THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE
Case No: 609/2012

In the matter between:

OAKDENE SQUARE PROPERTIES (PTY) LTD	**FIRST APPELLANT**
EDUCATED RISK INVESTMENTS 54 (PTY) LTD	**SECOND APPELLANT**
DIMETRYS THEODOSIOU	**THIRD APPELLANT**
ANTONYS THEODOSIOU	**FOURTH APPELLANT**

v

FARM BOTHASFONTEIN (KYALAMI) (PTY) LTD	**FIRST RESPONDENT**
NEDBANK LIMITED	**SECOND RESPONDENT**
IMPERIAL HOLDINGS LIMITED	**THIRD RESPONDENT**

Neutral citation:	*Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* (609/2012) [2013] ZASCA 68 (27 May 2013).
Coram:	Brand, Cachalia JJA, Van der Merwe, Zondi et Meyer AJJA
Heard:	**8 May 2013**
Delivered:	**27 May 2013**

Summary: **Companies Act 71 of 2008 – application for business rescue in terms of s 131(4) – whether court's decision amounts to exercise of discretion – what applicant has to show to satisfy requirement of 'reasonable prospect for rescuing the company'.**

ORDER

On appeal from: South Gauteng High Court, Johannesburg (CJ Claassen J sitting as court of first instance):

The appeal is dismissed with costs in favour of second and third respondents, including in both instances, the costs of two counsel.

JUDGMENT

BRAND JA (CACHALIA JJA, VAN DER MERWE, ZONDI ET MEYER AJJA CONCURRING):

[1] This appeal has its origin in an application by the four appellants in the South Gauteng High Court, Johannesburg, for an order placing the first respondent, Farm Bothasfontein (Kyalami) (Pty) Ltd (the company) under supervision and commencing business rescue proceedings as contemplated in chapter 6 of the Companies Act 71 of 2008. The second and third respondents not only opposed the main application, but sought the liquidation of the company instead. When the matter came before Claassen J it was plain that, unless the business rescue application was successful, the winding-up of the company would inevitably follow. In the event Claassen J refused the business application with costs and granted the liquidation order sought. The appeal against that judgment, which has since been reported *sub nom Oakdene Square Properties (Pty) Ltd and others v Farm Bothasfontein (Kyalami) (Pty) Ltd and others* 2012 (3) SA 273 (GSJ), is with the leave of this court.

The parties

[2] I find it convenient to start with an introduction of the appellants and the capacities in which they were cited. The first appellant is Oakdene Square Properties (Pty) Ltd (Oakdene). The second appellant is Educated Risk Investments 54 (Pty) Ltd (Educated Risk), while the third and fourth appellants

are Mr Dimetrys Theodosiou and his brother Antonys. Oakdene alleges that it is a creditor of the company, while Educated Risk contends that it is a 40 per cent shareholder of the company. The two Theodosiou brothers have an interest in both Oakdene and Educated Risk. But for their *locus standi* they rely on the allegation that they are the trustees of the MJF Trust which, so they say, previously owned the 40 per cent shares in the company now held by Educated Risk.

[3] The reason why the capacities of the appellants are couched in such guarded terms is because they are clouded by some of the numerous disputes of fact that arose on the papers. Small wonder therefore that the court a quo commenced its judgment with a reference to the observation by Harms DP in *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 26 to the effect that motion proceedings such as these are aimed at 'the resolution of legal issues based on common cause facts'. They are simply not geared toward the decision of factual disputes. In consequence, so Harms DP reminded us, it is well established that, where in motion proceedings disputes of fact arise on the papers, the matter can only be decided on the respondent's version of the disputed facts, unless that version is so farfetched or clearly untenable that it can justifiably be rejected merely on the papers. What is more, it makes no difference to this approach that, as in this case, motion proceedings have been dictated by the legislature. Neither does it make any difference where the legal or evidential onus lies. That approach was rightly adopted by the court a quo in dealing with the disputes of fact that proved to be pertinent in this case and it goes without saying that that is also the course I intend to pursue.

[4] But, to complete the introduction of the parties: the first respondent, as I have said, is the company. The second respondent is Nedbank Limited (Nedbank) and the third respondent is Imperial Holdings Limited (Imperial). Unlike those of the appellants, the interests of Nedbank and Imperial in the matter are not in dispute. These interests include the following: Nedbank and Imperial each holds 30 per cent of the shares in the company and they are each owed R7.5 million by the company in the form of a shareholder's loan. Moreover, Nedbank is a secured creditor and has in fact obtained summary judgment

against the company in the sum of R31 247 099; together with interest at 12 per cent per annum (which runs in excess of R320 000 per month) from 1 June 2011; and costs.

The application

[5] The concept of 'business rescue' had been introduced into our law for the first time in Chapter 6 of the 2008 Companies Act which came into operation on 1 May 2011. There have been several decisions in the High Court dealing with these provisions. But this is the first time that this court has been called upon to interpret and apply some of them. From the nature of things, a more detailed analysis of the relevant provisions is therefore bound to follow. Yet I find it helpful, for introductory purposes, to state the essential requirements for an application of this kind. These are essentially to be found in s 131 of the Act, which provides in relevant part:

'131(1) Unless a company has adopted a resolution contemplated in section 129 [which provides for voluntary business rescue proceedings], an affected person may apply to a court at any time for an order placing the company under supervision and commencing business rescue proceedings.

(2) . . .

(3) . . .

(4) After considering an application in terms of subsection (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.'

[6] With reference to s 131(1), the definition of 'affected person' in s 128(1) – which is the definition section for purposes of chapter 6 – includes a shareholder

or creditor of the company. On the face of it, Educated Risk is the registered holder of 40 per cent of the shares in the company. Although its entitlement to those shares is disputed, it therefore appears to qualify as an 'affected person'. In these circumstances the court a quo found it unnecessary (in para 13 of its judgment) to resolve the disputes surrounding the *locus standi* of the other three applicants. I agree with this approach. 'Financially distressed' is also defined, in s 128(1)*(f)*, to mean:

'. . . 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.'

[7] It is common cause that, although the company appears to be factually solvent in that the value of its assets, at least on the face of it, exceeds its debts, it is unable to satisfy the judgment debt in favour of Nedbank. This means that it is both commercially insolvent – for liquidation purposes – and 'financially distressed' within the contemplation of s 131(4)*(a)*(i). More problematic is the further requirement imposed by the section; that is, whether or not there was 'a reasonable prospect of rescuing the company'. This question, I believe, can only be resolved with reference to the background facts.

<u>Background</u>

[8] The company owns three immovable properties adjoining one another which are held under separate title deeds, namely, (a) portion 169 of the farm Bothasfontein, measuring about 69 hectares in extent, which constitutes what is known as the Kyalami Racetrack; (b) erf 5 Kyalami measuring about 2.3 hectares; and (c) erf 6 Kyalami, measuring about 1.3 hectares. On the papers these properties are jointly referred to as the 'immovable property' and I find it convenient to follow the same description.

[9] All the shares in the company were previously held by the Automobile Association of South Africa (the AA). During March 2004 the AA sold these

shares to Mr Michael Fogg, acting on behalf of the MJF Trust. A suspensive condition of the sale provided that the company would repay its debt of R42 million to the AA. In order to do so, the company obtained a loan of R28 million from Nedbank against registration of a mortgage bond over the immovable property. To raise the shortfall which, together with expenses, amounted to R15 million, the MJF Trust, represented by Fogg, entered into a memorandum of understanding (the MOU), dated 29 June 2004, with Imperial and a predecessor of Nedbank, known as Imperial Bank Ltd. Since nothing turns on the difference in the roles played by Nedbank, on the one hand, and its predecessor, on the other, I shall refer to them both as Nedbank.

[10] For present purposes, the main features of the MOU were the following:

(a) Nedbank and Imperial undertook to put up a bank guarantee for R15 million and each became entitled to 30 per cent of the shares in the company.

(b) The MJF Trust, Imperial and Nedbank would each nominate a director to the board of the company with a chairman and a fifth director to be jointly nominated by all three.

(c) The MJF Trust undertook to transfer the shares to Imperial and Nedbank; to appoint their nominees as directors; and to sign all documents necessary for the appointment of the remaining directors. All this was to happen upon registration of the mortgage bond in favour of Nedbank.

[11] Nedbank and Imperial advanced the R15 million in the form of shareholders' loans of R7.5 million each and the Nedbank mortgage bond was registered. Despite all this, the MJF Trust failed to comply with its obligations under the MOU. As a result, Nedbank and Imperial successfully brought an application in the High Court to compel performance of these obligations. However, when they eventually became members of the company, pursuant to the High Court's order, Nedbank and Imperial discovered that in the meantime, Fogg had caused the company to enter into a lease agreement with Motortainment Kyalami (Pty) Ltd (Motortainment), a company wholly owned by the MJF Trust. In terms of the lease, Motortainment became entitled to occupy the immovable property of the company for seven years, with the right of renewal for a further seven years, terminating in 2018. What is more, Nedbank and

Imperial also discovered that six days before they became members of the company, Fogg and his wife had resigned as trustees of the MJF Trust pursuant to a cession transaction in terms of which the beneficiaries of the MJF Trust – the Foggs and their two children – ceded all their rights in the trust to Educated Risk. These rights included the 40 per cent shareholding in the company. Educated Risk, as we know, is controlled by the two Theodosiou brothers. In consequence they were also appointed as the trustees of the MJF Trust, in which capacities they controlled both the company and Motortainment.

[12] Following upon the discovery of these transactions, Nedbank and Imperial launched two proceedings in the High Court: first, an action to set aside the lease to Motortainment and, secondly, an application to enforce their alleged pre-emptive right – in terms of the articles of the company – to the 40 per cent shareholding previously held by the trust, which were now held by Educated Risk. Neither case has been finalised. In the meantime, Motortainment was liquidated at the behest of Absa Bank Limited. In an apparent attempt to avoid the consequences of this liquidation, the Theodosiou brothers ceded Motortainment's rights in terms of the lease to another company under their control, Kyalami Events and Exhibitions (Pty) Ltd (Kyalami Events). This caused Nedbank and Imperial to bring a further application to the High Court for the eviction of Kyalami Events and Motortainment (in liquidation) from the immovable property. Shortly thereafter the business rescue application was launched by the four appellants. In the event the business rescue application and the eviction application were simultaneously heard by Claassen J in the court a quo. By virtue of the liquidation order granted in respect of the company in the business rescue application, Claassen J ordered that the eviction application be suspended in terms of s 359 of the (old) Companies Act 61 of 1973, pending the appointment of a liquidator for the company.

[13] Further events involving the Theodosiou brothers were the following:

(a) According to a note in the financial statements of the company for the year ended 31 December 2005, the company sold its rights to develop its immovable property to yet another company controlled by the Theodosiou brothers, at a price of R112 530 000, which is reflected as an interest free loan by the company with no fixed terms of repayment. With reference to this note, the auditors of the company entered the qualification that they were unable to verify the recoverability of the purchase price.

(b) According to a letter written by Antonys Theodosiou, as director of Kyalami Events, to his brother Dimetrys, as director of the company, on 2 August 2007, the company's 'income stream' derived from its immovable property had been ceded to Oakdene. It is not clear what happened with that 'income stream' between 2 August 2007 and March 2011. But it is common cause that from the latter date the company received no income from its assets. That seems to be the main reason why it was in no position to reduce its liability to Nedbank under the mortgage bond which in turn led to the latter obtaining judgment.

[14] Dimetrys Theodosiou is a director of the company as nominee of the MJF Trust. The company also has two other directors who were nominated to the board by Nedbank and Imperial. Initially the management of the company's affairs was largely left to Theodosiou. As a result of the way in which he performed this function, so Nedbank and Imperial alleged, they decided that their nominees should become more directly involved in the company's affairs. When they informed Theodosiou of that decision, his response was, however, that the company's board of directors had never been properly constituted. The basis he relied upon for that response was that the original tri-partite agreement, embodied in the MOU, provided for a chairman and a fifth director to be appointed by mutual agreement, which had never occurred. Every majority decision by the nominees of Nedbank and Imperial that Theodosiou found unacceptable was therefore simply met by the same response that no valid decision could be taken by an improperly constituted board. In the result the board became largely dysfunctional. The fact that no further directors could be agreed upon created a catch-22 situation.

[15] Lastly, with regard to the background facts, it is apparent that the business rescue application was brought in the wake of Nedbank's arrangements of a sale in execution pursuant to the High Court judgment in its favour for about R31.5 million, together with interest and costs. Understandably, in the circumstances, the crux of the appellants' case in their founding affidavit was that a forced sale in

execution would be to the detriment of the shareholders and creditors of the company. If the immovable property were to be sold in an execution sale, so they contended, it would realise no more than R120 million. If, on the other hand, the property were to be sold in the normal course, the appellants said, it could realise its true market value which was determined by their experts at between R300 million and R350 million. Hence the purpose of the business rescue application was not to ensure the continued existence of the company on a solvent basis. On the contrary, the essential aim of the application was formulated in the appellants' founding affidavit in the following way:

> 'In the event of this Honourable Court granting the relief sought herein, it will facilitate the sale of the Property by way of normal means as opposed to by way of a forced sale. . . . The further liabilities [of the company] . . . will be settled with the balance of the funds (after settling [Nedbank]) realised by way of the normal and arm's length sale of the Property in accordance with the business rescue plan.'

[16] In their answering affidavit, Nedbank and Imperial denied the valuation of the immovable property by the appellants' experts in excess of R300 million. For this denial they relied primarily on a valuation by their own experts of R97 million for portion 169 of the farm Bothasfontein and R32 million for erven 5 and 6 Kyalami, thus amounting to a total valuation of R129 million for the immovable property as a whole. Yet it seems that no valuation on behalf of any party took note of either the alleged alienation of the company's right to develop its property, or the existing long term lease of the immovable properties which endures until 2018. The influence of these on the value of the property is therefore unknown. But, on the face of it, the assets of the company are worth at least R129 million. Although the liabilities of the company are also in dispute, it appears to be common cause that they add up to no more than about R75 million. Again, purely on the face of it and without any proper analysis, the company thus appears to be factually solvent.

[17] However, of greater significance, with reference to the answering affidavits, was the position taken by Nedbank with regard to the execution sale. Since it was moving for the liquidation of the company, so Nedbank said, it no longer intended to pursue the forced sale of the immovable properties in

execution. In this light, the whole purpose of the business rescue application as formulated in the founding affidavit – which was to avoid a sale in execution – essentially fell by the wayside. In their replying affidavit the appellants nonetheless pursued their application for business rescue on the basis that it would yield a better return than liquidation. They did so on the following three grounds:

(a) A business rescue practitioner would be able to realise the immovable property at a higher price than a liquidator.

(b) The costs of a business rescue practitioner are likely to be considerably lower than those of a liquidator.

(c) The sale of the two Kyalami erven forming part of the property would be sufficient to satisfy Nedbank's secured claim, which would leave the business rescue practitioner in a position to trade with the remaining 69 hectares of the farm Bothasfontein.

The nature of the court's discretion under s 131(4)

[18] Against this background I can now turn to the legal principles involved. First amongst these concerns the intrinsic nature of the decision taken by the court a quo when it refused the business rescue application. The issue has its origin in the contention by Nedbank and Imperial that, because the decision by the court a quo derived from the exercise of a discretion, this court's authority to interfere with that decision is limited. The contention has its roots in the well-established principle that a court of appeal is not allowed to interfere with the exercise of a discretion merely because it would have come to a different conclusion. It may interfere only if the lower court had been influenced by wrong principles of law, or a misdirection of fact, or if it had failed to exercise a discretion at all. The reason for the limitation, it is said, is because, in an appeal against the exercise of a discretion, the question is not whether the lower court had arrived at the right conclusion, but whether it had exercised its discretion in a proper manner (see eg *Mabaso v Law Society of the Northern Provinces* 2005 (2) SA 117 (CC) para 20). Equally well-settled, however, is the principle that this limitation on interference only applies to the exercise of a discretion in the strict sense. What gives rise to the emphasis on the 'strict sense' in this context, is that the term 'discretion' is sometimes used in the loose sense to indicate no more

than the application of a value judgment. Where the 'discretion' exercised by the lower court was one in the loose sense of a value judgment, the limitation imposed on the authority of the court of appeal to interfere does not apply. In that event the court of appeal is both entitled, and in fact duty-bound, to interfere if it would have come to a different conclusion.

[19] Assuming therefore that the court's function under s 131(4) can be said to constitute the exercise of a 'discretion', the question remains whether it is a discretion in the strict sense or not. The guiding principles, I believe, are to be found in *Knox D'Arcy Ltd v Jamieson* 1996 (4) SA 348 (SCA), which principles have been approved and applied by the Constitutional Court on several occasions, eg in *Giddey NO v J C Barnard & Partners* 2007 (5) SA 525 (CC) paras 19-23. As explained by Grosskopf JA in *Knox D'Arcy* (at 361C-D), a discretion in the strict sense is confined to those instances where the lower court could legitimately adopt any one of a range of options about which there may well be a justifiable difference of opinion as to which one would be the most appropriate. An award of general damages, for example, may vary from say R90 000 to R120 000. No award within that range could be described as 'wrong'. That is a discretion in the strict sense. Since all these options would be legitimate, the choice of any one of them could therefore not be said to be inappropriate, as long as the choice was properly made.

[20] Reference to a 'discretion' without these attributes does not convey the meaning of a 'discretion in the strict sense'. Even if a discretion without these qualifications is described as a 'wide discretion', it conveys no more than the meaning that the court is entitled to have regard to a variety of diverse and contrasting considerations in reaching a conclusion. But in the end, that conclusion will be either right or wrong. And if it is wrong, the court of appeal will be bound to interfere (*Knox D'Arcy* at 361H-I). That is a 'discretion' in the loose sense. In *Media Workers Association of South Africa and others v Press Corporation of South Africa Ltd (Perskor)* 1992 (4) SA 791 (A) at 795-796, Grosskopf JA sought to explain the concept of a discretion in the loose sense with reference to the threefold distinction between matters of fact, matters of law and matters of discretion. The third category would therefore include all those

issues arising in litigation which cannot be classified as either questions of fact or questions of law. These would include, for example, the question whether the defendant acted reasonably in the circumstances; or whether the legal convictions of the community require the imposition of delictual liability for the purpose of defining wrongfulness; or whether the applicant for an interdict has an alternative remedy (see eg *Transvaal Property & Investment Co and Reinhold & Co v SA Townships Mining & Finance Corporation Ltd and the Administrator* 1938 TPD 512 at 521). As I see it, a discretion in the loose sense would therefore indicate all instances where the court is required to make a value judgment (see also M M Corbett – address at the First Orientation Course for New Judges – 'Writing a Judgment' (1998) 115 *SALJ* 116 at 125; Harms *Civil Procedure in the Supreme Court* C1.39). With hindsight it would perhaps be better not to refer to these instances of a discretion in the loose sense as the exercise of a discretion at all, but as the exercise of a value judgment. But since the terminology has become so well entrenched, we can do no better than to heed the caution sounded, eg in *Knox D'Arcy*, that the limitations on the powers of a court of appeal are confined to the exercise of a discretion in the strict sense.

[21] With this rather lengthy prelude I can now revert to the pertinent question: does s 131(4) afford the court a discretion in the strict sense or not? I think the short answer is 'no'. In a case such as this, the court's discretion is bound up with the question whether there is a reasonable prospect for rescuing the company. The other pertinent requirement in s 131(4), namely, that the company must be financially distressed, seems to turn on a question of fact. As to whether there is a reasonable prospect of rescuing the company, it can hardly be said, in my view, that it involves a range of choices that the court can legitimately make; of which none can be described as wrong. On the contrary, as I see it, the answer to the question whether there is such a reasonable prospect can only be 'yes' or 'no'. These answers cannot both be right. The position is comparable to the decision whether or not the conduct of a defendant in a case based on negligence met the standards of the reasonable person, or whether the negligent conduct should attract legal liability and thus be regarded as wrongful. Hence it involves a value judgment. And if the court of appeal should disagree with the conclusion, it is bound to interfere. Hence the question is whether we agree with the conclusion

reached by the court a quo that the appellants had failed to establish a reasonable prospect of rescuing the company.

The meaning of ‘rescuing the company’

[22] The next debate between the parties turned on what would constitute ‘rescuing the company’ within the contemplation of s 131(4)*(a).* This debate has its origin in the definition of that expression in s 128(1)*(h)*, read with 128(1)*(b)*(iii). According to s 128(1)*(h)*, ‘rescuing the company’ means ‘achieving the goals set out in the definition of “business rescue” in paragraph *(b)*’. Section 128 (1)*(b)* in turn provides:

‘“Business rescue” means 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 maximises 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;’

[23] The potential business rescue plan s 128(1)*(b)*(iii) thus contemplates has two objects or goals: a primary goal, which is to facilitate the continued existence of the company in a state of insolvency and, a secondary goal, which is provided for as an alternative, in the event that the achievement of the primary goal proves not to be viable, namely, to facilitate a better return for the creditors or shareholders of the company than would result from immediate liquidation. In this light the debate arose whether a business rescue application can succeed where the proposed rescue plan provides for the secondary goal only. In other words, whether the requirement of ‘rescuing the company’ as contemplated in s 131(4)*(a)* is satisfied where it is clear from the outset that the company can never be saved from immediate liquidation and that the only hope is for a better return than that which would result from liquidation. In *A G Petzetakis*

International Holdings Ltd v Petzetakis Africa (Pty) Ltd 2012 (5) SA 515 (GSJ) this question was answered in the negative. The reason for this decision appears to be encapsulated in para 2 of the judgment which reads:

'Section 131(4) does not incorporate the alternative object of the . . . rescue plan which is referred to in s 128, namely a plan which could result in a better return for creditors or shareholders than would result from immediate liquidation. It seems that the intention of the legislature on this point is as follows:

[17.1] The requirements for the granting of a s 131 rescue order include that the company under consideration must have a reasonable prospect of recovery.

[17.2] Once a company is under business rescue, its rescue plan may be aimed at the alternative object, namely a better return than the return of immediate liquidation.'

[24] In Australia it is accepted, on the other hand, that recourse to the rescue provisions of that country's Corporations Act 50 of 2001 – which are not dissimilar in wording to our s 128(1)*(b)* – need not necessarily be to save the company from liquidation. In *Dallinger v Halcha Holdings (Pty) Ltd* [1995] FCA 1727 para 28, for example, the Federal Court of Australia held that the statutory rescue machinery 'should be available in a case where, although it is not possible for the company to continue in existence, an administration is likely to result in a better return for creditors than would be the case with an immediate winding-up'. This also appears to have been the approach, at least by implication, in *Propspec Investments (Pty)Ltd v Pacific Coast Investments 97 Ltd* 2013 (1) SA 542 (FB) para 7; *Koen v Wedgewood Village Golf & Country Estate (Pty) Ltd* 2012 (2) SA 378 (WCC) para 17.

[25] Nedbank and Imperial contended that we should endorse the approach in *Petzetakis.* In support of this contention they referred to the dictionary meaning of 'rescue' and 'rehabilitate' both of which convey the notion of a return or restoration to a normal healthy state. When s 128(1)*(b)* therefore defines 'business rescue' as 'proceedings to facilitate the rehabilitation of a company', so they argued, it is clear that these proceedings must be aimed at the achievement of the primary goal in s 128(1)*(b)*(iii), that is, to restore the company to the normal healthy state of solvency. The secondary objective, to provide a better deal for creditors and shareholders than liquidation, so their argument proceeded, can

only be an alternative goal of the proposed rescue plan. It follows, so they concluded, that a proposed plan which holds out no hope for a return of the company to a state of solvency, but provides at best for achievement of the secondary goal, does not amount to 'rescuing the company' as defined by s 128(1)*(h)* read with s 128(1)*(b).* In consequence, such a plan fails to satisfy the requirement to that effect in s 131(4)*(a)*.

[26] Although I have no problem with the dictionary meaning of 'rescue' and 'rehabilitation' on which the argument relies, it fails to recognise, I think, that s 128(1)*(b)* gives its own meaning to these terms, which does not coincide with these definitions. As I understand the section, it says that 'business rescue' means to facilitate 'rehabilitation', which in turn means the achievement of one of two goals: (a) to return the company to solvency, or (b) to provide a better deal for creditors and shareholders than what they would receive through liquidation. This construction would also coincide with the reference in s 128(1)*(h)* to the achievement of the goals (plural) set out in s 128(1)*(b).* It follows, as I see it, that the achievement of any one of the two goals referred to in s 128(1)*(b)* would qualify as 'business rescue' in terms of s 131(4).

[27] The interpretation that business rescue proceedings are not limited to the return of the company to solvency is, in my view, also supported by the historical context of Chapter 6. With regard to judicial management under the *1973 Companies Act*, one of the prerequisites – in s 427(1)*(b)* of that Act – was 'a reasonable probability that, if [the company] is placed under judicial management, it will be enabled to pay its debts or to meet its obligations and become a successful concern'. In the light of this requirement it was held, eg in *Millman, NO v Swartland Huis Meubileerders (Edms) Bpk: Repfin Acceptances Ltd Intervening* 1972 (1) SA 741 (C) at 745A that:

'. . . even though it might be more advantageous to dispose of the business of the company as one under judicial management rather than as one in liquidation, this is not a factor that should influence the Court to grant an order of judicial management in respect of a company which will in all probability never be able to discharge more than a percentage of its liabilities.'

[28] The rhetorical question that arises is: why, as a matter of common sense and policy, should this be so? Why should a company not be temporarily protected against claims of creditors if that will, as in the case of *Millman, NO*, allow the sale of the business as a going concern at optimum value, in order to give creditors and shareholders a better return than would result from liquidation? Why should the law in these circumstances insist on the requirement that the creditors eventually be paid in full? It has been suggested that this insistence on an eventual return to solvency was one of the reasons why the institution of judicial management turned out to be an 'abject failure' (see eg Carl Stein and Geoff Everingham *The New Companies Act Unlocked* (2011) at 409). I believe it can be accepted with confidence that the legislature did not intend to repeat the mistakes of the past. Hence the pertinent question is – did the appellants establish a reasonable prospect of achieving any one of the two goals contemplated in s 128(1)*(b)* on the facts of this case?

<u>A reasonable prospect</u>

[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.

[30] Self-evidently it will be neither practical nor prudent to be prescriptive about the way in which the appellant must show a reasonable prospect in every case. Some reported decisions laid down, however, that the applicant must

provide a substantial measure of detail about the proposed plan to satisfy this requirement (see eg *Southern Palace Investments 265 (Pty) Ltd*) paras 24-25; *Koen v Wedgewood Village Golf & Country Estate (Pty) Ltd* 2012 (2) SA 378 (WCC) paras 18-20). But in considering these decisions Van der Merwe J commented as follows in *Propspec Investments v Pacific Coasts Investments 97 Ltd* 2013 (1) SA 542 (FB) para 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 a 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.

And at para 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 the resources that are likely to be available to the company, as well as the basis and terms on which such resources will be available, is tantamount to requiring proof of a probability, and unjustifiably limits the availability of business rescue proceedings.'

[31] I agree with these comments in every respect. Yet, the appellants contended that the bar should be set even lower than that. Relying on the reference in s 128(1)*(b)* to 'the development and implementation, if approved, of a plan to rescue the company' their argument was that the reasonable prospect for rescuing the company in s 131(4) demands no more than the reasonable prospect of a rescue plan. According to this argument, the applicant for business rescue is therefore not required to show a reasonable prospect of achieving one of the goals contemplated in s 128 (1)*(b)*. All the applicant has to show is that a plan to do so is capable of being developed and implemented, regardless of whether or not it may fail. Once it is established that it is the intention of the applicant to develop and implement a rescue plan which has that as its purpose, so the argument went, the court should grant the business rescue application even if it is unconvinced that this will result in the company surviving insolvency

or even achieve a better return for creditors and shareholders. I do not agree with this line of argument. As I see it, it is in direct conflict with the express wording of s 128(1)*(h)*. According to this section 'rescuing the company' indeed requires the achievement of one of the goals in s 128(1)*(b)*. Self-evidently the development of a plan cannot be a goal in itself. It can only be the means to an end. That end, as I see it, must be either to restore the company to a solvent going concern, or at least to facilitate a better deal for creditors and shareholders than they would secure from a liquidation process. 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)*.

<u>Application to the facts</u>

[32] In applying the approach to 'rescuing the company' that I thus subscribe to, it will be remembered that the appellants initially set out to prove that business rescue would be better than a sale in execution of the judgment in Nedbank's favour. When Nedbank made it plain in its answering affidavit that it no longer intended to pursue a sale in execution, but that it sought a liquidation of the company instead, the appellants had to change their tack. The case they then tried to make out in their replying papers was that business rescue would be better than liquidation. In the process they proffered two options. First, that the immovable property of the company be sold by the business rescue practitioner as a whole and that the proceeds be divided amongst the shareholders after the creditors have been paid in full. The second option they suggested was that the two Kyalami erven be sold, whereafter the business rescue practitioner could pursue the business of the company by utilising the rest of its property, which primarily consists of the Kyalami race track. The second option could perhaps also be understood as a proposal to return the company to a state of solvency, but that appears to be neither here nor there. Overlooking, for the moment, the general rule that the appellants are not allowed to make out their case in their replying papers, I propose to deal with the two options they propose in turn.

[33] My problem with the proposal that the business rescue practitioner, rather than the liquidator, should sell the property as a whole, is that it offers no more than an alternative, informal kind of winding-up of the company, outside the liquidation provisions of the *1973 Companies Act* which had, incidentally, been preserved, for the time being, by item 9 of schedule 5 of the 2008 Act. I do not believe, however, that this could have been the intention of creating business rescue as an institution. For instance, the mere savings on the costs of the winding-up process in accordance with the existing liquidation provisions could hardly justify the separate institution of business rescue. *A fortiori*, I do not believe that business rescue was intended to achieve a winding-up of a company to avoid the consequences of liquidation proceedings, which is what the appellants apparently seek to achieve.

[34] In any event, I believe that, even on its own terms, the appellants' proposal consisting of not more than an alternative winding-up, cannot be sustained. In motivating this proposal the appellants relied on two grounds. The first was that a business practitioner would be able to obtain a better price for the property than a liquidator. But I share the court a quo's difficulty in understanding why this should be so (see para 49(1) of the judgment). In short, this ground appears to rest on no more than pure speculation. Their second ground was that the remuneration of the liquidator would exceed that of the business rescue practitioner. It departs from the premise that the fees of the liquidator are calculated as a percentage of the assets of the company, while those of the business rescue practitioner are based on a daily rate. The reasoning then proceeds on the supposition that the business rescue proceedings will be finalised within a period of one year. This supposition seems to be highly questionable. I say this particularly in view of the litany of litigation – which is likely to occupy the business practitioner for many years to come – concerning the validity of the 40 per cent shareholding of Educated Risk; the entitlement of Oakdene to the 'income stream of the company'; the validity of the sale of the development rights of the company; the validity of the long term lease over the immovable property of the company; the validity of the cession of that lease; and so forth.

[35] Reference to these transactions of doubtful validity, and the other sinister aspects in the management of the company's affairs, lead me to the conclusion that liquidation proceedings are in fact better geared for the situation that arose in this case. On the respondents' version the company has been stripped of all its income and virtually all its assets while under the management of Dimetrys Theodosiou. These allegations are, of course, denied by the appellants. But, as I see it, that is not the point. The point is that these are the very circumstances at which the investigative powers of the liquidator – under s 417 and 418 of the *1973 Companies Act* – and the machinery for the setting aside of improper dispositions of the company's assets – provided for in the Insolvency Act 24 of 1936 – are aimed. In this light I believe there is a very real possibility that liquidation will in fact be more advantageous to creditors and shareholders – excluding, perhaps, the appellants – than the proposed informal winding-up of the company through business rescue proceedings.

[36] The appellants' further proposition, which involves the sale of the two Kyalami erven only, raises more problems than solutions. First amongst these is that it starts out from the premise that the two erven can be sold for R32 million. It is true that this is based on a valuation put forward on behalf of Nedbank and Imperial. Nonetheless, the valuation pays no heed, so it seems, to the influence of either the alienation of the rights to development of the company's property or to the long term lease and it would be surprising, to say the least, if these have no influence on the value of the property. But be that as it may, even if the two erven were to be sold for R32 million, that would not be enough to satisfy the judgment debt of R31.5 million in favour of Nedbank which has grown substantially in magnitude, due to interest at the rate of R320 000 per month since June 2011. That would leave all the other debts unpaid. In addition, the company would still have no income because, on the appellants' version, the remainder of the property would still be leased on a long term basis and the 'income stream' of the company would still be ceded to Oakdene. Hence there is no suggestion how the business rescue practitioner would go about satisfying outstanding debts. In fact, it is not even clear where the remuneration of the business rescue practitioner would come from.

[37] In these circumstances I do not believe Nedbank and Imperial can be branded unreasonable in their declared intent to oppose any business plan in line with either of the two options proposed by the appellants. The court a quo regarded this declared intent by the two major creditors – and the holders of 60 per cent of the shareholding in the company – as one of the reasons why business rescue was doomed to fail (see para 47). In argument before us the court a quo was criticised for doing so. Authority for this criticism was sought in the following statement from *Nedbank Ltd v Bestvest 153 (Pty) Ltd; Essa v Bestvest 153 (Pty) Ltd* 2012 (5) SA 497 (WCC) at para 55:

'In the answering affidavit both [the major creditors] make it clear that they are not in favour of any BRP plan, and that they will vote against it at any meeting to be convened by the business rescue practitioner in terms of ss 132(2)*(c)* and 152 of the Act. They accordingly urged the court not to sanction an exercise in futility, and to rather make an order of winding-up. Such an approach appears, at first blush, to be a stratagem to advance the argument for winding-up: one would have expected a responsible creditor to be open to any proposal that may ultimately redound to its benefit. Such an approach certainly does not accord with the overall purpose of BRP which, as I have demonstrated above, are aimed at saving rather than destroying a business, and in which consultation and consensus-seeking would be the point of departure.'

[38] If the statement is intended to convey that the declared intent to oppose by the majority creditors should in principle be ignored in considering business rescue, I do not agree. As I see it, the applicant for business rescue is bound to establish reasonable grounds for the prospect of rescuing the company. If the majority creditors declare that they will oppose any business rescue scheme based on those grounds, I see no reason why that proclaimed opposition should be ignored. Unless, of course, that attitude can be said to be unreasonable or mala fide. By virtue of s 132(2)*(c)*(i) read with s 152 of the Act, rejection of the proposed rescue plan by the majority of creditors will normally sound the death knell of the proceedings. It is true that such rejection can be revisited by the court in terms of s 153. But that, of course, will take time and attract further costs. Moreover, the court is unlikely to interfere with the creditors' decision unless their attitude was unreasonable. In these circumstances I do not believe that the court a quo can be criticised for having regard to the declared intent of the major

creditors to oppose any business rescue plan along the lines suggested by the appellants.

[39] In this court counsel for the appellants proposed another version of the company's return to solvency which had not been raised before. According to this proposal, a sale of the immovable property and payment of the creditors is likely to result in a cash surplus. This result, so the argument went, would in itself terminate the commercial insolvency of the company. That, so it seems to me, can be said of any company which is commercially insolvent, but factually solvent. Though the simple logic of the argument cannot be faulted, I do not believe it constitutes a 'business rescue' within the meaning of s 128(1)*(b)*(iii). What the section requires is 'the continuing existence of the business of the company on a solvent basis'. A company which merely exists to own cash in the bank, has lost its *raison d'être*. Unless there is a real possibility that the cash in the bank will lead to the resurrection of the company's business, the requirements of s 128(1)*(b)*(iii) had thus not been satisfied. In view of the history of irreconcilable differences between the shareholders, that possibility can safely be excluded in this case. It follows that, in my view, the court a quo cannot be criticised for finding that, on the facts of this case, business rescue proceedings were not appropriate and that liquidation of the company was the preferred remedy.

[40] In the result the appeal is dismissed with costs in favour of second and third respondents, including in both instances, the costs of two counsel.

F D J BRAND
JUDGE OF APPEAL

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