

**RESCUING THE BUSINESS RESCUE
PROCESS: A CRITICAL REFLECTION ON THE
AUTHORITY TO APPOINT A SUBSTITUTE
BUSINESS RESCUE PRACTITIONER THROUGH
THE LENS OF**

***Shiva Uranium Limited v Mahomed Mahier Tayob*
2022 (3) SA 432 (CC)**

1 Introduction

The South Africa Companies Act 71 of 2008 (the Act), introduced, *inter alia*, business rescue as a vital, innovative instrument for maintaining and sustaining corporate life by saving financially distressed companies (Cassim “Business Rescue Proceedings” in FHI Cassim, MF Cassim, R Cassim, Jooste, Shev and Yeats *Contemporary Company Law* 2ed (2012) 861). Business rescue is a legal mechanism that facilitates the rehabilitation of companies facing economic distress so that they can contribute to the national economy, thereby ensuring company profitability, preservation of employment, and other significant social goals (Naidoo, Patel and Padia “Business Rescue Practices in South Africa: An Explorative View” 2018 11(1) *Journal of Economic and Financial Sciences* 1–9). In this matrix, business rescue practitioners play an important role in the successful execution of business rescue proceedings (s 138(1) of the Act). Notably, the Act lays down criteria for a person to qualify as a business rescue practitioner. It states that to qualify as a business rescue practitioner, a person must be a member in good standing of a legal, accounting or business management profession accredited by the Companies and Intellectual Property Commission (CIPC) and be licensed as such by the CIPC. It is desirable that there should be clarity on the interpretation of statutory provisions governing the appointment of business rescue practitioners (Pretorius “Tasks and Activities of the Business Rescue Practitioner: A Strategy as Practice Approach” 2013 17(3) *Southern African Business Review* 1–26). The power to appoint a substitute business rescue practitioner was expounded in *Shiva Uranium Pty Ltd (In Business Rescue) v Mahomed Mahier Tayob* (2022 (3) SA 432 (CC)) (*Shiva v Tayob*). The court grappled with the question of who is vested with the authority to appoint a business rescue practitioner in circumstances where the court-appointed business rescue practitioner has either resigned, become incapacitated or died (see *Shiva v Tayob supra* par 1).

This case note provides a critical analysis of the *Shiva* decision by exploring the rationale of the court’s decision, its soundness, and assessing whether it is a correct reading of sections 128(1)(b), 129(3) and 130(6)(a) of

the Act. The central argument advanced by the article is that, unlike the court *a quo*, the Constitutional Court in *Shiva* had an opportunity to flesh out the rules and principles that govern the appointment of a substitute business rescue practitioner. The court was not only required to ascertain the formulation of section 129(3) of the Act *vis-à-vis*, the appointment of the business rescue practitioner, but also to ascertain ancillary, yet important questions, such as who can be appointed as a business rescue practitioner. This case note posits that the interpretation of controversial sections 128(1)(b), 129(3), and 130(1)(b) of the Act should be made in light of contemporary trends in India, which allow the appointment of juristic persons as business rescue practitioners to ensure continuity of business rescue proceedings (s 128 of the Act).

The structure of this case note is as follows. The first part lays the foundation for a discussion of the *Shiva* case by providing a succinct intertwined discussion on the significance of business rescue and the appointment of the rescue practitioner in general. Such an approach is important for the purposes of establishing the instrumentality of the business rescue. The second part of the case note introduces the factual matrix of the *Shiva* case. Thereafter, it explores the decisions of the Companies Tribunal and the High Court in *Shiva*. The case note then proceeds to distil the decisions of both the Supreme Court of Appeal (SCA) and the Constitutional Court in *Shiva*. Finally, the case note provides a critical analysis of the Constitutional Court's findings in *Shiva*, identifying the lacuna in the court's judgment and offering a pathway for refining and developing the corporate rules that govern the appointment of a substitute business rescue practitioner in accordance with the applicable provisions of the Act.

2 The necessity and ramifications of appointing a business rescue practitioner in business rescue proceedings

A business rescue practitioner is a person(s) appointed in terms of Chapter 6 of the Act to manage a company that has been placed in business rescue (s 138 of the Act provides the qualifications and conditions for appointment as a business rescue practitioner). The main duties of a business rescue practitioner are temporarily to supervise and manage the company's affairs (s 140 of the Act states that, "[d]uring a company's business rescue proceedings, the practitioner, in addition to any other powers and duties set out in this Chapter ... has full management control of the company in substitution for its board and pre-existing management"). Section 128 of the Act provides that a company that has been placed on the pathway of the business rescue process will enjoy a temporary moratorium from the claims of creditors against the company or in respect of other property in its possession (s 128(1)(b) read with s 133 of the Act). During this interval, subject to the approval by each creditor, the business rescue practitioner is required to develop, implement, and operationalise the business rescue plan (s 150 of the Act). A business rescue plan has the potential to rescue the company from its financial problems by restricting its liabilities, equity, debts and business affairs (s 128(1)(b)(iii); Rosslyn-Smith and De Abreu "Informing the Vote: The Business Rescue vs Liquidation Decision" 2021 25 *Southern*

African Business Review 22). Notwithstanding the corporate benefits of business rescue, including the stay of creditors' rights, when a company is placed in business rescue there is no guarantee that the rescue process will be successful (Rosslyn-Smith and De Abreu 2021 *Southern African Business Review* 22). According to the 2022 statistical overview provided by the CIPC, since the inception of business rescue in 2011, approximately 4 370 companies have entered business rescue, with 1 649 active business rescue proceedings and 546 companies under business rescue that have ended in liquidation (CIPC "Status of Business Rescue in South Africa" (30 June 2022) https://www.lssa.org.za/wp-content/uploads/2022/10/Status-of-Business-Rescue-in-South-Africa-Report_June-2022.pdf (accessed 2023-05-04)).

3 The factual matrix of the *Shiva* case

The facts of the case are as follows. On 20 February 2018, Shiva's board of directors decided to place the company in business rescue under section 129 of the Act (*Shiva v Tayob supra* par 3). Section 129 of the Act provides that a company's board of directors may decide to commence business rescue proceedings voluntarily and may place the company under supervision if there are good reasons to believe that the company is experiencing financial distress, and there appears to be a reasonable prospect of rescuing the company (s 129(1) of the Act). This section allows a company to be placed in business rescue without applying to court, and this approach is time- and cost-effective (Kubheka "The Requirements of Business Rescue Proceedings in South Africa: A Critical Analysis of 'Reasonable Prospect' in Light of Business Rescue Proceedings in Terms of the Companies Act 71 of 2008" (unpublished Master of Laws thesis, University of KwaZulu Natal) 2020 26). Commentators have pointed out that the purpose of section 129 is to persuade directors of financially struggling companies to seek assistance at an early stage rather than delaying their actions until it is too late to do so (Cassim *et al Contemporary Company Law* 866; see also Levenstein "An Appraisal of the New South African Business Rescue Procedure" (unpublished doctoral thesis, University of Pretoria) 2015 307; Pretorius and Du Preez "Constraints on Decision Making Regarding Post-Commencement Finance in Business Rescue" 2013 6(1) *The Southern African Journal of Entrepreneurship and Small Business Management* 168–191; Ramnanun, Rajaram and Nyatanga "Business Rescue Legislation: Rehabilitating or Debilitating Business Rescue Success During Covid-19" 2022 7(4) *African Journal of Business and Economic Research* 101–121). After resolving to commence business rescue, the board must appoint a business rescue practitioner. In *Shiva*, the board nominated Messrs Klopper and Knoop as business rescue practitioners. However, a month after their appointment, the Industrial Development Corporation (IDC) – an affected party – filed an application to replace Messrs Klopper and Knoop as business rescue practitioners with Mr Murray in terms of section 130(1)(b) read with section 130(6)(b) (s 130(6) of the Act states that, "[i]f, after considering an application in terms of subsection (1)(b), the court makes an order setting aside the appointment of a practitioner ...".) Section 130 allows an affected person to petition the court to nullify a practitioner's appointment based on a lack of certain competences – in

particular if the practitioner does not meet the requirements of section 138, is not independent of the company, or falls short of the necessary skills in light of the company's circumstances (s 130(1) of the Act). The Act ensures that the practitioner may be removed from office only by means of a court order (for a detailed discussion on the removal of a business rescue practitioner, see Wilson and Harten "How to Break Up With Your Business Rescue Practitioner" 2019 19(8) *Without Prejudice* 26–27; Cassim *et al Contemporary Company Law* 891). In *Shiva*, the day before the application was to be heard, Messrs Klopper and Knoop resigned from their positions as business rescue practitioners. When the case was brought before the High Court, the parties submitted a draft order that acknowledged the resignations of Messrs Klopper and Knoop and the appointment of Mr Murray as the new business rescue practitioner. The order also requested the CIPC to appoint an additional business rescue practitioner, and it duly appointed Mr Monyela as an additional business rescue practitioner for *Shiva*. Three months after his appointment, Mr Murray resigned as one of *Shiva's* business rescue practitioners. Nonetheless, before Mr Murray resigned, he and Mr Monyela passed a resolution to designate Mr Damons as his replacement. However, *Shiva's* board of directors opposed Mr Damons's appointment and decided to replace Mr Murray with Messrs Tayob and Januarie (see *Shiva v Tayob supra* par 11). Importantly, after taking the necessary steps, these competing appointments were submitted to the CIPC for determination (*Shiva v Tayob supra* par 11).

3.1 *The pronouncement of the Companies Tribunal in Shiva*

In *Shiva*, Mr Monyela, ostensibly in his own name and on behalf of *Shiva*, filed a lawsuit with the Tribunal to compel the CIPC to accept the appointment of Mr Damons and to remove that of Messrs Tayob and Januarie. The Companies Tribunal (established in terms of section 193 of the Act) has, *inter alia*, the function of resolving disputes as contemplated in Part C of Chapter 7 of the Act. In his lodgment, Mr Monyela contended that the IDC has the authority to appoint a business rescue practitioner in terms of section 139(3) of the Act (*Shiva v Tayob supra* par 12). He further argued that Mr Damons was appointed on behalf of the IDC as the major creditor. The Companies Tribunal accepted Mr Monyela's submission and ruled in his favour. Nonetheless, in response, Messrs Tayob and Januarie filed an application with the High Court seeking an interdict to prevent the CIPC from enforcing the Tribunal's judgment, and a declaration of invalidity of the decision of the Companies Tribunal (*Shiva v Tayob supra* par 12). Notwithstanding the ruling by the Companies Tribunal, ordinarily, it is accepted that the Companies Tribunal does not have explicit jurisdiction to hear matters arising from Chapter 6 of the Act, including those pertaining to business rescue (*Shiva v Tayob supra* par 12). However, arguably, considering that the presiding officer of the Tribunal has expertise in business, economics and finance, Boraine *et al* propose that the jurisdiction of the Companies Tribunal should be extended to include matters arising from business rescue proceedings (Boraine, Delport, Scott and Labuschagne "Seminar on Legislative Shortcomings in Implementing the

Tribunal's Mandate" (27 April 2023) *Companies Tribunal* <https://www.companiestribunal.org.za/seminar-on-legislative-shortcomings-in-implementing-the-tribunals-mandate-2/> (accessed 27-04-27) session 3). Such a development should be embraced because it serves multiple objectives, including decongesting the courts by providing a competent platform other than the courts for resolving disputes on business rescue (Boraine, Delpont, Scott and Labuschagne <https://www.companiestribunal.org.za/seminar-on-legislative-shortcomings-in-implementing-the-tribunals-mandate-2/> session 3).

3.2 *The High Court decision*

The three-fold issues for determination before the High Court were as follows. First, which business rescue practitioner appointment was valid (*Shiva v Tayob supra* par 14)? Secondly, did the board of directors have the authority to appoint a replacement business rescue practitioner without the approval of the existing business rescue practitioner (*Shiva v Tayob supra* par 14)? Thirdly, is a junior business rescue practitioner eligible for overseeing the rescue of a large company notwithstanding the provisions of regulation 127(3) of the 2011 Companies Regulations (GN R351 in GG 34239 of 26-04-2011; *Shiva v Tayob supra* par 14)? (Reg 127(3) states: "A junior practitioner (a) may be appointed as the practitioner for any particular small company; but (b) may not be appointed as the practitioner for any medium or large company, or for a state-owned company unless as an assistant to senior practitioner.") The High Court ruled that the appointment of Messrs Tayob and Januarie as business rescue practitioners was not valid because the board of directors did not obtain the approval of the existing business rescue practitioner (Mr Monyela) in terms of section 137(2) read with section 137(4) of the Act (*Shiva v Tayob supra* par 15 and 16; s 137(2)(a) of the Act states: "During a company's business rescue proceedings, each director of the company must continue to exercise the functions of director, subject to the authority of the practitioner.") The court held further that Mr Monyela could continue discharging his duties as a business rescue practitioner for *Shiva* only if the board of directors appointed an additional senior business rescue practitioner (*Tayob v Shiva Uranium (Pty) Ltd* [2020] ZASCA 162).

The main shortcoming of the High Court's decision is that the court did not distinguish between the business rescue practitioner's powers to manage the business, and the director's fiduciary duties during the business rescue process. It can be strongly argued that section 129 of the Act, which authorises the board of directors to place a financially distressed company in business rescue, is congruent with section 66(1) of the Act, which imposes a duty on the board of directors to manage the company's business (see also Cassim *et al Contemporary Company Law* 866). Such a duty is not abandoned or relegated by the director but continues to subsist and must be actively fulfilled during business rescue. This is because the directors are best equipped to know whether the company is in financial distress, and they are also properly positioned to appoint the best business rescue practitioner suited to facilitate the restructuring of the company. More importantly, the board of directors is not obligated to consult with the shareholders in

resolving to place a company in business rescue, or to appoint a business rescue practitioner (Cassim *et al Contemporary Company Law* 866). Considering that shareholders have interests in the survival of the company and are not consulted, this strongly suggests that the board does not need the practitioner's approval to appoint a replacement business rescue practitioner. The latter view is clearly captured by the Supreme Court of Appeal.

3.3 *Deciphering the defects in the Supreme Court of Appeal's conservative interpretation of the provisions of the Act*

The business rescue practitioners appointed by Shiva, Messrs Tayob and Januarie, appealed against the decision of the High Court to the Supreme Court of Appeal (SCA). The SCA held that the board of directors does not need the approval of the business rescue practitioner to appoint or replace a business rescue practitioner (*Tayob v Shiva Uranium (Pty) Ltd supra* par 25). The court reasoned that the powers and duties conferred on the business rescue practitioner in section 140(1) only relate to the company's management in the sense of overseeing the day-to-day operational management of the company (*Tayob v Shiva Uranium (Pty) Ltd supra* par 25). Therefore, when directors perform duties outside the scope of "management", they do not need the practitioner's approval (*Tayob v Shiva Uranium (Pty) Ltd supra* par 25). Most importantly, a decision taken by directors to replace a business rescue practitioner, as provided for in section 139(3), is an act of corporate governance falling outside the ambit of the practitioner's "management" of the company (*Tayob v Shiva Uranium (Pty) Ltd supra* par 25). Therefore, the appointment of Messrs Tayob and Januarie as business rescue practitioners by Shiva's board of directors was valid. Aggrieved by the SCA ruling, Mr Monyela appealed to the Constitutional Court.

3.4 *The decision of the Constitutional Court*

Although the SCA concluded that the board of directors had the authority to appoint a new business rescue practitioner, Mr Monyela maintained that such power belonged to the independent creditors with the majority of voting interests who had participated in the procedures that led to the appointment of the court-appointed business rescue practitioner. The Constitutional Court held that the answer depended on a proper interpretation of section 139(3) of the Act, which states:

"The 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."

The court ruled that the formulation of section 139(3) applied to two different scenarios: one in which a company is placed in business rescue by a board resolution in accordance with section 129, and the other in which a company is placed under compulsory business rescue by a court in terms of section

131 (*Shiva v Tayob supra* par 37). In the former scenario, when the business rescue practitioner resigns, the board of directors has the right and responsibility to appoint another business rescue practitioner. However, in the latter, the affected person who nominated the business rescue practitioner may nominate a substitute. The court elucidated that the reference in section 139(3) to the “creditor” who nominated the practitioner is infelicitous since the “affected person” envisioned by section 131(5) might not be a creditor (*Shiva v Tayob supra* par 38). The court further held that the legislature clumsily drafted section 139(3) of the Act with the presumption that the person who would file a petition for compulsory business rescue would be a creditor (*Shiva v Tayob supra* par 38). If the word “creditor” in section 139(3) is not read as meaning “affected person”, or if the words “or other affected person” are not read into the section immediately after “creditor”, there would be no provision for the appointment of a substitute where the person who applied for compulsory business rescue was an affected person in a capacity other than creditor (*Shiva v Tayob supra* par 38). The court concluded that the word “creditor” also included any person who falls under the category of affected persons.

The court held that when a practitioner chosen by the court in terms of section 130(6)(a) resigns, the question is where to accommodate the power to appoint a substitute. In this scenario, one is dealing with a voluntary business rescue (*Shiva v Tayob supra* par 38). The board is rightly positioned to choose a replacement. However, in this case, the individual who resigned was not the practitioner designated by the company but rather a practitioner appointed by the court under section 130(6)(a) following a successful challenge to the company’s appointment (*Shiva v Tayob supra* par 39). The court held that, in such a scenario, the power remained with the board to appoint a substitute business rescue practitioner, and reasoned that a purposive interpretation of section 139(3) would revive the company’s right of appointment if the court-appointed substitute resigned (*Shiva v Tayob supra* par 30 and par 53).

Further, section 7(k) of the Act provides that one of the purposes of the Act is to “provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders” (see also *Shiva v Tayob supra* par 51–53). The court concluded that given the importance of completing corporate rescue proceedings quickly and successfully, a court should prefer an interpretation that supports rather than hinders this purpose (*Shiva v Tayob supra* par 56). If section 139(3) is interpreted as the SCA did, the appointment of a substitute practitioner will be simple and quick. There will be no ambiguity as to who has the authority to make the appointment (*Shiva v Tayob supra* par 56). The company or the affected person who brought the business rescue application will make the alternative appointment, depending on whether the business rescue is voluntary or compulsory. In the case of voluntary business rescue, the rights and interests of stakeholders are balanced: the company keeps its right of appointment, while section 139(3) of the Act specifically preserves creditors’ rights to bring a new challenge under section 130(1)(b), if grounds for such a challenge exist (*Shiva v Tayob supra* par 56). Thus, when Mr Murray resigned, it was not incumbent upon the practitioner to appoint a substitute practitioner; instead, the right to nominate

his successor vested in Shiva's board of directors. Hence, the appointment of Messrs Tayob and Januarie was legitimate and valid.

It is argued that the SCA and the Constitutional Court reached the correct decision based on the following substantive viewpoints. The board of directors enjoys the first right to appoint a business rescue practitioner because it has an intricate understanding of the needs of the company and is better situated to decide on the appointment of a rescue practitioner. This resonated with the doctrine of the debtor in possession, which maintains that although the debtor may be replaced by the business rescue practitioner, the management of the business remains in the hands of the board of directors. The doctrine of the debtor in possession was adopted by South Africa from Australia and England and its precepts remain an authoritative guide and template of acceptable international best practice on the business rescue function.

Aside from the soundness of the decisions of the two courts, it was incumbent upon the Constitutional Court also to interpret the significance of section 129 read with section 66(1) of the Act. Section 66 of the Act provides 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. Therefore, as pointed out earlier, the decision to place a company in business rescue is in fulfilment of the directors' duty to manage the business of the company. It is submitted that the directors are not absolved of actively continuing to fulfil their fiduciary duties during the business rescue process, and they do not simply relinquish all their powers to the business rescue practitioner (see Jordaan and Nkaiseng "Directors Be Warned: There is Not Absolution in Rescue" (11 May 2022) *Business Rescue, Restructuring and Insolvency Newsletter* <https://www.cliffedekkerhofmeyr.com/en/news/publications/2022/Sector/Business/business-rescue-restructuring-and-insolvency-newsletter-11-may-directors-be-warned-there-is-not-absolution-in-rescue.html> (accessed 2023-04-02) 1–9). The legal relationship between directors and a company can be described as "co-governance" based on "cooperative governance" principles, in terms of which directors' fiduciary duties owed to the company are retained (*De Bruyn v Steinhoff International Holdings NV* [2020] ZAGPJHC 145 para 138). This vital relationship is not terminated during business rescue or when the business rescue practitioner assumes control of the company. Thus, when a business rescue practitioner resigns, the board of directors has a statutory duty to appoint a new business rescue practitioner.

4 Going beyond the *Shiva* ruling: A comparative analysis and proposal to cure the legislative defects concerning the authority to appoint a substitute practitioner

Although the above discussion, predicated on the *Shiva* ruling, has brought some illumination on the authority to appoint a substitute business practitioner through juridical interpretation of sections 128 7(k), 130(6) and 139(3) of the Act, the court(s) lost an important opportunity to pronounce on

the important aspects concerning the meaning of a business practitioner, as well as determining whether the court has power to delegate the CIPC to appoint a business rescue practitioner (*De Bruyn v Steinhoff International Holdings NV supra* par 138). The discussion below provides a succinct exploration of these two important aspects of business rescue. It argues that there is a need to go beyond the decision of the *Shiva* ruling by revisiting the concept of a business rescue, and the delegative power of the courts in the business rescue process.

4.1 *Revisiting the meaning of a business rescue practitioner*

The Act envisions in terms of section 128(1)(d) of the Act, an appointment of two or more people as business rescue practitioners. Nonetheless, Delpont argues that although the definition allows for the appointment of more than one business rescue practitioner to manage the rescue of a company, none of the other provisions of Chapter 6 of the Act appears to address this possibility (Delpont *Henochsberg on the Companies Act 2008* (2016) 451). For instance, none of the provisions dealing with remuneration of the business rescue practitioner makes provision for the division of fees where more than one practitioner has been appointed, or for a mechanism that must be applied should a dispute between practitioners arise. Furthermore, the Act does not specify what should happen if one of the practitioners dies or resigns.

In section 1 of the Act, the word “person” includes a legal person, and this implies that a juristic person could be appointed as a business rescue practitioner. However, in light of the Act’s other provisions, that inference may not be valid. This is also in contrast to the Insolvency Act 24 of 1936, and Chapter XIV of the Companies Act 61 of 1973, where only a natural person may be appointed as a trustee or liquidator (see s 1 of the Insolvency Act; s 372 of the 1973 Companies Act). It is not clear whether this is an anomaly or whether it was intentional. It is suggested that the legislature should consider amending the definition of business rescue practitioner to include a juristic person. One potential rationale for limiting the appointment of business rescue practitioners exclusively to individuals could be the parallel concern with the accountability of corporate entities for criminal behaviour, which is the basis for disqualifying juristic persons from serving as directors (see Mpofu, Nwafor and Selala “Exploring the Role of the Business Rescue Practitioner in Rescuing a Financially Distressed Company” 2018 14(2) *Corporate Board: Role, Duties and Composition* 20–26). Historically, the judiciary has embraced the stance that companies cannot be held criminally accountable for the actions of their directors. This conclusion was drawn from the difficulty with ascribing moral culpability or guilt to a legal entity. However, within the legal sphere, there is a contemporary perspective that prioritises adaptability and places significance on the practical responsibilities of an individual inside a firm, attributing their actions to the company as a whole (see *Meridian Global Funds Asia Ltd v Securities Commission* [1995] 2 AC 500; *El Ajou v Dollar Land Holdings Plc* [1994] 2 All ER 685 CA; *Canadian Dredge and Dock Co v The Queen* (1985) 1 SCR 662, 19 DLR 4th 314 (Ont. SCC); *The Rhone v The Peter A.B.*

Widener (1993)1 SCR 497, 101 DLR 4th 188 (SCC). For a detailed discussion of these cases and principles, see Nfawor “Examining the Concept of *De Facto* Director in Corporate Governance” 2016 12(2) *Corporate Board: Role, Duties and Composition* 12–21). Nevertheless, it appears that the South African corporation law jurisprudence has not fully integrated this judicial resolution, as juristic entities are still ineligible to serve as directors. Therefore, it is not permissible to designate juristic entities as business rescue practitioners in South Africa. However, the differentiation in the eligibility for holding office based on the distinction between juristic and natural people is no longer defensible within the context of contemporary company law. The issue of corporate liability has been extensively addressed in judicial rulings, establishing a clear legal framework. From a pragmatic standpoint, corporations generally possess superior capabilities for managing business operations compared to individuals (according to s 155(1) of the Companies Act 2006, the United Kingdom allows for the appointment of a corporate director on a company’s board, provided that there is at least one director who is a natural person). Individuals have significant challenges in matching the reach of corporate entities that possess abundant qualified personnel and financial resources.

In terms of section 5(2) of the South African Companies Act, a court interpreting or applying this Act may consider foreign company law. For this reason, the authors posit that South Africa should consider drawing some lessons from the United Nations Commission on International Trade Law (UNCITRAL) Legislative Guide parts one and two of 2005 (UNCITRAL) and from the Indian legislature. According to the UNCITRAL Legislative Guide, in some states, a legal person may also be eligible for appointment, though this is contingent upon meeting certain requirements, such as ensuring that the individuals who will carry out the work on behalf of the legal person have the appropriate qualifications, and ensuring that the legal person itself is subject to regulation (UNCITRAL Legislative Guide 2005: 177 par 44. The term “insolvency representative” is used in the Guide to refer to the person fulfilling the range of functions that may be performed in a broad sense without distinguishing between those different functions in different types of proceeding). The UNCITRAL Legislative Guide provides an authoritative and persuasive set of good practices on, *inter alia*, who can be competently appointed as a business rescue practitioner, and should inform the South African approach to the subject matter.

One of the jurisdictions that allows the appointment of a juristic person as an insolvency representative is India under the Insolvency and Bankruptcy Code of 2016. The Preamble to the Indian Insolvency and Bankruptcy Code states that the purpose of the Code is “to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets”. Chapter II of the Code provides for the “corporate insolvency resolution process” that is akin to Chapter 6 business rescue proceedings in South Africa. The resolution process is administered by a “resolution professional”, who holds the same status as a business rescue practitioner. A “resolution professional” means “an insolvency professional appointed to conduct the corporate insolvency resolution process and includes an interim resolution professional” (s 5(27) of the 2016 Insolvency

and Bankruptcy Code). The phrase “insolvency professional” means a “person enrolled under section 206 with an insolvency professional agency as its member and registered with the Board as an insolvency professional” (s 3(19) of the Insolvency and Bankruptcy Code); whereas the term “person” includes– (a) an individual; (c) a company; (d) a trust; (e) a partnership; (f) a limited liability partnership; and (g) any other entity established under a statute, and includes a person resident outside India (s 3(23) of the Insolvency and Bankruptcy Code). Under Indian law, a company that offers business rescue services can be appointed as a resolution professional (equivalent to a business rescue practitioner in South Africa).

There are two main foreseeable advantages to appointing a juristic person as a business rescue practitioner. First, when an individual resigns or dies, appointing another business rescue practitioner may not be necessary since the firm may just appoint other individuals with the same expertise without needing to approach the court. The rescue process may continue without unnecessary interruptions. In *Shiva*, the resignation of Murray and the appointment of Mr Damons could have been dealt with as an internal matter not affecting creditors or the board of directors. This would avert unnecessary debate on who the business rescue practitioner is, and more time and resources could be invested in rescuing the business. Secondly, a juristic person has the capacity to provide expertise in all the areas of a business, including accounting, law and financing. In other words, a firm specialising in business rescue may provide more expertise and resources than individuals.

4.2 *Reconsidering the delegative power of the court in the appointment of a substitute business rescue practitioner*

As previously discussed, the primary debate in *Shiva* concerned the authority to appoint a replacement business rescue practitioner where the court-appointed business rescue practitioner has resigned (*Shiva v Tayob supra* par 1). The Act authorises the board of directors and the court to appoint a business rescue practitioner. If the company initiates business rescue proceedings under section 129, the board of directors must appoint a business rescue practitioner within five working days of submitting the initiating decision with the CIPC (s 129(3)(b) of the Act). The stipulation of time frames for the appointment of the practitioner and the filing of the required notice reflect the lawmaker’s wish that the business rescue process should not be unreasonably extended. (In fact, failure to comply with the five-day requirement renders a business rescue resolution by the company null and void; see also *Madodza Pty Ltd (in business rescue) v ABSA Bank Ltd* [2012] ZAGPPHC 165 par 24–26). In *Shiva*, the dispute over a business rescue practitioner’s appointment started in March 2018, and was concluded in November 2021 (*Shiva v Tayob supra* par 4). It took more than 30 months to finalise the appointment issue, although the primary purpose of business rescue proceedings is not the appointment of a business rescue practitioner (s 132(3) of the Act). Rather, business rescue is intended to resuscitate the company and is estimated to last for three months. Hence, the decision of

the court is welcome because it puts to rest a complicated issue that might trouble other companies in the future.

Shiva also raises an important issue regarding the power of the court to delegate the CIPC to appoint a business rescue practitioner (*Shiva v Tayob supra* par 7). The CIPC was established in terms of Chapter 8 Part A of the Act, and one of its functions during business rescue is to provide licences for business rescue practitioners (s 187(2)(b) of the Act; the CIPC is responsible for monitoring whether nominated individuals comply with the requirements of a business rescue practitioner stipulated in section 138 of the Act). In *Shiva*, the creditors objected to the appointment of Messrs Knoop and Klopper as business rescue practitioners, but, before the matter was heard, they resigned. Instead, the practitioners submitted a draft order indicating their resignation and appointment of an additional business rescue practitioner by the CIPC. Ranchod J accepted the draft order and delegated the CIPC to appoint an additional business rescue practitioner. The Constitutional Court held that it is doubtful the court has the power to delegate its powers of appointment to the CIPC (*Shiva v Tayob supra* par 7). It is submitted that there is nothing in the Act authorising the court to transfer its power to appoint an additional or alternative business rescue practitioner to the CIPC. Section 130(6) of the Act is clear: if an affected party applies to set aside a resolution appointing a business rescue practitioner, the court has the authority to make an order to set aside the appointment of a practitioner. Suppose the court decides to set aside a resolution appointing a business rescue practitioner. In that case, it must also appoint an alternate practitioner who meets the requirements of section 138, and who is recommended or acceptable to the holders of a majority of the independent creditors' voting interests represented in the court hearing (s 130 of the Act).

However, it is posited that the court has the option to delegate that function to the CIPC, where parties consent to the appointment of the CIPC as a separate independent institute that appoints a business rescue practitioner. In fact, the UNCITRAL Legislative Guide states that some countries have a separate office or institution responsible for the general regulation of all insolvency representatives, including business rescue practitioners, and it has the authority to appoint an insolvency representative upon receiving a court order (UNCITRAL Legislative Guide 2005: 177 par 46). The main benefit of this approach lies in the fact that the independent appointing authority can select from a pool of qualified professionals who are familiar with the specifics of the case at hand. This includes the nature of the debtor's business, the market in which the debtor operates, and any specialised knowledge needed to comprehend the debtor's affairs (UNCITRAL Legislative Guide 2005: 177 par 46). It should be borne in mind that central to business rescue proceedings is the desire to resuscitate a company in financial distress within a short period of time and on a minimal budget. Endowing the CIPC with powers to appoint a substitute business rescue practitioner would resonate with the overall objective of expediting the rehabilitation of financially distressed companies.

5 Concluding remarks

This case note has demonstrated that the *Shiva* judgment can be celebrated for reducing potential litigation on the issue of appointing a substitute business rescue practitioner. It has shown that section 139(3) of the Act should be interpreted restrictively as requiring the company, or the affected person who lodged the application for business rescue, to make the alternative appointment, depending on whether the business rescue is voluntary or compulsory. In voluntary business rescue proceedings, the rights and interests of stakeholders should be balanced by upholding the company's right of appointment, while section 139(3) of the Act specifically preserves creditors' right to bring a new challenge under section 130(1)(b) if grounds for such a challenge exist. This means the Constitutional Court was correct in reasoning that, when Mr Murray resigned, it was not incumbent upon the practitioner to appoint a substitute practitioner. Instead, the right to nominate his successor vested in Shiva's board of directors. Hence, the appointment of Messrs Tayob and Januarie was legitimate and valid. Furthermore, the case note has strongly argued that to rescue the business rescue process effectively, there is a need for the legislature to amend sections 128(1)(d), 129 and 130(6) of the Act to enable the appointment of juristic persons that provide business rescue services, and also to allow the courts to delegate their power to appoint a business rescue practitioner to the CIPC in accordance with the Indian approach and international best practice derived from the UNCITRAL Legislative Guide. The argument is that the CIPC is better placed in terms of expertise to make a decision on who can be appointed as a business rescue practitioner. These developments will expedite and improve the process concerning the appointment of a business rescue practitioner, and obviate the challenges that continue to militate against the effectiveness of the current business rescue system.

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