

INSOLVENCY & BUSINESS RESCUE

Business Rescue Applications Under Scrutiny: business rescue orders are not there for the taking!

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This article considers the recent decision in *Trustees, Inkwazi Trust v Skema Holdings (Pty) Ltd* and its implications for business rescue applications under section 131 of the Companies Act 71 of 2008. The judgment reinforces the principle that access to business rescue is not automatic and that courts will closely scrutinise whether a credible and factually supported basis for rescue exists. It also highlights the importance of demonstrating that the company itself, and not the wider group, is capable of rescue.

The decision in *Trustees, Inkwazi Trust v Skema Holdings Proprietary Limited*^[1] is a measured but firm application of section 131 of the Companies Act 71 of 2008 (the “Companies Act”). It demonstrates how the existing principles will be applied where business rescue is invoked in response to sustained creditor pressure. What emerges clearly is that access to business rescue is not automatic. The Court will interrogate, at the outset, whether the statutory requirements have been properly met on the evidence provided in the application.

Section 131(4)(a) of the Companies Act 71 of 2008 provides that, after considering an application, a court may place a company under supervision and commence business rescue proceedings if it is satisfied that the company is financially distressed, or 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 that it is otherwise just and equitable to do so for financial reasons, and that there is a reasonable prospect of rescuing the company.

In this case, the enquiry turned on whether Skema Holdings was financially distressed and whether such a prospect had been established. The Court reaffirmed that this is not a superficial exercise. While an applicant is not required to prove that rescue will succeed, there must be a proper factual foundation demonstrating a realistic and workable pathway to that outcome. Assertions that a restructuring is possible, or that value exists within a broader commercial structure, are insufficient without supporting detail. The enquiry is forward-looking, but it must be grounded in objective, ascertainable facts.

A central issue was the manner in which the applicants framed Skema Holdings’ position within the broader group of companies. Considerable reliance was placed on group-level value, including property holdings and operational activities said to exist elsewhere in the structure. The Court rejected this approach. It made it clear that the enquiry under section 131 is confined to the affairs of the company before it. The existence of value, operations or employment within the group does not, without more, establish that the company itself is capable of rescue.

Once that distinction is applied, the deficiencies in the applicants’ case become apparent. The Court was not satisfied that Skema Holdings was shown, on the founding papers, to conduct a meaningful operational business. The position regarding the “axle business”, which was relied upon as evidence of ongoing activity, was not clearly articulated at the outset. The explanation as to how that business remained attributable to Skema Holdings, only emerged after it had been challenged in opposition. This, in the Court’s view, pointed to a case that evolved in response to criticism rather than one that was properly formulated from inception.

The same difficulty arose in relation to the asset base. The proposed rescue depended materially on immovable properties, yet many of these were held by subsidiaries and were encumbered. The founding affidavit did not set out how those assets could be lawfully accessed or deployed for the benefit of Skema Holdings. Although further explanations were provided in subsequent affidavits, they did not adequately address the constraints posed by ownership structures and secured creditor rights. The Court was not persuaded that value located within the group could simply be translated into a workable rescue for the company itself.

This fed directly into the assessment of the proposed rescue strategy. The applicants relied on a combination of allegations of property realisation and prospective funding to address the company’s indebtedness. However, the evidence put up consisted largely of indicative proposals and transactions that were incomplete or conditional. The implementation of the rescue strategy depended on future events, including the cooperation of creditors and the conclusion of further agreements. The Court accepted that business rescue is inherently forward-looking, but emphasised that the proposed plan must be supported by evidence demonstrating that it can be implemented. On the facts, that threshold was not met.

The reliance on employment considerations did not alter this conclusion. While the preservation of employment is a recognised objective of Chapter 6 of the Companies Act, the employees relied upon were not shown to be employees of Skema Holdings itself. Their positions were linked to other entities within the group. As a result, the broader impact on employment did not establish that the company before the Court had a viable business capable of rescue.

The manner in which the case was advanced also weighed against the applicants. A series of supplementary affidavits were filed in response to issues raised by the respondents, introducing material that was not contained in the founding papers. Although the Court admitted this material, it emphasised that an applicant must stand or fall by its founding affidavit. The incremental development of the case was relevant in assessing whether a coherent factual basis for rescue existed at the time the application was launched. The Court found that it did not.

Timing was a further consideration. The application was launched after the winding-up proceedings had been argued and judgment reserved. While business rescue may, in principle, be invoked at any stage, the Court emphasised that timing remains relevant in assessing the bona fides of the application. In the context of the evidential shortcomings identified, the timing supported the inference that the application was, at least in part, aimed at delaying the consequences of liquidation.

On the evidence before it, the Court held that the applicants had not established a reasonable prospect of rescuing Skema Holdings. The company’s financial position, the absence of a clearly established operational business, and the reliance on assets and transactions not shown to be within its control, undermined the rescue case. The proposed plan was contingent and insufficiently substantiated.

The application was dismissed, as was the strike-out application, with costs awarded against the applicants.

The judgment underscores the importance of a properly substantiated business rescue application. A business rescue application must demonstrate, on the papers, that the company itself has a viable business and a plan that is capable of implementation. Reliance on group value, anticipated transactions or future cooperation will not meet that standard.

[1] Trustees, Inkwazi Trust v Skema Holdings (Pty) Ltd [2026] ZAKZDHC (13 April 2026).



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