WHEN A MINE FAILS: LEGAL AND COMMERCIAL IMPLICATIONS OF MINING LIQUIDATION IN SOUTH AFRICA

Introduction

Ekapa approached the Northern Cape High Court on 25 February 2026, which placed it under provisional liquidation until 17 April 2026.[1] The diamond mining conglomerate stated that it was facing financial difficulties and that the global diamond market has recently experienced a downturn. This decision comes amid ongoing rescue operations that began on 17 February 2026. News headlines have been dominated by the tragic incident involving five miners trapped 890 metres deep underground as a result of catastrophic flooding and a mudslide at Ekapa's Kimberley Du Toitspan mine shaft.[2] Various stakeholders, particularly, unions, have expressed displeasure at Ekapa's decision to liquidate its operations, arguing that the mining entity is attempting to evade liability.[3]

This article considers the legal and commercial implications of mining company liquidation in South Africa, with specific reference to the interaction between insolvency law and the regulatory framework governing mining rights. The analysis is particularly relevant for investors, mining companies, lenders, and regulators navigating distressed mining assets.

1 Penelope Masilela "Editor's note: The Ekapa Mine liquidation – A tragedy compounded" https://www.miningreview.com/news/editors-note-the-ekapa-mine-liquidation-a-tragedy-compounded/.

2 Danie van der Lith "Recovery operation will continue amidst liquidation as five Ekapa miners now presumed dead" https://thestar.co.za/diamond-fields-advertiser/news/2026-02-25-recovery-operation-will-continue-amidst-liquidation-as-five-ekapa-miners-now-presumed-dead/?utm.

3 SABC "Ekapa Mine liquidation leaves over 1 000 workers jobless" https://www.sabcnews.com/sabcnews/ekapa-minerals-mine-put-under-liquidation/.

Voluntary Winding-up by a Court Order

The scope of this article is limited to liquidation proceedings within the remit of the voluntary winding-up of a company.

Legal basis of winding up by court order

A solvent company may voluntarily initiate liquidation proceedings through a special resolution.[4] This process is commonly referred to as the winding-up of a company. Voluntary winding-up by the company is governed by the provisions of the Companies Act 71 of 2008,[5] which provides a differentiated process from that stipulated in the old Companies Act 63 of 1973, which dealt with the voluntary winding-up of insolvent companies.[6] A voluntary winding-up of a solvent company is usually undertaken by members of that entity through the adoption of a resolution, if they are of the view that the company remains in a position to meet its debt obligations.[7]

Circumstances for court-order voluntary winding-up

Voluntary winding-up of a solvent company through a court order may occur under various circumstances, including, but not limited to:

- The company approaching the High Court to continue its voluntary winding-up;
- A business rescue practitioner concluding that business rescue is ineffective;
- The company being engaged in fraudulent activities; and
- Such winding-up by the Court being just and equitable.

4 Companies Act 71 of 2008 Section 80.
5 Companies Act 71 of 2008 Section 81(1).
6 Companies Act 61 of 1973 Section 343(2).
7 Companies Act 71 of 2008 Section 79 & 80.

Effect of Liquidation on Mining Rights

Nature of mining rights

The impact of liquidation on mining rights is determined by their legal nature as defined in the Mineral and Petroleum Resources Development Act (MPRDA).[8] Section 5 of the MPRDA provides a classification of mining rights as limited real rights, which pertain to the right of use over mineral resources, while the government retains custodianship over such resources.[9] This position is significant for insolvency purposes, as mining rights possess patrimonial value, which entails that they may form part of the insolvent company's estate and become realisable for the benefit of creditors. However, mining rights, unlike other rights with patrimonial value, are subject to statutorily imposed limitations because they are not fully owned by their holders, and their transfer is regulated in terms of the MPRDA. This legal position directly affects how mining rights are treated during liquidation.

Mining rights as assets in liquidation

Liquidation does not terminate the rights held by the insolvent company. Their continued existence is, instead, governed by the MPRDA, particularly in relation to transfer, cession, suspension, and cancellation. Mining rights are further subject to the oversight of the Minister, as well as the regulatory remit of the Department of Mineral Resources and Energy. Although mining rights may be treated as assets in liquidation, their disposal remains subject to statutory controls, including ministerial consent in terms of section 11 of the MPRDA. Financial distress could also place the company in a position where it violates the conditions attached to its mining rights, which could trigger suspension or cancellation of those rights in accordance with section 47. Additionally, a complex issue arises in the context of section 56(d), which stipulates that a right holder's rights lapse upon liquidation or sequestration, with the exception of rights that are encumbered in terms of section 11(3).

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8 Mineral and Petroleum Resources Development Act 28 of 2002.

9 Mineral and Petroleum Resources Development Act 28 of 2002; Mathebula T "Transitioning OldOrder Mining Rights into New Mining Rights: A Critical Analysis" PER / PELJ 2023(26) - DOI http://dx.doi.org/10.17159/1727- 3781/2023/v26i0a11121.

A key tension arises in relation to section 56(d), which provides for the lapse of mining rights upon liquidation or sequestration. This creates uncertainty regarding whether such rights retain value as assets capable of realisation for the benefit of creditors.

In practice, this tension has significant implications for lenders and investors, as it may undermine the security underpinning financing arrangements and limit the recoverability of value in insolvency proceedings.

Ministerial consent and regulatory oversight

Generally, the MPRDA requires ministerial consent to transfer and encumber a right; however, section 11(3) provides that, in the case of a mortgage obtained to finance prospecting or mining operations, such consent is not required. These provisions present a potential tension within the liquidation framework because, on the one hand, the mining rights form part of the assets of the insolvent entity and, on the other, the rights might lapse upon liquidation, which would defeat their purpose as assets with realisable value. This highlights that mining rights, despite their proprietary characteristics, remain contingent on compliance with the MPRDA framework and may be terminated by the State where non-compliance arises.

Practical implications for Ekapa

Applying these principles to Ekapa's provisional liquidation highlights the practical risks associated with mining insolvency. Ekapa's mining rights form part of its assets, the value of which is contingent on their continued validity under the MPRDA framework. Considering the catastrophic events of the flooding and mudslide, if Ekapa is found to be non-compliant with its mining rights' statutory conditions, the Minister will be entitled to suspend or cancel Ekapa's mining rights. Moreover, if the provisions of section 56(d) are invoked, this could result in Ekapa's mining rights lapsing upon its final liquidation. This would be to the disadvantage of the company's creditors, as it would extinguish a critical asset in the company's asset pool. Even where a prospective buyer seeks to acquire Ekapa's mining rights, the transaction remains subject to ministerial consent in terms of section 11 of the MPRDA, such acquisition

will be subject to the ministerial consent requirement stipulated in section 11 of the MPRDA.

Ekapa's position illustrates the hybrid nature of mining rights in insolvency proceedings. First, they possess value and form part of a company's assets. Second, they are enshrined in the legal framework that regulates mining and ensures compliance, equitable access, and environmental protection, among other considerations. The outcome of these mining rights depends not only on the liquidation process but also on the exercise of statutory powers by the State.

Commercial Implications for Market Participants

The liquidation of a mining company presents a number of commercial considerations for investors, lenders, and potential acquirers of distressed assets. While mining rights may form part of the insolvent estate, their transfer remains subject to regulatory approval in terms of section 11 of the MPRDA. This introduces timing delays and regulatory uncertainty, which may affect the valuation and bankability of such assets.

In addition, the potential lapse of mining rights in terms of section 56(d) creates a significant risk for creditors, particularly where the value of the insolvent estate is largely dependent on the continued validity of those rights.

From an investment perspective, distressed mining assets may present acquisition opportunities; however, such opportunities are often constrained by regulatory approval processes, environmental liabilities, and compliance risks. As such, investors must adopt a cautious and structured approach when engaging with mining assets in liquidation.

Environmental Obligations of Liquidated Mining Companies

Section 46 of the MPRDA is central to the liquidation of mining operations because it highlights the statutory obligations of the mining right holder towards the environment. This section acknowledges that the holder of a mining right may be liquidated or cease to exist. It further stipulates that the Minister is empowered to take measures to remedy

environmental and safety risks, even in the absence of the mining company. Section 46 provides that these obligations are to be carried out through the financial provision made by the holder of the mining right, or, in the absence of such provision, through money allocated by the government for these purposes. The liquidation of a mining company does not absolve it of its statutory environmental obligations.

In practice, environmental liabilities remain one of the most significant deterrents to the acquisition of distressed mining assets. The adequacy of financial provisioning is often uncertain, and potential acquirers may inherit residual environmental obligations, which can materially affect the commercial viability of a transaction.

Effect of Liquidation on Employees

Provisional liquidation has the effect of suspending employment contracts.[10] This means that employees are not obliged to render any services to their employer and, in turn, are not entitled to remuneration. This suspension usually lasts for up to 45 days, during which the liquidator conducts an assessment of the company's financial health to determine whether it can be rescued, sold, or shut down.[11] If this period lapses without an alternative, the process proceeds to final liquidation, and the employment contracts are terminated. As a result, employees' employment with the insolvent company is terminated.

The Labour Relations Act (LRA) provides an alternative mechanism to preserve employment where insolvency arises.[12] Section 197A of the LRA makes provision for the transfer of employees from one company (insolvent) to another, but this measure is contingent on the insolvent company being acquired by a new company.

In liquidation, employees are classified as preferent creditors.[13] Their claims usually comprise remuneration, contributions to benefit funds, and severance. However, these

10 Insolvency Act 24 of 1936 Section 38.
11 CCMA "Insolvency and Liquidation" https://labourguide.co.za/~documents/route%3A/download/100.
12 Labour Relation Act 66 of 1995.
13 Insolvency Act 24 of 1936 Section 98A.

claims are not always recoverable, as they depend on the residual estate after secured creditors have been satisfied.[14]

While the LRA provides mechanisms aimed at preserving employment, the liquidation framework is more focused on prioritising the equitable distribution of assets in accordance with the rights of creditors.

The disruption of employment also has broader operational implications, particularly where labour instability may affect the preservation or transfer of mining operations. This may further complicate efforts to realise value from distressed assets.

Business Rescue as an Alternative to Liquidation

A mining company facing financial distress can elect to undergo business rescue proceedings instead of applying for liquidation at the outset. The Companies Act of 2008 makes provision for business rescue, which provides the option of maintaining a company as a going concern by appointing a business rescue practitioner.[15] The practitioner restructures the company's debts, secures creditors' interests, retains jobs, and manages other affairs while steering the company toward a path of recovery. The company may apply for business rescue even during ongoing liquidation proceedings. Commencing business rescue interrupts and temporarily suspends the liquidation process. If business rescue is successful, the liquidation process is dispensed with; however, if business rescue fails, liquidation will proceed.[16]

In the mining context, business rescue may offer a more commercially viable alternative to liquidation, particularly where the preservation of mining rights and operational continuity is critical to maintaining asset value. As such, stakeholders may increasingly consider business rescue as a preferred mechanism in circumstances of financial distress.

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14 Robert Sharrock *et al.* Hockly's Insolvency 9th Ed(s) Chapter 16 – Creditors' ranking and their claims.

15 Companies Act 71 of 2008 Chapter Part A.

16 Robert Sharrock *et al.* Hockly's Insolvency 9th Ed(s) Chapter 25 – Business rescue and compromise.

Practical Considerations for Stakeholders

Stakeholders engaging with mining companies in financial distress should consider the following:

- The regulatory requirements associated with the transfer or encumbrance of mining rights;
- The risk of suspension, cancellation, or lapse of rights under the MPRDA;
- The adequacy of environmental financial provisioning;
- The impact of insolvency on employees and operational continuity; and
- The potential advantages of business rescue as an alternative to liquidation.

Conclusion

The liquidation of a mining company highlights the complex interplay between insolvency law and the regulatory framework governing mining rights in South Africa. While mining rights may constitute valuable assets, their realisation is contingent on regulatory compliance and ministerial approval, which introduces uncertainty for creditors and investors.

For market participants, mining insolvency presents both risk and opportunity. While regulatory constraints may limit asset realisation, they also shape the framework within which distressed assets may be acquired and restructured. A clear understanding of this intersection is essential for navigating South Africa's evolving mining and energy sector.