NEDBANK LTD v BESTVEST 153 (PTY) LTD; ESSA AND ANOTHER v BESTVEST 153 (PTY) LTD AND OTHERS 2012 (5) SA 497 (WCC) F

Citation	2012 (5) SA 497 (WCC)
Case No	21857/2011 and 2106/2012
Court	Western Cape High Court, Cape Town
Judge	Gamble J
Heard	April 10, 2012; April 11, 2012
Judgment	June 12, 2012
Counsel	*J Muller SC* for the applicant (in case No 21857/2011, and for the first intervening party in case No 2106/2012). *AP Möller* for the respondent (in case No 21857/2011, and for the applicant in case No 2106/2012). *JF Pretorius* for the second intervening party (in case No 2106/2012).
Annotations	Link to Case Annotations

G

Flynote : Sleutelwoorde

Company — Business rescue — Requirements — Reasonable prospect of H rescue — Evidence — Application to set out sufficient facts enabling court to assess prospects of successful rescue — Where, as here, applicant non-trading company with incomplete building development as its only asset, such facts should ideally include prospects of financing costs of completion and how, once completed, commercial viability to be attained — Companies Act 71 of 2008, s 131(4)*(a)*. I

Headnote : Kopnota

Section 131(4)*(a)* of the Companies Act 71 of 2008 provides that a court considering an application for business rescue 'may' place a company under supervision and order commencement of business rescue proceedings 'if . . . satisfied that —

(i) the company is financially distressed; J

A (ii) the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters; or

(iii) it is otherwise just and equitable to do so for financial reasons,

and there is a reasonable prospect for rescuing the company; . . . .'

An application for business rescue must set out sufficient facts, if necessary, B augmented by documentary evidence, from which a court would be able to assess the prospects of success before exercising its discretion to make an order in terms of s 131(4)*(a)*. Where, as here, the applicant is not a trading company and its only asset is an incomplete building (financed by the respondents), ideally one would expect such an applicant to set out —

- brief reasons for the company's commercial insolvency;
- C the reasonable cost of bringing the building to completion, making it commercially viable;
- the prospects of raising the finances required to so complete the building; and
- how best, once completed, the building can attain commercial viability, eg by developing it as a sectional title scheme, or letting to commercial D and/or residential tenants, or selling it.

(Paragraphs [41] – [43] at 507F – 508C, paraphrased.)

Cases Considered

Annotations:

Case law

E *Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group Ltd and Another*2011 (5) SA 600 (WCC): dictum at 603E applied

*Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd*2007 (6) SA 199 (CC) (2007 (10) BCLR 1027; [2007] ZACC 12): dictum at 218F – 219A applied

Gormley v West City Precinct Properties (Pty) Ltd and Another; Anglo Irish Bank Corporation Ltd v West City Precinct Properties (Pty) Ltd [2012] ZAWCHC 33: F dictum in para [6.3] applied

*Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others; In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others*2001 (1) SA 545 (CC) (2000 (2) SACR 349; 2000 (10) BCLR 1079): dicta in paras [21] and [22] applied

G *Koen and Another v Wedgewood Village Golf and Country Estate (Pty) Ltd and Others*2012 (2) SA 378 (WCC): referred to

*Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others*2012 (3) SA 273 (GSJ): dictum at 278F – 279A applied

H *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd*2012 (2) SA 423 (WCC): dicta at 431E and 425H – 426D applied

*Swarb v Beagles Run Investments 25 (Pty) Ltd (Four Creditors Intervening)*2011 (5) SA 422 (GNP): doubted.

Statutes Considered

Statutes

I The Companies Act 71 of 2008, s 131(4)*(a)*: see *Juta's Statutes of South Africa 2011/12 Supplement* vol 2 at 2-71.

Case Information

Judgment in two applications, for winding-up and business rescue respectively, heard together with third application involving same company. J

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J Muller SC for the applicant (in case No 21857/2011, and for the first A intervening party in case No 2106/2012).

AP Möller for the respondent (in case No 21857/2011, and for the applicant in case No 2106/2012).

JF Pretorius for the second intervening party (in case No 2106/2012).

Cur adv vult. B

Postea (June 12).

Judgment

Gamble J: C

Introduction

[1] Bestvest 153 (Pty) Ltd (the company) owns a valuable piece of commercial property in the Cape Town inner-city suburb of Woodstock. It has sought to develop that property and erect thereon a building known as '360 Degrees'. The building was financed by the company D with borrowed money.

[2] The company initially borrowed the sum of R26,1 million from Imperial Bank Ltd (Imperial) in February 2008 and passed a first mortgage bond in its favour to secure that loan. In July 2008 the E company borrowed a further amount of R6,5 million in terms of a so-called 'mezzanine finance loan' from a company called Structured Mezzanine Investments (Pty) Ltd (SMI). This was intended to be a short-term bridging loan for a year at a very high rate of interest. The SMI loan, secured by a second mortgage bond, was to have been repaid in full by July 2009. F

[3] The company was clearly under-capitalised for the project and by mid-2010 ran into cash-flow problems. It renegotiated the terms of its arrangement with Imperial in September 2010 and a restructured loan of some R36 million was secured by a third mortgage bond in favour of Imperial Bank, which was intended to augment the first mortgage bond. G With effect from 1 October 2010 all the assets and liabilities of Imperial were transferred to Nedbank Ltd.

[4] The financial woes of the company continued and it was further allegedly plagued by the liquidation of the main contractor on the development. It is common cause that there were regular defaults in its H obligations to both Imperial (and later Nedbank), as well as SMI.

[5] During November 2010 construction on the site ground to a halt and there has been no further work since then. It seems to be common cause that the work is about 90% complete, although the amount of money required to finish the project is in dispute. I shall revert to this aspect I later.

[6] The developers of the building originally intended selling units therein — both residential and commercial — by way of a sectional title scheme but the delay in completion of the project also led to the cancellation of the limited number of sales that had thus materialised. J

Gamble J

A [7] Nedbank appears to have held out for a protracted period of time in the hope that the project could be saved but eventually in November 2011 it launched urgent proceedings in this court for the winding-up of the company. In that application (case No 21857/11) Nedbank claims that the company was indebted to it in the sum of R36 743 860,87 as B at 25 October 2011.

[8] The winding-up application, which is to be decided in terms of s 344 of the Companies Act 61 of 1973 (the old Companies Act), is based primarily on the commercial insolvency of the company under s 345 of the old Companies Act. It is also suggested in that application C that it is quite probable that the company is factually insolvent given that the current value of the property exceeds the extent of the company's liabilities. The company's only asset is the building in question.

[9] It is not in issue that the company is unable to pay its debts and that a winding-up order falls to be granted. However, the directors of the D company (Messrs Essa and Coe) are of the view that the company can be saved from insolvency by the appointment of a business rescue practitioner and on 7 February 2012 they launched business rescue proceedings (BRP) in this court under case No 2106/2012. The BRP application is brought under ch 6 (and in particular s 131) of the Companies Act 71 of 2008 (the Act).

E [10] Nedbank and SMI were subsequently granted leave to intervene in the BRP application and actively participated therein by way of opposition.

The SMI payment application

F [11] On 28 October 2009 SMI initiated motion proceedings in this court under case No 22698/09 against Messrs Essa and Coe and another company controlled by them known as Coessa (Pty) Ltd, for the payment of the sum of R8 317 827,04. The amount is alleged to be due by these parties jointly and severally with the company in terms of a deed of suretyship executed in favour of SMI on 1 July 2008. The suretyship G was additional collateral security sought by SMI under the mezzanine loan.

[12] It will immediately be observed that SMI's 'payment application' (as the parties called it) followed only a few months after the mezzanine loan H was due for repayment, and preceded Nedbank's winding-up application by more than two years. That application was dealt with as an

ordinary application on the opposed motion roll and followed a litigation route of its own — a route which was plagued by a number of postponements not of SMI's making.

I [13] For the sake of convenience, the payment application was heard together with the winding-up and BRP applications by this court in one consolidated hearing which stretched over four days. Judgment in the payment application will be delivered separately in due course. This judgment concerns only the winding-up and BRP applications.

[14] At the hearing of the various applications Mr *AP Möller* appeared J for the company, Messrs Essa and Coe and Coessa (Pty) Ltd.

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Mr *J Muller SC* appeared for Nedbank and Mr *JF Pretorius* appeared for A SMI. The court is indebted to counsel for the immense amount of work they put into these matters and for the very thorough heads of argument which have greatly facilitated the preparation of this judgment.

The winding-up applicaton B

[15] As I have said, the company accepts that it is currently unable to meet its financial obligations and that a provisional winding-up order should follow. However, it asks that any such order be held in abeyance pending the determination of the BRP application. It is common cause that if the BRP application fails a winding-up order should follow. [1] I turn C then to consider the BRP application.

Interpreting the Companies Act of 2008

[16] The Companies Act came into operation on 1 May 2011. It is new- order legislation which brings with it a number of innovative concepts D not previously part of South African corporate law. Importantly, and unlike its predecessor, the Act has detailed provisions [2] which are designed to enhance an understanding of its purpose. These purposes track the policy paper issued by the Department of Trade and Industry in 2004 [3] and must be applied in the adjudication of any matter under the Act or brought before a court of law. [4] E

[17] It is therefore as well to set out the provisions of this section in full:

> '7 **Purposes of Act**
>
> The purposes of this Act are to — F
>
> *(a)* Promote compliance with the Bill of Rights as provided in the Constitution in the application of company law;
>
> *(b)* Promote the development of the South African economy by —
>
> (i) encouraging entrepreneurship and enterprise efficiency;
>
> (ii) creating flexibility and simplicity in the formation and maintenance of companies; and G
>
> (iii) encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation;
>
> *(c)* promote innovation and investment in the South African markets;
>
> *(d)* re-affirm the concept of the company as a means of achieving economic and social benefits; H
>
> *(e)* continue to provide for the creation and use of companies, in a manner that enhances the economic welfare of South Africa as a partner within the global economy;

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> A *(f)* promote the development of companies within all sectors of the economy, and encourage active participation in economic organization, management and productivity;
>
> *(g)* create optimum conditions for the aggregation of capital for productive purposes, and for the investment of that capital in enterprises and the spreading of economic risk;
>
> B *(h)* provide for the formation, operation and accountability of non-profit companies in a manner

designed to promote, support and enhance the capacity of such companies to perform their functions;

(i) balance the rights and obligations of shareholders and directors within companies;

C *(j)* encourage the efficient and responsible management of companies;

(k) provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders; and

(l) provide a predictable and effective environment for the efficient D regulation of companies.'

[18] It will be noted therefore that the legislature has directed that corporate law too must now be considered in a constitutional setting and that the Act must be interpreted so as to promote the development of the economy as a whole, while encouraging entrepreneurship and efficiency, E flexibility and relative simplicity in the maintenance of companies and, importantly, promoting transparency and high standards of corporate governance.

[19] It is to be noted in particular that specific mention is made in s 7*(k)* of the necessity for the Act to provide for the efficient rescue and recovery F of financially distressed companies while ensuring that the rights and interests of the parties affected thereby are preserved.

[20] It seems to me then that a fresh approach must be adopted when assessing the affairs of 'corporate South Africa'. The legislature has G pertinently charged the courts with the duty to interpret the Act in such a way that, firstly, the founding values of the Constitution are respected and advanced, and, secondly, so that the spirit and purpose of the Act are given effect to. Fundamental to the Act is the promotion and stimulation of the country's economy through, inter alia, the use of the company as a vehicle to achieve economic and social wellbeing. This H must be done efficiently and in accordance with acceptable levels of corporate stewardship, all the while balancing the rights and obligations of shareholders and directors in the company, its employees and any outside parties with which a company ordinarily interacts in the course of its business.

I [21] The general purposes of the Act circumscribed in s 7 must be interpreted in accordance with the interpretative provisions set out in s 5. Firstly, s 5 requires a purposive interpretation of the Act as a whole. Further, it is said that a court interpreting or applying the Act is entitled to have regard to foreign company law. Neither provision is in and of J itself particularly innovative.

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[22] In the constitutional era a purposive approach to legislative A interpretation is the method mandated by s 39(2) of the Constitution. [5] As Langa DP observed in the *Hyundai* case:

'This means that all statutes must be interpreted through the prism of the Bill of Rights. All law-making authority must be exercised in accordance with the Constitution. B

. . .

The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values.'

[23] Later, in *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd*, [6] Moseneke DCJ clarified the approach as follows: C

'In searching for the purpose, it is legitimate to seek to identify the mischief sought to be remedied. In part, that is why it is helpful, where appropriate, to pay due attention to the social and historical background of the legislation. We must understand the *provision within the context of the grid, if any, of related provisions and of the statute as a whole,* D *including its underlying values. Although the text is often the starting point of any statutory construction, the meaning it bears must pay due regard to context. This is so even when the ordinary meaning of the provision to be construed is clear and unambiguous.*' [Own emphasis.]

[24] Further, s 39(1)*(c)* of the Constitution entitles a court interpreting the Bill of Rights incorporated in ch 2 of the Constitution, to have regard E to foreign law.

[25] In the circumstances it appears that ss 5 and 7 of the Act serve to stress the importance of these modes of interpretation and, particularly in referring to foreign law, to encourage our courts to take a leaf out of F the books of foreign jurisdictions when interpreting the Act generally, and

not just issues encompassed by ch 2 of the Constitution.

[26] Our company law has for many decades closely tracked the English system and has often taken its lead from the relevant English Companies Acts and the judicial pronouncements thereon. The Act now encourages G our courts to look further afield and to have regard, in appropriate circumstances, to other corporate law jurisdictions — be they American, European, Asian or African — in interpreting the Act.

Interpreting the business rescue provisions of the Act

[27] The business rescue provisions incorporated in ch 6 of the Act are H innovative and, while they resemble in certain respects the judicial management provisions of ch XV of the old Companies Act, [7] there are

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A distinct differences. [8] In this regard I find myself more in agreement with the approach suggested by Eloff AJ in *Southern Palace* — namely, that the test for the successful granting of an order of business rescue is not as onerous as in an application for judicial management — than that postulated by Makgoba J in *Swart v Beagles Run Investments 25 (Pty) Ltd (Four Creditors Intervening).* B [9] This is apparent from a comparison of the phrase 'reasonable prospect' in s 131(4)*(a)* of the Act with the term 'reasonable likelihood' used in s 427(1) of the old Companies Act. One notes too, that while the extensive provisions of ch XIV of the old Companies Act relating to winding-up have been retained in the interim, [10] the provisions C of ch XV relating to judicial management have not. In this respect the legislature has obviously signalled a deliberate intention to break from the past and abandon that earlier limited form of corporate rescue.

[28] At the core of successful business rescue lie two critical jurisdictional facts which a court must consider when exercising its wide D discretion as to whether business rescue should be granted or not. [11] Firstly, in terms of s 131(4)*(a)*(i), the company sought to be rescued must be 'financially distressed' within the ambit of the definition of this phrase in s 128(1)*(f)* of the Act. That definition reads as follows:

> '"**Financially distressed**", in reference to a particular company at any E particular time, means that —
>
> (i) it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months; or
>
> (ii) it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six F months; . . . .'

[29] Secondly, the court considering a business rescue order must be satisfied that 'there is a reasonable prospect for the rescuing of the company'. For the sake of convenience I quote s 131(4) of the Act in full:

> '(4) After considering an application in terms of subsection (1), the G court may —
>
> *(a)* make an order placing the company under supervision and commencing business rescue proceedings, if the court is satisfied that —
>
> (i) the company is financially distressed;
>
> (ii) the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or H contract, with respect to employment-related matters; or

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> (iii) it is otherwise just and equitable to do so for financial reasons, A
>
> and there is a reasonable prospect for rescuing the company; or
>
> *(b)* dismissing the application, together with any further necessary and appropriate order, including an order placing the company under liquidation.'

[30] Mr *Pretorius* submitted that the definition of 'financial distress' in B s 128(1)*(f)* is intended to

refer only to a company that is commercially insolvent (ie one that is unable to pay its debts in the ordinary course of business as contemplated by s 345 of the old Companies Act), rather than a company which is actually insolvent (ie one in which the liabilities exceed the assets), and that accordingly, business rescue is only available to companies which are commercially insolvent. C

[31] Counsel further submitted that because Bestvest was actually insolvent, the application should fail on this basis alone. While I consider that there is much to be said for this approach, I need not decide the point since, in my view, it has not been conclusively established that the company is actually insolvent. D

[32] I am satisfied (and it was not in issue) that on the facts placed before the court, Bestvest is indeed a company which is financially distressed. The real issue in this case is whether it has been shown that there is a reasonable prospect of rescuing the company by placing it under the supervision of a business rescue practitioner. E

A 'reasonable prospect' for rescue?

[33] The interpretation of this phrase in s 131(4)*(a)* of the Act was the main area of debate in the business rescue application before me. F Adjunct to the interpretation was the question of the sufficiency of evidence which an applicant was required to put up to persuade a court to consider granting business rescue.

[34] I am in agreement with the dictum of Rogers AJ in *Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group Ltd and Another*, [12] basing his G opinion on s 7*(k)* of the Act, that '(t)he business rescue provisions in the 2008 Act reflect a legislative preference for proceedings aimed at the restoration of viable companies rather than their destruction'.

[35] In *Southern Palace* supra [13] Eloff AJ suggested the following approach: H

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

> A the company may not continue in existence, better returns may be gained by adopting the rescue procedure.
>
> The scheme created by the business rescue provisions in Ch 6 of the new Act envisages that the company in financial distress will be afforded an essential breathing space while a business rescue plan is B implemented by a business rescue practitioner. It is, however, necessary to caution against the possible abuse of the business rescue procedure, for instance, by rendering the company temporarily immune to actions by creditors so as to enable the directors or other stakeholders to pursue their own ends. The courts in Australia have been careful not to allow their equivalent procedure to be used where there appears to be an C ulterior purpose behind the appointment of an administrator by the directors. It is necessary that an application for business rescue be carefully scrutinized so as to ensure that it entails a genuine attempt to achieve the aims of the statutory remedy.'

[36] In a more recent decision in this division, in *Gormley v West City Precinct Properties (Pty) Ltd and Another; Anglo Irish Bank Corporation Ltd v West City Precinct Properties (Pty) Ltd*, D [14] Traverso DJP commented as follows:

> 'Business rescue has as its aim proceedings to facilitate the rehabilitation of a financially distressed company by providing for the temporary management of the affairs of the company, a temporary moratorium on E the rights of claimants, the implementation of a plan to rescue the company by restructuring its affairs in a manner that maximises the likelihood of a company continuing to function on a solvent basis or if that is not possible, a plan that would achieve a better return for the company's creditors than the payment they would receive if the company were to be immediately liquidated.'

F [37] In the *Oakdene Square* case supra CJ Claassen J observed that the focus of the section was on *business* rather than *company* recue:

> 'This is in line with the modern trend in rescue regimes. It attempts to secure and balance the opposing interests of creditors, shareholders and employees. It encapsulates a shift from creditors' interests to a

broader G range of interests. The thinking is that to preserve the business coupled with the experience and skill of its employees, may, in the end prove to be a better option for creditors in securing full recovery from the debtor.' [15]

[38] In an endeavour to achieve these aims, and to give effect to the H purpose of s 131 of the Act, in my view, a court should not set the bar at such a height that the applicant for business rescue has little chance of clearing it, and persuading the court to exercise its discretion to grant supervision. As I have said, the test under s 427(1) of the old Companies Act for the granting of judicial management was more onerous since an applicant was required to persuade a court that there was a 'reasonable I probability' that, if placed under judicial management, the company would be able to pay its debts, meet its obligations and ultimately become a successful business.

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[39] In *Southern Palace*[16] Eloff AJ usefully summarised the difference in A approach as follows:

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

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

[40] Mr *Muller* argued that an application for business rescue should, to all intents and purposes, contain a summary of the proposed business rescue E plan. He contended that only once this had been done could a court decide whether there was a reasonable prospect of the company being saved from insolvency. I do not agree with that submission. In my view, it should be left up to the business rescue practitioner to formulate the rescue package once he/she has had an opportunity to properly assess the company, its prospects going forward and, most importantly, the F reasons for its commercial distress.

[41] That is not to say, however, that a party can approach the court for the appointment of a business rescue practitioner with flimsy grounds in the hope that the practitioner will provide the panacea to its problems. G The application must set out sufficient facts, if necessary augmented by documentary evidence, from which a court would be able to assess the prospects of success before exercising its discretion.

[42] In *Southern Palace*[17] Eloff AJ suggested some of the objectively ascertainable details that may be put up in relation to a trading company. H That approach is not warranted in the present case because the company's only asset is the incomplete building which has been financed by Nedbank and SMI.

[43] Ideally, in a matter such as the present, one would expect an applicant for business rescue to set out: I

[43.1] Brief reasons for the company finding itself commercially insolvent;

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A [43.2] What the reasonable cost will be of bringing the building to completion in order that it can be commercially viable;

[43.3] What the prospects are of raising the finances required to so complete the building;

[43.4] How best the building, when completed, can attain commercial B viability, eg whether it can be developed as a sectional title block, or given to a letting agent for

the procurement of commercial and/or residential tenants, or sold to a prospective purchaser.

The commercial considerations advanced by the applicants for business C rescue

[44] In the founding affidavit deposed to on 7 February 2012, Essa describes the company's problems as 'short-term cash flow and liquidity issues as a result of the economic recession currently experienced'. He goes on to claim that the company's balance sheet is strong and that it D has 'the clear ability to trade out of its difficulties, alternatively to achieve a much better return and result for [its] creditors than would result from . . . immediate liquidation'. Essa confidently predicts in the founding affidavit that 'the co-operation of Nedbank will in all likelihood be obtained as Nedbank would benefit from the successful outcome of [the] E proceedings for business rescue'.

[45] Essa says too that the building (situated in a part of Cape Town that is evidently experiencing some urban renewal) is almost complete and 'requires less than R1,5 million to facilitate the completion of finishes and fittings, whereafter the property will be fully suitable for occupation'. F He claims that 'the purpose and ultimate goal of the 360 degree development [has always been] to achieve an out and out sale of the property or alternatively to conclude a long term lease with a Government entity'. He points out that during 2010 and 2011 there were extensive negotiations with the Cape Peninsula University of Technology with a view to concluding a long-term lease of the building for H student accommodation.

[46] These negotiations have floundered and it appears, instead, that the directors of the company have diverted their attention away from a lease situation to an out-and-out sale of the building. To this end the company has received various offers to purchase the building 'as is', some of which have been reduced to writing. It is said that these offers include the following:

[46.1] An offer in October 2010 for R45 million which was turned down because, although it would have settled most of the liabilities of Nedbank and SMI, it 'did not constitute a complete I resolution of the [company's] financial woes'.

[46.2] On 8 December 2011 a local trust made a cash offer of R15,75 million to the company and undertook to attend to the 'resolution of the outstanding liabilities'. This offer also fell through.

[46.3] In January 2012 a similar offer was made by a businessman J from Johannesburg for some R21 million. This offer did not

adequately address the settlement of the company's creditors A and was rejected.

[46.4] Also, in January 2012 two further offers were received from other parties, both of which were said to be still under consideration at the time the founding affidavit was deposed to.

[47] Copies of all the written offers received by the company were B annexed to the founding affidavit. During argument Mr *Möller* indicated that the two offers referred to in para [46.4] above were still under consideration. It is difficult to understand why these offers, if they were substantial and commercially viable, had still not been taken up some three months later. C

[48] Mr *Muller* indicated that Nedbank had not yet even had sight of these offers and suggested that settlement of the company's debts to it and SMI were far from resolved. Surely, he argued, if his client was to receive 100 cents in the rand in terms of either of these offers, it would not have been too difficult to put a deal together. In the absence of such D agreement, Mr *Muller* invited the court to conclude that Nedbank's debt would not be settled in full. Similar submissions were made by Mr *Pretorius.*

[49] Nedbank does not dispute that about R1,5 million is required to E complete the building but, it says emphatically, it will not provide the company with any further finance. SMI, however, disputes the figure on the basis that a quantity surveyor's report has not yet been placed before the court to verify the sum required to complete the work. SMI too has made it clear that it will

not be advancing the company any more money.

[50] In the replying affidavit of 23 March 2012 Coe confidently predicts F that 'the relatively small amount to complete the building will be easily raised by the business rescue practitioner'. However, no substance is given to this bald assertion and it is difficult to see where any further financing will come from. Three mortgage bonds have already been registered against the property to secure debt of some R46 million. Any G further mortgages will no doubt require the consent of these mortgagees, which is hardly likely to be forthcoming in the current circumstances given the hard-nosed approach adopted by them. Furthermore, the company has no income and it will not be in a position to service the interest payments on any further loans. Neither of the directors has indicated a willingness to put any further money into the project either. H

[51] At best for the company it could be hoped that the business rescue practitioner would try and raise some sort of bridging finance to enable the project to be completed and then on-sold immediately so that the major creditors can be settled. This prospect however does not seem realistic given that the company has already made use of very expensive I short-term finance and has still been unable to bring the project to completion.

[52] The situation may have been different too, if there was certainty regarding a potential purchaser of the completed project. At present, it must be assumed that the prospects of further capital being raised are not J

A good. Certainly, no evidence of any substance has been placed before the court to demonstrate that there are reasonable prospects of raising any further loans.

[53] The only other option open to a business rescue practitioner would B appear to be an attempt to market and sell the property in its present condition. In argument Mr *Möller* accepted that this would be the most likely scenario. As I have said, the property is the sole asset of the company. Should the company be wound up, the property will undoubtedly have to be sold by the liquidator. In that event, the issue which falls to be determined is whether a business rescue practitioner is likely to sell C the property for more than a liquidator.

[54] In the founding affidavit Essa deals with this issue in only the broadest of terms:

> '55. Upon consultation with Applicant's legal representatives it is clear that the process of business rescue is less expensive overall and D more advantageous to both the First Respondent, as a company in financial distress, and its creditors in order to resolve the recovery of the business and the settlement of outstanding debts and/or the restructuring of outstanding debts.
>
> . . .
>
> 62.4 (I)f it is not possible for the First Respondent so to continue E in existence, a better return will result to (sic) its creditors and shareholders than would otherwise result from the immediate liquidation of the First Respondent.
>
> 62.5 It is respectfully submitted that it is a well-known fact that the costs of business rescue proceedings represent much less expensive mechanism (sic) to achieve the responsible settlement F of debt, as opposed to liquidation proceedings that are expensive and destructive. Business rescue proceedings instituted in terms of this application will result in the efficient rescue and recovery of the First Respondent as a financially distressed company and in a manner that will balance the rights and interests of all relevant stake holders.'

G [55] In the answering affidavit both Nedbank and SMI make it clear that they are not in favour of any BRP plan, and that they will vote against it at any meeting to be convened by the business rescue practitioner in terms of ss 132(2)*(c)* and 152 of the Act. They accordingly urged the court not to sanction an exercise in futility, and to rather make an order H of winding-up. Such an approach appears, at first blush, to be a stratagem to advance the argument for winding-up: one would have expected a responsible creditor to be open to any proposal that may ultimately redound to its benefit. Such an approach certainly does not accord with the overall purpose of BRP which, as I have demonstrated above, are aimed at saving rather than destroying a business, and in I which consultation and consensus-seeking would be the point of departure.

[56] Mr *Möller* pointed out that, in the event that a BRP plan was not approved by the requisite majority of creditors, the practitioner could approach the court under s 153(1)*(a)* of the Act to set aside the result of J a vote on the grounds that it was 'inappropriate' (whatever that phrase

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may mean). Such a state of affairs would of course attract additional A costs and could lead to the practitioner becoming embroiled in ongoing litigation rather than the primary goal of rescuing the company. It certainly does not appear to me to be a desirable route in the present circumstances, particularly where there is no available cash to fund such litigation.

[57] In the replying affidavit deposed to by Coe, the following are said to B be factors which indicate the preference for BRP over winding-up:

> 126. It is common knowledge that the Court may take judicial knowledge thereof that forced sales under liquidation proceedings often result in a return that is not advantageous to the debtor. C There is every reason to believe that the business rescue proceedings will achieve a better return than the immediate liquidation of Bestvest. This is certainly one of the factors that a Court may or may not in due course after voting had failed, consider in order to decide whether or not to set aside the voting and/or make other directions as to the furtherance of the business rescue application. D
>
> . . .
>
> 144. It is incorrect that business rescue proceedings will inevitably result in any additional costs to be paid out of Bestvest. The liquidation proceedings as a fact have been shown and illustrated to be more costly than business rescue proceedings. However, as E (sic) this is a factor that will be considered in due course by the business rescue practitioner upon its reports alternatively upon its (sic) approach to Court upon a failed voting.
>
> . . .
>
> 146. It may be true that Nedbank will not benefit from the proposed business rescue proceedings in any manner as its full claim will be F settled during business rescue proceedings and/or during a liquidation process. Both processes will entail that Nedbank will have to wait until its secured claims and further costs are paid. In consequence nothing turns on this statement, save to illustrate Nedbank's cynical disregard for the policies and purposes underlying business rescue:
>
> 146.1 Nedbank exposes itself as a hostile creditor, aimed at a G one-sided promotion of their (sic) own interests at the expense of the other interested parties.
>
> 146.2 It is also true that much more turns on a successful business rescue application for first applicant and myself as we have invested a considerable part of our life into the project. Such investment will be destroyed on liquidation. H
>
> 146.3 Business rescue is not a remedy that this Honourable Court ought to disregard likely (sic) merely because a substantial creditor has a prejudicial predisposition against the process, it is submitted with respect.
>
> . . .
>
> 153.2 Interest will be accruing to Nedbank whether or not I Bestvest is liquidated or placed under business rescue. Nedbank is adequately covered and will be paid in full. It is not being suggested anywhere in any meaningful fashion that the immovable property constitutes insufficient security for Nedbank's claims.
>
> . . . J

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> A 157. These allegations are denied. It is not stated why a liquidator will be ''well placed'' to sell the movable (sic) property when it is clear that the liquidators have no interest in achieving the highest possible price but instead in processing assets in order to achieve the prompt payment of their commission. This state of affairs is common knowledge within the liquidation industry and it is B respectfully submitted that the Court may take judicial notice of the position. This state of affairs clearly gave rise to the creation of the business rescue provisions of the new Companies Act, it is respectfully submitted.'

[58] These generalised claims and allegations made by Coe in the reply C are not substantiated in any way at all but appear to be based upon 'well-known' perceptions of winding-up procedures in

general. In my view, the applicants have failed to demonstrate in this case why BRP is the preferred option over liquidation. Indeed, some of the passages referred to above show that the interests of the two secured creditors will D be adequately addressed either way. This seems to suggest that there is likely to be little difference between the proceeds of a sale of the property in liquidation or under business rescue.

[59] In the *Oakdene Square* case supra the court was faced with a similar conundrum. The company in that case owned a large tract of land to the E north of Johannesburg on which was situated the iconic Kyalami Grand Prix racetrack complex and which was the object of an ongoing commercial development.

[60] The learned judge decided in favour of winding up the company for a number of reasons which, in my view, find resonance in this case. F I therefore cite them in detail:

> 'I have difficulty in understanding why a liquidator will be less successful in realising a proper market value for the immovable property than a business rescue practitioner. Provided a sale of the properties is effected at market-related prices, whether by private treaty or at an execution G sale, I can see no reason why a liquidator would not be equally successful in obtaining the best price for the immovable property. Despite the negative connotations surrounding liquidations, they are not per se negative, since they may, in certain cases, yield a better financial return for creditors. No factual evidence was placed before me by the applicants which justifies a different conclusion. [At 287B – D.]
>
> H . . .
>
> Having regard to the provisions of ss 128 to 154 of the Act, once a company is placed under supervision and business rescue proceedings have commenced, such proceedings are open-ended, and could probably include further applications to court, and carry on for a considerable I period of time. This would be even more so if there are parties involved who are seeking to obstruct the creditors of the relevant company, as the applicants have been accused of doing. These conditions will make the task of a business practitioner who has to seek the co-operation of the directors, management and creditors extremely difficult. [At 288F – G, footnotes omitted.]
>
> J . . .

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> In my view, the interests of the creditors, as opposed to that of the A company, should carry more weight in the circumstances of this case. There is no business of the company to be rescued. The benefit of placing the business of the company on its feet again does not arise in this case. The applicants' counsel, however, relied on the provision of the definition of business rescue to the effect that or, if it is not possible for the company so to continue in existence, results in a better B return for the company's creditors or shareholders than would result from the immediate liquidation of the company.
>
> . . .
>
> The application of this provision to the facts of the present case begs the C question, well, will business rescue render a better return for the creditors?. . . . No facts were placed before me by the applicants in support of the contrary view. I have to decide this dispute on the allegations made by the respondents. Applying this rule, the applicants failed to show that business rescue will yield a better return for the company's creditors.' [At 288H – 289E, footnotes omitted.]
>
> . . . . D
>
> There is no provision for the taxation of the fees, costs and expenses of a business rescue practitioner, whereas a liquidator's costs are subject to taxation. There is, therefore, independent control over the costs of a liquidation, whereas there is currently none in the case of a business rescue procedure. This aspect may be for the legislature to consider when further amendments to the Act are proposed.' [At 290E – F.] E

[61] It was also common cause in that case that the company was in distress and that its income stream had dried up. In this matter almost the entire liabilities of the company are secured by the three mortgage bonds referred to earlier. The ordinary creditors are Messrs Essa and F Coe, who allege that they each have unsecured claims against the company. Essa says that his claims amount to R1,6 million for unpaid salary and certain running expenses disbursed on behalf of the company, while Coe says that he is owed some R840 000 by way of unpaid salary. The unsecured claims therefore amount to about 5 % of the company's alleged liabilities and are still subject to proof. There is no evidence G before me to suggest that the unsecured creditors will be better off under BRP than winding-up. In fact, the reverse is more likely to be the case since a liquidator will be in a position to invoke the relevant provisions of the old Companies Act to deal with any

disputed claims — on the papers before me these claims are certainly placed in issue. H

[62] Finally, on this score, s 133 of the Act places a general moratorium on legal proceedings against the company while it is under business rescue. Coe and Essa would therefore be precluded from asserting any claims against the company without either the written consent of the business rescue practitioner or the court. Their disputed claims will therefore remain unresolved under business rescue. In such circumstances, I winding-up is undoubtedly the preferred option.

Conclusion

[63] Having regard to all of the aforementioned facts and circumstances, I am not persuaded that there is any reasonable prospect of the company J

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A being rescued by the appointment of a business rescue practitioner, or that it is just and equitable to do so for financial reasons. In the circumstances the application for business rescue must fail and a provisional winding-up order must follow.

Order

B [64] Accordingly I make the following orders:

Case No 2106/2012 (the business rescue application)

The application is dismissed with costs.

Case No 21857/2011 (the winding-up application)

C 1. The respondent, Bestvest 153 (Pty) Ltd, is placed under a provisional winding-up order.

2. A rule nisi is issued calling upon the respondent and all interested parties to show cause, if any, to this court on 24 July 2012 as to why —

2.1 a final winding-up order should not be granted;

D 2.2 the costs of this application, including the costs occasioned by the postponement on 4 November 2011, should not be costs in the winding-up of the respondent.

3. Service of this order shall be effected:

3.1 By the sheriff upon —

E 3.1.1 the respondent at its registered address at 1 Hood Road, Belgravia, Cape Town;

3.1.2 the respondent's employees at its principal place of business at 20 Argyle Road, Rondebosch, Cape Town;

3.1.3 any trade union which the sheriff may establish represents F any employees of the respondent, in terms of s 346(A)*(a)* of the Companies Act 61 of 1973, read with the transitional provisions of the Companies Act 71 of 2008;

3.1.4 the South African Revenue Service at 22 Hans Strijdom Street, Cape Town;

G 3.2 By publication in one edition of each of the *Cape Times* and *Die Burger* newspapers.

Applicant's Attorneys (in case No 21857/2011, and for the First Intervening Party in case No 2106/2012): *Edward Nathan Sonnenbergs* Inc.

H Respondent's Attorneys (in case No 21857/2011, and for the Applicant in case No 2106/2012): *M Littleford & Associates* c/o Jason Freel & Associates.

Second Intervening Party's Attorneys (in case No 2106/2012): *Sim & Botsi Attorneys* c/o *Smit Rowan Attorneys*.

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1 See s 131(4)*(b)* of the Act.

2 Section 7 of the Act.
3 *South African Company Law for the 21st Century — Guidelines for Corporate Law Reform* published in *Government Gazette* 26493 of 23 June 2004.
4 *Henochsberg on the Companies Act 71 of 2008* vol 1 at 45.
5 *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others; In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others*2001 (1) SA 545 (CC) (2000 (2) SACR 349; 2000 (10) BCLR 1079) at paras 21 and 22.
6 2007 (6) SA 199 (CC) (2007 (10) BCLR 1027; [2007] ZACC 12) at 218F – 219A.
7 See ss 427 – 440 thereof.
8 *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd*2012 (2) SA 423 (WCC) in paras 20 – 22. See also *Koen and Another v Wedgewood Village Golf and Country Estate (Pty) Ltd and Others*2012 (2) SA 378 (WCC) in paras 13 – 14; *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others*2012 (3) SA 273 (GSJ) at 281G.
9 2011 (5) SA 422 (GNP) at 428 paras 24 – 25.
10 Section 224 of the Act read with sch 5 thereto.
11 '(I)t is otherwise just and equitable to do so for financial reasons.'
12 2011 (5) SA 600 (WCC) at 603E.
13 At 425H – 426D.
14 [2012] ZAWCHC 33 (18 April 2012).
15 At 278F.
16 At 431E – H.
17 At 432C – E.