with Mr Monyela, were Shiva's duly appointed business rescue practitioners.

[14] Messrs Monyela and Damons, on their own behalf and purporting to represent Shiva, opposed the application. The basis of opposition was that (a) the Act provided for a vacancy created by the resignation of the company's practitioner to be filled by the company; (b) in terms of the Act, the management of the company was to be undertaken by its business rescue practitioners, and the board could not act without the practitioners' authority; and (c) they (Messrs Monyela and Damons) had not authorised the company's board to adopt the resolution which the directors purported to pass on 22 September 2018.

[15] In amplification of this ground of opposition, the argument advanced on behalf of Messrs Monyela and Damons in the High Court was that, although section 139(3) provided for the company to appoint Mr Murray's replacement, section 137 precluded the board from exercising that power without the approval of the practitioners. In that regard, section 137(2) provides that during a company's business rescue proceedings, each director among other things "must continue to exercise the functions of director, subject to the authority of the practitioner" and "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".

Section 137(4) states:

“If, during a company’s business rescue proceedings, the board, or one or more directors of the company, purports to take any action on behalf of the company that requires the approval of the practitioner, that action is void unless approved by the practitioner.”

[16] The High Court agreed with this argument and dismissed Messrs Tayob and Januarie’s application with costs.⁶

[17] Aggrieved, Messrs Tayob and Januarie pursued an appeal to the Supreme Court of Appeal. Although the proceedings in the High Court had been for an interdict pending an application for review and a declaratory order, the parties agreed to ask the Supreme Court of Appeal to determine the substantive question as to whether or not the appointments of Messrs Tayob and Januarie were valid. The Supreme Court of Appeal acceded to this sensible request.

[18] It appears from the Supreme Court of Appeal judgment⁷ that there was a change of tack in the argument advanced on behalf of Mr Monyela. He jettisoned the argument which the High Court had accepted. The Supreme Court of Appeal held that the original argument was unsound, reasoning that in terms of section 140(1)(a)⁸ the powers and duties of the practitioner 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 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.⁹ Accordingly, the board had not

⁶ *Tayob v Shiva Uranium (Pty) Limited* [2019] ZAGPPHC 37 at para 47.

⁷ *Tayob v Shiva Uranium (Pty) Limited* [2020] ZASCA 162 (Supreme Court of Appeal judgment).

⁸ Section 140(1)(a) provides that during a company’s business rescue proceedings the practitioner, in addition to any other powers and duties set out in Chapter 6 of the Act, “has full management control of the company in substitution for its board and pre-existing management”.

⁹ Supreme Court of Appeal judgment above n 7 at para 25.

required the approval of the company's business rescue practitioners in order to appoint Messrs Tayob and Januarie as Shiva's practitioners. Since Mr Monyela has not persisted with this argument in this Court, it is unnecessary to say anything more about it.

[19] Mr Monyela's new argument, with which he persists in this Court, was that section 139(3) did not, upon Mr Murray's resignation, confer a power of appointment on the company at all. Instead, so it was submitted, 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 Ranchod J. 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 Messrs Murray and Monyela, appointed Mr Damons.

[20] The Supreme Court of Appeal rejected this argument as a matter of law, finding it unnecessary to deal with the argument's factual component. The Supreme Court of Appeal held that section 139(3) regulated only two scenarios in the alternative. If a company enters business rescue voluntarily in terms of section 129, the power to appoint a substitute, if the practitioner resigns, remains with the company. Conversely, if a company enters business rescue compulsorily in terms of section 131, the power to appoint a substitute, if the practitioner resigns, remains with the affected person who brought the application for business rescue. These were the two scenarios indicated by the phrase "as the case may be" in section 139(3).

[21] Mr Monyela now seeks leave to appeal against the order of the Supreme Court of Appeal.

Jurisdiction

[22] Mr Monyela contends on two grounds that this Court has jurisdiction in terms of section 167(3)(b): first, that the proposed appeal is a constitutional matter; and second, that it raises an arguable point of law of general public importance.

[23] The proposed appeal is said to be a constitutional matter on the following basis. Section 39(2) of the Constitution requires a court, when interpreting any legislation, to promote the spirit, purport and objects of the Bill of Rights. Section 9 of the Bill of Rights provides that everyone is equal before the law and has the right to equal protection and benefit of the law, and prohibits unfair discrimination. The Supreme Court of Appeal's interpretation of section 139(3) results in unfair discrimination between creditors: a creditor who brings proceedings in terms of section 131 has an ongoing power to appoint a substitute practitioner, whereas creditors who play a role in the appointment of a practitioner in terms of section 130(6)(a) do not.

[24] The invocation of sections 9 and 39(2) of the Constitution is specious. It was not raised in the High Court or the Supreme Court of Appeal. It is a belated attempt to clothe an ordinary matter of statutory interpretation in constitutional garb. There is not a sufficient commonality of circumstances between the two categories of creditors to implicate section 9:

- (a) The affected person contemplated in section 131(1), usually a single creditor, is a person who has taken the initiative to have the company placed in business rescue. In terms of section 131(5), the court – if it makes an order placing the company in business rescue – may appoint an “interim practitioner” who has been “nominated” by the petitioning creditor. This appointment is interim, because in terms of section 131(5) the 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”.

- (b) The creditors contemplated in section 130(6)(a) are persons who have not taken the initiative to place the company in business rescue. The company dealt with in that section is one which was placed in business rescue by resolution of its board. The creditors have simply made a challenge to the company's appointment of the practitioner, and they have to establish grounds for the company-appointed practitioner's removal. Although notionally there might only be a single independent creditor represented in the proceedings before the court, the section in its formulation envisages a plurality of creditors. They are not given a power of "nomination". The court's power to appoint the practitioner is simply subject to such practitioner having been "recommended by, or acceptable to" the creditors in question. The appointment once made is final, not interim.

[25] The lawmaker could have decided that once there has been a successful challenge in terms of section 130(1)(b), the company should lose its power of appointment and that the power should switch to creditors. However, that would be a policy choice, not one dictated by the requirements of constitutional equality. It would similarly be a policy choice to decide that the company should retain its ongoing power of appointment, subject to fresh challenge if the new appointee falls foul of one or other ground of removal set out in section 130(1)(b).

[26] Accordingly, this case does not engage our constitutional jurisdiction. It does, though, fall within our general jurisdiction. Business rescue proceedings are a common phenomenon of our corporate life. They serve the important economic and social goal of trying to save financially distressed companies so that they can continue to contribute to the economy and so that employees do not lose their jobs. Business rescue practitioners play a vital role in the success of business rescue proceedings. It is desirable that there should be clarity about the interpretation of the statutory provisions governing their appointment.

[27] Statutory interpretation is a question of law. The question here is of general public importance, since the answer will govern the appointment of practitioners in all cases where a practitioner appointed in terms of section 130(6)(a) dies, resigns or is removed from office. Mr Monyela's argument rises to the level of being "arguable": it is not "totally unmeritorious", has "a measure of plausibility" and "some prospects of success".¹⁰ It is novel,¹¹ the Supreme Court of Appeal's judgment being the first judicial pronouncement on the appointment of business rescue practitioners in this setting.

[28] The fact that the matter engages our jurisdiction does not mean, without more, that it is in the interests of justice to hear the appeal. In the present case, as in *Diener*,¹² the question whether it would be in the interests of justice to do so turns on Mr Monyela's prospects of success, which I shall address presently.

Clearing away irrelevancies

[29] The case in the High Court and the Supreme Court of Appeal was about the validity of Messrs Tayob and Januarie's appointment. The relief foreshadowed by Messrs Tayob and Januarie in the interdict application was an order establishing that they, together with Mr Monyela, were Shiva's duly appointed business rescue practitioners. If Mr Monyela's argument before us is correct, Shiva's board had no power to appoint Messrs Tayob and Januarie. Since Messrs Tayob and Januarie did not claim that their appointment carried the approval of the creditors contemplated in section 130(6)(a), their appointments would be invalid. This conclusion would not depend on any disputed factual matter.

[30] The invalidity of Messrs Tayob and Januarie's appointment would not mean, without more, that Mr Damons' appointment was valid. That would depend on the

¹⁰ *Paulsen v Slip Knot Investments 777 (Pty) Limited* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) at paras 21-2.

¹¹ *Id* at para 23(e).

¹² *Diener N.O. v Minister of Justice and Correctional Services* [2018] ZACC 48; 2019 (4) SA 374 (CC); 2019 (2) BCLR 214 (CC) (*Diener*) at paras 35-6.

answers to the further questions as to whether the IDC held the majority of the independent creditors' voting interests in the proceedings before Ranchod J and whether, in appointing Mr Damons, Messrs Murray and Monyela were acting at the IDC's behest. There were no factual allegations on these issues in the High Court or the Supreme Court of Appeal. The allegations were made for the first time in Mr Monyela's founding and replying affidavits in this Court. Mr Monyela did not have leave to file a replying affidavit. There was no application to adduce further evidence in the proposed appeal. No regard could thus be had to the new facts alleged in this Court. The new allegations, I may add, are inconsistent with the formulation of the practitioners' resolution.

[31] Be that as it may, no relief has been sought in connection with Mr Damons' appointment. If Mr Monyela's argument on the law were right, we could not find on the facts that Mr Damons was validly appointed, but the creditor or creditors contemplated in section 130(6)(a) could, if they have not already done so, make a valid appointment. If Mr Monyela's argument on the law is wrong, Messrs Tayob and Januarie were validly appointed. It would then also follow, as a matter of law, that Mr Damons was not validly appointed, although no relief to that effect has been sought.

[32] Before turning to the question of law, I must caution that litigants making affidavits in this Court in applications for leave to appeal must, in regard to the merits of the proposed appeal, scrupulously confine themselves to the evidence that was adduced in the courts from which the proposed appeal emanates. In the absence of an application for leave to adduce further evidence on appeal, this Court should be entitled to accept that the affidavits in this Court assert no facts on the merits which were not contained in the record before the courts below.

The interpretation of section 139(3)

[33] The formulation of section 139(3) indicates that it is dealing with two scenarios (X or Y "as the case may be"), and the lawmaker appears to have taken for granted that it would be obvious to those applying the section whether a case fell into one category

or the other, because on this depends whether the power of appointment lies with the “company” or with the “creditor who nominated the practitioner”. To see what it is that the lawmaker has taken as obvious, it is necessary to consider the provisions of Chapter 6 of the Act as a whole.

[34] A company can be placed in business rescue in only two ways, voluntarily by a board resolution in terms of section 129 or compulsorily by court application in terms of section 131.

[35] In regard to the first of these pathways to business rescue, section 129(3)(b) provides that within five business days after the company has adopted the resolution placing itself in business rescue, it must “appoint a business rescue practitioner who satisfies the requirements of section 138, and who has consented in writing to accept the appointment”. This appointment is subject to challenge by an “affected person” in terms of section 130(1)(b). In terms of section 130(4), “[e]ach affected person” has a right to participate in the challenge proceedings.

[36] In regard to the second pathway to business rescue, section 131(1) entitles an “affected person” to apply for the company to be placed in business rescue. Section 131(3) again provides that “[e]ach affected person” has the right to participate in the business rescue application. Section 131(5) stipulates 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)”. This 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 this way may be removed by order of court in terms of section 139(2) on any of the grounds listed in that section.

[37] That section 139(3) applies to these two scenarios is obvious and uncontentious. If the practitioner appointed by the company in terms of section 129(1)(b) resigns, the

company in terms of section 139(3) may appoint the substitute. If the practitioner appointed in terms of section 131(5) resigns, the “affected person” who applied for the company to be placed in business rescue, and who made the nomination envisaged in section 131(5), may appoint the substitute.

[38] The reference in section 139(3) to the “creditor” who nominated the practitioner is infelicitous, since the “affected person” envisaged by section 131(5) might not be a creditor. It must be accepted, as it was by the Supreme Court of Appeal,¹³ that section 139(3) was carelessly formulated on the assumption that the person petitioning for compulsory business rescue would be a creditor, as is most commonly the case. Unless “creditor” in section 139(3) is read as meaning “affected person”, or unless the words “or other affected person” are read into the section immediately after “creditor”, there would be no provision for the appointment of a substitute where the person who applied for compulsory business rescue was an affected person in a capacity other than as creditor. If at all possible, a statute must be interpreted so as to avoid a lacuna,¹⁴ and if the legislative intent is “clear and indubitable” the court may expand the literal meaning of words so as to avoid the lacuna.¹⁵

[39] The question is where to accommodate the power to appoint the replacement of a practitioner appointed by the court in terms of section 130(6)(a) when that practitioner resigns. In such a case, one is dealing with a voluntary business rescue initiated in terms of section 129. However, the person who has resigned is not the practitioner appointed by the company in terms of section 129(3)(b) but a practitioner appointed by the court in terms of section 130(6)(a) pursuant to a successful challenge to the company’s

¹³ Supreme Court of Appeal judgment above n 7 at para 18, approving a statement to this effect in Delpont and Vorster *Henochsberg on the Companies Act 71 of 2008* (LexisNexis, Durban 2021) vol 1 at 526(50).

¹⁴ *Davehill (Pty) Limited v Community Development Board* [1987] ZASCA 120; 1988 (1) SA 290 (A) at 300C-D relying on *Koller, N.O. v Steyn, N.O.* 1961 (1) SA 422 (A) at 429B-C.

¹⁵ *Summit Industrial Corporation v Claimants Against the Fund Comprising the Proceeds of the Sale of the M.V Jade Transporter* [1987] ZASCA 2; 1987 (2) 583 (A) at 596I-597B. See also *Barkett v SA Mutual & Assurance Co Limited* 1951 (2) SA 353 (A) at 362H-363D and *Airports Company South Africa SOC Limited v Imperial Group Limited* [2020] ZASCA 2; 2020 (4) SA 17 (SCA) at paras 67-72. This is a particular application of the well-known principle in *Venter v R* 1907 TS 910 that a court may depart from the literal meaning of words to avoid manifest absurdity, a principle approved in this Court in a number of cases (see, for example, *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at para 28).

appointment. Since the right to appoint the substitute in place of the practitioner whose appointment was successfully challenged does not lie with the company but with the court acting in terms of section 130(6)(a), a legislative choice against reviving the company's right of appointment if the court-appointed substitute resigns would be understandable. The question is whether section 139(3) can, and should, be interpreted as achieving this outcome.

[40] The argument for Mr Monyela is that this outcome can be achieved through a generous interpretation of the phrase "or the creditor who nominated the practitioner" in section 139(3). In my view, there are a number of factors which militate against this interpretation.

"who nominated"

[41] In the first place, there is the use of the word "nominated" in section 139(3). The only place where that word is used in Chapter 6 is in section 131(5), where it is used with reference to the practitioner "nominated" by the affected person bringing the application for compulsory business rescue. Counsel for Mr Monyela submitted that the phrase "recommended by, or acceptable to" in section 130(6)(a) is substantively equivalent to a nomination.

[42] I agree that in this statutory setting "recommendation" is not far removed from a "nomination". However, in the context of section 130(6), the independent creditors may make no recommendation at all or there may be no majority in favour of any particular practitioner. If they do by majority make a recommendation, they may recommend X or Y, leaving the choice to the court. They may recommend X while other parties prefer Y, and the court may appoint Y on the basis that Y, although not recommended by the independent creditors, is acceptable to them. The appointment of someone who is merely "acceptable to" the creditors is not closely akin to an act of nomination by the creditors. Moreover, the point is not merely that "nominated by" is not substantively the same as "recommended by or acceptable to"; the choice of words matters, because it sheds light on what the lawmaker had in mind in section 139(3). If

the section had been intended to cover the case of section 130(6)(a), section 139(3) would, I consider, have expanded upon the phrase “or the creditor who nominated the practitioner”.

“or the creditor”

[43] Section 139(3) refers to the “creditor” who nominated the practitioner. As explained, this should be read as “creditor or other affected person” who nominated the practitioner. Concentrating, however, on the word “creditor”, the definition of “affected person” in section 128(1)(a) includes, among others, a “creditor” of the company. The term “independent creditor” is defined in section 128(1)(g). A company’s independent creditors are a subset of its creditors. So an “affected person” who is a creditor might be an independent creditor or a creditor who is not independent.

[44] The importance of this is that a creditor applying for compulsory business rescue in terms of section 131(1) need not be an independent creditor. It suffices that such person is a creditor, independent or not. If the creditor’s application is successful, such creditor, whether independent or not, gets to nominate the practitioner. Consistently with this, section 139(3) refers to the “creditor” in unqualified language.

[45] On Mr Monyela’s argument, however, the language of section 139(3) must be understood as referring also to the independent creditors contemplated in section 130(6)(a). But what if no independent creditors were represented in the section 130 proceedings? Any “affected person” may bring section 130 proceedings. Such person, if a creditor, does not need to be an independent creditor. The affected person bringing the application, and the affected persons (if any) who participate in the proceedings, may be a combination of shareholders, trade unions and non-independent creditors. In such a case, so it seems to me, the court’s power of appointment in terms of section 130(6)(a) cannot be conditioned by a recommendation or acceptance by independent creditors. Although the court would presumably take into account the views of the affected persons participating in the proceedings, there would be no quantifiable “voting interest” by which to determine whose views should carry the day.

[46] In a case such as I have supposed in the preceding paragraph, the phrase “or the creditor who nominated the practitioner” in section 139(3) could not refer to the “independent creditors” envisaged in section 130(6)(a) because there would be none. Who then has the power of appointment in terms of section 139(3)? The answer must be the company, since otherwise there would be a lacuna, and, as I have said, statutes must as far as reasonably possible be interpreted to avoid a lacuna. If the company is to have the power of appointment in this situation, it shows that the lawmaker did not turn its face against a company’s continued involvement in appointing substitute practitioners after a successful section 130(1)(b) challenge. This greatly weakens the force of the argument that the company could not have been intended to retain the right of appointing a substitute upon the resignation of a practitioner recommended by or acceptable to a majority of independent creditors in terms of section 130(6)(a).

The use of the singular form of “creditor”

[47] Section 139(3) refers to an appointment by “[t]he company” or “the creditor” in the singular. Section 6(b) of the Interpretation Act¹⁶ provides that “in every law, unless the contrary intention appears . . . words in the singular number include the plural, and words in the plural number include the singular”. Since it is conceivable that two or more creditors might join as co-applicants in seeking to have a company placed in business rescue in terms of section 130, section 139(3) could notionally encompass more than one creditor.

[48] Nevertheless, it is not without significance that the lawmaker chose in section 139(3) to refer to “creditor” in the singular. Section 131(1) refers to an application for business rescue by “an affected person” as an “applicant”, both in the singular. Likewise, section 131(5) refers to a nomination “by the affected person” in the singular. The use of “creditor” in the singular in section 139(3) is consistent with

¹⁶ 33 of 1957.

the second of the two scenarios being a reference to nomination in terms of section 131(5).

[49] By contrast, section 130(6)(a) refers to a practitioner recommended by, or acceptable to, “the holders of a majority of the independent creditors’ voting interests”. Although there might be only one independent creditor represented in the section 130 proceedings, the lawmaker’s formulation was “independent creditors” in the plural. If section 139(3) had been intended to include the independent creditors envisaged in section 130(6)(a), the section could have been expected to refer to “the creditor or creditors who nominated”.

Section 131(5)

[50] In the case of compulsory business rescue, the affected person who brought the application nominates a practitioner, who is appointed as an interim practitioner, subject to ratification by the holders of a majority of the independent creditors’ voting interests at the first meeting of creditors. It was not suggested in argument that where a practitioner whose interim appointment has been ratified resigns, the power of appointment conferred by section 139(3) vests in those holding the majority of the independent creditors’ voting interests. The power of appointment plainly resides with the affected person who brought the application and nominated the interim practitioner.

[51] Accordingly, in the case of compulsory business rescue, the lawmaker decreed that, in the event of the practitioner’s resignation, the power of appointment would stay with the affected person who applied for business rescue rather than switching to the body of independent creditors who ratified the appointment. The fact that the lawmaker made this choice in relation to compulsory business rescue militates against a view that, in the case of voluntary business rescue, the power of appointment would, after a successful section 130 challenge, switch from the company to the body of independent creditors.

Removal of practitioner after approval of business rescue plan

[52] In terms of section 130(1), an application under that section for the removal of a company-appointed practitioner cannot be brought once a business rescue plan has been adopted in terms of section 152. Since the process of implementing approved business rescue plans may on occasion be time-consuming, it is conceivable that circumstances might come to light, after approval of the plan, which warrant the removal of the practitioner. Such an application could be brought by an affected person in terms of section 139(2). If the removal application succeeded, section 139(3) would undoubtedly confer on the company the right to appoint the substitute, since the removed practitioner would not, even on Mr Monyela's argument, have been "nominated" by the affected person. This is yet another indication that the lawmaker was content for the company to retain the right of nominating the practitioner, even though the company's initial appointee was subsequently removed by court order.

Section 7(k) of the Act

[53] A final but important consideration is this. Section 5(1) requires that the Act be interpreted and applied in a manner that gives effect to the purposes of the Act set out in section 7. Section 158 stipulates that when determining a matter brought before it in terms of the Act, a court "must promote the spirit, purpose and objects of the Act"; and that if any provision of the Act read in its context can be reasonably construed to have more than one meaning, the court must prefer the meaning "that best promotes the spirit and purpose of this Act, and will best improve the realisation and enjoyment of rights".

[54] In terms of section 7(k), one of the purposes of the Act 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". Section 7(l) proclaims another purpose of the Act as being to "provide a predictable and effective environment for the efficient regulation of companies". In my opinion, the interpretation which the Supreme Court of Appeal adopted gives effect to these stated purposes and best promotes the spirit and purposes of the Act.

[55] Business rescue is meant to be expeditious.¹⁷ Section 132(3) provides that if the business rescue proceedings have not ended within three months after the start of the proceedings, or such longer time as the court on application by the practitioner may allow, the practitioner must prepare monthly reports and deliver them to each affected person and to the court (in the case of compulsory business rescue) or to the CIPC (in the case of voluntary business rescue). Section 141(1) obliges the practitioner, as soon as practicable after being appointed, to investigate the company's affairs, business, property and financial situation. Within 10 days of appointment the practitioner must, in terms of sections 147(1) and 148(1), convene first meetings of creditors and employees' representatives. Section 150(5) requires that a business rescue plan be published within 25 business days after the date on which the practitioner was appointed, unless this period is extended by the court or by the holders of a majority of the creditors' voting interests. The consideration of the plan is itself subject to time-limits which are set out in section 151.

[56] 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 attainment of this goal. If section 139(3) bears the interpretation which the Supreme Court of Appeal adopted, the appointment of a substitute practitioner will be quick and uncontentious. There will be no doubt as to who can make the appointment. Depending on whether the business rescue is voluntary or compulsory, the substitute appointment will be made by the company or by the affected person who brought the business rescue application. In the case of voluntary business rescue, there is a balancing of the rights and interests of stakeholders: the company retains its right of appointment, while section 139(3) expressly preserves the right of creditors to launch a fresh challenge in terms of section 130(1)(b), if grounds for such challenge exist.

¹⁷ *Diener* above n 12 at para 38.

[57] By contrast, the interpretation for which Mr Monyela argues is beset with potential obstacles:

- (a) First, there would be a need to identify who the independent creditors are who were represented in the section 130 proceedings.
- (b) Second, it would be necessary to decide whether the creditors with the power to make the substitute appointment are the full body of independent creditors who were represented in the section 130 proceedings, or only the subset who held the majority of the creditors' voting interests in recommending or signifying acceptance of the practitioner appointed by the court.
- (c) Third, there would have to be machinery to convene a meeting of the creditors so that they could vote on the appointment, bearing in mind that the erstwhile practitioner, who might have been a sole practitioner, would no longer be in office. The Act contains no such machinery.
- (d) Fourth, there might be disputes as to whether a particular creditor is independent and as to the proper appraisal of a creditor's "voting interest" as defined in section 128(1)(j), i.e. "an interest as recognised, appraised and valued in terms of section 145(4) to (6)".
- (e) Fifth, what if, at the meeting of independent creditors, there is no majority in favour of any particular substitute? The Act contains no mechanism to resolve such a deadlock.

[58] Obstacles of this kind could delay the appointment of a new practitioner, and in the meanwhile the company would be left rudderless, jeopardising its prospects of successful rescue.

Conclusion

[59] For all the reasons stated above, Mr Monyela has not demonstrated that there are reasonable prospects of success of this Court reversing the Supreme Court of Appeal's conclusion. That Court held, rightly so, that upon Mr Murray's resignation the right to appoint his replacement vested in Shiva's board of directors and that Messrs Tayob and

Januarie were validly appointed. It is thus not in the interests of justice to hear the appeal, and it follows that Mr Monyela's application for leave to appeal must be dismissed.

[60] As to costs, there is no reason why they should not follow the result. The conclusion of the Supreme Court of Appeal's judgment is that since 22 September 2018 the company's business rescue practitioners have been Messrs Tayob, Januarie and Monyela. Mr Monyela, acting on his own, was not entitled to cause Shiva to pursue an appeal to the Supreme Court of Appeal or to pursue a further application to this Court. Shiva should thus not be made to bear any costs.

[61] The Supreme Court of Appeal ordered Messrs Monyela and Damons to pay the costs of the appeal and the costs of the High Court proceedings. Mr Damons did not join with Mr Monyela as an applicant in this Court, instead being cited as a respondent. In the circumstances, Mr Monyela must pay Messrs Tayob and Januarie's costs in this Court.

Order

[62] The following order is made:

1. The second applicant's application for leave to appeal is dismissed.
2. The second applicant must pay the first and second respondents' costs in this Court.

For the Second Applicant:

S Symon SC and G D Wickins SC
instructed by Smit Sewgoolam
Incorporated

For the First and Second Respondents:

P F Louw SC instructed by Aphan
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