IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA

CASE NO: CT012OCT2018

In the matter between**:**

SHIVA URANIUM (PTY) LIMITED (IN BUSINESS RESCUE)	**First Applicant**
CHRISTOPHER KGASHANE MONYELA	**Second Applicant**

and

THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	**First Respondent**
MOHAMED MAHIER TAYOB	**Second Respondent**
EUGENE JANUARIE	**Third Respondent**
IZAK BOSMAN MARAIS	**First Intervening Party**
JAN BOSMAN MARAIS	**Second Intervening Party**

In the application of:

SHIVA URANIUM (PTY) LIMITED (IN BUSINESS RESCUE)	**First Applicant**
CHRISTOPHER KGASHANE MONYELA	**Second Applicant**

and

THE COMPANIES AND INTELLECTUAL

PROPERTY COMMISSION	**First Respondent**
MOHAMED MAHIER TAYOB	**Second Respondent**
EUGENE JANUARIE	**Third Respondent**

Issue(s) for determination: This is an urgent application for an order that the Companies and Intellectual Property Commission must accept for filing Form CoR 123.2 appointing Mr. Juanito Martin Damons as the senior business rescue practitioner of Shiva Uranium (Pty) Ltd (in business rescue) and remove Form CoR 123.2 purportedly appointing Mr. Mohamed Mahier Tayob and Mr. Eugene Januarie as business rescue practitioners of Shiva Uranium (Pty) Ltd (in business rescue).

Coram: Lindelani Daniel Sikhitha, Khatija Tootla and Prof P. A. Delport

Majority Decision by: Lindelani Daniel Sikhitha

Concurring: Khatija Tootla

Minority Decision by: Prof PA Delport

Date of Hearing: 31 October 2018

Decision handed down on 27 November 2018

MAJORITY DECISION (Reasons and Order)

INTRODUCTION

[1] The First Applicant is Shiva Uranium (Pty) Limited (in business rescue) with registration number 1921/006955/07 (previously known as Uranium One Africa Limited ("Shiva") which is a private company duly registered and incorporated with limited liability in accordance with the Company Laws of the

Republic of South Africa with its registered office situate 1A Berg Street, Hartebeesfontein.

[2] The Second Applicant is Christopher Kgashane Monyela who is an adult male business rescue practitioner of Khaya Trustees (Pty) Limited of 287 Lynwood Road, Menlo Park, Pretoria.

[3] The First Respondent Companies and Intellectual Property Commission ("CIPC") with its office situate DTI Campus, Block F, 77 Meintjies Street, Sunnyside, Pretoria.

[4] The Second Respondent is Mahomed Mahier Tayob ("Tayob"), a business rescue practitioner of Forensic Auditors with its office situate 562 Main Road, Erasmia, Pretoria. The Second Respondent is cited because he may have an interest in the outcome of the application.

[5] The Third Respondent is Eugene Januarie ("Januarie"), a liquidator of Undiwell (Pty) Limited with its office situate 125 Van Wouw Street, Groenkloof, Pretoria. The Second Respondent is cited because he may have an interest in the outcome of the application.

[6] The First Intervening Party is Izak Bosman Marais who is an adult male employed by Shiva as Mineral Resource Manager. The First Intervening Party is residing at 52 Eenheid Street, Hartbeesfontein.

[7] The Second Intervening Party is Jan Bosman Marais who is an adult male employed by Shiva as an Information Technologist. The Second Intervening Party is residing at 34 Jansen Street, La Hoff, Klerksdorp.

[8] The First and Second Intervening Parties brought an application to intervene in the proceedings. There was no opposition to such application and on 31 October 2018 the Tribunal granted the First and Second Intervening Parties leave to intervene in the proceedings.

RELIEF SOUGHT

[9] The Applicants are seeking that the Companies Tribunal ("the Tribunal") should grant the following relief:

9.1 that the periods for the filling of documents be reduced and the matter be heard in accordance with the periods provided for in Form 147 filed herewith;

9.2 orders directing the recording officer of the Companies and Intellectual Property Commission (the First Respondent) to:

9.2.1 accept for filing Form CoR 123.2 appointing Mr. Juanito Martin Damons ("Damons") as the senior business rescue practitioner of Shiva Uranium (Pty) Ltd (in business rescue) (the First Applicant) in terms of regulation 168(5) of the Companies Regulations, 2011 ("the Regulations") and to file same in terms of section 129(2)(b) of the Companies Act, 2008 (Act No. 71 of 2008) ("the Act"); and

9.2.2 remove Form CoR 123.2 purportedly appointing Tayob (Second Respondent) and Januarie (Third Respondent) as business rescue practitioners of the First Applicant in terms of regulation 168(7) of the Regulations.

9.3 that costs should be granted against any respondent opposing the application.

BACKGROUND FACTS

[10] On 20 February 2018, the First Applicant's board of directors resolved that the First Applicant was financially distressed, but could be rescued, therefore adopted a resolution in accordance with section 129 of the Act to place the First Applicant under supervision and to commence business rescue proceedings. The First Applicant's board further adopted a resolution for the appointment of Louis Klopper ("Klopper") and Kurt Knoop ("Knoop") as First Applicant's joint business rescue practitioners.

[11] During the time of their appointment Klopper and Knoop compiled and published a proposed business rescue plan. The plan envisioned the sale of Shiva's assets to third parties and the payment of a dividend to creditors. A meeting in terms of section 151 of the Act to vote on the proposed business rescue plan was convened but the First Applicant's creditors approved a vote to postpone the said meeting until 15 October 2018 in order to find a purchaser in order to include the proposed sale in a business rescue plan and thereafter, to vote on the possible adoption of the plan.

[12] On 23 March 2018, the IDC, being one of First Applicant's largest creditors, instituted urgent legal proceedings in the Gauteng Division of the High Court ("the North Gauteng High Court") under case number: 21288/2018, to have Klopper and Knoop removed from office as business rescue practitioners in terms of section 130(1)(b) of the Act, and to have Cloete Murray ("Murray") appointed as replacement business rescue practitioner.

[13] On 01 June 2018, the First Respondent duly appointed the Second Applicant as the joint business rescue practitioner with Murray. On 18 September 2018,

Murray and Second Applicant appointed Damons who is a senior business rescue practitioner, as an additional business rescue practitioner of the First Applicant. Form CoR 123.2 was submitted to the First Respondent together with the required resolution and confirmation by Damons that he complies with the prescripts contained in section 138 of the Act.

[14] On 19 September 2018, Murray resigned as business rescue practitioner, which resignation was confirmed by the North Gauteng High Court on 25 September 2018.

[15] On 01 October 2018, the First Respondent notified Devon Brikkels (acting on behalf of Damons) that it cannot process the application for appointment of Damons due to the potential conflict of interest as envisaged in section 138(e). The Second Applicant instructed Smit Sewgoolam Incorporated to query the decision of the First Respondent which they did on several occasions.

[16] On 24 September 2018, George Peter Van Der Merwe ("Van Der Merwe") signed Form CoR 123.2 in terms of which notice of the purported appointment of Tayob and Januarie as business rescue practitioners of the First Applicant was given and the said Form was filed with the First Respondent on 03 October 2018. The Second Applicant was informed about such appointment and filing of Form CoR 123.2 on 09 October 2018. The Second Applicant immediately instructed his attorneys to object to the aforesaid filing in terms of regulation 168(6) of the Regulations and same was forwarded by email communication on 09 October 2018.

[17] In terms of regulation 168(7), a filing that has been challenged in terms of sub-regulation (6) is a nullity and must be removed from the register. The Applicants did challenge the filing of Form CoR 123.2. Instead of doing what the regulation

stipulates, the First Respondent appears to have challenged the authority of the attorneys representing the Applicants to file Form CoR 168 challenging the filing of Form CoR 123.2 referred to paragraph 16 above. The First Respondent did this despite the fact that there was a copy of Special Power of Attorney attached to Form CoR 168 duly authorising Wilhelm Bouwer Van Niekerk to file such Form on behalf of the Applicants.

[18] There were several email communications exchanged between the Applicants' attorneys and the First Respondent regarding the refusal by the First Respondent to do the following:

18.1 accept for filing Form CoR 123.2 giving notice of appointment of Damons as business rescue practitioner; and

18.2 remove Form CoR 123.2 giving notice of the appointment of Tayob and Januarie as business rescue practitioners of the First Applicant.

[19] The current application is therefore brought on an urgent basis to seek, amongst others, orders directing the recording officer of the First Respondent to accept for filing Form CoR 123.2 giving notice of the appointment of Damons as business rescue practitioner of the First Applicant and to remove Form CoR 123.2 giving notice of the appointment of Tayob and Januarie as business rescue practitioners of the First Applicant.

THE ISSUE OF URGENCY OF THE CURRENT APPLICATION

[20] The Companies Tribunal ("the Tribunal") has prescribed rules and procedures that govern the way it functions and how proceedings are commenced and adjudicated. Ordinarily, parties are obliged to afford each other time for the

filing of notices and affidavits and the applicable normal time periods are set out in the Regulations.

[21] There are, however, unique disputes that give rise to circumstances that would result in grave prejudice and harm to a party if such party was to be required to follow the normal time periods strictly. In such circumstances, time is a critical factor and the applicant cannot follow the normal time periods due to the harm that the applicant will suffer if it were to do so. In such an instance, a party is allowed to approach a court / tribunal by way of an urgent application in terms of which an urgent relief is sought.

[22] The Applicants brought the current application on an urgent basis and they seem to have done so relying on sections 180 to 184 of the Act read together with regulation 147 of the Regulations. Sections 180 to 184 of the Act deal with Tribunal adjudication procedures. Regulation 147 of the Regulations deals with applications for condonation of late filing of a document, or to request an extension or reduction of the time to file a document. These applications are brought by way of filing form CTR 147.

[23] I have however noted that the Regulations as they currently stand do not provide for the issue of bringing of urgent applications before the Tribunal. Where does this then put a party who wish to approach the Tribunal on an urgent basis? I am of the view that the answer to this question is provided for in regulation 154 of the Regulations which reads as follows:

> "(1) If, in the course of proceedings, a person is uncertain as to the practice and procedure to be followed, the member of the Tribunal presiding over a matter-

(a) **may give directions on how to proceed**; and

(b) **for that purpose, if a question arises as to the practice or procedure to be followed in cases not provided for by these Regulations, the member may have regard to the High Court Rules**." [Own emphasis added]

[24] Having regard to the provisions of regulation 154(1)(b), I am convinced that I should follow the practice and procedure followed by the High Court when dealing with this urgent application. It follows therefore that I should have regard to the High Court Rules (Uniform Rules of Court) which deal with launching of urgent applications before the courts. Urgent applications must be brought in accordance with Rule 6 and the guidelines set out in cases such as *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A) at 782A-G, *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makins Furniture Manufacturers)* 1977 (4) SA 135 (W) and *Sikwe v SA Mutual Fire & General Insurance* 1977 (3) SA 438 (W) at 440G-441A.

[25] Rule 6(12) of the High Court Rules, deals with launching of urgent applications in the High Court and it reads as follows:

"(12) (a) **In urgent applications the court or a judge may dispense with the forms and service provided for in these Rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these Rules) as to it seems meet**.

(b) In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course.

(c) A person against whom an order was granted in his absence in an urgent application may by notice set down the matter for reconsideration of the order." [Own emphasis added]

[26] In launching an urgent application, an applicant will request the court to condone the applicant's non-compliance with the High Court Rules that prescribe the manner and time periods that are applicable. The court will essentially be called upon to give preference to the applicant to prevent the prejudice and harm that may materialise or continue if the respondent's behaviour complained of continues unabated.

[27] In seeking condonation from the court, the applicant must clearly demonstrate to the court that the application is urgent and warrants being heard as such. In doing so, the applicant must justify the truncated time periods placed on the respondent for the filing of affidavits.

[28] The courts generally do not recognise commercial urgency. By commercial urgency I am referring to disputes regarding a claim for payment of money from one party to another. The courts are generally not tolerant of such disputes being enrolled on the urgent roll as alternative remedies are available in the normal course. This therefore begs a question as to what do the courts

consider to be urgent? Whether or not a dispute is urgent for purposes of a court application should be determined carefully on a case-by-case basis.

[29] What are then the important factors which a party must consider before launching an urgent application? The party intending to launch an urgent application should carefully consider what its prejudice is; how serious it is and its impact; and whether such prejudice can be cured by some other remedy in law. Sometimes an alternative remedy is available, however, interim urgent relief may be required to minimize prejudice or harm pending finalization of the matter.

[30] The time when the applicant gained knowledge of the respondent's prejudicial behaviour or actions is vitally important because the applicant must take steps to launch its application as expeditiously as possible after learning of the harm or prejudice. An applicant that knows of prejudice or harm that it is suffering and does nothing about it for a period of time and then launches an urgent application is likely to have its application struck from the urgent roll with an order to pay the costs of the respondent. Once the prejudice or harm has materialised or come to the knowledge of the applicant, the applicant must immediately prepare court papers and file its application promptly to demonstrate that the matter is urgent and warrants being heard as such. The presumption if an applicant delays in filing its application is that the prejudice or harm being suffered is not of such a serious nature and the court is therefore unlikely to entertain the application.

[31] In summary the following are stated to be the main reasons for bringing the current application on an urgent basis by the Applicants:

31.1 The IDC does not oppose the relief sought in the application.

31.2 In order to rescue the First Applicant, it is necessary to enter into agreements with third parties to take over the operations of the mines so as to ensure, that among others, the First Applicant's employees, the security tasked with protecting the First Applicant's assets, SARS and Eskom be paid what is owed to them.

31.3 Heads of Agreement for contract mining of coal is presently under implementation.

31.4 A memorandum of agreement has been negotiated in relation to the reclamation of gold from the First Applicant's slime dams which will not only generate revenue but will also reduce First Applicant's statutory rehabilitation obligations. The agreement is ready to be signed but cannot, under present circumstances, be concluded. The intended agreement requires the performance by the intended contractor of a due diligence and then thereafter the establishment of the site. This also cannot be progressed under present circumstances and has a serious knock on effect on the ability to generate much required cash flow of R600 000.00 per month increasing to R3.5 Million.

31.5 There is a need to obtain clarity as to who the practitioners of the First Applicant are. This must be done as soon as possible, and the need creates necessary urgency to have this application heard on an urgent basis. Without certainty as to who the business rescue practitioners are, the rescue of First Applicant cannot proceed and the business rescue plan cannot be prepared. This is to the obvious prejudice of the First

Applicant and all affected person and it is therefore important that certainty should be restored as soon as possible.

[32] The reasons given by the Applicants to justify the bringing of the current application on an urgent basis seems to be valid. I therefore do agree with the Applicants that the current application is urgent and should therefore be treated as such. I now proceed to deal with the merits of the application.

THE MERITS OF THE CURRENT APPLICATION

[33] It is clear from the papers placed before the Tribunal that the current application is twofold. Firstly it deals with the refusal by the First Respondent to accept and process for filing Form CoR 123.2 giving notice of appointment of Damons as business rescue practitioner as filed by the Applicants. Secondly it is dealing with the refusal by the First Respondent to accept and process the filing of Form CoR 168 challenging the filing of Form CoR 123.2 giving notice of the appointment of Tayob and Januarie as business rescue practitioners of the First Applicant as filed by the Applicants.

[34] In terms of section 187(4), some of the functions of the First Respondent which are relevant to the current application are the following:

34.1 to establish and maintain in the prescribed manner and form-

(i) a companies register; and

(ii) **any other register contemplated in this Act, or in any other legislation that assigns a registry function to the First Respondent;**

34.2 **to receive and deposit in the registry any documents required to be filed in terms of the Act;** [Own emphasis added]

34.3 make the information in those registers efficiently and effectively available to the public, and to other organs of the state; and

34.4 perform any related functions assigned to it by legislation, or reasonably necessary to carry out its assigned registry functions.

[35] Regulation 168 of the Regulations deals with the filing of documents with regulatory agencies created in terms of the Act. The term "regulatory agency" is defined in regulation 2(f) to mean the CIPC, the Takeover Regulation Panel and the Tribunal.

[36] In terms of regulation 168(4)(a) of the Regulations, the recording officer of a regulatory agency **must take reasonable steps to**:

36.1 **confirm the identity of any person filing a document with that regulatory agency;**

36.2 **verify that the person filing a document on behalf of, or in relation to a juristic person, has the right to file that document in their own name, or is authorised to file the document on behalf of another person who has the right to file the document; and**

36.3 **verify the authenticity of every document being filed**. [Own emphasis added.]

[37] In addition, a regulatory agency may, in terms of regulation 168(4)(b), demand that the person seeking to file a document supply reasonable evidence for the purposes contemplated in regulation 1684(a) of the Regulations.

[38] **A regulatory agency may only reject any document on the grounds that the requirements of regulation 168(4)(a), or the demand issued in terms**

of regulation 168(4)(b), have not been satisfied. [Own emphasis added.] I now turn to deal with the refusals by the First Respondent to accept the two documents (Form CoR 123.2 and Form CoR 168) presented for filing by the Applicants.

Refusal to accept and process Form CoR 123.2 giving notice of the appointment of Damons as business rescue practitioner

[39] The First Respondent informed Damons through an email dated 01 October 2018 of its decision not to process the application for the appointment of Damons due to the potential conflict of interest as envisaged in section 138(e) of the Act.

[40] Upon closer scrutiny, it is clear that section 138(e) does not provide any basis upon which the First Respondent can refuse to accept and process the filing of a document by a party. This can only be a ground upon which the First Respondent could challenge the resolution passed by the business rescue practitioners to appoint Damons as an additional business rescue practitioner. It is common cause that such resolution remain unchallenged and therefore it remains to be valid until such time that it is set aside by a court. The reason furnished by the First Respondent to refuse to accept and process the filing of Form CoR 123.2 filed by the Applicants is irrational and not in line with what is provided as grounds for refusal to accept a document in terms of regulation 168(4)(a) of the Regulations.

[41] The First Respondent is a creature of statute and can only do what it is authorised to do in terms of legislation from which it derives its own existence and powers. In simple terms, the First Respondent cannot assign to itself

powers which it does not have in terms of the Act (including the Regulations). It follows therefore that any conduct of the First Respondent that is done outside the parameters of the Act and Regulations will be unlawful and can be set aside on review. The grounds upon which the First Respondent is permitted to refuse to accept and process a document for filing are fully outlined in regulation 168(4)(a) and (b) of the Regulations.

[42] I was therefore not able to find any lawful basis for the refusal of the First Respondent to accept and process for filing Form CoR 123.2 giving notice of the appointment of Damons as a business rescue practitioner. It is clear that such a refusal is based on misunderstanding of functions and the powers that are assigned to the First Respondent in terms of the Act and the Regulations. It is my view therefore that the refusal by the First Respondent is unlawful and should be set aside on review by the Tribunal as set out in regulation 168(5) of the Regulations.

Refusal to accept and process CoR 168 challenging the filing of Form CoR 123.2 giving notice of the appointment of Tayob and Januarie as business rescue practitioners

[43] On 09 October 2018, Form CoR 168 was filed on behalf of the Applicants which effectively challenged the filing of Form CoR 123.2 giving notice of the appointment of Tayob and Januaries as business rescue practitioners in terms of regulations 168(6) of the Regulations. The First Respondent refused to accept and process the filing of Form CoR 168 filed on behalf of the Applicants on the basis that the Second Applicant as a junior business rescue practitioner does not have authority to file Form CoR 168 on behalf of the First Applicant.

Reference was also made to section 139(3) of the Act by the First Respondent. This section does not have any relevance to the grounds upon which the First Respondent can refuse to accept and process the filing of a document by a party in terms of regulation 168(4)(a) and (b) of the Regulations.

[44] Form CoR 168 that is the subject of refusal by the First Respondent was filed by Mr. Wilhelm Bouwer van Niekerk ("Mr. van Niekerk") in his capacity as an attorney acting on behalf of the Applicants. He was acting in terms of the Power of Attorney duly signed by the Second Applicant on the 09th day of October 2018. The First Respondent did not attempt to challenge the authority of Mr. van Niekerk to file Form CoR 168 on behalf of the Applicants. It rather strangely chose to attack the capacity of the Second Applicant to represent the First Respondent due to the fact that he is a junior business rescue practitioner. This is strange because the Second Applicant did not have anything to do with the filing of Form CoR 168.

[45] Be that as it may, Mr. van Niekerk did have the necessary authority to file Form CoR 168 on behalf of the Applicants and the refusal by the First Respondent to accept and process the filing of Form CoR 168 is therefore unlawful and should be set aside on review. Such refusal is clearly based on the misunderstanding of the functions and powers that are assigned to the First Respondent in terms of the Act and the Regulations.

[46] In terms of regulation 168(7), a filing that has been challenged in terms of regulation 168(6) automatically becomes a nullity and should be removed by the First Respondent from the register. There is no discretion that is given to the First Respondent in terms of regulation 168(7). It is my view therefore that

the refusal by the First Respondent is unlawful and should be set aside on review by the Tribunal as set out in regulation 168(5) of the Regulations.

FINDINGS

[46] I therefore find that the refusal by the First Respondent to accept and process the filing of Form CoR 123.2 giving notice of the appointment of Damons as an additional business rescue practitioner of the First Applicant is unlawful and should be set aside.

[47] I further find that the refusal by the First Respondent to accept and process the filing of Form CoR 168 challenging the filing of Form CoR 123.2 giving notice of appointment of Tayob and Januarie as business rescue practitioners of the First Applicant is unlawful and should be set aside.

COSTS

[48] There is no doubt that the Applicants were forced to bring the current application on an urgent basis due to the conduct of the First Respondent. The First Respondent clearly did not understand its powers and functions in terms of the Act and the Regulations. And as a regulatory agency, a high level of service standard is expected from the First Respondent.

[49] The attitude displayed by the First Respondent on the correspondence and papers placed before the Tribunal is indicative of a party that is not concerned about the financial prejudice that it has placed parties such as the Applicants under. This litigation could have been avoided had the First Respondent understood its powers and functions. The First Applicant is a company that is under business rescue and should not have been forced to institute litigation

which could have been prevented. The Tribunal must therefore show its displeasure by ordering the First Respondent to pay the costs of the Applicants.

[50] The Second and Third Respondents opposed the application and their arguments for opposing such application did not have merits at all. It follows therefore that considering the outcome of the current application they too should bear the costs of the Applicants.

[51] The First and Second Intervening Parties were in actual fact opposing the applications. In other words, they were respondents who applied to intervene in the proceedings. It follows therefore that since the two intervening parties were in actual fact respondents who opposed the application and considering the outcome thereof, they too should bear the costs of the Applicants.

THE ORDER

[52] I therefore make the following order:

52.1 The First Respondent is hereby directed to accept and process the filing of Form CoR 123.2 giving notice of the appointment of Juanito Martin Damons as a business rescue practitioner of the First Applicant (Shiva Uranium (Pty) Ltd (in business rescue)) within a period of 5 (five) days from date of this order.

52.2 The First Respondent is hereby directed to accept and process the filing of Form CoR 168 challenging the filing of Form CoR 123.2 giving notice of the appointment of Mahomed Mahier Tayob and Eugene Januarie as business rescue practitioners of the First Applicant (Shiva Uranium (Pty)

Ltd (in business rescue)) within a period of 5 (five) days from date of this order.

52.3 The First, Second and Third Respondents as well as the First and Second Intervening Parties as hereby ordered to jointly and severally pay the costs of the First and Second Applicants which costs shall include the costs of two counsels.

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Lindelani Sikhitha

Tribunal Member

27 November 2018

Concurring:

I have read the decision of my colleague, Lindelani Daniel Sikhitha, and I am in agreement with his decision.

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Khatitja Tootla
Tribunal Member

MINORITY DECISION

[53] I agree with the facts and the law as succinctly and correctly set out in the decision of Lindelani Daniel Sikhitha above and there is no need to repeat it.

[54] I am in agreement with the findings and orders made but, however, on different grounds as set out hereunder in respect of the findings.

[55] In para [46] the finding is that "...the refusal by the First Respondent to accept and process the filing by the Applicants of Form CoR 123.2 giving notice of the appointment of Damons as an additional business rescue practitioner is unlawful and should be set aside."

[56] I am in total agreement with the motivation. However, this is/was an administrative action by the CIPC not to accept the filing for reasons not provided for in the Act and a review in terms of, *inter alia*, the Promotion of Administrative Justice Act No. 3 of 2000 in respect of the refusal is required and this falls outside the jurisdiction of the Companies Tribunal. The validity of the exercise of the discretion of the CIPC will be determined in the review process. In any case, Regulation 168 which gives certain powers to the Tribunal, is also only applicable to "identity"/"authority" and does not apply to any other substantive grounds (see also "file" in section 1 of the Act and non-binding opinion "The date on which an amendment of a memorandum of incorporation of a company takes effect and the meaning of "filing" (November 2011)" para 5). It should be added that filing is merely a notice of an

appointment as business rescue practitioner, and if the appointment is valid, the non-acceptance of an attempted filing of the CoR 123.2 does not invalidate a valid appointment and *vice versa*.

[57] In para [47] the finding is "...that the refusal by the First Respondent to accept and process the filing by the Applicants of Form CoR 168 challenging the filing of Form CoR 123.2 giving notice of appointment of Tayob and Januarie as business rescue practitioners for the First Applicant is unlawful and should be set aside."

[58] In terms of Regulation 168(4) a person who attempts to file *in respect of a company* has certain remedies if the CIPC refuses acceptance and can apply to the Tribunal for an order in favour of the applicant and "against" the CIPC.

[59] However, if the company challenges a document filed in terms of Regulation 168(6), the CIPC does not have a discretion to refuse the filing of the CoR 168, except under the circumstances as in the non-binding opinion "The date on which an amendment of a memorandum of incorporation of a company takes effect and the meaning of "filing" (November 2011)" para 5 which states that the CIPC can refuse acceptance of a document to be filed:

> "...when the CIPC is unable to verify that the person filing the document/form has the right to file that document or is authorised to file it on behalf of another person who has the right to file it (reg 168). (In the latter two instances the CIPC's refusal to accept a document might be taken on direct appeal to the Companies Tribunal)."

[60] The issue is whether the sole business rescue practitioner, the Second Applicant, had the authority to act for the company and to file the CoR 168, as there was a vacancy in respect of the second (required) business rescue practitioner. The power of attorney given to Wilhelm Bower van Niekerk to file the CoR 168 was therefore ineffective, and therefore the challenge in terms of regulation 168(6) is invalid due to the lack of authority from the company. The filing of the CoR 123.2 giving notice of appointment of Tayob and Januarie as business rescue practitioners for the First Applicant is therefore not a nullity due to Regulation 168 (7).

[61] However, the original purported appointments of Tayob and Januarie as business rescue practitioners for the First Applicant were made by a single director of the applicant who has a board of more than one. On the basis of section 66 of the Act and the common law, that appointment was void due to lack of authority (see *Kaimowitz v Delahunt and Others* 2017 (3) SA 201 (WCC); *Moraitis Investments (Pty) Ltd and Others v Montic Dairy (Pty) Ltd and Others* [2017] 3 All SA 485 (SCA) para 35 and *Henochsberg on the Companies Act 71 of 2008* at 250(5) and authorities cited). A challenge in terms of Regulations 168 (6) and (7) was therefore not necessary, under the common law, to invalidate the appointments. As there is no exercise of a discretion by First Respondent to accept the CoR 123.2, a review is not called for in terms of the Promotion of Administrative Justice Act No. 3 of 2000. It should be added, *ex abundanti*, that filing is merely a notice of an appointment as business rescue practitioner, and if the appointment is void, filing of the purported appointment in CoR 123.2 does not cure defects in the appointment

and *vice versa*. Therefore, the purported appointments of Tayob and Januarie are *void ab initio*.

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Prof P.A. Delport