COMPANIES TRIBUNAL OF SOUTH AFRICA

Case/File Number: CT00503ADJ2020

In the matter between:

FRANKTON FRENCEL GILLION Applicant

and

COMPANIES AND INTELLECTUAL PROPERTY COMMISSION Respondent

Presiding Member	:	Khashane La M. Manamela (Mr.)
Date of Hearing	:	28 January 2021
Date of Decision	:	19 February 2021

Summary: Application based on regulation 126(8) of the Companies Regulations, 2011 to review and set aside the decision of the Companies and Intellectual Property Commission (CIPC) certifying the applicant as an experienced business rescue practitioner – regulation 127(2)(c)(i) providing that certification as senior business rescue practitioner is granted to persons with at least 10 years' active engagement in business turnaround practice or as a business rescue practitioner - applicant asserting he has over 25 years' experience and that he qualifies for a licence as a senior business rescue practitioner – CIPC only recognising, as relevant, only 8 years of the 25 years – applicant providing, for the first time, details of his relevant experience during the hearing – but, CIPC informally noting the expanded details may qualify applicant for a different certificate or licence – held that the application is dismissed and CIPC's decision is confirmed in its entirety.

DECISION (Reasons and an Order)

Khashane La M. Manamela

Introduction

[1] The applicant, Mr. Frankton Frencel Gillion, is a chartered accountant of over 25 years' experience in a variety of business management and/or administration roles at various entities he previously worked for. He started his career at Ernst & Young from 1992 to 1995, where he did his articles of clerkship. Qualified as a chartered accountant, he worked in various capacities, among others, at the Industrial Development Corporation; the Development Bank of Southern Africa, National Empowerment Fund and Kagiso Tiso Holdings between 1995 and June 2017. In September 2020, he applied to the Companies and Intellectual Property Commission (the CIPC), the respondent, to be licensed as a business rescue practitioner (BRP). The CIPC considered his application and granted him a licence as an experienced BRP.[1] He is dissatisfied with this grading or category of the licence granted and assert in terms of the current application that the CIPC's decision is erroneous. He contends that he ought to have been granted a licence as a senior BRP. He applies - in terms of regulation 126(8)[2] of the Companies Regulations, 2011 (the Companies Regulations) - that this Tribunal review and set aside, in its entirety, the CIPC's decision. The application is opposed by the CIPC.

[2] The matter came before me on 28 January 2021 for a hearing on an opposed basis. The applicant appeared in person and Mr. Vuyani Nkohla, a senior manager of the CIPC, represented the CIPC. Ms. Lucinda Steenkamp, also from the CIPC, observed the proceedings. I reserved this decision after listening to submissions from both parties. At the end of the hearing I indicated the general direction the determination, likely to be

[1] See par [17] below, for a reading of regulation 127(2) of the Companies Regulations, 2011 (the Regulations) providing for different categories of certification or licensing for business rescue practitioners.
[2] See par [16] below, for a reading of regulation 126(8).

made in this matter, may take. This approach was significantly influenced by the peculiar developments at the hearing, which I would deal with in greater detail, below.

Brief background

[3] Naturally, the activities in the background of this matter were set in motion, so to speak, by an application to be licensed as a BRP lodged by the applicant with the CIPC. The application was lodged in early September 2020.

[4] On 17 September 2020, a meeting called "BRP Vetting Meeting" of the CIPC, chaired by Mr. Nkohla, took place. This was the same Mr. Nkohla who appeared at the hearing on behalf of the CIPC. It was at this meeting where it was decided that the applicant be issued with certificate or licence as an experienced BRP. An extract from the minutes of the meeting, provided by the CIPC to the applicant, reads in the material part:

> "Mr Gillion is a CA and has stated that his professional working experience spans over 25 years and having held positions at senior management and board level. From his application documents named Summary of relevant experience and Biographical details were looked at and the following salient points were raised by the committee:
>
> - Mr Gillion detailed much of the responsibilities that were in line with the portfolios/positions he held. What he achieved was during the course of his duties and the mandate of the institutions he was working for.
>
> - Mr Gillion didn't give details of the companies that needed restructuring and the cause for that and the outcome save KTH, Old RTT, Continuity SA, On Digital Media when he was working NEF and those were considered and the committee came to around 7-8 years of experience that can be linked to business turnaround.

> - The committee then unanimously agreed that Mr Gillion should be issued with the Business Rescue certificate with a category of an experience business rescue practitioner."

[underlining added for emphasis]

[5] Following the decision by the CIPC's vetting committee, the Commissioner of the CIPC issued the relevant certificate confirming the award of a licence of an experienced BRP to the applicant. Dissatisfied with the decision of the CIPC, the applicant – at first – attempted to resolve the issue with the CIPC and exchanged correspondences with CIPC's functionaries in this regard. He also escalated the matter to Advocate Rory Voller, the Commissioner of the CIPC, but in vain. Eventually, this review application ensued.

Applicant's case

[6] The applicant essentially argues that given his 25 years' experience he ought to have been awarded a licence at the level of senior BRP. He complains that he is in the dark with regard to the criteria employed when determining the outcome of his application. He concludes that the CIPC did not have regard of his credentials and made factual errors when considering his "work history and turnaround experience".

[7] Further, the applicant also complains that from a list compiled by the CIPC - in his possession - he is aware of individuals who have been appointed senior BRPs without the requisite background or experience. Also, he bemoans the fact that the category of

senior BRPs is dominated by white males and has fewer persons of colour. Some of these individuals did not have "the legal technical criteria of 10 years prior BRP or Turnaround experience" when they were awarded with a senior BRP licence, the applicant further complains.

[8] The applicant's case was tremendously expanded during the hearing of the matter from what it was in the papers filed with the Tribunal. This was significantly due to my probing – or even prompting, if you will – regarding the requirements of regulation 127 of the Companies Regulations dealing with the classification of persons eligible to be appointed as BRPs, as "senior practitioner and "experienced practitioner".[3] This approach was appropriate considering the issues material for the determination to be made in this matter and the fact that the applicant, as the *dominis litis*, appears to be a layperson in matters of law. But the latter statement ought not to be construed criticism of either the manner in which the papers were drafted or the oral submissions made at the hearing. The papers were well drafted and the applicant acquitted himself with aplomb at the hearing. But it was necessary to urge the applicant to address the specifics of his work history germane to the requirements of regulation 127.

[9] The "probing" exercise laid bare the fact that the applicant may have not furnished sufficient details to the effect that he was a person "who … has actively engaged in business turnaround practice before the effective date of the [Companies] Act, or as a business rescue practitioner in terms of the [Companies] Act, for a combined

[3] The third category of "junior practitioner" was always irrelevant to this matter.

period of at least 10 years".[4] In fact, the applicant at the hearing appeared to "concede" that the material he placed before the CIPC may not have contained the necessary details in this regard. He labelled the omission "miscommunication".

[10] The applicant's "concession" is located amongst the following exchanges from the transcribed record of the hearing:

> "MR MANAMELA: Okay. Let me ask. I am just having something in my mind here. I will give Mr Gillion a chance to respond. If you now were given this information, you being the royal you, but the CIPC actually, if you are given this information that you have now, are you able to revise your grading or licence and award a different licence?
> MR NKOHLA: Yes, Chair, we do have that process where *10* …[intervenes]
> MR MANAMELA: How quickly is that process?
> MR NKOHLA: Chair, our processes due to this COVID it takes plus minus four to five days.
> MR MANAMELA: Four to five days for the committee to sit and decide?
> MR NKOHLA: That is correct, Chair.
> MR MANAMELA: Okay. Anything else that you want to say, Mr Nkohla, with regard to the number of years?
> MR NKOHLA: No, Chair. *20*
> MR MANAMELA: Okay. Mr Gillion, your comments.
>
> [end of page, start of page]
>
> MR GILLION: Yes. Chair, I think it is unfortunate. I think if I listen to Mr Nkohla it is essentially a case of miscommunication as to what I think they are looking for and what I consider relevant experience. Because I agree with him that actually the entire KTH experience is in fact relevant, but then earlier on we are talking about they were strictly distressed companies. Now what I am saying to you is that if you were to take into

[4] Regulation 127(2)(c)(i).

account the entire six years of KTH as relevant experience, I would submit the entire four years of NEF is relevant because in NEF I was actually dealing with a burning platform. So in KTH the *10* experience is relevant because it was restructuring two businesses to become one, but in NEF it was actually completely a burning platform. The business was broken. It had no -it did not operate …[intervenes]

MR MANAMELA: But why did you not respond to Ms Masemola's request for more information, Mr Gillion?

MR GILLION: <u>But I did, that is why I mention the question about miscommunication. Because what she did is she asked me for more information on specific examples. So for example Mr Nkohla says I did not give examples on the DBSA. I did *20* and she asked me for more. She wanted to drill down on that.</u>

[end of page, start of page]

So I did not understand the broader context.

MR MANAMELA: Yes.

MR GILLION: And then when I asked them for reasons why my senior licence was not awarded, then they gave me the minute. So it is not correct to say that we had an engagement similar to this one where we said listen, how many years do you count and how many years do I count and where is the differences. We did not have an engagement like that. So she asked me for more information about -because I had two submissions. The one …[intervenes] *10*"[5]

[underlining added for emphasis]

[11] Evident from the above is that the applicant's case considerably metamorphosed from what it was in the papers, due to the material that came out of the applicant's oral submissions or statements made during the hearing. The impact of this is immense. I will revert to this, below.

[5] Transcribed record of proceedings (on 28 January 2021 of the Companies Tribunal) on pp 67-69.

Respondent's or CIPC's case

[12] Naturally, the case for the CIPC in support of its decision sought to be reviewed is primarily located in the minutes from its BRP Vetting meeting of September 2020, referred to above.[6] The minutes, together with the material in the application submitted to the CIPC when the applicant applied for a licence, constitute the record of this review. I consider the contents of the minutes (quoted *verbatim* above)[7] to be self-explanatory. But, I think it is still important to highlight a few issues from the minutes.

[13] According to the minutes, the CIPC remarked that the applicant simply furnished details of his responsibilities "in line with the portfolios/positions he held" in the institutions he was involved in over the 25 years of his work-life. The applicant stated what he had achieved "during the course of his duties and the mandate of the institutions he was working for". But he failed to provide "details of the companies that needed restructuring" and the outcomes thereof. Consequently, the CIPC concluded that from the applicant's work history of over 25 years, only "around 7-8 years of experience [could] be linked to business turnaround", hence his certification as "an experienced business rescue practitioner".

[14] The above and the extracts from the transcribed record of the hearing, partially quoted above,[8] clearly confirm that the CIPC was not provided with the detailed information placed before the Tribunal by the applicant during the hearing. To its credit, the CIPC has been very resolute from the beginning in its stance and incessantly

[6] See par [4] above.
[7] *Ibid.*
[8] See par [10] above.

informed the applicant that his certification and, therefore, the outcome of his application was "evaluated based on the information provided" by the applicant.[9] Mr Nkohla, representing the CIPC at the hearing, repeated this stance. It, therefore, was not surprising that he vehemently denied the applicant's characterisation of his omission as "miscommunication".

[15] Faced with this turn of events, I sought to determine the matter from an angle which would be cognizant of the new material from the applicant. But this has implications for the legal principles applicable to the facts in this matter. I discuss these principles against the facts, next.

Applicable legal principles and the facts (a discussion)

[16] This review application is premised on regulation 126(8) of the Companies Regulations. This provision reads:

> "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."

[underlining added for emphasis]

[9] See par 5 of the answering affidavit.

[17] Regulation 126(8) is to be considered against the spectrum of other relevant provisions, such as regulation 127, already scantily referred to above. Regulation 127(2) reads in the material part:

> "(2) For the purposes of this regulation, and in Regulation 128—
> (a) **"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;
> (b) …
> (c) Persons eligible to be appointed as practitioners are classified in the following three groups:
> (i) **"senior practitioner"** means a person who is qualified to be appointed as a business rescue practioner 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"** being a person who is qualified to be appointed as a business rescue practioner 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 5 years."

[underlining added for emphasis]

[18] Other legal principles - applicable to the discussion and relevant to the determination of this matter - will be referred to as the discussion progresses. Suffice for now to state that what is to be determined in this matter is whether the applicant has made out a case for the review and setting aside (or to use the words in the provision, for the

Tribunal to "partially or entirely confirm or set aside") of the impugned decision of the CIPC?

[19] Without much ado I find that the applicant's case as contained in its papers and the review record is without merit. It has now become common cause that the application or, in the main, the applicant's curriculum vitae or CV furnished to the CIPC when he applied for his BRP licence, did not fully comply with regulation 127(2)(c)(i). The material placed before the CIPC did not portray the applicant as a person "who … has actively engaged in business turnaround practice before the effective date of the [Companies] Act, or as a business rescue practitioner in terms of the [Companies] Act, for a combined period of at least 10 years". It is, therefore, unsurprising that the tally in years of relevant accumulated experience made by the CIPC from the "information provided" by the applicant was only sufficient to qualify him for a licence as an experienced BRP. This outcome was borne by the facts of this matter as then presented to the CIPC by the applicant himself. But, it is now known, even to the CIPC, that there is more to the applicant's relevant experience that what was contained in documents which served before the CIPC on 17 September 2020.

[20] Mr Nkohla was forthcoming that the outcome would have been different had the CIPC been furnished with the now-known detailed information when the applicant sought the BRP licence.[10] The candidness of Mr Nkohla is very helpful, in as much as it is appreciated. But his say-so cannot be considered binding on the CIPC or its relevant

[10] See par [10] above.

committee to be constituted to decide a possible fresh application for a licence from the applicant.

[21] The essence of what Mr Nkohla is saying is that the door is still open for the applicant to approach the CIPC in an attempt to sway it for "a different licence" than the one he was awarded. All things remaining equal and bearing in mind the current restrictions ensuing from measures to combat the COVID-19 pandemic, the licensing process "takes plus minus four to five days", Mr Nkohla further explained.[11]

Conclusion

[22] Therefore, this application would fail. I must add that my preliminary view at the conclusion of the hearing was that I would simply refer the matter back to the CIPC for reconsideration. But this is not possible under regulation 126(8). This provision only grants jurisdiction to this Tribunal to either confirm, be it in part or in whole, or set aside the impugned decision. It is different to the outcome possible under a review based on section 172 of the Companies Act 71 of 2008.[12] In terms of the latter provision a review may be disposed of by this Tribunal either confirming, modifying or cancelling the impugned notice or decision. Modifying[13] suggests an element of broader interference with the substance of the decision made than confirmation, cancellation or setting aside of something. But, there is no jurisdiction for this Tribunal to substitute its brand new

[11] *Ibid*.
[12] Section 172 reads in the material part: "Any person issued with a compliance notice in terms of this Act may apply to the Companies Tribunal in the case of a notice issued by the Commission…to review the notice …
(2) After considering any representations by the applicant and any other relevant information, the Companies Tribunal … may confirm, modify or cancel all or part of a compliance notice." [underlining added for emphasis]
[13] The Oxford Dictionary defines "modify" as "make partial changes to".

decision for that of the CIPC, especially where the facts before the Tribunal were not fully disclosed to the CIPC.

[23] Also, in as much as I would like to be of assistance to the applicant, I should still be careful not to let such quest cloud my judgment under the peculiar circumstances of this matter. Should I set aside the current CIPC decision, it would mean that the applicant is immediately without a licence, even at the non-preferred "experienced practitioner" level. This may have unintended consequences as until or unless the CIPC decides again on the applicant's certification for his still-to-be-lodged application, he would be uncertified. Given this possibility, I consider the appropriate approach to be to leave the current licence undisturbed until the CIPC decides on the applicant's fresh application (when it is lodged) what certificate to grant. I do not interpret the Companies Regulations to require a holder of a lower certificate to have to firstly jettison that certificate before applying for a higher one. A contrary interpretation will be absurd.

[24] Therefore, I will confirm the decision of the CIPC in its entirety. The CIPC does not appear to have asked for costs against the applicant in the event of his application being found to be unmeritorious. But, even if the CIPC did, under the circumstances of this matter and considering that the applicant was not necessarily motivated by *mala fides* in pursuing this review application, no costs order is warranted. Therefore, no costs order will be made.

Order

[25] In the premises the order is made in terms of a) and b), as follows:

a) the application is dismissed;

b) the decision of the Companies and Intellectual Property Commission, the respondent, made on 17 September 2020 or thereafter, to issue Mr. Frankton Frencel Gillion, the applicant, with the business rescue practitioner certificate in the category of an experienced business rescue practitioner is confirmed in its entirety, and

c) the applicant is urged to approach the Companies and Intellectual Property Commission on the basis of a detailed application for purposes of consideration for a business rescue practitioner certificate in a higher category or classification.

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Khashane La M. Manamela

Member, Companies Tribunal

19 February 2021