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

CASE NO.: 2355/2018

Date heard: 24,25-10-2018
Date delivered: 07-12-2018

In the matter between:

C Rock (PTY) LTD	**Applicant**
And	
H.C Van Wyk Diamonds LTD (In provisional liquidation)	**1st Respondent**
D.T Majiedt NO	**2nd Respondent**
K.C Monyela NO	**3rd Respondent**
A.D Draai NO (In their capacities as appointed joint liquidators for the 1st Respondent)	**4th Respondent**
All Known Creditors of the First Respondent as Per Annexure "A" to the founding Affidavit	**5th to 68th Respondents**
Diacore South Africa (Pty) Ltd t/a Ascot Diamonds	**69th Respondent**
Standard Bank of South Africa Limited	**70th Respondent**
Bondeo 140 CC	**Intervening Party**
Rietput Delwery CC	**Intervening Party**

CORAM: WILLIAMS J

JUDGMENT

WILLIAMS J:

1. The applicant, C Rock (Pty) Ltd (C-Rock) launched an application on 25 September 2018 that the 1st respondent, HC

Van Wyk Diamonds (Pty) Ltd (VWD), be placed under supervision and that business rescue proceedings commence under s 131(1) read with s 131(4) of the Companies Act 71 of 2008 (the Act).

2. In order to contextualise this matter it is necessary to briefly set out the history of the proceedings leading up to the application *in casu*.

2.1 During the latter half of 2016 C Rock brought applications for the liquidation of VWD and the companies Saxendrift Mines (Pty) Ltd (Saxendrift) and Rockwell Resources RSA (Pty) Ltd (Rockwell RSA), on the basis that the companies could not pay its debts. Provisional liquidation orders were granted in respect of all three companies on 23 March 2017.

2.2 Thereafter, during April 2017 three creditors of the companies in provisional liquidation Ascot Diamonds (Pty) Ltd (Ascot), Just Tracks and Brenda Barretto applied for the companies to be placed under supervision and for business rescue proceedings to commence. The business rescue orders were granted on 18 May 2017.

2.3 On 21 September 2017, the Standard Bank of South Africa Limited (Standard Bank) obtained orders, (i) uplifting the general moratorium on legal proceedings against a company in business rescue; and (ii) for the provisional perfection of a notarial special and general covering bond held over the movable property of Saxendrift, to the value of R12.7 million alternatively R10.7 million.

2.4 The business rescue proceedings in respect of the three companies were discontinued on 22 September 2017 pursuant to an application brought by the business rescue practitioners, (BRP's) who simultaneously obtained a further order for the provisional liquidation of the companies.

2.5 The three companies have since been in provisional liquidation. The extended return date being during February 2019.

3. The 2nd, 3rd, and 4th respondents are the appointed joint provisional liquidators of VWD, Rockwell RSA and Saxendrift (the liquidators) in their capacities as such. The 5th to 68th respondents are cited as the known creditors of VWD.

4. On 10 September 2018 the liquidators scheduled an auction at which the mining and prospecting rights belonging to VWD and two rights vesting in Saxendrift were sold to Bondeo 140 CC (Bondeo) for an amount of R46 million as well as certain immovable property for a purchase price of R400 000.00.

At the same auction the remaining mining and prospecting rights belonging the Saxendrift were sold to Rietput Delwery CC (Rietput) for an amount of R14 million.

5. The liquidators initially had until 2 October 2018 to confirm or reject the offers submitted by the purchasers mentioned in the preceding paragraph. The launching of this business rescue application has had the effect however, in terms of s 131 (6) of the Act, that all liquidation proceedings are suspended including the liquidators' ability to sell the assets of VWD, Saxendrift and Rockwell RSA. The situation has now been created where the liquidators cannot accept the offers to purchase the property sold at the auction. After negotiations with Bandeo and Rietput the liquidators were however able to extend the period for acceptance of the offer until 22 October 2018.

6. The liquidators, Ascot and Standard Bank oppose the application for business rescue. On 19 October 2018 the liquidators brought an urgent application, incorporating their opposing affidavit to the business rescue application, that C-Rock's application be heard on an urgent basis and be dismissed with costs. Rietput and Bondeo (henceforth referred to herein as the purchasers) filed an application to be heard on the same day to intervene in the business rescue application as respondents and as applicants in the urgent application brought by the liquidators.

On 19 October 2018, the applications were postponed as a whole, to be heard on 24 and 25 October 2018.

Application to intervene

7. The first order of business on 24 October was the determination of the purchasers' application to intervene, which was opposed by C-Rock. In short and as I understand it C-Rock's opposition is based on the following:

7.1 Since the purchasers are not affected persons as defined in the Act, they have no right to participate in business rescue proceedings as provided for in s 131(3). (The Act defines in s 128 thereof an "affected person" as, a shareholder or creditor of the company, any registered trade union representing employees of the company and, in the case of employees not so represented, then each of those employees or their respective representatives.).

7.2 As such the purchasers have to prove a legal interest in the proceedings in order to succeed with an application to intervene. This Mr Lourens for C-Rock argues, the purchasers cannot do since the sale had either been suspended together with all liquidation proceedings when the business rescue application was issued or the sale had lapsed since the due date for the acceptance of the offers has passed – and cannot be extended by agreement between the purchasers and the liquidators while the business rescue application is pending.

8. The business rescue application was launched 4 business days before the due date for acceptance of the purchasers' offers by

the liquidators. Mr Lourens was constrained to concede that the timing of the application was not merely co-incidental but that it was intended to stop the sale of the companies' assets pending the determination of the business rescue application. C-Rock is of the opinion that the prices obtained are too low and prejudicial to C-Rock who is a concurrent creditor of VWD to the tune of about R212 million. There is nothing untoward in this approach of course, provided that a proper case for business rescue is made out and the application is not an abuse of the process.

9. The business rescue application has suspended liquidation proceedings (s131 (6) of the Act), which of course includes the sale of the assets of DWD. Although the extended due date for acceptance has passed, Mr Heystek for the purchasers informs that the purchasers are willing to accept a late acceptance and to further extend the offers to buy the assets. The liquidators have confirmed in their opposing affidavit that they intended to accept the offers. It seems to me in these circumstances that the offers to purchase the assets of DWD have not lapsed since it is the offeror's prerogative whether to extend the due date or not. See *Manna v Lotter and Another* 2007(4) SA 315 (CPD) paragraph 26.

10. The suspension of the sale brought about by the business rescue application does not mean that the purchasers have permanently lost all their rights in terms of the sales, only that the transactions have been placed on hold, but may be

revisited in future. As such the purchasers have in my view a direct and substantial interest in the subject matter of this application. In addition they also bring information to the table which is relevant to the determination of the business rescue application.

11. That being the case, I granted the application by the purchasers to intervene as respondents in the business rescue application and applicants in the urgent application.

Urgency

12. Which now brings me to the issue of urgency. With the exception of C-Rock the other parties before me support the liquidators in their application that the business rescue application be determined as a matter of urgency.

13. The liquidators maintain that the urgent adjudication of the business rescue application is warranted since the application has suspended liquidation proceedings and the liquidators are unable to continue with the winding-up process. A hearing of the application in due course will, based on the current state of the court roll, probably only occur during the third term of 2019. In the mean time the mines and assets of the companies have to be maintained, secured and insured at a cost of approximately R340,000,00 per month while there is not enough money to do so. Standard Bank as a secured creditor has thus far been willing to fund these expenses on overdraft. The amount owing to Standard Bank at present is

approximately R3.7 million and will only increase with the inevitable delay caused by a hearing in due course and which would result in enormous prejudice to the body of creditors.

14. Quite astoundingly in my view, C-Rock, the party which one would have expected to be most anxious to have the application dealt with expeditiously opposed the urgent application. The basis of the opposition is that even if there had been no application for business rescue and the sale of the assets to the purchasers proceeded, the liquidators would in any event have had to make provision for the costs of maintenance, security and such with regards to the assets of the companies for a period much longer that the date of hearing of the application in due course, since the sale of the mineral rights is subject to the suspensive condition that the Minister, in terms of s11 of the Mineral and Petroleum Resources Development Act, 2002, grants his approval of the transfer of the mineral rights to the purchasers. Such approval, according to C-Rock could take up to two years. Therefore the argument goes, the liquidators would on either scenario be liable for the expenses referred to for quite some time and that these expenses do therefore not render the application urgent.

15. What C-Rock has failed to take into account however is the affidavit of the purchasers in their intervention application. Therein it is stated and confirmed that the representative of the purchasers, an attorney, Mr Japie Van Zyl, has been in discussions with the Regional Manager: Department of Mineral

Resources: Northern Cape Region, Mr Pieter Swart, who has given an undertaking, given the circumstances of the case, to fast-track the required ministerial consent for the transfer of the mineral rights. Attempts would be made to facilitate the transfer within 6 months of submission of an application for transfer of the rights.

16. In addition to the above, the purchasers had reached an agreement with the liquidators that pending ministerial consent for the transfer of the mining rights – which they were confident would be granted in light of their history in the mining industry, their expertise, financial and general ability to meet the requirements for such a transfer – that they be appointed as contractors to conduct prospecting and mining operations under the mining rights and take over the obligations and the liabilities in relation to maintaining the mining rights.

17. I was satisfied in the circumstances that urgent determination of the matters was justified. Consequently and once I was satisfied that the liquidators had given all the affected parties notice of the application that the business rescue application be heard on an urgent basis, I granted the application and the matter proceeded, though not without further preliminary skirmishes.

18. C-Rock initially disputed the *locus standi* of all the parties opposing the business rescue application. Standard Bank's *locus standi* as an affected party (a creditor) was conceded at

the hearing of the application when I allowed Mr Tsangarakis on behalf of Standard Bank, to file a further affidavit to which was attached a Deed of Suretyship whereby VWD bound itself as surety for the indebtedness of Saxendrift towards Standard Bank.

19. Before I proceed to deal with the disputed *locus standi* of the opposing parties it is important to note that C-Rock in its founding affidavit describes the application for business rescue of VWD as *"one in a trilogy of inseparably inter-related applications which essentially have, as their principal concern and objective, the pursuit of orders placing VWD Rockwell and Saxendrift (collectively "the companies"), under supervision and for business rescue proceedings to commence in relation to the said entities."*

20. It appears to be common cause that the companies have been dependent on each other for survival. Rockwell RSA does not trade and is described as an investment/holding company which served as a vehicle through which its Canadian shareholders, Rockwell Diamonds Inc. (RDI), held their stakes in the South African Rockwell enterprises particularly VWD and Saxendrift.

Saxendrift holds most of the mining equipment which VWD leases from it for its mining operations, as well as certain mining and prospecting rights. VWD has as its principal concern one mining enterprise known as Wouterspan Mining Operations and holds the mining and prospecting rights which sustain its mining operations at Wouterspan and owns the immovable property on which Wouterspan is situated.

21. As a result of the inter-related nature of the relationship between the companies, and to prevent an unnecessary proliferation of applications, the parties have agreed that only the VWD application be prosecuted on the basis and understanding that success in the VWD application for business rescue will result in success in the Saxendrift and Rockwell RSA applications. Conversely failure of the VWD application will necessarily result in failure in the other two applications.

Locus Standi

22. Mr Lourens for C-Rock contends that the liquidators have no *locus standi* to participate in the business rescue application since, by virtue of s361 (2) of the 1973 Companies Act, if they are unable to perform their duties, the assets of VWD would rest in the Master. There being no authorisation or directive by the Master for the liquidators to oppose the business rescue application, the liquidators have no standing in these proceedings.

S 361(2) reads as follows:

"in any winding-up of any company, at all times <u>while the office of the liquidator is vacant or he is unable to perform his duties</u>, the property of the company shall be deemed to be in the custody and under the control of the Master."

23. S 131(6) of the Act provides for the suspension of *"liquidation proceedings"* once an application for business rescue is made,

until the court has adjudicated upon the application or the business rescue proceedings end, if the court makes the order applied for. *"Liquidation proceedings"* in this context has been said in Richter v Absa Bank Limited 2015(5) SA 57 (SCA) at paragraphs 9-12, not to alter the significance of what is meant by "liquidation" – which historically has been used in the context of dissolving a company. Reference is made to Cilliers and Benade; Corporate Law, 3rd ed at 494 where *"liquidation"* is described as follows:

" . . . The process of dealing with or administering a company's affairs prior to its dissolution by ascertaining and realising its assets and applying them firstly in the payment of creditors of the company according to their order of preference and then by distributing the residue (if any) among the shareholders of the company in accordance with their rights, is known as the winding-up of liquidation of the company."

24. The function of a provisional liquidator is not to liquidate a company. His or her function is essentially that of a receiver *pendente lite*, ie to assume control and to superintend the administration of the property and affairs of the company pending the appointment of the liquidator. See Henochsberg on the Companies Act 71 of 2008, volume 2; APPI – 152(1).

25. On an interpretation of *"liquidation proceedings"* as described in the Richter matter, the functions of a provisional liquidator stands unaffected by the suspension of liquidation proceedings as per s 131 (6) of the Act. In my view therefore they have not

been rendered *"unable to perform"* their duties in terms of s 361(2) of the 1973 Act.

26. The extended powers in terms of s386 (5) granted to the liquidators by order of Court on 27 October 2017 may be a different matter. These mainly aim to advance the winding-up process and are clearly liquidation proceedings as envisaged in s 131(6). The normal powers of the (provisional) liquidators are in my view however not affected.[1]

27. Even if I am wrong in this regard and the custody and control of the companies' assets now rest in the Master, the failure by the liquidators to obtain the requisite authority for purposes of litigation is not fatal to the proceedings. In *Patel v Paruk's Trustee* 1944 (AD) 569, the Appellate Division held that the fact that the trustee in an insolvent estate has not obtained the consent of the Master or the creditors to institute legal proceedings on behalf of the estate does not invalidate such proceedings. Similarly in *Waisbrod v Potgieter and Others* 1953(4) SA 502 (W), Ramsbottom J said the following at 507 G-H,

"I think that the provisions of secs 130(2) (a) and 142(4) were enacted for the protection of creditors and contributories and to prevent the assets of the company from being squandered in useless litigation. As between himself and the company the liquidator requires to be authorised before he embarks on litigation, and if he does so without the prescribed authority the Court may refuse to allow him his costs out of the assets of the company and he may have to pay them himself. But that does

1 The judgment of the SCA in GCC Engineering & others v Lawrence Maroos & others, (901/2017) [2018] ZASCA 178 (3 December 2018) supports this view.

The references in the above quotation are to the 1926 Act but the principle pertaining to a liquidator's authority to litigate remains the same.

28. A further argument in relation to the *locus standi* of the liquidators is that they are not affected persons as defined in the Act and therefore have no right to participate in the application. The argument is that the provisions of s 136(4) of the Act cannot confer *locus standi* on the liquidators at this stage since it envisions them becoming creditors only upon the conversion to business rescue proceedings, should the application be successful. At present therefore, so the argument goes, the liquidators are contingent or prospective creditors – and the Act makes no provision for such creditors as affected persons.

S 136(4) reads as follows:

"(4) If liquidation proceedings have been converted into business rescue proceedings, the liquidator is a creditor of the company to the extent of any outstanding claim by the liquidator for any remuneration due for work performed, or compensation for expenses incurred, before the business rescue proceedings began."

29. Whilst it may be that the liquidators do not fall within any of the categories of affected persons as defined in the Act, there can be no doubt in my view that an application by them to intervene on behalf of the company and in the interest of the body of creditors would have been successful. An application by the liquidators to intervene has however been rendered

unnecessary by C-Rock itself by citing the liquidators as respondents. As such they are entitled to participate in these proceedings as respondents and have the right to oppose the application if they so choose. The suggestion by Mr Lourens that they would only be entitled to report to the court on information within their knowledge and which would be of assistance in determining the application has no merit. In such an instance mere service of the application on the liquidators would have sufficed, as is provided for under s 131(2) (a).

30. The opposition by C-Rock to the *locus standi* of the liquidators is nothing else but opportunistic and in my view amounts to an abuse of the process.

31. Ascot claims to be a creditor of VWD in the amount of R259 million arising from money lent and advanced to Rockwell RSA and on-lent to VWD and which claim against VWD was ceded by Rockwell RSA to Ascot in *securitatem debiti.*

32. C-Rock takes issue with Ascot's status as an affected person on the basis that, (i) Rockwell RSA has abandoned its claim against VWD; or (ii) Rockwell RSA's claim against VWD has been subordinated. Therefore, the argument goes, Ascot is at best (based on the subordination scenario) a contingent or prospective creditor of VWD.

33. The assertions above are made with reference to a Memorandum of Agreement entered into between VWD and

Rockwell RSA during March 2017, wherein Rockwell RSA agreed to assist VWD by subordinating its claim(s) against VWD in favour and for the benefit of other creditors of VWD. The relevant terms of the agreement are *inter alia* that:

33.1 Rockwell RSA subordinates so much of its claim against VWD as would ensure that the balance of VWD's liabilities (excluding the claims of Rockwell RSA) do not exceed VWD's assets;

33.2 Rockwell RSA warrants that its claims against VWD have not been ceded to any third party and that no third party has any interest in those claims;

33.3 In the liquidation of VWD it (Rockwell RSA) will not prove or tender to prove a claim in respect of its subordinated claim which proof would diminish or reduce any dividend payable to other creditors. Accordingly in the event of liquidation of VWD, Rockwell RSA abandons that claim to the extent that it would reduce the dividend payable to other creditors;

33.4 The subordination shall remain in force and effect for so long as the liabilities of VWD exceed its assets; and

33.5 Rockwell RSA agrees that until such time as the assets of VWD exceed its liabilities, it shall not be entitled to demand or sue for or accept repayment of the whole or part of its subordinated claim.

34. This agreement between Rockwell RSA and VWD ignores completely the cession and pledge agreement entered into during May 2015 whereby Rockwell RSA ceded its claim against VWD to Ascot in securitatem debiti, and to which VWD was a signatory party together with Rockwell RSA and Ascot.

35. Purely on the papers before me, the subordination agreement entered into between Rockwell RSA and VWD is worthless since it is settled that unless otherwise agreed, a cession in securitatem debiti in any event results in the cedent being deprived of the right to recover the ceded debt, retaining only the bare dominium or a *"reversionary interest".* See *Picardi Hotels Ltd v Thekwini Properties* (Pty) Ltd 2009(1) SA 493 SCA at 496 C-E.

36. Without any suggestion of an agreement between Ascot and Rockwell RSA that Rockwell RSA could either abandon or subordinate its claim against VWD (which if there had been such an agreement I would have expected Ascot to be a party to the subordination agreement), the normal consequences of a cession in *securitatem debiti* stand and Ascot is substituted as the creditor.

37. That being said, Mr Lourens made allowance during argument for the fact that I may find that the cession trumps the subordination agreement, in which event he proferred alternative arguments.

38. Firstly, that during May 2018 when the cession was concluded, the shares which Rockwell RSA held in VWD constituted the greater portion of Rockwell RSA's assets. Consequently the cession constitutes a disposal by Rockwell RSA of the greatest portion of its assets which in terms of s 112 of the Act could only be validly done if the disposal had been approved by a special resolution of the shareholders and in compliance with certain requirements in terms of the Insolvency Act.

39. The argument has no merit. In *Alexander and Another NNO v Standard Bank Merchant Bank Ltd* 1978(4) SA 730 (WLD), Viljoen J held at 741 H-742B that since the cedent in a cession in *securitatem debiti* retained a reversionary right during the currency of the cession, a cession in *securitatem debiti* is not a disposal in terms of s 228 of the 1973 Act, which is the forerunner to s 112 of the Act.

40. Secondly, the contention is that the R259 million loan made by Ascot tot Rockwell RSA constitutes financial assistance as contemplated in s 45 of the Act, which requires a special resolution by the board of Ascot to sustain its validity. Since Ascot had failed to provide a copy of the special resolution despite being challenged by C-Rock to do so, it has failed to

show that the loan was lawfully extended to Rockwell RSA, that the cession is lawful and enforceable and hence failed to prove the necessary *locus standi* to participate in the VWD business rescue application.

41. S45 deals with financial assistance between related and inter-related companies. Related and inter-related entities are defined in s2 of the Act, with the control of one over the other being integral. The argument is that since Ascot owns 20% of the shares in RDI, which in turn own 100% of the shares in Rockwell RSA, Ascot therefore indirectly holds 20% of the shares in Rockwell RSA. How Ascot would be able to directly or indirectly control the business of Rockwell RSA and consequently VWD (via the cession) based on 20% shareholding eludes me.

This argument lacks any merit.

42. In any event, even if there had been any merit in the arguments against Ascot's *locus standi* in these proceedings (which I have not found), Mr Spiller for Ascot has argued, quite correctly, that it would not be in the interest of justice to deny Ascot participation in these proceedings, given the agreement between the parties that the fate of the DWD business rescue application would be determinative of the rescue applications pertaining to the other two companies.

43. Surprisingly, and though I made an order allowing the purchasers to intervene in the application, Mr Lourens

persevered with his argument that the purchasers have no *locus standi* to participate in this application. However as I made no restrictions on the participation of the purchasers in this application, the purchasers have the same rights as the other parties to the application.

44. In the premises C-Rock's points *in limine* regarding the *locus standi* of the opposing parties are dismissed. I have dealt in detail with the specific grounds upon which the *locus standi* of the parties have been challenged for the reason that the liquidators and Ascot have implored me to specifically order that C-Rock pay the costs of the opposition to their *locus standi.* I will revert to this issue when I deal with the costs of the application.

45. Be that as it may, after all the objections raised by C-Rock, I can finally deal with the merits of this application.

The merits

46. As mentioned herein-before the three companies were previously placed in business rescue on 18 May 2017. Mr TJ Murgatroyd and Mr PF Van der Steen were appointed as business rescue practioners (BRPs) for the companies. Five months later and on 22 September 2017 the BRPs were granted orders for the discontinuation of the business rescue proceedings and for the companies to be placed in provisional liquidation.

47. The facts relating to the business rescue operations conducted by the erstwhile BRPs are contained in the founding affidavit to the application brought by the BRPs for the discontinuation of business rescue and for provisional liquidations and can be summarised as follows:

47.1 Shortly after their appointment the BRPs were informed by representatives of the board of directors of RDI of a prospective purchaser or investor in the companies and requested them to continue the operations of the companies without any radical interventions other than cost-cutting measures until such a transaction was finalised.

47.2 In order to enhance the saleability of and preserve the assets of the companies the BRPs *inter alia:*

47.2.1 Procured post commencement financing (PCF) in the amount of R13 million;

47.2.2 Paid the salaries of the 304 employers of VWD up to 31 August 2017. Rockwell and Saxendrift had no employees;

47.2.3 Paid critical suppliers in order to continue with mining operations;

47.2.4 Consulted and engaged with a qualified geologist Stephan Le Roux to conclude a correct and optimal mining plan after it was determined that the previous mining plan and model was inappropriate. The operations of the mine were thereafter refocused using the new mining plan to ensure optimal recovery of diamonds and revenue generation for the companies.

47.2.5 Managed to generate significant diamond recoveries (albeit insufficient) over the period June to August 2017.

47.3 Notwithstanding the attempts to reinvigorate the mining operations the BRPs determined at the beginning of September 2017 that it would no longer be possible to operate the companies without further funding.

47.4 Therefore, following upon the potential investor/purchaser indicating that it was not in a position to submit an offer or provide PCF, the BRPs decided it prudent to stop all mining operations at Wouterspan (the VWD Mine) as of 8 September 2017 and retain only a core compliment of employees to take care of and maintain the mine and equipment. The rest of the employees were asked to vacate the property immediately.

48. The reasons given for the failure of the business rescue are as follows.

48.1 The plant and equipment of the companies are generally of poor quality and require significant cash injections to restore it to a state at which it would consistently achieve the desired mining values and diamond recovery;

48.2 The companies no longer have the funds or access to funds to restore the plant and equipment in order to achieve the above objectives;

48.3 Excluding repairs and maintenance for September 2017 (which would amount to approximately R6 million), the expected monthly shortfall is approximately R12 million to R13 million.

49. As at close of business on 8 September 2017 after paying the salaries of employees and essential post-commencement suppliers, the aggregate nett bank balance of the companies was approximately R28 000,00.

50 Accordingly, the BRPs concluded that there was no reasonable prospect for the companies to be rescued.

51. Since 8 September 2017 the VWD mine has not been operational.

52. C-Rock contends in its founding affidavit to the present business rescue application that the erstwhile BRPs were

mistaken in their diagnosis of the problems plaguing the profitability of the companies, most likely due to their inexperience in the diamond mining industry.

53. C-Rock claims to have experience in the mining industry for 30 years and in the diamond mining industry specifically, for 18 years. It alleges to have identified three aspects of VWD's enterprise that can be meaningfully restructured to pursue a successful rescue of the companies. The proposal is as follows:

53.1. Firstly, the staff component at VWD can be reduced from 304 to 150 employees and still be fully operational.

53.2 Secondly, VWD's diamonds should be sold in the open market, at least temporarily under the proposed business rescue regime, and not in terms of the VWD and Ascot take-off agreement. The contention is that the diamonds would likely achieve an increased revenue of between 25% and 30% in the open market as opposed to the revenue generated under the take-off agreement.

53.3 Thirdly, VWD requires PCF in order to kick-start the wetplant into operation and VWD into operational and commercial mining. C-Rock in this regard commits to providing the necessary PCF to implement the proposed restructuring of the companies' affairs provided that it be appointed a consultant and manager of the mining opera ration during the business rescue proceedings at a management fee of R900 000.00 per month.

54. C-Rock has prepared and annexed cash-flow forecasts over a 36 month proposed business rescue regime on the basis of a reduction in the number of employees and that VWD's diamonds be sold in the open market. Accordingly it contends that with only the minimal restructuring which it proposes, the companies will gradually return to profitability within the next 6 months whereafter it will be able to start servicing its pre-commencement debts. Such debts, it is projected, will be extinguished by the 20th month into the restructuring if compromised at 50c in the rand, by the 26th month if compromised at 75c and if not compromised, by the 32nd month into the restructuring. Thereafter and within a period of 36 months VWD would be free of pre-commencement debt and likely debt-free.

55. Needless to say, the liquidators, supported by the other opposing parties, are highly critical of the feasibility of the proposal put forward by C-Rock and its motive behind it. Besides C-Rock being the applicant in the initial liquidation applications against the companies, C-Rock vehemently opposed the previous business rescue applications before the orders were eventually obtained by agreement. In fact, in its opposing papers to the previous business rescue applications C-Rock stated *inter alia* that:

"It is quite clear that the launch of the three business rescue applications of HC Van Wyk, Saxendrift and Rockwell is a stratagem to frustrate the winding-up of the three companies, and to sterilise the function of the provisional liquidators";

"The business rescue applications have no prospect of success"; and

"Rockwell is entirely dependent on a dividend income stream from Saxendrift and HC Van Wyk. Both of these companies are hopelessly insolvent and are incapable of trading themselves out of insolvency and cannot be restored to profitability."

56. At the time the above statements were made, the businesses of the companies were still operational. At present the mining operations have been suspended for more than a year. The liquidators aver that with the passage of time all previous mining plans had become outdated and irrelevant, the mining fleet inoperative, the plant rusted and partially stripped. There is currently no electrical or water supply at the mine and C-Rock's proposal does not provide for the substantial reconnection fees. Major funding will be required to clear the mining site of waste material and to provide infrastructure. Repairs would have to be undertaken to the mining fleet before any mining can commence. These basic expenses, being just the tip of the iceberg are not catered for in C-Rock's proposal.

57. In addition further critical difficulties with C-Rock's proposal are highlighted by the opposing parties, in particular the liquidators.

I do not intend to refer to each and every problem raised and refer to only the following:

57.1 C-Rock has failed to deal at all in its proposal with the necessary rehabilitation liability, which is estimated by the liquidators at more than R42 million and which will increase as soon as further mining operations are undertaken;

57.2 C-Rock does not disclose in its founding affidavit the amount of PCF it proposes to inject into the business rescue operation, neither its ability to do so. The liquidators maintain that their investigations have shown that at least R50 million will be required to get the mine operational again;

57.3 C-Rock has failed to explain why and how the proposed sale of diamonds in the open market will create increased income;

58.4 C-Rock has failed to provide factual information to support the conclusion that a reduced staff compliment will have a positive effect or that the mine can operate successfully with the drastically reduced employees it suggests. The liquidators state that at least 3 shifts are required per day for a 24 hour operation. Each shift requires a certain number of skilled employees. Employees ordinary work 8 days with 4 days leave. The liquidators are of the view that it would be impossible to successfully operate a fully fledged alluvial diamond mine with the number of employees suggested.

58.5 C-Rock's cash projections are not reliable since it has failed to provide historic financial information on which its estimations are based.

58.6 C-Rock has failed to disclose that should business rescue prove successful i.e. the assets of the companies exceed its liabilities, the subordinated debts of certain creditors will revive. The biggest of which is a debt exceeding R1 billion owed by Saxendrift to N10C Resources Inc.

59. C-Rock has attempted to address the difficulties raised by the liquidators in its replying affidavit. As can be expected the opposing parties immediately went on the offensive and I was urged to ignore any new matter raised in reply which should rightfully have been addressed in the founding affidavit.

60. It hardly needs mentioning that in terms of the rules of motion proceedings, an applicant is required to make his case in the founding affidavit. Save in exceptional cases, a court will not allow an applicant to make or supplement a case in a replying affidavit. The reason is obvious – the respondent would not in the normal course have the opportunity to respond to such new matter. No explanation whatsoever is given for the inclusion in the replying affidavit of matter which should have been in the

founding affidavit. Two glaring examples hereof are the take-off agreement between VWD and Ascot for the sale of diamonds to Ascot, which is alleged to have been disadvantageous to VWD and the disclosure of the amount of PCF which C-Rock proposes to provide.

61. Another well founded criticism is the inclusion in C-Rock's papers (both founding as well as replying affidavit) of lengthy annexures without identifying the specific portions on which reliance is placed. In *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1992(2) SA 279 (T) at 324 F-H it was said that:

"Regard being had to the function of affidavits, it is not open to an applicant or a respondent to simply annex to its affidavit documentation and to request the Court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof. If this were not so the essence of our established practice would be destroyed. A party would not know which case must be met."

62. Prime examples hereof are annexures "C", "D" and "E" to the founding affidavit – the founding affidavits of C-Rock in the initial applications for the liquidation of the companies, and annexure "M" to the replying affidavit – a Technical Report on the Wouterspan Alluvial Diamond Project which runs into some 124 pages, to name but a few. This is simply not permissible.

63. Mr Vorster for the liquidators has argued that I would be entitled to strike out the whole replying affidavit. He is no doubt correct, however I am inclined to adopt the approach of Harms ADP in *Van Zyl v Government of the Republic of South Africa and Others* 2008(3) SA 294 (SCA) at paragraph 46 and *"shall nevertheless have regard to the reply to the extent that it contains relevant and admissible material that impact on the merits of the case."*

64. That being said, very little has been achieved by C-Rock in its attempt to bolster its case in the replying affidavit. Its three-pronged proposal to bring about the turnaround of the companies remains speculative at best.

65. Although identifying previous employees who are willing to take up employment again, C-Rock has still not explained how the mining operations could be sustained to the extent it proposes with only 50% of its previous employees, except for the say so of Mr MJ Van Niekerk, the sole director of C-Rock and the deponent to its affidavits. He states in the replying affidavit that C-Rock knows the labour related needs of the mining operation since it designed, developed and erected VWD's mining plant, was involved and included in its mining activities from an operational perspective and had advised VWD on operational aspects on its crisis committee. I will revert to the significance of this statement in due course.

66. With regards to the proposed temporary cessation (during the course of the business rescue proceedings) of the sale of diamonds to Ascot, the liquidators have in broad terms outlined the terms of the take-off agreement with Ascot in their opposing affidavit as follows:

"34.4 The Ascot payment terms were as follows:

(a) 90% of the price offered for the diamonds would be paid within 24 hours after concluding the deal;

(b) In lieu of the remaining 10%, VWD would afford Ascot an opportunity to cut and polish the diamonds, and to sell the diamonds in the open market. Thereafter, VWD would receive 50% of the profit earned by Ascot. This amount was usually higher than the outstanding 10% of the purchase price, and resulted in additional income."

67. C-Rock attached the take-off agreement to its replying affidavit to the opposing affidavit of Ascot. Significantly the take-off agreement does not restrict the sale of VWD's diamonds only to Ascot. It provides for an arrangement whereby Ascot will have the right of first refusal on the marketing and beneficiation of all special stones i.e. stones equal to or greater than 10 carats. That upon an identification of a special stone the parties shall meet and negotiate on a market valuation and purchase price. If the parties cannot agree thereon, RDI may market such diamond independently of Ascot to an agreed third party. Prior to selling such diamond to the third party, RDI must offer such diamond back to Ascot at the third party price. Should Ascot

decline the offer, then RDI may sell the diamond to the third party.

68. The liquidators contend further in their opposing affidavit that historically Ascot has assisted VWD financially during tough times through *inter alia* a loan in 2011 and a debenture transaction in 2014 and that their investigations suggested that the relationship with Ascot has been beneficial for the companies. This was met by C-Rock in reply with a reference to a document titled *"NED Review September 2015"* wherein Rockwell supposedly confirms that VWD's diamonds were sold off to Ascot at *"persistent price under-achievement in comparison to market-based pricing, of 20-25%."* On inspection of the report referred to, the above quotation appears to refer to sales and marketing prices achieved for mines referred to as *"NJK", "R/H"* and *"S/X".* Whether any of these mines belong to VWD is not apparent. Lest my criticism of C-Rock's reference to this document, without explanation to place it in context, appears to be unnecessary nitpicking on my part, it must be remembered that Saxendrift at one stage conducted mining operations and the mines referred to in abbreviated fashion could very well have belonged to Saxendrift and not VWD. It is common cause that VWD conducted mining operations at Wouterspan, which does not appear to be any one of the mines referred to in the report. Be that as it may, C-Rock has failed to show factually or comparatively that the sale of VWD's diamonds in the open market would achieve the increased prices as alleged.

69. The issue of PCF remains a challenge. In its replying affidavit C-Rock states that it commits itself to PCF of R10 million and that the required PCF is not only available in cash but also in the form of yellow machinery and mining equipment.

C-Rock has refused to rise to the challenge by the liquidators to prove its financial ability to provide the proposed PCF. Meanwhile the deponent to Ascot's opposing affidavit, Mr BA Josselowitz states that he had been approached by a Mr Glenn Norton, a senior executive of C-Rock, during late September 2018, who informed him of C-Rocks intention to apply for a business rescue order and requested Ascot's support in putting up some of the capital required by C-Rock for PCF purposes. In return C-Rock would continue to dispose of all rough diamond production via Ascot throughout the business rescue operation. Josselowitz informed Norton that Ascot had no interest in being associated with C-Rock whereupon Norton responded by saying that he would contact other creditors or parties in an attempt to raise PCF.

70. C-Rock's Van Niekerk admitted that Norton had a conversation with Josselowitz regarding the business rescue application, but denies that the conversation was along the lines as alleged by Josselowitz. An affidavit by Norton setting out his version of the conversation was promised but no such affidavit has been forthcoming. In these circumstances I have to accept the version of Josselowitz, which reflects adversely on C-Rock's ability to provide the proposed PCF and the *bona fides* of its contention that the sale of diamonds in the open market, as

opposed to Ascot, would be beneficial to the turn-around of VWD. In any event one can only wonder how C-Rock will get the mining operations to be fully functional and profitable with PCF of R10 million when the erstwhile BRPs failed to do so with PCF of R13 million and an operational mine.

71. C-Rock's reply to the criticism levelled at its cash flow projections unfortunately does very little to allay the concerns raised. Van Niekerk states *inter alia* that C-Rock had been part of the *"reality"* that had circumscribed VWD's present circumstances from a diamond mining operational prospective and that its projections are therefore founded on reality. That C-Rock can rent the necessary yellow machines from Saxendrift or if that proves to be a problem, it has its own mining fleet which can be used in the mining operations. The environmental liability, it is alleged, is only payable on demand and in any event C-Rock proposed to rehabilitate concurrently with the mining, which is a common practice and which would reduce the financial exposure. The reconnection of the water and electricity supply would be no big problem, and so forth.

72. A further bone of contention between C-Rock and the liquidators is the wet plant. C-Rock has attached to its founding affidavit a valuation of the wet plant dated October 2016. Therein the value of the wet plant is reckoned at R119 million and is based on a completed wet plant. C-Rock which was responsible for the construction of the wet plant maintains that the plant has been completed and is operational. The erstwhile

BRPs were of the view however that significant cash injections are required to restore the plant and equipment to enable it to consistently achieve the desired mining volumes and diamond recoveries. The liquidators allege that whereas C-Rock had been contracted to construct a wet plant of at least three production lines, only the first production line has been completed and that it will require substantial sums of money to bring the wet plant into full operation.

73. Whilst it appears from its founding affidavit that C-Rock realises the need for money to be pumped into the wet plant – stating that PCF will be provided to *"kick start"* the wet plant, the replying affidavit seems to suggest that the wet plant is fully operational. C-Rock states in reply that it had completed four lines, that the erstwhile BRPs had removed one line, but that the remaining three lines were fully operational as at 8 September 2017 when the BRPs ceased all mining operations.

74. There is obviously a dispute of fact pertaining to this issue, but what is clear on their own version is that funding is required for the wet plant. The amount needed is however not canvassed in C-Rock's papers.

75. S 131(4) of the Act provides the following:

> "(4) After considering an application in terms of subsection (1), the court may–
>
> (a) make an order placing the company under supervision and commencing business rescue proceedings, if the court is satisfied that-

(i) the company is financially distressed;

(ii) the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters;

Or

(iii) it is otherwise just and equitable to do so for financial reasons,

and there is a reasonable prospect for rescuing the company; or

(b) dismissing the application together with any further necessary and appropriate order, including an order placing the company under liquidation."

(Own highlighting)

In *Oakdene Square Properties (Pty) LTD and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* [2013] 3 All SA 303 (SCA), the Supreme Court of Appeal dealt with amongst others the issue of a reasonable prospect which an applicant has to show of rescuing a company.

Brand JA states at paragraph 29 that while it is generally accepted that a reasonable prospect is a lesser requirement than the reasonable probability which was the yardstick for placing a company under judicial management in terms of the 1973 Act:

"On the other hand, 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."

76. Intrinsic to the requirement of a reasonable prospect for rescuing VWD seems to be an explanation of the circumstances pertaining to the financial failure of VWD, since a rescue proposal needs to address and rectify those circumstances. See *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments* 386 Ltd 2012(2) SA 423 (WCC) at paragraph 24. C-Rock has failed to deal in the founding affidavit with the circumstances leading to the downfall of DWD despite its director, Van Niekerk, having sat on VWD's crisis committee and executive committee during 2016, albeit, as stressed by Van Niekerk, relating purely to *"operational"* matters. In addressing C-Rocks omission to deal with the reasons for the failure of DWD, Van Niekerk states that C-Rock is a creditor at arms length of DWD, does not know the internal financial dealings of DWD and has played open cards with the court by attaching the erstwhile BRPs affidavit, which deals with the reasons for DWD's downfall.

77 Ironically, and most probably why the reasons for VWD's downfall were not specifically dealt with in the founding affidavit, two of the reasons the BRPs provide relate to C-Rock, that is, *". . . ineffective oversight of the contract miner C-Rock Mining Proprietary Limited (C-Rock) and the lack of timely completion of the Wet Plant Project."* In these circumstances it cannot in my view, be made out that C-Rock is a creditor at arms length, and cannot reasonably be expected to know the reasons for the financial predicament of VWD.

78. Standard Bank and Ascot, both substantial creditors of VWD have indicated that they will not vote in favour of the business rescue proposal put forward by C-Rock. Moreover Standard Bank has stated that it will not release any of the assets over which its perfection lies to the proposed BRP for use in the business rescue plan, nor extend overdraft facilities while business rescue operations take place.

79. In all of the above circumstances I am of the view that the application for business rescue cannot succeed. The application is ill-conceived. C-Rock has failed to place cogent evidence before court to support the existence of a reasonable prospect of business rescue and in my view relies purely on conjecture and speculation.

Costs

80. I see no reason why costs should not follow the result. However as mentioned, the liquidators and Ascot have asked that I make a separate cost order with regard to the opposition of their *locus standi.* I do not see the purpose of such an order. The *locus standi* issues were dealt with simultaneously with the merits and can have no separate cost implication.

81. Mr Vorster for the liquidators has however made submissions with regard to a punitive cost order which I intend to entertain. C-Rock has referred to the liquidators in their affidavits and even heads of argument as incompetent. The liquidators are experience professionals and such an epitaph is not only

inappropriate but also not justified. It is completely unacceptable. In addition, the extent and manner in which the liquidators' participation in this application were challenged, where they were only performing their duty in the interest of the company and the body of creditors, should not be allowed to be prejudicial for the general body of creditors in terms of costs. C-Rock has received prior warning of the cost order the liquidators intended to request.

In the circumstance the following orders are made:

a) The business rescue application is dismissed.

b) The applicant is to pay the costs of the application in the following manner:

(i) The costs of the 2nd, 3rd and 4th Respondents (the joint provisional liquidators) on the scale as between attorney and client;

(ii) The costs of Diacore South Africa (Pty) Ltd trading as Ascot Diamonds and Standard Bank of South Africa Limited on the party and party scale; and

(iii) The costs of the application to intervene by Bandeo 140 CC and Rietput Delwery CC (the intervening parties) on an opposed basis.

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CC WILLIAMS

JUDGE

For Applicant:	Adv. P Lourens De Vries Inc c/o Van de Wall Inc
For 2nd, 3rd, 4th, Respondents:	Adv J Voster Brooks & Braatveldt Inc c/o Adrian Horwitz & Associates
For Ascot Diamonds:	Adv L M Spiller Haarhoffs Inc
For Standard Bank:	Adv S Tsangariakis Hugo Mathewson & Oosthuizen
For the intervening parties:	Adv AM Heystek Japie Van Zyl Attorneys c/o Roux Welgemoed & Du Plooy