



THE SUPREME COURT OF APPEAL  
REPUBLIC OF SOUTH AFRICA

**MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL**

From: The Registrar, Supreme Court of Appeal  
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**NEWCITY GROUP (PTY) LIMITED v ALLAN DAVID PELLOW N.O. AND OTHERS (577/2013)[2014]**

The Supreme Court of Appeal (SCA) today, dismissed an appeal, with costs.

This appeal is against the judgment of the South Gauteng High Court, Johannesburg. Where the court below dismissed the appellant's application to place Crystal Lagoon Investments 53 (Pty) Limited (in provisional liquidation), under supervision and business rescue in terms of s 131 of the Companies Act 71 of 2008 (the Act) and granted an order placing it under final liquidation.

The appellant, Newcity Group (Pty) Limited (Newcity), is the sole shareholder of Crystal Lagoon which brought application proceedings to have Crystal Lagoon placed under supervision and business rescue in December 2012. The basis of the application was that (a) Crystal Lagoon was financially distressed; (b) it was just and equitable to place it under business rescue; and (c) there was a reasonable prospect of rescuing it as placing it under business rescue would provide temporary supervision and management of its affairs, business and property, a temporary moratorium on the rights of claims against it or in respect of property in its possession and the development and implementation of a plan to rescue it, which would result in a better return for its creditors and shareholders than would result from liquidation as envisaged in s 128(1)(b) of the Companies Act.

The court below accepted that Crystal Lagoon was financially distressed. However, regarding whether there was a reasonable prospect for its rescue as envisaged in s 129 of the Act, the court found that it was unnecessary for a business rescue applicant to attach a business rescue plan to its founding affidavit. In the court's view it merely has to 'advance facts that can be developed into a plan that, if approved, will maximise the likelihood of the company continuing in existence on a solvent basis or ... results in a better return for

the company's creditors or shareholders than would result from the immediate liquidation of the company' as contemplated in s 128(1)(b) of the Act. The court below further held that if there is reasonable possibility of either of these two events the jurisdictional requirements have been satisfied and a court may exercise its discretion to grant the relief sought. The court below then held that on the facts before it neither the proposed plans created a reasonable prospect that the company could be rescued. The court concluded that as things stood, the company could be sold as a going concern and a balancing of the parties' rights and interests favoured finality and the granting of a final winding up order.

The main issue on appeal before this court, therefore, was simply whether Newcity had shown a reasonable prospect of rescuing Crystal Lagoon. It was found to be plain from the wording of the provisions of the Act, that a court may not grant an application for business rescue unless there is a reasonable prospect for rescuing the company. In deciding that question, it was held that the court exercises a discretion in the wide sense – it makes a value judgment – and if a court of appeal should disagree with the conclusion, it is bound to interfere.

As to what 'reasonable prospect' means, this court found that it was properly described as a yardstick higher than 'a mere prima facie case or an arguable possibility' but lesser than a 'reasonable probability' – a prospect based on reasonable grounds to be established by a business rescue applicant in accordance with the rules of motion proceedings

Based on all the facts before the court, that Newcity had failed to establish a prospect based on reasonable grounds that business rescue would return Crystal Lagoon to solvency or provide a better deal for its creditors.

In the result, the appeal was dismissed with costs.