

Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others, Farm Bothasfontein (Kyalami) (Pty) Ltd v Kyalami Events and Exhibitions (Pty) Ltd and Others (2011/35199, 2011/24545) [2012] ZAGPJHC 12; • 2012 (3) SA 273 (GSJ) (17 February 2012)

The application is brought in terms of section 131 of the new Companies Act 71 of 2008 ("the Act") for an order commencing business rescue proceedings for the rehabilitation of the Company. The term "business rescue" is defined in section 128(1)(b) of the Act. Nedbank and Imperial opposed the business rescue application on the simple basis that any rescue proposal put forward by the practitioner would be rejected as, having sixty percent of the vote, they will vote against it.

It further appeared from the papers that it was common cause that neither of the parties sought the rehabilitation and continued existence of the company. The point of dispute was whether the best results will be obtained by a liquidator selling the immovable property as the only major asset of the company or whether a business rescue practitioner would be able to do better. The applicants' case was based on the assumption that a business rescue practitioner would be able to realise a higher price, whereas a liquidator at a sale in execution will realise a lesser price. No factual basis has been laid by the applicants for justifying such an assumption.

The judge came to the conclusion that in this case an order for business rescue was not appropriate for the following reasons:

- Why a liquidator would be less successful in realising a proper market value for the immovable property than a business rescue practitioner.
- The fact that the applicants have become embroiled in a litany of pending court cases.
- It was common cause that the Company is financially distressed, in that, it has failed to make due payments on the bond resulting in a judgment being taken against it by Nedbank.
- The refusal to disclose the Company's latest financial statements.

- Having regard to the provisions of section 128 to 154 of the Act, once a company is placed under supervision and business rescue proceedings have commenced, such proceedings were open-ended, and could probably include further applications to court and carry on for a considerable period of time.

In view of the fact that the outcome of the business rescue application, resulted in a final order for the liquidation of the Company, the applicant in this matter had no longer any standing to proceed with the application. It was for the liquidator to decide whether or not this application should proceed or not.