IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Not reportable

Case no: 2758/2024

In the matter of:

ARNO LEON MCLEOD N O	**FIRST APPLICANT**
CATHERINE MCLEOD N O	**SECOND APPLICANT**
DANIEL DEKKER N O	**THIRD APPLICANT**

(Cited in their capacity as trustees of the time being of The McLeod Cape Family Trust, IT20762/2014)

and

INTERNATIONAL CHEMICAL SPECIALITIES (PTY) LTD [Registration Number 2014/114613/07]	**FIRST RESPONDENT**
RYNETTE PIETERS N O	**SECOND RESPONDENT**
LIZANNE CHANTAL MULLER N O	**THIRD RESPONDENT**
LEANNE LOMBAARD N O	**FOURTH RESPONDENT**
KARIN DE BRAUWERE VAN STEELAND N O	**FIFTH RESPONDENT**

(Cited in their capacity as the duly appointed joint final liquidators of Hardware Initiative (Pty) Ltd (In Liquidation) (Master's Reference No. C157/2024))

JEAN FRANCOIS VAN NIEKERK	**SIXTH RESPONDENT**

IN RE:

RYNETTE PIETERS N O	**FIRST APPLICANT**
LIZANNE CHANTAL MULLER N O	**SECOND APPLICANT**
LEANNE LOMBAARD N O	**THIRD APPLICANT**
KARIN DE BRAUWERE VAN STEELEN N O	**FOURTH APPLICANT**

(Cited in their capacity as the duly appointed joint final liquidators

of Hardware Initiative (Pty) Ltd (In Liquidation) (Master's Reference No. C157/2024))
JEAN FRANCOIS VAN NIEKERK **INTERVENING APPLICANT**

and

INTERNATIONAL CHEMICAL SPECIALITIES (PTY) LTD **RESPONDENT**
[Registration Number 2014/114613/07]

ARNO LEON MCLEOD N O **FIRST INTERVENING RESPONDENT**

CATHERINE MCLEOD N O **SECOND INTERVENING RESPONDENT**

DANIEL DEKKER N O **THIRD INTERVENING RESPONDENT**

(Cited in their capacity as trustees of the time being of The McLeod Cape Family Trust, IT20762/2014)

Neutral citation: *McLeod N O and Others v International Chemical Specialities (Pty) Ltd and Others: In Re: Pieters NO and Others v International Chemical Specialities (Pty) Ltd and Others* (2758/2024) [2025] ZAFSHC 333 (24 October 2025)

Coram: VAN ZYL J

Heard: 6 March 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by e-mail and released to SAFLII. The time and date of hand-down is deemed to be 15h00 on 24October 2025.

Summary: Application to place company under supervision and commencing business rescue proceedings in terms of s 131(4) of the Companies Act 71 of 2008 – determination of whether the company is financially distressed and reasonable prospects for rescuing the company – liquidation proceedings which have already been commenced at the time when the application was made, suspended in terms of s 131(6) – application granted – costs to be costs in the business rescue.

ORDER

1 The first respondent (ICS) is placed under supervision and business rescue proceedings in terms of s 131(4) of the Companies Act 71 of 2008 (the Act), is commenced.

2 Messrs Terry Morrison N O and David Stanley Hotz N O are appointed as the first respondent's (ICS) interim business rescue practitioners in terms of s 131(5) of the Act.

3 The first respondent (ICS) is to notify each affected person of this order within 5 (five) business days after the date of this order in terms of s 131(8)*(b)*.

4 The first to third applicants` (the Trust's) costs of the business rescue application are to be costs in the business rescue, calculated at a scale as between attorney and client.

5 The second to fifth respondents` (the liquidators) and the sixth respondent`s (Mr Van Niekerk`s) costs of opposition to the business rescue application are to be costs in the business rescue, calculated at a scale as between party and party, with counsel`s fees calculated at scale B.

6 The liquidation application issued by the second to fifth respondents (as the first to fourth applicants in the said liquidation application) (the liquidators) is removed from the roll.

7 The liquidation application issued by the sixth respondent (as the intervening applicant in the said liquidation application) (Mr van Niekerk) is removed from the roll.

8 The costs of the respective two liquidation applications stand over for later adjudication.

JUDGMENT

Van Zyl J

[1] This matter commenced as a liquidation application brought by the duly appointed provisional liquidators of Hardware Initiative (Pty) Ltd (in liquidation)

(Master's Reference C157/2024) (Hardware) for the liquidation of International Chemical Specialities (Pty) Ltd (Registration Number 2014/114613/07) (ICS). On 6 June 2024, Jean Francois van Niekerk (Mr van Niekerk) was granted leave to intervene as the intervening applicant in the liquidation application. He holds 35 shares in ICS and is also a director. On the same date Arno Leon McLeod N O (Mr McLeod), Catherine McLeod N O and Daniel Dekker N O, in their capacities as the trustees for the time being of The McLeod Cape Family Trust (IT20762/2024) (the Trust) were granted leave to intervene as the first, second and third intervening respondents in the liquidation application. The Trust holds 65 shares in ICS and Mr McLeod is the only other director of ICS. The Trust opposed the two liquidation applications and subsequently filed a counter-application for ICS to be placed under supervision and commencing business rescue in terms of s 131(4) of the Companies Act 71 of 2008 (the Act). The liquidators of Hardware and Mr van Niekerk are opposing the said application for business rescue and are persisting with their applications for liquidation of ICS.

[2] In the alternative to the liquidation of ICS, Mr van Niekerk is seeking relief in terms of s 163 of the Act that the Trust be directed to purchase his 35% shareholding which he holds in the respondent at a fair value.

The citing of the parties and legal representation

[3] In the process of the intervention of some of the parties and the filing of the respective affidavits, the citing of the parties has been different in the headings of the respective affidavits. I deem it apposite to cite them as set out in the heading of this judgment.

[4] As already indicated, for ease of reading, I will refer to the parties in the body of the judgment as follows:

(a) The liquidators;

(b) The Trust;

(c) ICS;

(d) Mr McLeod; and

(e) Mr van Niekerk.

[5] The legal representative of the Trust is Ms McChesney, of the liquidators Ms Cowlin and of Mr van Niekerk, is Mr Crookes.

Service and notice of the business rescue application

[6] Section 131(2) of the Act determines as follows:

'(2) An applicant in terms of subsection (1) must –

(a) serve a copy of the application on the company and the Commission; and

(b) notify each affected person of the application in the prescribed manner.'

[7] When the matter initially served before me, the point was raised by Ms Cowlin and Mr Crookes that proper service and notice had not been effected on all affected persons. Ms McCowley conceded same.

[8] In the matter of *Lutchman NO v African Global Holdings*[1] the Supreme Court of Appeal, with reference to para 11.3 of *Taboo Trading 232 (Pty) Ltd v Pro Wreck Scrap Metal CC; Joubert v Pro Wreck Scrap Metal CC* 2013 (6) 141 (KZP), held at paras 38 and 39 as follows:

'[38] Each affected person — a shareholder or creditor of the company in liquidation, any registered trade union representing employees of that company or each of the individual employees — is entitled to oppose or support the business rescue application. That necessarily follows from the right afforded to each of them in terms of s 131(3) to participate in the hearing of the business rescue application. Each should have been notified of the business rescue application in terms of s 131(1)*(b)* in the prescribed manner.

[39] The service and notification requirements set out in s 131(2) of the Companies Act <u>are not merely procedural steps</u>. According to *Taboo*, "<u>[t]hey are substantive requirements, compliance with which is an integral part of making an application for an order in terms of s 131(1)</u> of the Companies Act". Strict compliance with those requirements is required because business rescue proceedings can easily be abused.' (My emphasis.)

[9] After hearing some arguments from the respective legal representatives and discussions in open court, it was suggested that the application for business rescue be postponed in order for the Trust to rectify and supplement the service issues and that leave be granted to the Trust to file supplementary papers in this regard. The Trust tendered the wasted costs occasioned by the postponement.

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[1] *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] ZASCA 66; [2022] 3 All SA 35 (SCA); 2022 (4) SA 529 (SCA).

[10] Section 131(6) of the Act provides as follows:

'(6) If liquidation proceedings have already been commenced by or against the company at the time an application is made in terms of subsection (1), the application will suspend those liquidation proceedings until –

(a) the court has adjudicated upon the application; or

(b) the business rescue proceedings end, if the court makes the order applied for.'

[11] The application for business rescue therefore has to be adjudicated first. However, for the sake of practical efficacy, I suggested that all three applications be postponed to the same date so that arguments on the two liquidation applications can also be entertained. In that way, should the business rescue application not be successful, I can adjudicate the liquidation applications. I consequently made the following order:

'1. The application for liquidation by the liquidators, the application for liquidation or alternative leave by Mr van Niekerk and the business rescue application are postponed to 6 March 2025 at 09h30 to be argued and heard simultaneously, which hearing shall be heard virtually.

2. Leave is granted to the trust to supplement its papers in the business rescue application in respect of service and notification in terms of section 131(2)(b) of the Companies Act, 71 of 2008.

3. The trust is also to comply with the mentioned section 131(2)(b) in respect of the aforesaid supplementary papers and this order.

4. The liquidators' report with its annexures, dated 10 February 2025, is to be considered *pro non scripto* for purposes of the present applications.

5. All supplementary heads of argument, if any, are to be filed on or before 12h00 on Friday, 28 February 2025.

6. The trust is to pay the wasted costs occasioned by the postponement, counsel's fees to be taxed on scale B.'

[12] During the hearing of the business rescue application on the aforesaid postponed date, the parties were *ad idem* that the deficiencies in respect of the service and notice of the application had been duly rectified and that the application was consequently ripe for hearing.

[13] As previously explained I subsequently entertained arguments by all three legal representatives on the merits of all three applications. However, considering

the aforesaid provisions of section 131(6) I will start off by dealing with the business rescue application.

THE BUSINESS RESCUE APPLICATION:

Background

[14] These proceedings are set against the background of interrelated entities of which ICS forms part ('the Group'). In addition to ICS the Group includes:

(a) Hardware Initiative (Pty) Ltd (in voluntary liquidation) ('Hardware');

(b) Organic Synthesis (Pty) Ltd (in provisional liquidation) ('OS');

(c) African Chemical Holdings (Pty) Ltd (in provisional liquidation) ('ACH'); and

(d) Hardings Proprietary Products CC (in final liquidation) ('HPP').

[15] Each entity of the Group has the same two directors (and effectively) shareholders, namely Mr van Niekerk and Mr McLeod, with Mr McLeod's shares being held either in his personal capacity or via the Trust. Each of them carried on business, either as actively trading entities or in ancillary roles, in the chemical manufacturing industry.

[16] The Group has a long history of inter-company loan accounts where amounts due and owing on the various entities' trade accounts for the supplier of materials *inter se* would be captured as credits and debits on the inter-company loan accounts.

[17] The liquidators of Hardware are now pursuing the alleged inter-company loan accounts between the various entities within the Group, hence the liquidation application against ICS.

[18] The application for the liquidation of ICS is on the basis that it is unable to make payment of its debts as and when they fall due for payment in the ordinary course of its business, as contemplated in terms of s 344*(f)*, as read with s 345(1)*(c)* of the Companies Act 61 of 1973, and item 9 of Schedule 5 to the Act (2008). According to Hardware, ICS is indebted to Hardware in an amount of at least R611 920.06 (plus interest and costs), which is currently due, owing and payable by ICS to Hardware ('the debt'). According to the liquidators the debt arises from monies loaned and advanced by Hardware to ICS on debit loan account at the

latter's special instance and request. Hardware holds no security for this alleged claim against ICS. Their case is therefore one of deemed insolvency.

[19] Mr van Niekerk is seeking the liquidation of ICS on consideration of justice and equitability, alternatively based on Section 163 of the Act.

[20] During June 2024, Nedbank has pulled its credit facilities and has called on payment of all its loans by the entities within the Group, including ICS. It has also frozen the bank accounts of ICS. According to the Trust notwithstanding the solvency of ICS to date, the result of Nedbank's actions has led ICS into financial distress. A copy of Nedbank's letter of demand is attached to the founding affidavit of the Trust in the counter-application as Annexure 'BR8'. In terms thereof, the outstanding balance on the overdraft facility of ICS was R2 069 731.33, plus finance charges and interest, which was to be paid within 10 business days from the date of the letter.

[21] According to the Trust, Nedbank has called up its facilities across all the entities within the Group, not due to the performance of ICS *per se*, but due to the financial issues within the Group as a whole, in particular the demise and the winding up of the other entities referred to earlier. Each company within the Group has bound itself as surety and co-principal debtor for the facilities across the Group. According to the Trust, the totality of the Group's exposure to Nedbank is R17.9 million.

[22] Aside from the issue with Nedbank, it appears to be common cause between the parties that the relationship between Mr van Niekerk and Mr McLeod has deteriorated to the point that they can no longer sensibly do business together. Their ailing relationship has had a negative knock-on effect on the performance of ICS. According to the Trust it had become increasingly difficult to pass necessary resolutions to turn around certain aspects of the business.

[23] It is the Trust's case that there are consequently only two causes for the financial distress of ICS at this stage, namely the call up of the overdraft facility by Nedbank and, secondly, the failed relationship between Mr van Niekerk and Mr McLeod.

Statutory provisions

[24] In terms of s 131(1) of the Act, unless the company has adopted a resolution contemplated in s 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.

[25] An 'affected person' in relation to a company includes a shareholder of the company, as defined in s 128(1)*(a)*(i) of the Act.

[26] 'Business rescue' is defined in s 128(1)*(b)* of the Act to mean the following:

'. . . proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for –

(i) the temporary supervision of the company, and of the management of its affairs, business and property;

(ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and

(iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business property, debt and other liabilities, and equity in a manner that maximizes the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.'

[27] 'Financially distressed' is defined in s 128(1)*(f)* of the Act:

'. . . in reference to a particular company at any particular time, means that –

(i) it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months; or

(ii) it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months.'

[28] In relation to the adjudication of a business rescue application by the Court, s 131(4) of the Act determines as follows:

'(4) After considering an application in terms of sub-section (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.'

[29] In terms of s 128(1)*(h)* 'rescuing the company' means achieving the goals set out in the definition of 'business rescue' in s 128(1)*(b)*.

Abuse of process

[30] A court will not grant a business rescue application if it constitutes an abuse of process. In this regard both Ms Cowlin and Ms McChesney referred in their heads of argument to the matter of *PFC Properties (Pty) Ltd v Commissioner for the South African Revenue Service and Others*[2] where the Supreme Court of Appeal confirmed that the purpose of business rescue proceedings is aimed at restoring a company to solvency, and are not to be abused by a company with no prospects of being rescued but mainly to avoid a winding-up or to obtain some respite from creditors. With reference to the judgment in *Villa Crop Protection (Pty) Ltd v Bayer Intellectual Property GmbH*[3] the court also warned that that a business rescue application should not be brought with an ulterior motive.

[31] In the matter of *Van Staden and Others NNO v Pro-Wiz (Pty) Ltd*,[4] it was held as follows:

'. . . It has repeatedly been stressed that business rescue exists for the sake of rehabilitating companies that have fallen on hard times but are capable of being restored to profitability or, if that is impossible, to be employed where it will lead to creditors receiving an enhanced dividend. Its use to delay a winding up, or to afford an opportunity to those who were behind its business operations not to account for stewardship, should not be permitted.'[5]

Reasonable prospect for rescuing the company

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[2] *PFC Properties (Pty) Ltd v Commissioner for the South African Revenue Service and Others* [2023] ZASCA 111; 2024 (1) SA 400 (SCA) para 27.

[3] *Villa Crop Protection (Pty) Ltd v Bayer Intellectual Property GmbH* [2022] ZACC 42; 2023 (4) BCLR 461 (CC).

[4] *Van Staden and Others NNO v Pro-Wiz (Pty) Ltd* [2019] ZA SCA 7; 2019 (4) SA 532 (SCA)

[5] Ibid para 22.

[32] As mentioned earlier, with reference to s 131(4) of the Act, an applicant must satisfy the court that there is a reasonable prospect for rescuing the company.

[33] In *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd*[6] (*Oakdene*) the following principles were determined in this regard:

'[29] This leads me to the next debate which revolved around the meaning of 'a reasonable prospect'. As a starting point, it is generally accepted that it is a lesser requirement than the 'reasonable probability' which was the yardstick for placing a company under judicial management in terms of s 427(1) of the *1973 Companies Act* (see eg *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd* **2012 (2) SA 423** (WCC) para 21). 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.'[7]

[34] In *Prospect Investments v Specific Coast Investments 97 Ltd and Another*[8] it was held as follows:

'[11] I agree that vague averments and mere speculative suggestions will not suffice in this regard. There can be no doubt that in order to succeed in an application for business rescue, the applicant must place before the Court the factual foundation for the existence of a reasonable prospect that the desired object can be achieved. But with respect to my learned colleagues, I believe that they place the bar too high.

. . .

[15] In my judgment it is not appropriate to attempt to set out general minimum particulars of what would constitute a reasonable prospect in this regard. It also seems to me that to require, as a minimum, concrete and objectively ascertainable details of the likely costs of rendering the company able to commence or resume its business, and the likely availability of the necessary cash resource in order to enable the company to meet its day-to-day expenditure, or concrete factual details of the source, nature and extent of resources that are likely to be available to the company as well as the basis and terms on which such

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[6] *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* [2013] ZASCA 68 (*Oakdene*).

[7] Ibid para 29

[8] *Prospect Investments v Specific Coast Investments 97 Ltd and Another* [2012] ZAFSHC 130; 2013 (1) SA 542 (FB)

resources will be available, is tantamount to requiring proof of a probability, and unjustifiably limits the availability of business rescue proceedings.'[9]

[35] In *Oakdene*, it was confirmed that:

'[31] I have indicated my agreement with the statement in *Propspec* that the applicant is not required to set out a detailed plan. That can be left to the business rescue practitioner after proper investigation in terms of s 141. But the applicant must establish grounds for the reasonable prospect of achieving one of the two goals in s 128(1)*(b)*.'[10]

The replying affidavit

[36] At the outset I have to deal with a point raised by both Ms Cowlin and Mr Crookes, namely that the Trust has not made out a proper case in its founding affidavit in the counter-claim and then introduced new matter in its replying affidavit not dealt with in its founding papers or expanding upon aspects of its case in the founding affidavit. In this regard it is trite that an applicant must make out its case in the founding affidavit and save in exceptional circumstances, an applicant is not permitted to make out a new case, or introduce new matter or new grounds, in reply.

[37] Ms McChesney submitted that although there is a degree of new matter in the replying affidavit, it is mostly in respect of financial information which was not yet available at the time of the filing of the founding affidavit and further in response to issues that were raised in the answering affidavits of the liquidators and Mr Van Niekerk, which were not dealt with in the founding affidavit and which the Trust therefore had to respond to in reply. She submitted that in these circumstances new matter is allowed in reply. Ms McChesney further submitted that the liquidators and Mr Van Niekerk have not been prejudiced in the circumstances, otherwise they could and probably would have exercised one of the available remedies by having filed a rule 30 application, an application to strike out or an application in terms of rule 6(5)*(e)* for permission to file a fourth set of affidavits in order to respond to the alleged new matter complained of.

[38] I agree with the submissions by Ms McChesney. It is evident that certain relevant financial information was not yet available at the time of the filing of the answering affidavit. The other so-called 'new matter' emanated from averments

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[9] Ibid paras 11 and 15.

[10] *Oakdene* fn 6 para 31.

made in the answering affidavits to which the Trust considered it necessary to respond. In the matter of *eBotswana (Pty) Ltd v Sentech (Pty) Ltd and Others*[11] the court held as follows at paras 28 and 29:

'The short answer is that in view of the contents of the answering affidavit it was well within the ordinary procedural rules for the applicant to respond by introducing further corroborating facts. Even if certain of the averments could have been made in the founding affidavit, on its own that is no basis for excluding it from consideration. It is evident that Sentech would not have been able to challenge the averment or document produced. A common-sense approach based on want of prejudice precludes their exclusion from consideration. Mr *Budlender* referred to two cases in point: *Hidro-Tech Systems (Pty) Ltd v City of Cape Town and Others* 2010 (1) SA 483 (C) in para 81; and *Smith v KwaNonqubela Town Council* 1999 (4) SA 947 (SCA) ([1999] 4 All SA 331) in para 15.

Accordingly the application to strike out on this ground is dismissed.'

[39] In the circumstances there is no prejudice for the liquidators or Mr Van Niekerk. The issues are now properly ventilated. It is in the interest of justice that the totality of the replying affidavit be considered in the adjudication of the application.

Financial position of ICS:

[40] The application for business rescue is being opposed by the liquidators mainly on three grounds, namely that the application is an abuse of process, there is no reasonable prospect of rescuing ICS and that ICS is not suited for business rescue. One of the main contentions by the liquidators is that ICS has initiated business rescue proceedings to avoid paying Nedbank and its other creditors indefinitely and that it therefore constitutes an abuse of process.

[41] In the founding affidavit filed in the counter-application the Trust relies upon the annual financial statements of ICS for the financial year ending February 2022 as compiled by the company auditors, Grant Maddock & Co. At the time of the filing of the founding affidavit, the annual financial statements for the financial years ending February 2023 and February 2024 were not yet available.

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[11] *eBotswana (Pty) Ltd v Sentech (Pty) Ltd And Others* [2012] ZAGPJHC 231; 2013 (6) SA 327 (GSJ).

[42] At paras 52 and 53 of the founding affidavit, the Trust sets out the following information as evident from the annual financial statements:

'52.1 The respondent has a total asset value of R43 515 623.00;

52.2 The respondent's total liabilities are R22 792 516.00;

52.3 The respondent's nett equity (or "free residue") as at the end of the 2022 financial year was R20 723 170.00;

52.4 Total sales for the year was R93 928 645.00;

52.5 The gross profit for the year was at R27 035 825.00; and

52.6 The nett profit for the year was R79 531.00.

53. The nett profit for the preceding financial years as per the annual financial statements, duly signed off by the directors, were as follows:

53.1 February 2018 – R8 122 614.00;

53.2 February 2019 – R4 441 986.00;

53.3 February 2020 – R1 122 648.00.'

[43] The following figures are set out in para 56 of the founding affidavit as per the most recent management accounts available at the time:

'56.1 Between March 2023 and February 2024 the respondent had a total revenue of R36 239 186.05;

56.2 During said period, the nett profit was R4 852 926.37;

56.3 During the period March 2024 to July 2024 being a period of only five months, the respondent had a revenue of R10 599 216.29; and

56.4 During the aforesaid five-month period, the respondent had a nett profit of R1 945 554.06 before tax.'

[44] From the more recent management accounts attached to the replying affidavit, it appears that ICS showed a trade profit of R4 850 000.00 for the 2024 financial year, with an average monthly profit of around R4 111 000.00 for the three months immediately preceding Mr McLeod deposing to the replying affidavit and a net profit of R3.7 m over the past 8 months preceding Mr McLeod deposing to the replying affidavit.

[45] Despite Mr Van Niekerk`s averments in his answering affidavit that the management accounts/financial records of ICS are unreliable, when read in context

of the responses thereto in the replying affidavit, it is evident that these averments are unsubstantiated.

[46] With reference to the current trade debtors and creditors the Trust set out the respondent's accounts payable as at 5 August 2024 with explanatory notes in respect of the respective accounts. The Trust then concludes as follows at paras 61 to 63 of the founding affidavit:

'61. Disregarding the disputed claim of SAUPA and that of ACH, the trade creditors are at R1 506 463.18. Juxtapose to the trade receivables of at least R2 652 925.88 and the court will note that the respondent has positive cashflow.

62. It is telling that none of the respondent's creditors have taken any legal action against the respondent so far, aside from the Second, Third and Fourth Respondents herein, who are not, I submit, usual "trade creditors".

63. The Respondent is for all intends and purposes, so far at least, factually and commercially solvent.'

[47] In response to Mr Van Niekerk dealing with the debtors and creditors of the Trust in his answering affidavit, the Trust responded in detail thereto in the replying affidavit.

[48] It is accordingly the case of ICS that it is factually and commercially solvent, but that Nedbank's actions and the failed relationship with Mr van Niekerk have led ICS to be in financial distress. According to the Trust ICS is, and always has been, a lucrative company. ICS has a healthy balance sheet and a positive cash flow.

Sale of the ACH and OS assets

[49] According to Mr McLeod he and Mr van Niekerk agreed as long ago as 2022 that the ACH properties should be sold. The intention has always been to use the sale proceeds to settle the Group's facilities with Nedbank. Although Mr Van Niekerk in his answering affidavit admits this, he contends that there is little prospect that the ACH properties are going to realize enough to settle all of the Nedbank debt, let alone the other creditors.

[50] According to Mr van Niekerk, the totality of the Group's exposure to Nedbank is R19 440 303.06. In the founding affidavit the Trust attached a summary of the Nedbank loans on which basis the Trust alleges that the totality of the Group's exposure to Nedbank is R17.9 million.

[51] It is the Trust's case that through the sale of the assets of ACH and OS, Nedbank's claim will be entirely extinguished or at least greatly reduced. The Trust refers to actual offers received on ACH's properties for the ChemCity and Naledi Properties in a cumulative value of R19 000 000.00. More recent offers, or potential offers, that came to light after deposing to the founding affidavit have been disclosed in the replying affidavit, including interest in the OS assets of around R4 000 000.00. Given the liquidation of both ACH and OS, the sale of the assets is imminent.

[52] The aspect raised by Mr Van Niekerk that ICS conducts its business from one of the properties of ACH which, according to the Trust, stands to be sold, was not only a known fact to all relevant parties, but the Trust furthermore duly addressed the issue in its replying affidavit. ICS occupies ACH`s property at Naledi. If the property cannot be sold tenanted so that ICS can continue with its operations from there, ICS will have to relocate, which is not fatal to ICS.

[53] Mr Van Niekerk alleged in his answering affidavit that ICS does not pay rental to ACH in respect of the aforesaid property, is completely contradicted by the Trust`s evidence in its replying affidavit from which it is evident that ICS made monthly payments to ACH sufficient to cover the monthly instalments of the mortgage bond, which constituted inflated 'rental amounts' which were not market related.

[54] In the founding affidavit the Trust, at para 81 thereof, sets out the advantages which will follow from placing the Trust under business rescue and appointing a business rescue practitioner ('BRP'). (There appears to be some references to the incorrect parties, but the substance of the averments still stands):

'81.1 The Second to Fourth Respondents' liquidation application will be stayed;

81.2 Any collection action by Nedbank will be suspended;

81.3 There will be a general moratorium on claims from creditors;

81.4 The BRP can make decisions on behalf of the First Respondent without the need for Fourth Respondent and I to co-operate;

81.5 The First Respondent will be given time to reap the benefits of its restructuring and ACH will have time to sell the properties at the best possible value to settle Nedbank in full and to settle the First Respondent's loan of over R4M;
81.6 The BRP will be able to take action against ACH, including an application to place it under business rescue so as to garner control over the sale of the properties, should it deem it necessary (bearing in mind that the First Respondent is a creditor of ACH and hence an "affected person"; and
81.7 Third party financers, such as Paragon Lending who specialises in post-commencement finance and whom have already expressed an interest in possibly providing such finance to the Respondent, can advance rescue lending to the First Respondent with the protection of their loans being treated as "super preferred" in the case of liquidation.'

Conclusion

[55] I have duly considered all the evidence and the submissions made by the respective legal representatives. I am satisfied that ICS is financially distressed and there is a reasonable prospect for rescuing ICS. I am consequently also satisfied that the business rescue does not constitute an abuse of the court process.

[56] The rescue plan is not speculative or unfounded. It is evident that the sale of the assets of ACH and OS is a certainty. The values these sales are to achieve is underpinned by actual offers to purchase and letters of intent attached to the Trust's papers. If the sale of the ACH and OS assets does not have the effect of rescuing ICS, it will probably have the effect of greatly increasing the dividend payable to its creditors and shareholders over time.

[57] The application for placing ICS under supervision, thereby commencing business rescue proceedings as set out in the counter-application, is consequently to be granted.

The proposed business rescue practitioners

[58] The Trust applies that Terry Morrison NO of Terry Morrison Consulting and David Hotz N O be appointed as the business rescue practitioners. According to the Trust they have extensive experience in liquidations, turn-arounds and business rescue proceedings. They are duly registered business rescue practitioners and, according to the Trust, in all respects, comply with the requirements of the Act.

[59] It is consequently evident that the proposed business rescue practitioners are fit and proper persons to be appointed. They have also consented to the said appointment.

Costs of the business rescue application

[60] In the business rescue application the Trust is seeking an order that costs be ordered against any such party opposing the application.

[61] In *Meskin, Insolvency Law*, at 18-54(17), para 18.8.2.1, the following is stated with reference to the matter of *Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group Ltd and Others*:[12]

'Although the phrase "and other claims arising out of the costs of the business rescue proceedings" in section 135(3) is not defined or clarified anywhere in the Companies Act 2008, it is submitted that these expenses will include all costs that are necessarily incurred in the running of the company under the business rescue process, including the costs incurred in bringing an application to place the company under supervision in terms of section 131.'

[62] In the aforesaid judgment the court also held, at paras 9 and 10, that such costs should be taxed on attorney and client scale.

[63] Therefore, although the liquidators and Mr Van Niekerk opposed the business rescue application, I am of the view that the Trust's costs of the application on an attorney and client scale are to be costs in the business rescue.

[64] I further find the opposition of the business rescue application to have been reasonable, in which circumstances I consider it fair and reasonable that the costs of the opposition to the application, also be costs in the business rescue, but which costs are to be taxed on a party and party scale.

The two liquidation applications

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[12] *Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group Ltd and Others* [2011] ZAWCHC 306, 2011 (5) SA 600 (WCC).

[65] As indicated earlier in the judgment, the two liquidation applications were postponed to the same date as the application for business rescue. However, in terms of s 131(6) the liquidation applications were suspended. In terms of this judgment I am granting the application for business rescue. I have therefore not adjudicated the two liquidation applications as such and in view of the granting of the business rescue application, I am not to adjudicate them at this stage either.

[66] The alternative relief being sought by Mr Van Niekerk in his application for the liquidation of ICS, is exactly that – relief in the alternative, should I find that a proper case has not been made out for the granting of a liquidation order on the basis that it is just and equitable for it to be wound up. Mr Van Niekerk in fact again accentuated at paragraph 11 of his answering affidavit filed in opposition to the business rescue application as follows:

'Save to stress that the basis upon which I support the winding up relief sought by the liquidators is based **both** on section 163 and the just and equitable ground of winding up, and that the valuation relief is sought **only in the event** that the court finds that it is not just and equitable to wind up ICS . . .' (His emphasis)

[67] In my view I can therefore not consider or grant the alternative relief at this stage before the main relief, namely the application for the liquidation of ICS, has not been adjudicated, despite the fact that the Trust consents to the granting of the alternative relief.

[68] However, in view of the fact that the two liquidation applications are currently still on the roll, I need to make an order in respect of them. In the circumstances I deem it apposite that the two applications merely be removed from the roll, costs to stand over.

Order

[69] The following order is made:

1 The first respondent (ICS) is placed under supervision and business rescue proceedings in terms of s 131(4) of the Companies Act 71 of 2008 (the Act), is commenced.

2 Messrs Terry Morrison N O and David Stanley Hotz N O are appointed as the first respondent's (ICS) interim business rescue practitioners in terms of s 131(5) of the Act.

3 The first respondent (ICS) is to notify each affected person of this order within five business days after the date of this order in terms of s 131(8)*(b)*.

4 The first to third applicants` (the Trust's) costs of the business rescue application are to be costs in the business rescue, calculated at a scale as between attorney and client.

5 The second to fifth respondents` (the liquidators) and the sixth respondent`s (Mr Van Niekerk`s) costs of opposition to the business rescue application are to be costs in the business rescue, calculated at a scale as between party and party, with counsel`s fees calculated at scale B.

6 The liquidation application issued by the second to fifth respondents (as the first to fourth applicants in the said liquidation application) (the liquidators) is removed from the roll.

7 The liquidation application issued by the sixth respondent (as the intervening applicant in the said liquidation application) (Mr van Niekerk) is removed from the roll.

8 The costs of the respective two liquidation applications stand over for later adjudication.

[redacted]

C VAN ZYL

JUDGE OF THE HIGH COURT

Appearances:

For the first to third applicants:	MA McChesney
Instructed by:	Potgieter & Associates
	c/o Webbers Attorneys, Bloemfontein
For the second to fifth respondents:	AH Cowlin
Instructed by:	Duvenhage & De Villiers Attorneys
	c/o Symington & de Kok, Bloemfontein
For the sixth respondent:	T Crookes
Instructed by:	Abrahams & Gross
	c/o Honey Attorneys, Bloemfontein.