IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

Reportable

Case no:2026-104756

In the matter between:

ZIZWE OPEN CAST MINING (PTY) LTD	**APPLICANT**
and	
LETHABO MINERALS (PTY) LTD	**FIRST RESPONDENT**
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	**SECOND RESPONDENT**

Coram: Wessels AJ

Heard: 29 May 2026

Delivered: This judgment was handed down electronically, circulated to the parties' representatives via email, uploaded to CaseLines, and released to SAFLII.

The date and time for the handing down of the judgment are deemed to be 14h00 on 15 June 2026.

Summary: Companies — Business rescue — Application in terms of s 131(1) of the Companies Act 71 of 2008 — Commencement of proceedings — When s 131 application 'made' — Application made when issued, served on company and Commission, and affected persons notified in prescribed manner — Meaning of 'applies' in s 132(1)(b) synonymous with 'made' in s 131(6) and 'apply' in s 131(1) — All three phrases carrying same meaning — *Lutchman NO v African Global Holdings (Pty) Ltd* [2022] ZASCA 66 applied.

Companies — Business rescue — Voluntary resolution in terms of s 129 — Board adopting resolution while court-driven proceedings pending — Whether board divested of authority — Section 129(2A) confined to liquidation context — Board not expressly divested of authority by mere filing of s 131 application — However, s 132(1) architecturally providing for single commencement event only — Word 'or' separating triggering events disclosing legislative intention that voluntary and court-driven routes mutually exclusive — Two competing business rescue processes incapable of co-existing in respect of same company simultaneously.

Companies — Business rescue — Voluntary resolution — Setting aside — Just and equitable ground — Section 130(5)(a)(ii) — Resolution adopted without disclosure on eve of hearing — Board fully aware of pending s 131 proceedings — Resolution adopted for ulterior purpose of retaining control over identity of business rescue practitioner — Not adopted in genuine pursuit of objects of business rescue — Directors not acting in good faith or for proper purpose as required by s 76 — Just and equitable to set aside — *Panamo Properties (Pty) Ltd v Nel NO* [2015] ZASCA 76 applied.

Companies — Business rescue — Voluntary resolution — Filing — Section 129(2)(b) — CIPC Practice Note 3 of 2021 having status of binding subordinate legislation — Mere submission of documents to CIPC not constituting filing — Filing occurring only upon confirmation by CIPC team member — Resolution having no force or effect prior to such confirmation.

Companies — Business rescue — Abuse of process — Voluntary business rescue mechanism susceptible to abuse — Section 129 not a tactical instrument available to directors for purposes other than genuine rescue — Court having inherent jurisdiction to protect its own process — Ambushing court and opposing party with documents during hearing constituting abuse.

Companies — Business rescue — Reasonable prospects of rescue — Standard of proof — More than arguable possibility but less than reasonable probability — *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* [2013] ZASCA 68 and *Newcity Group (Pty) Ltd v Pellow NO* [2014] ZASCA 162 — Two decisions complementary authorities — Oakdene foundational; Newcity confirming court exercises value judgment in wide sense on primary facts — Neither decision displacing other.

Companies — Business rescue — Jurisdiction — Jurisdiction determined by company's registered address — Non-exclusive jurisdiction clause in agreement not preventing applicant from approaching court of competent jurisdiction — Fabricated composite quotation attributed to underlying agreements advanced in support of jurisdiction point — Credibility of first respondent adversely affected.

Companies — Business rescue — Costs — Punitive costs order warranted by conduct of board — Practical futility where company placed in business rescue and costs would rank as pre-commencement claim against distressed estate — Costs ordered as costs in the business rescue.

JUDGMENT

Wessels AJ

Introduction

[1] Before this Court is an application brought in terms of s 131(1) of the Companies Act [1] ('the Act') by the applicant, a creditor of the first respondent, a financially distressed chrome mining company, for an order placing that company under supervision and commencing business rescue proceedings ('s 131 application').

[2] The matter came before me for argument on 29 May 2026. What was envisaged as a straightforward hearing of a business rescue application turned, by reason of the extraordinary conduct of the first respondent on the eve of and during the hearing itself, into two avenues to business rescue, one court-driven and one voluntary, with the first respondent contending that a last-minute voluntary resolution it had taken and filed with the second respondent ("CIPC") rendered the s 131 application moot.

Background

[3] The applicant is an open-cast mining contractor operating in the North West, Limpopo and Mpumalanga provinces. The first respondent is the holder of a mining right in respect of the Boshoek Chrome Mine near Rustenburg in the

[1] Companies Act 71 of 2008.

North West Province ('the mine'). The second respondent is cited for its interest in the proceedings, against whom no substantive relief is sought.

[4] The applicant seeks the following order: that the first respondent be placed under supervision and that business rescue proceedings be commenced in terms of s 131(4)(a) of the Act, the appointment of Mr Johan van Greunen of Van Greunen & Associates Inc. as interim business rescue practitioner ("interim BRP"), subject to ratification by the holders of a majority of the independent creditors' voting interests at the first meeting of creditors; and an order that a resolution adopted by the board of the first respondent on 27 May 2026, purporting to place the first respondent in voluntary business rescue in terms of s 129 of the Act, be declared a nullity.

[5] The relationship between the applicant and the first respondent originated in a competitive tender process conducted in early 2024. The applicant was awarded a contract to provide open-cast mining services to the first respondent, comprising pit services, ore removal, crushing and screening at the mine. A written Contract Mining Agreement was concluded and implemented from approximately August 2024. Additionally, an Escrow Agreement was concluded between the applicant, the first respondent and an escrow agent dated 26 September 2024. In terms of the Escrow Agreement, all proceeds from the sale of chrome ore were to be paid into a transparent escrow account and distributed by the escrow agent in accordance with an agreed-upon priority order. The applicant was entitled to insight into all transactions in the escrow account.

[6] The mining right, as described in the applicant's founding affidavit, is the proverbial goose that lays the golden eggs. In respect of the mine, it is the cornerstone of the first respondent's business. The first respondent does not itself

conduct physical mining operations but depends on contractors, such as the applicant, to generate income from the right.

[7] From the outset, the mining operations were plagued by adverse circumstances. When the applicant commenced operations, the geological conditions proved more difficult than anticipated, increasing mining costs and the quality of the chrome ore was lower than projected. In addition, the international price for chrome concentrates, which had been approximately US$ 300 per tonne at the commencement of operations in early 2024, plummeted to approximately US$ 200 per tonne towards the end of 2024, which represents a decline of approximately 33%.

[8] As a result, the first respondent began to experience financial strain. It failed to pay the applicant timeously, and the accumulation of arrear debt led to prolonged negotiations between the parties. By June 2025, the first respondent's total indebtedness to the applicant was R94,717,099. In settlement of these amounts, the parties entered into two agreements. Firstly, a Cancellation Agreement dated approximately 27 June 2025, in terms of which the mining agreement was cancelled and first respondent acknowledged indebtedness of R 56,435,373.40 ('the Contract Debt'). Secondly, a Settlement Agreement in terms of which the first respondent acknowledged a further liability of R 38,281,725.60 (the 'Additional Claim') arising from the unforeseen ground conditions. An additional loan of R 5,000,000 was advanced by the applicant to the first respondent on 27 June 2025. The last payment received by the applicant from the first respondent was R11,150,000 on 8 October 2025. In breach of these agreements, no further payments have been made by the first respondent. The total outstanding indebtedness as at the date of the hearing exceeded R43 000 000 (comprising the unpaid balance of the Contract Debt and the entirety of the

Additional Claim). All four of these agreements concluded between the parties will collectively be referred to as 'the underlying agreements'.

[9] From approximately 15 April 2026, the applicant began to discover, through independent investigation, that the first respondent's non-payment was not an isolated cash-flow constraint, but part of a widespread pattern of defaults. Essential service providers had withdrawn from the mine and the first respondent had been placed in the process of deregistration by CIPC on 17 April 2026, evidently for failure to file annual returns. The first respondent's management, who had consistently assured the applicant that the situation was under control, ceased engaging with the applicant entirely.

[10] On 28 April 2026, the applicant formally placed the first respondent on terms, demanding that it either cease trading under insolvent circumstances, voluntarily enter business rescue, or face litigation. This demand was ignored, and this application was filed with the Registrar of this Court on 8 May 2026. Service on all affected persons, including both directors of the first respondent, was effected by 11 May 2026 at the latest. The importance of these dates will be addressed later in this judgment.

The first hearing

[11] The matter was initially enrolled for hearing on 22 May 2026. At that hearing, the first respondent indicated that it required time to file a proper answering affidavit. The matter was accordingly postponed to 29 May 2026 for the filing of the answering and replying affidavits and argument.

[12] The answering affidavit was delivered on 22 May 2026 and was deposed to by Mr Lesego Manzini ('Mr Manzini'), the CEO and a director of the first

respondent. What is immediately apparent from the answering affidavit is what it does not address. The deponent does not deny that the first respondent is in financial distress and does not dispute the quantum or validity of the debt acknowledged in the Cancellation and Settlement Agreements and provides no financial statements, no management accounts, no indication of the first respondent's total creditor base, or any positive evidence of solvency or of a viable path to recovery. Importantly, the answering affidavit does not challenge the qualifications or independence of the proposed interim BRP and makes no mention of any intention to place the first respondent in voluntary business rescue.

[13] The answering affidavit confines itself to three points in limine being that the application lacks urgency or that any urgency is self-created, that the jurisdiction clauses in the underlying agreements concluded between the parties confer exclusive jurisdiction on the Gauteng Division of the High Court; and that the arbitration clauses in the agreements concluded between the parties, require the parties to exhaust the contractually agreed dispute resolution mechanisms before approaching a court. The first respondent confirmed the operational stability of its operations, which it dealt with in a single sentence.

The hearing of 29 May 2026

[14] What occurred during the hearing of 29 May 2026 is, in my experience, unusual. I set it out chronologically because the sequence is directly applicable to the issues I must decide. Shortly before the commencement of this hearing, the first respondent filed a notice in terms of Rule 6(5)(d)(iii) of the Uniform Rules of Court purporting to raise a question of law only, which in itself was an unusual procedural step, as this notice was filed despite the first respondent already having filed an answering affidavit. This notice disclosed, for the first time in these proceedings, that the board of the first respondent had adopted a written resolution

on 27 May 2026, two days before this hearing, placing the first respondent in voluntary business rescue in terms of s 129 of the Act. The notice stated that the requisite form (Form CoR 123.1) had been duly filed with the CIPC and that business rescue proceedings had commenced by operation of law. On that basis, it was submitted that the s 131 application had become moot.

[15] Even during the hearing, the first respondent's attorneys continually uploaded documents to the CaseLines platform. These included the resolution itself, the purported sworn statement of Mr Manzini in support of the CIPC application and a CIPC acknowledgement of receipt. On a brief perusal of these documents during the hearing, counsel for the applicant identified several apparent irregularities, inter alia, the sworn statement bore typewritten rather than handwritten initials on its pages. It appeared to bear a computer-generated signature on the final page rather than a handwritten one, and to be missing or deficient in certain required documents.

[16] The CIPC report generated at 13h50 on 29 May 2026, ten minutes before the hearing commenced, reflected the first respondent's status as 'IN BUSINESS.' It did not reflect any business rescue status.

[17] I granted the parties an adjournment of twenty minutes during the hearing to allow the first respondent's counsel to read the two authorities cited by counsel for the applicant on the question of when a s 131 application is to be regarded as 'made' for purposes of s 132 of the Act. When the argument resumed, the first respondent's counsel announced that he had just received notification via WhatsApp message and that CIPC had formally confirmed the acceptance of the filing and that the first respondent's status had been changed to 'BUSINESS RESCUE.' This was confirmed by a Certificate of Confirmation issued by the Commissioner of CIPC and subsequently uploaded to CaseLines, bearing a

timestamp of 16h05 (on 29 May 2026) and recording an effective date of commencement of business rescue proceedings of 29 May 2026.

[18] The CaseLines digital case management platform is a useful administrative tool for pre-hearing preparation, but it lends itself to abuse when it remains open during the course of a hearing. Unlike a document physically handed up in court, which is a visible act, subject to a court's discretion to refuse it, an electronic upload happens quietly in the background, without any formal step and without necessarily drawing the attention of the Court or opposing counsel. The party on the receiving end simply does not have the time to properly consider, verify, or respond to material introduced in this way. Applicant's counsel was left having to deal with documents on the spot whose authenticity had not been tested and whose implications had not been properly thought through. This is fundamentally at odds with the principle that each party must know the case it has to meet. The practical solution is that once a matter is called, CaseLines should be frozen, and any document a party wishes to place before the Court thereafter should require leave, with the opposing party given a fair opportunity to respond. It should not, however, require a court to freeze the platform to prevent this. Counsel appearing before a court is expected to know that documents may not simply be introduced during a hearing without leave, regardless of whether the electronic document system technically permits it. That obligation rests on counsel independently of any administrative control. A document uploaded without leave after the matter has been called is not properly before the Court and may be disregarded.

[19] It is accordingly common cause that by the time judgment was reserved, the CIPC had formally changed the first respondent's status to 'BUSINESS RESCUE' pursuant to the s 129 filing. The over-arching issue for this Court to determine is what legal consequences follow from this sequence of events. I now turn to deal with the points in limine raised by the first respondent.

Urgency

[20] The timeworn test for urgency requires the applicant to show that it could not obtain substantial redress in the ordinary course. The first respondent is, on any objective reading of the evidence, a company in acute financial distress. Its main asset, the mining right, is dependent on the continued legal existence and operational activity of the first respondent. The current factual situation is that service providers have withdrawn from the site, the first respondent is in the process of deregistration and a safety suspension in terms of s 54 of the Mine Health and Safety Act[2] has been in force since January 2026, halting full operations. These issues culminated in Mr Manzini admitting to creditors, in writing, to cash flow strain.

[21] In these circumstances, a delay of several months for a hearing in the ordinary course would render the remedy of business rescue redundant. By definition, a financially distressed company's prospects of rescue diminish with every passing week. As held in *Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd and Others*[3] it follows axiomatically that business rescue applications should be treated with the required urgency. Once the business is permitted to collapse entirely, no business rescue practitioner can restore it to viability. The allegation of self-created urgency is without merit. The applicant acted with reasonable expedition once it became aware, from approximately 15 April 2026, of the true extent of the first respondent's financial distress and the widespread nature of its defaults. It placed the first respondent on terms on 28 April 2026. The application was launched and served within ten days. An applicant who first exhausts reasonable extra-curial steps before approaching a

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[2] Mine Health and Safety Act 29 of 1996.

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

court cannot be accused of creating its own urgency, especially in the expedient manner in which the applicant did so. The applicant was accordingly entitled to bring the application on an urgent basis, and I am satisfied that urgency has been established.

Jurisdiction

[22] The first respondent advanced two distinct grounds regarding this Court's jurisdiction. Firstly, this Court lacks territorial jurisdiction because, on the respondent's case, SMT does not reside or carry on business within this Court's area of jurisdiction and the underlying disputes have their seat in Gauteng. This point borders on the frivolous. The territorial jurisdiction objection ignores that the first respondent's registered address is situated within this Court's territorial jurisdiction in the North West Province. The Act vests jurisdiction in business rescue applications in the High Court having jurisdiction over the company concerned. As held in *Sibakhulu Construction (Pty) Ltd v Wedgewood Village Golf Estate (Pty) Ltd (Nedbank Ltd Intervening)*[4], jurisdiction for purposes of company status proceedings, including business rescue and winding-up, is determined by the company's registered address. The first respondent's registered address is 12 Stone Ridge Estate, Rockcliff Estate, Cashan, Rustenburg, North West, which falls squarely within this Court's territorial jurisdiction.

[23] Secondly, that the parties had contractually submitted to the exclusive jurisdiction of the Gauteng Division, Pretoria, to which extent the applicant was not entitled to approach this Court. The answering affidavit purports to quote verbatim the jurisdictional clauses said to be present in all four of the underlying

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[4] *Sibakhulu Construction (Pty) Ltd v Wedgewood Village Golf Country Estate* (Pty) Ltd [2011] ZAWCHC 439 para 23.

agreements or in any one of them. The quoted passage, as contained in the answering affidavit, states that:

'The parties have agreed, in writing and for valuable consideration, that disputes arising from or in connection with these agreements which plainly includes the alleged debt now relied upon by the applicant shall be determined by the High Court of Gauteng in its Pretoria seat, and that the applicant is not entitled to resile from this agreement by electing to approach a different division of the High Court.'

[24] The replying affidavit characterises this quotation, bluntly, as a fabrication. I have had regard to the content of the underlying agreements and I agree with the applicant's contention on the following basis. The Contract Mining Agreement provides that the parties irrevocably and unconditionally consent to the *non-exclusive* jurisdiction of the High Court, Gauteng Division, in regard to all matters arising from that agreement. The Escrow Agreement similarly provides that the parties agree to the *non-exclusive* jurisdiction of the High Court, Gauteng Division, to settle any dispute or claim arising out of or in connection with that agreement. The operative agreements, the Cancellation Agreement and the Settlement Agreement, contain no reference to any particular division of the High Court at all with regard to all matters arising from those agreements. None of the four agreements uses the term 'exclusive' and none of them contains any prohibition on the applicant approaching a different division. The first respondent's aforementioned quotation in the answering affidavit is therefore manifestly false. This relates directly to the credibility of the first respondent and to the assessment of bona fides that pervades this judgment. Consequently, this point is dismissed.

Arbitration

[25] The first respondent alleges that the issue before this Court falls within the ambit of the dispute resolution clause in the agreements concluded between the parties. This point is wholly misconceived as the application does not seek to enforce any of the underlying agreements between the parties. No contractual dispute has been declared. The relief sought in this application, the placement of the first respondent under supervision and the commencement of business rescue proceedings, is the exercise of a statutory right conferred on affected persons by s 131(1) of the Act. It is trite that no arbitrator has the power to place a company in business rescue. The arbitration clauses in the underlying agreements simply have no application to a statutory business rescue application. I dismiss this point in limine.

Financial distress

[26] A company is financially distressed, as defined in s 128(1)(f) of the Act, if it appears reasonably unlikely that it will be able to pay all of its debts as they become due and payable within the immediately ensuing six months, or if it appears reasonably likely that the company will become insolvent within the immediately ensuing six months. The evidence establishing financial distress is overwhelming and, to a great extent, comes from the first respondent itself. The first respondent owes the applicant an acknowledged, documented, and undisputed debt in excess of R 43 million. The last payment by the first respondent was made on 8 October 2025 and no payment has been made in more than seven months. Mr Manzini's letter to creditors on 12 May 2026 acknowledged a temporary strain on its cash flow and its ability to meet current payment obligations in the ordinary course of business and requested a three-month moratorium. This is, as counsel for the applicant correctly submitted, a

textbook acknowledgement of commercial insolvency. The s 54 suspension notice under the Mine Health and Safety Act[5] has been in force since January 2026, halting full mining operations. It is important to note that essential service providers have withdrawn from the mining site, and the first respondent is in the process of being deregistered by the CIPC for failure to file annual returns. The answering affidavit raises no defence to financial distress.

[27] By the time of this hearing, the first respondent's own board had adopted a resolution placing the company in business rescue, which is an implicit acknowledgement that the first respondent is financially distressed and that there are reasonable prospects of its rescue. Section 129(1)(a) of the Act requires the board to have reasonable grounds to believe that the company is financially distressed as a precondition for adopting such a resolution. The board, therefore, conceded financial distress by its own conduct.

Reasonable prospects of rescue

[28] Section 131(1) and (4) of the Act reads as follows:

'(1) Unless a company has adopted a resolution contemplated in section 129, an affected person may apply to a court at any time for an order placing the company under supervision and commencing business rescue proceedings.

...

(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;

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[5] Mine Health and Safety Act 29 of 1996.

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.'

[29] The standard of proof for a reasonable prospect under s 131(4)(a) of the Act was established by the Supreme Court of Appeal ('SCA') in *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* [6]. The SCA held that the standard of a reasonable prospect is:

'a lesser requirement than the "reasonable probability" which was the yardstick for placing a company under judicial management … 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.'

[30] The SCA in *Oakdene* further confirmed that an applicant is not required to submit a detailed business rescue plan, as that is the domain of the BRP after appointment. A solid evidentiary basis is necessary for a court to objectively evaluate whether the goal of the business rescue can be attained, to which end vague allegations do not suffice. Thereafter, in *Newcity Group (Pty) Ltd v Pellow NO and Others*[7], the SCA revisited the standard when it held as follows:

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

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[6] *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2013 (4) SA 539 (SCA) para 29.

[7] *Newcity Group (Pty) Limited v Pellow N.O. and Others* [2014] ZASCA 162 para 15.

deciding that question, the court exercises a discretion in the wide sense – it makes a value judgment …'

[31] *Newcity* confirmed the principle laid down in *Oakdene* that the standard requires more than an 'arguable possibility' but less than a 'reasonable probability', based on reasonable grounds established on the papers[8]. Counsel for the applicant relied primarily on *Newcity* as the latest SCA authority and invited me to follow it. That submission is correct as a matter of chronological sequence, but has to be qualified. *Newcity* does not displace *Oakdene*. The two decisions stand as complementary authorities. *Oakdene* remains the authoritative judgment on the threshold standard, defining the range between arguable possibility and reasonable probability, the necessity of a solid evidential basis, and the dual objectives of business rescue. *Newcity* confirms and refines the inquiry by characterising a court's function as the exercise of a wide discretion in the form of a value judgment on the primary facts placed before it. The correct approach, to my mind, is to apply both authorities together, not to treat the latter as superseding the earlier, which is the approach followed in this judgment.

[32] In reaching a conclusion on this issue, I rely on the following facts: the international chrome price, having fallen to approximately US$ 200 per tonne in late 2024, has recovered to above US$ 250 per tonne, a level at which the applicant's evidence establishes that profitable production at the mine is achievable; the mine has intact, extractable reserves and is not exhausted; the causes of the first respondent's financial distress are, correctible as governance failures and operational inefficiencies are the matters that a competent BRP is equipped to address; the applicant, a party with firsthand operational experience of the mine over fourteen months, has stated its willingness to return to site and provide start-up capital under a structured business rescue structure; the statutory

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[8] *Ibid* fn5, para 16.

moratorium in terms of s 133 of the Act will stop the piecemeal erosion of the first respondent's operational capacity by individual creditors, which is already underway; and third-party service providers, Sandton Plant Hire and LMJ Projects, have indicated in principle their willingness to return to site under BRP supervision. Measured against the standard set by *Oakdene* and *Newcity*, I am satisfied that reasonable prospects of rescue are established.

[33] On the question of business rescue producing a better outcome for creditors than liquidation, the answer is clear. In terms of s 56(d) of the Mineral and Petroleum Resources Development Act[9], a mining right lapses upon the holder's liquidation. The first respondent's mining right is its only material asset. Liquidation would extinguish the mining right, along with the company's sole income-generating asset and the only meaningful source of value for creditors. As both counsel acknowledged in argument (one of the few matters on which they agreed), liquidation would be commercially catastrophic for all stakeholders. Business rescue is not merely preferable to liquidation, it is the only route that may preserve any prospect of value for creditors.

The s 129 resolution

[34] The first respondent's main submission is that due to the adoption of the s 129 voluntary business rescue resolution and its subsequent formal acceptance by CIPC (during the course of the hearing), the s 131 application has been rendered moot. Both routes, it is argued, lead to the same destination, namely, business rescue. Since the voluntary process is already underway and has been formally confirmed, any court order would produce no additional legal effect. I cannot accept this submission. The question of mootness requires a court to determine

[9] Mineral and Petroleum Resources Development Act 28 of 2002.

whether there remains a live dispute between the parties and whether any order I might make would have practical effect. The application remains alive and the order sought is not academic, for the reasons that follow. The answer to this question lies in interpreting the relevant sections of the Act. The approach to interpreting legislation, as established in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[10] is defined as a single, objective, and unitary process that attributes meaning to words by considering language, context, and purpose together from the outset. As a starting point, the provisions of s 132 of the Act have to be considered. It reads as follows:

(1) Business rescue proceedings begin when-

(a) the company-

(i) files a resolution to place itself under supervision in terms of section 129(3); or

(ii) applies to the court for consent to file a resolution in terms of section 129(5)(b);

(b) **an affected person applies to the court** for an order placing the company under supervision in terms of section 131(1);

…(emphasis added)

[35] It is plain that s 132(1) of the Act provides that business rescue proceedings begin when the company files a resolution in terms of s 129, or when a person applies to a court for an order placing the company under supervision in terms of s 131 (1).

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[10] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

[36] The applicant argues that the triggering event is when the s 131 application is 'made'. In relation to when a business rescue application has been made, the applicant referred me to *Taboo Trading 232 (Pty) Ltd v Pro-Rec Scrap Metal and Others*[11], wherein the court held that a s 131 application is made once it has been lodged with the Registrar, issued and a copy served on CIPC and all affected persons. In *Blue Star Holdings (Pty) Ltd v West Coast Oyster Growers CC* [12], to which the applicant also referred me, the court adopted a slightly more lenient formulation, holding that the application is made when lodged with the Registrar for issuing.

[37] However, the SCA ended this disparity in *Lutchman N.O. and Others v African Global Holdings (Pty) Ltd and Others; African Global Holdings (Pty) Ltd and Others v Lutchman N.O. and Others*[13]. The SCA endorsed the characterisation of *Taboo* of the service and notification requirements as substantive and not merely procedural and that they are an integral part of making an application for an order in terms of s 131(1). Applying this standard, the s 131 application was made at the latest by 11 May 2026, when service on all affected persons was complete. However, *Lutchman* was decided within the realm of s 131(6), which provides for the suspension of liquidation proceedings from the time a s131 application is made.

[38] Section 132(1)(b) defines the start of business rescue proceedings as when 'an affected person **applies** to the court' (emphasis added). However, the meaning of the operative term, for purposes of this matter, in s 132(1)(b) is 'applies', which differs from that of 'made'. *Lutchman*: the SCA treated 'applies' in s 132(1)(b) as synonymous with 'made' in s 131(6) and 'apply' in s 131(1),

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[11] *Taboo Trading 232 (Pty) Ltd v Pro-Rec Scrap Metal and Others* 2013 (6) SA 141 (KZN).
[12] *Blue Star Holdings (Pty) Ltd v West Coast Oyster Growers CC* 2013 (6) SA 540 (WCC).
[13] *Lutchman N.O. and Others v African Global Holdings (Pty) Ltd and Others; African Global Holdings (Pty) Ltd and Others v Lutchman N.O. and Others* 2022 (4) SA 529 (SCA) para 39.

and proceeded to interpret all three phrases as carrying the same meaning. The conclusion, then, is that issuing, service on the company and the CIPC and notification of affected persons apply uniformly across all three subsections. When applied to the facts of this matter, it draws the ineluctable conclusion that the s 131 application had already been made by the time the board of the first respondent took the s 129 resolution.

[39] The applicant argues that when the s 131 application was made, the first respondent's board was stripped of its powers to pass a voluntary business rescue resolution. The first respondent's counsel's argument to the contrary is that no express provision of the Act divests the board of a company of its powers to pass any resolutions. I could not find any provision in the Act that expressly divests the board of its power to pass a voluntary business rescue resolution the moment an s 131 application has been made, and I cannot align myself with the applicant's contention.

[40] That is, however, not the end of the matter. Chapter 6 of the Act creates a single, coherent system for rescuing a company in financial distress. The moment a s 131 application is filed, s 132(1)(b) fixes a commencement date by operation of law. That date is no technicality, it represents the inception of the entire business rescue regime to the extent that the moratorium, the practitioner's authority, and the rights of creditors all flow from it. The Act does not contemplate that a board of directors, fully aware that a court-driven rescue process has already been set in motion, can simply pass its own resolution to start a parallel voluntary process with a different commencement date and a different practitioner of its own choosing. Two competing business rescue processes cannot reasonably co-exist in respect of the same company at the same time. The coherence of Chapter 6 does not permit it.

[41] Even if I am wrong on the question of whether s 129 applies to this matter, I am in any event satisfied, for the reasons set out below, that the resolution is invalid on other grounds and that the application is not moot.

The filing requirement and the CIPC Practice Note

[42] Section 129(2)(b) of the Act provides that a board resolution to place a company in voluntary business rescue 'has no force or effect until it has been filed with the Commission.' The word 'filed' is of some moment in the context of this matter. CIPC Practice Note 3 of 2021 was issued in terms of regulation 4 of the Companies Regulations, 2011 ('the Practice Note'), which has the status of binding subordinate legislation. It states:

'The date of filing or effective date of commencement of business rescue proceedings will be the date the relevant information was confirmed as correct by a team member of the CIPC, once submitted via New E-Services. Therefore, mere submission of the information and required documents, does not constitute filing. CIPC will confirm the commencement of business rescue proceedings and the effective date of the proceedings, upon the issuing of a confirmation letter …'

[43] The Practice Note provides a definition of 'filing' for purposes of s 129(2)(b). Mere submission to CIPC, even if a reference number is allocated, does not constitute filing. Filing occurs only when a CIPC team member confirms the documents as correct and issues a confirmation letter. The CIPC report generated at 13h50 on 29 May 2026, ten minutes before the hearing commenced, reflected the first respondent's status as 'IN BUSINESS'. This is objective, evidence that no filing had occurred as at the commencement of the hearing. The acknowledgement of receipt uploaded during the hearing expressly stated that 'Your reworked application has been successfully received. The application awaits approval'. This was not a confirmation of filing, rather, it confirmed that

the application had not yet been filed. On any proper reading of the Practice Note, the resolution therefore had, at the commencement of argument, no force or effect.

[44] The CIPC Certificate of Confirmation, eventually uploaded by the first respondent's attorneys during the hearing, records an effective date of commencement of voluntary business rescue proceedings of 29 May 2026, a date that falls after the commencement of these proceedings and after the Court was already seized with the matter. This does not eliminate the question of what consequences flow from the s 129 process having been initiated in these circumstances, it merely confirms that the voluntary process was not complete as at the commencement of the hearing.

Abuse of process

[45] Even if I were satisfied that the voluntary process was competent, I would still be entitled and obliged to consider whether the manner in which the first respondent sought to employ that process constitutes an abuse of the process of this Court. The relevant facts are as follows. The board of the first respondent had been continuously aware of the pending s 131 proceedings since 8 May 2026. The matter was postponed on 22 May 2026, on the basis that the first respondent required time to file a proper answering affidavit. The answering affidavit filed on 22 May 2026 contains no mention of any intention to pursue voluntary business rescue, and no objection to the proposed BRP. The replying affidavit was filed on 26 May 2026. The board resolution was adopted on 27 May 2026, two days before the hearing of the application. No disclosure was made to the applicant or to this Court of the intended resolution. The applicant learned of the resolution only at the commencement of the hearing.

[46] There is no *bona fide* explanation for this sequence of events. The inference is irresistible that the resolution was adopted not as a genuine expression of the board's commitment to rescuing the first respondent in line with the standards required of a director of a company as provided for in s 76 of the Act. Section 76 of the Act requires every director to act in good faith, for a proper purpose, and in the best interests of the company. To take resolutions as a tactical manoeuvre to retain control of the business rescue process, specifically control over the identity of the business rescue practitioner, and to derail the court-driven proceedings, is not for a proper purpose and is not in the best interests of the company. Had the board genuinely wished to pursue voluntary business rescue in the interests of the company and its creditors, it would have done so when first placed on terms by the applicant on 28 April 2026, or genuinely wished to object against the appointment of Mr van Greunen as interim BRP, it would have done so in its answering affidavit. At each of those moments, it remained silent.

[47] It had been recognised in, *inter alia*[14], *Panamo Properties (Pty) Ltd and Another v Nel N.O. and Others* [15] that the voluntary business rescue mechanism under s 129 is susceptible to abuse and that it is not a tactical instrument available to directors for purposes other than the genuine rescue of a financially distressed company. This Court has an inherent jurisdiction to protect its own process from abuse. The conduct of the first respondent's board in this matter in deliberately withholding the resolution until the eve of the hearing, ambushing the applicant and this Court with documents during the hearing itself, constitutes an abuse of process that this Court cannot countenance.

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[14] See *Lutchman supra.*

[15] *Panamo Properties (Pty) Ltd and Anotherv Nel N.O. and Others* [2015] ZASCA 76; 2015 (5) SA63 (SCA) para 34.

[48] The principle that business rescue mechanisms may not be deployed as a tactical instrument is not novel to this Court. In *Liebenberg and Another v Tariomix (Pty) Ltd t/a Forever Diamonds and Gold (In Liquidation) and Others*[16], Petersen J dismissed an urgent application that sought, on the basis of a purported pending business rescue application, to interdict provisional liquidators from performing their statutory duties and to suspend all liquidation proceedings. The Court held that the business rescue application had not been properly 'made' within the meaning of s 131(6) of the Act because the service and notification requirements of s 131(2) had not been complied with, consistent with the standard set by the SCA in *Lutchman*. Petersen J further found that even a properly made business rescue application would not have suspended the powers and duties of the provisional liquidators, whose function of securing assets for the benefit of the body of creditors was not among the liquidation proceedings capable of suspension. The Court in that matter, as in this one, was confronted with a business rescue mechanism that had been invoked not in genuine pursuit of the statutory objects of rehabilitation, but as a device to obstruct proceedings already lawfully underway. That this Court has consistently declined to permit such conduct is a consideration that weighs in favour of the relief sought by the applicant in the present matter.

The declaratory relief

[49] The question whether the resolution was validly adopted is a live issue. It is not rendered academic by the subsequent CIPC confirmation. The applicant has applied, by way of an oral application brought during argument, for a declaratory order that the resolution of 27 May 2026 be declared a nullity.

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[16] *Liebenberg and Another v Tariomix (Pty) Ltd t/a Forever Diamonds and Gold (In Liquidation) and Others* [2024] ZANWHC 166.

[50] Although I have found that the filing of the s131 application did not expressly divest the board of its authority to adopt a voluntary business rescue resolution, that finding does not assist the first respondent. The applicant is an affected person entitled in terms of s 130(1) to apply for an order setting aside the resolution. The power of a court to grant such an order is set out in s 130(5)(a), which provides that when considering an application in terms of ss (1)(a) to set aside the company's resolution, the court may set aside the resolution on any grounds set out in subsection (1), which grounds are not applicable in the present application. Alternatively, in terms of s 130(5)(a)(ii), if, having regard to all of the evidence, a resolution may be set aside if the court considers that it is otherwise just and equitable to do so. It is the latter ground upon which I rely. As the Supreme Court of Appeal confirmed in *Panamo Properties* [17], that ground exists to preclude litigants from exploiting the business rescue machinery to subvert it or secure advantages not contemplated by its purpose. On the facts already traversed, the just and equitable onus is satisfied.

[51] The resolution was adopted without disclosure, on the eve of a hearing, by a board fully aware of the pending proceedings, for the ulterior purpose of retaining control of the practitioner appointment. It was not adopted in a genuine pursuit of the objectives of business rescue. No director who acts for such a purpose, acts in the best interests of the company or its creditors as required by s 76 of the Act and it is just and equitable that the resolution be set aside. Resultantly, I order that the resolution of 27 May 2026 is set aside. Business rescue proceedings under the s 129 process accordingly terminate by operation of s 132(2)(a)(i) upon the granting of this order.

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[17] *Ibid* fn 15 para 34.

[52] The applicant proposes Mr Johan van Greunen of Van Greunen & Associates Inc. as interim BRP. The papers confirm, *inter alia*, that Mr van Greunen is registered with CIPC as a senior business rescue practitioner and has more than ten years of experience as a business rescue practitioner. Furthermore, he is a member in good standing of the South African Restructuring and Insolvency Practitioners' Association (SARIPA) and holds a current Fidelity Fund certificate from the Legal Practice Council.

[53] Counsel for the first respondent submitted in oral argument that Mr van Greunen lacks the specialised mining-industry expertise required for a business rescue in a chrome mining context, and proposed the first respondent's preferred candidate as a more suitable practitioner. This submission is rejected for several reasons: Firstly, the objection was raised for the first time in oral argument on the day of the hearing. It is not raised in the answering affidavit, nor is it supported by any affidavit from the first respondent and to that extent, it remains a bare submission, unsupported by any evidence. Secondly, *ex lege*, this Court makes only an interim appointment under s 131 of the Act. That appointment is expressly subject to ratification by the holders of a majority of the independent creditors' voting interests at the first meeting of creditors contemplated in s 147 of the Act. The creditors, as a body, not the company's board, have the ultimate say on the practitioner's continued appointment. As was held in *Swart v Beagles Run Investments 25 (Pty) Ltd and Others*[18] that where there are differences of opinion between the company and its creditors in business rescue proceedings, the interests of the creditors should carry the day. The board's preferred choice of practitioner is not a relevant consideration at this stage. Thirdly, in the particular circumstances of this matter, where the very motivation for the first respondent's last-minute voluntary resolution appears to have been to install a practitioner of

[18] *Swart v Beagles Run Investments 25 (Pty) Ltd and Others* 2011 (5) SA 422 (GNP) para 41.

its own choosing, this Court is especially disinclined to favour the board's preferred candidate over the qualified and consenting practitioner properly proposed by the applicant.

[54] I am satisfied that Mr van Greunen meets all requirements of s 138 of the Act and that his appointment as interim BRP is appropriate.

Costs

[55] I have already remarked on the conduct of the first respondent's board in these proceedings and I do not propose to repeat those observations. It suffices to say that the conduct traversed above in ordinary circumstances warrants a punitive costs order as between attorney and client. The difficulty, however, is practical as the first respondent has been placed in business rescue. A punitive costs order against it would rank as a pre-commencement claim against a financially distressed estate that is already unable to meet its existing obligations, chief among them the applicant's own acknowledged substantial debt. Such an order would be an empty gesture that affords the applicant no meaningful protection beyond that which it already enjoys as a creditor of the estate. I accordingly make no punitive costs order, not because the conduct does not deserve one, but because the circumstances render it without practical consequence. The costs of this application should be costs in the business rescue.

Order

[56] In the result, the following order is made:

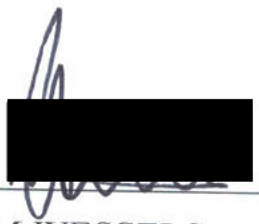
1. The application is heard as one of urgency in terms of Rule 6(12) of the Uniform Rules of Court and non-compliance with the normal time periods is condoned.

2. The first respondent is hereby placed under supervision and business rescue proceedings in respect of the first respondent are hereby commenced in terms of section 131(4)(a) read with section 131(1) of the Companies Act 71 of 2008, with effect from 11 May 2026.

3. Mr Johan van Greunen of Van Greunen & Associates Inc., Attorneys (registration number 2013/194117/21), is hereby appointed as the interim business rescue practitioner of the first respondent in terms of section 131(5) of the Act, with all powers and duties contemplated in Chapter 6 of the Act, subject to ratification by the holders of a majority of the independent creditors' voting interests at the first meeting of creditors as contemplated in section 147 of the Act.

4. The resolution adopted by the board of directors of the first respondent on 27 May 2026 purporting to place the first respondent in voluntary business rescue in terms of section 129 of the Act is set aside.

5. The costs of this application are costs in the business rescue.



M WESSELS

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

Appearances

For applicant	:Adv H Scholtz
Instructed by	:Wessels Botha Stoltz Inc
	:Pretoria
	:c/o LFS Attorneys
	:Mahikeng
For first respondent	:Adv J Raubenheimer
Instructed by	:Malapane Attorneys Inc.
	:c/o Lehabe Attorneys
	Mahikeng