REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 035371/2023

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED

20/11/2023
DATE SIGNATURE

In the matter between:

TEGETA EXPLORATION AND RESOURCES (PTY) LTD	First Applicant
KOORNFONTEIN MINES (PTY) LTD	Second Applicant
OPTIMUM COAL MINE (PTY) LTD	Third Applicant
OPTIMUM COAL TERMINAL (PTY) LTD	Fourth Applicant
RONICA RAGAVAN	Fifth Applicant
DHANASEGARAN ARCHERY	Sixth Applicant

and

KURT ROBERT KNOOP	First Respondent
JOHAN LOUIS KLOPPER	Second Respondent
JUANITO MARTIN DAMONS	Third Respondent

KGASHANE CHRISTOPHER MONYELA	Fourth Respondent

In re:

TEGETA EXPLORATION AND RESOURCES (PTY) LTD	First Applicant
KOORNFONTEIN MINES (PTY) LTD	Second Applicant
OPTIMUM COAL MINE (PTY) LTD	Third Applicant
OPTIMUM COAL TERMINAL (PTY) LTD	Fourth Applicant
RONICA RAGAVAN	Fifth Applicant
DHANASEGARAN ARCHERY	Sixth Applicant
RAYMOND PETER VAN ROOYEN	Seventh Applicant

and

KURT ROBERT KNOOP	First Respondent
JOHAN LOUIS KLOPPER	Second Respondent
JUANITO MARTIN DAMONS	Third Respondent
KGASHANE CHRISTOPHER MONYELA	Fourth Respondent
PETRUS FRANCOIS VAN DEN STEEN N.O.	Fifth Respondent
ALL AFFECTED PARTIES OF TEGETA EXPLORATION AND RESOURCES (PTY) LTD AS REFLECTED IN “A”	Sixth Respondent
ALL AFFECTED PARTIES OF KOORNFONTEIN MINES (PTY) LTD AS REFLECTED IN “B”	Seventh Respondent
ALL AFFECTED PARTIES OF OPTIMUM COAL MINE (PTY) LTD AS REFLECTED IN “C”	Eighth Respondent
ALL AFFECTED PARTIES OF OPTIMUM COAL TERMINAL (PTY) LTD AS REFLECTED IN “D”	Ninth Respondent

THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION Tenth Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 20 November 2023.

JUDGMENT

PHOOKO AJ

INTRODUCTION

[1] The applicants launched the main application ("the removal application") under case no: 035371/2022 wherein they *inter alia* sought the removal of the First to Fourth Respondents as Business Rescue Practitioners ("BRPs") of the applicants' companies for various alleged grounds ranging from conflict of interest to the failure to exercise the proper degree of care in executing their functions as BRPs.

[2] However, during the proceedings of the removal application, the issue of the authority of the applicants to appoint and be represented by Van der Merwe and Van der Merwe Attorneys came to the fore. This resulted in the applicants launching the interlocutory application before this Court.

THE PARTIES

[3] The First Applicant is Tegeta Exploration and Resources (Pty) Ltd, a private company duly registered and incorporated in accordance with the company laws of the Republic of South Africa, with its registered address at Grayston Ridge Office Park, Block A, Lower Ground Floor, 144 Katherine Street, Sandton.

[4] The second applicant is Koornfontein Mines (Pty) Ltd ("KFM") which is in voluntary business rescue. It is a colliery, a private company duly registered and incorporated in accordance with the company laws of South Africa, which also has its registered office at Grayston Ridge Office Park, Block A, Lower Ground Floor, 144 Katherine Street, Sandton. Ms Ragavan is the sole director of the second applicant. The first two respondents were appointed as the business rescue practitioners of KFM by its board of directors.

[5] The Third Applicant is Optimum Coal Mine (Pty) Ltd, which is also in voluntary business rescue, also a colliery, referred to as "OCM". OCM is a private company duly registered and incorporated in accordance with the company laws of South Africa with its registered address at Grayston Ridge Office Park, Block A, Lower Ground Floor, 144 Katherine Street, Sandton. The directors of OCM are Mr Zuma and Mr Archery.

[6] The Fourth Applicant is Optimum Coal Terminal (Pty) Ltd ("OCT"), a company dully incorporated and registered in terms of the company laws of South Africa with its registered office at Grayston Ridge Office Park, Block A, Lower Ground Floor, 144 Katherine Street, Sandton. Its directors are Mr van der Merwe, Mr Mtshali, Mr Jennings, Mr van Rooyen and Mr Sivhada. Mr Jennings, Mr van Rooyen and Mr Sivhada who have been duly authorised by the company by resolution to participate in these proceedings on behalf of OCT.

[7] The Fifth Applicant is Ronica Ragavan, an adult female person who resides in Midstream Estate, Midrand, Gauteng. The Fifth Applicant is the director of the First and Second applicant companies.

[8] The Sixth Applicant is Dhanasegaran Archery, an adult male person who is a director of the Third Applicant, who has been duly authorised to represent the board of directors of the third applicant.

[9] The First Respondent is Kurt Robert Knoop, a professional BRP who conducts business under the name "Manci Knoop Financial Services" at 98 Jan Smuts Avenue, at the corner of Saxonwold Road, Johannesburg. Mr Knoop was

appointed as BRP by the boards of each of the applicants' companies.

[10] The Second Respondent is Johan Louis Klopper, also a professional BRP conducting business under the name "Coronado Consulting Group" at 181 Burger Street, Pietermaritzburg, KwaZulu-Natal. Mr Klopper was appointed as the BRP for the applicants' companies with the exception of OCT.

[11] The Third Respondent is Juanito Martin Damons, also a BRP, who conducts business as such under the name "Legae Turnarounds" which is situated at 257 Brooklyn Road, Equity Park, Block B, Pretoria. Mr Damons was not appointed by the board of directors of any of the applicants' companies.

[12] The Fourth Respondent is Kgashane Christopher Monyela, a BRP by profession, who conducts business as "Masiye Administrators CC" at 405 Moreletta Street, Silverton, Pretoria. Mr Monyela was also not appointed by the board of directors of any of the applicant companies.

[13] The Fifth Respondent is Petrus Francois van den Steen who is cited herein in his capacity as a duly appointed *curator bonis* in respect of the property defined in the order of this Honourable Court granted on 23 March 2022. Who practices as a legal practitioner at the law Webber Wentzel, 90 Rivonia Road, Sandton.

[14] The Sixth, Seventh, eighth and Ninth respondents are all the affected parties in Tegeta, KFM, OCM and OCT as defined in section 128(1)(a) of the Companies Act 71 of 2008 ("the Companies Act") as shareholders or creditors of the company in business rescue. Affected parties include any registered trade union representing the employees of the company and any representatives of employees of the company are not represented by a registered trade union.

[15] The Tenth Respondent is the Companies and Intellectual Property Commission ("CIPC"), established in terms of section 185 of the Companies Act, situated at the DTI Campus, Block F, Meintjies Street, Sunnyside, Pretoria.

THE ISSUE FOR DETERMINATION

[16] The issue for determination is whether Van der Merwe and Van der Merwe Attorneys have the authority to represent the applicants in the removal application.

FACTUAL BACKGROUND

[17] The First to the Fourth applicants namely, Tegeta, KFM, OCM, and OCT are linked to the Gupta family. In 2016, following several questionable transactions that were uncovered by the Judicial Commission of Inquiry into Allegations of State Capture in South Africa, the banks closed all the accounts that were linked to the above-mentioned applicants.

[18] Consequently, the First to the Fourth applicants were placed in voluntary business rescue at the beginning of 2018 by their boards of directors as their unbanked position amounted to financial distress. The board of directors appointed the First and Second Respondents as the BRPs for the aforesaid companies with the hope that the appointed BRPs could open bank accounts for the companies and payments could be made and received to enable the companies to trade.

[19] According to the applicants, the BRPs have seriously breached their obligations as BRPs, and they have *inter alia* created intolerable conflicts of interest between the various Tegeta companies. Consequently, the applicants seek their removal as BRPs under section 139(2) of the Companies Act based on their failure to perform the duties of a BRP, failure to exercise a proper degree of care in the performance of the functions of a BRP, or conflicts of interest or lack of independence.

[20] Following a case management meeting that was held between the parties on 31st January 2023, the applicants were directed to file the Rule 7 application dealing with the authority of Van der Merve and Van der Merwe Attorneys to represent them in the removal application.

[21] The First to Fourth Respondents oppose the interlocutory application on the

basis that Van der Merve and Van der Merwe Attorneys were not duly authorised to represent the applicants in the main application.

CONDONATION

[22] The applicants did not seek condonation for the late filing of their replying affidavit. Consequently, the First to Fourth Respondents challenged their failure to apply for condonation. The legal principles applicable to the granting of condonation are well-known and settled in our law. The Constitutional Court in *Mphephu-Ramabulana and Another v Mphephu and Others*[1], eloquently put the position as follows:

> ". . . compliance with this Court's Rules and timelines is not optional, and . . . condonation for any non-compliance is not at hand merely for the asking. The question in each case is "whether the interests of justice permit" that condonation be granted. Factors such as the extent and cause of the delay, the reasonableness of the explanation for the delay, the effect of the delay on the administration of justice and other litigants, and the prospects of success on the merits if condonation is granted, are relevant to determining what the interests of justice dictate in any given case".

[23] The aforesaid factors are therefore useful in determining whether to grant the condonation for the late filing of the replying affidavit. I now turn to consider the applicable time frames, the extent of the lateness, and the explanation proffered by the applicants, if any.

[24] On 31st January 2023, a case management meeting was held between the parties. The applicants were directed to file their replying affidavit on or before 18 March 2023. However, they only filed them on 22 March 2023. Consequently, the First to Fourth Respondents contends that the applicants did not provide a full and frank disclosure of the reasons for their delay and did not deal with the issue of condonation in their heads of argument. Accordingly, they submit that condonation should be refused, and that the application be determined on the facts in the founding and answering affidavits.

[25] The First to Fourth Respondents are correct, there was no explanation

[1] 2022 (1) BCLR 20 (CC) at para 33.

whatsoever and/or an application for condonation from the applicants regarding the delay in filing their replying affidavit. In *Rozani (Born Nohako) and Another v Qoboka and Another,*[2] albeit in the context of unpaginated papers, Tokota AJP observed that:

> "There appears to be a growing prevalence of failure to comply with the Rules of Court and a total disregard for the practice directives".

[26] Tokota AJP went on to state that:

> "…the time has now come to sound a stern warning to the practitioners that unless there are justifiable circumstances warranting condonation …, Courts will not tolerate non-compliance with the Rules of Court and Practice Directives" (own emphasis added).[3]

[27] This is what occurred in this case, the applicants displayed a blatant disregard of the court directives. As if that was not enough, the applicants proceeded as if it was business as usual and did not file any application for condonation. This is unacceptable. The late filing of the replying affidavit is not condoned. Therefore, this application will be determined on the facts in the founding and answering affidavits.

APPLICABLE LEGAL LAW

Chapter 6 of the Companies Act ushered in a new regime on 1 May 2011 when it replaced judicial management provisions under the old Companies Act 61 of 1973. These developments brought about a *"concept of business rescue proceedings for companies that are trading in a position of financial distress"*.

[29] [4]

[29] Whilst the Companies Act spells out the duties of the BRPs during the business rescue process, it also specifies the duties of directors whilst the company is

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[2] [2022] ZAECMHC 4 at para 3.
[3] *Ibid* at para 4.
[4] Levenstein E *An appraisal of the new South African business rescue procedure* (LLD thesis, University of Pretoria, 2015) 15.

under business rescue proceedings. For example, sections 137(2)-(4) of the Companies Act provides that:

"…

(2) During a company's business rescue proceedings, each director of the company—

(a) must continue to exercise the functions of director, subject to the authority of the practitioner;

(b) has a duty to the company to exercise any management function within the company in accordance with the express instructions or direction of the practitioner, to the extent that it is reasonable to do so;

(c) remains bound by the requirements of section 75 concerning personal financial interests of the director or a related person; and

(d) to the extent that the director acts in accordance with paragraphs (b) and (c) is relieved from the duties of a director as set out in section 76, and the liabilities set out in section 77, other than section 77(3)(a), (b) and (c).

(3) During a company's business rescue proceedings, each director of the company must attend to the requests of the practitioner at all times, and provide the practitioner with any information about the company's affairs as may reasonably be required.

(4) If, during a company's business rescue proceedings, the board, or one or more directors of the company, purports to take any action on behalf of the company that requires the ap the approval of the practitioner, that action is void unless approved by the practitioner."

[30] The above provision entails that during business rescue proceedings, the directors of the company do not become redundant. They continue exercising their fiduciary duties as directors of the company. However, they perform their functions subject to the authority of the practitioner. In other words, whatever

that they want to do, must go past the BRP.

[31] In *Absa Bank Limited v Marotex (Pty) Ltd and Others*[5], the court held that:

> "Now s140 is clear that the business rescue practitioners are authorised to manage the company in business rescue even though the directors retain their functions as such (s137 (2) (a)). However, these functions are still subject to the authority of the business rescue practitioners in terms of s140. So whichever way one spins it the authority to manage the company will always lie with the business rescue practitioner, whether one is a shareholder, director or co-founder. In the result, the fifth to eighth respondents do not and would not have the right and authority to appoint the attorneys representing the first respondent. This could only come about with the authorisation of the business rescue practitioners who are the *de facto* managers of the company during business rescue proceedings" (own emphasis added).

[32] Furthermore, in *NDPP v Sharma and Others*[6] it was held that:

> "… during business rescue proceedings, the business rescue practitioners have full management control of the company in substitution for its board and pre-existing management. The business rescue practitioner may, however, in terms of section 140(1)(b) delegate any of his or her powers or functions to a person who was part of the board or pre-existing management of the company. It is common cause that the business rescue practitioners did not delegate any power to the third defendant or its directors to oppose this application".

[33] The first glance at the aforementioned decisions suggests that the legal position is that the directors of a company that is under business rescue retain the exercise of their functions, but they do so under the authority of the BRP. However, a closer look at the ruling of the Supreme Court of Appeal in *Tayob and Another v Shiva Uranium (Pty) Ltd and Others*[7] reveals that there is a distinction that needs to be drawn between the concepts of management and governance to fully appreciate the extent of the powers of the BRPs and those of the directors. To this end, the court in *Tayob and Another v Shiva Uranium (Pty) Ltd and Others* said:

> "The word 'management' is not defined in the Act. Consequently, it

[5] [2016] ZAGPPHC 1190 at para 22.
[6] 2022 (1) SACR 289 at para 26.
[7] [2020] ZASCA 162 at para 24.

> must be ascribed its ordinary meaning, that is, to be in charge of or to run a company, particularly on a day-to-day basis. To appoint a substitute practitioner (who will then be in full management control of the company) is rather a function of governance and approval thereof is not in my view a management function (own emphasis added)".[8]

[34] The Court proceeded to state that:

> …Subsection 137(2)(a) must, of course, be read with the provisions of "Chapter 6 of the Act and those of s 140 in particular. They circumscribe the ambit of the authority of the practitioner. Any function of a director that falls outside of that ambit, cannot be subject to the approval of the practitioner. It follows that s 137(2)(a) only affects the exercise of the functions of a director in respect of matters falling within the ambit of the authority of the practitioner. As I have shown, the appointment of a practitioner does not fall within the powers or authority of a practitioner" (won emphasis).[9]

[35] This decision, therefore, implies that the BRP has exclusive powers and duties in so far as the management of the company is concerned and which pertains to the day-to-day running of the business affairs. Consequently, any other functions that fall outside the management of the company, remain that of the directors' functions and are not subject to the authority of the BRPs.

[36] In light of the above legal position, I now turn to consider the circumstances of this case taking into consideration the oral and written submissions of the parties before this Court to ascertain whether the applicants have made out a case for the relief sought.

APPLICANT'S SUBMISSIONS

[37] The applicants argued that the Companies Act does not expressly stipulate which actions of the board of directors require the approval of a BRP. To this end, counsel argued that there was a need to consider the powers of the BRP and the board of directors in light of what counsel called the "Management vs Governance debate" which requires statutory interpretation of Chapter 6 of the Companies Act.

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8 *Ibid* at para 25.
9 *Ibid* at para 25.

[38] Counsel contended that the legislature did not only distinguish between the roles and functions of directors and BRPs. Relying on *Tayob*, counsel averred that this Court *"equated company as used in Chapter 6 to the directors so that a reference to the company is one to the directors"* where it said:

> "Unless indicated otherwise 'company' must bear its ordinary meaning and the same meaning as in s129, that is, the company represented by its board. There are no indications to the contrary."

[39] In light of the above, counsel submitted that the courts have recognised that the *"board of directors continues to play a decisive role in the affairs of the company after it has been placed under supervision and in business rescue"*. To buttress this point, counsel averred that "what is placed under the exclusive control of the BRP is "management". Therefore, "management" must be distinguished from the concept of "corporate governance". According to counsel, "corporate governance" resides in the directors, not in managers".

[40] Relying on section 66(1) of the Companies Act, counsel argued that powers regarding governance and management both a "priori reside in the board of directors appears. The provisions of section 66(1) of the Companies Act provide that:

> "The business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or a company's Memorandum of Incorporation provides otherwise."

[41] Counsel argued that once a company is placed under business rescue, the *"BRP becomes the supervisor of the board and the supreme manager of the company"*. Counsel referred this Court to the provisions of sections 140(1) and (3) of the Companies Act which *inter alia* provides that the BRP *"has full management control of the company in substitution for its board and pre-existing management"* and *"has the responsibilities, duties and liabilities of a director of the company".*

[42] Counsel averred that sections 137 and 142 of the Companies Act *"make it clear*

that directors and BRPs must collectively cooperate with each other". Counsel relied on section 137 of the Companies Act which inter alia provides that:

> "(2) During a company's business rescue proceedings, each director of the company –
>
> (a) must continue to exercise the functions of director, subject to the authority of the practitioner;
>
> (b) has a duty to the company to exercise any management function within the company in accordance with the express instructions or direction of the practitioner, to the extent that it is reasonable to do so;
>
> (c) remains bound by the requirements of section 75 concerning personal financial interests of the director or a related person; and to the extent that the director acts in accordance with paragraphs (b) and (c), is relieved from the duties of a director as set out in section 76, and the liability set out in section 77, other than section 77(3)(a), (b) and (c). (b) has a duty to the company to exercise any management function".

[43] Counsel further submitted that directors have a duty to co-operate and assist the BRPs as per section 142 of the Companies Act.

[44] According to counsel, the directors *"retain their powers at all levels, both in respect of the strategic positioning of the company and in respect of the tactical implementation of the strategy, viz the management*". Notwithstanding this, counsel averred that insofar as management is concerned, "the BRPs trump the powers of the directors" but "some powers of the directors nevertheless remain unaffected by business rescue, such as the instances where reference is made in Chapter 6 to *"the company" and matters of governance"*.

[45] Counsel argued that section 66(1) of the Companies Act "makes the directors the 'highest authority' in the company" and that this position does not change because of business rescue. According to counsel, "BRPs are not directors, they only have the "responsibilities, duties and liabilities of a director, as set out

in sections 75 to 77". Consequently, counsel argued that sections 75 to 77 do not deal with corporate governance, that is, the leadership role of a director as enunciated for example in King IV. According to counsel, *"BRPSs are not obliged to determine a destination or to plot a course for the company as ghost directors"*. Rather, a BRP becomes aboard as a pilot and his or her duty is to formulate a plan to rescue the company and to get it back on the course that its directors had set.

[46] Counsel *inter alia* argued that there are various external acts of the company under supervision that vest in the directors. To this end, counsel argued that the Supreme Court of Appeal in *Tayob* and Another *v Shiva Uranium (Pty) Ltd and Others*[10] has ruled that the reference to the company in section 139(3) of the Companies Act is a reference to the directors of the company. In addition, counsel contented that a further reference to the company in "Chapter 6 with external effect is for example section 135(2) by which the company may obtain post-commencement finance, not the BRP for the company".

[47] Counsel contended that the proposed divide was not a *"handy rule of thumb because it requires the further classification of an act as external or internal"*. According to counsel, *"the fact that an act may have an external manifestation does not mean that it is an external act; it may be an internal act with an external aspect, which is what the appointment of directors' amounts to"*.

[48] Counsel argued that the BRP has control only over "management" and not over "governance". This entails that the BRP must take control of the execution and the day-to-day functioning of the company such as to hiring and firing of managers, but not directors as this remains a governance function.

[49] Consequently, counsel contended that the power to appoint directors is governance in nature and is not subject to the authority of business rescue practitioners. To this end, counsel averred that the removal of practitioners is part and parcel of governance and the power to do so has, with some further limitation, been expressly referred to in the context of directors who voted in

[10] (Case no 336/2019) [2020] ZASCA 162.

favor of a resolution commencing business rescue proceedings. Further, counsel submitted that it can never be correct that appointed business practitioners can *veto* the instituting of an application for their removal, any interpretation that supports such a conclusion is illogical.

[50] Concerning the powers of directors as they relate to the Fifth and Sixth applicants, counsel argued that the BRPs accepted in their answering affidavit that the authority of Van der Merwe and Van der Merwe attorneys has been established and that Van der Merwe and Van der Merwe attorneys are authorized to represent the Fifth and Sixth Applicant in the removal application.

[51] Concerning The First Applicant, counsel argued that it is difficult to discern the basis on which the BRPs dispute the authority of VDM in representing Tegeta. Further, they submit that the BRPs accept that the Fifth Applicant is now the sole director of Tegeta who in terms of the power of attorney has a vested power to appoint Van der Merwe and Van der Merwe attorneys. Furthermore, counsel averred that "whilst the BRPs contend that Mr van Rooyen was not validly appointed as director of Tegeta, they rightly concede that in light of his resignation, the issue is moot".

[52] Concerning the second applicant, as in the case of Tegeta, counsel argued that the BRPs have not provided any basis to dispute the authority of Van der Merwe and Van der Merwe attorneys to represent KFM, save to they that they *"admit that Ms Ragavan is the sole director of KFM, but dispute that she had the power to appoint VDM as KFM's attorneys in the main application"*.

[53] Regarding the Third applicant, counsel contends that the BRPs' contention to the effect that Tegeta as a shareholder of OCM has the power to appoint directors in OCM is flawed because the appointment of directors is purely a governance function of directors which does not form part of the management control powers of a BRP.

[54] Concerning the Fourth Applicant, counsel contended that the BRPs seek to apply the same submissions regarding OCT that were applied during its

submissions for the Third Applicant in that the BRPs contend that the Fifth Applicant as a director of Tegeta could not make appointments in OCT on behalf of Tegeta as a shareholder without the authority of the BRPs in Tegeta. According to counsel, the power of a shareholder to appoint directors is a fundamental issue of governance and not of management.

[55] Concerning the BRPs' complaint submitted to the Companies and Intellectual Property Commission ("the CIPC") purportedly in accordance with section 168 of the Companies Act on the same basis that their consent was necessary, counsel averred that the CIPC had incorrectly amended their records based on the complaint without complying with the provisions of Section 169 or 170 of the Companies Act. Consequently, counsel submitted that the fact that the CIPC did not investigate the complaint in terms of the requirements of the Act, entails that the CIPC does not have the power to decide over the appointment of directors, but its role is to only keep a record of who has been appointed.

[56] Ultimately, counsel avers that because the appointment of directors falls squarely within the governance functions retained by the board of directors of a company, they submit that Van der Merwe and Van der Merwe attorneys have properly demonstrated that the boards of each of the applicant companies have been duly appointed them in terms of the relevant powers of attorney to represent the companies in bringing the main application.

FIRST TO FOURTH RESPONDENTS' SUBMISSIONS

[57] Relying on *inter alia* section 140 of the Companies Act and the decision of *Sharma*[11] counsel argued that a BRP has full management control of the company during business rescue proceedings and that the director(s) of such a company cannot institute or defend legal proceedings on its behalf without the authority of the BRP.

[58] Therefore, counsel contended that only the BRPs have the authority to represent the companies in the main application as they have not authorised

[11] *Supra* fn 6, at paras 26-32.

Van der Merwe and Van der Merwe attorneys to act on behalf of the companies.

[59] Furthermore, counsel submitted that the BRPs disputed the appointment of Mr van Rooyen as a director of Tegeta and that he failed to provide information about his appointment as per the request of the BRPs dated 28 November 2022. In addition, the BRPs averred that he did not file any confirmatory affidavit and therefore there was no evidence to support the compliance with his appointment and in accordance with the provisions of sections 66(7) and 137(4) of the Companies Act. To this end, counsel argued that the resolution that was allegedly adopted by Ms. Ragavan and Mr. Van Rooyen does not constitute proof that Van der Merwe and Van der Merwe attorneys is authorised to act on behalf of Tegeta in the main application.

[60] In addition, counsel submits that Messrs Archery and Zuma, as directors of OCM are in breach of section 137 of the Companies Act because Ms. Ragavan did not respond to the BRPs' requests of 2 June 2022 and 28 November 2022, and the CIPC's request of 13 February 2023 for information pertaining to their alleged appointment. Furthermore, counsel argued that their confirmatory affidavits do not constitute proof of their appointment and that there was no evidence of their appointment as directors of OCM in compliance with the provisions of sections 66(7) and 137(4) of the Companies Act. Therefore, they argued that the resolution allegedly adopted by them and Ms. Ragavan does not constitute proof that Van der Merwe and Van der Merwe attorneys are authorised to act on behalf of OCM in the main application.

[61] Counsel argued that Mr van Rooyen, Mrs Jennings and Mr Sivhada, as directors of OCT breached section 137 of the Companies Act because Ms. Ragavan did not respond to the BRPs' requests of 14 and 28 November 2022 for information pertaining to his alleged appointment. Furthermore, counsel argued that their confirmatory affidavits do not constitute proof of their appointment and that there was no evidence of their appointment as directors of OCT and therefore, were not in compliance with the provisions of sections 66(7) and 137(4) of the Companies Act. Therefore, they argued that the

resolution allegedly adopted by them and Ms. Ragavan does not constitute proof that Van der Merwe and Van der Merwe attorneys are authorised to act on behalf of OCT in the main application.

[62] Counsel further argued that the CIPC removed Mr van Rooyen, Mrs Jennings and Mr Sivhada, as directors of OCT and reinstated Mr van der Merwe and Mr Mtshali on 2 February 2023 as directors, and that there were no legal proceedings that have been instituted to challenge and/or review that decision. Consequently, counsel argued that there is no evidence of their appointment as directors of OCT and of compliance with the provisions of s 66(7) and s 137(4) of the Companies Act.

[63] In light of the above, counsel submitted that prayers 1 to 4 of the notice of motion ought to be dismissed with costs on the attorney and client scale including the costs of two counsel, one being senior counsel.

EVALUATION OF SUBMISSIONS

[64] Concerning the applicant's submission that the Companies Act does not expressly indicate which actions of the board of directors require the approval of a BRP, counsel tried at length to distinguish between management vs governance. On one hand, counsel argued that management entailed the day-to-day affairs of the company and that these duties fall under the terrain of the BRPs. On the other hand, counsel argued that the appointment of directors and/or removal of BRPs was exclusively a matter of governance and directors are responsible for giving effect to same. However, when counsel was asked as to who would be responsible for the payment of the invoice from Van der Merwe and Van der Merwe Attorneys, he responded that the BRPs would facilitate such payment.

[65] Although counsel tried at length to distinguish between management and governance, in my view these two concepts are interconnected and overlap. In other words, the distinction between governance and management is not

always that clear.[12] Governance could be said to be "higher level, future-orientated matters of strategy and policy"[13] whereas management is more about the day-to-day affairs of the company. The directors and the BRPs in one way or another need each other. If directors were to appoint attorneys without the involvement of the BRPs, such a move would undermine the very essence of business rescue proceedings because it means that the BRPs would be caught off guard when presented with additional debts that were incurred without their knowledge and would be in contravention of the directors' fiduciary duties. Further, it entails that there are two managers of the company who are doing different things at dissimilar times. This is not what could have been envisaged by the drafters of the Companies Act. As was correctly found in *Sharma*[14] where Musi JP held that:

> "It is correct that the directors remain directors but, importantly, they operate under the authority of the business rescue practitioners. If Mr Hellens' proposition is correct, it would mean that the directors may perform certain governance functions without the authorisation, consent, instruction or direction of the business rescue practitioners. This would undermine the whole business rescue scheme and would give rise to an undesirable parallel management of a company. It would effectively mean that the directors may hold meetings and resolve to institute or defend legal proceedings without the intervention or knowledge of the business rescue practitioners. This cannot be correct" (own emphasis added).

[66] The court went further to state that[15]:

> "Instituting or defending legal proceedings has financial implications. Costs orders against a financially distressed company may have far-reaching implications for the implementation of a business rescue plan and may result in the company not achieving a better return for its creditors or shareholders. This, on its own, is more than enough reason why the business rescue practitioners must be centrally involved when litigation on behalf of the company in business rescue is embarked upon (own emphasis added).

[67] Furthermore, in *Ragavan and Others v Optimum Coal Terminal (Pty) Ltd and Others*[16] it was held that:

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12 B.S Bader "Distinguishing governance from management" 2008 (8) *Great Boards* 3.
13 *Ibid*.
14 *Supra* at fn 6, at para 29.
15 *Ibid* at para 30
16 2023 (4) SA 78 (SCA) at para 6.

> …the BRP has full management control of the company in substitution for its board and pre-existing management and has the power to implement the business plan. … Full management and control of the company in substitution for its board could not be clearer…' (own emphasis added).

[68] Notwithstanding these observations, this Court with approval of the decision of the Supreme Court of Appeal in *Tayob and Another v Shiva Uranium (Pty) Ltd and Others*[17] agrees that the powers of directors relating to governance functions (and not management) such as the appointment and/or removal of directors and BRPs are not subject to the authority of the BRP. Section 139(3) of the Companies Act provides a *"board with the unfettered power to appoint a substitute practitioner"*.[18] Consequently, the directors do not need to seek the approval of the BRPs to appoint attorneys to represent them in the removal application.

[69] I further agree with the applicant's submission that it would make no sense for the directors to seek approval from the BRPs to remove them from office. In other words, the BRPs would have to approve a process that seeks to remove them. What if the BRP in question has died? Who will approve a process that seeks to replace him or her? As was correctly held by the court in *Tayob and Another v Shiva Uranium (Pty) Ltd and Others*[19] that:

> It follows that if a practitioner dies, resigns or is removed from office, there would either be no practitioner in office to authorise a board to act under s 139(3) or the remaining practitioner(s) would have no authority to act. The remaining practitioner may be a junior practitioner in respect of a large company. Thus, the interpretation of the court a quo that a board is to act in terms of s 139(3) with the approval of the practitioner of the company, would render the provision quite unworkable (own emphasis added).

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[17] At paras 22-26.
[18] *Ibid* at para 21. See also E Levenstein *South African Business Rescue Procedure* (LexisNexus, 2021) at 9-37(7) – (8).
[19] *Ibid*.

[70] To suggest otherwise, would be illogical. As a result, the appointment or removal of the BRP does not fall within the powers or authority of a BRP but within the powers of the directors.[20] Therefore, a BRP cannot *veto* a process that seeks their removal because it relates to a governance function and not a management function.[21] All in all, the directors do not need the authority of the BRPs to act in matters related to governance. A subsequent application for leave to appeal the aforesaid decision in the Constitutional Court in *Shiva Uranium (Pty) Limited (In Business Rescue) and Another v Tayob*[22] *and Others* was refused. The Constitutional Court *inter alia* held that the right to appoint a replacement of a BRP is vested with the directors.[23] I now turn to the issue related to the appointment of the directors.

[71] Concerning the authority of Van der Merwe and Van der Merwe attorneys in representing Tegeta, the Applicants seemed to be relying on the fact that the BRPs accepted that the Fifth Applicant is now the sole director of Tegeta who has the power to appoint an attorney of her choice to represent the company. However, they are missing the point. The Fifth to Fourth Respondents' concerns relate to the authority, in the form of a resolution, of Ms Ragavan and Mr van Rooyen to appoint Van der Merwe and Van der Merwe attorneys on 8 October 2022. In my view, the absence of a confirmatory affidavit to support his appointment as a director does not assist this Court or their case. Consequently, Ms. Ragavan and Mr Van Rooyen were not authorised to appoint Van der Merwe and Van der Merwe attorneys to represent Tegeta in the removal application.

[72] Concerning the Second Applicant, I fail to understand the BRPs' contention to the effect that Ms. Ragavan had no authority to appoint Van der Merwe and Van der Merwe attorneys to represent KFM because they have admitted that she is the sole director of KFM. The Fifth to Fourth Respondents also do not address this aspect in their heads of argument. Consequently, the Fifth to Fourth Respondents' argument challenging Ms Ragavan's power to appoint

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[20] *Ibid* at para 25.
[21] *Ibid* at 24.
[22] 2022 (2) BCLR 197 (CC).
[23] *Ibid* at paras18, 52, 56 and 59.

Van der Merwe and Van der Merwe attorneys to represent KFM in the main application has no merit.

[73] Regarding the Third Applicant, and the authority of Messrs Archery and Zuma as directors to appoint Van der Merwe and Van der Merwe attorneys to act on behalf of OCM in the main application, counsel for the applicant focused on the appointment of directors as purely a governance function which does not form part of the management control powers of a BRP. In my view, this submission failed to address the issue of appointment to directorship. Further, the CIPC's request for information relating to their appointment as directors was ignored. This alone, is fatal to the applicant's case. Consequently, Messrs Archery and Zuma including Ms. Ragavan were not authorised to appoint Van der Merwe and Van der Merwe attorneys to represent OCM in the removal application.

[74] Concerning the Fourth Applicant, I agree with the First to Fourth Respondents in that the resolution allegedly adopted by Mr van Rooyen, Mrs Jennings, Mr Sivhada and Ms. Ragavan does not constitute proof that Van der Merwe and Van der Merwe attorneys are authorised to act on behalf of OCT in the main application because the CIPC had removed Mr van Rooyen, Mrs Jennings and Mr Sivhada, as directors of OCT. Their removal by the CIPC has never been challenged and/or reviewed elsewhere. Consequently, if the CIPC had incorrectly amended its records based on the complaint without following the proper procedure and/or investigation, that is a matter that needs to be dealt with elsewhere. It is not before this Court. Therefore, Van der Merwe and Van der Merwe attorneys are not authorised to act on behalf of OCT in the main application.

[75] The Fifth to Fourth Respondents do not dispute the authority of Van der Merwe and Van der Merwe attorneys to act on behalf of the Fifth and Sixth Applicants in the main application. Therefore, the relief sought by the applicant ought to be granted.

COSTS

[76] All the parties sought to persuade this Court that if they were successful, they were entitled to costs on a punitive scale.

[77] However, an obvious observation is that both parties have to a certain extent been successful. Therefore, both parties deserve to be awarded costs.[24]

ORDER

[78] Having regard to the above, the following order is made:

(a) The application for condonation is refused.

(b) The application in respect of prayers 1, 3, and 4 is dismissed with costs on party and party scale including the costs of two counsel, one being senior counsel.

(c) It is declared that the authority of Van der Merwe and Van der Merwe attorneys have been established and that Van der Merwe and Van der Merwe attorneys are authorized to represent the Second Applicant in the removal application.

(d) It is declared that the authority of Van der Merwe and Van der Merwe attorneys have been established and that Van der Merwe and Van der Merwe attorneys are authorized to represent the Fifth Applicant in the removal application.

(e) It is declared that the authority of Van der Merwe and Van der Merwe attorneys have been established and that Van der Merwe and Van der Merwe attorneys are authorized to represent the Sixth Applicant in the removal application.

(f) The First to Fourth Respondents are ordered to pay the applicant's costs on a

[24] *President of the Republic of South Africa & Others v Gauteng Lions Rugby Union & Another* 2002 (2) SA 64 (CC) at para 15.

party and party scale including the costs of two counsel.

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PHOOKO AJ

ACTING JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA

APPEARANCES:

Counsel for the Applicants:	Adv PF Louw SC & Adv L Van Gass
Instructed by:	Instructed by VDM Attorney
Counsel for Respondents for:	GD Wickins SC and Adv VR Van Tonde
First to Fourth Respondents	
Instructed by:	Smith Sewgoolam Incorporated
Date of Hearing:	7 September 2023
Date of Judgment:	20 November 2023