

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

- (1) Reportable Yes  
(2) Of interest to other Judges Yes  
(3) Revised: Yes

Date:-10/12/2021

  
Signature.....



**CASE NO: 2021/39004**

In the matter between:

**MINTAILS SOUTH AFRICA (PTY) LTD**

Applicant

and

**MINTAILS MINING SA (PTY) LTD**

First Respondent

Selwyn Trackman N. O.

Nomsa Sefanyetso N.O.

Edward Sebastian N.O.

**THE COMMISSION FOR COMPANIES AND  
INTELLECTUAL PROERTIES**

Second respondent

**THE MASTER OF THE HIGH COURT, JOHANNESBURG**

Third Respondent

**JOHANNES CHRISTOFFEL BEKKER**

First Intervening Party

**HENNING JOHANNES VILJOEN DU PLESSIS**

Second Intervening Party

**JACO JOHAN ROESTOF**

Third Intervening Party

**BLACK HAWK BUSINESS SOLUTIONS (PTY) LTD**

Affected Party

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**J U D G M E N T**

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**MAIER-FRAWLEY J:***Introduction*

1. This application is brought in terms of section 131 of the Companies Act 71 of 2008 ("the Act") for an order placing the first respondent (Mintails Mining SA (Pty) Ltd) (in liquidation)) under supervision and business rescue, together with ancillary relief.
2. The applicant is an affected party as envisaged in section 128(1)(a) of the Act, being both a shareholder and creditor of the first respondent. The first respondent, represented by its three duly appointed joint provisional liquidators, has opposed the application and has simultaneously filed a counter-application for an extension of the powers of the provisional liquidators, as envisaged in section 386(5) of the Companies Act 61 of 1973 (the 1973 Act), to obtain the court's permission to: (i) sell certain remaining assets of the first respondent, in particular, the movable assets owned by the first respondent in one of its subsidiaries, and (ii). defend the present proceedings and to institute further legal proceedings as may be required.
3. The second and third respondents were cited on account of their interest in the matter. Neither of them have participated in these proceedings.
4. The application was initially launched on an urgent basis and enrolled for hearing in the urgent court. At the hearing of the matter in the urgent court, application for leave to intervene in the main application was made by members of a consortium of investors or financiers consisting of the persons presently cited in the application as the first to third intervening parties (hereinafter jointly referred to as 'the intervening party'), which application was granted by order of that court. The matter was ultimately struck from the urgent court roll for lack of urgency. Thereafter, the applicant successfully applied to the DJP of this division for a special allocation of the

hearing of the matter on an expedited basis, with the concurrence of the first respondent (as represented by its joint provisional liquidators, who will hereinafter be referred to as 'the liquidators').

5. The intervening party relies on a cession of the entire unpaid creditor's claim of Black Hawk Business Solutions (Pty) Ltd (Black Hawk), a security company that rendered security services to the first respondent post-liquidation, entitling it to step into the shoes of such creditor. It opposes the relief sought in the application in its alleged capacity as cessionary of Black Hawk's claim against the first respondent.
6. The notice of motion and founding papers were served on 'all known affected and interested parties' as listed in annexure 'NOM1' to the notice of motion, which list included Black Hawk as one of the affected parties. Black Hawk opposes the relief sought in this application in such capacity, alleging that the cession relied on by the intervening party is invalid and that it remains an administration creditor in the estate of the first respondent.
7. All parties before court accept that the dispute between the intervening party and Black Hawk does not arise for determination in these proceedings. Although the applicant persists with its contention that Black Hawk lacks legal standing to participate in these proceedings, a point to which I return later in the judgment, at the outset of the hearing the applicant's counsel submitted that it is in the interests of justice that both the intervening party and Black Hawk be heard on the merits of their opposition to the relief sought in the application.

#### *Background Facts*

8. The relevant background factual matrix is not contentious.

9. Prior to its liquidation, Mintails Mining SA (Pty) Ltd (hereinafter intermittently referred to as 'Mintails Mining' or 'the company in liquidation') together with other entities within the Mintails Group, conducted business in the mining of gold bearing ores and gold bearing tailings.
10. Mintails Mining was previously placed in business rescue for a period of three years between 2015 and 2018. On 12 October 2015, its board of directors passed a resolution to commence business rescue proceedings in terms of s129 of the Act on account of the company being in financial distress. A year later, on 16 October 2016, a business rescue plan was published, which plan was adopted on 4 November 2016. In 2018, consequent upon the business rescue practitioner being unable to resolve various issues, including disputes between Mintails Mining and the Department of Mineral Resources (DMR) concerning, amongst others, a large unpaid environmental rehabilitation liability owed by the former to DMR and issues surrounding the renewal of permits, which ultimately impelled a cessation of mining activities conducted by Mintails Mining, the business rescue practitioner determined that there was no reasonable prospect of rescuing the company by restoring it to a solvent going concern. Accordingly, on 3 August 2018, the business rescue practitioner applied to court for the liquidation of Mintails Mining. A further cause for the failed business rescue was said to be that Mintails Mining became obliged to raise an unforeseen VAT liability in its books due to the incorrect historical accounting treatment by its chief financial officer of certain revenue streams which affected its immediate cash flow position.<sup>1</sup>
11. On 10 August 2018 a provisional winding-up order was granted and on 18 September 2018 a final liquidation order was granted. Three joint provisional

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<sup>1</sup> This appears from para 30 of Black Hawk's answering affidavit.

liquidators were appointed by the Master on 22 August 2018. The liquidators satisfied themselves that the company in liquidation was factually insolvent in that its liabilities substantially exceeded its assets. The deponent to the first respondent's answering affidavit, Mr Selwyn Trackman (Trackman) has been the lead liquidator in the administration of the estate of the company in liquidation thus far. The company in liquidation has thus been under administration for a period of six years preceding the present application (three years in business rescue under the provisions of the Act and three years in final liquidation under the provisions of the 1973 Act). On 29 June 2021, the applicant launched the present application to once again commence business rescue proceedings in respect of the company in liquidation.

12. The company in liquidation is a subsidiary of the applicant. The Mintails group of companies is made up of the applicant<sup>2</sup> (the local holding company), which holds a 96% shareholding in Mintails Mining and is thus the majority and controlling shareholder of the company in liquidation. The company in liquidation in turn holds a 100% shareholding in, *inter alia*, 7 subsidiary companies, including: (i) Mogale Gold (Pty) Ltd ('Mogale Gold') (ii) Mintails SA Soweto Cluster (Pty) Ltd ('Mintails Soweto') (iii) Mintails Gold SA (Pty) Ltd ('Mintails Gold') (iv) Mintails Randfontein Cluster SA (Pty) Ltd ('Mintails Randfontein') (v) Witfontein Mining (Pty) Ltd ('Witfontein') (vi) Luipardsvlei Estates (Pty) Ltd ('Luipardsvlei') and (vii) Mintails Fleet (Pty) Ltd ('Mintails Fleet')..
13. Mogale Gold owns the mine dumps known as Randfontein cluster and is the holder of mining right 206, entitling it to re-mine tailings on specific mine dumps. Mintails Soweto owns the Soweto mine dumps and the gold located in the dumps which it is entitled to re-mine. Witfontein and Luipaardsvlei

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<sup>2</sup> The holding company of the applicant is an external or foreign company, based overseas.

both own immovable properties. The shares held by the company in liquidation in Luipardsvlei and Witfontein have been allegedly been ceded to the applicant. In addition, the applicant is a bondholder over the respective immovable properties owned by the two property owning companies. The bond and cession serve as security for the company in liquidation's indebtedness to the applicant. Mintails Fleet previously owned the vehicles utilised in the Mintails group of companies although such assets have since been sold. Mintails Gold owned the gold processing plant and certain mining equipment that was used by the Mintails Group to process the gold holding material mined by it. It remains unclear from the papers what assets Mintails Rietfontein owns or owned, but these may include certain other mining rights.

14. The moveable assets of the company in liquidation comprise in general of its shares and in some instances, claims on loan account in its various subsidiaries.<sup>3</sup> No mention is made in the papers of any immovable assets owned by the company in liquidation.
15. Mintails Gold and Mintails Rietfontein are currently in liquidation, whilst Mintails Witfontein and Mintails Luipardsvlei (the property owning companies) are currently under business rescue, allegedly to enable the immovable properties to be sold and converted into cash. Trackman is also one of the duly appointed joint liquidators in both Mintails Gold and Mintails Rietfontein. The lead liquidator of Mintails Gold is Mr Werner Van Rooyen (Van Rooyen).

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<sup>3</sup> The realizable assets of the company in liquidation comprise of:

- (i) 100% of the issued shares in Mogale Gold, Mintails Soweto, Mintails Gold, and Mintails Randfontein;
- (ii) 100% of the issued shares and claims in Luipardsvlei and Witfontein Mining; and
- (iii) Claims on loan accounts held against Mogale Gold and Mintails Soweto.

16. The applicant is by far the largest creditor in the estate of the company in liquidation, having a potential (albeit yet unproven) claim of approximately R1.3 billion arising from inter-company loans made by the applicant to the company in liquidation, which latter entity in turn loaned monies to one or more of its subsidiaries. The applicant's claim comprises approximately 99% of the total liabilities of the company in liquidation.<sup>4</sup> Other discernible creditors comprise, amongst others, Black Hawk (albeit that its claim is subject to a dispute concerning the validity of a cession of its claim to the intervening party), and WH Auctioneers, both being administration creditors who *prima facie* hold preferent claims (aside from the liquidators claim for fees) in terms of s 97 of the Insolvency Act, No. 24 of 1936 (the Insolvency Act).<sup>5</sup> Further potential concurrent creditors possibly hold yet unproven claims to the tune of R9 991 830.47<sup>6</sup> (being the aggregate total of possible claims ostensibly held by those other entities listed in annexure 'NOM1' to the notice of motion – referred to the 'independent creditors' in the papers). According to Trackman, the claims of the liquidators and administration creditors amount to R44,919.940.00.<sup>7</sup>
17. On 23 August 2019, the Master convened a first meeting of creditors. The meeting was adjourned because of an administrative error whereby the incorrect company was advertised as being the relevant company in liquidation. Since that date, no first meeting of creditors has been reconvened by the Master, despite written requests by Trackman for him to

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<sup>4</sup> See annexure AA7 to the liquidators' answering affidavit, being the letter addressed by the applicant's attorneys to the Master, dated 19 February 2020.

<sup>5</sup> Black Hawk's claim for unpaid security services rendered during the liquidation process is said to amount to R31 837 827.79 whilst WH Auctioneer's claim is for approximately R5000.00, excluding any commission as may be payable to it in facilitating securing the Pan-African Transaction (referred to in para 23 of the judgment below), in which regard, see para 44.1 of annexure 'AA18' to the liquidators' answering affidavit.

<sup>6</sup> Regard being had to the contents of annexure 'FA6' to the first respondent's answering affidavit.

<sup>7</sup> See annexure 'AA19' to the liquidators' answering affidavit.

do so.<sup>8</sup> Consequently, no final liquidators have to date been appointed by the Master. Accordingly, as matters presently stand, save for the specific authorisation obtained from the Master for the liquidators to sell certain movable assets of the company in liquidation (comprising of its shares in and loan accounts against Mogale Gold and Mintails Soweto) the powers of the liquidators of the company in liquidation have been severely curtailed by statutory constraints imposed upon their ability to realise the remaining assets of the company in liquidation in their capacity as provisional liquidators.<sup>9</sup>

18. On the applicant's version, it provided at least R2.5 million to the liquidators of Mintails Mining with which to fund the provision of security services rendered by Black Hawk for purposes of protecting and preserving the assets of the three companies in liquidation (being Mintails Mining, Mintails Gold and Mintails Rietfontein) (hereinafter, 'the Mintail companies in liquidation').<sup>10</sup> Suffice it to say that a volatile security risk had developed at

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<sup>8</sup> In the interim, the vicious Covid 19 pandemic (that has raged worldwide and in South Africa without respite) intervened and interfered with what was previously regarded as the normal functioning of business, exacerbated by various restrictions imposed upon the operations of businesses, including that conducted by the Master's offices during various of the levels of ongoing lockdowns that have been implemented in South Africa since 26 March 2020 to date. During this period, the functioning of the Master's office has all but ground to a halt, as has been widely reported in the public domain.

<sup>9</sup> The liquidators (being the joint provisional liquidators of Mintails Mining) were granted the powers set out in sections 386(1)(a), (b), (c), (e) and 4(f) of the old Companies Act, as appears from the certificate of their appointment. This did not include the power to realize the assets of the company in liquidation, that is, unless specifically authorized by the Master or the Court (as the case may be) upon application.

<sup>10</sup> It is perhaps expedient at this juncture to mention that the applicant unequivocally admitted, in para 87 and 89 of its replying affidavit to the answering affidavit filed by Black Hawk in these proceedings, that Black Hawk had rendered security services to all three of the Mintail companies in liquidation (i.e., including the company in liquidation). The applicant however asserts that Black Hawk's claim (for unpaid services rendered) cannot be accounted for *only* by Mintails Mining, as is contended for by Black Hawk in these proceedings. The applicant holds the view that there is a legitimate dispute raised in the papers around which of the three Mintail companies in liquidation are responsible for Black Hawk's claim, including the quantum of the claim and the appropriate apportionment of the claim as between all three of the Mintail companies in liquidation.



or around the site/s at which, *inter alia*, the mine equipment and plant were located (although the name of the Mintails mine or its physical location is not specified in the papers) due to the fact that criminal elements (referred to as the 'Zama Zamas' in the papers) were invading the site/s and unlawfully engaging in looting and destruction of, *inter alia*, property owned by the company in liquidation and Mintails Gold, and threatening the lives of surrounding community members. The amount provided by the applicant proved insufficient to retain the services of Black Hawk, which entity had ultimately also agreed to provide extended security services on credit for a period of six months until 30 April 2019. Although a further financial contribution was requested from the applicant in order to safeguard the assets of the Mintail companies in liquidation, same was not forthcoming. As a result of non-payment, Black Hawk eventually withdrew its services. This resulted in any remaining movable property located on-site being stripped and plundered within a matter of days.

19. The deponent to the applicant's papers, Mr Johan Moolman (Moolman), is a director of the applicant. He was also a director of Mintails Mining at the time of its liquidation, albeit that he became *functus officio* upon the grant of a provisional winding-up order on 10 August 2018. It is common cause that Moolman possesses intricate technical and institutional knowledge of the workings of the company in liquidation and its affairs, including the relevant statutory prescripts and regulatory aspects pertaining to, *inter alia*, mining rights, servitudinal rights and water licences. He also has extensive knowledge of the history of the yet unresolved dispute between the company in liquidation and the DMR, including the quantum of such liability.

20. During the three years that Mintails Mining has been in liquidation, Moolman<sup>11</sup> has worked closely with the liquidators (mainly Trackman) in providing hands on assistance to the liquidators to enable them to gain insight into the affairs of the company in liquidation, including an understanding of the technicalities surrounding certain regulatory requisites and the facts underpinning the DMR liability dispute.
21. The applicant financially assisted the liquidators in obtaining legal advice from the applicant's attorneys of record, namely, Falcon & Hume Inc (Falcon & Hume) who indeed provided the liquidators with legal advice from time to time during the course of the liquidation process, which included the drafting of an application to the Master for an extension of powers to enable the liquidators to conclude a sale transaction with a prospective purchaser, as well as facilitating various meetings and interactions between the liquidators, representatives of the applicant and representatives of the prospective purchaser. Prior to Falcon & Hume's involvement, the applicant's erstwhile attorney (Stan Rothbart) worked together with the liquidators and participated in negotiations and consultations with the DMR in attempts to resolve the dispute surrounding the DMR liability.
22. During November 2020, the liquidators applied to the Master for authority to sell certain movable property owned by the company in liquidation (hereinafter referred to as 'the authorisation application'), being its 100% shareholding and claims on loan account in Mogale Gold and Mintails Soweto ('the sale property'). The need for the liquidators to obtain an extension of their statutory powers in order to sell these specific assets arose pursuant to their receipt of a credible offer from Pan African Resources PLC

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<sup>11</sup> During this period, other representatives of the applicant, namely, Gideon Harbour and Mark Brune were also involved on behalf of the Applicant and were apprised of various aspects relating to the progress of the liquidation process, including emerging security risks, offers pertaining to the sale of assets, and the like.

(Pan African) for the purchase of the sale property at a purchase consideration of R50 million.<sup>12</sup> Pan African is said to be a BEE compliant South-African based mid-tier gold producer that is listed on both the London and Johannesburg stock exchanges. The liquidators were satisfied that the offer reflected a fair and reasonable purchase price for the sale property, taking into account, amongst others, the large rehabilitation liability of approximately R400 million alleged to be owing by the company in liquidation to the DMR, which liability Pan African was willing to assume in terms of its offer. The liquidators were also satisfied that a sale by private treaty of the sale property was most likely to result in the highest proceeds realizable from the sale of such assets for the benefit of the general body of creditors and for purposes of effecting payment of all administration costs and fees incurred in the liquidation process. Suffice it to say that Moolman, acting on behalf of the applicant, agreed that the sale price was commensurate with the fair and reasonable market value of the sale property. Moreover, Moolman supported the authorisation application and agreed with all the facts elucidated therein.<sup>13</sup> Pan African also supported the authorisation application and the liquidators' continued involvement in the deal.<sup>14</sup>

23. The Master's failure to revert on the outcome of the application with any degree of promptitude eventually impelled Trackman, on 12 April 2021, to seek further legal guidance from Falcom & Hume on how to expedite the matter or whether a more effective process could be utilised.<sup>15</sup> According to Trackman, the said attorneys advised the liquidators to wait for the Master

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<sup>12</sup> The offer included R37.5 million for the shares and claims in Mogale Gold and R12.5 million for the shares and claims in Mintails Soweto.

<sup>13</sup> See Annexure 'AA18' to the liquidators' answering affidavit, read with annexures 'C' and 'D' thereto.

<sup>14</sup> Per Annexure 'O' to the application.

<sup>15</sup> Trackman indicates in the liquidators' answering affidavit that Falcon & Hume declined to bring an application to court in terms of s 386(5) of the 1973 Act or to advise the liquidators that they could do so.

to respond to correspondence that they had addressed to the Master on 19 February 2021, wherein concerns were voiced on behalf of the applicant apropos the Master's conduct in delaying its consideration of the grant of powers to the liquidators to conclude the Pan-African transaction. The Master eventually granted authorisation to the liquidators to proceed with the Pan African transaction some four months after the application was filed.

24. By the time this matter was heard, it was not in dispute that the ultimate destruction and looting of whatever tangible movable property<sup>16</sup> had remained at the site/s invaded by the Zama Zamas,<sup>17</sup> likely significantly diminished or eroded the value of the shares [and claims on loan account] held by the company in liquidation in Mintails Gold and Mintails Randfontein. Mention is made in the papers that the fleet of vehicles owned by Mintails Fleet had at some stage been sold at the instance of one or another of the liquidators of the respective Mintail companies in liquidation in order to procure funds with which to finance the provision of security services (rendered by Black Hawk) for purposes of safeguarding the assets housed at the site/s and which were under attack by the Zama Zama's. Although the authority of the liquidators of the respective companies in liquidation to sell the vehicles has been questioned by the applicant, given that such assets were not in fact owned by any one of the Mintail companies in liquidation, this is not an issue that I am called upon to determine in the present proceedings. But, given that the assets owned by three subsidiaries of the company in liquidation (being Mintails Fleet, Mintails Gold and Mintails Rietfontein) have either been sold, removed or destroyed pursuant

<sup>16</sup> The papers make mention of assets such as the mining plant and equipment, office equipment, furniture and paperwork comprising of hard copies of the financial documents of the company in liquidation, and the like.

<sup>17</sup> Mention is made in the papers of some items having been removed from site by Black Hawk (para 98 of the founding affidavit) but as the applicant concedes in its heads of argument, dated September 2021, nothing much turns on this, as it appears to be common cause that the assets of Mintails Gold have been lost and can no longer be applied for the benefit of creditors.

to the Zama Zama unrest, the only remaining subsidiary companies of the company in liquidation which own assets of value are in fact Mogale Gold and Mintails Soweto, that is, barring the property owning subsidiaries of the company in liquidation. Effectively therefore, and barring the property owning subsidiaries of the company in liquidation which are presently in business rescue, being Witfontein and Luipardsvlei, the main value to be derived from a realisation of assets of the company in liquidation, as far as the present application is concerned, pertains to the sale of shares and claims on loan account held by the company in liquidation in the subsidiaries forming the subject matter of the Pan African transaction.

25. The Pan African offer has in the interim been accepted by the liquidators. Such offer is subject to certain conditions precedent, including the outcome of a due diligence investigation currently being performed by Pan African in terms of the relevant sale agreements. Moolman has stated unequivocally that he will not be willing to assist the liquidators with further financial assistance, technical expertise or advice or the impartation of institutional knowledge as may be required to procure the successful fruition of the Pan African deal, however, he has stated that he will be willing to render whatever assistance may be required, but only to the proposed business rescue practitioners, if appointed, to enable them to bring the due diligence process to completion and the Pan African sale transaction to a successful completion.

*Relevant Legal and Statutory framework*

26. In terms of section 131 (4) of the Act, a court may make an order placing the company under supervision and commencing business rescue proceedings on application by an affected person if it is satisfied, *inter alia*, that the company is financially distressed or it is just and equitable to do so for

financial reasons, *and* there is a reasonable prospect of rescuing the company.

27. In terms of section 128(h) of the Act, 'rescuing' the company entails achieving either of the goals set out in the definition of business rescue in s 128(b) of the Act.<sup>18</sup> Two objects or goals are envisaged in that section: The first or primary goal is aimed at facilitating the continued existence of the company and its recovery to a state of solvency. If the ultimate rescue of the company is not possible in the sense that achievement of the primary goal is not viable or is infeasible, then the second or secondary goal, which is aimed at achieving an outcome that ensures a higher return for creditors or shareholders than they would otherwise receive under liquidation, may be relied on.
28. The purposes or objectives of the Act are set out in section 7. As regards business rescue proceedings, the stated objective expressed in section 7(k) 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.'
29. In the seminal case of *Oakdene*<sup>19</sup> (per Brand JA), the Supreme Court of Appeal stated that the court's discretion to grant an order commencing business rescue is bound-up with the question of whether there is a

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<sup>18</sup> Section 128(b) reads:

"**business rescue**" means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for-

- (i) The temporary supervision of the company, and of the management of its affairs, business and property;
- (ii) A temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and
- (iii) The development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximizes 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. (emphasis added)

<sup>19</sup> *Oakdene Square properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2013 (4) SA 539 (SCA).

reasonable prospect for rescuing the company, which involves a range of choices that the court can legitimately make, of which none can be described as wrong. Ultimately, it involves making a value judgment.<sup>20</sup>

30. Brand JA went on to say that an applicant who seeks an order for business rescue is required to establish a reasonable prospect of achieving any one of the two goals contemplated in s 128(1)(b) of the Act.<sup>21</sup> It must be a reasonable prospect, that is, a prospect based on reasonable grounds. Something more than a prima facie case or an arguable possibility is required. Mere speculative suggestion is not enough. Moreover, because it is the applicant who seeks to satisfy the court of the prospect, it must establish those reasonable grounds in accordance with the rules applicable to motion proceedings, which generally speaking require that it must do so in its founding papers.<sup>22</sup> In par 30 of the judgment, Brand AJ approved of what was stated in *Prospec*,<sup>23</sup> namely, that ‘in order to succeed in an application for business rescue, the applicant must place before the court a factual foundation for the existence of a reasonable prospect that the desired goal can be achieved.’
31. Subsequent to *Oakdene supra*, in *Kariba*,<sup>24</sup> the Supreme Court of Appeal affirmed that any belief by an applicant that reasonable prospects of rescue exist, must be based on a concrete foundation.<sup>25</sup> Stated differently, a cogent evidential foundation to support the existence of a reasonable prospect that the desired object can be achieved must be placed before the court.<sup>26</sup>

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<sup>20</sup> Id, para 21.

<sup>21</sup> Id para 28.

<sup>22</sup> Id para 29.

<sup>23</sup> *Prospec Investments v Pacific Coasts Investments 97 Ltd* 2013 (1) SA 542 (FB), para 11.

<sup>24</sup> *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and Others* 2015 (5) SA 192 (SCA) ('*Kariba*')

<sup>25</sup> Id *Kariba*, para 30.

<sup>26</sup> This requirement is in fact conceded by the applicant in para 14.5 its heads of argument dated 5 August 2021.

*Submissions of the parties*

32. All opposing parties essentially contend that the applicant has failed to make out a proper case, based on a concrete foundation, that there are reasonable prospects for rescuing the company in liquidation by means of ensuring a higher return for creditors or shareholders than they would otherwise have received under liquidation, more particularly, having regard to the history of the matter and the peculiar facts; that it has not in any event been demonstrated that the company in liquidation is a suitable candidate for business rescue; and that the application for business rescue was instituted for an ulterior and improper purpose to benefit the applicant exclusively at the expense of or without regard to a balancing of the interests of all other stakeholders, including creditors holding preferent claims under the relevant insolvency precepts. All opposing parties thus seek the dismissal of the application with punitive costs.
  
33. The applicant, on the other hand, contends that:
  - (i) The company in liquidation is a suitable candidate for business rescue, *inter alia*, because the liquidation is at a 'stalemate' - no first meeting of creditors has yet been convened, no final liquidators have been appointed - with the provisional liquidators being unable to wind-up the affairs of the company in liquidation, given the statutory limitations on their powers in their capacity as provisional liquidators; There appears to be no prospect of any payment to concurrent creditors who face the real prospect of a contribution when submitting claims in the liquidation process, and it is therefore unlikely that creditors will prove claims, with the result that it may be difficult to obtain resolutions at the first or second meeting of creditors; the liquidators do not have access to sufficient funding to secure the required skills set to secure the successful disposal of the sale property involved in the Pan African



transaction or for that matter, the remaining assets of the subsidiaries in the Mintails Group; and, the liquidators lack understanding and knowledge of the information made available and funded by the applicant for purposes of setting up an electronic data room in order to accommodate queries or assist with the due diligence investigation presently being performed in terms of the Pan-African transaction.

- (ii) The creditors will be in a better position in business rescue than in liquidation, *inter alia*, because the winding-down process will be completed quicker under business rescue; the business rescue practitioners (BRP's) will have access to post-commencement finance that will be provided by the applicant to the BRP's to enable the Pan-African transaction to be efficiently, expeditiously and successfully managed and disposed of; claims in dispute can be dealt with quickly through alternate dispute mechanisms; BRP's will be better equipped to deal with the complexity of the first respondent's company structure, operations and mining assets, which assets are subject to environmental restrictions and strict regulatory requirements (mentioned in para 27 of the founding affidavit) as the BRP's will 'be able to obtain the necessary skills and expertise to wind-down the affairs of the first respondent in an orderly and controlled manner' and to attend to various outstanding environmental considerations (mentioned in para 30 of the founding affidavit).

#### *Discussion*

- 34. By the time this matter was heard, it was not in dispute the primary objective of business rescue, namely, to return the company in liquidation to a solvent concern, is not achievable. That is hardly surprising, given the fact that the Mintails Group ceased mining operations as far back as 31 July 2018,

with Eskom terminating power supply in September 2018. Save for the intervening party,<sup>27</sup> all other parties appear to accept that the company in liquidation is financially distressed as envisaged in s 128 of the Act. It has been so since before 12 October 2015, when its board of directors passed a resolution to commence business rescue proceedings. I do not consider it necessary to decide the point raised by the intervening party in the light of the conclusions arrived at later in the judgment, but will assume, without deciding, that the company in liquidation is financially distressed for purposes of the relief sought by the applicant in this application.

35. The applicant pins its hopes on the achievement of the secondary goal - to facilitate a better deal for creditors and shareholders than they would secure in the liquidation process by means of the successful finalisation of the sale property to Pan African. The applicant submits in its heads of argument, dated September 2021, that this court needs to consider whether the proposed BRP's are better equipped in bringing the tabled offer by Pan African to fruition in order to secure a successful sale.<sup>28</sup> The applicant submits that any successful outcome of the Pan African transaction is dependent on the successful completion of the due diligence exercise (currently underway), which is directed at satisfying Pan African regarding

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<sup>27</sup> The intervening party submits that Mintails Mining is not financially distressed within the meaning contemplated in s 128(1)(f) of the Act. In terms of that section, 'financially distressed' is defined to mean that it appears to be reasonably: (i) unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing 6 months; or (ii) likely that the company will become insolvent within the immediately ensuing 6 months. On that basis, the intervening party contends that Mintails Mining is not financially distressed. It is rather hopelessly insolvent, has been so for the past 3 years and was not able to pay its debts as they became due and payable since 2015, which is why it underwent business rescue during 2015 to 2018, which process ultimately failed.

<sup>28</sup> The applicant submits that "the crisp question that now arises for decision is whether the Pan African transaction has a better prospect of coming to fruition with Mintails Mining remaining in liquidation vis-à-vis the company being placed under business rescue in the hands of suitably qualified and experienced business rescue practitioners."

the financial viability of its proposed acquisition of the shares and claims held by the company in liquidation in Mogale Gold and Mintails Soweto.

36. The applicant has levelled allegations of maladministration, delay and ineptitude against the liquidators in its papers,<sup>29</sup> all of which are vehemently disputed by the liquidators. Moolman has gone as far as to state that he has lost faith in the ability of Trackman and his co-liquidators to procure the successful closing of the Pan-African Transaction, based, amongst others, on Trackman's perceived lack of interest or involvement in the management of the due diligence investigation presently being conducted by Pan-African in terms of the relevant sale agreements, and Trackman's perceived inability to understand the complexities involved in the mining operations of the Mintail Group (including the company in liquidation) as well as complexities involved in the due diligence exercise that is presently underway, which Moolman fears may derail the successful completion of the deal. Any lack of interest or involvement in the further management of the Pan African transaction or the alleged lack of understanding the mining operations of the Mintails Group, its company structure or regulatory or environmental issues, is likewise disputed by the liquidators.
37. The accusations levelled in these proceedings against the conduct of the liquidators and the concerns expressed about Trackman's lack of

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<sup>29</sup> Further criticisms are that: (i) the provisional liquidators failed to secure their appointments as final liquidators and failed to make sufficient attempts to cause the Master to convene a first meeting of creditors. This criticism is unfounded. It is contrary to the legislative scheme, when regard is had to the provisions of ss 364, 365 and 368 of the old Companies Act; and (ii) that the liquidators are opposing this application for purposes of safeguarding their fees, i.e., for personal reasons, rather than acting to manage the administration of the property and affairs of the company in liquidation or to protect its assets for the benefit of all the creditors of the company. This criticism lacks credence, given that the applicant knew that the liquidators and service providers had expended time, energy and resources in working, and that amounts would become owing and payable to them in preference to other claims by virtue of the provisions of the Insolvency Act 24 of 1936 (the Insolvency Act). The applicant appears to have had a change of heart only after the procuring of the Pan African deal, when the feasibility of a greater return to the applicant in a business rescue context became plain. I return to this aspect later in the judgment.

understanding, aptitude or proficiency in these proceedings, fly in the face of the agreed facts articulated in authorisation application, with which the applicant, and Moolman specifically, concurred. By way of example, in the said authorisation application, the extensive efforts made by the liquidators since the inception of the insolvency process to secure the sale of the movable assets of the company in liquidation, were fully articulated, including Trackman's extensive engagements, negotiations and dealings with Pan African.<sup>30</sup> The terms of the proposed transaction and Pan African's commitment thereto, including various administration expenses incurred by the liquidators since the inception of the insolvency process, were also particularized in the authorisation application. Mention was made in the authorisation application that funds to be derived from the Pan African transaction (once successfully completed) would be utilised to make payment of *bona fide* administration expenses and related expenses incurred in the insolvency process to date, with a possibility of further amounts being available for distribution to the general body of creditors, including the applicant as single largest creditor.<sup>31</sup> More significantly, it was expressly stated that the authorisation application was premised on the liquidators' duty to protect and act in the interests of the general body of creditors.

38. It is clear that the applicant is seeking nothing other than an informal winding-down of the affairs of the company in liquidation by means of the

<sup>30</sup> This included, amongst others, (i) the liquidators engaging the services of WH Auctioneers to market and advertise the movable property for sale, with WH Auctioneers incurring expenses in the region of R350 000.00 in so doing, coupled with the fact that WH Auctioneers facilitated securing the transaction with Pan African, entitling it to commission on the successful completion of the Pan African Transaction; (ii) various engagements between the liquidators and Pan African, more specifically, 'intense negotiations' between Trackman and Pan African that led to the tabled offer by Pan African, with it being unequivocally said that Pan African is 'very well aware of the large rehabilitation liability and the complications of dealing with the DMR with regards to the applicable statutory regulations'; and (iii) the liquidators took legal advice on the finalization and negotiation of the Sale and Purchase Agreements prepared by Pan African's attorneys, which fees were paid by the applicant in good faith.

<sup>31</sup> See paras 35, 61 and 62 of the authorization application, Annexure "AA8" to the liquidators' answering affidavit.

business rescue remedy provided for in the Act. It is not for the applicant to choose its preferred method of achieving a winding-down of the company in liquidation. Moolman's feelings, opinions or his expressed *reservatio mentalis* in Trackman's ability is not in my view a proper reason for taking the company out of liquidation. The sentiments expressed by Brand JA in this regard in *Oakdene supra*<sup>32</sup> are wholly apposite:

"My problem with the proposal that the business rescue practitioner, rather than the liquidator, should sell the property as a whole, is that it offers no more than an alternative, informal kind of winding-up of the company, outside the liquidation provisions of the 1973 *Companies Act* which had, incidentally, been preserved, for the time being, by item 9 of schedule 5 of the 2008 Act. I do not believe, however, that this could have been the intention of creating business rescue as an institution. For instance, the mere savings on the costs of the winding-up process in accordance with the existing liquidation provisions could hardly justify the separate institution of business rescue. A *fortiori*, I do not believe that business rescue was intended to achieve a winding-up of a company to avoid the consequences of liquidation proceedings, which is what the appellants apparently seek to achieve."<sup>33</sup>

39. Likewise, *in casu*, any savings on the costs of the winding-up process (given that statutory protections afforded to administration creditors in terms of the Insolvency Act will be forfeited and the claims of administration creditors significantly eroded, if not jettisoned, by the institution of business rescue) will be subsumed by new costs that will per force have to be incurred in the business rescue scenario, the applicant itself having conceded that the proposed BRP's will have to procure expert advice to manage the due

<sup>32</sup> See: *Oakdene*, cited in fn 19 above, at para 33.

<sup>33</sup> See too: *Van Staden NO and Others v Pro-Wiz Group (Pty) Ltd* 2019 (4) SA 532 (SCA) at par 22, where the following was said:

"...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. Its use to delay a winding up, or to afford an opportunity to those who were behind its business operations not to account for their stewardship, should not be permitted. When a court is confronted with a case where it is satisfied that the purpose behind a business rescue application was not to achieve either of these goals a punitive costs order is appropriate."

diligence investigation in terms of the Pan African transaction and incur other expenses in preparing statutorily prescribed financial statements.

40. Moolman's view that the Pan African transaction has a better prospect of coming to fruition with the company in liquidation being placed under business rescue in the hands of suitably qualified and experienced PRP's who are chartered accountants, rather than for it to remain in liquidation under the control of the appointed liquidators (who have been assisted throughout by Moolman, who is himself a chartered accountant), is not seemingly shared by Pan African.<sup>34</sup> It is clear from the authorisation application and the papers in the present application that Trackman was extensively involved in negotiating the sale transaction with Pan African, albeit guided by Moolman. There is nothing to suggest that Pan African is anything other than satisfied with the liquidators' involvement hitherto in the sale transaction or apropos their continued management of the due diligence exercise that is currently being undertaken by Pan African.
41. According to Trackman, the liquidators, Moolman and other representatives of the applicant, have worked together for a period of three years during the liquidation process, facing difficulties in respect of the realisation of the assets of the company in liquidation, strategizing how best to act, exchanging correspondence, conducting telephone discussions, spending hundreds of hours on the matter, sometimes acting on a daily basis. In so doing, the liquidators state that they have worked themselves ragged in a challenging liquidation to try and preserve value and a suitable return to the general body of creditors under trying circumstances. Although the deponent to the applicant's papers does not agree with such version, I cannot find that the

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<sup>34</sup> That much is evident from a reading of annexure 'O' to the application for authorization by the Master to conclude the Pan African deal. See too: annexure 'AA 22' to the answering affidavit filed in the main application.

liquidators' version is palpably false or untenable.<sup>35</sup> On an application of the Plascon Evans rule, the liquidators version must prevail.<sup>36</sup> It is not in dispute that the realisation of assets of the company in liquidation has been delayed by factors outside the control of the liquidators. These include, amongst others: (i) the fact that no credible offers were received in a period of two years for the sale of movable assets of the company in liquidation, despite extensive advertising to market the movable property of the company in liquidation in order to realise the best price for the benefit of creditors of the company in liquidation; (ii) delays by the Master in convening a first meeting of creditors or to attend to the appointment of final liquidators, not least of all, the Master's unexplained delay in dealing with the authorisation application; (iii) restraints imposed on the ability of the liquidators to realise assets sooner, based on the common cause facts set out in the authorisation application, compounded by the limitations imposed upon their powers under the precepts of the 1973 Act; and (iv) reliance by the liquidators on legal advice received from the applicant's attorneys regarding the obtaining of authorisation for an extension of their powers from the Master, and not the court as such.

42. Without by any means discounting the oral argument tendered by the applicant's counsel at the hearing of the application, when specific examples were highlighted (supported by substantiating evidence contained in annexures to the papers), *inter alia*, of instances of prevarication or contradictions on the part of Trackman apropos the Black Hawk claim and other instances where he did not always dance to the tune (or kowtow to the beckoning) of the applicant or where he did not adhere to the timetable

<sup>35</sup> See: *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA), para 26.

<sup>36</sup> See: *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H-635C where, *inter alia*, the following was said: 'where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order...'

sought to be dictated by the applicant or where he was criticized for maintaining a lack of transparency in his dealings, I am not persuaded that such examples substantively contribute to the true enquiry at hand, namely, whether or not the applicant has established a reasonable prospect for the rescue of the company in liquidation, as envisaged in the case law cited above. This is because the applicant does not become entitled to an order placing the company in liquidation in business rescue simply because it is dissatisfied with the manner in which the liquidators may have conducted themselves historically.

43. The common cause facts support a finding that Trackman was equipped with knowledge, through the assistance and expert guidance imparted to him by Moolman over the course of a three year period, of the operations of the company in liquidation, the nature and extent of its realisable assets, and the complexities surrounding the Pan African deal, not excluding the arduous regulatory requirements, environmental issues and the exigencies of the ongoing dispute with the DMR. If that had not been the case, Trackman would likely not have been able to successfully negotiate and secure a credible offer from Pan African in regard to the sale of assets of Mogale Gold and Mintails Soweto. Moreover, he acted, on significant occasions, in accordance with legal advice received from the applicant's attorneys. Moolman's expressed reservation about Trackman's lack of mental acuity to understand the complexities of the due diligence exercise presently underway, or even the Mintails mining operations in general, given his extensive involvement in the Pan African transaction, rings hollow. The applicant denies that the liquidators have attempted to preserve value and a suitable return to creditors. In the light of the view I take on the matter, a resolution of the myriad of peripheral disputes between the applicant and the liquidators in the papers is not required. The applicant has remedies



available to it under the 1973 Act, should it wish to bring its complaints concerning the liquidators' performance of their duties to the attention of the Master. Significantly, the applicant has never sought the removal of the liquidators in terms of s 379 of the old Companies Act, nor has it pursued recourse in terms of s 381 thereof.<sup>37</sup>

44. The applicant brought the present application at a time when: (i) the Pan African deal had already been concluded although it is subject to finalisation pending the outcome of a due diligence investigation; (ii) the relevant sale agreements had already been signed; (iii), the price for the purchase of the sale assets had been negotiated and is fixed by agreement; and (iv) after Pan African had itself announced the signature of the Sale and Purchase agreements on both the London stock exchange and the Johannesburg stock exchange and had unequivocally expressed its commitment to the deal.
45. The applicant (through Moolman) appears to harbour suspicion about the various administration expenses incurred hitherto in the insolvency process and has raised concerns or objections about the legitimacy and quantum of Black Hawk's claim (including the fees of the liquidators, which are by operation of law subject to taxation and are yet to be taxed),<sup>38</sup> notwithstanding the agreed facts concerning the incurrence of such expenses for services admittedly rendered, as alluded to in the authorisation application. All opposing parties submit that whilst such disputes do not substantially contribute to a determination of the real issue at hand, being

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<sup>37</sup> As pointed out in the first respondent's heads of argument and in the answering affidavit deposed to by Trackman on behalf of the joint liquidators, Trackman was astonished when in May 2021 the applicant indicated that it would bring a business rescue application when the Pan African deal was already concluded and in progress. He (Trackman) states that he was '*dismayed to read the spurious allegations of maladministration, delay and ineptitude levelled against the liquidators when, despite some disagreements, not once in the 3-year liquidation has Moolman (or other representatives of the applicant) complained to the Master or even made any major complaint to the liquidators, concerning their conduct.*'

<sup>38</sup> The applicant states that it wants the liquidators to prove their claim (for fees) so as to 'shine a light of transparency on any claim they submit'.

whether the applicant has established a reasonable prospect for rescue on the basis that it will lead to all creditors receiving an enhanced dividend if the proposed BRP's were to take over management of the process of winding-down the company in liquidation, they serve to expose the applicant's ulterior motive in seeking the termination of the liquidation process at this juncture. In this regard, all the opposing parties submit that the true purpose of the application is to maximise a return for the applicant, an outcome which serves the applicant's own interests but which redounds to the prejudice of other creditors (including preferred administration creditors under the provisions of the Insolvency Act) and which ultimately fails to balance the rights of all stakeholders and affected parties. The effect of a conversion to business rescue at this stage of the liquidation, as contended by the liquidators and other opposing parties, will be that the liquidators and service providers who have worked for years without being remunerated, will be concurrent creditors in the business rescue scenario as opposed to being preferent creditors in liquidation, and due to the large claim of the applicant, will likely stand to receive next to nothing, or at best, an illusory dividend in the business rescue scenario.

46. The applicant's response in its replying papers to the contentions of the opposing parties in this regard, is telling. The applicant alleges that it provided financial assistance to the liquidators in the course of the liquidation process and did so only to the extent that it expected to receive a net benefit from such contributions. It contends that it is entitled to look out for its own interests and effectually concedes that its aim is to maximise a return for itself through the mechanism of business rescue, without cogently addressing the effect thereof on all other stakeholders.
47. The applicant alleges that general creditors will receive very little payment, if any, in the liquidation process, as Trackman intends using the proceeds

derived from the Pan African sale to cover costs and disbursements incurred in the liquidation. The applicant contends in generalised terms that it is possible for all creditors who lodge claims to receive payment 'in some or other form' in the business rescue scenario, and that the proposed business rescue plan will be voted on by all creditors, including the liquidators in their capacity as concurrent creditors in business rescue. The difficulty with the Applicant's submission is that it remains elusive about exactly *how* a better return to *all* creditors will be achieved in a business rescue scenario. It has failed to provide specificity of details,<sup>39</sup> based on objective and verifiable data (whether in the form of its latest financial statements or management accounts or the like) of the true financial position of the company in liquidation to enable a comparative exercise to be conducted of the returns that the applicant and other concurrent creditors may expect to receive in the two scenarios – being liquidation versus business rescue. No objective factual evidence has been provided in support of the conclusion that all the creditors of the company in liquidation will receive a better dividend under business rescue, compared to that which they will likely receive in a liquidation scenario.

48. The liquidators have pointed out in their papers that Pan African has made an amount of R500 000.00 available to them to manage the Pan African transaction, and that more funds could be procured, if needed. This will enable the liquidators to obtain expert advice, if needed, to equip them to manage the due diligence process suitably or to clarify any questions that may arise during such investigation. If they require the assistance of a chartered accountant, they can employ one. The proposed transaction, despite the complexities involved, is ultimately a commercial one like any other. Moreover, Pan African appears more than capable to see it through. It

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<sup>39</sup> See: *Kariba*, cited in fn 24 above.

is undisputed on the papers that Pan African is already at an advanced stage of conducting the due diligence, and, as regards the electronic data room that the applicant has created to conduct the due diligence, all documentation and information required has already been collated, is available to the parties and requires no further cost. For example, Pan African will be in the same position to access information required by it to enable it to negotiate with the DMR regarding the quantum of the DMR liability, an obligation which it assumed under the sale agreements, irrespective of whether the liquidators or the proposed BRP's manage the process. Presumably the applicant would not seek to intentionally disrupt such process, given its expressed desire for the transaction to come to fruition.

49. If regard is had to the applicant's papers, it appears that it seemingly promises co-operation only in a business rescue scenario, only on its own terms and in pursuit of its own financial interests.<sup>40</sup> It has also indicated that it will *consider* reducing and/or subordinating a portion of its claim against the company in liquidation to ensure a better return for creditors. The applicant's contention is that Moolman will provide the appointed BRP's with ongoing advice and that the applicant will provide funding and even consider subordinating its claims, which will enable a better return for creditors than they would receive in a liquidation scenario. But, as the opposing parties point out, the applicant's professed undertaking is a half-baked one, offering cold comfort, given that such an undertaking is not unequivocal – it is subject to a cap of R10 000.00 and to a 'proper business rescue plan being approved' and ultimately to the applicant being able to recover at least 80% of its secured debt from the realisation of encumbered properties.

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<sup>40</sup> See, for example, paras 25.1; 25.2 and 114 of the applicant's founding affidavit.

50. The contention by the applicant in its heads of argument, dated 5 August 2021, namely, that the BRP's in consultation with secured creditors will be able to dispose of the encumbered assets in a manner that will optimise their proceeds on disposal, also does not sway the decision. The undisputed facts are that the liquidators have hitherto endeavoured to negotiate the disposal of assets in a manner that will optimise their proceeds on disposal, as evidenced by the terms of the Pan African transaction.
51. The liquidators further point out in para 166 of their answering affidavit that whether in liquidation or under business rescue, the administration of the winding-up process will essentially be the same in that it is intended that the Pan African transaction will proceed and the remaining assets of the company in liquidation will be sold.<sup>41</sup>
52. Guidance is to be obtained from the reasoning of Claasen J in the judgment of the lower court *Oakdene*,<sup>42</sup> where the learned judge concluded that an order for business rescue was not appropriate in respect of a financially distressed company in the following circumstances:
- 52.1. the court had difficulty in understanding why a liquidator would be less successful in realising a proper market value for the sale of property than a business rescue practitioner – *in casu*, a fair and proper market value has already been negotiated and determined for the sale property forming the subject matter of the Pan African transaction, under the helm of the liquidators, and Pan African appears to be content to have the liquidators oversee the finalisation of the transaction, with expert guidance being procured by them as may be necessary;

<sup>41</sup> This was not dealt with in reply and remains undisputed and unrefuted.

<sup>42</sup> *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2012 (3) SA 273 (GSJ)

- 52.2. Uncertainties arising from the outcome of pending court cases militated against the grant of a business rescue order. Such uncertainties would necessarily make any plan proposed by a BRP subject to a variety of contingencies and outcomes which would be incapable of being defined in advance in precise terms, nor could the financial implications be calculated. *In casu*, the unresolved process with the DMR concerning the unpaid liability owing to it over a three year period has shown that litigation may well have to follow.
- 52.3. The applicant has not put up the latest financial documents of the company in liquidation in these proceedings. As Claasen J pointed out, 'The absence of these statements will be of no moment to a liquidator as his/her duties are to gather the company's property and liquidate the same, with or without any financial statements. However, a business rescue practitioner is subject to certain statutory duties which requires him/her to have access to the Company's financial statements in order to complete the statutory investigations.<sup>45</sup> In the absence of such statements, the practitioner will be obliged to enforce the provisions of section 142<sup>46</sup> of the Act against any defaulting director who refuses to deliver up all books of account and other records, which may further extend the rescue proceeding and/or increase the costs.' (footnotes omitted) The same situation exists *in casu*.
- 52.4. The open-endedness of business rescue proceedings cannot be discounted, as was demonstrated during the first business rescue process in this matter. As stated by Claasen J: 'Having regard to the provisions of section 128 to 154 of the Act, once a company is placed under supervision and business rescue proceedings have commenced, such proceedings are open-ended, and could probably include further applications to court and carry on for a considerable period of time.<sup>47</sup> This would be even more so if there are parties involved who are seeking to obstruct the creditors of the relevant Company as the applicants have been accused of doing. These conditions will

make the task of a business practitioner who has to seek the cooperation<sup>48</sup> of the directors, management and creditors extremely difficult.'

52.5. The advantage of a BRP mediating cannot apply in the present case because of all the potential disputes raised by the applicant surrounding the claims of administration creditors and litigation may well follow in respect of the Black Hawk claim. The liquidators have the facility of enquiring into any alleged irregularities as may be alleged (as have already been alluded to by Black Hawk in these proceedings) in terms of the mechanisms provided in the 1973 Act, whereas a BRP has no such power under the Act. Ultimately, the importance of accountability in corporate governance is not to be underestimated or ignored.

52.6. There is no provision for the taxation of fees, costs and expenses of a BRRP whereas a liquidator's costs are subject to taxation.

53. Further factors that impel me to conclude that an order for business rescue is not appropriate, are the following:

53.1. The applicant contends that qualified accountants (being the proposed BRP's) are better suited to address queries during the due diligence process, based on an existing virtual data room available to them with input to be provided by Moolman remaining at their disposal. However, there is no evidence to suggest that Pan African has raised queries or that these could not be addressed by the liquidators, who have been provided with funding to obtain expert advice for such purpose, if required.

53.2. The BRP's will have to come to terms with a process that has been ongoing for three years and publish a plan that will provide for the

winding-down of the company in liquidation, or to put it plainly, to do no more than what the liquidators are busy doing in liquidation. The applicant wants the Pan African deal finalised by BRP's despite the fact that Pan African itself has approved of the liquidators continuing with the finalisation of the deal and has itself raised no concerns in that regard.

53.3. The events after winding-up resulted in many service providers agreeing to be paid through the liquidation process, to the knowledge of Moolman, and they worked together until this application was conceived. The applicant thus knew that debts were being incurred to service providers and made no complaint when such services were rendered. They brought a business rescue application after the Pan African deal was tabled, signed and progressed, only at that juncture to raise objections against known administrative claims and the liquidators' fees, ostensibly to bolster the case for a need for such claims to be proven in a business rescue scenario and to be subjugated to concurrent claims, with the real prospect that such claims will, given the enormity of the applicant's claim, be rendered all but nugatory. The difficulty I have with this approach is that the applicant brought the present application after three years of co-operating with the liquidators and then sought to highlight conduct on the part of the liquidators that was never seemingly considered to be irregular before.

53.4. The amounts that the general body of concurrent creditors will receive in each of the processes has not been addressed by the applicant to enable this court to determine whether or not a reasonable prospect exists that they will receive more in a business



rescue scenario. The applicant contents itself with the supposition that it is better for creditors to receive 'the little they can' under business rescue, rather than not proving claims in liquidation for fear of having to make a contribution. The prospect of an increased dividend under business rescue is, however, to be informed by primary facts and information in the company's records, as indicated in *Kariba, supra*, which evidentiary basis is lacking in this application. Without evidence to support a prospect of an enhanced dividend to the general body of concurrent creditors through the Pan African deal in a business rescue scenario, it appears to me that only the manner of distribution will be impacted. Claims by liquidators for their fees and costs of administration creditors will be rendered concurrent claims in business rescue, with such stakeholders receiving, on the applicant's own version, only 'the little they can'. On the peculiar facts, that would be iniquitous.<sup>43</sup> Any disagreement between the applicant, as major creditor and shareholder, in relation to the liquidators' fees or the extent of administration costs, is not, in my view, a proper reason to convert the current process to one of business rescue.

- 53.5. Black Hawk has alleged that it would not have provided services, whether on credit or at all during the liquidation process, had it not been assured that its claim would be secured or preferent, as envisaged in the Insolvency Act. The inference is inescapable that the applicant seeks, through the mechanism of business rescue, to improve its own position by attaining an outcome that will effectually deprive the liquidators of compensation for fees and

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<sup>43</sup> The facts being, *inter alia*, that the company in liquidation has been dormant for several years; Moolman and others on behalf of the applicant proffered advice and rendered assistance and co-operated with the liquidators, even sharing legal representatives

administration costs, by means of an informal winding-up of the company in liquidation but with the added benefit of not having to account for their stewardship relating to the demise of the company in liquidation.

54. For all the reasons given, I have come to the conclusion that the application for conversion to business rescue cannot succeed.
55. The counter-application filed on behalf of the company in liquidation is brought in terms of s 386(5) read with s 386(4) (a) and (h) of the 1973 Act for: (i) permission to sell the shares and claims on loan account held by the company in liquidation in its subsidiary, Luipardsvlei (being one of the property owning companies referred to earlier in the judgment) by private treaty, subject to reasonable consultation with the applicant, alternatively, by public auction; and (ii) Ratifying, to the extent required or necessary, the actions of the liquidators (representing the company in liquidation) in opposing the main application and in bringing the counter-application and engaging the services of counsel and/or attorneys.<sup>44</sup>
56. The relief referred to in (ii) above was in my view correctly not opposed.<sup>45</sup> Although the relief in (i) above was opposed in the papers, such opposition was not seriously pursued in oral argument tendered at the hearing of the matter.
57. It is common cause that the company in liquidation must be wound down and its remaining assets sold. It is also common cause that the Luipardsvlei

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<sup>44</sup> These are the powers provided for in ss 386(4)(a) and (h) of the 1973 Act.

<sup>45</sup> See: *Van Staden and Others NNO v Pro-Wiz (Pty) 2019 (4) SA 532 (SCA)*, para 12, where the following was said: "It is apparent from the provisions of s 131 that the company that is the subject of the business rescue application is entitled to oppose it. At the time the application is made in relation to a company under provisional or final winding up, its affairs will be in the hands of the liquidators. On ordinary principles it seems obvious that liquidators, whether provisional or final, faced with such an application should be entitled either to support or oppose the application depending upon their judgment as to the interests of the company and its creditors."

properties should be sold urgently for reasons set out in paras 128 to 132 of the applicant's founding affidavit in the main application. Without obtaining either authorisation from the Master or from the court for an extension of their powers<sup>46</sup> to enable a sale of the remaining assets in the estate of the company in liquidation, the liquidators will be hamstrung in the further administration of the estate by virtue of their provisional appointment, as noted earlier in the judgment.

58. Both parties (applicant and liquidators) have alluded in their papers to the prejudice that is being suffered by various delays being experienced in the liquidation process. It is in the interests of all creditors that the liquidation process be advanced. On the common cause facts, funds can be obtained from the sale of properties owned by Luipardsvlei, which will inure to the ultimate benefit of creditors, including the applicant. The undisputed delays experienced in the liquidation process as a result of the tardiness of the Master vis-à-vis the convening of a first meeting of creditors and previous authorisation application are well documented in the papers, and nothing further needs to be said about that.
59. For these reasons, I am inclined to exercise my discretion in favour of granting the relief sought in the counter-application.
60. As regards the legal standing of Black Hawk, I have already mentioned that on the applicant's own version, Black Hawk is acknowledged as an affected party. The applicant was aware, prior to the launch of the application, of the fact that a cession of Black Hawk's claim to the intervening party was challenged, as set out in the papers. Until the dispute between Black Hawk

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<sup>46</sup> As contemplated in s 386 (5) of the 1973 Act, which reads as follows: "In a winding-up by the Court, the Court may, if it deems fit, grant leave to a liquidator to raise money on the security of the assets of the company concerned or to do any other thing which the Court may consider necessary for winding up the affairs of the company and distributing its assets."

and the intervening party is finally resolved, whether by litigation or otherwise, I am prepared to accept that both such parties have a vested interest in the issues involved in the matter and in the ultimate outcome of the application. Both have demonstrated a sufficient interest of their own. A person has standing to challenge an order sought in instances where that person's rights are directly affected in a manner adverse to such person – requirements which the affected party and intervening party have in my view, *prima facie* met. The Constitutional Court has endorsed a broad approach to legal standing, underpinned by the notion that access to justice should not be precluded by rules made in a different constitutional environment in which a different model of adjudication predominated.<sup>47</sup>

#### Costs

61. All opposing parties seek the dismissal of the main application with costs on the scale as between attorney and client for fairly similar reasons. On behalf of Black Hawk, it was argued that the main application was not bona fide, evidenced, *inter alia*, by the applicant's intransigent stance that it will not provide any further finance or assistance in the realisation of assets unless the court grants an order for business rescue. The imputation arising therefrom is fairly obvious: Either the applicant genuinely wants to see the Pan African transaction through to finality, or its functionaries will mala fide refuse to co-operate in such process under the helm of the liquidators. Counsel for the intervening creditor likewise argued that the application was

<sup>47</sup> See: *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) at paras [165] – [168].

Section 38 of the Constitution reads:

"Anyone listed in the section has the right to approach a competent court, alleging that the right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach the court are –

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group of class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members."

not bona fide, evidenced by the statements made by the deponent to the applicant's papers to the effect that that he will not co-operate with the liquidators going forward, despite having the technical know-how and institutional knowledge, and despite the tender by the liquidators in the answering affidavit to reimburse him for his expert advice, but that he will assist the BRP's, if appointed, only in a business rescue scenario, which, so it was contended, cannot be considered as bona fide.


62. Counsel for the liquidators argued that the applicant has failed to meet the requirements for business rescue, having approached the court with an ulterior motive to improve its own position at the expense of the general body of creditors and in order to denude payment in respect of claims for services provided during the insolvency process, let alone payment of the liquidators' reasonable fees, raising spurious allegations concerning the conduct of the liquidators when the Pan African deal was all but finalised whilst raising no complaints regarding the performance by the liquidators of their duties with the Master or the liquidators themselves, at least prior to the launch of the main application.
63. At the risk of repetition, it bears stressing that in *Van Staden and Others NNO v Pro-Wiz (Pty) Ltd* (412/2018) [2019] ZASCA 7 (8 March 2019) at para [22], Wallis JA cautioned 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. Its use to delay a winding up...should not be permitted. When a court is confronted with a case where it is satisfied that the purpose behind a business rescue application was not to achieve either of these goals a punitive costs order is appropriate.' (emphasis added)
64. In the circumstances of this case and in the light of the conclusions reached, as outlined earlier in the judgment, I am persuaded that a punitive costs

order is warranted. The opposing parties ought not to be out of pocket for successfully opposing the application.

65. For all the reasons given, the following order is granted:

**ORDER**

1. The main application is dismissed with costs on the scale as between attorney and client.
2. The counter-application succeeds and it is ordered that:
  - (i) The first respondent (represented by the joint provisional liquidators of Mintails Mining SA (Pty) (in liquidation)) Ltd is authorised to sell the shares and claims on loan account which Mintails Mining SA (Pty) Ltd (in liquidation) owns in Luipardsvlei Estates (Pty) Ltd ('the asset'), subject to reasonable consultation with Mintails Outh Africa (Pty) Ltd, alternatively by public auction.
  - (ii) The actions of the duly appointed provisional liquidators of of Mintails Mining SA (Pty) (in liquidation) in opposing the main application and in instituting the counter-application is hereby ratified or confirmed;
  - (iii) The costs of instituting the counter-application will be costs in the winding-up of Mintails Mining SA (Pty) (in liquidation).

  
**A. MAIER-FRAWLEY**  
**JUDGE OF THE HIGH COURT,**  
**GAUTENG DIVISION, JOHANNESBURG**

Date of hearing:

6 October 2021