Republic of South Africa

In the High Court of South Africa
Western Cape High Court, Cape Town

In the matter between:

CASES NO : 9831/2011

+ 7811/2012

FIRST RAND BANK LIMITED	Intervening Creditor
and	
ZONESKA INVESTMENTS (PTY) LTD / BONATLA PROPERTIES (PTY) LTD	Applicant
and	
MIDNIGHT STORM INVESTMENTS 386 LTD (Registration No : 2007/019270/06)	Respondent
THE REGISTRAR OF BANKS	
GREYHAVEN RICHES 9 LTD	First Interested Party
GREYHAVEN RICHES 11 LTD	Second Interested Party
IPROBRITE LTD	Third Interested Party

JUDGMENT DELIVERED ON TUESDAY, 28th AUGUST 2012

STELZNER, AJ:

1 This is an application for the winding up of the respondent at the instance of an intervening creditor and an application for the rescue of the respondent in terms of section 131(1) of the Companies Act, 71 of 2008 ("the Act") at the instance of a cessionary of one of the respondent's creditors.

2 An order placing the respondent ("Midnight Storm", "the company") under provisional winding up was granted by this court on 28 October 2011 at the instance of the abovementioned creditor ("Zoneska").

3 Prior to that, a further creditor of the company, Southern Palace Investments 265 (Pty) Ltd ("Southern Palace") had brought an application in terms of section 131(1) of the Companies Act, 71 of 2008 ("the Act") for the rescue of Midnight Storm (and its business). The application of Southern Palace Investments was dismissed and the provisional winding up order granted. [1]

4 On 10 April 2012 Zoneska sold its claim against Midnight Storm to Bonatla Properties (Pty) Ltd ("Bonatla") for R1.2 million with the result that Bonatla became a creditor of the company.

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[1] Further background to the present applications is to be found in **Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd 2012 (2) SA 423.**

5 On 7 June 2012 the provisional winding up order was, by agreement between the parties and against the background of the acquisition of Zoneska's claim by Bonatla, discharged. The intervening creditor ("First Rand") was given leave to intervene and Midnight Storm was provisionally wound up its instance. The return day of the provisional winding up order was 16 August 2012.

6 Prior to the return day, and in terms of an agreed timetable, Bonatla brought its application in terms of section 131 for what is claimed to be the rescue of Midnight Storm's business. It is common cause that Bonatla, as creditor of Midnight Storm by virtue of the cession of Zoneska's claim to it, is an "*affected person*" with the requisite *locus standi* to bring the application. But for the cession it would not have been. It is clear it took cession of the claim in order for it to bring the business rescue application.

7 First Rand is a secured creditor of Midnight Storm, with a claim in the sum of R52 515 207,70 plus interest. It, together with the two other major creditors of the company, oppose the business rescue application.

8 Bonatla accepts that unless its business rescue application is successful, a final winding up order should follow (see section 131(4)(b) of the Act). It accepts therefore that the company is financially distressed.

9 It brings its application in terms of section 131(4)(a) of the Act on the grounds that there is a reasonable prospect for rescuing the company (or more particularly its business) in the sense of continuing with the development of the company's property (once the property and the business of the company have been transferred to its nominee) with the claimed objective of providing a greater return to creditors and shareholders (and other indirect investors) than would, according to it, otherwise have been available on the immediate liquidation of Midnight Storm.

10 Midnight Storm is the registered owner of erf 19390 Blaauwberg, upon which a luxury hotel to be known as the Radisson Blue Hotel Blaauwberg is being constructed. The funding for the hotel came from the public sale of debentures and the issuing of shares by at least two of the companies who have been cited herein as interested parties (the first and second interested parties, referred to hereafter as "the investor companies").

11 The investor companies, in turn, lent money to various other companies in the Realcor group of companies in order to fund various developments by these companies in the group, including Midnight Storm.

12 The funding dried up when investigations were undertaken into the activities of the Realcor group at the instance of the Reserve Bank which determined that the activities of the group were in contravention of the Banks Act. The investor companies have since been liquidated. Both liquidators of the investor companies (as does First Rand – the only secured creditor) oppose the business rescue plan and state that even if a business rescue practitioner were to be appointed they would not approve the proposed plan.

13 The construction of the hotel ceased some time ago. It is currently incomplete and will require substantial funding before it can be completed. Until the development is completed, it is incapable of producing income. Until such time as the hotel has been developed, Midnight Storm has no prospect of discharging its indebtedness to its creditors, including First Rand. It is thus commercially insolvent.

14 Midnight Storm is also factually insolvent. Its approximate liabilities are as follows. R54 million in capital and interest owed to First Rand. R240 million owed to the investor companies (in liquidation). R50 million owed to other concurrent trade creditors.

15 Its only asset, the development, is (possibly conservatively) valued at R120 million. This value diminishes as time goes by. The interest claims of First Rand, on the other hand, increase as time goes by.

16 The current application has as its primary aim the purchase by Buzzway Properties (Pty) Ltd, a nominee of Bonatla, of Midnight Storm's sole asset, the immovable property at Blaauwberg with its incomplete hotel thereon, together with the business the company planned for the property, namely that of conducting an hotel operation, letting apartments within the hotel and/or selling some of the apartments once the hotel had been fully developed.

17 The hotel was in the process of being constructed and nearing completion when the funding for the development dried up in the circumstances referred to hereafter. Bonatla's proposal is that Buzzway continues the development, and in due course the business, in its own name. once it has acquired the property and business from the business rescue practitioner it proposes be appointed.

18 In the process undoubtedly employment will be created and the likelihood exists that many of the company's former employees will be employed by Buzzway in the future, but exactly when and how this is to be done. is not spelt out in the plan. Nor does it have to be done. The proposed plan must

simply show that there is a reasonable prospect that it will provide creditors and shareholders of the company with a greater return.

19 The plan records the following :

19.1 Bonatla Holdings, a public company listed on the main board of the JSE, carries on business as an investment company with interests in property development and property holding companies.

19.2 Bonatla is one of its wholly owned subsidiary.

19.3 Bonatla acquired the interests of Zoneska Investments (Pty) Ltd ("Zoneska"), the liquidation applicant in the matter of Midnight Storm Investments, from it after a provisional winding up order had been obtained by it.

19.4 Buzzway is a special purpose vehicle nominated for the purposes of taking transfer and holding the property on behalf of Bonatla in terms of this agreement.

19.5 Bonatla, pursuant to its acquisition of the rights, title and claims of Zoneska against Midnight Storm Investments, has a claim against Midnight Storm Investments (in the region of some R600 000,00).

19.6 It is prepared to suspend further action against Midnight Storm and wishes to acquire the property and the rental enterprise from Midnight Storm in a single, indivisible transaction.

20 In order to do so, (it is not entirely clear whether this is Buzzway or Bonatla Holdings) it has undertaken to pay :

20.1 Bonatla that which it paid Zoneska in order to take cession of Zoneska's claim (R1.2 million) ;

20.2 The claim of First Rand in full ;

20.3 By agreement with the South African Reserve Bank, the individual investors in the investor companies by way of substituting their interests (in these companies in liquidation) with equity in the share capital of Bonatla Holdings, alternatively where the individual investors refuse such substitution, Bonatla agrees to make payment to the SARB on their behalf, alternatively directly to such parties, of "*an agreed amount to be payable in cash*" ;

20.4 To the investor companies themselves pro rata shares in Bonatla Holdings (once again in an amount still to be agreed) :

20.5 "*Certain trade creditors*" of Midnight Storm (which is understood to be the remaining concurrent creditors) "*a total amount to be settled either by way of an issue of ordinary shares in Bonatla Holdings, alternatively cash*" ;

21 Bonatla (or Buzzway) further undertakes to finance all costs related to the completion of the property, its development and ongoing operational overheads.

22 The agreement is concluded on the basis that the transaction constitutes the sale of a business of a rental enterprise which is capable of separate operation and which will be an income earning activity on the transfer date, all assets necessary to enable the purchaser to carry on the rental enterprise which will have been transferred to the purchaser and the business is disposed of as a going concern, with the result that it constitutes a zero rated taxable supply in terms of section 11(1)(e) of the VAT Act. In the event that this transaction or any part thereof is ruled not to be so zero rated, Bonatla may elect to either cancel the agreement or pay the amount of transfer duty.

23 Additional conditions precedent are that the board of directors of Bonatla Holdings ratify the agreement, Bonatla delivers proof of the requisite available funds with which to finance the transaction by 30 July 2012 in no less than R230 million on terms acceptable to Bonatla at its sole discretion

for purposes settling the payments referred to in clause 4.3 of the memorandum. In addition, by 31 August 2012, the approval of various entities, including the SARB, JSE, SARS, Competition Commission, Securities Takeover Regulation Panel and the majority of shareholders of Bonatla. Provided applications are submitted timeously and reasonable progress is made with the approvals, all fulfilments required, these dates may be extended by 90 days, and, notwithstanding this, should the fulfilment of conditions become the subject matter of further delays, the agreement will remain in full force and effect until 90 days following fulfilment thereof.

24 It is further recorded that Bonatla has the following resources available to it - the ability of Bonatla Holdings, as the parent company, to fund debt raised against a combination of its own nett assets and the value of the property to be acquired (in other words, money will need to be borrowed from an undisclosed source), the IDC is willing, in principle, to consider a formal application for a loan of R210 million, and the purchaser is in *"a more than adequate position to fund the commitments required in terms of completing the purchase of the property and completion of the development"*

25 Bonatla's application differs from the application of Southern Palace referred to above in that Bonatla seeks to pursue the second aim highlighted in section 128(1)(b)(iii) of the Act, namely to implement a business plan that would result in a better return for the respondent's creditors or shareholders

than would result from the immediate liquidation thereof. See para [27] of **Southern Palace Investment** *supra*.

26 The current application therefore has as its primary objective the increase of dividends identified in the second part of section 128(1)(b)(iii) as being what is referred to in **Southern Palace Investments** matter as being *"the second aim"* of this section. It is also referred to as *"an alternative aim"* of the Act in paragraph 25 of the judgment. Given that the application in **Southern Palace Investments** was premised on the first aim highlighted in section 128(1)(b)(i) and the first part of section 128(1)(b)(iii) of the Act, the question whether section 131 of the Act can be utilised in circumstances where the very granting of the business rescue application will bring about the demise of the company was not specifically addressed. The discussion in **Southern Palace Investments** further as to the factors to be taken into account when assessing whether the plan satisfactorily showed that the alternative aim could be met (para[25] at 432E – G) was accordingly *obiter* (see para [27] at 433A).

27 **Oakdene Square Properties (Pty) Ltd & Others v Farm Bothasfontein (Kyalami) (Pty) Ltd & Others 2012 (3) SA 273 (GSJ)** was a case similar to the present where the essential point of dispute was whether the best results would be obtained by a liquidator selling the immovable property (as the only major asset of the company) or whether a business rescue

practitioner would be able to achieve a better return (See para [11] at 278, [49.7] at 288H – 289C)

28 In that matter, as in the present, the applicant for the business rescue did not seek the rehabilitation and continued existence of the company. Claassen J held, with reference to *inter alia* the Australian decision of **Dallinger v Halcher Holdings (1996) 14 ACLC 263 at 268**, that this secondary goal of business rescue proceedings, namely the hope of a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company, was a legitimate aim of a plan in terms of the Act. In **Dallinger** *supra* Sundberg J had held that the machinery in Part 5.3A of the Australian Corporations Law should be available "*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*".

29 Part 5.3A, ss 435A-451D of the Australian Corporations Law, headed "*Administration of a Company's Affairs with a View to Executing a Deed of Company Arrangement*", has as its object in terms of s 435A to " *provide for the business, property and affairs of an insolvent company to be administered in a way that (a) maximises the chances of the company, or as much as possible of its business, continuing in existence, or (b) if it is not possible for the company or its business to continue in existence - results in*

a better return for the company's creditors and members than would result from an immediate winding up of the company."

30 Subsection (a) may set a lower threshold than the first part of section 128(b)(iii) which speaks of "*maximising the likelihood of the company continuing on a solvent basis*", but the subsection (b) is on all fours with the second part of section 128(b)(iii), the relevant part for purposes of the current application.

31 Notwithstanding the difference in the wording of the Australian subsection 435A(a) and the first part of our section 128(b)(iii) the application of the **Dallinger** dictum to the alternative aim in section 128(b)(iii) is in my view consistent with one of the purposes of the Act. Section 7(k) of the Act states that one of the purposes is to provide for the efficient rescue and recovery of financially distressed companies in a manner that balances the rights and interests of all relevant stakeholders Section 158(b)(i) and (ii) requires the court when determining a matter brought before it in terms of the Act, or making an order contemplated in the Act, to promote the spirit, purpose and objects of this Act: and if any provision of this Act, read in its context, can be reasonably construed to have more than one meaning, must prefer the meaning that best promotes the spirit and purpose of this Act, and will best improve the realisation and enjoyment of rights.

32 In **Nedbank Ltd v Bestvest 153 (Pty) Ltd WCC Case No 21857/2011**, dated 12 June 2012, which also dealt with a plan which proposed that the company not be rescued but that a business rescue practitioner be appointed in order to sell the company's sole asset (which, it was claimed, would be financially more beneficial for creditors than if the company were to be wound up) Gamble J, following a purposive approach to the interpretation of sections 128 and 131, also accepted that even where such an increased return was the sole purpose of the plan, it was a permissible objective in terms of the Act.

33 I am in agreement. Although the first part of section 128(b)(iii) may refer in the main to the company being rescued (and section 131 only to the rescue of the company, as opposed to its business), it is clear that where this is not possible it would also be a legitimate alternative to try and rescue the business of the company (*in casu* the continued development of the hotel with a view to its business continuing, albeit in the hands of another).

34 This interpretation would be consistent with the purpose of the section, aimed at preventing the societal and financial hardship caused by a winding up in many instances. If the company cannot be saved, as an alternative, the court can approve a plan aimed at rescuing the company's business at least. For such a plan to receive the court's sanction however it would need

to be established that there is a reasonable prospect that in so doing a better return for creditors and members of the company will be realised than upon liquidation. Where this alternative purpose is the sole purpose relied on, the prospect of that purpose being achieved would need to be established on the papers. See **AG Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd & Others Case No 35891/2011 SGHC 6 February 2012 para 18**

35 Section 131(4)(a) read with the second part of section 128(b)(iii) requires that the Court needs to be satisfied that there is "*a reasonable prospect*" of the company being rescued (even only in the secondary sense as set out above). This threshold has formed the subject of a number of recent decisions.

36 In **Swart v Beagles Run Investments 25 (Pty) Ltd (Four Creditors Intervening) 2011 (5) SA 422 (GNP),** with reference to judicial management proceedings under the old Act it was held that the test, applied to the current matter, was that of it being reasonably probable that the granting of business rescue would ultimately result in creditors achieving a better dividend.

37 In **Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd 2012 (2) SA 423 (WCC)** it was held at paras [20],[21] and [24] that something less was required than that the recovery should be

a reasonable probability - in exercising its discretion, a court should give due weight to the legislative preference for rescuing ailing companies if such a course was reasonably possible.

38 This dictum was approved in **Koen And Another v Wedgewood Village Golf & Country Estate (Pty) Ltd And Others** 2012 (2) SA 378 (WCC). See further **Oakdene Square Properties (Pty) Ltd And Others v Farm Bothasfontein (Kyalami) (Pty) Ltd And Others** 2012 (3) SA 273 (GSJ) in which the court held, as to the meaning of 'reasonable prospect for rescuing the company', that it agreed with Eloff AJ in **Southern Palace Investments** that 'reasonable prospect' indicated 'something less [was] required than that the recovery should be a reasonable probability'. If the facts **indicated a reasonable possibility of a company being rescued,** a court might exercise its discretion in favour of granting an order contemplated in s 131. (Paragraph [18] at 281F – H.) Cf further **Gormley v West City Precinet Properties (Pty) Ltd and Anglo Irish Bank Corporation Ltd, WCHC case No 19075/11 and 15584/11.**

39 The On Line Oxford English Dictionary defines "*prospect*" as both "*the possibility*" or "*likelihood*" of some future event occurring. The definition of "*possibility*" in turn is "*a thing that may happen or be the case*". "*Likelihood*" is defined as "*the state or fact of something's being likely. probable*".

40 Given the qualification in the section that the prospect must be a reasonable one and the presumption against tautology / superfluity in interpreting statutes, (Steyn Uitleg van Wette 5th ed pp 17 -18) "*prospect*" in my view should be interpreted to mean "*possibility*". (Compare the use of the word "*likelihood*" in section 128(1)(b)(iii), which can be equated with "*reasonable possibility*".) In the circumstances I intend following the same approach, that of considering whether there is a reasonable possibility of a greater return being achieved for creditors in terms of the plan.

41 Eloff AJ went on to discuss the level of proof required to satisfy this test, the type of detail one would expect to be in the plan. He was however at pains to point out that each case is to be decided on its own facts. It is in this context that the following general remarks were made in relation to the alternative aim referred to in s 128(1)(b)(iii) of the Act (*obiter* as alluded to earlier in this judgment) – "*one would expect an applicant for business rescue to provide concrete factual details of the source, nature and extent of the resources that were likely to be available to the company, as well as the basis and terms on which such resources would be available. It was difficult to see how, without such details, a court would be able to compare the scenario sketched in the application with that which would obtain in an immediate liquidation of the company. Mere speculative suggestions were unlikely to suffice* (at para [25] at 432E – G).

42 Mr Reinders, who appeared for Bonatla, argued that the level of proof employed in **Southern Palace Investments** sets the bar too high.

43 Relying on the judgment of Van der Merwe J in **Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd & Another (5000/2011) [2012] ZAFSHC 1130 (28 June 2012)** at para [11] it is argued "*a prospect*" meant "*an expectation, which may or may not come true and signified no more than a possibility*". This was all that needed to be proved. As set out above there is no fundamental difficulty with this. The question is what proof is required to satisfy this test.

44 Relying further on **Henochsberg on the Companies Act**, 71 of 2008 [Issue 1] Vol 1 p 464 Mr Reinders argued that the applicant for a business rescue should not have to provide concrete details at the level indicated by the court in **Southern Palace Investments**.

45 The one difficulty with Mr Reinders' argument that the court need not concern itself with the detail of the plan is that the present matter is not one in which the plan is to rescue the company itself by continuing to trade, an example of the type of case where the proposer may not have all the relevant information at its disposal in order to spell out exactly how this is to be done and where a general outline may suffice. Bonatla, however, wishes to acquire the company's property for itself (or for its nominee) and to develop same. The relevant information in this regard should be at its

disposal – it is after all the one who will be purchasing the property. It should not only be capable of placing more relevant information before the court than would otherwise be the case but should be required to do so in order to show that there is a reasonable prospect of a greater return being realised through a business rescue practitioner as opposed to the appointed liquidator. (Cf **Oakdene Square** supra para [49])

46 Section 131 in any event does not only require a "prospect", it requires a reasonable one. In **Propspec Investments** it was held that a possibility would be reasonable if it rested on a ground that was objectively reasonable. This court, per Traverso DJP, in **Gormley** supra at para [13], held that where it is clear that no business plan as envisaged by the Act can eventuate, the court cannot ignore that fact on the ground that is premature to express a view on the viability of the plan. Bonatla would accordingly need to place sufficient facts before the court in order for the court to be satisfied on objective grounds that there is a reasonable possibility of the proposed plan of the applicant resulting in a greater dividend for creditors than the immediate liquidation of the company.

47 For this to be done, facts need to be placed before the Court, as opposed to speculative suggestions. Mr Muller who appeared with Mr Melunsky, for First Rand, argued with reference to **Wilcox & Others v Commissioner for Inland Revenue 1960 (4) SA 599 (A) at 602 A**, that what is required is direct evidence, which, in this context, does not include contention,

submission or conjecture (See further **Great River Shipping Inc v Sunny Face Marine Ltd 1994 (1) SA 15 (C) at 75I, Die Dros (Pty) Ltd & Another v Telefon Beverages CC & Others 2003 (4) SA 207 (C) para 28).** I agree with these submissions, save that, based on the facts placed before it, the Court will need to infer from the facts whether there is a reasonable possibility of the relevant objectives set by section 128(b)(iii) being met.

48 It may not be necessary for the applicant to spell out each and every detail of the proposed plan, and it could be left to the business rescue practitioner to negotiate the exact rescue package in due course (cf **Gormley** supra at para [13]), but as was held by Gamble J in **Bestvest** *supra* at para [41], that is not to say, that a party can approach the court for the appointment of a business rescue practitioner "*with flimsy grounds in the hope that the practitioner will provide the panacea to its problems.*"

49 In **Vumba Intertrade CC v Geometric Intertrade CC 2001 (2) SA 1068 (W)** a full bench of the then Witwatersrand Local Division held at para [8] as follows in the context of deciding whether there was "*reason to believe*" that a close corporation would be unable to satisfy a costs order – "*It is necessary to emphasise that, before a Court can decide how to exercise the discretion vested in it by s 8 of the Close Corporations Act, there must be 'reason to believe' that the respondent close corporation will be unable to pay the costs of the defendant applicant if successful in its defence: Viviers v Williams Builders and Contractors Ltd 1936 TPD 273 at 274; Henry v R E*

Designs CC 1998 (2) SA 502 (C) *at 507H. Although the phrase 'there is reason to believe' places a much lighter burden of proof on an applicant than, for instance. 'the court is satisfied' (Trust Bank van Afrika Bpk v Lief and Another 1963 (4) SA 752 (T); Agro Drip (Pty) Ltd v Fedgen Insurance Co Ltd 1998 (1) SA 182 (W) at 186E), the 'reason to believe' must be constituted by facts giving rise to such belief (cf London Estates (Pty) Ltd H v Nair 1957 (3) SA 591 (D) at 592F) and a blind belief, or a belief based on such information or hearsay evidence as a reasonable man ought or could not give credence to, does not suffice (cf Native Commissioner and Union Government v Nthako 1931 TPD 234 at 242). In short, there must be facts before the court on which the court can conclude that there is reason to believe that a plaintiff close corporation will be unable to satisfy an adverse costs order; and the onus of adducing such facts rests on the applicant."*

50 The same approach should in my view be followed in deciding whether there is a reasonable prospect (in the sense of a reasonable possibility) that the proposed plan will result in an increased return for creditors and members.

51 The applicant must set out sufficient facts from which a court would be able to assess the prospects of the plan succeeding in meeting this objective before exercising its discretion. This would include an assessment of the practical feasibility of the plan (Cf **Deetlefs v Deetlefs 1967 (1) SA 516 (A)).**

52 In the **Bestvest** matter, Gamble J held that one would expect an applicant for business rescue in circumstances where it seeks to have the company's sole asset sold (*in casu* in effect to itself or more correctly to its nominee, of which it will be a majority if not sole shareholder) to set out what the reasonable costs would be of bringing the building (*in casu* the hotel development) to completion in order for the business to be commercially viable, what the prospects are of raising the finances required to so complete the building, how best the building, when completed, can attain commercial viability, for example whether it can be developed in one manner or another or sold to a prospective purchaser.

53 These may be some of the factors relevant to evaluating whether the purpose of the proposed rescue is to maximise the return for the creditors and the shareholders or whether it is aimed at achieving a benefit for the purchaser of the company's business (*in casu* the applicant for the business rescue) without any increased return for the company or its creditors and members (as opposed to that which could be attained on liquidation). The current application, however, needs to be decided on its own facts. There cannot be a checklist approach to business rescue applications – the relevant considerations in deciding whether a particular proposal meets the test may differ from case to case.

54 Every proposal must be considered on its own merits (see **Southern Palace** at para [24]). Each plan will need to be evaluated, based on the facts

placed before the court, as to the potential of the plan being workable and whether there is a reasonable possibility that the objectives contained in section 128 can be met.

55 The order sought by Bonatla can furthermore only be granted if the facts averred in its affidavits, which have been admitted by First Rand, together with the facts alleged by First Rand, justify such an order. Where real, relevant and material disputes of fact present themselves, these are to be decided on First Rand's version of the facts, unless their version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, are palpably implausible, far fetched or so clearly untenable that the court would be justified in rejecting them merely on the papers. See **Oakdene Square Properties** *supra* para 2, **National Director of Public Prosecutions v Zuma 1009 (2) SA 277 (SCA) at 290 para 26** and **Plascon-Evans Paints Ltd v Van Riebeek Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634E-635C**.

56 The question therefore is whether Bonatla has, on the common cause facts of this matter and where there is a real dispute, on First Rand's version, shown that there is a reasonable prospect of "rescuing the company" in the sense that there is, to adopt the formulation of the test of Van der Merwe J, upon which Bonatla relies, a possibility based on objective facts that its proposed plan will result in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.

57 The extent by which Midnight Storm's liabilities exceed its assets currently is in the region of R200 million. On liquidation, First Rand has calculated the dividend payable to concurrent creditors (after its own secured claim has been satisfied), to be approximately 24c in the rand on current values

58 The liquidators of both the investor companies and First Rand favour the winding up of Midnight Storm, *inter alia* that this will realise an early, easily determinable and certain dividend in at least the above sum.

59 Bonatla claims that its proposal will ensure a better return for Midnight Storm's creditors than would result from the immediate liquidation thereof. First Rand and the liquidators of the investor companies fear further delay will simply prolong the agony and ultimately cause concurrent creditors to receive even less.

60 On liquidation, according to Bonatla, the individual investors will receive an amount - which will be less than the anticipated dividend of 24c in the rand, given that the costs of the liquidators of the investor companies of which they are creditors, would still need to be deducted. Liquidation, according to Bonatla, will result in the individual investors obtaining a lesser return than 24c in the rand (as opposed to being compensated in full by Bonatla in terms of its proposed plan). (In its founding papers Bonatla claimed that there was no prospect of any dividend being paid to these investors.)

61 First Rand disputes that Bonatla has the financial capability to implement the proposed business rescue plan. It further argues the plan is so vague and uncertain and dependent on so many contingencies as to be incapable of having the prospects of its succeeding even evaluated. Whatever the possible outcome of the proposal it will take a long time for any benefit to be achieved for the creditors and shareholders of Midnight Storm, hence the major creditors' opposition to the plan, which of its own, they claim, already makes the proposal doomed to failure.

62 Apart from being dubious as to whether the required funding can be obtained, First Rand points to what is claimed to be a fundamental flaw in the plan. Shares in Bonatla's holding company, which has been suspended from trading on the JSE since at least June 2010, currently has no (alternatively insufficient value) to constitute adequate or actual compensation for creditors. There are no facts placed before court in this respect on which it can be concluded that this will change in the near future.

63 In addition, the *bona fides* of the plan and the prospect of the plan, as generalised and unspecific as it is, ever being implemented are questioned. In this regard First Rand argued that there are numerous conditions precedent for the plan's implementation which in many instances can in all probability not be met, or will in all probability not be met.

64 One of these conditions is that the property and business of the company be sold as a going concern, which will attract no value added tax. Given the fact that no further development has taken place and Midnight Storm currently has no employees, the prospects of it being sold as a going concern to Buzzway are non-existent, with the result that this condition precedent cannot be met.

65 The plan envisages the property and the business of Midnight Storm being transferred, against payment of the purchase price, to Bonatla. The plan does not envisage the company be resuscitated in order for the company to finalise the development and for the property and the company's business being sold to Buzzway as a going concern. It is premised on Buzzway acquiring the property on the stated conditions, one of which, it is already clear, is incapable of being fulfilled. In respect of the others, there is every possibility that these conditions precedent will also not be fulfilled. It is not stated that the plan (and its conditions) can be the subject of further negotiation in due course should a business rescue practitioner be appointed. On the contrary, should any of the conditions not be met within the time period set (or any extension thereof for 90 days, which extension is at the discretion of Bonatla) the provisions of the agreement will be of no force and effect.

66 There is accordingly every indication that many of the suspensive conditions cannot and will not be fulfilled, whether timeously or at all, with the result

that the proposed plan will not even get off the ground. It is argued on Bonatla's behalf it will always be open to the business rescue practitioner to bring an application for the winding up of the company should the plan fail. This is no argument for prolonging the agony of the investors, if there is no reasonable prospect of an increased return, and if the delay in all probability could have the opposite result.

67 The fact that the major creditors, First Rand Bank and the liquidators of the investor companies, have indicated that they will not approve any sale of the property on the proposed conditions to Bonatla or Buzzway (and have motivated their reasons for this) is in the circumstances of this matter a weighty consideration. This is not to find that the views of the major creditors will always be a weighty consideration. Although section 152(2)(a) requires the support of 75% of the creditors' voting interests for a business rescue section 153 provides for certain further steps which can be taken in the event of such support not being forthcoming. This will however require a further application to Court should the business practitioner wish to proceed therewith and bring about further delays and costs, which is ultimately not in the creditors' best interests.

68 There is furthermore, on the papers, no indication that the plan envisages the company, Midnight Storm, continuing for a while in order to establish a going concern in order to obtain the VAT benefit which is a condition

precedent for the sale. It is therefore more than probable that this fundamental condition will not be met.

69 In terms of the proposal it is envisaged that First Rand Bank will be paid in full. The individual investors will also be repaid the balance of their investments (in the investor companies) in full, alternatively, if they so choose, would obtain shares in Bonatla's holding company (which is listed on the JSE). Concurrent creditors will be paid 25c in the rand and the investor companies will be offered shares in Bonatla Holdings (which will result in a further benefit for the individual investors).

70 In terms of the proposal First Rand is accordingly to be paid more than R54 million in respect of its claim (capital and interest to date of payment, which interest increases by some R470 000 per month). The provisional liquidators of Midnight Storm are to receive R4,6 million from Bonatla for their fees and costs to date (which it is claimed will not need to be paid in the business rescue, although the proposed business rescue practitioner was to invoice it weekly for his fees and required a deposit of R250 000 in respect thereof). The funder (it is assumed Bonatla, although this is not clearly stated) may need to pay R22 million to the individual investors (should they not elect to take shares in Bonatla) and R63.7 million in the respect of the investment companies' claims. Completion of the hotel will according to Bonatla cost R115 million. In addition the purchaser of the property and business (Buzzway) will repay Bonatla (in due course or

immediately, it is not clear) the sum of its (Zoneska's) ceded claim against Midnight Storm (a claim which was certified by the creditor to be R684 497 as at 30 April 2011, and in respect of which (together with interest and costs) Bonatla paid R1,2 million nearly a year later).

71 It is not clear where the funding for these sums (in excess of R270 million) will be obtained and who will be effecting payment thereof.

72 The proposal refers to the balance sheet of Bonatla Holdings as at 26 April 2012 demonstrating "*total equity and liabilities*" of R494 150,00 for the year ending 31 December 2011 and to the liabilities as at the same date as being R110 463,00. The holding company claims that it will be in a position to fund debt raised against the combination of its own net assets and the value of the property to be acquired. The financial statements produced in reply do not show that Bonatla or its holding company have the cash resources to fund this.

73 And if a further mortgage bond were to be registered over the property, it would have to be repaid in preference to the claims of the concurrent creditors (section 135(3)(b)).

74 Bonatla Holdings appears to be a management company. Its only assets are loans to and investments in its various subsidiaries, of which Buzzway is

one. It does not itself own fixed asset or have investment property against which mortgage finance can be raised.

75 Bonatla claims that the Industrial Development Corporation has committed itself to providing (some) finance. The only fact relied on in support of this is that the IDC has written a letter in which it states it will consider an application for finance in the sum of R210 million (which Bonatla submits as proof of its being "*in principle ... willing*" to advance the money) to complete the hotel and settle the claims. This sum falls some R60 million short of the required total funding. It is R20 million short of the condition precedent set by Bonatla (namely that by no later than 30 July 2012 Bonatla was to deliver proof of the requisite available funds with which to finance the transaction "*comprising equity, debt or a combination of both comprising no less than R230 million ... on terms acceptable to Bonatla at its sole discretion*".

76 Even if it could be accepted on the strength of this letter that there was a reasonable possibility that such finance would be made available (which is doubtful), it is unclear when this was to have been done by (the granting thereof being subject to due diligence investigations and approval from its management), what conditions the IDC may set in order to secure its investment and where the balance of the funding was to be found. What is clear is that the condition precedent was not met by 31 July 2012. At the time of the matter being argued before me there was no indication that the requisite funding had been obtained.

77 Bonatla claims that more than a thousand of the individual investors support the plan. It is not that difficult to see why. They have a *spes* (based on the conditional promise referred to above) of obtaining both payment from Bonatla and in due course shares in Bonatla Holdings from the liquidators of the investor companies. The individual investors are however neither creditors nor members of Midnight Storm – their claims lie against the investment companies. Even if their interests are to be included in the assessment under section 131, although they are not strictly speaking creditors or shareholders of Midnight Storm, they have not stated in these proceedings the extent to which they have been informed of the details of the proposal nor exactly what they believe they stand to derive from it.

78 On the facts placed before me there does not appear to be a reasonable prospect that the promised additional benefit (i.e shares in Bonatla Holdings) would produce a better return for them (whether directly or indirectly). As set out above, trading in Bonatla Holdings' shares on the JSE has been suspended for some two years already. There is no indication when trading is to be resumed.

79 Even if the JSE were to lift its suspension of Bonatla Holdings, there are many more hurdles to be overcome, *inter alia* the consent of the various regulatory bodies whose approval is a condition precedent. It is clear that even if all of this were to be realisable, it would take a considerable time.

80 Whether funding can indeed be obtained to pay for the property in cash (without shares) is also not reasonably possible, on the facts currently before the Court. The Industrial Development Corporation has not bound itself to making any funds available. It has simply agreed in principle that it would be willing to consider any application by Bonatla for these funds, but that this would be subject to its own due diligence investigations and final approval. Bonatla's own balance sheets do not reveal that it has sufficient cash available to purchase the property and the business of Midnight Storm.

81 On the contrary, on what was submitted on its behalf is a misprint, the 2011 financial statements for the company reveal that it only had some R60 000,00 in cash at its disposal. Other financial statements reflect R1.2 million cash at the disposal of Bonatla Holdings. The plan itself is premised on further funds being borrowed by Bonatla from undisclosed sources against its equity. There is no satisfactory indication that such further finding is available. The time within which the funding was to be obtained has in fact already expired (although this can be extended at Bonatla's sole discretion).

82 It is also not explained in the papers why the expenses to be incurred by the business rescue practitioner will be any less than the costs of the liquidation. The provisional liquidators of Midnight Storm have already sought and obtained approval from this Court to incur various costs aimed at preserving

the assets. These costs will continue to mount unless finality is achieved in the near future.

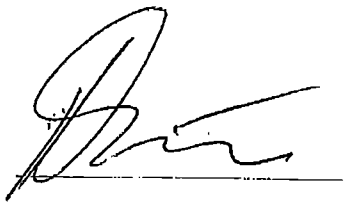
83 The purchase price itself is still subject to negotiation, which, in turn, depends on some acceptance that there is value in the shares which are being tendered as part of the purchase consideration. Given the fact that the company in which these shares are being tendered has been suspended for at least 2 years, it appears that agreement being reached in respect of the balance of the purchase price is unrealistic.

84 The current value of Bonatla Holdings' shares could, were they tradable, be as little as 7c. Any increase in the value of these shares is dependent on the development of Midnight Storm's property being done to successful completion and the rental enterprise being successfully conducted. This will be dependent on the approval of the business plan.

85 To argue that the shares, which are being tendered as part of the purchase price, could become as valuable as 67c is to put the cart before the horse. They will only achieve that value, on Bonatla's own version, if the proposed plan is not only approved but is successfully implemented to completion. In the absence of such value, the cash component becomes larger, which in turn increases the possibility of sufficient finding not being attainable.

86 Given all these difficulties there is, in my view, no reasonable prospect that the proposed plan will have the benefit for creditors which is claimed.

87 In the circumstances, the application for business rescue is dismissed with costs which costs are to be paid by Bonatla and which costs are to include the costs of the Registrar of Banks. A final winding-up order is granted in terms of which the respondent, Midnight Storm Investments 386 Ltd. is placed under final liquidation with the costs of the liquidation application to be costs in the liquidation. The costs in all these matters are to include the costs of two counsel where so employed.



R.G.L. STELZNER, (AJ)

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 15155/2011

In the matter between:

SOUTHERN PALACE INVESTMENTS 265 (PTY) LTD	Applicant
And	
MIDNIGHT STORM INVESTMENTS 386 LTD	Respondent
And	
THE REGISTRAR OF BANKS	First Intervening Party
ZONESKA INVESTMENTS (PTY) LTD	Second Intervening Party

JUDGMENT

ELOFF, AJ:

1. The commencement of the Companies Act, no 71 of 2008 ("the new Act") introduced profound changes to the legislation governing companies in this country. One such change is a new remedy available to ailing companies, being a business rescue. It constitutes a major theme of the new Act, and is amplified in section 7 (k) thereof, which states that one of the purposes of the Act is "*to provide for the efficient rescue and recovery of financially distressed companies, in a manner*

that balances the rights and interests of all relevant stakeholders".

2. Like its Australian equivalent[1], one of the aims of the remedy is to render it possible for companies in financial difficulty to avoid winding-up and to be restored to commercial viability[2]. Both jurisdictions recognise the desirability of a company in distress to continue in existence. Business rescue does, however, not necessarily entail a complete recovery of the company in the sense that, after the procedure, the company will have regained its solvency, its business will have been restored and its creditors paid[3]. There is also the further recognition that even though the company may not continue in existence, better returns may be gained by adopting the rescue procedure[4].

3. The scheme created by the business rescue provisions in Chapter 6 of the new Act envisages that the company in financial distress will be afforded an essential breathing space while a business rescue plan is implemented by a business rescue practitioner. It is, however, necessary to caution against the possible abuse of the business rescue procedure, for instance, by rendering the company temporarily immune to actions by creditors so as to enable the directors or other stakeholders to pursue their own ends. The courts in Australia have been careful not to allow their equivalent procedure to be used where

[1] To be found in Part 5.3A of the 2001 Australian Corporations Act, as amended in 2007
[2] See the definition of "Business Rescue" in section 128(1)(b) of the new Act
[3] Cassim *et al* Contemporary Company Law, 2011, p783
[4] See section 128(1)(b)(iii) of the new Act

there appears to be an ulterior purpose behind the appointment of an administrator by the directors[5]. It is necessary that an application for business rescue be carefully scrutinised so as to ensure that it entails a genuine attempt to achieve the aims of the statutory remedy. The instant case is one where such attempt was not discernible from the affidavits filed of record.

4. On 20 May 2011, Zoneska Investments (Pty) Ltd ("Zoneska") launched an application for the compulsory winding-up of the respondent, Midnight Storm Investments 386 Ltd, based on its inability to pay its debts.

5. The amount of the indebtedness of the respondent to Zoneska was said to be R561 656,45, being the outstanding balance of monies lent and advanced by Zoneska to the respondent in terms of a written agreement of loan. But for the application subsequently launched by Southern Palace Investments 265 (Pty) Ltd ("Southern Palace") on 27 July 2007 for business rescue proceedings be commenced in respect of the respondent in terms of the provisions of section 131(1) of the new Act, ("the business rescue application"), there was no reason for the winding-up application of Zoneska not to be granted. On 28 October 2011, I dismissed the business rescue application of Southern Palace with costs and issued an order placing the respondent in provisional winding-up. My reasons for making these orders follow

[5] Dr Colin Anderson 'VIEWING THE PROPOSED SOUTH AFRICAN BUSINESS RESCUE PROVISIONS FROM AN AUSTRALIAN PERSPECTIVE' 2008(1) Griffiths Business School Journal, p8

below.

6. Southern Palace, represented by Mr R Hassim, relied for its *locus standi* to launch the business rescue application on a claim which it acquired against the respondent from another creditor thereof. It accordingly qualified as an *"affected person"*, as defined in section 128(1)(a)(i) of the new Act.

7. The Registrar of Banks featured as the first intervening party in the business rescue application, and Zoneska became the second intervening party. Each of these intervening parties delivered a detailed factual response on affidavit to the business rescue application. Neither of them supported the application.

8. The following facts served as background to the business rescue application:

8.1. Midnight Storm is one of several companies in the so-called Realcor group, most of which find themselves in (voluntary) business rescue or in provisional liquidation.

8.2. These companies include Purple Rain Properties 15 (Pty) Ltd ("Purple Rain") and Africa's Best 258 (Pty) Ltd ("Africa's Best"). At the instance of creditors of these two companies, I made orders on 27 October 2011 placing them in provisional winding-

up.

8.3. Some of the companies in the Realcor group such as Midnight Storm and Africa's Best involved themselves in the acquisition and development of commercial properties. Africa's Best established a retail shopping mall in Grabouw, Western Cape, and Midnight Storm is the owner of a property in Blaauwberg on which the construction of a luxury hotel is in an advanced state of completion. Purple Rain conducted a construction business, and it apparently performed much of the construction work in relation to the hotel.

8.4. The businesses of the companies were conducted under the directorship of Ms Deonette de Ridder ("De Ridder") and Mr W B Nortjé ("Nortjé"). De Ridder is also a director of various other companies in the Realcor group, including Gray Haven Riches 9 Ltd, Gray Haven Riches 11 Ltd and Iprobrite Ltd ("the investment companies"), to which I shall make reference below.

9. The business rescue application was one of three such applications, the other two relating to Africa's Best and Purple Rain. The applications relating to those two companies failed, which resulted in them being placed in provisional winding-up. In each of those cases, there was no real answer to the liquidation application, and the business rescue application was devoid of any merit. In fact, in respect

of Africa's Best, counsel and the attorney acting for the applicants in the business rescue application withdrew as such, and the application was dismissed. In respect of Purple Rain, counsel who moved the business rescue application, and who also moved the business rescue application in respect of Midnight Storm, did not show any enthusiasm for the Purple Rain business rescue application. This was unsurprising, because there was no merit in that application. It was similarly dismissed.

10. The funding of the operations of the companies in the Realcor group, including Africa's Best, Purple Rain and Midnight Storm occurred as follows:

10.1. The Realcor group, under the directorship of De Ridder and Nortjé, used the investment companies to raise capital from members of the public by way of offers contained in a number of prospectuses. The particular mechanism that was used by the investment companies to raise funding was that one year debentures, five year debentures and various classes of shares in the investment companies were issued to members of the investing public, consisting of approximately 3 000 individual persons.

10.2. In this manner, an amount in excess of R616 million was collected over a period of time from subscribing members of the

public. These funds were principally used for the construction of the hotel of Midnight Storm in Blaauwberg. Members of the public were led to believe that they had acquired interests in the company owning the hotel itself.

11. In 2008, the then governor of the South African Reserve Bank appointed Ms L McPhail and two other persons as inspectors in accordance with the provisions of section 12 of the South African Reserve Bank Act, 90 of 1989, to investigate the conduct of companies in the Realcor group in relation to the manner in which funds had been taken from members of the public by way of the mechanism described earlier. On 26 August 2008, the Deputy Registrar of Banks appointed Ms McPhail and her team in terms of the provisions of section 84 of the Banks Act, 94 of 1990, to act as managers in order to manage and control the repayment of such funds by the companies in the Realcor group to the investors. These appointments resulted from the fact that the mechanism employed by the Realcor group to obtain funding from members of the public was unlawful and contravened the provisions of the Banks Act.

12. Having conducted a thorough and detailed investigation into the affairs of various companies in the Realcor group, including Midnight Storm, Purple Rain and Africa's Best, Ms McPhail was able to provide useful and detailed information, on behalf of the Registrar of Banks, in relation to the financial affairs and position of, *inter alia*, Midnight Storm. That

affidavit formed part of the papers in the current business rescue application.

13. The consequence of the actions of the Registrar of Banks in requiring the repayment of funds unlawfully received by companies in the Realcor group from members of the public, was that Purple Rain was unable to complete the construction of the respondent's hotel in Blaauwberg, and such construction activities came to a rapid halt. Purple Rain ceased conducting any further business.

14. Of importance is the fact that Purple Rain apparently acted as the banker in the Realcor group. Various funds were channelled through Purple Rain between the companies in the group. Ultimately, its accounting records were said to reflect positive balances in respect of various intercompany loans that were relied upon in its own business rescue application as constituting its major assets. However, such *"assets"* were plainly valueless, because the intercompany loans were irrecoverable. A proper set of financial statements for Purple Rain would probably have reflected a complete impairment of such suggested assets.

15. Reverting to the current business rescue application of Southern Palace, the contents thereof were extremely terse, vague and uninformative. What the main deponent, Mr Hassim, proposed therein, was that a globular approach was to be adopted to the three business

rescue applications (those of Africa's Best, Purple Rain and Midnight Storm) and that regard was to be had to the fact that he, himself, in his capacity as a trustee of companies to be formed, had contributed vast sums to a number of companies in the Realcor group in order to rescue them. Moreover, reliance was sought to be placed on an affidavit deposed to by Mr D F Du Toit Burger, a businessman whose family trust had invested more than R2 million in Gray Haven Riches 11 Ltd on the strength of public offers, and who had taken it upon himself to act on behalf of an *"investors' forum"*, which represented the interests of some 3 400 investors in the investment companies. The relevant parts of what Mr Burger had to say was that:

15.1. The respondent, which had conducted its business under the control of De Ridder, was financially distressed.

15.2. In view of the fact that the Realcor group of companies was interrelated in respect of shareholding, loan accounts, creditors and suretyships, all of such companies had been involved in an attempt to construct a rescue package. The liquidation of one of such companies would, however, result in the liquidation of the respondent and ultimately also the liquidation of the investment companies.

15.3. The globular rescue package consisted of agreements that had been concluded with Mr Hassim as a trustee for several

companies to be formed, and the purchase consideration payable by Mr Hassim for such companies would be used to discharge the obligations of the companies in the Realcor group to their creditors. The agreements constituting the globular rescue package were, however, subject to the fulfilment of suspensive conditions, one of which was that the written permission of the Registrar of Banks or Ms L McPhail and her team was to be obtained in terms of the provisions of section 84 of the Banks Act. Such permission was, however, not obtained.

15.4. Southern Palace and Mr Hassim were still committed to rescue the respondent by negotiating new agreements with *"all stakeholders"* in order to discharge the obligations of the respondent's creditors, including its bondholder, to secure further funds to complete the construction of the hotel and to enter into further agreements with the investors with a view to Southern Palace acquiring their shares in the respondent.

15.5. If the new rescue plan was allowed to continue, all investors would benefit, the hotel would be completed and an income would be generated by the respondent through the operation thereof.

15.6. Were the respondent, however, to be wound up, the investors would suffer most, because instead of procuring the opening of

the hotel, the investors would be left with almost nothing.

15.7. The business rescue plan depended on co-operation between all the entities within the Realcor group and with Mr Hassim.

16. Zoneska responded to the business rescue application by way of an affidavit deposed to by Mr Duvenage. He pointed out trenchantly that:

16.1. the respondent was indebted to the investment companies in an amount of approximately R415 million;

16.2. the respondent was bereft of any income and the construction work in respect of the hotel had already been suspended for many months;

16.3. a further amount of approximately R200 million would be required to complete the construction of the hotel and to render it ready for business;

16.4. an amount of R52 million was owed by the respondent to its bondholder, being First National Bank;

16.5. there was no reason to believe that the proposed new rescue plan which Mr Hassim was about to offer would result in the respondent becoming a successful concern.

17. As at the date of the hearing of the application for business rescue, being 26 October 2011, no new business rescue offer or agreement from Mr Hassim or Southern Palace had come about. Mr Saint, counsel for Southern Palace, nonetheless sought to impress upon me that Mr Hassim, who had, as has been pointed out, already contributed vast sums towards companies in the Realcor group in order to save them from winding-up, was prepared to commit a further amount of R120 million to that end. He was apparently prepared to provide a guarantee in respect thereof to the various creditors of the respondent. These creditors included the twelve month debenture holders, to whom an aggregate of approximately R27 million was owed.

18. It was not clear to me how the *spes* of a commitment made from the bar by counsel on Mr Hassim's behalf could assist me in considering whether to exercise the discretion in terms of section 131(4) of the new Act to grant the business rescue application. Mr Saint's suggestion was that, in considering the exercise of such a discretion, some weight was to be attached to the fact that a similar discretion would in due course be exercised by the proposed business rescue practitioner to be appointed in accordance with the provisions of section 141(1) of the new Act. What the submission entailed was that this Court's discretion which it was asked to exercise was, in some way, to be shared with the proposed business rescue practitioner. I found this proposition startling – such an approach would entail some type of delegation by this Court

of its statutory discretion to a person not yet appointed as business rescue practitioner. It clearly seeks to place the cart before the horse.

19. In terms of section 131(4) of the new Act, a Court may make an order placing a company under supervision and commencing business rescue proceedings if the Court is satisfied that:

19.1. the company is financially distressed;

19.2. 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

19.3. it is otherwise just and equitable to do so for financial reasons,

and there is a reasonable prospect for rescuing the company, or, it may dismiss the application together with any further necessary and appropriate orders, including an order placing the company under liquidation.

20. The meaning of the term *"reasonable prospect"* as used in this sub-section falls to be considered. In terms of section 427(1) of the previous Companies Act, no 61 of 1973, a rather cumbersome and ineffective procedure was provided for reviving ailing companies. That section of the 1973 Companies Act used the phrase *"reasonable*

probability" in respect of the recovery requirement. It read:

> *"427(1) When any company by reason of mismanagement or for any other cause –*
>
> *(a) is unable to pay its debts or is probably unable to meet its obligations; and*
>
> *(b) has not become or is prevented from becoming a successful concern,*
>
> *and there is a reasonable probability that, if it is placed under judicial management, it will be enabled to pay its debts or to meet its obligations and become a successful concern, the Court may, if it appears just and equitable, grant a judicial management order in respect of that company."*

21. In contrast, section 131(4) of the new Act uses the phrase *"reasonable prospect"* in respect of the recovery requirement. The use of different language in this latter provision indicates that something less is required than that the recovery should be a reasonable probability. Moreover, the mind-set reflected in various cases dealing with judicial management applications in respect of the recovery requirement was that, *prima facie*, the creditor was entitled to a liquidation order, and that only in exceptional circumstances would a judicial management order be granted. The approach to business rescue in the new Act is the opposite – business rescue is preferred to liquidation.

22. However, even if the substantive test with its lower threshold is satisfied, the Court still has a discretion not to grant the order. In exercising this discretion, the Court should give due weight to the legislative preference for rescuing ailing companies if such a course is reasonably possible. It would therefore be inappropriate for a Court faced with a business rescue application to maintain the mind-set (from the earlier regime) that a creditor is entitled *ex debito justitiae* to be paid or to have the company liquidated.

23. Reverting to the instant case, it is significant that the board of directors of the respondent did not itself initiate business rescue proceedings under section 129 of the new Act. But, more importantly, there is, on the vague and undetailed information before me, no reason to believe that there is any prospect of the business of the respondent being restored to a successful one. There is not even a concrete plan available for consideration. The previous plan of Mr Hassim failed, and there is not as yet any reason to believe that another plan will yield any better result. There is, of course, nothing that will preclude Southern Palace from renewing its business rescue application in the future, once Mr Hassim conceives of and produces a new business rescue plan.

24. Whilst every case must be considered on its own merits, it is difficult to conceive of a rescue plan in a given case that will have a reasonable

prospect of success of the company concerned continuing on a solvent basis unless it addresses the cause of the demise or failure of the company's business, and offers a remedy therefor that has a reasonable prospect of being sustainable. A business plan which is unlikely to achieve anything more than to prolong the agony, i.e. by substituting one debt for another without there being light at the end of a not too lengthy tunnel, is unlikely to suffice. One would expect, at least, to be given some concrete and objectively ascertainable details going beyond mere speculation in the case of a trading or prospective trading company, of:

24.1. the likely costs of rendering the company able to commence with its intended business, or to resume the conduct of its core business;

24.2. the likely availability of the necessary cash resource in order to enable the ailing company to meet its day-to-day expenditure, once its trading operations commence or are resumed. If the company will be reliant on loan capital or other facilities, one would expect to be given some concrete indication of the extent thereof and the basis or terms upon which it will be available;

24.3. the availability of any other necessary resource, such as raw materials and human capital;

24.4. the reasons why it is suggested that the proposed business plan will have a reasonable prospect of success.

25. In relation to the alternative aim referred to in section 128(b)(iii) of the new Act, being to procure a better return for the company's creditors and shareholders than would result from the immediate liquidation thereof, one would expect an applicant for business rescue to provide 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. It is difficult to see how, without such details, a Court will be able to compare the scenario sketched in the application with that which would obtain in an immediate liquidation of the company. Mere speculative suggestions are unlikely to suffice.

26. In the instant case, the only information of any value that was provided to me was that contained in the affidavits of Zoneska and the Registrar of Banks. The picture painted therein as to, for instance, the likely amount that will be required in order to enable the respondent to complete the construction of the hotel and to commence with its intended business, rendered it clear that unless Mr Hassim was prepared to contribute at least double the amount apparently offered by him on extremely liberal terms as to repayment, there was no reason to believe that the respondent had any prospect of becoming a successful trading concern. Unsurprisingly, other than the vague and undetailed

commitment offered on behalf of Mr Hassim by Mr Saint from the bar, no such offer came about, and no indication as to the basis upon which Mr Hassim would be prepared to share his bounty with the respondent emerged from the papers or during the hearing.

27. It was not sought, in the business rescue application, to pursue the second aim highlighted in section 128(1)(b)(ii) of the new Act, namely to implement a business plan that would result in a better return for the respondent's creditors or shareholders than would result from the immediate liquidation thereof.

28. In the circumstances, I was not prepared to exercise the discretion provided for in terms of section 131(4) and I dismissed the application for business rescue with costs on 28 October 2011, and placed the respondent in provisional winding-up.

ELOFF AJ 25·11·2011

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