IN THE COMPANIES TRIBUNAL OF THE REUBLIC OF SOUTH AFRICA

("The Tribunal")

CASE NO. CT00781ADJ2021

In re: In an application in terms of Regulation 126(8) 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 rescuepractitioner.

In the matter between:

Gabriel Mauritz de Kock **Applicant**

AND

Companies and Intellectual Property Commission **Respondent**

DECISION

INTRODUCTION:

[1] The applicant is Gabriel Mauritz de Kock, an adult male Junior Business Rescue Practitioner ("BRP"), who conducts his business at 45 Elgar Street, Vanderbijlpark, SW5, 1911. The applicant has brought this application in terms of regulation 126(8),

for a default order in terms of regulation 153[1], of the Companies Act ("the Act"), to review and set aside the awarding by the Companies and Intellectual Property Commission of a junior business rescue licence instead of a senior business rescue licence.

[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. According to the records filed with the Tribunal, the respondent was served with the application on the 06th August, one day after the issue of the stamped CTR142 by the Tribunal's registry. The application was served upon various email addresses recognized for communicating legal processes with the respondent, which emails include; corporatelegalservices@cipc.co.za, LSteenkamp@cipc.co.za, TMulaudzi@cipc.co.za and EMonyelo@cipc.co.za.

BACKGROUND:

[3] The application for relief, in the form CTR142 with the accompanying affidavit, was filed with the Tribunal on 05 August 2021, and served upon the respondent via email on 06 August 2021, as alluded to above. The respondent did not respond by filing its answering affidavit, and the 20 day period having expired on 03 September

[1] (1) If a person served with an initiating document has not filed a response within the prescribed period, the initiating party may apply to have the order, as applied for, issued against that person by the Tribunal.
(2) On an application in terms of sub regulation (1), the Tribunal may make an appropriate order-
(a) after it has heard any required evidence concerning the motion; and
(b) if it is satisfied that the notice or application was adequately served.

2021[2], the applicant has filed this notice of motion in terms of regulation 145(3)[3] , requesting the Tribunal to award him a senior business rescue practitioner licence as opposed to the junior business rescue practitioner licence that was awarded by the respondent on 15 July 2021[4].

[4] The applicant submitted that he lodged an application with the respondent in July 2021, and that the new E-services portal was used to apply for the licence. The applicant applied for a senior business rescue practitioner licence, and while applying online through the portal, only a CV could be uploaded and there was no place for any additional supporting documents to support a request for a senior practitioner licence. As a result of not being able to upload the supporting documentation, this created an opportunity for a wrong decision to be made. The applicant further submitted that the feedback from the respondent as per the award of the licence does not indicate which experience was deemed to be acceptable for licence purposes and which was not, which made it impossible for a practitioner to know when they can reapply for their licence to be moved to an experienced level and or senior, and that this makes it impossible to determine if there is misperception or clarification required to ensure the correct licence is awarded. Based on the aforegoing, the applicant has applied to the Tribunal for a review and set aside of the respondent's decision to award a junior business licence practitioner,

[2] Regulation 143 provides: (1) Within 20 business days after being served with a complaint referral, or an application, that has been filed with the Tribunal, a respondent who wishes to oppose the complaint or application must-

(a) serve a copy of an Answer on the initiating party; and

(b) file the Answer with proof of service.

[3] A Notice of Motion to be made before the Tribunal, for any purpose in terms of the Act and there Regulations, must be in Form CTR 145.

[4] CIPC CoR 126.2 License certificate issued in favour of Gabriel Mauritz De Kock

based on the supporting documentation that he has now filed with the Tribunal, in favour of a senior business rescue practitioner licence.

CASE LAW

[5] Regulation 126 provides for accreditation of professions and licensing of business rescue practitioners. This application is based on regulation 126(8) which provides: "An applicant whose application has been refused, or who has been issued a conditional licence, or a licensee whose licence 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". The Act defines business rescue as proceedings to facilitate the rehabilitation of a company that is financially distressed, by providing for temporary supervision of the company, its management and assets, a temporary moratorium on the rights of claimants against the company or in respect of the property in its possession, and the development and implementation of a business rescue plan. The Act further defines a business rescue practitioner (BRP) as a person appointed to oversee a company during business rescue proceedings. Regulation 127 provides for persons who are eligible for appointment as a business rescue practitioner and the various classes/categories of business rescue practitioners according to experience in business rescue and or business turnaround practice[5]. Regulation 127(2)(c) classifies persons eligible to be appointed as practitioners in the following three groups:

[5] Business turnaround practice means activities of a professional nature engaged in before the effective date, that are comparable to the functions of a business rescue practitioner in terms of the Act.

(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** 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.

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 a 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.

EVALUATION & FINDINGS

[6] The basis of this application for a review of the decision of the Commission, as submitted by the applicant in his affidavit, is that as a result of his inability to submit detailed information to prove sufficient experience to be awarded a senior BRP licence via the e-services portal of the respondent , the respondent only made its decision based on the CV, which was the only document he could upload. The Act gives the Tribunal powers to partially or entirely confirm or set aside the

Commission’s (respondent) decision. It appears that the respondent did not make an error in coming to the decision to award a junior licence, on the basis of the CV, which does not show experience for a combined 10 years as provided for in regulation 127(c)(i). The Tribunal’s decision must be based on any procedural errors in the respondent's decision to award the junior BRP license, and under the current circumstances, it is apparent that the respondent made its decision solely based on the information that was brought before it, and on the basis of that information, the respondent made the correct decision to award a junior BRP licence. The circumstances of this case are quite similar to the opposed hearing over which my learned colleague Khashane Manamela presided over (CT00503ADJ2020). In that case, my colleague found that the applicant had not furnished sufficient details to prove that he had actively engaged in business turnaround practice before the effective date of the (Companies) Act, for a combined period of at least 10 years, to qualify him as a senior practitioner, "in fact, the applicant at the hearing appeared to 'concede' that the material placed before the CIPC may have not contained the necessary details in this regard. He labeled the omission as 'miscommunication' ". In coming to a decision, my colleague considered the fact that the CIPC was not provided with the detailed information placed before the Tribunal by the applicant during the hearing, as is the case with the present application. The outcome of the application with the CIPC was evaluated on the information provided by the applicant. The representative from the CIPC even admitted that the outcome may have been different had the CIPC been furnished with the information that was now tabled before the hearing. On the basis of the preceding considerations, the decision of the CIPC was confirmed by my learned colleague in its entirety.

I would be acting beyond my powers in considering information that was not submitted to the respondent in reaching its decision. This was an unfortunate system issue and the applicant will have to approach the respondent to get guidance on submitting all the supporting documentation via the e-Services portal or other alternative means. The Commission issued the applicant with the junior business rescue practitioner licence in accordance with the CV furnished by the applicant.

ORDER

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

- The application for a review and set aside of the award of a junior business rescue practitioner to the applicant is dismissed;
- The Commission's decision to issue a junior BRP license is entirely confirmed;
- The applicant is urged to approach the CIPC on the basis of a detailed application for the purposes of a consideration for a senior BRP licence as sought.

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B. Zulu

Member: Companies Tribunal

30 March 2022