



## COMPANIES TRIBUNAL OF SOUTH AFRICA

Case/File Number: CT009NOV2016

In the matter between:

**CRAIG LYNTON WING**

Applicant

and

**COMPANIES AND INTELLECTUAL  
PROPERTY COMMISSION**

Respondent

*Review of the decision of the respondent appointing the applicant as a junior business rescue practitioner instead of a senior business rescue practitioner*

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Presiding Member : Khashane La M. Manamela (Mr.),

Date of Decision : 31 March 2017

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### DECISION (Reasons and an Order)

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**K. La M. Manamela**

## ***Introduction***

[1] On 30 December 2016, I handed down a decision, in terms of which, I ordered a *sine die* postponement of this review application.<sup>1</sup> I simultaneously ordered the respondent to file the “*full reasons and record (comprising, among others, policy documents of criteria for appointment of business rescue practitioners and minutes ...)* regarding the application”<sup>2</sup> (the record sought to be reviewed) within a prescribed time period, and granted leave to the applicant, once the record has been filed, to re-enroll the matter with or without supplementary papers. This, therefore, constitutes the re-enrolment of the application.

[2] The terms of the order made (in the decision referred to above) were far from the relief sought by the applicant in terms of this application. The applicant asked for the decision of the respondent appointing him only as a “junior business rescue practitioner”,<sup>3</sup> instead of “senior business rescue practitioner”<sup>4</sup> to be reviewed and set aside. The application wasn’t opposed by the respondent, but the respondent had not filed the record sought to be reviewed. Naturally, I found it almost impossible to determine the application without access to the record or any material on which the decision was based, including full reasons for the decision. I decided against just dismissing the application based on the aforesaid and in the interests of justice opted to direct the respondent to file the record, whilst allowing the applicant to thereafter pursue the matter.

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<sup>1</sup> See par 20 of the decision dated 30 December 2016 under the above stated case number. Copies of decisions of this Tribunal are available from its website: [www.companiestribunal.org.za](http://www.companiestribunal.org.za).

<sup>2</sup> *Ibid.* Italics added.

<sup>3</sup> See par 15 below for a definition of “junior business rescue practitioner”.

<sup>4</sup> See par 15 below for a definition of “senior business rescue practitioner”.

[3] Again, the respondent, just like before, is not participating in these proceedings. Consequently, the relief sought is effectively in the form of a request for default order, as contemplated by regulation 153 of the Companies Regulations, 2011<sup>5</sup> of the Companies Act (the Companies Act). However, the respondent had filed a notice to abide the decision of this Tribunal prior to the postponement of the matter referred to above. And the applicant has filed proof that notice of the current re-enrolment was given to the respondent,<sup>6</sup> albeit emanating from specific instructions from this Tribunal.<sup>7</sup> Therefore, I am satisfied that the respondent was adequately served with the application<sup>8</sup> and thus he is not taking part in these proceedings due to continued reliance upon its previous decision to abide the outcome.

[4] Next, I briefly deal with the background of this matter, before turning my attention to the record and submissions made on behalf of the applicant.

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<sup>5</sup> Regulation 153 of the Companies Regulations, 2011, reads as follows: " (1) If a person served with an initiating document has not filed a response within the prescribed period, the initiating party may apply to have the order, as applied for, issued against that person by the Tribunal. (2) On an application in terms of sub-regulation (1), the Tribunal may make an appropriate order—

(a) after it has heard any required evidence concerning the motion; and

(b) if it is satisfied that the notice or application was adequately served.

(3) Upon an order being made in terms of sub-regulation (2), the recording officer must serve the order on the person described in subsection (1) and on every other party." The Companies Regulations were published by the Minister of Trade and Industry in terms of section 223 of the Companies Act 71 of 2008 under GN R351 in Government Gazette 34239 of 26 April 2011.

<sup>6</sup> See annexures "C" and "D" of the supplementary papers regarding delivery of the notice and supplementary papers by the applicant on 28 February 2017, appeared to have been read on 01 March 2017, on behalf of the respondent. The applicant used the email address: businessrescue@cipc.gov.za, which is an acceptable method for the delivery of documents in terms of Table CR 3 of Annexure 3 based on regulation 7 of the Companies Regulations.

<sup>7</sup> See annexure "A" of the supplementary papers.

<sup>8</sup> See regulation 153(2)(b).

### ***Brief background***

[5] The background of this matter is as set out in the previous decision made. And for ease of reference, I quote the material part of the decision as follows:

“[5] The applicant was previously turned down by the respondent and approached this Tribunal for relief. In terms of the previous decision of this Tribunal the application was refused for want of disclosure that the respondent acted *mala fide* or from ulterior and improper motives. The decision found that there was no reason to interfere with the aforementioned decision of the respondent and as such dismissed the application.

[6] The applicant - to his credit - agreed with the previous decision of this Tribunal. He submits that he considered the concerns raised in the decision and submitted a fresh application for consideration by the respondent. He included, as part of the application, what he calls “an enhanced curriculum vitae” correlating his business experience with the functions of a business rescue practitioner as stipulated in the Companies Act, particularly in section 140 of the Companies Act. As already indicated, the re-application was refused, hence this application.

[7] It is submitted by the applicant that the respondent rejected his re-application on the ground that the respondent “could not find evidence that demonstrate a licence, other than that of a **Junior** Practitioner”. As indicated above, the applicant submits that the decision of the respondent is erroneous, vitiated by *mala fides* and that he ought to be registered as a senior business practitioner.

[8] However, as already indicated, the respondent did not file anything, besides the notice to abide the decision of this Tribunal. The applicant has included in the papers an electronic mail of 27 September 2016 by one Mr. Donovan van Schalkwyk, presumably a functionary of the respondent involved in the making of the decision sought to be reviewed. This document reads as follows in the material part:

“Dear Mr Wing

The committee has peruse [sic] your application and could not find evidence that demonstrate a licence, other than that of a Junior Practitioner.

Regards

Donovan”

[9] Also, as already indicated above, I do not think that the respondent has acted properly in terms of the applicable legal principles. I proceed to deal with this issue next.”

[accompanying footnotes omitted]

[6] I deem it warranted to add to the material quoted above. I source the additional material from the applicant’s profile or curriculum vitae, included as part of the application for licence to the respondent, and consequently forming part of papers before this Tribunal. I will only deal with some highlights thereof, although I have considered the papers in their full span.

[7] The applicant was born in 1961. He completed the degrees BA LLB at the University of Natal (now University of KwaZulu-Natal) in 1985. He was admitted as an attorney in 1993, after having previously gained admittance to the advocates’ profession in 1987. He thereafter entered the employment market and served at a number of organisations. Of greater significance to this application is his role as a junior partner in a

law firm between 1992 and 1993, and his running of own transport business from 1994 to 2014. It is in his latter role or capacity that the applicant submits he gained the necessary experience or skills qualifying him to be appointed as a senior business rescue practitioner, as opposed to, a junior business rescue practitioner. I must add that the applicant also has a certificate from the University of South Africa in business rescue.

[8] The respondent obviously does not agree with the applicant's contentions, hence the decision, which precipitated this application. I deal next with the respondent's decision and reasons therefor, as garnered from the relevant parts of the record.

### ***Record (reviewed) and applicant's submissions***

[9] In compliance with the order of this Tribunal referred to above, the respondent filed "the record" reviewed. I am not completely certain that the document filed constitutes a record of the matter in the conventional sense.<sup>9</sup> The document appears to be

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<sup>9</sup> I referred to the applicability of rule 53 of the Uniform Rules of the High Court to this matter in paragraph 13 of my previous decision of 30 December 2016. This rule reads in the material part:

"(1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected -

(a) calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside, and

(b) calling upon the magistrate, presiding officer, chairman or officer, as the case may be, to dispatch, within fifteen days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he is by law required or desires to give or make, and to notify the applicant that he has done so.

(2) The notice of motion shall set out the decision or proceedings sought to be reviewed and shall be supported by affidavit setting out the grounds and the facts and circumstances upon which applicant relies to have the decision or proceedings set aside or corrected.

(3) The registrar shall make available to the applicant the record dispatched to him as aforesaid upon such terms as the registrar thinks appropriate to ensure its safety, and the applicant shall thereupon cause copies of such portions of the record as may be necessary for the purposes of the review to be made and shall furnish the registrar with two copies and each of the other parties with one copy thereof, in each case

more like an answering affidavit or even heads of argument and raises arguments of a factual and legal nature, other than just reflecting the respondent's decision and reasons therefor. It was also prepared in February 2017, which is long after the respondent's decision was made and actually after the matter was postponed. Also, minutes of the meeting where the impugned decision appear to have been taken have also been filed, but they are only cryptic in nature. They do not say much. Be that as it may, there are parts of "the record" which are relevant and sufficient for purposes of determination to be made in this review, including the following:

- "10. The applicant submitted that he was the sole owner of the business and in that capacity he was engaged in activities that are comparable to the functions of the business rescue practitioner in terms of the Act, however, [sic]
11. In the current dispensation of the Companies Act, qualification of persons who are eligible for appointment is a requirement and further prohibits qualifying persons who have certain relationships with the Company in terms of section 138(1)(d), (e).
12. Mindful of oversimplifying that the matter in that one must, (as the saying goes, 'Apples must be compared with Apples',) be directed by the Regulation 127(2)(a), the Commission is not clothed with a discretionary power to simply

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certified by the applicant as true copies. The costs of transcription, if any, shall be borne by the applicant and shall be costs in the cause.

(4) The applicant may within ten days after the registrar has made the record available to him, by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of his notice of motion and supplement the supporting affidavit.

(5) Should the presiding officer, chairman or officer, as the case may be, or any party affected desire to oppose the granting of the order prayed in the notice of motion, he shall -

(a) within fifteen days after receipt by him of the notice of motion or any amendment thereof deliver notice to the applicant that he intends so to oppose and shall in such notice appoint an address within eight kilometres of the office of the registrar at which he will accept notice and service of all process in such proceedings; and

(b) within thirty days after the expiry of the time referred to in subrule (4) hereof, deliver any affidavits he may desire in answer to the allegations made by the applicant.

(6) The applicant shall have the rights and obligations in regard to replying affidavits set out in rule 6.

(7) The provisions of rule 6 as to set down of applications shall *mutatis mutandis* apply to the set down of review proceedings."

[underlining added for emphasis]

overlook what the legal framework was before and after the effective date calling for the control of a company that is in a severe financial difficulty by an independent or third party.

13. The Commission does not view the applicants' [sic] relationship with the company at the time as independent and cannot correlate such activities to the activities of a business rescue practitioner in terms of the Companies Act as defined in section 128(1)(d) which provides that such a person is appointed to oversee a company during rescue proceedings.
14. Accordingly, it follows that when section 128(1)(d) read with Regulation 127(2)(a) do not find application or prescripts thereof are not met, the applicant rely on the provision of Regulation 127(2)(a) to correlate his experience to business turnaround practice as defined therein and the evidence seeking to support such facts as set out in the application, are for lack of compliance irrelevant.

#### EXPOSITION OF PART B OF THE COMPANIES REGULATIONS

The Commission is of the view that there are no qualms regarding the directives relating to subregulations 126(2), (4) and (5) and such are common cause.

15. ...

...

21. Without derogating from the above, 'active engagement in business turnaround practice' must be construed in light of the definition as contemplated in Regulation 127(2)(a), wherein the activities are of a professional nature and therefore comparable to the functions of a business rescue practitioner in terms of the Companies Act, 2008.

22. ...

23. The Commission is of the view that, it is required of the person to have been actively engaged in such practice is a third party in a company that is financially distressed and for the purpose.
24. It follows from the applicant's submission that the company lost a major client and he was the owner of the said business, consequently, it was feasible that he, as an astute businessman, to restructure his business to accommodate its foreseeable circumstances.



...

## IN CONCLUSION

**The Commission hereby [sic] issue a Conditional Licence after having been satisfied that–**

1. The Applicant is of good character and integrity; and
2. The Applicant's education and experience are sufficient to equip the applicant to perform the functions of a business rescue practitioner.

Having had regard to the applicant's education and experience of the Commission has imposed the following restrictive conditions;

- a) the licensee is only eligible to be appointed as a practitioner in the 'junior practitioner' group.
- b) the applicant is a person who is qualified to be appointed as a business rescue practitioner in terms of section 138(1) as a person who has not acted as a business rescue practitioner in terms of the Act as contemplated in regulation 127(1)(ii)(aa)."

[10] Apart from what is stated above, the applicant also included testimonials in support of his application to the respondent. In sum, he submits on the bases of his experience and qualifications that he is qualified to be appointed a senior business rescue practitioner. In his view, his application meets the relevant criteria set out in the statutory regime for his appointment as such. I consider next the applicable legal principles.

### ***Applicable legal principles***

[11] This review is in terms of regulation 126(8) of the Companies Regulations, which reads in the material part:

“An applicant whose application has been refused, or who has been issued a conditional license, or a licensee whose license has been suspended or revoked, may apply to the Tribunal to review the Commission’s decision in the matter, and the Tribunal may partially or entirely confirm or set aside the Commission’s decision.”

[12] I do not consider it warranted to explore, in minute terms, the nature and extent of a review contemplated by regulation 126(8). Suffice it to say that, as indicated above, regulation 126(8) grants this Tribunal jurisdiction to either confirm, be it in part or in whole, the impugned decision or set it aside. I must add though that I find it remarkable that, unlike a review in terms of section 172 of the Companies Act,<sup>10</sup> a review in terms of regulation 126(8) does not does not entitle this Tribunal to modify or vary the impugned decision. However, nothing turns on this.

[13] I also stated in the previous decision that the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) are relevant to this review, but it is not necessary to be detained by those, save to state that the provisions of PAJA will be considered for purposes of the determination made in this matter.

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<sup>10</sup> Section 172 reads in the material part: “Any person issued with a compliance notice in terms of this Act may apply to the Companies Tribunal in the case of a notice issued by the Commission...to review the notice ...

(2) After considering any representations by the applicant and any other relevant information, the Companies Tribunal ... may confirm, modify or cancel all or part of a compliance notice.” [underlining added for emphasis]

[14] Criteria for appointment as or licensing as business rescue practitioner is in terms of section 138 of the Companies Act, read with regulations 126 of the Companies Regulations. Section 138 reads as follows in the material part:

“(1) A person may be appointed as the business rescue practitioner of a company only if the person - (a) is a member in good standing of a legal, accounting or business management profession accredited by the Commission; (b) has been licensed as such by the Commission in terms of subsection (2); (c) is not subject to an order of probation in terms of section 162(7); (d) would not be disqualified from acting as a director of the company in terms of section 69(8); (e) does not have any other relationship with the company such as would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship; and (f) is not related to a person who has a relationship contemplated in paragraph (d). (2) For the purposes of subsection (1)(a)(ii), the Commission may license any qualified person to practice in terms of this Chapter and may suspend or withdraw any such licence in the prescribed manner. (3) The Minister may make regulations prescribing - (a) standards and procedures to be followed by the Commission in carrying out its licencing functions and powers in terms of this section; and (b) minimum qualifications for a person to practice as a business rescue practitioner, including different minimum qualifications for different categories of companies.”

and, on the other hand, regulation 126 reads in the material part:

“(1) ...  
(2) A person may apply to the Commission for a license to serve as a business rescue practitioner, as contemplated in section 138 (1)(b), by filing Form CoR 126.1, together with the fee set out in Table CR 1.  
(3) When considering an application in terms of sub-regulation (2), the Commission may require the applicant to provide—  
(a) further information relevant to the application; or  
(b) evidence in support of any facts set out in the application.

- (4) Subject to sub-regulation (5), the Commission may issue a business rescue practitioner's licence to an applicant if the Commission is satisfied that—
- (a) the applicant is of good character and integrity; and
  - (b) the applicant's education and experience are sufficient to equip the applicant to perform the functions of a business rescue practitioner.
- (5) The Commission must not issue a license to an applicant who is disqualified from appointment as a practitioner in terms of section 138 (1)(c) or (d).
- (6) After considering an application, the Commission must either—
- (a) issue a license as applied for in Form CoR 126.2;
  - (b) issue a conditional license, on terms that are reasonable having regard to the applicant's education and experience; or
  - (c) refuse to issue the license, by notice in writing to the applicant, setting out the reasons for the refusal.
- (7) The Commission, by notice in writing to a licensee—
- (a) must revoke the license of a person who, after being licensed, becomes disqualified from appointment as a practitioner in terms of section 138 (1)(c) or (d); and
  - (b) may suspend or revoke a license if the Commission has reasonable grounds to believe that the person is no longer qualified to be licensed, or has contravened the conditions of the license.
- (8) An applicant whose application has been refused, or who has been issued a conditional license, or a licensee whose license has been suspended or revoked, may apply to the Tribunal to review the Commission's decision in the matter, and the Tribunal may partially or entirely confirm or set aside the Commission's decision."

[underlining added for emphasis]

[15] Other provisions of relevance to this matter are in terms of regulation 127, which read in the material part:

**"127. Restrictions on practice**

- (1) This regulation—

(a) applies to any person who is eligible to be appointed as a business rescue practitioner in terms of section 138 (1) (a) and (b), irrespective of whether that eligibility arises in terms of a license issued by the Commission, or otherwise as contemplated in section 138 (1)(a); and

(b) is subject to any more restrictive condition imposed by the Commission in terms of regulation 126 (6)(b), in the case of a licensee contemplated in section 138 (1)(b).

(2) For the purposes of this regulation, and in Regulation 128—

(a) **“business turnaround practice”** means activities of a professional nature engaged in before the effective date, that are comparable to the functions of a business rescue practitioner in terms of the Act;

(b) ...

(c) Persons eligible to be appointed as practitioners are classified in the following three groups:

(i) **“senior practitioner”** means a person who is qualified to be appointed as a business rescue practitioner in terms of section 138 (1) and who, immediately before being appointed as practitioner for a particular company, has actively engaged in business turnaround practice before the effective date of the Act, or as a business rescue practitioner in terms of the Act, for a combined period of at least 10 years.

(ii) **“experienced practitioner”** being a person who is qualified to be appointed as a business rescue practitioner in terms of section 138 (1) and who, immediately before being appointed as practitioner for a particular company, has actively engaged in business turnaround practice before the effective date of the Act, or as a business rescue practitioner in terms of the Act, for a combined period of at least 5 years;

(iii) **“junior practitioner”** means a person who is qualified to be appointed as a business rescue practitioner in terms of section 138 (1) and who, immediately before being appointed as practitioner for a particular company, has either—

(aa) not previously engaged in business turnaround practice before the effective date of the Act, or acted as a business rescue practitioner in terms of the Act; or

(bb) has actively engaged in business turnaround practice before the effective date of the Act, or as a business rescue practitioner in terms of the Act, for a combined period of less than 5 years.

(3) ...

[underlining added for emphasis]

[16] Next, I turn to the application of the above legal principles to the facts in this matter.

*Legal principles and the facts (a discussion)*

[17] The crisp issue to be decided in this matter is whether the respondent's decision appointing the applicant only a junior business rescue practitioner (instead of a senior business rescue practitioner) ought to be reviewed and set aside, be it in part or whole or confirmed.<sup>11</sup> The guiding light in this regard is the above statutory provisions. In my view, a review of this nature would include a determination whether or not the applicant met the statutory criteria for appointment as a senior business rescue practitioner. The result would naturally have a bearing on the decision of the respondent, which would be vitiated if found not coterminous with the statutory regime.

[18] As indicated above, it is common cause that the applicant may only be appointed a senior business rescue practitioner upon meeting the criteria set out in the relevant statutory provisions. It is also common cause that these include being of good character and integrity, and the required level of education and experience, sufficient to perform the functions of a business rescue practitioner. This is what is envisaged by regulation 126(4).<sup>12</sup> It is common cause that the applicant has satisfied these requirements.<sup>13</sup> What is in dispute is the level of entrance at which he is to gain admittance to business rescue practice.

[19] This brings me to the nature and extent of the applicant's skills or experience. The requirements for appointment as a senior business rescue practitioner is that one ought to have "actively engaged in business turnaround practice" or have been a business rescue

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<sup>11</sup> See regulation 126(8) of the Companies Regulations. For a reading of this regulation see par 11 above.

<sup>12</sup> See par 14 above for a reading of regulation 126(4).

<sup>13</sup> See par 9 above.

practitioner in terms of the Companies Act, for a period of at least 10 years. This is set out in regulation 127(2)(c)(i).<sup>14</sup> This is the exact location of the current dispute.

[20] The above provision (i.e. regulation 127(2)(c)(i)), as I understand it, places two requirements for an application for appointment as a senior business practitioner. Firstly, the applicant ought to have been “actively engaged in business turnaround practice”. Secondly, such active engagement has to have been for a period of 10 years. The other option of having been admitted as a business rescue practitioner in terms of the Companies Act is not relevant for current purposes. I deal with the two requirements next.

[21] As to what constitutes “business turnaround practice”, I refer to regulation 127(2)(a), which says it is “activities of a professional nature... that are comparable to the functions of a business rescue practitioner in terms of the Act”. The general powers and duties of business rescue practitioner are set out in section 140 of the Companies Act.<sup>15</sup> There is no need to single them out one by one for discussion. In my view, the

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<sup>14</sup> See par 15 above.

<sup>15</sup> Section 140 of the Companies Act reads in the material part: “(1) During a company’s business rescue proceedings, the practitioner, in addition to any other powers and duties set out in this Chapter-

- (a) has full management control of the company in substitution for its board and pre-existing management;
- (b) may delegate any power or function of the practitioner to a person who was part of the board or pre-existing management of the company;
- (c) may-
- (i) remove from office any person who forms part of the pre-existing management of the company; or
- (ii) appoint a person as part of the management of a company, whether to fill a vacancy or not, subject to subsection (2); and
- (d) is responsible to-
- (i) develop a business rescue plan to be considered by affected persons, in accordance with Part D of this Chapter; and
- (ii) implement any business rescue plan that has been adopted in accordance with Part D of this Chapter.

(1A) The practitioner must, as soon as practicable after appointment, inform all relevant regulatory authorities having authority in respect of the activities of the company, of the fact that the company has been placed under business rescue proceedings and of his or her appointment.

(2) Except with the approval of the court on application by the practitioner, a practitioner may not appoint a person as part of the management of the company, or an advisor to the company or to the practitioner, if that person-

- (a) has any other relationship with the company such as would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship;
- or
- (b) is related to a person who has a relationship contemplated in paragraph (a).

functions of a business rescue practitioner will be best understood from the definition of business rescue in terms of section 128(1)(b) of the Companies Act, which reads as follows:

- “(b) “**business rescue**” means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for-
- (i) the temporary supervision of the company, and of the management of its affairs, business and property;
  - (ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and
  - (iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company’s creditors or shareholders than would result from the immediate liquidation of the company...”

[22] The respondent’s contention is that the applicant did not perform functions of a business rescue nature and has no experience whatsoever as a business rescue practitioner. On the other hand, the applicant submits that his involvement is his own transportation business constitutes business turnaround practice. He stated that he not only grew the business, but when he lost a major procurement contract, he restructured

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- (3) During a company’s business rescue proceedings, the practitioner-
- (a) is an officer of the court, and must report to the court in accordance with any applicable rules of, or orders made by, the court;
  - (b) has the responsibilities, duties and liabilities of a director of the company, as set out in sections 75 to 77; and
  - (c) other than as contemplated in paragraph (b)-
- (i) is not liable for any act or omission in good faith in the course of the exercise of the powers and performance of the functions of practitioner; but
  - (ii) may be held liable in accordance with any relevant law for the consequences of any act or omission amounting to gross negligence in the exercise of the powers and performance of the functions of practitioner.
- (4) If the business rescue process concludes with an order placing the company in liquidation, any person who has acted as practitioner during the business rescue process may not be appointed as liquidator of the company.”



his business and turned it around. It is common cause that apart from his legal skills and experience as a lawyer, the applicant only relies on the experience acquired from management of his business. Therefore, the question to be asked is whether the running of his business constitutes business turnaround practice, as contemplated in the statutory regime.

[23] One of the elements of the definition of “business turnaround practice” is that the activities performed have to be of professional nature. The Oxford English dictionary defines “profession”, among others, as

“n. **1** a job that needs training and a formal qualification. **2** a body of people engaged in a profession” and “professional” as “*adj.* **1** relating to or belonging to a profession. **2** engaged in an activity as a paid job rather than as an amateur. **3** competent”

[24] On the other hand, the trilingual legal dictionary defines “profession” as:

“**profession** *beroep, professie*;  
- **al** *beroeps-, professioneel*;  
- hazard *beroepsgevaar/ -risiko*;  
- man *professionele man, man in 'n vrye beroep*;  
- services *professionele dienste*;  
- training *beroepsopleiding*.

[25] The above definitions, as I understand them, denote that “professional” refers to the performance of activities of a professional nature or belonging to a profession or doing a job or performing services for which one has received training and has formal qualification. It is common cause that the applicant’s involvement in his own transport business was not based on any training or formal qualification, let alone of the business turnaround nature. His involvement was aimed at deriving income and realising a return on his investment. Therefore, in my view, the applicant was not involved in activities of a professional nature, be they of business turnaround practice nature or not. With that the applicant falls short of meeting one of the elements of business turnaround practice. I will

nevertheless proceed to look at the duration requirement, which is, in a way linked to the previous requirement.

[26] Admittance as the senior business rescue practitioner requires the applicant to have been involved in business turnaround practice for at least 10 years. As indicated above, the applicant ran his transport business for 20 years. He says that until 2012 business was good and, at its pinnacle, the business grossed an amount of R13 million, whilst returning a profit of R2.8 million. The problems started in December 2012, when the business lost a major contract and had to be restructured to survive. It was sold in December 2014. The aforesaid, in my understanding, means that the applicant's business was not "financially distressed"<sup>16</sup> as contemplated in the Companies Act or a situation requiring engagement of business turnaround activities until December 2012. The therefore, the only material period from the applicant's 20-year experience is from December 2012 to December 2014, when he lost a major contract; restructured and sold his business. Therefore, even if one were to assume that in those two years the applicant was involved in business turnaround practice activities, the applicant would fall short of the 10 years' minimum threshold. For, I cannot make the same assumption for the balance of the 20 years, as one is not necessarily engaged in business turnaround when operating own business, particularly when there is nothing to turn around. This shortcoming and the one stated above, are fatal to this review application.

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<sup>16</sup> See section 128(1)(f) which is in the material part: "**financially distressed**", in reference to a particular company at any particular time, means that-

(i) it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months; or  
(ii) it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months;"

### ***Conclusion***

[27] On the basis of the above, I find that, the applicant did not perform turnaround activities for a period of 10 years, let alone for 20 years. As I have indicated, even if one were to grant the applicant that he performed activities equating to business turnaround practice, the applicant would still not meet the time-period requirement. Therefore, the respondent's decision (allocating the applicant the status of junior business rescue practitioner and not senior business rescue practitioner) and the process followed in its taking, cannot be faulted. I have found nothing in the submissions and the record warranting interference with it. Consequently, I will not interfere with it, but dismiss the application.

### ***Order***

[28] In the premises the following order is made:

- a) the application is dismissed.
- b) the decision of the Companies and Intellectual Property Commission, the respondent herein, appointing Craig Lynton Wing, the applicant herein, as a junior business rescue practitioner is confirmed in its entirety.

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**Khashane La M. Manamela**

**Member, Companies Tribunal**

**31 March 2017**