Compromising Post-Commencement Creditors and Business Rescue: Rethinking the JBSA Props Judgment

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In 2025 the judgment of Olsen J in *JBSA Props (Pty) Ltd and Wilmeg Investments (Pty) Ltd v South African Revenue Service,*[1] reignited an important question in South African business rescue law: can post-commencement claims be compromised under a business rescue plan, and if so, on what basis?

The Court concluded that while section 154(2) of the Companies Act,[2] permits the compromise of pre-commencement debts through the collective effect of an adopted plan, post-commencement debts may only be compromised where the affected creditor has acceded to the discharge of the debt. South African Revenue Service's post-commencement VAT claim therefore survived the plan because SARS had not expressly agreed to its compromise. Many business rescue practitioners and lawyers in the field appeared to accept the correctness of the judgment. These authors question it.

Importantly, in November 2025 Olsen J granted the applicants leave to appeal to the Supreme Court of Appeal, meaning that the judgment is not the final word on the matter and the issues it raises will receive appellate attention, hopefully before the end of 2026.

Facts in brief

On the facts, the applicants were property-owning companies placed into business rescue. The business rescue practitioners proposed and implemented a plan that provided for the controlled winding-down of the businesses and the payment of dividends to creditors. During the business rescue proceedings, VAT became payable on rental and related income generated post-commencement but was not paid. SARS contended that these VAT amounts, being post-commencement obligations, could not be compromised in terms of the adopted business rescue plan. The plan, however, treated SARS as part of the general body of creditors, with its post-commencement VAT claim to be settled in accordance with the dividend waterfall. A dispute then arose as to whether SARS' post-commencement VAT exposure was capable of compromise through the plan, or whether it survived notwithstanding the plan's adoption and implementation.

The court held that the R15 million VAT liability that accrued after approval of the business rescue plan could not have been compromised because it did not exist at the time the alleged compromise was reached. It reasoned that the applicants' argument effectively implied that the company could continue collecting VAT from customers while retaining 99.97% of the funds instead of remitting them to SARS. The court found no statutory basis permitting such an arrangement and suggested that invoices issued under such circumstances would constitute false tax invoices. It therefore concluded that:

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[1] *(5009/2023P) [2025] ZAKZPHC 3; 2025 (3) SA 510 (KZP) (10 January 2025)*

[2] Act 71 of 2008 (Thereafter "the Act")

1. There could be no lawful compromise of post-commencement VAT without SARS' accession under section 154(1) of the Companies Act 71 of 2008.

2. SARS did not accede to any such compromise.

In essence, the court treated the post-commencement VAT obligations as incapable of being compromised absent express consent.

Against that background, the Court's conclusion that post-commencement debts may only be compromised through creditor accession assumes significant practical and systemic importance.

The judgment turns heavily on the linguistic differences between subsections 154(1) and 154(2). However, when viewed against the structure, purpose and commercial realities of Chapter 6, the reasoning sits uneasily with the design of business rescue, particularly in a creditor-driven regime where the rescue outcome depends on the participation of both pre- and post-commencement stakeholders.

This article critiques the judgment from the perspective of practitioners operating in the restructuring market and proposes an alternative interpretation that remains faithful to the text of the Act while preserving the commercial workability of business rescue.

1. The Court's reasoning: a narrow reading of section 154

The Court in *JBSA Props* drew a sharp line between section 154(1) and section 154(2). It reasoned that subsection (1) applies where a creditor has acceded to the discharge of a debt, whereas subsection (2) applies automatically to pre-commencement debts on approval and implementation of the plan. From this distinction and in particular the fact that section 154(2) refers only to pre-commencement debts, the Court inferred that post-commencement debts cannot be compromised through the plan unless the creditor expressly consents.

This approach gives primacy to formal consent over collective restructuring outcomes and places significant weight on the individual protection of post-commencement creditors, including SARS, even where compromise may be commercially necessary to preserve value or enable substantial implementation.

There is, however, another way to understand the structure of section 154, one already articulated at appellate level and more consistent with the purpose and mechanics of business rescue. This approach is unpacked below.

2. Business rescue as a creditor-driven restructuring process – the matching principle

Unlike the court-supervised rescue models of the United States and Canada, South African business rescue is a creditor-driven regime. That legislative design choice implies a greater tolerance for collective decision-making, provided creditors are fully informed and statutory voting thresholds are met.

As argued in earlier commentary on the status and participation of post-commencement creditors, the system becomes conceptually unstable if some creditors enjoy participation rights and influence in the restructuring process while simultaneously being insulated from the possibility of compromise. That produces a misalignment between rights, risk and outcome.

Across comparative restructuring regimes, there is general coherence between the scope of voting rights and the scope of compromise: those who participate in the decision are ordinarily part of the restructuring compact. Chapter 6 reflects the same matching logic. Section 145 affords participation rights to all creditors; section 150 contemplates engagement with creditors during plan development; and section 152(4) provides that an adopted plan binds all creditors irrespective of individual consent.

A rigid rule that post-commencement creditors may not be compromised unless they accede to the discharge of their claims entrenches an uneven playing field in which one group may influence outcomes in the rescue without sharing exposure to the consequences of those outcomes.

3. The Application of Section 7(k) of the Companies Act

The matching principle discussed above finds statutory articulation in section 7(k) of the Companies Act, which 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.[3] This provision articulates the underlying policy rationale of Chapter 6. Business rescue is not designed solely to protect creditors, employees, or shareholders in isolation. Instead, it seeks to facilitate corporate rehabilitation through a structured statutory process that promotes commercial sustainability while equitably considering competing stakeholder interests.

The emphasis on balancing rights and interests reflects a deliberate departure from the liquidation model, which traditionally prioritises creditor claims in strict hierarchical order. Under business rescue, mechanisms such as post-commencement finance (section 135), creditor voting thresholds (sections 151 and152), and the binding effect of an adopted plan (section 154) collectively serve to mediate competing interests within a regulated framework. Accordingly, section 7(k) functions as an interpretative guide. Courts are required to construe the provisions of Chapter 6 in a manner that advances both commercial rescue and fairness among stakeholders, rather than elevating the interests of any single constituency above the broader objective of sustainable recovery.

4. The practical reality: not all post-commencement claims are PCF

[3] Sec 7(k) of the Companies Act 71 of 2008
"The purposes of this Act are to—
(k) provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders"

An important distinction is that not all post-commencement claims are post-commencement finance (PCF) in the narrow sense contemplated by section 135(2). For example, SARS' post-commencement claims do not arise from contract with the BRP and therefore cannot constitute PCF. PCF is deliberate, contractual and incentivised by statutorily senior ranking. But many post-commencement claims do not arise from a post-commencement contract. Instead, they may arise as an incident of trading during rescue or as a necessary part of the practitioner's restructuring efforts, including for example:

- statutory obligations such as VAT[4]
- damages arising from suspension or cancellation by the BRP of pre-commencement contractual obligations under section 136(2),
- indemnity or liability exposures arising after commencement from pre-commencement operations, and
- operational trading claims continuing into the rescue period.

Treating all such claims as incapable of compromise unless consent is obtained is commercially unrealistic and, in some instances, rescue-defeating. There will be cases in which limited compromise of selected or even all post-commencement exposures is necessary to achieve substantial implementation and preserve value for the general body of creditors.

The appropriate safeguard is not categorical exclusion but transparency by the practitioner, careful classification of claims, and the exercise of discipline over the practitioner's actions through the voting process.

5. The "Special Case" Characterisation of SARS as a Jurisprudential Misstep

The court's reasoning in *JBSA Props,* in paragraph 24 namely that "SARS is a special case" constitutes the first doctrinal misstep in its analysis. By isolating SARS from the general operation of Chapter 6 of the Companies Act 71 of 2008, the court introduced a differentiation that finds no express support in the statutory framework of business rescue.

The court reasoned that because the compromise of a tax debt under Part D of Chapter 14 of the Tax Administration Act 28 of 2011 requires a written agreement signed by a senior SARS official in terms of sections 200 and 204, there was "no room" for tacit accession or acquiescence to the compromise of the post-commencement VAT debt. On this basis, it concluded that SARS could not be bound absent compliance with the formal statutory compromise procedure[5]. This reasoning is problematic for several interrelated reasons.

First, section 154(1) of the Companies Act does not require contractual compromise in order for a claim to be discharged. The extinguishment of a claim arises from the statutory effect of a validly adopted business rescue plan, not from bilateral agreement between the company and the creditor. Once adopted in terms of sections 151 and 152, the plan binds

[4] Arguably PAYE falls into a different category, namely deemed PCF in terms of section 135(1) of the Act.
[5] Ibid

all affected persons, irrespective of whether they voted in favour of it. The statutory mechanism operates independently of consensual compromise procedures found in other legislation.

Second, by invoking the Tax Administration Act's compromise provisions, the court conflated two distinct legal processes:

- a voluntary compromise of tax debt initiated under tax legislation; and
- a statutory restructuring process under Chapter 6, which binds creditors by operation of law.

Business rescue does not require SARS to *authorise* a compromise in the same way it would under sections 200 and 204 of the Tax Administration Act. Rather, SARS, like any other creditor, is afforded procedural safeguards including notice, participation, voting rights, and the right to approach court. If it fails to exercise those rights, the binding effect flows from statute, not agreement.

The characterisation of SARS as a "special case" undermines the balancing objective contained in section 7(k) of the Companies Act. The legislature did not create a separate hierarchy for tax authorities within Chapter 6. Indeed, section 135 does not single out SARS for superior ranking in respect of post-commencement tax liabilities. To elevate SARS outside the statutory framework risks reintroducing creditor exceptionalism inconsistent with the collective nature of rescue proceedings.

Section 5(4) of the Companies Act provides that where there is an inconsistency between the provisions of that Act and the provisions of other Acts, the Companies Act prevails (except for a limited list of legislation that does not include the Tax Administration Act). Insofar as there may be an irreconcilable inconsistency between the need for compliance with sections 200 and 204 of the Tax Administration Act for a valid compromise of a tax debt and section 152(4) of the Companies Act, the Companies Act must prevail.

Finally, the court's rejection of tacit accession overlooks the distinction between waiver of statutory power to compromise tax debt and acquiescence to the statutory consequences of a lawfully adopted plan. The question is not whether SARS concluded a compromise agreement under the Tax Administration Act, but whether it was bound by the consequences of a statutory restructuring process in which it had full opportunity to participate.

In this sense, the "special case" reasoning shifts the analysis away from the architecture of Chapter 6 and towards tax administration formalism, thereby unsettling the principle of commercial finality that underpins business rescue.

6. The Significance of *Mashwayi Projects (Pty) Ltd v Wescoal Mining (Pty) Ltd & Others*[6] for Post-Commencement Creditors

[6] (1157/2023) [2025] ZASCA 5; [2025] 2 All SA 57 (SCA); 2025 (3) SA 441 (SCA) (29 January 2025)

In *Mashwayi Projects (Pty) Ltd v Wescoal Mining (Pty) Ltd and Others* (SCA) ("*Wescoal"*), the Supreme Court of Appeal clarified that post-commencement creditors fall within the ordinary meaning of "creditors" for purposes of voting on a business rescue plan under sections 145 and 152 of the Companies Act 71 of 2008. The Court rejected the view that only pre-commencement creditors are entitled to vote, holding that Chapter 6 does not create a separate participatory regime for different categories of creditors. Any distinction between pre- and post-commencement creditors relates to ranking and preference under section 135, not to their status as creditors for voting purposes.

The SCA adopted a purposive and contextual interpretation of the Act, emphasising section 7(k), which requires the balancing of rights and interests of all stakeholders. It further cautioned against importing liquidation principles into business rescue, noting that the latter constitutes a distinct statutory mechanism aimed at restructuring rather than a concursus creditorum.

The practical effect of the judgment is that post-commencement creditors are entitled to vote and are counted in determining whether the statutory 75% threshold in section 152(2) has been achieved. If excluded from voting, the adoption of the plan may be invalid.

For purposes of creditor prioritisation under section 135, the judgment is significant because it confirms that post-commencement creditors are not a separate species of creditor, but form part of the unified creditor body contemplated in Chapter 6. Their preferential ranking does not remove them from the binding effect of a lawfully adopted business rescue plan under section 152(4). This interpretation strengthens the argument that, once properly adopted, a plan may regulate or compromise post-commencement claims, subject to compliance with statutory safeguards.

7. The Equal Treatment of Pre- and Post-Commencement Creditors Under Section 154

The interpretative difficulty surrounding section 154 of the Companies Act 71 of 2008 arises from the apparent differentiation between section 154(1), which applies to creditors who accede to a compromise, and section 154(2), which renders an adopted business rescue plan binding on all creditors, irrespective of whether they voted in favour of it. The question is whether section 154(2) should automatically apply only to pre-commencement creditors while excluding post-commencement creditors.

In light of *Wescoal*, such differentiation is doctrinally unsustainable. We elaborate on this below.

8. Unified Meaning of "Creditor" in Chapter 6

The SCA in *Wescoal*[7] confirmed that the term "creditor" in Chapter 6 bears its ordinary, inclusive meaning and encompasses both pre- and post-commencement creditors. The Act does not create separate participatory classes of creditors for purposes of voting. The only distinction drawn in Chapter 6 concerns ranking and preference under section 135, not legal status.

If post-commencement creditors are "creditors" for purposes of sections 145 and 152 (voting and adoption), there is no textual basis to assign a narrower meaning to the same word in section 154(2). A differentiated interpretation would violate the principle of internal statutory consistency.

It is an unfortunate accident of history that the *Wescoal* judgment was published less than three weeks after the *JBSA Props* judgment. Had Olsen J had the benefit of reading the SCA's reasoning, he might well have come to a different conclusion. In particular, it is doubtful that the learned judge would have had the leeway to draw such a far-reaching distinction between pre- and post-commencement creditors.

9. Misunderstanding the role of quiescence in statutory binding effect of Business Rescue

The court in the *JBSA Props* case, concluded that acquiescence was not present, holding that SARS's absence from the creditor meeting and silence did not amount to tacit acceptance of the compromise of post-commencement VAT claims. This reasoning is open to critique on several grounds.

While the court distinguished between quiescence (informed inaction) and acquiescence (tacit consent),[8] it overlooked that quiescence can, in the proper statutory context, reinforce the binding effect of a plan, particularly where the creditor has been notified and given an opportunity to participate. SARS had full knowledge of the plan, received notice, and did not object to its adoption. Even if statutory consent is required for the discharge of post-commencement claims, the court understated the significance of objective silence in reinforcing the plan's enforceability for the purposes of commercial

The court treated acquiescence as requiring explicit tacit acceptance, ignoring that the Companies Act, particularly sections 151(2) and 152(4), already binds all affected persons to an adopted plan. By insisting that absence from the meeting could not constitute acquiescence, the court effectively elevated individual creditor consent above the collective, statutory logic of Chapter 6.

The court drew a rigid line between quiescence and acquiescence. Yet doctrine and prior case law suggest that quiescence can give rise to an inference of acquiescence where a

[7] It should be noted that applications were lodged by two of the unsuccessful Respondents for leave to appeal to the Constitutional Court. These applications are enrolled for hearing on 19 February 2026.

[8] JBSA Props (Pty) Ltd and Another v Commissioner for the South African Revenue Services and Others (5009/2023P) [2025] ZAKZPHC 3; 2025 (3) SA 510 (KZP) (10 January 2025) para. 23.

creditor, with knowledge of the plan and opportunity to act, remains silent in circumstances that objectively require a response. The court did not sufficiently account for the fact that SARS's conduct acknowledging the plan generally while only disputing specific post-commencement obligations could, if interpreted objectively, support a limited form of acquiescence with respect to other binding aspects of the plan.

10. The Distinction Between Section 154(1) and 154(2)

Section 154(1) governs compromises accepted by affected persons. It reflects consensual restructuring. Section 154(2), by contrast, embodies statutory compulsion once the required voting threshold is met. It is not limited to those who "acceded" to the compromise. Its function is to bind dissenting and non-participating creditors. To confine section 154(2) to pre-commencement creditors alone would amount to an impermissible reading-in, particularly given that the legislature did not expressly exclude post-commencement creditors.

11. Section 154(1) vs 154(2): why the distinction does not require a consent-only rule

The judgment in *JBSA Props* treats the difference in wording between section 154(1) and section 154(2) as decisive. Because subsection (1) refers to a broad category of creditors who have acceded to a discharge, while subsection (2) refers only to the non-enforceability of pre-commencement debts, the Court concludes that post-commencement debts may only be compromised where the creditor expressly consents.

This interpretation runs counter to the provisions of section 152(4) of the Act. This section states, in the clearest and broadest terms, that a business rescue plan that has been adopted is binding on "each of the creditors of the company" whether or not that creditor attended the voting meeting, voted, or voted against the plan. This is the expression of the cram-down principle.

In any event, the Supreme Court of Appeal had, in *Van Zyl v Auto Commodities (Pty) Ltd (279/2020) [2021] ZASCA 67 (3 June 2021)*, provided a different and more nuanced explanation for why subsections (1) and (2) are worded differently, and it is an explanation that does not lead to the restrictive conclusion adopted in *JBSA Props*.

Wallis JA explains that the two subsections regulate different mechanisms and different consequences arising from a business rescue plan. Section 154(1) applies where a creditor voluntarily accedes to the discharge of a debt as part of the plan. In that situation, the debt is properly and fully discharged because the creditor has agreed to release it, reflecting ordinary principles of consensual compromise.

Section 154(2), by contrast, does not deal with consensual discharge. It creates a statutory bar on enforcement of pre-commencement debts as against the company once the plan is approved and implemented. The debt may continue to exist, but the creditor is restricted from enforcing it beyond the limits set by the plan. It is therefore a defence *in personam* rather than an extinction of the obligation. The creditor may in particular enforce payment

of that same debt, or at least the unpaid balance thereof, against another person - typically, a surety.

On this interpretation, the difference in wording between subsections (1) and (2) is not an indication that the Legislature intended to prohibit compromise of post-commencement debts unless the creditor consents.

The Supreme Court of Appeal had therefore, long before Olsen J's judgment, offered a coherent explanation for the differing language in the two provisions without treating it as a basis to limit the substantive scope of which categories of claims a business rescue plan may compromise under section 152(4). Seen in this light, *Van Zyl v Auto Commodities* demonstrates that the reasoning in *JBSA Props* is not the only plausible reading of section 154, and that a purposive interpretation consistent with Chapter 6's restructuring objective remains available.

12. Where PCF fits: protection, not immunity

There is broad professional consensus that genuine PCF should not ordinarily be compromised absent explicit consent. That expectation is driven by the need to preserve market confidence rather than due to a statutory prohibition.

In any event, PCF creditors in the narrow sense do not need the protection implied by JBSA Props. Their claims arise from a contract with the business rescue practitioner, and they are therefore able to protect themselves expressly. In practice, PCF providers commonly include in the PCF loan agreement terms to the effect that:

- their post-commencement claim may not be compromised under any business rescue plan, and/or
- the publication of a draft plan contemplating compromise of the PCF claim constitutes a breach of the PCF agreement.

Where such provisions exist, the PCF creditor is fully protected through contractual enforcement remedies and does not require an implied statutory immunity from compromise. The market already has the tools to secure that outcome consensually.

The policy equilibrium may therefore be expressed as follows:

- for genuine PCF, the default commercial expectation is priority and repayment, safeguarded through contract and only departed from by agreement;
- for non-PCF post-commencement claims, compromise should remain available in appropriate cases through the plan process, subject to disclosure, classification integrity and fairness protections.

This approach aligns incentives with Chapter 6's flexibility and avoids freezing restructuring options where compromise may be necessary to achieve rescue.

Insofar as SARS is concerned, it has other remedies available to reduce its exposure to compromise of post-commencement debts. These include the potential classification of

unpaid PAYE as deemed PCF in terms of section 135(1)(a) of the Act and the classification of unpaid VAT as business rescue costs in terms of section 135(3) of the Act. Achieving such classifications would raise SARS' post-commencement claims up the payment waterfall, since section 135(1) claims rank above all other PCF claims in terms of section 135(3)(a), while section 135(3) costs rank higher than all categories of PCF.

13. Hard cases and the risk of rigid doctrine

The facts in *JBSA Props*, particularly regarding non-payment of VAT, may have invited judicial caution about abuse risk. But hard cases should not make bad law by producing rigid doctrine with negative systemic consequences.

A striking example arises in relation to claims under section 136(3), where damages flow from the suspension or cancellation of pre-commencement contractual obligations that are deemed onerous by the practitioner. A typical example is the cancellation of unprofitable lease agreements, which is a step regularly taken by practitioners of retail companies in rescue[9]. These cancellations afford section 136(3) damages claims to the landlords, for the unexpired portions of the cancelled leases. Preventing a business rescue plan from compromising that damages claim without the landlord's consent serves no rational restructuring purpose. It does not spare the company from the liability the practitioner sought to avoid; it merely postpones payment until later in the rescue period. In commercial terms, that outcome runs directly against the logic of Chapter 6.

Other examples would be a product liability claim or a construction defect liability claim that arises after commencement of the rescue. Again, preventing the practitioner from compromising such a claim without the consent of the claimant would serve no rational restructuring purpose.

There will inevitably be cases in which some measure of compromise across creditor rankings, including selected post-commencement exposures such as section 136(3) liabilities, is the only viable route to achieving substantial implementation. Chapter 6 was designed to accommodate such flexibility, not to foreclose it.

14. Practical guidance for practitioners

Until further appellate guidance emerges, prudent practice suggests that business rescue practitioners and creditors should:

- classify claims carefully, distinguishing genuine PCF from operational and statutory post-commencement claims[10]

[9] Strictly speaking, business rescue practitioners are required to apply to Court in terms of section 136(2)(b) of the Companies Act to cancel the obligations of the company in terms of these lease agreements.

[10] For example, it may be argued that incurring post-commencement VAT should be categorised differently – not as an unsecured post-commencement claim but rather as costs of business rescue in terms of section 135(3).

- address the treatment of post-commencement claims expressly in the plan, with reasons and alternatives considered
- engage early with material post-commencement creditors, especially SARS where applicable – after all, it is manifestly in the broader interests of society for commerce to support the fiscus rather than seek to handicap it
- where compromise is contemplated, secure clear voting support and ensure fairness considerations are recorded, and
- ensure PCF agreements document purpose, ranking and consent mechanics to mitigate re-characterisation risk.

These measures preserve flexibility while respecting both commercial expectations and statutory safeguards.

15. Conclusion

The judgment in *JBSA Props* adopts an overly narrow reading of section 154 that risks undermining the commercial functionality of business rescue. A purposive, system-aware interpretation remains available - one that recognises that post-commencement claims may, in appropriate cases, be compromised through the collective will of creditors under section 152(4), while preserving the commercial protections expected by genuine providers of post-commencement finance.

With leave to appeal having been granted, the Supreme Court of Appeal now has an important opportunity to clarify the law in a manner that is textually sound, commercially realistic and aligned with the rescue purpose of Chapter 6.