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LEGAL UPDATE

Mystery of the momentary visitor: Solving the uncertainty surrounding the replacement of an interim business rescue practitioner

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A company can be placed in business rescue in only two ways, voluntarily by a board resolution in terms of section 129 or compulsorily by court application brought by an affected person in terms of section 131 of the Companies Act 71 of 2008 ("Companies Act").

The affected person contemplated in section 131(1) of the Companies Act is usually a single creditor who has taken the initiative to have the company placed in business rescue. In terms of section 131(5), the Court – if it makes an order placing the company in business rescue – may appoint an "interim practitioner" who has been "nominated" by the petitioning creditor. This appointment is interim, because in terms of section 131(5) the appointment is "subject to ratification by the holders of a majority of the independent creditors' voting interests [50%+1] at the first meeting of creditors, as contemplated in section 147" [our insertion in square brackets].

The Companies Act is, unfortunately, silent on what process ought to be followed if the interim practitioner's appointment is not ratified at the first meeting of creditors. This article briefly seeks to solve that mystery.

However, section 139 of the Companies Act, headed "Removal and replacement of practitioner" is instructive (to a limited extent), and provides at subsection (3) that "[t]he company, or the creditor who nominated the practitioner, as the case may be, must appoint a new practitioner if a practitioner dies, resigns or is removed from office, subject to the right of an affected person to bring a fresh application in terms of section 130(1)(b) to set aside that new appointment."

That is, if a practitioner, who is *finally* appointed by the company in terms of section 129(1)(b) of the Companies Act, *dies, resigns or is removed* from office, the company may, in terms of section 139(3), appoint the substitute. If the practitioner, who is *finally* appointed in terms of section 131(5) *dies, resigns or is removed* from office in terms of section 139(1), the "affected person" who applied for the company to be placed in business rescue, and who made the nomination envisaged in section 131(5), may appoint the substitute.

This was confirmed in *Shiva Uranium (Pty) Limited (In Business Rescue) and Another v Tayob and Others* 2022 (2) BCLR 197 (CC) by the Constitutional Court.

It is worth noting, however, that section 139(3) deals with the removal from office of a business rescue practitioner that has taken up his/her office and is then removed. An interim practitioner, as contemplated in section 131(5) of the Companies Act, is not finally appointed and does not take up his/her office unless his/her appointment is ratified, and is not therefore "removed" from office – that interim practitioner's appointment simply lapses, if not ratified.

However, taking a purposive approach that balances the rights of all stakeholders (having regard to the words expressly used in section 131(5) of the Companies Act, as read with section 7(k), and section 139(3)) it appears that the legislature intended for the right to nominate a substitute interim practitioner, if the appointment of the interim practitioner by the Court lapses, to vest with the applicant (petitioning) creditor only, and any further nomination under section 131(5) will likely also be an interim appointment by the applicant creditor subject, yet again, to an interim appointment by Court and ratification in terms of section 147(3) of the Companies Act, or, taking a more practical approach, appointment directly by the independent creditors per section 147(3) of the applicant creditors' nominee.

That is, when, at the first meeting of creditors, the interim business rescue practitioner's appointment is rejected by the body of independent creditors in terms of section 147(3) of the Companies Act, the applicant creditor alone will have the power to nominate a replacement which

would again, taking the aforesaid purposive and practical approach, have to be sanctioned by the majority of independent creditors at the first meeting of creditors. And so on, and so forth...until a business rescue practitioner is eventually finally appointed.

We point out that this position has not yet been crystalised by legal precedent, but we believe that this is the most plausible interpretation.

However, this does not mean that the body of independent creditors cannot make their preferred business rescue practitioner/s known to the applicant creditor and then try to negotiate for his/her nomination and subsequent appointment (jointly with the applicant creditor's preferred practitioner), in order to avoid the company remaining indefinitely in business rescue without a final practitioner at the helm to steer the proceedings.

This mystery, as many mysteries arising from the Companies Act, ends with a real cliff hanger, as our Courts may ultimately have to decide how, by and with whom the interim business rescue practitioner is replaced.

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