SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

DATE 8 December 2020

STATUS Immediate

Tayob and Another v Shiva Uranium (Pty) Ltd and Others (336/2019) [2020] ZASCA 162 (8 December 2020)

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

Today the Supreme Court of Appeal (the SCA) granted leave to appeal and upheld the appeal of the applicants, Messrs Mahomed Tayob Mahier and Eugene Januarie, against the decision of the Gauteng Division of the High Court, Pretoria (the high court).

The board of directors (the board) of Shiva Uranium (Pty) Ltd (in business rescue) (Shiva) resolved in terms of s 129(1) of the Companies Act 71 of 2008 (the Act) to place it under business rescue supervision. Shiva, being a 'large company' as defined in reg 127 of the Companies Regulations, 2011, could only have a business rescue practitioner (practitioner) who was a 'senior practitioner'. The board simultaneously appointed Messrs Louis Klopper and Mr Kurt Knoop as senior practitioners for Shiva. The Industrial Development Corporation of South Africa Limited (IDC), a creditor of Shiva, launched an application in the high court for the removal of Messrs Klopper and Knoop and for the appointment of Mr Cloete Murray in their stead. The order recorded that Messrs Klopper and Knoop had resigned as the practitioners of Shiva and appointed Mr Murray as the substitute senior practitioner. The high court also directed the Companies and Intellectual Property Commission (the Commission) to appoint an additional practitioner, subject to the appointment being acceptable to the IDC. Pursuant thereto, the Commission appointed the second respondent, Mr Christopher Kgashane Monyela, who was a 'junior practitioner' and could only act for a large company as an assistant to a senior practitioner.

Messrs Murray and Monyela resolved, in anticipation of the resignation of Mr Murray, to appoint the third respondent, Mr Juanito Martin Damons, as his substitute. Mr Murray resigned, and the board appointed the applicants as practitioners for Shiva together with Mr Monyela. Messrs Murray and Monyela gave notice to the Commission of the appointment of Mr Damons; while a director of Shiva, in turn, submitted to the Commission notification of the appointment of the applicants. The Commission accepted the notification of the appointment of the applicants and refused to accept the notification in respect of Mr Damons. Mr Monyela, purportedly also acting for Shiva, urgently approached the Companies Tribunal to overturn the decisions of the Commission. It directed the Commission to accept the notification in respect of Mr Damons and remove from its register the notification in respect of the applicants. The applicants, in turn, approached the high court on an urgent basis for an order interdicting the Commission from implementing, enforcing and/or adhering to the order of the Companies Tribunal, pending the determination of an application seeking to review and set aside the decision of the Companies Tribunal; and seeking a declaratory order to the effect that the applicants and the second respondent were the duly and lawfully appointed business rescue practitioners of the first respondent. The court a quo dismissed the application with costs and refused leave to appeal to this Court.

The SCA held that it was rightly common cause that the court a quo erred in refusing leave to appeal on the ground that its order was not appealable. It held that the principal issue for determination was whether the board of directors of Shiva validly appointed the first and second applicants as business rescue practitioners. The central

issue was from where the power to appoint a substitute in the event of the death, resignation or removal from office of a practitioner was sourced.

The SCA held that there are two pathways to business rescue supervision under the Act: voluntary business rescue by a company through the adoption of a resolution in terms of s 129(1); and application for business rescue by an affected person, including a creditor, to court in terms of s 131. The SCA set out the applicable provisions of the Act. In terms of s 139(1) a practitioner may only be removed from office by a court order in terms of s 130 or as provided for in s 139. Section 139(2) provides that upon the request of an affected person, or on its own motion, the court may remove a practitioner from office. Section 139(3) provides that a company or 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. The SCA held that s 139(3) does not apply when the court sets aside the appointment of a practitioner. In the result the SCA held that if a practitioner dies, resigns or is removed from office under s 139(2), a substitute must be appointed by the board of a company or by the affected person that made the nomination.

Regarding whether the board had to act subject to the authority of the practitioner in appointing a substitute, the SCA held that unless indicated otherwise, 'company' must bear its ordinary meaning, that is, the company represented by its board. In the circumstances, the context strongly supports the conclusion that s 139(3) provides a board with the unfettered power to appoint a substitute practitioner. Section 139(3) also obliges the appointment of a new practitioner in the envisaged circumstances. In many cases only one practitioner is appointed for a company. If more than one are appointed, they have to act jointly, in the same manner as joint trustees and liquidators. It follows that if a practitioner dies, resigns or is removed from office, there would either be no practitioner in office to authorise a board to act under s 139(3) or the remaining practitioner(s) would have no authority to act. During business rescue supervision a board retains all its powers and functions except to the extent that the Act expressly or by necessary implication provides otherwise. 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 the Act has full management control of the company in substitution for its board and pre-existing management. The SCA held that given that 'management' was not defined in the Act, it must be ascribed its ordinary meaning, that is, to be in charge of or to run a company, particularly on a day-to-day basis. The SCA held that the appointment of a substitute practitioner was a function of governance and approval thereof was not a management function. For that reason, the appointment of a practitioner did not fall within the powers or authority of a practitioner. In the circumstances, the appeal was upheld.