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**Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty)  
Ltd:**

**A case discussion of the Supreme Court of Appeal decision with reference to  
the reasonable prospect requirement set out in Chapter 6 of the Companies  
Act 71 of 2008.**

by

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# INDEX

1 Introduction

2 Problem Statement

3 South Africa

3.1 Business Rescue

3.1.1 Definition and Purpose

3.1.2 Voluntary Commencement of Business Rescue

3.1.3 Financially Distressed

3.1.4 Reasonable Prospect

3.1.5 Compulsory Commencement of Business Rescue

3.1.6 Objections to Company Resolution

3.1.7 Business Rescue Practitioner

4 Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd

4.1 Facts

4.2 Court a quo Judgment

4.3 Supreme Court Of Appeal Judgment

5 Reasonable Prospect

5.1 Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd

5.2 Koen v Wedgewood Village Golf and Country Estate (Pty) Ltd

5.3 Employees Solar Spectrum Trading 83 (Pty) Limited v AFGRI Operations Limited and Another,  
In Re: AFGRI Operations Limited v Solar Spectrum Trading 83 (Pty) Ltd

5.4 Prospec Investments (Pty) Ltd v Pacific Coast Investments Ltd



5.5 Newcity Group (Pty) Ltd v Pellow NO and Others, China Construction Bank Corporation  
Johannesburg Branch v Crystal Lagoon Investments 53 (Pty) Ltd and Others

7 Conclusion



## 1 Introduction

Prior to the recent law reform initiatives, companies which were unable to remain afloat and which were no longer able to perform the functions and duties for which they were initially incorporated, were destined to be liquidated and thus ceasing to continue in existence.<sup>1</sup> This called for the formulation of a rescue culture as the failure of a company affects a lot of people and not just its employees and creditors.<sup>2</sup> The introduction of a rescue measure has enabled companies, which have the possibility to be rescued, to not have to face the fate of liquidation. Unfortunately, business rescue is not constructed in a manner that allows for every single sinking ship to remain afloat, but it can provide ailing companies, companies with the potential to be rescued, with an alternative to liquidation. The new business rescue procedure seeks to protect a wider range of interests as opposed to judicial management and liquidation which have, in the past, been implemented for the benefit of creditors.<sup>3</sup>

The business rescue provisions, which are in Chapter 6 of the Companies Act 71 of 2008,<sup>4</sup> are not without their own issues and complications. Like its predecessor judicial management, the interpretation of some terms and phrases which are not defined in the Act has caused an ongoing debate. A lot of uncertainty is experienced by the courts regarding the meaning of reasonable prospect and, as a result, it is one of the most problematic factors that stand in the way of granting business rescue orders.<sup>5</sup>

This dissertation will, firstly, briefly discuss business rescue in general. It will do so by discussing the manner in which business rescue proceedings may commence, the requirements that need to be proved, the powers and functions of the business rescue practitioner and so forth. Secondly, it will discuss the facts of *Oakdene Square Properties vs Farm Bothasfontein*<sup>6</sup> as well as the judgment by referring to the issues dealt with by the court a quo and the Supreme Court of Appeal. Thirdly, it will discuss the much debated requirement in the Companies Act that, when making an application for business rescue, there

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<sup>1</sup> In the United Kingdom rescue mechanisms were also not available to companies struggling financially. In *Cork Insolvency Law and Practice Report of the Review Committee (1928)* par 496 it was observed that in a number of cases, potentially viable businesses that could be rescued were forced into liquidation and were closed down since no proper rescue procedure was available to them. It was proposed that a procedure be introduced to assist companies experiencing financial difficulties by enabling a person (an Administrator) to be appointed to carry on the business of the company and to borrow for that purpose and thus be in a position to be able to rescue the business of the company.

<sup>2</sup> Loubser *Some Comparative Aspects of Corporate Rescue in South African Company Law* (2010 thesis SA) 1.

<sup>3</sup> Bradstreet "Business Rescue proves to be creditor-friendly: CJ Claassen J's analysis of the new business rescue procedure in *Oakdene Square Properties*" 2013 *SALJ* 44.

<sup>4</sup> The judicial management regime has been replaced by the business rescue regime. Like South Africa, the corporate insolvency provisions in Australia are contained in its general company law statute.

<sup>5</sup> Joubert "'Reasonable possibility versus 'reasonable prospect': Did business rescue succeed in creating a better test than judicial management?" 2013 *THRHR* 550 562.

<sup>6</sup> *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* 2013 4 SA 539 (SCA) 2.

should be reason to believe that a reasonable prospect of rescuing the company exists.<sup>7</sup> This discussion will focus mainly on the reasonable prospect element of the provision by looking at various ways in which courts have attempted to interpret this phrase. Lastly, before concluding, it will refer to authors who have written on business rescue, its problems, advantages, disadvantages and how it is viewed as being a far better method as opposed to liquidation and judicial management.

## 2 Problem Statement

Business rescue is for the benefit of struggling companies which do not wish to go through liquidation. It is not for the corporation that is terminally ill nor is it for the corporation that is chronically ill, but for ailing corporations which, given time, will be rescued and become solvent.<sup>8</sup> In other words, it is specifically for financially distressed companies which can actually be rescued. An application for business rescue needs to be scrutinized by the court to ensure that there is a genuine attempt to achieve the aims of the Act.<sup>9</sup> When a business rescue application is made it is required that there be a reasonable prospect that the company can be rescued.<sup>10</sup> There is uncertainty as to what a 'reasonable prospect' actually entails and there has been some controversy as to the approach to be used by the courts to determine whether a reasonable prospect is present. The Supreme Court of Appeal dealt with this phrase in the *Oakdene* case and adopted its own approach to interpreting whether a reasonable prospect is present in the business rescue application. Whether this approach will be the approach that will be followed by other courts remains to be seen.

## 3 South Africa

### 3.1 Business Rescue<sup>11</sup>

There are consequences that are associated with the granting of a liquidation order. It results in the demise of the corporation, loss of jobs, and it almost always results in “an unsatisfactory pro rata share in the residue for unsecured creditors and the abandonment of claims when such are not proven.”<sup>12</sup> Therefore, based on these outcomes it is necessary to have “legislation that is effective in providing ‘escape routes’ from such ‘commercial death’ that are aimed at rescuing a financially distressed company from its decline

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<sup>7</sup> See ss 129(1)(b) and 131(4)(a).

<sup>8</sup> See *Welman v Marcelle Props 193 CC 2012 ZAGPJHC 32* par 28.

<sup>9</sup> See *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd 2012 2 SA 423 (WCC)* par 3.

<sup>10</sup> s 129(1)(b) and s 131(4)(a).

<sup>11</sup> In Australia, the equivalent of the business rescue provisions can be found in Part 5.3A in the Corporations Act 2001. In the United Kingdom, administration (the English law version of business rescue) is regulated by Part II of the Insolvency Act of 1986 as now revised by the Enterprise Act 2002. The Enterprise Act substituted Part II with a new Part II, the provisions of which are contained in a new Schedule B1 to the Insolvency Act.

<sup>12</sup> Bradstreet “The new business rescue: will creditors sink or swim?” 2011 *SALJ* 352.

towards liquidation.”<sup>13</sup> Judicial reorganization or the conclusion of a re-structuring agreement are examples of such escape routes.<sup>14</sup> Chapter 6 of the Companies Act contains a mechanism which could be categorized as judicial reorganization.<sup>15</sup>

When a company is in financial trouble, it has two possible alternatives to liquidation: business rescue or a compromise with its creditors.<sup>16</sup> The vision behind business rescue is that an independent business rescue practitioner will be appointed for the sole purpose of attending to the company’s problems and proposing a plan to rescue its business.<sup>17</sup> S 7(k) of the Act 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.”<sup>18</sup> This section is in accordance with one of the themes of the Companies Act of 2008 which is to create a system of corporate rescue that is appropriate to the needs of a modern South African economy.<sup>19</sup> It has been accepted that business rescue offers a useful alternative to the liquidation of a company.<sup>20</sup>

Chapter 6 has been described as a corporate rescue mechanism that is effective as well as modern.<sup>21</sup> Firstly, it not only provides for a voluntary initiation of the procedure which provides for “an inexpensive alternative to expensive and time-consuming court proceedings,”<sup>22</sup> but also a compulsory initiation should the company not adopt a resolution.<sup>23</sup> Secondly, the provision of a general moratorium once business rescue proceedings have commenced is an important element of any corporate rescue mechanism as it allows a company breathing space to find a solution to its financial problems.<sup>24</sup> Creditors and other interested parties are prevented from taking any legal or enforcement action, including liquidation

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<sup>13</sup> n 12 above.

<sup>14</sup> n 12 above.

<sup>15</sup> n 12 above.

<sup>16</sup> Sharrock, Smith and Van der Linde *Hockly’s Insolvency Law* (2012) 275; The Corporations Act makes provisions for two formal arrangements with the view of rescuing a business: scheme of arrangement and voluntary administration. In Schedule B1 business rescue or the implementation of a reorganization of a company can occur in a number of ways: A contract based arrangement outside of the statutory environment, administration, company voluntary arrangements, or re-organisation in terms of s 425 of the UK Companies Act.

<sup>17</sup> n 16 above.

<sup>18</sup> s 7(k); n 16 above, as a result preference will be given to business rescue over liquidation. This is so only where there is a genuine attempt to achieve the aims of the Act.

<sup>19</sup> FHI Cassim, MF Cassim, R Cassim, Jooste, Shev and Yeats *Contemporary Company Law* (2012) 861.

<sup>20</sup> Havenga, Esser, Geach, Locke, Vermaas and Mahony *South African Corporate Business Administration* (2012) 14-1.

<sup>21</sup> Meskin, Galgut, Magid, Kunst, Boraine and Burdette *Insolvency Law* (2013) par 18.2.

<sup>22</sup> n 21 above; See s 129 of the Companies Act 71 of 2008

<sup>23</sup> n 21 above; See ss 129 and 131 of the Companies Act 71 of 2008

<sup>24</sup> n 21 above; See s 133 of the Companies Act 71 of 2008.

proceedings, which could prevent the possible rescuing of the company.<sup>25</sup> Thirdly, provision is made for post-commencement finance to enable the company to continue trading as the rescue of the company would be at risk without it.<sup>26</sup> Fourthly, provision is made for a business rescue practitioner to develop and implement a business rescue plan formulated to rescue the company or its business.<sup>27</sup> Fifthly, all stakeholders are bound by the terms of the business rescue plan once the plan has been accepted by the requisite majority.<sup>28</sup> Lastly, short timeframes are provided within which the business rescue procedure is to be completed.<sup>29</sup> It is in the interests of the company and the relevant stakeholders that the process be completed as soon as possible considering the objectives and consequences of the commencement of business rescue proceedings.<sup>30</sup>

### 3.1.1 Definition and Purpose

Business rescue is defined as a proceeding to facilitate the rehabilitation of a financially distressed company.<sup>31</sup> It does so by providing the following: temporary supervision of the company and the management of its affairs, business and property;<sup>32</sup> temporary moratorium on the rights of claimants against the company or in respect of property in its possession;<sup>33</sup> and the development and implementation of a plan to rescue the company in various ways to ensure the likelihood of the company continuing in existence on a solvent basis or, if this is not possible, that results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.<sup>34</sup>

The business rescue plan must thus have two goals: A primary goal, which is to facilitate the continued existence of a company in a state of insolvency<sup>35</sup> and a secondary goal, which is provided as an

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<sup>25</sup> n 24 above.

<sup>26</sup> n 21 above; See s 135 of the Companies Act 71 of 2008.

<sup>27</sup> n 21 above; See ss 150 – 152 of the Companies Act 71 of 2008.

<sup>28</sup> n 21 above.

<sup>29</sup> n 21 above.

<sup>30</sup> n 21 above.

<sup>31</sup> s 128(1)(b); n 16 above; Stein and Everingham *The New Companies Act Unlocked* (2011) 410; n 19 above 864.

<sup>32</sup> s 128(1)(b)(i); n 16 above 276.

<sup>33</sup> s 128(1)(b)(ii); n 16 above 276.

<sup>34</sup> s 128(1)(b)(iii); n 16 above 276.

<sup>35</sup> In Australia, the object of voluntary administration is almost identical to what the term 'rescuing a company' aims to achieve. The main purpose of Part 5.3A is to provide for the business, property and affairs of an insolvent company to be administered in a way that maximizes the chance of the company, or as much as possible of its business, continuing existence; In the United Kingdom the purpose of administration, in terms of Schedule B1, is for the administrator to perform his functions with the objective of rescuing the company as a going concern. The administrator must perform his functions with this objective as his primary objective unless he is of the opinion that it is not reasonably practical to achieve this objective; Finch *Corporate Insolvency Law: Perspectives and Principles* (2009) 523, with regards to the primary objective, employees are given no opportunity to give input into the decision-making process governing administration regardless of the fact that



alternative, namely, to facilitate a better return for the creditors or shareholders of the company than would result from immediate liquidation.<sup>36</sup> Thus, a “successful business rescue procedure does not necessarily require that all creditors be paid in full or that all shareholders retain their investment.”<sup>37</sup> The secondary goal is present if the achievement of the primary goal proves not to be viable.<sup>38</sup> It is regarded as being unfortunate that neither section 129(1) nor section 131(4) state the secondary objective as a requirement for the commencement of business rescue proceedings.<sup>39</sup> According to the Companies Act 71 of 2008, rescuing a company means achieving the goals set out above.<sup>40</sup> Rescue does not necessarily mean keeping a company alive and, in certain instances, it may mean protecting the interests of creditors.<sup>41</sup> Furthermore, rescuing the company does not mean saving the wreck at all costs, “but rather making an appropriate use of the business rescue procedure to facilitate an outcome that is in the interests of all stakeholders.”<sup>42</sup>

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their livelihoods are at stake. This differs substantially from Chapter 6 as employees are given an opportunity to be included in the process of business rescue and to object to a resolution of the board.

<sup>36</sup> *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* 2013 4 SA 539 (SCA) par 23; Similar to s 128(1)(b)(iii), Part 5.3A also makes provision for an administration that results in a better return for the creditors and the members of the company than would result from an immediate winding up of the company if it is not possible for the company or its business to continue in existence; Schedule B1 also contains a secondary objective which is achieving a better return for the company’s creditors than would be likely if the company were to be wound up. This objective is pursued if it would achieve a better result for the company’s creditors as a whole. This objective differs from the objectives in Chapter 6 and Part 5.3A which specifically include other members of the company and not just the creditors. Unlike Chapter 6 and Part 5.3A, Schedule B1 contains a third objective which is realising property in order to make a distribution to one or more secured or preferential creditors. This objective may only be pursued if the administrator thinks that it is not reasonably practicable to achieve either of the other two objectives and he does not unnecessarily harm the interests of the company’s creditors. It is observed that the effect of the above three objectives is that the administrator does not have an obligation to rescue the company at all costs. Furthermore, it is clear from the second and third objectives that administration in the United Kingdom is mostly beneficial to creditors. This makes this procedure different from South Africa and Australia which aim to benefit other members of a company such as shareholders and employees.

<sup>37</sup> Stein and Everingham *The New Companies Act Unlocked* (2011) 25.

<sup>38</sup> *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* 2013 4 SA 539 (SCA) par 23; In other words, the main object of business rescue is to save the company as a going concern or, if that is not possible, to produce a better return for creditors and shareholders than would result from the liquidation of the company.

<sup>39</sup> n 21 above par 18.4.3, the omission of the alternative objective as a requirement for the commencement of business rescue proceedings has led to some judgments questioning whether the secondary goal is a legitimate objective of a business rescue application.

<sup>40</sup> s 128(1)(h); n 16 above 276; Stein and Everingham *The New Companies Act Unlocked* (2011) 411; See also *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* 2013 4 SA 539 (SCA) par 22.

<sup>41</sup> n 3 above 50.

<sup>42</sup> n 3 above 51.

### 3.1.2 Voluntary Commencement of Business Rescue

Business rescue proceedings may be initiated in two ways: a resolution by the board of directors of a company (voluntary business rescue) or by an order of court (compulsory business rescue).<sup>43</sup> To begin voluntary business rescue proceedings and to place the company under supervision, a company resolution is required.<sup>44</sup> Although section 129 refers to a company resolution, it is the board of a company that adopts such a resolution. Before the board may adopt such a resolution, the board must have reasonable grounds to believe that the company is financially distressed<sup>45</sup> and that there appears to be a reasonable

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<sup>43</sup> In Australia, voluntary administration commences when an administrator is appointed. The appointment of an administrator can occur in three ways. Firstly, by the company through the adoption of a resolution that an administrator of the company should be appointed. The directors voting for the resolution must be of the opinion that the company is insolvent or is likely to become insolvent at some time in the future. Secondly, by a liquidator or provisional liquidator. The liquidator or provisional liquidator may make such an appointment if he or she believes that the company is insolvent or is likely to become insolvent at some time in the future. Such a liquidator or provisional liquidator may appoint him or herself as the administrator with leave from the Court, provided that he or she meets the qualifications of an administrator required by the Act. Thirdly, by a creditor that is entitled to enforce a charge on the whole, or substantially the whole, of a company's property. The charge must have become, and is still, enforceable. In all instances, an administrator may not be appointed where the company is already being wound up. In the United Kingdom, an administration order is an order appointing a person as the administrator of a company. A company enters administration when the appointment of an administrator takes effect and is in administration while the appointment of an administrator has effect. A person may be appointed as an administrator in three ways. Firstly, by an administration order of the court. The application to the court for an administration order may only be made by the company, by the directors of the company, by one or more creditors of the company, the designated officer exercising the power conferred by the Magistrates' Court Act, or a combination of all the persons listed above. If the company is already in liquidation, an application for an administration order may only be made by the company's liquidator. Secondly, by the holder of a qualifying floating charge in respect of a company's property. The person making the appointment must give at least two business days' notice to the holder of any prior floating charge of the holder of any prior floating charge has consented in writing to the making of the appointment. Thirdly, by the company or its directors. An administrator may not be appointed by the company or its directors if a petition for the winding up of the company has been presented and is not yet disposed of, an administration application has been made and is not yet disposed of, or an administrative receiver of the company is in office. When an application for administration is made, whether by an order of court or by the company or its directors, it is required that the company must be, or likely to become, unable to pay its debts and the court must be satisfied that the administration order is reasonably likely to achieve the purpose of administration.

<sup>44</sup> s 129; n 16 above 277; Stein and Everingham *The New Companies Act Unlocked* (2011) 412.

<sup>45</sup> s 129(1)(a); n 16 above 277; n 21 above par 18.4.3, this requirement turns on a question of fact; Voluntary administration only requires that the person or persons appointing the administrator be of the opinion that the company is insolvent or is likely to become insolvent at some time in the future. In Alberts *Business Rescue in South Africa: a critical review of the regulatory environment* (2004 dissertation UP) 33 it is observed that this allows directors to enter business rescue sufficiently early and thus leaving enough time for rescue actions to be implemented. In Smits "'Corporate administration': A proposed model" 1999 *DE JURE* 80 87 it is noted that the policy of voluntary administration aims to encourage directors to file early in order to increase the corporation's chance of recovery. In terms of this procedure a company need not be insolvent in order for an administrator to be appointed.

prospect of rescuing the company.<sup>46</sup> The phrase ‘reasonable grounds to believe’ is not defined in the Act. This phrase appears to indicate that directors must believe that the requirements are present and they must have good reasons for this belief when voting for a resolution to begin business rescue proceedings.<sup>47</sup> This phrase refers to the company’s specific circumstances at the time of the resolution, and which will be known to the board, which is a subjective test.<sup>48</sup>

The ability of the board to adopt a resolution should serve to encourage directors of a financially distressed company to seek help at an early stage instead of waiting until the company is insolvent which will be too late.<sup>49</sup> In essence, directors are in a position which enables them to know whether the company is in financial difficulties.<sup>50</sup> However, a problem with allowing the board to resolve to commence business rescue is that it allows directors to initiate business rescue proceedings even though the company’s financial problems may have been caused by their own incompetence.<sup>51</sup> Such a resolution may not be adopted if liquidation proceedings have been initiated by or against the company and the resolution has no force or effect until it has been filed.<sup>52</sup> Liquidation proceedings may not begin unless the resolution has lapsed or until the business rescue proceedings have come to an end.<sup>53</sup>

### 3.1.3 Financially Distressed

The Companies Act defines financially distressed.<sup>54</sup> It provides that a company is financially distressed if: 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;<sup>55</sup> or it appears to be reasonably likely that

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<sup>46</sup> s 129(1)(b); n 16 above 277; n 21 above paragraph 18.4.3, the second requirement lies in the discretion of the Court; See paragraph 5 below for a more detailed discussion of the phrase ‘Reasonable prospect of rescuing the company’.

<sup>47</sup> n 2 above 55.

<sup>48</sup> Delport, Vorster, Burdette, Esser and Lombard *Henochsberg on the Companies Act 71 of 2008* (1<sup>st</sup> ed) 451.

<sup>49</sup> n 19 above 866.

<sup>50</sup> n 19 above 866.

<sup>51</sup> n 19 above 867.

<sup>52</sup> s 129(2)(a)-(b); n 16 above 277.

<sup>53</sup> s 129(6); n 16 above 278.

<sup>54</sup> See s 128(1)(f); n 16 above 277; Stein and Everingham *The New Companies Act Unlocked* (2011) 410; In Voluntary Administration no timeframe is specified with regards to the likelihood of the company becoming insolvent. This differs immensely from the financially distressed requirement which expressly states that it must appear to be reasonably likely that the company will become insolvent within the immediately ensuing six months.

<sup>55</sup> s 128(1)(f)(i); n 16 above 277; In terms of Schedule B1, the phrase ‘unable to pay its debts’ has the same meaning as in s 123 of the Insolvency Act. According to s 123(2), a company is deemed to be unable to pay its debts if it is proved, to the satisfaction of the court, that the value of the company’s assets is less than the amount of its liabilities, taking into account its prospective and contingent liabilities. In Goode *Principles of Corporate Insolvency Law* (2011) 130, the excess of liabilities over assets is not a determining factor. It has to be shown is that because of the deficiency of its assets, the company has reached a point of no return; Loubser

the company will become insolvent within the immediately ensuing six months.<sup>56</sup> At this stage the company is not insolvent but on the verge of insolvency or is experiencing liquidity problems.<sup>57</sup> It is apparent that the intention of the business rescue procedure is that it be used at the earliest possible moment, i.e. “when the company is showing signs of pending insolvency but where it has not yet reached the stage of actual insolvency.”<sup>58</sup> The financially distressed requirement is the main advantage of business rescue in that “business rescue can begin as early as six months before a company anticipates that it could go insolvent, thereby greatly improving the chances of a successful rehabilitation”<sup>59</sup> The sooner a company receives assistance (business rescue) the better chance it will have of being rescued.<sup>60</sup> This is the rationale for making provision for voluntary business rescue.<sup>61</sup>

However, Loubser is of the view that a period of six months is too short and “may deprive a company of the opportunity to take the necessary steps to protect itself in good time from a financial risk or impending crisis that is foreseeable more than six months prior to its occurrence.”<sup>62</sup> A period of 12 months seems more appropriate than six months since a company’s financial planning normally stretches over the next financial year.<sup>63</sup> Therefore, increasing the period to 12 months will allow remedial action to be taken at the first indication of future financial problems and whilst there is still a chance of successfully avoiding the company’s failures.<sup>64</sup>

### 3.1.4 Reasonable Prospect

The phrase ‘reasonable prospect of rescuing the company’ is not defined in the Act and as a result it is unclear what a reasonable prospect entails.<sup>65</sup> The punctuation used in the Act appears to suggest that the

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*Some Comparative Aspects of Corporate Rescue in South African Company Law* (2010 thesis SA) 178 *et seq*, this ground is crucial to any corporate rescue attempt. Not only does it allow an application for an administration order to be presented while the company is still able to pay its debts as they fall due, but its current and foreseeable liabilities are such that at some stage the company’s assets will not be enough to pay all the creditors. Therefore, an administrator can be appointed before a company is commercially and factually insolvent and thus beyond rescue.

<sup>56</sup> s 128(1)(f)(ii); n 16 above 277.

<sup>57</sup> n 19 above 864; Stein and Everingham *The New Companies Act Unlocked* (2011) 411, the test is whether or not a reasonable likelihood exists that the company will suffer enormous cash flow or balance sheet difficulties within the next six months.

<sup>58</sup> n 48 above 447 *et seq*.

<sup>59</sup> n 37 above 411.

<sup>60</sup> n 48 above 450; See also Loubser *Some Comparative Aspects of Corporate Rescue in South African Company Law* (2010 thesis SA) 57.

<sup>61</sup> n 48 above 450.

<sup>62</sup> n 2 above 58.

<sup>63</sup> n 62 above.

<sup>64</sup> n 2 above 337 *et seq*.

<sup>65</sup> The Corporations Act does not contain a recovery requirement that is the equivalent of the South African recovery requirement. As a result, this system is less strict as it only requires that the person appointing an

reasonable prospect requirement applies only when business rescue commences by board resolution, or when an application is granted on the basis that it is just and equitable for financial reasons.<sup>66</sup> For example, the only requirement that an affected person applying for a business rescue order would have to prove is that the company is financially distressed.<sup>67</sup> It has been suggested that prospect, which could mean a possibility or a probability, must be taken to mean a reasonable possibility in the instance of business rescue.<sup>68</sup> The reasonable prospect requirement ensures that companies that are more than merely financially distressed are not placed under business rescue but are instead liquidated.<sup>69</sup> It has been recommended that the wording of this requirement be amended to differentiate it from the reasonable probability requirement in judicial management so as to avoid any uncertainty.<sup>70</sup> By doing so a lot of confusion and uncertainty will be avoided.<sup>71</sup> The reasonable prospect requirement will be discussed in more detail below.

### 3.1.5 Compulsory Commencement of Business Rescue

Where a company (board of directors) has not adopted a resolution to begin business rescue proceedings, an affected person - a shareholder or creditor of a company, any registered trade union and any of the employees of the company not represented by a trade union - may apply to a court for an order placing the company under supervision and thus commencing business rescue proceedings.<sup>72</sup> It is rather unfortunate

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administrator be satisfied that the company is insolvent or it is likely that it will become insolvent some time in the future. It is not required that there be a reasonable prospect that the company will be rescued. Schedule B1 is similar to Chapter 6 in some aspects. For instance, the recovery requirement is similar to the requirement that the court, when appointing an administrator, must be satisfied that the administration order is likely to achieve the purpose of administration. The phrase 'reasonably likely to achieve' requires more than a mere possibility that administration will achieve its intended purpose; Loubser *Some Comparative Aspects of Corporate Rescue in South African Company Law* (2010 thesis SA) 180 and Parry *Corporate Rescue* (2008) 37, in this instance, the court has to be satisfied that a real prospect exists that administration will achieve the stated purpose. In other words, the court does not have to be satisfied that the purpose of administration will be achieved, but only that there is a reasonable prospect that it will be achieved. That being said, "it is insufficient to show a real prospect that administration would achieve an outcome no worse than in liquidation."

<sup>66</sup> n 3 above 48.

<sup>67</sup> n 66 above.

<sup>68</sup> n 62 above.

<sup>69</sup> n 19 above 865.

<sup>70</sup> n 2 above 339.

<sup>71</sup> n 70 above.

<sup>72</sup> s 131(1); n 16 above 279; Stein and Everingham *The New Companies Act Unlocked* (2011) 411; Australian law does not make provision for shareholders, creditors or employees to appoint an administrator. They are not regarded as 'affected persons' like in Chapter 6. Unlike the South African system, the procedures to commence voluntary administration do not involve any application to the court. In response to this criticism, Anderson in "The Australian Corporate Rescue Regime: Bold experiment or sensible policy?" 2001 *International Insolvency Review* 81 84 states that regardless of the form of gateway that there is to the insolvency process, abuse is likely to occur at some stage. What needs to be considered is whether the extent of the abuse "exceeds the benefits that may arise from having a speedy and low cost system of commencement."

that the board and individual directors are excluded from the definition of affected persons in section 128(1)(a).<sup>73</sup> This results in a director being unable to apply to court (in his capacity as director) for a business rescue order even if he or she believes that the company is financially distressed and should be placed under supervision, but who is outvoted by other directors.<sup>74</sup>

After an application made by an affected person is considered, the court may make such an order if it is satisfied that the company is financially distressed,<sup>75</sup> that it has failed to pay any amount in terms of an obligation in terms of a public regulation, or contract, pertaining to employment-related matters,<sup>76</sup> or it is otherwise just and equitable to do so for financial reasons.<sup>77</sup> The court must also be satisfied that there is a reasonable prospect for rescuing the company.<sup>78</sup> Although the court still has a discretion, the test is stricter in this regard as the court *must* be satisfied that the requirements in section 131(4)(a) are present, whereas, the board need only have reasonable grounds to believe that the requirements in section 129(1) are present.<sup>79</sup> The 'reasonable grounds to believe' requirement is evidently excluded from section 134(4). Furthermore, there is doubt as to whether compulsory initiation of business rescue will be of much use since in most instances it will be rather difficult, if not impossible, for an outsider to prove that a company is financially distressed.<sup>80</sup> Loubser regards it as unfortunate that there is no provision for a deeming inability of the company to pay its debts<sup>81</sup> which would be helpful to outsiders to prove the financially distressed requirement.

By requiring that the court approve the application to commence business rescue proceedings, abuse of the process, frivolous or malicious applications intended to harass the company are deterred.<sup>82</sup> Another option that the court has at its disposal is the ability to dismiss the application together with any further

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<sup>73</sup> n 2 above 51.

<sup>74</sup> n 73 above.

<sup>75</sup> s 131(4)(a)(i); n 16 above 279; Stein and Everingham *The New Companies Act Unlocked* (2011) 417.

<sup>76</sup> s 131(4)(a)(ii); n 16 above 279; Stein and Everingham *The New Companies Act Unlocked* (2011) 417.

<sup>77</sup> s 131(4)(a)(iii); n 16 above 279; Stein and Everingham *The New Companies Act Unlocked* (2011) 417.

<sup>78</sup> s 131(4)(a); n 16 above 279; Stein and Everingham *The New Companies Act Unlocked* (2011) 417; In the United Kingdom, the court will only make an administration order if it is satisfied that the requirements for administration are present. If the administration order is granted, any winding up order must be discharged by the court.

<sup>79</sup> n 2 above 59 et seq.

<sup>80</sup> n 2 above 60; Stein and Everingham *The New Companies Act Unlocked* (2011) 417, affected persons applying to the court for the commencement of business rescue will, in most cases, require the co-operation of the company in proving any of the requirements in section 134(4); However, in terms of s 31(3) of the Companies Act trade unions must, through the Commission, be given access to financial statements of the company for purposes of initiating a business rescue process. Thus, this places them in a better position to obtain some knowledge as to the financial position of the company.

<sup>81</sup> n 2 above 60.

<sup>82</sup> n 19 above 873.



necessary and appropriate order, including a liquidation order.<sup>83</sup> So in essence, even if the applicant proves all the requirements in section 134(4), the court still has a discretion to grant the order placing the company under supervision and commencing business rescue proceedings.

An application for business rescue by way of a court order differs from the commencement of business rescue by way of a board resolution in that, in the former, liquidation proceedings that have already commenced at the time the application is made will be suspended until the court has adjudicated upon the application or until the business rescue proceedings end.<sup>84</sup> In the latter, a resolution may not be adopted if liquidation proceedings have already been initiated.<sup>85</sup>

### 3.1.6 Objections to Company Resolution

The Act allows for affected persons to object to the resolution by applying to a court for an order setting it aside.<sup>86</sup> Such an application may be made at any time after the board has taken a resolution to commence business rescue proceedings but before the adoption of a business rescue plan.<sup>87</sup> The court may set aside the resolution on either of the following grounds: there is no reasonable basis for believing that the company is financially distressed;<sup>88</sup> there is no reasonable prospect for rescuing the company;<sup>89</sup> or the company has failed to satisfy the procedural requirements relating to the company resolution to begin business rescue proceedings.<sup>90</sup> If the court does not set aside the resolution on the abovementioned grounds, the court may set aside the resolution simply because it regards it as otherwise just and equitable to do so.<sup>91</sup>

The right to object to a resolution serves as a safeguard against the abuse of the business rescue process. However, making it easy to reverse a board's decision to commence business rescue proceedings will definitely undermine the success of the proceedings.<sup>92</sup> A more effective solution to the possible abuse would have been to provide for a more thorough scrutiny by the court.<sup>93</sup> It must, nevertheless, be borne in

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<sup>83</sup> s 131(4)(b); n 164 above 279.

<sup>84</sup> s 131(6); n 16 above 279.

<sup>85</sup> s 129(2)(a); n 16 above 277.

<sup>86</sup> s 130(1).

<sup>87</sup> s 130(1); n 16 above 278; Stein and Everingham *The New Companies Act Unlocked* (2011) 414.

<sup>88</sup> s 130(1)(a)(i); n 16 above 278.

<sup>89</sup> s 130(1)(a)(ii); n 16 above 278.

<sup>90</sup> s 130(1)(a)(iii); n 16 above 278, this last requirement seems rather unnecessary since, according to s 129(5)(a), a business rescue resolution automatically lapses and becomes a nullity if any procedural requirements are not complied with.

<sup>91</sup> s 130(5)(a)(ii); n 16 above 278.

<sup>92</sup> n 2 above 69.

<sup>93</sup> n 19 above 870.

mind that “the potential abuse of the procedure is an unavoidable risk that must be taken in order to encourage boards to initiate business rescue proceedings where and when necessary.”<sup>94</sup>

### 3.1.7 Business rescue practitioner

A business rescue practitioner<sup>95</sup> is then appointed either when the board files the business rescue resolution,<sup>96</sup> or a court makes an order to commence business rescue proceedings.<sup>97</sup> The role of the practitioner is to oversee a company during business rescue proceedings.<sup>98</sup> The practitioner has full management control of the company and is responsible to develop and implement the business rescue plan.<sup>99</sup> There have been strong criticisms against the board’s power to appoint the practitioner. Since the requirement to commence business rescue proceedings is simply a board resolution, the argument is that it is important that the practitioner be a person of integrity who is entirely independent of the company and has the necessary expertise to do the job.<sup>100</sup> Allowing the board to appoint the practitioner could lead to immense abuse since the board could be the very cause of the company being financially distressed.<sup>101</sup> The appointment process, so the criticisms continue, should include some form of independent approval of the board’s appointment.<sup>102</sup>

## 4 *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd*

### 4.1 Facts

Oakdene Square Properties alleged that it was a creditor of the company and thus had locus standi to bring an application for business rescue, while Educated Risk contended it was a 40 per cent shareholder of the company.<sup>103</sup> The two Theodosiou brothers, who had an interest in Oakdene and Educated Risk, relied on the allegation that they were the trustees of the MJF trust which previously owned the 40 per

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<sup>94</sup> n 2 above 69.

<sup>95</sup> In terms of the Corporations Act, administration commences when an administrator is appointed. An administrator in Australian law is the equivalent of a business rescue practitioner in South African law.

<sup>96</sup> S 129(3)(b); n 16 above 284.

<sup>97</sup> S 131(5); n 16 above 284.

<sup>98</sup> s 128(1)(d); Stein and Everingham *The New Companies Act Unlocked* (2011) 411.

<sup>99</sup> s 140 (1)(a) and (d)(i) and (ii); n 16 above 284; In the Corporations Act the administrator has control of the company’s business, property and affairs; In Schedule B1, an administrator is a person who is appointed to manage the affairs, business and the property of the company. The administrator is obliged to perform his functions in the interests of the company’s creditors as a whole and he is also required to perform his functions as quickly and as efficiently as is reasonably practicable.

<sup>100</sup> n 37 above 413.

<sup>101</sup> n 100 above.

<sup>102</sup> n 100 above.

<sup>103</sup> *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2013 4 SA 539 (SCA) par 2.



cent shares in the company now held by Educated Risk.<sup>104</sup> The first respondent is the company, Farm Bothasfontein.<sup>105</sup> The second (Nedbank Limited) and third (Imperial Holdings Limited) respondents' interest in the matter was not in dispute.<sup>106</sup> Both respondents each held 30 per cent of the shares in the company and they were each owed 7.5 million by the company in the form of a shareholder's loan.<sup>107</sup>

The four appellants Oakdene Square Properties (Pty) Ltd, Educated Risk Investments 54 (Pty) Ltd, Dimetrys Theodosiou and Antonys Theodosiou applied to the South Gauteng High Court for an order placing Farm Bothasfontein (Kyalami) (Pty) Ltd under supervision and commencing business rescue proceedings as contemplated in chapter 6 of the Companies Act.<sup>108</sup> This application was brought around the time of Nedbank's arrangement of a sale in execution pursuant to the High Court judgment in its favour for about R31.5 million, together with interest and costs.<sup>109</sup> The crux of the appellants' case in their founding application was that a forced sale in execution would be to the detriment of the shareholders and creditors of the company.<sup>110</sup> They contended that if the immovable property were to be sold in an execution sale it would realise no more than R120 million, whereas, if the property were to be sold in the normal course, it could realise its true market value which was determined by their experts as between R300 million and R350 million.<sup>111</sup>

Nedbank Limited and Imperial Holdings Limited opposed the main application and sought to liquidate the company instead.<sup>112</sup> In their answering affidavit, they denied the valuation of the immovable property by the appellants' expert.<sup>113</sup> They relied primarily on a valuation by their own experts of R129 million for the immovable property as a whole.<sup>114</sup> On the face of it, the assets of the company are worth at least R129 million while the liabilities added up to no more than about R75 million.<sup>115</sup>

In their replying affidavit, the appellants pursued their application for business rescue on the basis that it would yield a better return than liquidation.<sup>116</sup> They did so on the following three grounds: (a) A business rescue practitioner would be able to sell the immovable property at a higher price than a liquidator; (b)

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<sup>104</sup> par 2.

<sup>105</sup> par 4.

<sup>106</sup> par 4.

<sup>107</sup> par 4.

<sup>108</sup> par 1.

<sup>109</sup> par 15.

<sup>110</sup> par 15.

<sup>111</sup> par 15.

<sup>112</sup> par 1.

<sup>113</sup> par 16.

<sup>114</sup> par 16.

<sup>115</sup> par 16.

<sup>116</sup> par 17.

The costs of a business rescue practitioner are likely to be lower than those of a liquidator; and (c) The sale of the two Kyalami erven 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.<sup>117</sup> When the matter went before the Supreme Court of Appeal it was clear that, unless the business rescue application was successful, the winding-up of the company would inevitably follow.<sup>118</sup>

Although the company appeared to be factually solvent (the value of its assets exceeded its debts) it was unable to satisfy the judgment debt in favour of Nedbank.<sup>119</sup> This meant that it was both commercially insolvent for liquidation purposes and financially distressed within the contemplation of section 131(4)(a)(i).<sup>120</sup> The further requirement imposed by this section, that is, whether or not there was a reasonable prospect of rescuing the company, was more problematic.<sup>121</sup>

#### 4.2 Court a quo Judgment

Claassen J agreed with Eloff AJ's view that the phrase indicates that something less is required in terms of the Act as opposed to reasonable probability in the previous Act.<sup>122</sup> Claassen J went even further and stated that if the facts indicate that there is a reasonable possibility of rescuing the company, the court might exercise its discretion and grant the application.<sup>123</sup> He used the word "possibility" instead of 'prospect'.

#### 4.3 Supreme Court of Appeal Judgment

In his judgment, Brand JA, firstly, dealt with the nature of the discretion of the court in terms of section 131(4). With regards to the question whether section 131(4) affords the court a discretion in the strict sense or not, Brand JA concluded that the short answer was 'no'.<sup>124</sup> If the court of appeal should disagree with the conclusion, it is bound to interfere.<sup>125</sup> The question is whether the Supreme Court of Appeal agrees with the conclusion reached by the court a quo.<sup>126</sup>

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<sup>117</sup> par 17.

<sup>118</sup> par 1.

<sup>119</sup> par 7.

<sup>120</sup> par 7.

<sup>121</sup> par 7.

<sup>122</sup> *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2012 3 SA 273 (GSJ) par 18.

<sup>123</sup> par 18.

<sup>124</sup> par 21.

<sup>125</sup> par 21.

<sup>126</sup> par 21.

Secondly, the court dealt with the meaning of ‘rescuing a company’. Section 128(1)(b)(iii) has two goals: the primary goal is to facilitate the continued existence of the company in a state of insolvency. The secondary goal 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. The debate arose whether a business rescue application can succeed in an instance where the proposed business rescue plan provides for the secondary goal only.<sup>127</sup> Basically, whether the requirement will be satisfied where it is clear that the company can never be saved from liquidation and that the only hope is for a better return than that which would result from liquidation.<sup>128</sup>

Nedbank and Imperial contended that the approach in *A G Petzetakis International Holdings Ltd v Petzetakis Africa* should be endorsed.<sup>129</sup> In this case, the question was answered in the negative the reason being that “s 131(4) does not incorporate the alternative object of the rescue plan referred to in s128.”<sup>130</sup> They referred to the dictionary meaning of ‘rescue’ and ‘rehabilitate’, which portray the restoration of a company to a normal healthy state.<sup>131</sup> Therefore, they argued that these proceedings must be aimed at the achievement of the primary goal in section 128(1)(b)(iii) which is to restore the company to the normal healthy state of solvency.<sup>132</sup> Thus according to their contention, the secondary objective can only be an alternative goal of the proposed rescue plan.<sup>133</sup> They concluded that a proposed business rescue plan that would not result in the return of a company to a state of solvency, but provides for the achievement of the secondary goal, does not amount to rescuing a company as defined in the Act.<sup>134</sup> Such a plan does not comply with the requirement in section 131(4).<sup>135</sup>

Brand JA held that the dictionary meaning of these words does not acknowledge that section 128(1)(b) already gives its own meaning to these terms, which does not match up to these definitions.<sup>136</sup> To his understanding, business rescue means to facilitate rehabilitation, which means the achievement of one of two goals: (a) returning the company to solvency, or (b) providing a better deal for creditors and shareholders than what they would receive through liquidation.<sup>137</sup> This construction, he further states,

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<sup>127</sup> par 23.

<sup>128</sup> par 23.

<sup>129</sup> par 25.

<sup>130</sup> *A G Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd and Others* 2012 5 SA 515 (GSJ) par 17.

<sup>131</sup> par 25.

<sup>132</sup> par 25.

<sup>133</sup> par 25.

<sup>134</sup> par 25.

<sup>135</sup> par 25.

<sup>136</sup> par 26.

<sup>137</sup> par 26.

“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).”<sup>138</sup> As he sees it, achieving of any one of these two goals would qualify as business rescue in terms of section 131(4).<sup>139</sup>

Thirdly, the court dealt with the meaning of a reasonable prospect. Reasonable prospect is generally regarded as a lesser requirement than reasonable probability which was a standard for placing a company under judicial management.<sup>140</sup> Brand JA believes that more than a mere prima facie case or an arguable possibility is required.<sup>141</sup> The Court is of the opinion that “it must be a reasonable prospect – with the emphasis on ‘reasonable’ – which means that it must be a prospect based on reasonable grounds and a mere speculative suggestion is not enough.”<sup>142</sup>

According to Brand JA, “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.”<sup>143</sup> The Court noted the position laid down in some reported decisions in that an applicant must provide a substantial measure of detail about the proposed plan to satisfy this requirement<sup>144</sup>, but agreed with the comments by Van der Merwe J in *Propspec Investments v Pacific Coasts Investments 97 Ltd*<sup>145</sup> about the bar being placed too high by the previous decisions.<sup>146</sup>

The applicants contended that the bar be set lower than that.<sup>147</sup> They relied on the 'development and implementation, if approved, of the plan to rescue the company' stated in section 128(1)(b) in their argument that the reasonable prospect for rescuing a company demands no more than the reasonable prospect of the rescue plan.<sup>148</sup> Therefore, according to their argument, the application for business rescue is need not show a reasonable prospect of achieving the goals in section 128(1)(b).<sup>149</sup> The only thing the applicant has to prove is that “a plan to do so is capable of being developed and implemented, regardless of whether or not it may fail.”<sup>150</sup> The argument went on and the applicants contended that once it is established that the applicant’s intention is to develop and implement a rescue plan which has that as its

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<sup>138</sup> par 26.

<sup>139</sup> par 26.

<sup>140</sup> par 29; See *Southern Palace investments v Midnight Storm Investments* 2012 2 SA 423 (WCC) par 21 which is dealt with in more detail below.

<sup>141</sup> par 29.

<sup>142</sup> par 29.

<sup>143</sup> par 30.

<sup>144</sup> par 30.

<sup>145</sup> 2013 (1) SA 542 (FB).

<sup>146</sup> par 31: See also Meskin, Galgut, Magid, Kunst, Borraine and Burdette *Insolvency Law* (2013) par 18.4.3.

<sup>147</sup> par 31.

<sup>148</sup> par 31.

<sup>149</sup> par 31.

<sup>150</sup> par 31.

purpose, the court should grant the business rescue application even if it is not convinced that this will result in the primary or secondary goal being achieved.<sup>151</sup> Brand JA did not agree with this argument because it is in direct conflict with the express wording of section 128(1)(h).<sup>152</sup> Rescuing a company actually requires the achievement of one of the goals in section 128(1)(b) and “the development of a plan cannot be the goal in itself but only a means to an end.”<sup>153</sup> The court was of the opinion that the end must be to restore the company to a solvency, or at least to facilitate a better deal for creditors and shareholders than they would receive from liquidation.<sup>154</sup> Although the applicant is not required to set out a detailed plan since this is left to the business rescue practitioner after careful investigation, the applicant must establish grounds for the reasonable prospect of achieving one of the goals.<sup>155</sup>

In applying the law to the facts, Brand JA had a problem with the proposal that the business rescue practitioner, rather than the liquidator, should sell the property as a whole.<sup>156</sup> This proposal was viewed as offering “no more than an alternative, informal kind of winding-up of the company, outside the liquidation provisions.”<sup>157</sup> The court believed that this could not have been the intention of creating business rescue.<sup>158</sup> Ultimately, the court did not “believe that business rescue was intended to achieve a winding-up of a company in order to avoid the consequences of liquidation proceedings, which is what the applicants were apparently seeking to achieve.”<sup>159</sup>

Brand JA believed that the appellants’ proposal was unsustainable.<sup>160</sup> In motivating this proposal, the appellants relied on two grounds: Firstly, the business rescue practitioner would be able to obtain a better price for the property than a liquidator.<sup>161</sup> According to Brand JA, this ground rests on no more than pure speculation.<sup>162</sup> Secondly, the remuneration of the liquidator would exceed the remuneration of the business rescue practitioner.<sup>163</sup> This ground departs from the principle that the fees of the liquidator and the business rescue practitioner are calculated differently.<sup>164</sup> While the liquidator fees are calculated as a

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<sup>151</sup> par 31.

<sup>152</sup> par 31.

<sup>153</sup> par 31.

<sup>154</sup> par 31.

<sup>155</sup> par 31.

<sup>156</sup> par 33.

<sup>157</sup> par 33.

<sup>158</sup> par 33.

<sup>159</sup> par 33.

<sup>160</sup> par 34.

<sup>161</sup> par 34.

<sup>162</sup> par 34.

<sup>163</sup> par 34.

<sup>164</sup> par 34.

percentage of the assets of the company, the fees of the business rescue practitioner are based on a daily rate.<sup>165</sup>

Brand JA reached the conclusion that liquidation proceedings are more suitable for situation that arose in this case.<sup>166</sup> In his view, the circumstances of the case are the very circumstances at which the investigative powers of the liquidator are aimed.<sup>167</sup> The Court believed that there was a real possibility that liquidation would be more advantageous to creditors and shareholders than the proposed informal winding-up of the company through business rescue proceedings.<sup>168</sup>

The proposition by the appellants, which involved the sale of the two Kyalami erven, raised more problems than solutions.<sup>169</sup> The valuation of the two erven was the first problem. Even if they were to be sold for R32 million, that would not be enough to satisfy the judgment debt in favour of Nedbank which had grown substantially due to the interest it had accumulated.<sup>170</sup> That would, therefore, leave all the other debts unpaid and, in fact, it was not even clear where the remuneration of the business rescue practitioner would come from.<sup>171</sup>

In these circumstances Brand JA did not believe that the declared intent of two major creditors (Nedbank and imperial) to oppose any business plan in line with either of the two option proposed by the appellants was unreasonable.<sup>172</sup> While the court a quo regarded this declared intent by Nedbank and Imperial as one of the reasons why business rescue was doomed to fail, Brand JA had a different opinion.<sup>173</sup> If majority creditors declare that they will oppose any business rescue scheme based on the reasonable grounds established by the applicant for the prospect of rescuing a company, there is no reason why that proclaimed position should be ignored, unless that attitude can be said to be unreasonable or mala fide.<sup>174</sup>

The counsel for the appellants proposed that a sale of the immovable property and the payment of creditors is likely to result in a cash surplus.<sup>175</sup> This would, according to the counsel, terminate the commercial insolvency of the company.<sup>176</sup> Brand JA could not fault the simple logic of the argument but

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<sup>165</sup> par 34.

<sup>166</sup> par 35.

<sup>167</sup> par 35.

<sup>168</sup> par 35.

<sup>169</sup> par 36.

<sup>170</sup> par 36.

<sup>171</sup> par 36.

<sup>172</sup> par 37.

<sup>173</sup> par 37.

<sup>174</sup> par 38.

<sup>175</sup> par 39.

<sup>176</sup> par 39.

he did not believe that it constituted a ‘business rescue’ within the meaning of section 128(1)(b)(iii).<sup>177</sup> The section requires the continued existence of the business of the company on a solvent basis and a company which merely exists to own cash in the bank has lost its purpose of existence.<sup>178</sup> According to Brand JA, “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.”<sup>179</sup> The Court held that in light of the fact that there are irreconcilable differences between the shareholders, the possibility of the resurrection of the company’s business can be excluded in this case.<sup>180</sup> In the Court's view, the court a quo could not be criticized for finding that business rescue proceedings were not appropriate and that the liquidation of the company was more preferable.<sup>181</sup> The appeal was dismissed with costs in favour of the second and third respondents.

### *5 Reasonable Prospect*

When the board of a company adopts a resolution, or when an affected person applies to court for an order, to commence business rescues and place the company under supervision, the court needs to be satisfied, amongst other requirements, that there is a reasonable prospect that the company can be rescued.<sup>182</sup> The term ‘reasonable prospect’ is not defined in the Act and, as a result, it has been rather problematic to interpret. It is unclear what this term means exactly and there has been a lot of attempts by the courts to interpret and apply it in various cases. The fact that the phrase ‘reasonable prospect of rescuing a company’ (also referred to as the ‘recovery requirement’) is not defined in Chapter 6 is rather unfortunate, especially since the interpretation of ‘reasonable probability’, as contained in both the 1921 and 1973 Act, was problematic as well.<sup>183</sup> According to Joubert, it is unfortunate that the need for a clearly formulated burden of proof was not considered when the new business rescue regime was established.<sup>184</sup>

In interpreting the phrase, it is submitted that the requirements of reasonable prospect should not be seen as separate from the rest of the objective associated with them, that is, the interpretation of ‘reasonable

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<sup>177</sup> par 39.

<sup>178</sup> par 39.

<sup>179</sup> par 39.

<sup>180</sup> par 39.

<sup>181</sup> par 39.

<sup>182</sup> ss 129(1)(b) and 131(4)(a).

<sup>183</sup> n 5 above 553.

<sup>184</sup> n 183 above.



prospect for rescuing the company' as a unit.<sup>185</sup> By keeping the complete phrase as a unit, it is apparent that what is required is that there be a reasonable prospect of rescuing the company by achieving one of the goals set out in section 128(1)(b) at the time the application is made. Without a definition of this phrase, it is up to the courts to interpret the phrase in each case and to determine whether there is in fact a reasonable prospect that the company will be able to be rescued.

Another submission with regards to the interpretation of reasonable prospect is that it is dependent on the route taken, namely, when the board adopts a resolution to place the company under supervision or when an affected person brings an application to court for an order placing the company under supervision.<sup>186</sup> This submission is made based on the fact that the board will have full knowledge of the company's financial affairs, what it is still capable of achieving, and what would reasonably be required to rescue the company.<sup>187</sup> On the other hand, the knowledge available to the board is in contrast to the knowledge of the company's affairs that an affected person may have at the time an application is brought.<sup>188</sup> In such an instance the application would be brought by an employee, a creditor, or a shareholder, "none of which would necessarily have, or be expected to have, the information required to meet the requirements laid down by the Court in the *Southern Palace* case."<sup>189</sup> Since directors have access to the financial affairs of the company, the recovery requirement should apply in a stricter manner than to an affected person who does not have the financial affairs of the company at their disposal.

Loubser recommends that the wording of the recovery requirement be amended and that the requirement should use the words "a reasonable possibility of rescuing the company".<sup>190</sup> This would avoid any uncertainty or confusion.<sup>191</sup> 'Possibility' would be much easier to interpret than 'prospect'.

As previously mentioned, this problematic phrase has enjoyed a great deal of attention in case law. I will now refer to the manner in which different South African courts have attempted to interpret 'reasonable prospect'.

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<sup>185</sup> n 5 above 554.

<sup>186</sup> See Delpont, Vorster, Burdette, Esser and Lombard *Henochsberg on the Companies Act 71 of 2008* (2012) 467, there should be a difference between the case where a board adopts a resolution and where an affected person brings an application to the court; n 5 above 555; n 21 above paragraph 18.4.3.

<sup>187</sup> n 48 above 467.

<sup>188</sup> n 187 above; *Employees of Solar Spectrum Trading 83 (Pty) Limited v AFGRI Operations Limited and Another, In Re: AFGRI Operations Limited v Solar Spectrum Trading 83 (Pty) Ltd* 2012 ZAGPPHC 359 par 17.

<sup>189</sup> n 186 above.

<sup>190</sup> n 2 above 339.

<sup>191</sup> n 190 above.



### 5.1 *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd*<sup>192</sup>

Southern Palace, which qualified as an affected person, launched business rescue proceedings against the respondent.<sup>193</sup> In his judgment, Eloff AJ expressly indicated that the use of different language in section 131(4) of the new Act indicates that something less is required by the recovery requirement contained in Chapter 6 than the one required in the 1973 Act, namely, a ‘reasonable probability’.<sup>194</sup>

When considering the meaning of ‘reasonable prospect’, Eloff AJ looked at various factors that would apparently indicate the existence of a reasonable prospect. He created a short check list to be used by a court before granting a business rescue application, despite acknowledging that each case must be judged on its own merits.<sup>195</sup> According to Eloff AJ, unless a rescue plan addresses the cause of the demise or failure of the company’s business, and offers a remedy that has a reasonable prospect of being suitable, it is difficult to conceive of a rescue plan that will have a reasonable prospect of success and thus resulting in the company concerned continuing on a solvent basis.<sup>196</sup> A business plan which is unlikely to achieve anything more than to prolong the agony is unlikely to suffice.<sup>197</sup> Concrete and objectively ascertainable details that go beyond mere speculation should be provided.<sup>198</sup>

Joubert notes that although Eloff AJ had the correct idea when he created the check list, a lot of detail is required to meet this check list and such detail is often not available at the time an application for business rescue is brought before the court.<sup>199</sup> So essentially, this check list would be problematic in enabling the court to determine whether a reasonable prospect of rescuing a company has been proven.

These factors were criticized by judgments that followed, as well as by authors, as placing the bar too high.<sup>200</sup> Delport submits that the requirements laid down in this case “go too far and set an unreasonably high benchmark in showing that there is a reasonable prospect of rescuing the company.”<sup>201</sup> Despite the criticisms, the judgment has been unfortunately followed by subsequent judgments resulting in the same

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<sup>192</sup> 2012 2 SA 423 (WCC).

<sup>193</sup> par 5.

<sup>194</sup> par 21.

<sup>195</sup> par 24.

<sup>196</sup> par 24.

<sup>197</sup> par 24.

<sup>198</sup> par 24.

<sup>199</sup> n 5 above 557.

<sup>200</sup> See *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd and Another* 2013 (1) SA 542 (FB) par 11; *Newcity Group (Pty) Ltd v Pellow NO, China Construction Bank Corporation Johannesburg Branch v Crystal Lagoon Investments 53 (Pty) Ltd and Others* 2013 ZAGPJHC 54 par 14.

<sup>201</sup> n 48 above 467.

misunderstanding as to what reasonable prospect means.<sup>202</sup> Delport goes on further and states that the court appears to have lost sight of the purpose of business rescue which is to appoint a business rescue practitioner to investigate the aspects the Court referred to in its judgment.<sup>203</sup> He submits that the requirements laid down by the Court in establishing a reasonable prospect of rescuing the company, “would be better suited when applied to the circumstances where the business rescue practitioner has to express an opinion on whether or not there is a reasonable prospect of rescuing the company, as these would be the type of questions he would be faced with in principle.”<sup>204</sup> Expecting a business rescue plan to be in place at the time an applicant approaches the Court for an order placing a company under supervision is “to place the cart before the horse.”<sup>205</sup> A reasonable prospect may be demonstrated in many other ways that do not involve presenting a full business rescue plan to the Court.<sup>206</sup>

The judgment by Eloff AJ could set an unreasonable precedent for the level of proof required in order for an applicant to obtain a compulsory business rescue order generally.<sup>207</sup> Expecting all applicants to meet the stringent requirements laid down in this case “will probably sound the death knell for business rescue in South Africa and lead to the procedure becoming as ineffective as its predecessor, judicial management.”<sup>208</sup> The approach under Chapter 6 is to rescue companies and not liquidate them.<sup>209</sup> So it is regrettable that the Court laid down requirements that will make it extremely difficult for applicants to obtain the necessary orders to rescue a company.<sup>210</sup>

## 5.2 *Koen v Wedgewood Village Golf and Country Estate (Pty) Ltd*<sup>211</sup>

This case also involved a compulsory application for business rescue. In dealing with the recovery requirement, Binns-Ward J stated that the information or evidence that will be sufficient to prove the existence of a reasonable prospect will depend on the object (the objects contained in section 128(1)(b)(iii) of the Companies Act).<sup>212</sup> Binns-Ward J immediately thereafter continued by stating that in order to succeed in the application for business rescue, the applicant must be able to place before the court

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<sup>202</sup> See *Koen v Wedgewood Village Golf and Country Estate (Pty) Ltd* 2012 2 SA 378 (WCC) par 18.

<sup>203</sup> n 48 above 467.

<sup>204</sup> n 48 above 467 et seq.

<sup>205</sup> n 48 above 468; .

<sup>206</sup> n 48 above 468.

<sup>207</sup> n 206 above.

<sup>208</sup> n 48 above 468(1).

<sup>209</sup> n 208 above.

<sup>210</sup> n 208 above.

<sup>211</sup> 2012 2 SA 378 (WCC).

<sup>212</sup> par 17.

a “cogent evidential foundation to support the existence of a reasonable prospect that the desired object can be achieved”<sup>213</sup> This is the case regardless of the object of the proposed business rescue.<sup>214</sup>

Regarding the type of information that needs to be placed before the court in an application based on section 131(4)(a) to show that a reasonable prospect does exist, Binns-Ward J further stated that:

“the founding papers in a business rescue application must nevertheless contain sufficient factual detail to enable the court to determine whether the business rescue practitioner will probably have a viable basis to undertake the task, or, at the very least, make out a case for the court to hold that an investigation by a business rescue practitioner to that end, in terms of s 141(1) of the Act, appears to be justified.”<sup>215</sup>

Regarding what will be required of an applicant seeking a supervision order to put a company into business rescue, Binns-Ward J concurred with Eloff AJ’s remark that as least some concrete and objectively ascertainable details going beyond mere speculation should be provided.<sup>216</sup> He expressly stated that vague and speculative averments will not be sufficient in assisting a court to determine whether there is a reasonable prospect that the intended business rescue objective could be achieved.<sup>217</sup>

### *5.3 Employees Solar Spectrum Trading 83 (Pty) Limited v AFGRI Operations Limited and Another, In Re: AFGRI Operations Limited v Solar Spectrum Trading 83 (Pty) Ltd*<sup>218</sup>

The employees of Solar Spectrum Trading approached the court as affected persons for the commencement of business rescue proceedings of the company.<sup>219</sup> The dispute in this case, like the others mentioned above, concerned the question whether there was a reasonable prospect to rescue the company.

Kollapen J referred to the words of Eloff AJ in his judgment. He expressed his difficulty in understanding the factors mentioned by Eloff AJ with regard to satisfying the requirement that there be a reasonable prospect of rescuing the company.<sup>220</sup> His difficulty to understand was especially brought on by the fact that Eloff AJ listed these factors after expressly stating that every case must be considered on its own

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<sup>213</sup> par 17.

<sup>214</sup> par 17.

<sup>215</sup> par 17.

<sup>216</sup> par 18.

<sup>217</sup> par 18.

<sup>218</sup> 2012 ZAGPPHC 359.

<sup>219</sup> par 1.

<sup>220</sup> par 17.

merits.<sup>221</sup> He added that when a court is determining whether a reasonable prospect does exist, regard must be given to the type of information the affected party is able to present given the position that he or she has toward the company.<sup>222</sup> This was referred to by the judge as a “balancing exercise”.<sup>223</sup>

In his interpretation of the meaning of the word “prospect”, Kollapen J noted that the concept of a “prospect” is not something that is certain.<sup>224</sup> He explained it as follows:

“By its very nature a prospect is future looking and dependent upon a number of variables and includes a level of risk to the extent that the future is hardly capable of accurate prediction. What is required is not certainty but a determination on the facts and on the evidence presented that the future prospects of rescuing the business appear to be reasonable.”<sup>225</sup>

#### 5.4 *Propspec Investments (Pty) Ltd v Pacific Coast Investments Ltd*<sup>226</sup>

A creditor, qualifying as an affected person, applied for an order placing the respondent under supervision and commencing business rescue proceedings of a company in financial distress.<sup>227</sup> The question before the court was whether there was a reasonable prospect of rescuing the company.<sup>228</sup>

In searching for the meaning of the phrase, Van der Merwe J started by looking at the meaning of ‘rescuing the company’ contained in section 128(1)(h).<sup>229</sup> Van der Merwe J turned to Eloff AJ’s interpretation of the phrase and agreed with his viewpoint that ‘reasonable prospect’ indicates something less than a reasonable probability, as was required by the by the previous Act.<sup>230</sup> Van der Merwe J agreed that vague averments and mere speculative suggestions will not suffice.<sup>231</sup> In order to succeed in an application for business rescue, “a factual foundation for the existence of a reasonable prospect that the desired object can be achieved” must be placed before the court by the applicant.<sup>232</sup> According to Van der Merwe J’s view, a prospect means an expectation in this context.<sup>233</sup> An expectation may or may not come

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<sup>221</sup> par 17.

<sup>222</sup> par 17.

<sup>223</sup> par 17.

<sup>224</sup> par 34.

<sup>225</sup> par 34.

<sup>226</sup> 2013 1 SA 542 (FB).

<sup>227</sup> par 2.

<sup>228</sup> par 5.

<sup>229</sup> par 6.

<sup>230</sup> par 8.

<sup>231</sup> par 11.

<sup>232</sup> par 11.

<sup>233</sup> par 12.

true and it therefore signifies a possibility.<sup>234</sup> "A possibility is reasonable if it rests on a ground that is objectively reasonable."<sup>235</sup> Although he concurred with Eloff JA, Van der Merwe J remarked that Eloff AJ and Binns-Ward J placed the bar too high.<sup>236</sup>

Van der Merwe J formulated a new test for the recovery requirement when he stated that "a reasonable prospect means no more than a possibility that rests on an objectively reasonable ground or grounds".<sup>237</sup> He further stated:

"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 made available, is tantamount to requiring proof of a probability, and unjustifiably limits the availability of business rescue proceedings."<sup>238</sup>

Delpoort submits that the remarks in this case set the most realistic requirements.<sup>239</sup> The test formulated by Van der Merwe makes it easier for the courts to determine whether a reasonable prospect to rescue a company actually exists. It allows for each case to be judged on its own merits without imposing a stringent level of proof.

#### *5.5 Newcity Group (Pty) Ltd v Pellow NO and Others, China Construction Bank Corporation Johannesburg Branch v Crystal Lagoon Investments 53 (Pty) Ltd and Others*<sup>240</sup>

Newcity, qualifying as an affected person, brought an application placing Crystal Lagoon under supervision and commencing business rescue proceedings.<sup>241</sup> Van Eeden AJ referred to some of the cases that also dealt with the phrase 'reasonable prospect' and the way it was interpreted and applied. He started

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<sup>234</sup> par 12.

<sup>235</sup> par 12.

<sup>236</sup> par 11.

<sup>237</sup> par 12.

<sup>238</sup> par 15

<sup>239</sup> n 48 above 468(2).

<sup>240</sup> 2014 ZASCA 162.

<sup>241</sup> par 8.

with *Southern Palace* and pointed out that when Eloff AJ had to decide whether a reasonable prospect existed in that case he had very little precedent to follow.”<sup>242</sup>

Van Eeden JA made it clear that a company can only be rescued if there is a reasonable prospect that one of the objects will be achieved on the basis of facts, not speculation.<sup>243</sup> He went on further to state that if objectively there is a reasonable possibility or likelihood of those uncertain future events occurring, namely the eventual rescue of the company or a better return as contemplated in s128(1)(b), the jurisdictional requirements have been satisfied and the court can exercise its discretion whether or not to grant business rescue.<sup>244</sup>

Although Van Eeden AJ could not fault the guidelines laid down by Eloff AJ in *Southern Palace*, he agreed with Van der Merwe J and Eloff AJ that the bar must not be placed too high, given the legislator’s preference of business rescue over liquidation.<sup>245</sup> A suitable test “should be flexible and the circumstances of each case will determine whether the available facts give rise to a reasonable prospect or not”<sup>246</sup> and “speculation cannot create a reasonable prospect”.<sup>247</sup>

On appeal in the Supreme Court of Appeal, Maya JA referred to Brand JA’s judgment in *Oakdene Square Properties (Pty) Ltd*<sup>248</sup> as to what ‘reasonable prospect’ means as well as Van der Merwe J’s comments in *Propspec Investments (Pty) Ltd*.<sup>249</sup>

It is submitted that the reasonableness approach started by Van der Merwe J in the *Propspec* decision can be regarded “as a constructive approach to the many difficulties encountered in proving the recovery requirement.”<sup>250</sup>

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<sup>242</sup> *Newcity Group (Pty) Ltd v Pellow NO and Others, China Construction Bank Corporation Johannesburg Branch v Crystal Lagoon Investments 53 (Pty) Ltd and Others* 2013 ZAGPJHC 54 par 11.

<sup>243</sup> par 14.

<sup>244</sup> par 14.

<sup>245</sup> par 14..

<sup>246</sup> par 14.

<sup>247</sup> par 23.

<sup>248</sup> par 16; See *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2013 4 SA 539 (SCA) par 29, it is a yardstick higher than ‘a mere prima facie case or an arguable possibility’ but lesser than a ‘reasonable probability’.

<sup>249</sup> par 16.

<sup>250</sup> n 5 above 563.

## 7 Conclusion

Chapter 6 represents a renovation of South Africa's former regime of corporate rescue judicial management.<sup>251</sup> Business rescue reflects a genuine concern<sup>251</sup> for helping a struggling business back onto its feet.<sup>252</sup> As opposed to the previous judicial management regime, business rescue is concerned with the repayment of creditors while also protecting all affected persons.<sup>253</sup> This is done through the appointment of a business rescue practitioner who must "ensure that the various interests at stake are equitably balanced within the constraints of the legislation."<sup>254</sup>

Chapter 6 is aligned with the interests of creditors. Not only does the primary aim of business rescue serve creditors' interests indirectly, but achieving a better return for creditors is explicitly provided for in the secondary aim.<sup>255</sup> Bradstreet recognizes that creditors would want to recover debts owed to them in full, failing which, to obtain the highest possible return.<sup>256</sup> In essence, the primary goal offers creditors a greater prospect of recovering their debts in full and is perhaps better aligned with creditors' interest.<sup>257</sup>

Business rescue should be more attractive to creditors because of the secondary goal which aims to achieve a better result than immediate liquidation.<sup>258</sup> However, it is most likely that a creditor will benefit far more from having the debtor back in the marketplace than from suing the debtor into extinction.<sup>259</sup> It is submitted that a modern business rescue procedure should take advantage of the fact that a company has substantial value as a going concern and its going concern value exceeds its liquidation value.<sup>260</sup>

There are advantages as well as the disadvantages of business rescue. The advantages of business rescue are that firstly, creditors get a better return on their claims than they would in immediate liquidation.<sup>261</sup> It is assumed that if a company cannot be rescued, its business or at least part of it can be sold at a higher price than it would be sold after the company has been put into liquidation.<sup>262</sup> The better return for creditors argument is based on three perceptions: (1) liquidators do not have the knowledge to run a

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<sup>251</sup> n 12 above 353.

<sup>252</sup> n 251 above.

<sup>253</sup> n 12 above 355.

<sup>254</sup> n 253 above.

<sup>255</sup> n 12 above 356.

<sup>256</sup> n 255 above.

<sup>257</sup> n 255 above.

<sup>258</sup> n 255 above.

<sup>259</sup> Rajak and Henning "Business rescue for South Africa" 1999 *SALJ* 262 286.

<sup>260</sup> Smits "'Corporate administration': A proposed model" 1999 *DE JURE* 80 83.

<sup>261</sup> Tselane *The Requirements for Business Rescue Proceedings under the Companies Act 71 of 2008 as discussed in Swart v Beagles Run Investments 25 (Pty) Ltd (Four creditors intervening) 2011 (5) SA 422 GNP (2012) dissertation SA* 4.

<sup>262</sup> Loubser "Tilting at windmills? The quest for an effective corporate rescue procedure in South African law" 2013 *SA MERC LJ* 437 447.



distressed company so that it can be sold as a going concern; (2) this results in the assets of the company in liquidation always being sold off piecemeal; and (3) selling a business as a going concern will always be better than the selling of assets.<sup>263</sup> Loubser believes that if there is a viable business, there is more than enough evidence that liquidators will try to find a purchaser for the business as a going concern.<sup>264</sup> Our courts have expressly rejected the view that a sale of assets by a business rescue practitioner will be at a higher price than a sale by a liquidator and have pointed out that there is no basis to the assumption that a liquidator would be unable to sell an asset at its real market value or would get a lower price for it than a business rescue practitioner would.<sup>265</sup>

Secondly, business rescue has the effect of saving jobs.<sup>266</sup> This advantage is considered to be of major importance but companies tend to shed jobs at the first signs of trouble and long before any formal rescue or liquidation procedure is actually applied for.<sup>267</sup> Retrenchments are generally unavoidable in any rescue attempt since the company has to cut costs in order to survive.<sup>268</sup> So it is evident that business rescue is not always successful in saving jobs.

Thirdly, business rescue does not carry the same stigma as straightforward liquidation.<sup>269</sup> Business rescue may result in the company's business partners and customers having confidence in the continued existence of the company to do business with it during business rescue.<sup>270</sup> It is noted that this could have a positive influence on the value of the business if it has to be sold.<sup>271</sup> However, it must be accepted that business rescue procedures will generally affect the reputation and creditworthiness of a company because it is more often than not followed by liquidation.<sup>272</sup>

The disadvantages are that firstly, the business rescue procedure is open to abuse.<sup>273</sup> Debtors might avoid paying creditors based on the fact that the company has been placed under rescue proceedings.<sup>274</sup> Secondly, the provisions of the Act, which are aimed more specifically at the rescue of a business, appear

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<sup>263</sup> n 262 above 447 ff.

<sup>264</sup> n 262 above 448.

<sup>265</sup> n 262 above 449; *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2012 3 SA 273 (GSJ) par 48. This principle has been confirmed by the Supreme Court of Appeal in *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2013 4 SA 539 (SCA) par 35.

<sup>266</sup> n 261 above.

<sup>267</sup> n 262 above 450.

<sup>268</sup> n 267 above.

<sup>269</sup> n 261 above.

<sup>270</sup> n 262 above 452.

<sup>271</sup> n 270 above.

<sup>272</sup> n 262 above 453.

<sup>273</sup> n 261 above 5.

<sup>274</sup> n 273 above.



to be more favourable to debtors than creditors.<sup>275</sup> This is clearly in contrast with the creditor-friendly focus of the preceding legislation.<sup>276</sup> Shifting the emphasis from a primarily creditor-friendly dispensation is likely to affect the interests of various parties in different ways, giving rise to new issues for Courts to confront.<sup>277</sup>

After a critical analysis of business rescue proceedings and after a comparison between judicial management and business rescue, Museta considers business rescue as a great improvement for ailing companies in comparison to judicial management.<sup>278</sup> It makes an effort to involve all affected persons and it seeks, through the appropriate planning, to ensure that all the affected persons are satisfied with the conditions and actions that will be taken.<sup>279</sup> It provides a more transparent system.<sup>280</sup>

The principle of the business rescue process is that a company in financial difficulties may be worth more as a going concern than if it is liquidated and its assets sold on a piecemeal basis.<sup>281</sup> However, not all companies are suitable for business rescue as much depends on the cause of the company's financial distress.<sup>282</sup> This is also apparent in the *Oakdene* case where both the court a quo and the Supreme Court of Appeal held that liquidation proceedings would be more suitable than business rescue in the circumstances of that case.<sup>283</sup> It is believed that a realistic approach is required, that it must be accepted that only a few distressed companies are capable of being rescued (returned to a solvent state), and that the alternative goal of attaining a better return for creditors will only be achieved in a limited number of cases.<sup>284</sup>

Business rescue may, in some cases, be an expensive process for a company to adopt.<sup>285</sup> In other cases, a straightforward sale of a business may be quicker, more effective and less expensive.<sup>286</sup> The majority of financially distressed companies should not waste time and costs by first being put into business rescue and should rather go straight into liquidation.<sup>287</sup> Essentially, business rescue does not necessarily entail

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<sup>275</sup> n 273 above.

<sup>276</sup> n 273 above.

<sup>277</sup> n 273 above.

<sup>278</sup> Museta *The Development of Business Rescue in South African Law* (2011 dissertation UP) 46.

<sup>279</sup> n 278 above.

<sup>280</sup> n 278 above.

<sup>281</sup> n 19 above 862.

<sup>282</sup> n 19 above 863.

<sup>283</sup> See *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* 013 4 SA 539 (SCA) par 35.

<sup>284</sup> n 262 above 456 ff.

<sup>285</sup> n 282 above.

<sup>286</sup> n 282 above.

<sup>287</sup> n 262 above 457.

the complete rescue of the company “in the sense that after the procedure, the company will regain its solvency, its business will have been restored and its creditors repaid.”<sup>288</sup> Although this is the ideal outcome, it is not always attainable.<sup>289</sup> Therefore, liquidation should not be regarded as the enemy that must be avoided at all costs.<sup>290</sup> It must be understood that liquidation can possibly achieve the same or maybe even better results than a formal rescue procedure if it is used in the correct manner.<sup>291</sup>

It has been recommended that the wording in Chapter 6 be improved by using South African legal terminology with clear meanings and thus ensuring that the provisions are clear and correct.<sup>292</sup> I am in complete agreement with this recommendation. Improving the provisions of the Act will most likely result in more successful rescues and thus removing the stigma on rescue mechanisms resulting from the failures and ineffectiveness of judicial management.

There is still no definite approach as to how to interpret the phrase ‘reasonable prospect of rescuing the company’. It is clear that, although there is no general consensus between the courts, the majority of the judges are of the opinion that the recovery requirement in the current Companies Act requires something less as compared to its predecessor, reasonable probability. However, their approaches to determine whether a reasonable prospect is present, differ.

I agree with the judges who state that the bar must not be set too high when deciding whether or not to grant a business rescue application. Setting the bar too high would result in the interpretation of the recovery requirement being stringent. Thus, I do not agree with the short list created by Eloff AJ as I feel that it causes the interpretation of ‘reasonable prospect’ to be rather narrow. The aim of the requirements for business rescue is for the courts to be able to separate the ailing companies from the terminally ill ones. Setting the bar too high would result in the entire business rescue concept being just a myth. Financially distressed companies would be turned away merely because they are unable to prove that a reasonable prospect exists to rescue the company in the manner required by the bar that has been set. That is clearly something that the Legislature never intended when he envisaged the introduction of Chapter 6.

With regards to the approaches adopted by the courts, I am in agreement with the findings that vague and speculative averments will not be sufficient to prove a reasonable prospect. Indeed, there needs to be

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<sup>288</sup> n 282 above.

<sup>289</sup> n 282 above.

<sup>290</sup> n 287 above.

<sup>291</sup> n 287 above.

<sup>292</sup> n 2 above 331.

concrete and objectively ascertainable details that should be given. I also agree with the balancing exercise implemented by Kollapen J. The persons that are able to make an application for business rescue hold different positions towards the company they wish to place under supervision. The information accessible to directors is not the same information that is accessible to the employees of the company. To require that they provide the same type of information when proving that a reasonable prospect does exist would be doing a disservice to the purpose of Chapter 6. It would not be balancing the rights and interests of all relevant stakeholders. Having regard to the position held by the applicant eliminates the possibility of a lot of companies, with the potential of being rescued, being turned away.

In my opinion, Chapter 6 of the Companies Act has the potential to be an effective corporate rescue regime. It provides for a dual gateway to commencing business rescue proceedings and it allows a wide variety of persons to be able to place a company under supervision. A company will be regarded as being rescued either when it is returned to its solvency, or when a better return is obtained than would result from immediate liquidation. There is obviously opportunity for abuse but I believe that the benefits of business rescue far outweigh the extent of abuse.

The enforcement of Chapter 6 is, however, proving to be rather problematic. In interpreting the provisions regarding business rescue, the intention of the Legislature should carry more weight. Although the term reasonable prospect has not been defined in the Act, it was most certainly not the intention of the Legislature that the bar be placed too high or judicial management would have simply been retained. The vision behind business rescue, in my opinion, was to create a corporate rescue regime that would be effective in rescuing a company that would otherwise be wound up. I believe that every provision of Chapter 6 should be interpreted with that vision in mind.

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