REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 2025-210749

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED: **YES**

14 May 2026 [redacted]

DATE SIGNATURE

In the matter between:

TUSK CONSTRUCTION SUPPORT SERVICES (PTY) LTD	First Applicant
MASSMART RETAIL (PTY) LTD T/S BUILDERS	Second Applicant

and

MUSAWENKOSI EMMANUEL BENEDICT MALINGA NO	First Respondent
TSSN CARRIERS (PTY) LTD (IN BUSINESS RESCUE)	Second Respondent
COMPANIES AND INTELLECTUAL PROPERTIES COMMISSION	Third Respondent
SOUTH AFRICAN INSTITUTE OF CHARTERED ACCOUNTANTS	Fourth Respondent

Summary

Business rescue – termination of business rescue pursuant to section 141(2)(b) of the Companies Act 71 of 2008 – power of the court to set aside – inherent jurisdiction

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JUDGMENT

DANIELS AJ

Introduction

[1] When this application was first launched, the applicants sought the removal of the first respondent as the practitioner in the business rescue proceedings of the second respondent (TSSN Carriers (Pty) Limited), and replacing him with an alternative practitioner.

[2] Consequent upon the (disputed) termination of the business rescue proceedings by the first respondent, which occurred shortly before the hearing of the application for the first respondent's removal, the applicants now seek, in the first instance, an order to set aside the termination of the business rescue.

[3] On 3 April 2025, the second respondent placed itself in business rescue and on 23 April 2025 the first respondent was appointed as the business rescue practitioner.

[4] On 6 November 2025 the application for the first respondent's removal was issued (and with it, an order was sought for the appointment of an alternate practitioner).

[5] A business rescue plan was published on 21 November 2025, and the application for removal remained unopposed. It was accordingly set down for hearing, as unopposed. On 19 January 2026, a week before the (unopposed) hearing date of 26 January 2026, the first respondent filed a notice in accordance with Form CoR125.2. This, according to the first respondent, meant the end of the business rescue of the second respondent.

[6] This notice of termination became the focus of the application and it prompted the applicants to seek an order for the Form CoR125.2 to be set aside (effectively as a precursor to the removal of the first respondent). The applicants contend that the effect of an order setting aside the termination will be that the second respondent remains in business rescue in terms of section 129(3) of the Companies Act, 71 of 2008, and the removal of the first respondent can be decided upon. The applicants' amended notice of motion sets out the relief sought, in this sequence.

[7] The Form CoR125.2 was registered pursuant to the first respondent's decision to terminate the business rescue of the second respondent in terms of section 141(2)(b) of the Companies Act. The relevant part of section 141(2) provides, as follows:

> (2) If, at any time during business rescue proceedings, the practitioner concludes that-
>
> *(a)* there is no reasonable prospect for the company to be rescued, the practitioner must-
>
> (i) so inform the court, the company, and all affected persons in the prescribed manner; and
>
> (ii) apply to the court for an order discontinuing the business rescue proceedings and placing the company into liquidation;
>
> *(b)* there no longer are reasonable grounds to believe that the company is financially distressed, the practitioner must so inform the court, the company, and all affected persons in the prescribed manner, and-
>
> (i) if the business rescue process was confirmed by a court order in terms of section 130, or initiated by an application to the court in terms of section 131, apply to a court for an order terminating the business rescue proceedings; or
>
> (ii) otherwise, file a notice of termination of the business rescue proceedings...

<u>The issues</u>

[8] The applicants' first attack on the validity of the notice terminating the business rescue, is that the first respondent did not inform the court that he concluded that there were no longer reasonable grounds to believe that the second respondent is financially distressed as required by section 141(2)(b).

[9] It is the applicants' position that this requirement – to inform the court – is intended to enable court oversight *inter alia* over a practitioner who (according to the applicants) reached a conclusion on misleading or irrational grounds, or with a collateral purpose, that a company (the second respondent) is no longer financially distressed. The applicants say that a reasonable belief is required, and that the question is whether objectively speaking, based on fact, such a belief or conclusion holds water.

[10] Central to the applicants' difficulty with the validity of the termination of the business rescue, is the second respondent's ostensible transformation from a financially distressed entity at the commencement of the business rescue proceedings and at the date of publication of the proposed plan, to a company that is no longer financially distressed, when the CoR 125.2 notice was filed on 19 January 2026. The applicants contend that objective facts which would support such a sudden change of fortunes do not exist, which in turn suggests carelessness and incompetence, or a wilful abuse on the part of the first respondent. In simple terms, the applicants say that the conclusion to the effect that the second respondent is no longer financially distressed (or, at least, that there no longer are reasonable grounds to believe that the second respondent is financially distressed) is irreconcilable *inter alia* with the picture painted in the business rescue plan, as it was published in November 2025.

[11] This supports the applicants' case to the effect that the decision to terminate the business rescue by the first respondent is not objectively justifiable, and the question of the factual basis on which the first respondent based decisions also plays a prominent part in the order sought for his removal. It is the applicants' position that the first respondent based decisions on wrong, inaccurate information and that this is indicative of *inter alia* the failure to properly investigate the affairs of the second respondent. It is also contended that the first respondent failed to take the applicants' otherwise undisputed claims into

consideration, favoured certain creditors above others and generally, conducted the business rescue in a manner that lacked skill and transparency. This is intended to be no more than a broad summary of the applicants' case for the first respondent's removal, and for present purposes it suffices to be stated that the numerous failings, mistakes, and omissions as they are listed in the applicants' affidavits are relied upon as grounds for the first respondent's removal, as per section 139 of the Companies Act.

[12] The amended relief is opposed on the basis of the court lacking jurisdiction to set aside the termination. Two issues arise for consideration under this topic.

[13] First, that because this is said to constitute administrative action by the CIPC (when it registered the Form CoR125.2 filed by the first respondent) the respondents contend that a substantive review under the Promotion of Administrative Justice Act ("PAJA") is required.

[14] Second, it is the respondents' position that the court lacks the inherent power (or, as it was articulated on behalf of the respondents, *substantive jurisdiction*) to make the order setting aside the notice of termination and/or the Form CoR125.2.

[15] The parties are in principle agreed that, if the first respondent is right, it would render the application for his removal moot at this point. If not, the grounds for setting aside the termination must be considered and if the termination falls to be set aside (and if it follows that the second respondent is in fact still in business rescue) the removal of the first respondent arises for consideration.

<u>The Promotion of Administrative Justice Act 3 of 2000</u>

[16] The registration of the Form CoR125.2 involved no decision by the CIPC. It – the CIPC – took no decision and it is by the same token unable to provide any reasons for the decision.

[17] The decision was made by the first respondent and in this context, the CIPC is no more than a record-keeper. In <u>Knoop NO and Another v. Gupta (Execution)</u> 2021 (3) SA 135 (SCA) it was held that the keeping and maintaining of records involved no

public act, with legal efficacy by the CIPC that required to be set aside in the manner suggested by the respondents.

[18] For these reasons, I do not believe that this point has merit and this leaves the question of the power of the court to set aside the notice of termination.

The power to make the order setting aside the notice of termination

[19] It is the applicants' case that the court has jurisdiction to set aside the notice, because the court has statutory oversight over business rescue proceedings throughout in accordance with Chapter 6 of the Companies Act, and whilst there may be no express provision for the setting aside of a termination this would follow from the stated purpose of Chapter 6. There can, according to the applicants, be no question of the court having the power to intervene in order to counter an abuse. The applicants contend that an applicant is always entitled approach the court for appropriate relief in the case of an abuse, or an irregularity in the context of business rescue, and a business rescue practitioner is and remains accountable for his conduct to the court and to affected parties.

[20] *Oversight* is a somewhat nebulous concept. In section 128(i) of the Companies Act, reference is made to *supervision*, and it is said to mean "*the oversight imposed on a company during its business rescue proceedings*". In this sense, it means the oversight by a business rescue practitioner, not the court.

[21] In Knoop NO and Another v. Gupta (Execution) at [39] to [41][1], an overview is provided

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1 "...When one is dealing with a company that is placed in business rescue voluntarily by way of a resolution of the board of directors, the process of business rescue is conducted on the basis of the actions of the company; affected persons, that is, shareholders, any trade union representing employees, and employees; the BRP; and the creditors. It is the company, acting through its directors, that commences the process and appoints the BRP. The company then gives notice of the resolution to commence business rescue. During the course of the business rescue the directors of the company remain in office and must continue to perform their functions as directors and perform their management functions in accordance with the express instructions of the BRP to the extent that it is reasonable to do so. The BRP must investigate the affairs of the company and develop a business rescue plan to be considered by affected persons. If the plan is adopted, the company is obliged to implement it under the direction of the BRP. [40] If it transpires at any stage of the process that the company cannot be rescued, the BRP is obliged to give notice of this and approach the court for a liquidation order. If the business rescue plan is substantially implemented, the BRP files a notice with the CIPC and the business rescue terminates when that notice is filed. If the business rescue plan is proposed and rejected and no affected person has acted to extend it in terms of s 153(1) of the Act, the business rescue terminates. The BRP is obliged in that event to

of the business rescue process, where it is commenced voluntarily by a resolution of the directors and it is held, at [41], that:

> ...Instead, there is an entirely private process involving the company, the BRP and all affected persons...

[22] The fact that business rescue is an entirely private process of the nature described above, obviously does not mean that the process (or the business rescue practitioner) is entirely immune from judicial scrutiny and Chapter 6 of the Companies Act provides a number of instances where the court may, and should be approached.

[23] For instance, in a voluntary business rescue the practitioner is appointed by the board of directors of the company, but can only be removed by a court order under section 130 of the Companies Act, or under the provisions of section 139. When the court has made an order under section 130(1)(b), then, in the language of section 130(6)(a), "*the court must appoint an alternate practitioner*". As further examples, the business practitioner may, under section 136(2)(b) apply urgently to court to entirely, partially or conditionally cancel, on any terms that are just and reasonable in the circumstances, any obligation of the company contemplated in paragraph 136(2)(a) and under section 137(5), the court may remove a director from office on application by the business rescue practitioner and on specific grounds. Under section 153 (b)(i)(bb) the court may set aside – on the application of an affected person – the result of a vote against the adoption of a business rescue plan, on the grounds that it was inappropriate.

[24] The manner in which Chapter 6 is structured and organized does not, to my mind, point to the existence of an inherent power over business rescue practitioners, or, for that matter, to a court having general oversight over the business rescue process (of a nature that would enable any disagreement with any decision made by a business rescue practitioner being effectively reviewable by the court). It points in the opposite direction and at least the examples referred to above indicate that the court may be approached to

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file a notice of termination of the business rescue. If at the end of the BRP's investigation, they conclude that there are no longer grounds for thinking that the company is financially distressed, they must inform the court, the company and all affected persons of that fact and file a notice of termination of the business rescue. On filing that notice, the business rescue proceedings end" intervene under specific circumstances, for a specific purpose.

[25] The question of the inherent power of the court should be approached carefully. In Molaudzi v. The State 2015 (2) SACR 341 (CC) at [33] it is explained with reference to section 173 of the Constitution[2] that the inherent power (to regulate the process), does not apply to substantive rights. It pertains to adjectival or procedural rights. The court may exercise inherent jurisdiction to regulate its own process where existing rules and procedures do not provide a mechanism to deal with a particular scenario and at [34], it is held that the court cannot use this power to assume jurisdiction that it does not otherwise have.

[26] Subject to this *caveat*, the nature of the enquiry into the existence of the inherent power of the court is important. The question is not whether there is no reason for the court not to have the power, but rather, whether the court does indeed have the power to make an order sought. This is the manner in which the question of inherent jurisdiction was approached by Wallis JA (in a minority judgment) in General Council of the Bar of South Africa v. Geach and Others 2013 (2) SA 52 (SCA) at [195]. In Geach, the question concerned the power to order the repayment of fees and Wallis JA held that "*The power in question is not authorised by law and does not arise from an inherent disciplinary power that courts may exercise over legal practitioners.*"

[27] In Cawood NO v. Murray NO and Others 2024 (6) SA 222 (GP) the Full Court considered the question whether it had the power to order the repayment of a business rescue practitioner's fees. It was argued *inter alia* that because business rescue practitioners are officers of the court and because the court has inherent power to discipline and sanction legal practitioners, the court has (or should have) the power to order repayment of practitioners' fees. It was held, as follows, at [45] and further:

[2] "The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

[45] I find that the court does not have an inherent power over BRPs. I say so for the following reasons.

[46] In the first place Knoop is authority for the proposition that, when we consider BRPs as officers of the court, this does not add anything to their duties and responsibilities. Put differently, the court limited the meaning of the concept in respect of BRPs, albeit not directly on point in respect of the issue of ordering the repayment of fees.

[47] But this is not the only source. The language and structure of s 140(3)(a) also suggest a limited meaning should be given.

[48] First, the section says the BRPs are only officers of the court '(d)uring a company's business rescue proceeding'. This limited duration suggests that BRPs are officers of the court only temporarily, whilst they are appointed in a specific case. Thus, they are unlike the legal practitioners who are still on the roll, for whom being an officer of the court is a continuous, uninterrupted obligation.

[49] Second, the subsection couples the notion of BRPs being officers of the court with their reporting duty in terms of 'any applicable rules of, or orders made by, the court'. This means that when they report to the court, they are subject to a higher fiduciary duty because in this respect they are officers of the court. But there is no suggestion that beyond this specified function they are subject to further obligations as officers of the court, akin to those of legal practitioners.

[50] Third, the structure of the section, which goes on to say that the BRP has the responsibilities and duties of a director, suggests that this is an office holder sui generis, not quite an officer of the court or a company director in the traditional sense.

...

[56] I find therefore that the court does not have an inherent power to order a business rescue practitioner to repay fees for misconduct. Such an order would be beyond the court's powers in terms of the principle of legality.

[28] I am in respectful agreement with the findings in Cawood, and in Gilbert v. Bekker 1984 (3) SA 774 (W) it was held, with reference to the Insolvency Act 24 of 1936 that:

> ... it is quite inaccurate, in the scheme of our insolvency legislation, to regard the trustee as any kind of officer of the Court. After all, he is elected by the creditors and not appointed by the Court and is furthermore not under the control of the Court but under that of the Master. Our Courts are not entrusted with insolvency administration as in England. The Court, when called upon to do so, merely applies the law to a given situation. In England, however, bankruptcy administration is conducted not only by the Judges and Registrars of the Courts (which function also as "bankruptcy Courts") but by certain officers appointed for the purpose of bankruptcy administration. They are official receivers and trustees. They are by statute designated officers of such Courts...[3]

[29] I appreciate that Gilbert was decided with reference to a different statute, but the same principle, in my view applies in this case. Business rescue is a statutory creation, and the business rescue process is regulated and organized, by statute (Chapter 6). Absent an inherent or substantive jurisdiction, the court has the powers, as conferred by the Companies Act, and for the purposes set out in the Companies Act.

[30] For these reasons, I find that this court does not have the power to make the order sought by the applicants, for the CoR125.2 notice / the notice of termination to be set aside. This is not a power extended by any provision of the Companies Act and this application, for these reasons, falls to be dismissed.

The failure to inform the court

[31] I consider it necessary to deal with the question of the business rescue practitioner's failure to inform the court, in accordance with section 141(2)(b) of the Companies Act.

[32] I have some difficulty in seeing how the court is to be informed. Section 141(2)(b) provides that (once the business rescue practitioner forms the view that there no longer are

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3 See also The Master of the High Court (North Gauteng High Court, Pretoria) v. Motala NO and Others 2012 (3) SA 325 (SCA) at [5] and further and Lipschitz v. Wattrus NO 1980 (1) SA 662 (T) at 671G

reasonable grounds to believe that the company is financially distressed) the practitioner must so inform the court, the company, and all affected persons in the prescribed manner, and, in terms of section 141(2)(b)(i) – if the business rescue process was confirmed by a court order in terms of section 130, or initiated by an application to the court in terms of section 131 – apply to court for an order terminating the business rescue proceedings. Thus, in the case of a business rescue process that was confirmed by a court order in terms of section 130, or initiated by an application to the court in terms of section 131, an application must be made to court, in any event. If that is so, the purpose of the court being informed, in addition to an application being made to court, is not clear to me at all.

[33] Section 141(2) contemplates two scenarios. The first is that which is described above, where a business rescue process that was confirmed by a court order in terms of section 130, or initiated by an application to court in terms of section 131 is terminated pursuant to section 141(2)(b)(i). This must happen on application to the court. The second is that which is relevant to this application, and may occur in terms of section 141(2)(b)(ii), which provides that *otherwise* (in other words, other than where business rescue process was confirmed by a court order in terms of section 130, or initiated by an application to the court in terms of section 131) the business rescue practitioner is to file a notice of termination of the business rescue proceedings. In this, second scenario, the notice requirement becomes, to my mind, even more problematic. Section 141(2)(b)(ii) does not require a court application, or a court order and if that is so, the purpose of notice to the court, without an application to the court, is similarly unclear. I also have some difficulty in seeing how, practically, the court would (and could) be notified, absent an application and there would be no purpose to make an application, if the leave of the court is not required.

[34] These issues were considered in <u>Knoop NO and Another v. Gupta and Another</u> 2021 (3) SA 88 (SCA), which is authority for the proposition that a reporting obligation, of this nature, does not exist in this context (of a voluntary business rescue). It was held as follows:

> [32] Section 141(2)(b) says that if the BRP concludes that there are no longer any reasonable grounds for thinking that the company is financially distressed they are obliged to inform the court, the company and all the affected parties in the prescribed manner. With a voluntary business rescue, it is unclear how the court is to be informed or what it is to do with this information. A judge

> faced with an unopposed, and probably ex parte, application in the motion court, in which no relief was asked and no order could be made, would rightly question whether it was properly before the court. The BRP merely has to file a notice of termination of business rescue with the CIPC. This brings the business rescue to an end. Section 141(2)(b) seems inapplicable in the case of a voluntary business rescue. There is no other provision of the Act that requires them to report to the court as envisaged in s 140(3)(a). In my view, whatever relevance the description of a BRP as an officer of the court may have in the context of business rescue ordered by the court under s 131 of the Act, it has no application to a voluntary business rescue and these provisions should be construed accordingly.

[35] The more pertinent question for purposes of this application, is whether the failure to comply with this requirement, even if it exists, would address the issue of the power to make the order sought. I do not believe that it does, and even if I am wrong, and there is in fact a manner, practically, in which this requirement can be complied with, I do not see how the failure to do so will change the position on jurisdiction. Business rescue ends, not with a court order to that effect (in the context of section 141), but with a notice to that effect and the same considerations and principles, as discussed above, suggest that even if there is an obligation to notify the court, the failure to do so does not provide a basis on which to grant the order sought in this application.

Order:

I accordingly make the following order:

The application is dismissed, with costs (payable on scale C, and to include the costs of two counsel where two counsel were employed).

J. DANIELS

Acting Judge of the High Court

GAUTENG DIVISION, JOHANNESBURG

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 13 May 2026.

HEARD ON: 18 March 2026

DELIVERED ON: 14 May 2026

For the applicants: Adv. J G Smit

Instructed by: Larson Falconer Hassan Parsee Inc.

For the respondents: Adv. H A Van der Merwe and Adv. Khosi Pama

Instructed by: Dempster McKinnon Inc.