



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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***OAKDENE SQUARE PROPERTIESS (PTY) LTD and others v FARM
BOTHASFONTEIN (KYALAMI) (PTY) LTD and others***

The Supreme Court of Appeal (SCA) today dismissed an appeal against the decision of the South Gauteng High Court to refuse an application for an order placing the first respondent, Farm Bothasfontein (Kyalami) (Pty) Ltd (the company) under supervision and commencing business rescue proceedings as contemplated in the ‘new’ Companies Act 71 of 2008.

The case arose out of the commercial insolvency of the company, who is unable to satisfy a judgement debt awarded against it, in favour of the respondents and majority shareholders in the company, to the tune of R31.5 million. The minority shareholder, seeking to avoid a liquidation order, brought an application for business rescue on the premise that a business rescue practitioner would be able to realise the company’s assets on more favourable terms.

The concept of ‘business rescue’ under the new Companies Act has, until the present matter, remained untested in the SCA. As such, the court took this opportunity to clarify the law in this regard. For one, the term ‘business rescue’ was held to incorporate not only plans to restore the company to solvency – as it was under the previous regime – but also scenarios which aim solely at securing a better deal for creditors and shareholders than that which they

would receive through liquidation. Secondly, the court interpreted the requirement that there be a 'reasonable prospect' for rescuing the company to mean that the applicant must evidence 'reasonable grounds' - something more than a mere *prima facie* case, but less than a reasonable probability (the yardstick as it was under the old system) – that the goals of business rescue may be achieved. Cases requiring a substantial measure of detail as to the content of the proposed business rescue plan were rejected, as was the contention that mere speculative suggestion would suffice. Further, this determination was held to require a value judgment, thus affording the courts discretion in the wide sense.

In the result, the SCA upheld the decision of the court a quo and reasoned that the appellants' proposal, consisting of not more than an alternative winding-up, could not be sustained: for one, the proposal that a business rescue practitioner would be able to obtain a better price for the assets of the company than that which would be achieved under liquidation was found to rest on no more than pure speculation; secondly, the contention that the remuneration of the liquidator would exceed those of the business rescue operator was held to be irrational. Reference to transactions of doubtful validity and other sinister aspects in the management of the company's affairs further persuaded the court that liquidation proceedings were better suited to the situation that arose in this case.