THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

Reportable/**Not Reportable**
Case no: 2026-119276

In the matter between:

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA	Applicant
and	
EKAPA MINERALS (PTY) LTD *(Registration no: 2004/023503/07. In provisional liquidation)*	1st Respondent
RICHARD KEAY POLLOCK N.O.	2nd Respondent
KGASHANE CHRISTOPHER MONYELA N.O.	3rd Respondent
MMAESHIBE PHUTI DIBETE N.O.	4th Respondent
BENESTE DICKS N.O.	5th Respondent
MERVIN DOWRIES N.O.	6th Respondent
LEANDI ELS N.O.	7th Respondent
MADELINE FIVAS N.O.	8th Respondent
KAREN FORTEIN N.O.	9th Respondent

EKAPA MINING (PTY) LTD *(Registration no: 2001/014296/07)*	10th Respondent
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	11th Respondent

and

EKAPA RESOURCES (PTY) LTD *(In provisional liquidation)*	1st Intervening Respondent
JOHANNES ZACHARIAS HUMAN MULLER N.O.	2nd Intervening Respondent
GONASAGREE GOVENDER N.O.	3rd Intervening Respondent
MELUSI GUMBO N.O.	4th Intervening Respondent
YOUSUF MOHAMED HASSEN N.O.	5th Intervening Respondent
ELAINE JUANITA JACOBS N.O.	6th Intervening Respondent
EUGENE JANUARIE N.O.	7th Intervening Respondent
MARI HAYWOOD N.O.	8th Intervening Respondent

Neutral citation: *National Union of Metalworkers of South Africa v Ekapa Minerals (Pty) Ltd (In Provisional Liquidation) and Others* (2026-119276) 28 July 2026.

Coram: Tyuthuza AJ.

Heard: 18 June 2026.

Delivered electronically: The judgment is handed down electronically by circulating to the parties or legal representatives by email. The date for the handing down of the judgment is deemed to be 27 July 2026.

Summary: *Company Law* – Business rescue proceedings– Application in terms of section 131(1) of the Companies Act 71 of 2008 – Reasonable prospects of rescue and/or better return for creditors and shareholders – Application succeeds.

ORDER

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1. The Rules relating to forms service, notice and time periods are dispensed with and this application is heard as an urgent application as provided for in Rule 6(12) of the Uniform Rules of Court.

2. The first respondent is placed under supervision and business rescue in terms of section 131(1) of the Companies Act, 71 of 2008.

3. Marius Van Tonder is appointed as the interim business rescue practitioner of the first respondent in terms of section 131(5) of the Companies Act, subject to ratification by the holders of a majority of the first respondent's independent creditors' voting interests at the first meeting of the creditors, as contemplated in section 147 of the Companies Act.

4. The liquidation proceedings under case number 2026-044107 are suspended until the business rescue proceedings end, as contemplated in section 131(6) of the Companies Act.

5. The applicant is to give notice of this order to all known affected persons of the first respondent within five days of the order having been granted.

6. The respondents are ordered to pay the costs of the application on a party and party scale, including the costs of two counsel where so employed on scale C.

JUDGMENT

Tyuthuza AJ

Introduction

[1] This is an application launched on an urgent basis in terms of section 131(1) of the Companies Act 71 of 2008 (Companies Act), wherein the applicant seeks an order placing the first respondent under supervision and commencing business rescue proceedings *inter alia*.

[2] The first to ninth respondents and the first to eighth intervening respondents have opposed the application.

Urgency

[3] As alluded to above, the application is launched on an urgent basis. As such, the applicant must comply with Rule 6(12)(*b*) of the Uniform Rules of Court, which reads as follows:

> 'In every affidavit filed in support of any application under paragraph *(a)* of this subrule, the applicant shall set forth explicitly the circumstances which it is averred render the matter urgent and the reasons why the applicant claims that applicant could not be afforded substantial redress at a hearing in due course.'

[4] In *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers)*[1], with reference to Rule 6(12)(*b*), the following was stated:

[1] 1977 (4) SA 135 (W) at 136A.

'Mere lip service to the requirements of Rule 6(12)(*b*) will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter be set down.'

[5] It is trite that business rescue proceedings by their very nature are inherently urgent and must be conducted within the timelines provided for in terms of the Companies Act[2]. Even so, the applicant is still required to set out its case for urgency and why it cannot be afforded substantial redress at a hearing in due course.

[6] In its founding affidavit, the applicant has set out the circumstances relied upon to justify the enrolment of the matter as one of urgency. It has further explained why substantial redress would not be available in the ordinary course and identified the prejudice it would suffer if the matter were not heard on an urgent basis. The respondents correctly did not take issue with the urgency of the matter.

[7] I am satisfied that the applicant has met the requirements of Rule 6(12) of the Uniform Rules of Court.

Background

[8] The applicant, the National Union of Metalworkers of South Africa (NUMSA), is a recognised trade union at the first respondent and represents 369 of its employees. It brings this application in its capacity as the majority union at the first respondent and, accordingly, as an affected person as contemplated in section 128(1)(*a*)(ii) of the Companies Act.

[9] The first respondent, Ekapa Minerals Proprietary Limited (Ekapa Minerals), is a diamond mining company situated in Kimberley, Northern Cape. It conducts surface-level diamond mining and provides contract mining and processing services to Ekapa Resources Proprietary Limited (the first intervening

[2] See *Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd and Others* 2012 (2) SA 378 (WCC) para 10.

respondent hereafter referred to as Ekapa Resources). Ekapa Minerals employs approximately 1 030 employees and is the registered holder of mining right NC 30/5/1/2/2/142 MR (A).

[10] The second to ninth respondents are cited in their capacities as the joint provisional liquidators of Ekapa Minerals.

[11] The first intervening respondent, Ekapa Resources, is presently in provisional liquidation. The second to eighth intervening respondents are cited in their capacities as the joint provisional liquidators of Ekapa Resources. Ekapa Resources is the registered holder of mining right NC 30/5/1/2/2/142 MR (B).

[12] Ekapa Minerals and Ekapa Resources form part of the Ekapa group of companies. The Ekapa group is described as the largest privately owned diamond mining operation in the world and is the owner and operator of three diamond mines, namely Du Toitspan, Bultfontein and Wesselton.

[13] Over the past few years, Ekapa Minerals has experienced financial difficulties arising from, among other things, a decline in diamond prices. These difficulties ultimately led to the adoption of a restructuring strategy. According to the respondents, that turnaround strategy began to bear fruit in early 2026.

[14] On 17 February 2026, operations at Ekapa Minerals' Du Toitspan and Bultfontein mines were immediately halted following a catastrophic mud rush, which left five miners trapped underground. As a result of the mud rush, operations at the Joint Shaft mines of Du Toitspan and Bultfontein were also suspended and production at Ekapa Minerals came to a complete halt.

[15] A few days after the mud rush, a resolution was adopted to place the first respondent in provisional winding-up in terms of section 344(*a*) of the Companies Act 61 of 1973, read with item 9 of Schedule 5 to the Companies Act 71 of 2008.

[16] On 3 March 2026, Ekapa Minerals and Ekapa Resources were placed in provisional liquidation.

The Applicable Law

[17] Section 131(1) of the Companies Act provides that an *affected person* may apply to court for an order placing a company under supervision and commencing business rescue proceedings. The applicant, as a registered trade union representing employees of the first respondent, is an affected person as contemplated in the Act.

[18] Section 131(4) empowers a court, in the exercise of its discretion, to place a company under business rescue if it is satisfied that the company is financially distressed, has failed to pay over an amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters; or if it is otherwise just and equitable to do so for financial reasons, and that there is a reasonable prospect of rescuing the company.

[19] The primary purpose of business rescue is to enable the business rescue practitioner to develop and implement 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".[3]

[20] In *Diener NO v Minister of Justice and Correctional Services and Others*[4]*,* the Constitutional Court summed up the purpose of business rescue proceedings in the following words:

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[3] Section 128(1)(*b*)(iii) of the Companies Act.
[4] 2019 (4) SA 374 (CC) para 54.

'The purpose of business rescue is to assist a financially distressed company with paying its debts, avoiding insolvency, and maximising the benefit to stakeholders upon liquidation (if inevitable). It is stated expressly in s 7(*k*) of the Companies Act 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". It must be emphasised that this must be done while balancing the rights of all affected persons, including creditors, employees, and shareholders. The primary goal of business rescue is to avoid liquidation and its attendant negative consequences on stakeholders. In addition, a secondary purpose is to achieve a better outcome on liquidation or disinvestment, whereby "[t]he underlying principle behind restructuring or reorganisation proceedings is that a business may be worth a lot more if preserved, or even sold, as a going concern than if the parts are sold off piecemeal". At the same time, where it is not viable to rescue a company, it should be liquidated and its business sold. Business rescue can only begin where there is a reasonable prospect of saving the company. This was highlighted in *KJ Foods*, where the Supreme Court of Appeal quoted with approval the High Court in *DH Brothers Industries*, which stated that –

> "Chapter [6] as a whole reflects 'a legislative preference for proceedings aimed at the restoration of viable companies rather than their destruction' but only of viable companies, not of all companies placed under business rescue."'

[21] In *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others*[5], ("*Oakdene*"), the Supreme Court of Appeal (SCA) clarified the objectives of the business rescue plan as follows:

'The potential business rescue plan s 128(1)(*b*)(iii) thus contemplates has two objects or goals: a primary goal, which is to facilitate the continued existence of the company in a state of solvency and, a secondary goal, which is provided for as an alternative, in the event that the achievement of the primary goal proves not to be viable, namely, to facilitate a better return for the creditors or shareholders of the company than would result from immediate liquidation.'

[5] 2013 (4) SA 539 (SCA) para 23.

[22] In *Oakdene* at paragraph 29, the SCA held as follows regarding the standard of proof for a reasonable prospect in terms of section 131(4)(*a*) of the Companies Act:

'. . . I believe it requires more than a mere prima facie case or an arguable possibility. Of even greater significance, I think, is that it must be a reasonable prospect – with the emphasis on "reasonable" – which means that it must be a prospect based on reasonable grounds. A mere speculative suggestion is not enough. Moreover, because it is the applicant who seeks to satisfy the court of the prospect, it must establish these reasonable grounds in accordance with the rules of motion proceedings which, generally speaking, require that it must do so in its founding papers.'

[23] In *Newcity Group (Pty) Limited v Pellow NO and Others*[6], the SCA revisited the standard of proof for a reasonable prospect and held as follows:

'It is plain from the wording of these provisions that a court may not grant an application for business rescue unless there is a reasonable prospect for rescuing the company, i.e., facilitating its rehabilitation so that it continues on a solvent basis or, if that is not possible, yields a better return for its creditors and shareholders than what they would receive through liquidation. In deciding that question, the court exercises a discretion in the wide sense – it makes a value judgment . . .

As to what "reasonable prospect" means, Brand JA, in *Oakdene Square Properties (Pty) Ltd*, properly described it as a yardstick higher than "a mere prima facie case or an arguable possibility" but lesser than a "reasonable probability" – a prospect based on reasonable grounds to be established by a business rescue applicant in accordance with the rules of motion proceedings.'

[24] In *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd*[7] the following was stated:

'In contrast, section 131(4) of the new Act uses the phrase "reasonable prospect" in respect of the recovery requirement. The use of different language in this latter

[6] (577/2013) [2014] ZASCA 162 (1 October 2014) paras 15-16.
[7] 2012 (2) SA 423 (WCC) paras 21-22.

provision indicates that something less is required than that the recovery should be a reasonable probability. Moreover, the mind-set reflected in various cases dealing with judicial management applications in respect of the recovery requirement was that, prima facie, the creditor was entitled to a liquidation order, and that only in exceptional circumstances would a judicial management order be granted. The approach to business rescue in the new Act is the opposite - business rescue is preferred to liquidation.'

However, even if the substantive test with its lower threshold is satisfied, the court still has a discretion not to grant the order. In exercising this discretion, the court should give due weight to the legislative preference for rescuing ailing companies if such a course is reasonably possible. It would therefore be inappropriate for a court faced with a business rescue application to maintain the mind-set (from the earlier regime) that a creditor is entitled *ex debito justitiae* to be paid or to have the company liquidated.'

[25] In applications of this nature, it must be recognised that the concept of a "prospect" is inherently uncertain. A prospect is, by its very nature, concerned with future events and is dependent upon a range of variables, many of which may be beyond the control of the parties. Accordingly, the future cannot be predicted with absolute accuracy, and certainty is neither required nor attainable. The enquiry is instead whether, having regard to the facts placed before the Court and the evidence presented, there exists a reasonable basis for concluding that the prospects of rescuing the business are sufficiently viable. The Court's task is therefore not to determine whether rescue is assured, but whether the evidence demonstrates that such a prospect is reasonable.[8]

[26] In *Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd and Others*[9]*,* the Court made the following pertinent observations:

'It is evident in the provisions of s 131(4) that a person making an application for business rescue in terms of s 131(1) of the 2008 Companies Act must satisfy the court that there is a reasonable prospect that the subject company can be rescued in the relevant sense by being placed under supervision. The information or evidence that

[8] *Employees of Solar Spectrum Trading 83 (Pty) Limited v Afgri Operation Limited and Another* (6418/2011, 18624/2011, 66226/2011, 66226/2011, 66226A/11) [2012] ZAGPPHC 359 (16 May 2012) para 33.

[9] 2012 (2) SA 378 (WCC) para 17.

will suffice to meet this requirement will depend on the object of the proposed business rescue, viz whether it is to achieve the continued existence of the company on a solvent basis; alternatively, to allow the company's business to be managed for an interim period to allow for a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company. Whatever the object of the proposed business rescue, however, in order to succeed in the application the applicant must be able to place before the court a cogent evidential foundation to support the existence of a reasonable prospect that the desired object can be achieved. While it is the function of the business rescue practitioner, if appointed, to draw up a business rescue plan to be considered by the "affected persons", the founding papers in a business rescue application must nevertheless contain sufficient factual detail to enable the court to determine whether the business rescue practitioner will probably have a viable basis to undertake the task, or, at the very least, make out a case for the court to hold that an investigation by a business rescue practitioner to that end, in terms of s 141(1) of the Act, appears to be justified.'

[27] The end goal is that business rescue proceedings are meant for the efficient rescue and recovery of financially distressed companies in a manner that balances the rights and interests of all relevant stakeholders.[10]

[28] It is so that '[b]usiness rescue is designed to resolve a company's future direction quickly. An independent and suitably qualified person, referred to as a business rescue practitioner, takes full control of the company to try to work out a way to save the business. Where a turnaround is unlikely to succeed, the aim is to administer the affairs of the company in a way that results in a better return for the creditors than they would have received if the company had been liquidated'.[11]

Submissions of the parties

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[10] Section 7(*k*) of the Companies Act.

[11] AJ Smits 'Corporate administration: a proposed model' (1999) 32 *De Jure* 80-107. See also *Commissioner, South African Revenue Service v Louis Pasteur Investments (Pty) Ltd (In Provisional Liquidation) and Others* 2022 (5) SA 179 (GP) para 61.

[29] The applicant, placing reliance on the proposed business rescue plan of Mr Van Tonder, states *inter alia* as follows in respect of a reasonable prospect of the "rescue" of Ekapa Minerals:

29.1. That there is a reasonable prospect of rescuing the first respondent and that placing the first respondent under business rescue would be in the best interest of all its creditors, employees, suppliers and customers.

29.2. The mine remains capable of continuing operations notwithstanding the mud rush (flooding) incident. The flooding was limited in scope and affected only the Du Toitspan and Bultfontein areas.

29.3. The other areas of the mine, being Wesselton, Surface Mining and other departments were fully operational. More specifically, only Level T890 was impacted at Du Toitspan and Bultfontein.

29.4. The remainder of the mine's operational infrastructure remains intact and unaffected. In this regard, three levels at Du Toit Span/Bultfontein (namely- T580, T555, and T760) can continue to be fully operational, and are capable of sustaining full production without any hindrance arising from the flooding incident.

29.5. There are three identified areas containing higher-grade diamonds, which are commercially viable and suitable for continued mining operations.

29.6. The first respondent's movable assets are valued at R141 million as obtained from its statement of financial position as at 31 January 2026. Ekapa Minerals also owns immovable property, including a game farm (a non-core asset which can be disposed of for R20 million to R30 million). This asset base provides a credible platform for funding and value realisation.

29.7. The first respondent has a substantial receivables base which can be unlocked through business rescue proceedings. The management accounts reflect that approximately R400 million is due to the first respondent by related group entities, while trade receivables due by related parties have increased by approximately R221 million over the preceding seven-month period, demonstrating the existence of significant recoverable value. In addition, specific recoverable claims include amounts owed by:

-Ekapa Mining Proprietary Limited of approximately R3, 662,976.00;

-Super Stone Mining (Pty) Ltd of approximately R25,428,000.00;

-Kimberley Miners Forum RF (Pty) Ltd of approximately R4,981,000.00; and

-Batho Pele Mining Co-operative of approximately R50 000.00.

29.8. These amounts will be actively pursued and recovered under the supervision of Van Tonder and his legal team and applied towards operational funding and the settlement of creditor claims.

29.9. Creditors will receive a materially better return under business rescue than would be the case in liquidation. In liquidation, the first respondent's assets would be realised on a forced sale basis, resulting in a substantial diminution in value, particularly in respect of cancellation of the mining right and integrated operations, which derive their value from continued use.

29.10. In contrast, business rescue will preserve the first respondent as a going concern, enabling it to generate revenue, realise receivables, recover outstanding claims, and implement a structured repayment plan in respect of creditor claims, while preserving the first respondent's mining right which would otherwise be at risk in liquidation.

29.11. In the alternative and having regard to the value of the first respondent's assets, business rescue is a mechanism that can be used to sell the first respondent's assets in a controlled fashion to secure the highest possible return for creditors. Conversely, in liquidation, the first respondent's assets will be sold at forced sale values and a fraction of their market related value. Additionally, the first respondent's mining right in a liquidation scenario would automatically lapse. This would result in a significant value loss for the first respondent and be highly prejudicial to the general body of creditors. In business rescue, the business rescue practitioner can attract market related offers for the mining rights and remaining assets to secure the highest possible dividend payment to creditors.

29.12. If a business rescue plan is successfully implemented, independent creditors can expect to receive a dividend of 100 cents in the Rand over a period of 36 months.

29.13. The employment of approximately 1,030 employees is directly dependent on the first respondent's ability to continue its mining operations as a going concern. The continuation of the first respondent's operations, albeit on a downscaled and cost-efficient basis, will enable the retention of about 500 employees, who would otherwise face immediate retrenchment in the event of liquidation.

29.14. The implementation of a downscaled operational model will ensure that employment is preserved to the greatest extent reasonably possible, while aligning the workforce with the first respondent's immediate operational requirements and financial position. This approach is aimed at striking a balance between operational sustainability and the protection of jobs.

29.15. Hall of Diamonds has issued the applicant with a letter of intent, wherein it has confirmed that it will provide post-commencement business rescue finance in the sum of R25 000 000.00, subject to the provisional liquidation being converted to business rescue and it being granted exclusivity to purchase all diamonds produced from Ekapa Minerals at market related prices for the duration of the business rescue.

[30] Relying on *Ziegler South Africa (Pty) Ltd v South African Express SOC Ltd and Others*[12], the applicant submitted that it succeeded in placing a cogent evidential foundation that supports the existence of a reasonable prospect of rescuing Ekapa Minerals.

[31] On the contrary, the first to ninth respondents dispute that there is a reasonable prospect to rescue Ekapa Minerals. In support of their opposition, they submit as follows:

31.1. The proposed plan does not take into consideration that the business activities and affairs of Ekapa Minerals are intimately interwoven and interrelated with other entities within the Ekapa Group of Companies.

31.2. The post-commencement business rescue financing of R25 million is not enough to attend to the business of Ekapa Minerals for even the first

[12] 2020 (4) SA 626 (GJ) para 51.

month of operations. This amount can only preserve the mine for a very short period and does not allow for a restoration to financial health.

31.3. The proposed plan fails to deal with the position and lack of involvement of Ekapa Resources. The mining rights for the relevant area belong to Ekapa Resources as do the underground assets.

31.4. Ekapa Resources has indicated that it will not co-operate and/or participate in the business rescue plan because it will be prejudicial to its creditors.

31.5. The proposed business rescue plan enjoys no reasonable prospects of success and cannot succeed in its professed purpose.

31.6. The proposed business rescue plan will only serve to further increase the liabilities of Ekapa Minerals.

31.7. The preservation and maintaining of the core assets of Ekapa Minerals, until such time that the business can be sold as a going concern is the only viable option that will serve the interests of its employees, shareholders and creditors.

31.8. Business rescue and supervision in terms of section 131 was previously considered but the shareholders and management of Ekapa Minerals decided to rather place it in liquidation, as this was the only feasible and responsible avenue.

31.9. Fifty-three (53) employees of Ekapa Minerals have signed an objection letter and petition to oppose the application for business rescue. These employees believe that there is no reasonable prospect of rescuing Ekapa Minerals. It is noted that in the supplementary affidavit, the respondents allege that more signatures were appended to the objection letter.

31.10. The only possibility to revive the mining operations of the Group, would be to maintain and safeguard the existing assets of Ekapa Minerals and the Group in order to sell it, as a running concern, to an entity with substantial resources. An investment of approximately R800 million will be needed to clear the damages caused by the flood and revive mining activities.

31.11. The processing of the surface dumps by Ekapa Minerals cannot be done on a profitable basis. The processing of material from the tailing dumps is not profitable and results in trading losses.

31.12. Ekapa Minerals experienced financial strain for the last few years and elected to implement a turnaround strategy to address its financial woes. Under the turnaround strategy, mining operations concentrated and changed to mining and processing high-quality material from level 890.

31.13. The turnaround strategy began to bear fruit in early 2026, but the mud rush undermined the viability of the business. Thus, the only viable basis for the financial turnaround of the operations has been destroyed.

31.14. Recoveries from the related parties are unrealistic and largely irrecoverable given that Ekapa Resources and Superstone Mining are both in liquidation.

31.15. The applicant relies on the financial statements of year ending June 2024, which are of limited assistance.

31.16. The proposed plan does not take into consideration that the intercompany loans are subject to certain terms and conditions insofar as it relates to their subordination.

31.17. The proposed plan does not reflect realistic and market prices for the low quality of diamonds that will be retrieved from the tailings.

31.18. The period of 36 months suggested for independent creditors to receive their dividends mitigates the very spirit and purpose of the business rescue regime as envisaged in the Companies Act.

[32] The intervening respondents *inter alia* contend that:

32.1. Ekapa Resources is a creditor of Ekapa Minerals. Ekapa Minerals is indebted to Ekapa Resources for monies lent and advanced to it prior to and after the commencement of the winding up.

32.2. The mud rush was a decisive event that fundamentally undermined the viability of the business, and left Ekapa Resources unable to meet its ongoing obligations as and when they fall due.

32.3. The proposed rescue plan is neither realistic nor financially viable. It will have a direct and adverse impact on the administration of Ekapa Resources and the return to its creditors.

32.4. Ekapa Resources is the largest creditor of Ekapa Minerals, and the plan makes no meaningful provision for the protection of its interests or its creditors' interests. In the circumstances, its liquidators would not support the rescue proposal.

32.5. The proposed funding in the amount of R25 million would be insufficient to sustain the proposed operations, including the Eskom charges.

[33] The respondents essentially contend that the application and the proposed business rescue plan constitute nothing more than a mere speculative suggestion which does not bear judicial muster or scrutiny. They thus seek the dismissal of the application with costs.

[34] In reply, the applicant submits the following *inter alia:*

34.1. The respondents' opposition is premised on the opinion of Mr Mardsen, who is not suitably qualified to gainsay the opinion evidence of Mr Van Tonder. Mr Mardsen is an employee of the first respondent, he is not a business rescue practitioner, thus cannot be regarded as an expert in business rescue proceedings. He is not impartial, independent or of assistance to the Court.

34.2. The proposed plan relies on financial statements of the financial year ending January 2026, which is the same statement relied on by the first respondent in its liquidation application.

34.3. The proposed plan considers a rescue of the business without underground mining; the first respondent will not need to use the mining rights of Ekapa Resources and any of its equipment.

34.4. There is no evidence that there are loans or that the first respondent paid its intercompany loans. The lending of R110 million to interrelated companies that are liquidated within 7 months at the expense of other creditors and employees appears negligent and reckless on the fact of it. There is no evidence provided to demonstrate the conditions of the loans and why these amounts cannot be received through business rescue.

34.5. The R25 million will be used to pay expenses for the first month of operations. The plan contemplates selling assets that are valued at R141 million, at a force sale value of R62 million.

34.6. The joint liquidators attempt to vitiate the business rescue plan by exaggerating the expenses of the company. The reference to R800 million is unsupported by evidence.

34.7. A complete rescue of a mining operation as big as the first respondent takes at least 24 months, the benefits of the business rescue will not only start in 36 months. Creditors and employees will benefit as soon as the company starts operating and non-core assets are sold to raise capital.

34.8. There is no evidence that business rescue proceedings were previously considered during 2025.

Analysis

[35] The parties are *ad idem* that Ekapa Minerals is financially distressed as defined in section 128(1)(*f*)(i) of the Companies Act. Thus, the only question for consideration is whether there is a reasonable prospect for rescuing Ekapa Minerals.

[36] The cases cited above demonstrate that a reasonable prospect as envisaged in section 131(4)(*a*) of the Companies Act require more than a *prima facie* case or an arguable possibility. The applicant must place a cogent evidential foundation that supports the existence of a reasonable prospect of rescuing Ekapa Minerals.

[37] In *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd and Another*[13], as to what is meant by "*reasonable prospect*" in section 131, the Court stated as follows:

[13] 2013 (1) SA 542 (FB) para 12.

'. . . a prospect in this context means an expectation. An expectation may come true or it may not. It therefore signifies a possibility. A possibility is reasonable if it rests on a ground that is objectively reasonable. In my judgment, a reasonable prospect means no more than a possibility that rests on an objectively reasonable ground or grounds.'

[38] In *Van Staden NO and Others v Pro-Wiz Group (Pty) Ltd*[14], the SCA stated as follows:

'. . . It has repeatedly been stressed that business rescue exists for the sake of rehabilitating companies that have fallen on hard times but are capable of being restored to profitability or, if that is impossible, to be employed where it will lead to creditors receiving an enhanced dividend.'

[39] The applicant submits that the principal purpose of this application is to avoid liquidation and the adverse consequences that would follow for creditors, stakeholders, employees, and the Kimberley community and its surrounding areas. It contends that, in the circumstances, business rescue is preferable to liquidation.

[40] The respondents, on the other hand, contend that there is no reasonable prospect that Ekapa Minerals can recover from the consequences of the mud rush. They further submit that business rescue would seriously prejudice creditors and other interested parties.

[41] It is trite that upon institution of an application in terms of section 131, the applicant is not required to set out a detailed plan, that can be left to the business rescue practitioner after proper investigation in terms of section 141.[15] However, the applicant must establish grounds for the reasonable prospect of achieving one of the two goals in section 128(1)(*b*).[16]

[42] In its notice of motion, the applicant nominated Marius Van Tonder (Mr Van Tonder) as the interim business rescue practitioner to oversee the rescue

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[14] 2019 (4) SA 532 (SCA) para 22.
[15] *Oakdene* (*Supra* fn 5) para 31.
[16] *Ibid*.

process in terms of section 131(5) of the Companies Act. According to his curriculum vitae, Mr Van Tonder is a senior business rescue practitioner who has practised in the field since 1990. Since 2012, he has accepted 117 business rescue appointments and has consulted on numerous business rescue matters across various industries, including mining, engineering and construction.

[43] Having considered the proposed business rescue plan prepared by Mr Van Tonder, the following features emerge: Certain areas that were fully operational before the mud rush remain unaffected and are capable of sustaining production. The mine's operational infrastructure is said to be intact and unaffected, and mining remains possible in the affected Joint Shaft albeit to a limited extent. Ekapa Minerals has movable assets valued at approximately R141 million and owns immovable property, including a game farm, which may be disposed of to provide funding. The sale of movable and immovable assets is expected to generate a cash surplus. Ekapa Minerals also has a substantial receivables base of approximately R400 million due from related group entities, together with trade receivables from related parties, which indicates the existence of potentially recoverable claims. Those claims may be pursued and applied towards operational funding and the settlement of creditor claims. The indebtedness of Ekapa Minerals to related entities consists of unsecured intercompany loans, with no fixed payment terms and no interest payable. On the applicant's case, creditors are likely to receive a materially better return under business rescue than in liquidation. The first respondent's mining right, which is a valuable asset, would be preserved if the company continues as a going concern, thereby enabling it to generate revenue, realise receivables and recover outstanding claims. Approximately 500 employees would remain employed rather than face retrenchment, with the result that their households would continue to benefit from the continued operation of Ekapa Minerals. The proposed post-commencement business rescue finance would be available immediately to assist with day-to-day costs. In addition, the offer to purchase all diamonds produced during the business rescue process would support continued operations and generate revenue from diamonds extracted during

that period. On this basis, the applicant contends that business rescue is preferable to liquidation and would produce greater benefits for stakeholders.

[44] The proposed business rescue plan further records that, as of February 2026, Ekapa Minerals' exposure to trade creditors was approximately R110 million, of which R55 million had been outstanding for more than 120 days. Employee-related claims had increased to approximately R57.7 million. The plan also records that the company's assets exceed its liabilities by a substantial margin of approximately R286 million. Those assets include the mining right, plant, equipment, immovable property and recoverable receivables, all of which may support continued operations. Through continued operations, post-commencement finance may be raised and returns to creditors generated. In my view, the business rescue plan, having regard to the prevailing financial constraints and the decline in the diamond industry, provides a sufficient basis for the conclusion that there is a reasonable prospect of rescuing the company, or at least of achieving a better outcome for creditors, employees and other stakeholders than would result from liquidation.

[45] The business rescue process will also afford all affected stakeholders an opportunity to participate in the reorganisation of the business. They will be able to consider the proposed plan, assess its benefits and risks, and make an informed decision whether to adopt or reject it.

[46] In terms of section 56(*d*) of the Mineral and Petroleum Resources Development Act[17], a mining right lapses upon the holder's liquidation. Upon the liquidation of Ekapa Minerals, its very valuable mining right, which it needs to operate and generate an income will be extinguished.

[47] Generally, it is clear that business rescue is preferred to liquidation. In *Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd and Others*[18], it was stated that:

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[17] 28 of 2002.
[18] *Supra* fn 9 para 14.

'. . . It is clear that the legislature has recognised that the liquidation of companies more frequently than not occasions significant collateral damage, both economically and socially, with attendant destruction of wealth and livelihoods. It is obvious that it is in the public interest that the incidence of such adverse socioeconomic consequences should be avoided where reasonably possible. Business rescue is intended to serve that public interest by providing a remedy directed at avoiding the deleterious consequences of liquidation in cases in which there is a reasonable prospect of salvaging the business of a company in financial distress, or securing a better return to creditors than would probably be achieved in an immediate liquidation.'

[48] The proposed plan has been criticised by the respondents on the basis that it is vague, speculative, materially flawed and insufficiently informed. I am not persuaded by that criticism. The plan was prepared with reference to information obtained from the respondents, including reports relating to the affairs of the first respondent; information contained in the liquidation proceedings before this Court; existing payment schedules; and the first respondent's management accounts, audited financial statements and cashbooks, among other documents. Mr Van Tonder's proposed plan appears to constitute a genuine attempt to achieve the purposes of business rescue as contemplated in the Companies Act. It seeks to protect the interests of a wider group of affected persons and to restore Ekapa Minerals to solvency, or at least to produce a better outcome than liquidation.

[49] Upon his appointment, Mr Van Tonder will be entitled to obtain access to the relevant information, investigate fully the affairs of Ekapa Minerals, and thereafter determine whether there remains a reasonable prospect of rescuing the company.[19] If, after conducting that investigation, he forms the view that there is no reasonable prospect of rescue, he may take the steps provided for in the Companies Act to terminate the business rescue proceedings, whereafter liquidation may follow. By contrast, if Ekapa Minerals is placed in final liquidation, the opportunity to pursue business rescue will effectively be lost.

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[19] *Van Staden v Angel Ozone Products CC (In Liquidation) and Others* 2013 (4) SA 630 (GNP) para 33.4.

[50] The respondents rely substantially on the views of Mr Mardsen in disputing the viability of the proposed business rescue plan and in contending that no reasonable prospect exists for the rescue of Ekapa Minerals. Mr Mardsen is a mining engineer with 13 years' experience in diamond mining operations. According to the respondents, he has been employed within the Ekapa group since 2018 and has intimate knowledge of the group's operations and the historical attempts to render them financially viable. His qualifications and experience no doubt place him in a position to provide useful insight into the operational affairs of Ekapa Minerals and to assist the liquidators with information concerning its mining operations. However, he is not a business rescue practitioner and does not profess to possess expertise in business rescue. His views must therefore be considered in that context.

[51] Although the respondents strongly oppose the business rescue application and submit that business rescue had previously been considered before the mud rush, they do not develop that allegation. They provide no detail as to when this occurred, whether a business rescue practitioner was approached, what information was placed before such practitioner, or what conclusion was reached. In this respect, the respondents have not placed sufficient information before the Court to enable that contention to carry decisive weight.

[52] Finally, the respondents aver that the management, including the shareholders of Ekapa Mining and the provisional liquidators of Ekapa Resources, would not support a business rescue plan in due course, because it would seriously prejudice creditors and all other interested parties. On the papers, it is likely that there will be challenges in the adoption of the business rescue plan. Be that as it may, in the event the situation arises where the plan is not supported, the business rescue practitioner has remedies in terms of section 153 and is empowered in terms of section 153(1)(*a*)[20] to approach the Court for relief to have the business plan adopted by Ekapa Minerals.

[20] Section 153(1) of the Companies Act provides as follows:
'(a) If a business rescue plan has been rejected as contemplated in section 152(3)(*a*) or (*c*)(ii)(bb) the practitioner may–

[53] In *Oakdene* the SCA clarified that business rescue is not intended to delay inevitable liquidation, but rather to provide an opportunity for viable restructuring or, at the very least, to secure a more advantageous outcome for stakeholders.[21] 'This reflects a policy preference for rescue and rehabilitation over liquidation, aligning with broader constitutional values of fairness and the protection of economic activity. The overall aim of business rescue is to facilitate the rehabilitation of financially distressed companies, protect the interests of stakeholders, and ensure that decisions made during business rescue proceedings are just, reasonable, and aligned with legislative intent.'[22]

[54] In *Richter v Absa Bank Ltd*[23], Dambuza AJA observed the following in respect of the purpose of business rescue:

'Of significance is the fact that in respect of business rescue the Act refers to the interests of "stakeholders" in contrast to the interests of creditors and shareholders which take centre stage in liquidation proceedings. The rights of employees through trade unions, as stakeholders, are expressly recognized in the Act. Section 128(1)(*a*) defines the following as principal stakeholders and affected persons who may apply for business rescue in respect of the company: shareholders, creditors, registered trade unions representing employees, and employees not represented by a registered trade union. Business rescue therefore seeks to protect interests of a wider group of persons than liquidation. The role of companies as a means of achieving economic and social benefits is given prominence.'

[55] It cannot be gainsaid that the continuation of mining operations, *albeit* on a reduced scale, is likely to yield a better outcome for economic activity in Kimberley and the surrounding areas than immediate liquidation, particularly where there exists a reasonable prospect of salvaging the business of Ekapa Minerals.

(ii) advise the meeting that the company will apply to a court to set aside the result of the vote by the holders of voting interests or shareholders, as the case may be, on the grounds that it was inappropriate.'

[21] *Supra* fn 5.

[22] *Tongaat Hulett Ltd and Others v South African Sugar Association and Others* 2026 (3) SA 108 (SCA) para 42.

[23] 2015 (5) SA 57 (SCA) para 14.

[56] Therefore, it follows that the application must succeed.

Costs

[57] The ordinary principle is that costs should follow the result. In its notice of motion, the applicant sought an order that the costs of the application be payable as an expense in the business rescue process, unless the application was opposed, in which event any party opposing the application should be ordered to pay the costs thereof, including the costs of two counsel.

[58] Having regard to the circumstances of this matter, I see no reason to depart from the ordinary rule. The respondents must therefore pay the costs of the application, including the costs of two counsel where so employed.

[59] Consequently, I make the following order:

1. The Rules relating to forms service, notice and time periods are dispensed with and this application is heard as an urgent application as provided for in Rule 6(12) of the Uniform Rules of Court.

2. The first respondent is placed under supervision and business rescue in terms of section 131(1) of the Companies Act, 71 of 2008.

3. Marius Van Tonder is appointed as the interim business rescue practitioner of the first respondent in terms of section 131(5) of the Companies Act, subject to ratification by the holders of a majority of the first respondent's independent creditors' voting interests at the first meeting of the creditors, as contemplated in section 147 of the Companies Act.

4. The liquidation proceedings under case number 2026-044107 are suspended until the business rescue proceedings end, as contemplated in section 131(6) of the Companies Act.

5. The applicant is to give notice of this order to all known affected persons of the first respondent within five days of the order having been granted.

6. The respondents are ordered to pay the costs of the application on a party and party scale, including the costs of two counsel where so employed on scale C.

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ACTING JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

Appearances

For the Applicant:	Adv L Siyo Adv with P Vabaza
Instructed by:	Lenyehelo L Attorneys Inc.
	c/o Thiso & Partners Inc.
For the Respondents:	Adv JG Cilliers SC with Adv S Tsangarakis
Instructed by:	Bowman Gilfillan Inc.
	c/o Duncan & Rothman Attorneys.