

**Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd and Others
(24850/11) [2011] ZAWCHC 464; 2012 (2) SA 378 (WCC) (9 December 2011)**

An liquidation application in terms of which, amongst other matters, the winding up application against Wedgewood Village Golf Country Estate (Pty) Ltd ('the company') was postponed so as to enable the second and third intervening parties in that application the opportunity, to transfer the application for an order placing the company under supervision for business rescue.

The judgment indicated that if the business rescue application was not so transferred to the court by the date to which the winding up application was postponed, an order would be made placing the company into provisional liquidation. The business rescue application was thereafter transferred. The transfer of the business rescue application had the effect of suspending proceedings in the winding up application - see s 131(6) of the Companies Act 71 of 2008.

Pursuant to the directions given, the applicants in the business rescue application delivered lengthy replying affidavits. The replying affidavits introduced significant new material and also included allegations by the applicants of misconduct by the deponent.

The most significant new matter contained in the replying affidavit was the description of the efforts of a Port Elizabeth estate agent to obtain an offer from an undisclosed third party which would enable the re-capitalisation of the company's business so as to permit the completion of the golf course village development, which had comprised its sole business activity at all material times. It was apparent that the new matter introduced in reply had not been within the applicants' knowledge when they commenced proceedings.

Assuming that a case had been made out for business rescue in the founding papers, allowing, on that assumption, that it would be in the interests of justice to permit the applicants to rely on the new matter, it would be manifestly unjust to deny Nedbank the opportunity to deal with it. It similarly would have been unjust to deny the deponent to Nedbank's principal affidavits in the proceedings the opportunity to deal with the serious allegations of impropriety made against her. Moreover, the applicants could hardly be heard to complain about the bank's acceptance of their express challenge addressed to it in the replying papers to file responding papers.

A company in financial distress may itself resolve, by a decision of its directors, to place the company under supervision; alternatively, application to put a company into business rescue can be made by an 'affected person' in terms of s 131(4) of the 2008 Companies Act. It is evident in the provisions of s 131(4) that a person making an application for business rescue in terms of s 131(1) of the 2008 Companies Act must satisfy the court that there is a *reasonable prospect* that the subject company can be rescued in the relevant sense by being placed under supervision.

It was clear from the papers, not only in the current application, but also in the winding up application, that the company's expenditure in the development of the estate outpaced the

receipts received in respect of the sale of plots to such an extent that, even with considerable borrowing, it was unable to sustain its development operations. The result was that the principal external funder of the business, Nedbank, refused to extend its exposure, and work on the development site consequently ground to a halt.

It was not clear which of the two possible objects of business rescue the applicants seek to achieve by having the company placed under supervision. In their founding papers it appeared to be to restore it to solvency, while in their reply it appeared that a better return for creditors than would be achieved on immediate liquidation was the intended objective. It does not really matter, however, because on either approach the applicants have fallen woefully short of furnishing the court with the material required to make the assessment of whether a reasonable prospect of business rescue succeeding exists. Their case was manifestly dependent on the provision by the mystery potential investor of the means to enable a business rescue practitioner to draw up a feasible rescue plan.

In the result the application is dismissed with costs;

