

IN THE COMPANIES TRIBUNAL OF THE REUBLIC OF SOUTH AFRICA

("The Tribunal")

CASE NO. CT00730ADJ2021

In re: In an application in terms of Regulation 126(8)(a)
of the Companies Act 71 of 2008 for a review of a
refusal by the CIPC to be granted a license as a senior
business practitioner.

In an Ex parte Application by:

Mandla Stanley Mokoena

Applicant

AND

CIPC

Respondent

DECISION

INTRODUCTION:

- [1] The applicant is Mandla Stanley Mokoena, an adult male Business Rescue Practitioner ("BRP"), who conducts his business in Bokfontein, Brits, North West. The applicant has brought this application in terms of Regulation 126(8) of the Companies Act ("the Act"), for a review and to set aside the refusal by the respondent to grant him a license as a senior BRP.

- [2] The respondent is the Companies and Intellectual Property Commission (CIPC), with its offices situated at 77 Meintjies Street, the DTI Campus, Block F, Sunnyside, Pretoria, represented herein by Mr. Vuyani Nkohla, in his capacity as the Senior Manager for the Business Unit within the Business Registers division that deals with Directors, Members and Practitioners.

BACKGROUND:

- [3] The application, in the form CTR142 and an affidavit, was filed with the Tribunal and served upon the respondent on 23 June 2021, the respondent has responded by filing its answering affidavit, which the respondent has submitted is meant "to answer only but not oppose" the application.
- [4] The applicant submitted that he has business turnaround experience in terms of the Act and Regulation 127, and that his involvement with business turnaround started in May 2008 when he was responsible for International Finance Corporation (IFC) programme which included the Lonmin Platinum Mine Joint SMME Development Programme. His key deliverables were to train SMMEs improve their efficiency and profitability and ensure they are sustainable enterprises. He submitted further that for over 12 years he has been involved in SMME development and business turnaround, and that during the period May 2008 to June 2010 "we" have developed over 100 SMMEs (Lonmin/IFC programme). Based on these projects, the applicant believes he qualifies for a senior BRP license.
- [5] In its answering affidavit, Mr. Nkohla, submitted that he noted from the applicant's founding affidavit that the applicant claimed has experience in turnaround in terms of the Companies Act, and in terms of Regulation 127, and that his experience in

turnaround started in May 2008. Mr. Nkohlha thereafter proceeds to outline the provisions of Regulation 127(2)(c)(i)-(iii), which provides the classification of practitioners as follows:

- (i) **Senior practitioner** means a person who is qualified to be appointed as business rescue practitioner in terms of section 138(1) and who, immediately before being appointed as practitioner for a particular company, has actively engaged in business turnaround practice before the effective date of the Act, or as a business rescue practitioner in terms of the Act, for a combined period of **at least 10 years**.
- (ii) **Experienced practitioner** means a person who is qualified to be appointed as a business rescue practitioner in terms of section 138(1) and who, immediately before being appointed as practitioner for a particular company, has actively engaged in business turnaround practice before the commencement date of the Act, as a business rescue practitioner in terms of the Act, for a combined period of **at least 5 years**.
- (iii) **Junior practitioner** (respondent erroneously wrote Senior practitioner) means a person who is qualified to be appointed as a business rescue practitioner in terms of section 138(1) and who, immediately before being appointed as practitioner for a particular company, has either-
 - (aa) not previously engaged in business turnaround practice before the effective date of the Act, or acted as a BRP in terms of the Act; or

(bb) has actively engaged in business turnaround practice before the effective date of the Act, or as a BRP in terms of the Act, for a combined period of **less than 5 years.**

- [6] Based on the foregoing, and the fact that by his own admission, the applicant has made reference to the period 2008 to 2010, and 2010 to 2012 with regards to his experience in turnaround, the respondent argues that such experience falls short of 5 years, as Regulation 127 refers to active engagement in turnaround practice before the effective date of the Act, which effective date was May 2011, and therefore renders the applicant qualified for junior BRP, as per his application with the CIPC and his affidavit for relief in this application.

CASE LAW

- [7] I will not repeat the provisions of Regulation 127(c)(i)-(ii) as clearly quoted from the Regulations by the respondent above. Section 138 (Chapter 6, Part B) of the Act, provides:

- (1) A person may be appointed as the business rescue practitioner of a company only if the person-
- (a) is a member in good standing of a legal, accounting or business management profession accredited by the Commission;
 - (b) **has been licensed as such by the Commission in terms of subsection (2);**
 - (c) is not subject to an order of probation in terms of section 162(7);

- (d) would not be disqualified from acting as a director of the company in terms of section 69(8);
 - (e) does not have any other relationship with the company such as would lead to a reasonable and informed third party to conclude that the integrity , impartiality or objectivity of that person is compromised by that relationship; and
 - (f) is not related to. person who has a relationship contemplated in paragraph (d)
- (2) **For the purposes of subsection (1)(b), the Commission may license any qualified person to practice in terms of this Chapter and may suspend or withdraw any such license in the prescribed manner.**
- [8] Regulation 126 provides for the accreditation of professions and business rescue practitioners, and subsection 8 specifically provides that *"an applicant whose application has been refused, or who has been issued a conditional license, or a licensee whose license has been suspended, or revoked, may apply to the Tribunal to review the Commission's decision in the matter, and **the Tribunal may partially or entirely confirm or set aside the Commission's decision.***

EVALUATION & FINDINGS

- [9] The basis of this application for a review of the decision of the Commission, as submitted by the applicant in his affidavit, is that the Commission did not consider the applicant's experience as a turnaround practitioner, which experience ranged from May 2008 to June 2010 and from June 2010 to February 2012. As a result of this experience, the respondent gave the applicant a license under the classification

of a junior BRP¹. As a result of this outcome, the applicant applied for a review of the classification to that of senior BRP². The respondent responded on 07 June 2021³, and confirmed that all information that the applicant had provided regarding his experience in business turnaround was post 2011, after the Act became effective, and in terms of Regulation 127, business turnaround experience is considered before the effective date of the Act. Having considered the CV of the applicant, the experience submitted fell short in terms of the criteria for the classification of senior BRP in line with the provisions of regulation 127(c)(i). The request for a review of the classification was unsuccessful on that basis. In the period May 2008 to June 2010, in the programme with IFC/Lonmin, the applicant submitted that he was involved in turnaround of over 100 SMME's. I agree that on the basis of the applicant's submission, the experience prior to the Act coming into effect (May 2011), falls short of 5 years and therefore the applicant does not qualify for a license as a senior BRP. The number of turnaround projects that the applicant was involved in during this period bears no relevance to the required duration of experience.

ORDER

[10] In the premises, the order is made as follows:

- The application for a review and to set aside the refusal by the respondent to classify the license of the applicant from junior to senior business rescue

¹ license certificate dated 25 March 2021

² Letter to CIPC dated 24 April 2021

³ CIPC letter issued by Mr. Vuyani Nkohla ref:BRP file No 1044

practitioner is dismissed. The Commission's decision to issue a junior BRP license⁴ is entirely confirmed.

B. Zulu

Member: Companies Tribunal

01 December 2021

⁴ issued on 25 March 2021 and valid for 3 years until 25 March 2024