IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 2023/117272

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED: YES/NO

....
SIGNATURE **DATE**

In the application between:

KGASHANE CHRISTOPHER MONYELA NO First Applicant

EUGENE JANUARIE NO Second Applicant
(As the business rescue practitioners of
Shiva Uranium (Pty) Ltd (In Business Rescue)

PLANTCOR (PTY)(Ltd) (Intervening) Third Applicant

and

MAHOMED MAHIER TAYOB NO First Respondent
(As the business rescue practitioner of

Shiva Uranium (Pty) Ltd (In Business Rescue))

SHIVA URANIUM (PTY) LTD
(In Business Rescue) Second Respondent

MDUDUZI JOSEPH MTSHALI Third Respondent

GEORGE PETER VAN DER MERWE Fourth Respondent

NWABISA JENNINGS Fifth Respondent

COLBERT THILVALI SIVHADA Sixth Respondent

RAYMOND PETER VAN ROOYEN Seventh Respondent

THE COMPANIES AND INTELLECTUAL PROPERTY
COMMISSION Eighth Respondent

THE AFFECTED PERSONS OF SHIVA URANIUM (PTY) LTD
(In Business Rescue) Ninth and Further Respondents
(Attached as Annexure X to the Notice of Motion)

APPLICATION FOR LEAVE TO APPEAL: JUDGMENT

LABUSCHAGNE AJ

[1] On 1 December 2023, sitting in the urgent court, I granted an order in the above matter in the following terms:

"1.

1.1 The application by Plantcor Mining and Plant Hire (Pty) Ltd to intervene as co-applicant is granted.

1.2 The main application matter is found to be urgent.

1.3 Pending the final determination of the relief sought in Part B of the notice of motion the third to seventh respondents are restrained from exercising any function as a director of the second respondent, other than in accordance with the provisions of Chapter 6 of the Companies Act and in particular Sections 140(1)(a) and (b), Section 137(2)(b), Section 137(3), Section 137(4), Section 137(2)(d), read with Section 218(2).

1.4 The parties may supplement their papers for purposes of the Part B hearing.

1.5 The first and second applicants and the first respondent are directed to report to the court hearing Part B:

1.5.1 Whether Shiva Uranium (the second respondent) is in financial distress or not;

1.5.2 If they differ in this regard, they are directed to state the reasons, and to explain whether they have approached the court for directions in this regard.

2. The parties are authorised to approach the Deputy Judge President for an urgent allocation for the hearing of Part B.

3. The costs of the Part A proceedings will stand over for determination in the Part B proceedings.

4. The counterapplication is struck from the roll."

[2] Three applications for leave to appeal were filed, i.e. on behalf of Mr Tayob (first respondent), the directors of Shiva Uranium and ORE (Oakbay Resources).

[3] The application for leave to appeal was heard on 25 January 2024. There is an overlap on the grounds upon which leave to appeal is sought. In this judgment I will deal with the topics raised in the applications for leave to appeal. All three applications are dealt with simultaneously in this judgment.

[4] When the matter was called in the urgent court, all parties were present, and the papers were complete. None of the parties requested time for the further filing of papers and I therefore preceded to hear the matter, attempting to impose time limitations in order to accommodate the hearing of the matter. It suffices to say that the time periods were exceeded, and argument took most of a full day in court.

URGENCY

[5] Each of the applicants for leave to appeal, appeal on the grounds of my finding that the matter was urgent.

[6] The first respondent, one of the appointed business practitioners, had filed a notice of termination of business rescue at the CIPC on 23 October 2023. The remaining business rescue practitioners (the first and second applicants) disputed the legality of that notice and brought the application on an urgent basis to restrain the directors of Shiva Uranium from performing any of their duties as directors of the company other than in accordance with Chapter 6 of the Companies Act (dealing with companies under supervision in business rescue).

[7] The applicants contended that the company remains in financial distress while the first respondent contended that it is not in financial distress. Shiva Uranium is the largest uranium mine in the country and has been in business rescue for the past six years. In the course of the business rescue, litigation has proliferated through every level of the court hierarchy pertaining to *inter alia* who the business rescue practitioners are, the validity of substitutions of business rescue practitioners etc.

[8] In the light thereof that the application before me represented a further indication of bickering between business rescue practitioners of an important company, and as the control thereof was in dispute, I was satisfied that the matter had to be dealt with as a matter of urgency. This is evident in the judgment in which I directed the business rescue practitioners to report to the court in Part B proceedings, on whether the company is in financial distress and, if they differ, whether they have approached the court for directions in this regard. I further granted an order to facilitate the expeditious hearing of Part B.

[9] It is against this backdrop that the application for leave to appeal against my finding of urgency is assessed.

[10] There is clear authority to the effect that a finding on urgency is not dispositive of the matter and is therefore in principle not appealable. (See: **Lubambo v Prebyterian Church of Africa** 1994 3 SA 241 (SE) at 242H-

244; **K Malao Inc v Investec Bank** 2021 JDR 0108 (GP)). In this matter the urgency was interwoven with the facts and could not be dealt with *in limine*.

[11] The applicants further contend that I was bound by the Practice Directive and erred in not refusing to hear the matter as the papers exceeded 500 pages. The practice directive was relied upon as granting the respondents' rights. The practice directive has been created to guide proceedings in the urgent court. They do not create rights for litigants but provide guidelines for the administration of justice. The court has a constitutional right to regulate its affairs. (See: Section 173 of the Constitution, 1996)

[12] As I had read the papers, and as the core issues appeared to be crisp, I decided to hear the matter rather than burden another court with reading the papers again.

[13] It suffices to state that I am of the view that the issues of urgency and compliance with the practice directive are not appealable. In any event, they have no prospects of succeeding, as I had exercised my discretion to hear the matter on grounds that I regard to be cogent and in respect of which I do not anticipate another court finding differently.

[14] The applicants for leave contend that I had engaged in the Part A proceedings in matters reserved for Part B. The applicants contend that

they were brought to court on the basis that the question whether Shiva was in business rescue or not would be dealt with in Part B. As it was stated by counsel: "*We came for a knife fight and got shot."*

[15] Prayer 2 of the notice of motion in Part A is premised upon Shiva being in business rescue. The respondents contended that, by virtue of the termination of business rescue notice filed by the first respondent on 23 October 2023 at the CIPC, Shiva was not in business rescue.

[16] Section 66 of the Companies Act makes it clear that a company is governed by its board of directors unless the Act provides otherwise. Chapter 6 imposes limitations upon the board of directors, should the company be in business rescue.

[17] The aforesaid prayer clearly engaged the question whether Shiva was in business rescue or not. The fact that the same topic is dealt with in Part B is not unusual. Part A is only concerned with interim relief.

[18] At the time of the hearing and in the papers, the first respondent contended that he is the sole business rescue practitioner, and that Mr Januarie was merely his assistant. During the application for leave to appeal, this submission was explained as referring to Mr Tayob, asserting the right to act

alone as the senior business rescue practitioner, whereas Mr Januarie is a junior business rescue practitioner.

[19] It is common cause that Mr Tayob filed the notice terminating business rescue unilaterally.

19.1 In **Shiva Uranium v Tayob** 2022(3) SA 432 the Constitutional Court found at par [59] that Mr Tayob and Mr Januarie were validly appointed as business rescue practitioners.

[20] In the proceedings before Msimang J the court referred to this finding and added that Mr Monyela was an assistant business rescue practitioner to Mr Tayor and Mr Januarie. It suffices to state that there was more than one business rescue practitioner, despite acerbic submissions made before me in respect of Mr Monyela. He was called an imposter and is alleged to be in the pocket of one of the interested parties.

[21] The facts pertaining to Mr Monyela were not properly before me and were not an issue on which I could make any finding. That is and remains in issue that the parties can deal with in Part B proceedings. I regard myself as bound by the SCA authority that, where more than one business rescue practitioner has been appointed, they must act jointly. As Mr Tayob acted unilaterally, his actions, based on the SCA judgment, lacks legality. The

import of the aforesaid was that Shiva Uranium was still in business rescue. That formed the basis upon which the interim interdict was granted.

[22] However, as the company could not be held ransom to bickering business rescue practitioners, I made directions as to the future process in order to facilitate proceedings in Part B. My power to grant an order in terms of par 1.5 of the 1 December 2023 order was assailed in the application for leave to appeal.

[23] Section 140(3)(d) empowers the court to direct a business rescue practitioner to report to it. The facts of the matter justify such an order, despite the fact that the parties did not expressly requests such an order. The order requiring a reporting was however based on facts before me. Business rescue practitioners who do not cooperate act unilaterally and take steps with deliberately intended legal consequences, without approaching the court for directions (in the face of internal disputes on the steps to be taken) required an accounting by such business rescue practitioners. As the order in Prayer 1.5 will assist the court in Part B proceedings in deciding whether to grant the declarator, based on facts available to it at that time, therefore serves a procedural purpose in the further conduct of the matter. Section 140(3)(d) does not expressly require an application by a party for an order directing a reporting. While a party can no doubt applies for such an order in this instance, the dilemma the company faces is that the dispute between the BRPs regarding its status is partly due to their failure to apply

for directions to undo the consequences of an impasse. Going it alone, as Mr Tayob did, appears to be self-help in the face of a dispute on his power to act alone. The reporting order in par 1.5 is an order made in the best interests of the company and affected persons. The argument that the order oversteps the power of the court in Part A proceedings has insufficient prospects on appeal.

[24] The applicants contend that the finding that Shiva is in business rescue is final.

24.1 Based on the aforesaid SCA authority, my finding on the law, i.e. that jointly appointed business rescue practitioners must act jointly, is final. It is however based on binding authority. There is no persuasive reason suggesting that the SCA would deviate from its judgment. There are therefore no reasonable prospects of another court coming to a different conclusion on this question of law.

24.2 My finding that Shiva is still in business rescue flows from the application of binding SCA authority on the common cause facts that Mr Tayob acted unilaterally in filing the termination notice in the belief that he was entitled to act unilaterally.

24.3 The parties are entitled to place further facts before the court hearing Part B proceedings. In particular, the assertion by Mr Tayob that he

had sent the notice of termination to both Mr Monyela and Mr Januarie, is a factual issue not fully canvassed. If the facts in Part B proceedings indicate either acquiescence or consent on the part of Mr Monyela and Mr Januarie in the filing of the termination notice, then the granting of the declarator sought in Part B regarding the status of Shiva will be based on those facts. The suggestion that my finding of fact is final is therefore incorrect. It merely underpins interim relief that may be revisited in Part B. It does not have final effect. It is therefore not appealable.

[25] The applicants for leave contend that the CIPC regulations were not before the SCA and that the authority relied upon is therefore distinguishable and does not bear sufficient prospects of success on appeal.

[26] It is the filing of a notice of termination of business rescue by the BRPs in terms of section 141(2)(b)(ii) that determines whether business rescue has ceased or not. Its effect is not dependent on the CIPC updating its records.

[27] The reliance by the applicants for leave to appeal on the regulations is based on the subsequent steps taken by the CIPC. It is contended that the CIPC exercises a discretion in updating its records, following the filing of such a termination of business rescue notice. It was submitted that Regulation 168(4) requires of the CIPC to take reasonable steps to confirm the identity

of the person filing the notice and to verify that such person has the right to file such notice (identity and authority).

[28] Regulation 168(4) has the hallmarks of an administrative checklist. The decision to update records is, based on such an interpretation, a clerical or mechanical act.

[29] Regulation 168(5) provides that, if the CIPC refuses to update the records, the person concerned can apply to the CIPC to set aside the refusal. By contrast, the refusal to exercise the power to update records may very well constitute the exercise of a discretion and Regulation 168(5) creates a remedy to deal with such refusal.

[30] One cannot conflate the process of updating records with a refusal to undo the updating in the aforesaid context.

[31] The role of the CIPC has been definitively dealt with by the SCA in **Knoop and Another NNO v Gupta1** 2021(3) SA 135 (SCA). On my interpretation, what was stated in par [41] constitutes part of the ratio of the SCA and is therefore binding upon me. At par [41] the SCA stated:

"… the CIPC has no role to play in the process beyond receiving and maintaining in its records information about the commencement and termination of business rescue. There is accordingly no public act by the CIPC that has legal efficacy and is required to be set aside in accordance with the principles in Tasima. Instead, there is an entirely private process involving the company, the BRP and all affected persons. The role of the CIPC is simply to hold the public record of the company's status."

[32] In the light of the aforesaid, the grounds of appeal based on the updating of records by the CIPC has no reasonable prospects of success on appeal.

[33] Grounds of appeal have been formulated with reference to statements concerning Plantcor. Plantcor was an applicant for intervention at the time of the hearing and it was admitted as a third applicant.

[34] There is no reference to Plantcor in the order granted. Its involvement is no more than background in the urgent application. The statements in par 1 was not a final finding of fact. It forms part of Plantcor's assertions that it has a right to intervene as co-applicant. I was not adjudicating on a dispute regarding the validity of the Plantcor contract or its duration. However, Plantcor is another reason why the BRPs should co-operate and act jointly rather than act independently, as it is trite that an appeal is against the order and not the reasoning.

[35] It suffices to state that the assertions of Plantcor was mentioned as introductory and background information without findings that are intended to be final. The judgment indicates that it is for the business rescue practitioners, acting jointly, to determine the position of Plantcor, i.e. whether it is a post-commencement creditor or not.

[36] My comments regarding the termination of the contract with Plantcor by Mr Tayob was based on the date of termination being after filing of the termination notice on 23 October 2023. This was not intended as criticism, but an indication that, if that was the termination date, if makes no sense. If the termination date was in 2022, as was submitted by Mr Louw SC, the same issue of unilateral action by Mr Tayob is engaged. That is not an issue I was required to adjudicate. That too is an issue that should be dealt with by the business rescue practitioners, acting jointly, or be dealt with by the parties in the proceedings in Part B.

[37] It suffices to state therefore that references to Plantcor in the judgment are related to the assertions upon which they seek intervention and are not intended as final findings of fact. If so advised, these issues can be fleshed out in supplemented papers in Part B. The grounds of appeal related to Plantcor therefore do not justify leave to appeal.

[38] The SCA in **Knoop v Gupta** 2021(3) SA 88 (SCA) at par [31] envisaged reports to court by business rescue practitioners. Although business rescue

is therefore essentially private, there are circumstances that require or justify reports to court.

[39] It was contended that I erred in granting interdictory relief in the absence of cogent evidence of irreparable harm. The directors of Shiva contend that the company has R40 million in the bank, does not need the protection of business rescue, that all creditors were compromised and that the company suffers irreparable harm by virtue of the interim order.

[40] The issue whether Shiva deserves to be in business rescue is not an issue that served before me. The question was whether the termination notice filed by Mr Tayob had the effect of taking it out of business rescue or not. In making the finding that I did, I regard myself as bound by SCA and Constitutional Court authority that there are at least two business rescue practitioners who are required to act jointly. Insofar as Mr Tayob acted unilaterally, this constitutes an illegality. The continuation of this illegality not only informs the question of urgency but justifies a court intervening based on the Rule of Law.

[41] The first respondent is the only party to raise an issue which it contends *"might raise the apprehension of bias"*.

[42] It was submitted that I was required to disclose upfront the fact that Mr Maritz SC, acting for Plantcor and I had a standing dinner appointment for Wednesday evening (the hearing having taken place on Tuesday). This submission that I was obliged to disclose the dinner appointment was based on the Code of Judicial Conduct, paragraph 13(iv). This provision relates to a duty of disclosure upon a presiding judge. Even if no grounds for accusal exist, a judge, believing that there are facts which might influence parties as whether a judge should continue in the matter, that they need to be disclosed. The submission was based on a perception regarding facts which, if known, might result in an application for accusal.

[43] At the hearing of the application for leave to appeal I advised the parties of the fact that Mr Maritz SC's involvement in the application only became apparent when the was called before me. Based on his involvement, I resolved that I would not be attending the dinner and requested my wife to convey this to Mr Maritz's wife (a lifelong friend of hers).

[44] After the hearing had concluded I was then advised by her that Mr Martiz SC had apparently discussed the matter with all counsel after the hearing. He was clearly unaware of my decision not to attend. However, the parties were informed by Mr Maritz SC of the dinner appointment for the Wednesday evening. He requested them whether he needs to postpone the meeting if they had an objection. All counsel concerned stated that there was no need for it. They had no issue with the dinner continuing.

[45] When this was conveyed to me, I was reassured that it was a non-issue. However, during the application for leave to appeal, it appears that this matter resurfaced.

[46] It bears noting that, after the hearing adjourned on Wednesday, all parties had an opportunity to make supplementary heads of argument available to me that I would take into consideration before finalising the judgment. None of the parties referred to this issue at all. The belated reliance on the dinner appointment has served as a disappointment. Nevertheless, the facts present to my mind at the hearing was that the dinner date would not proceed. It was therefore not an issue that I regarded as necessary to disclose, other than to Mr Maritz SC as host.

[47] Applications for recusal cannot be banked until it suits. It was submitted that, through their inaction and silence, the applicants for leave had acquiesced that the dinner date was a non-issue.

[48] Counsel for Mr Monyela, who raised this issue during the application, expressly stated that nobody thinks that I and Mr Maritz SC spoke about the case. That goes without saying. It suffices to state that I regarded the dinner as a non-issue as I had resolved not to attend. That was the position

during the hearing. It only changed when I was assured that it had become a non-issue due to the intervention of Mr Maritz SC.

[49] Section 17(1)(a)(i) and (ii) impose a higher duty upon applicants for leave than prevailed prior to the commencement of Act 10 of 2013.

[50] The two issues central to part A, i.e. whether Shiva was in business rescue or not and the role of the CIPC was decided on SCA case law. The applicants have not persuaded me on any of the grounds that there are reasonable prospects that another court would find differently.

[51] It was also argued that judicial honesty requires leave to be granted on the question whether the CIPC performs a clerical act or an administrative action in updating its records. This submission was based on the Gouws judgment of the Full Court referred to in the main judgment. It was contended that as the Full Court was split, that at least two judges in the High Court thought that the CIPC records are the result of administrative action. The stare decisis principle answers this submission. The majority judgment in the Full Court is binding. This debate is further informed by the SCA's findings on the role of the CIPC, which is consistent with the majority in the Gouws matter. The role of the CIPC has been settled. There is therefore no compelling reason to grant leave to appeal.

[52] Based on the reasoning set out above, I am not persuaded that the applicants' applications have risen to the standard required for leave to appeal.

[53] In the premises I make the following order:

1. All three applications for leave to appeal are dismissed with costs, such costs to include the costs of two counsel where so employed.

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E LABUSCHAGNE
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES:

For Applicant:	Adv G Wickins SC Adv L V R van Tonder Instructed by Smit Sewgoolam Incorporated
For First Respondent:	Adv PF Louw SC Instructed by A Mothilal Attorneys Inc
For Oakbay Resources and Energy (Pty) Ltd:	Adv L Van Gass Instructed by VDM Attorneys
For Second & Fifth to Seventh Respondents:	Adv D Vetten Instructed by SWM Attorneys
For Plantcor Mining and Plant Hire (Pty) Ltd:	Adv J C Viljoen Instructed by Liebenberg Malan Mofolo

	Attorneys
Date of Hearing:	25 January 2024
Date of Judgment:	2 February 2024