CONSTITUTIONAL COURT OF SOUTH AFRICA

Shiva Uranium (Pty) Limited (In Business Rescue) and Another v Mahomed Mahier Tayob and Others

CCT 305/20

Date of Judgment: 9 November 2021

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Tuesday, 9 November 2021 at 09h30, the Constitutional Court handed down judgment in an application for leave to appeal against the judgment and order of the Supreme Court of Appeal dated 8 December 2020, in which it upheld an appeal against an order of the High Court dismissing an application brought by the present first and second respondents, Messrs Tayob and Januarie. The Supreme Court of Appeal, contrary to the High Court, held that Messrs Tayob and Januarie had been validly appointed as business rescue (BR) practitioners of the present first applicant, Shiva Uranium (Pty) Ltd (Shiva). The appeal concerned the interpretation and application of section 139(3) of the Companies Act 71 of 2008 (the Act).

A brief history of the matter is that on 20 February 2018, Shiva's board of directors resolved to place it in BR in terms of section 129 of the Act. Pursuant thereto, the board appointed Messrs Klopper and Knoop as Shiva's BR practitioners. On 23 March 2018, the Industrial Development Corporation (IDC), being a major creditor of Shiva, brought an application in terms of section 130(1)(b) of the Act to remove Messrs Klopper and Knoop as the BR practitioners and to replace them with Mr Murray in terms of section 130(6)(b) of the Act. On 31 May 2018, being the date of the hearing of the application, Messrs Klopper and Knoop resigned as Shiva's BR practitioners. When the matter was called before the High Court, the parties handed up an agreed draft order which recorded the resignation of Messrs Klopper and Knoop, appointed Mr Murray as the new BR practitioner and directed the Companies and Intellectual Property Commission (the CIPC) to appoint an additional BR practitioner to assist Mr Murray. On 1 June 2018, the second applicant, Mr Monyela, was appointed by the CIPC as an additional BR practitioner of Shiva. On 18 September 2018, Mr Murray resigned as one of Shiva's BR practitioners. Prior to and in anticipation of Mr Murray's resignation, he and Mr Monyela passed a resolution to appoint the third respondent, Mr Damons, as Mr Murray's replacement. The appointment of Mr Damons by Messrs Murray and Mr Monyela became the subject of dispute.

Mr Monyela submitted that the power to appoint a BR practitioner following Mr Murray's resignation vested in the IDC and that section 139(3) of the Act is apposite in this regard. He further submitted that the appointment of Mr Damons by him and Mr Murray was made on behalf of the IDC as the major creditor. Shiva's board of directors however took a different view and passed a resolution on 22 September 2018 to appoint Messrs Tayob and Januarie (together with Mr Monyela), as Mr Murray's replacements. The CIPC, seized with the appointment of Mr Damons by Messrs Monyela and Murray, allegedly at the instance of the IDC, as well as the appointment of Messrs Tayob and Januarie by the board, accepted the notification of appointment by the board over that of Messrs Monyela and Murray. The CIPC's decision prompted Mr Monyela to launch an urgent application in the Companies Tribunal on 27 November 2018, seeking an order to overturn the CIPC's decision and to direct it to appoint Mr Damons as Mr Murray's replacement. The Companies Tribunal ruled in favour of Mr Monyela. In response, Messrs Tayob and Januarie approached the High Court for an order to interdict the CIPC from implementing the Tribunal's ruling pending the outcome of an application to review and set aside the Tribunal's ruling.

Before the High Court, the questions for determination were firstly, which appointment of the replacement BR practitioner should prevail, secondly whether the appointment by the board could be effected without the authorisation of the BR practitioner and thirdly whether Mr Monyela could continue to act as a BR practitioner of Shiva, which is a large company as defined in the Regulations, in circumstances where he was a junior practitioner and Regulation 127(3) only allows for junior practitioners to be appointed as practitioners for a large company as an assistant to a senior practitioner. The High Court dismissed Messrs Tayob and Januarie's application and found in favour of Mr Monyela, holding that following a resignation by a BR practitioner, in this case Mr Murray, the board could only appoint Messrs Tayob and Januarie as BR practitioners with the authorisation of Mr Monyela in accordance with section 137(2) of the Act. The High Court further held that Mr Monyela could continue to act as Shiva's BR practitioner provided that the company or creditors who appointed the practitioner who resigned took all necessary steps to ensure that a senior practitioner was appointed to fill the vacant post left by Mr Murray.

Aggrieved, Messrs Tayob and Januarie appealed to the Supreme Court of Appeal. The Supreme Court of Appeal found that the merits turned on the source of power to appoint a substitute in the event of death, resignation or removal from office of a practitioner. It held that the Act does not confer any power on a practitioner to appoint another practitioner, and thus Messrs Monyela and Murray had no authority to appoint Mr Damons. Most significantly, the Supreme Court of Appeal held that section 139(3) did not confer on creditors the right to make a substitute appointment when a practitioner appointed pursuant to section 130(6)(a) resigns. It reasoned that "the language of sections 130 and 139(3) in the context of section 139(1) makes it quite clear that section 130 provides for separate procedures which, in a case of the setting aside of the appointment of a practitioner, oblige the court to appoint an alternative practitioner in terms of section 130(6)(a)" as opposed to in accordance with section 139(3) as contended for by Mr Monyela. The Supreme Court of Appeal consequently upheld the appeal in favour of Messrs Tayob and Januarie.

The question on the merits before the Constitutional Court was where, in the case of a voluntary BR initiated in terms of section 129 of the Act, a BR practitioner appointed by a court in terms of section 130(6)(a) in place of the company-appointed practitioner resigns, who has the power to appoint the court-appointed practitioner's replacement? The Supreme Court of Appeal held that the power of appointment resided with the company's board. Mr Monyela contended that it resides with the majority of the independent creditors' voting interests who were represented in the proceedings giving rise to the court's appointment in terms of section 130(6)(a).

In a unanimous judgment, the Constitutional Court held that the answer to the question before the Court depends on a proper interpretation of section 139(3) of the Act. The Court held that it was obvious and uncontentious that the formulation of section 139(3) applied to two scenarios: a company being placed in BR voluntarily by a board resolution in terms of section 129 or compulsorily by court application in terms of section 131. If the practitioner appointed by the company in terms of section 129(1)(b) resigns, the company in terms of section 139(3) may appoint the substitute. If the practitioner appointed in terms of section 131(5) resigns, the "affected person" who applied for the company to be placed in BR, and who made the nomination envisaged in section 131(5), may appoint the substitute.

In its interpretation of the Act, the Court interpreted the use of the words "who nominated" and "or the creditor" in section 139(3). It disagreed with Mr Monyela's submission that the phrase "recommended by, or acceptable to", in section 130(6)(a) is substantively equivalent to a nomination in terms of section 139(3) and the argument that the language of 139(3) must be understood as referring also to the independent creditors contemplated in section 130(6)(a). The Court further found that section 139(3) could notionally encompass more than one creditor, notwithstanding that the section refers to "the creditor" in the singular.

The Court found that the interpretation adopted by the Supreme Court of Appeal gave effect to the purposes of the Act as envisaged in section 7 and best promoted the spirit and purposes of the Act. On prospects of success, the Court held that Mr Monyela had not demonstrated that there were reasonable prospects of success of the Court reversing the Supreme Court of Appeal's conclusion. It agreed with the Supreme Court of Appeal's finding that upon Mr Murray's resignation, the right to appoint his replacement vested in Shiva's board of directors and that Messrs Tayob and Januarie were validly appointed.

In the result, the Constitutional Court dismissed Mr Monyela's application for leave to appeal and ordered him to pay the costs in the Constitutional Court of Messrs Tayob and Januarie.