

Who appoints the substitute BRP? A look into the meaning of Section 139(3) of the Companies Act

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Section 139(3) of the Companies Act

1. Who has the power to appoint a business rescue practitioner's replacement, in circumstances where a practitioner dies, resigns, or is removed from office? This question (amongst others) was answered by the Supreme Court of Appeal ("**SCA**")^[1] and confirmed in a recent application for leave to appeal before the Constitutional Court in *Shiva Uranium (Pty) Limited (In Business Rescue) and Another v Tayob and Others*.^[2]
2. This matter involved Shiva Uranium (Pty) Limited ("**Shiva**"), whose business rescue proceedings commenced on a voluntary basis in terms of section 129 of the Companies Act 71 of 2008 ("**Companies Act**"). During the course of Shiva's business rescue proceedings, its initial "company-appointed" business rescue practitioner resigned. Following this resignation, an order was granted by the High Court in terms of section 130(6)(a) of the Companies Act, pursuant to which two substitute practitioners (one senior and one junior) were appointed by the court, albeit irregularly.^[3] The senior practitioner later wished to resign from office, and accordingly, a resolution was passed by the two "court-appointed" practitioners purporting to appoint a substitute senior practitioner. However, shortly after this, Shiva's board of directors also appointed replacement practitioners of their own. The question, then, was which of these two appointments was valid? The appointment by the practitioners or the appointment by the company's board of directors?
3. The SCA, whose judgment was the subject of the application for leave to appeal, *inter alia*, held that section 139(3) of the Companies Act regulates only two scenarios in the alternative, namely (i) where business rescue proceedings commence on a voluntary basis in terms of section 129 of the Companies Act, and (ii) where a company enters into business rescue proceedings compulsorily pursuant to a section 131 court application. In the present case, Shiva's business rescue proceedings commenced voluntarily, and as such, the power to appoint a new practitioner resided with Shiva's board of directors. The SCA stated that had Shiva's business rescue commenced on a compulsory basis in terms of section 131, the power to appoint a substitute, in the event that a practitioner resigned, would lie with the affected person who initially brought the application for business rescue. Accordingly, the SCA upheld the appeal and set aside the appointment made by the "court appointed" business rescue practitioners.
4. It is important to note that, in addition to the above, the SCA also held that where the company's board has the power to appoint a substitute practitioner as aforesaid, the board is not required to act subject to the authority of the practitioners. This finding of the SCA was premised on the fact that the board of a company in business rescue retains all of its powers and functions except to the extent that the Companies Act expressly or by necessary implication provides otherwise. The SCA confirmed that although business rescue practitioners enjoy full management control of the company in substitution of its board during the course of business rescue proceedings, the appointment of a substitute practitioner is a function of governance falling outside the ambit of the practitioner's "management" of the company. As such, the SCA confirmed that any function of a director that falls outside the ambit of the authority of the practitioner, cannot be subject to the practitioner's approval. These findings were not contested in the application for leave to appeal.
5. Turning now to the application for leave to appeal, the Constitutional Court was required to engage in an exercise of statutory interpretation to ascertain the proper meaning of section 139(3) of the Companies Act. The Constitutional Court regarded this as a question of general public importance, since its finding on the issue would govern the appointment of practitioners in all future cases where a practitioner, appointed in terms of section 130(6)(a) of the Companies Act, subsequently dies, resigns or is removed from office.

6. The Constitutional Court agreed with the findings of the SCA, namely that where a practitioner appointed by a company in terms of section 129(1)(b) resigns, the company itself (acting through its board) may appoint the substitute. On the other hand, where a practitioner appointed by the court in terms of section 131(5) resigns, the “affected person” who applied for the company to be placed in business rescue, and who made the nomination envisaged in section 131(5), would have the ability to appoint a substitute practitioner. The Constitutional Court was of the view that this interpretation of section 139(3) would ensure that the appointment of substitute practitioners would be quick and uncontentious, thereby resulting in the efficient rescue and recovery of financially distressed companies.
7. On the issue as to whether an appointment by a court in terms of section 130(6)(a) of the Companies Act changed this position (in the manner and form suggested by the applicant), the Constitutional Court held that there were numerous factors that militated against any such interpretation. This conclusion was premised on the wording used by the legislature in the relevant sections of the Companies Act, as well as the delays and obstacles that would be occasioned, if the interpretation proffered by the applicant was adopted. Accordingly, the Constitutional Court found that the applicant had not demonstrated that there were reasonable prospects of success of the Constitutional Court reversing the SCA’s conclusion, and as such, the application for leave to appeal was dismissed.
8. In view of the above, it is now clear what the law says in relation to the appointment of substitute practitioners, in the event that a practitioner dies, resigns or is removed from office. Depending on whether the business rescue is voluntary or compulsory, the substitute appointment will be made by the company or by the affected person who brought the business rescue application. It is also important to note that any function of a director that falls outside the ambit of the authority of the practitioner cannot be subject to the practitioner’s approval. In addition, the board of directors of a company in business rescue retains all of its powers and functions except to the extent that the Companies Act expressly or by necessary implication provides otherwise.

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[1] *Tayob and another v Shiva Uranium (Pty) Ltd and others* (Case no. 336/2019) [2020] ZASCA 162 (8 December 2020).

[2] *Shiva Uranium (Pty) Limited (In Business Rescue) and Another v Tayob and Others* [2021] ZACC 40 (9 November 2021).

[3] The order was irregular on the basis that the High Court did not first make an order setting aside the appointments of the practitioners in terms of section 130(1)(b) of the Companies Act. Instead, the business rescue practitioners resigned and as such the jurisdictional prerequisites for appointing a substitute practitioner in terms of section 130(6)(a) did not exist.



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