

Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd - 2011 section 131(4) Court order to begin business rescue proceedings (sections 128 & 131) (25 November 2011)

This important section sets out the preconditions for an order to commence business rescue proceedings. It distinguishes the test of “reasonable prospect” from “reasonable probability” used in section 427 of the old Companies Act 61 of 1973 in respect of judicial management (paragraph 20). Unlike the old Act where judicial management was granted instead of a liquidation order in exceptional circumstances, the approach in the new Act is the opposite and business rescue is preferred to liquidation. 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.

Whilst every case must be considered on its own merits, it is difficult to conceive of a rescue plan in a given case that will have a reasonable prospect of success of the company concerned continuing on a solvent basis unless it addresses the cause of the demise or failure of the company's business, and offers a remedy therefor that has a reasonable prospect of being sustainable.

A business plan which is unlikely to achieve anything more than to prolong the agony, i.e. by substituting one debt for another without there being light at the end of a not too lengthy tunnel, is unlikely to suffice. One would expect, at least, to be given some concrete and objectively ascertainable details going beyond mere speculation in the case of a trading or prospective trading company of:

- the likely costs of rendering the company able to commence with its intended business, or to resume the conduct of its core business;
- the likely availability of the necessary cash resource in order to enable the ailing company to meet its day-to-day expenditure, once its trading operations commence or are resumed. If the company will be reliant on loan capital or other facilities, one would expect to be given some concrete indication of the extent thereof and the basis or terms upon which it will be available;
- the availability of any other necessary resource, such as raw materials and human capital;

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

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