FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 5000/2011

In the matter between:-

PROPSPEC INVESTMENTS (PTY) LTD	Applicant
and	
PACIFIC COAST INVESTMENTS 97 LTD	First Respondent
ARCHIBALD ROTHMAN	Second Respondent

HEARD ON: 14 JUNE 2012

JUDGMENT BY: VAN DER MERWE, J

DELIVERED ON: 28 JUNE 2012

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[1] This is an application for orders placing the first respondent, a public company, under supervision and commencing business rescue proceedings and for appointment of an interim business rescue practitioner.

[2] The applicant is a creditor of the first respondent (the company). The application is opposed only by the second respondent, who is also a creditor of the company. Both the applicant and the second respondent are therefore affected

persons as defined in section 128(1)(a)(i) of the Companies Act 71 of 2008 (the Act), with the right to participate in the hearing of the application, in terms of section 131(3) of the Act.

[3] Section 131(4)(a) of the Act provides as follows:

> "(4) After considering an application in terms of subsection (1), the court may-
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> *(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 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;"

[4] It is common cause that the company is financially distressed

as defined in section 128(1)(f)(i) of the Act.

[5] The question therefore is whether there is a reasonable prospect for rescuing the company. Before turning to the facts of this matter, it must be considered what the meaning is of the phrase “a reasonable prospect for rescuing the company”.

[6] In terms of section 128(1)(h) “rescuing the company” means achieving the goals set out in the definition of “business rescue” in section 128(1)(b). This definition reads as follows:

> “*(b)* **'business rescue'** means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for-
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> (i) the temporary supervision of the company, and of the management of its affairs, business and property;
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> (ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and
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> iii) the development and implementation, if approved, of a plan to rescue the company by restructuring

> its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company;"

[7] A goal in this context means a desired end or result. It follows that the goals set out in this definition are that the company continues in existence on a solvent basis or, if it is not possible for the company to so continue in existence, a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.

[8] What then is the meaning of a reasonable prospect of attaining these goals? In **SOUTHERN PALACE INVESTMENTS 265 (PTY) LTD v MIDNIGHT STORM INVESTMENTS 386 LTD** 2012 (2) SA 423 (WCC) Eloff AJ held, correctly in my respectful view, that the term "reasonable prospect" indicates something less than a

reasonable probability, as was required for placing a company under judicial management in terms of section 427(1) of the repealed Companies Act 61 of 1973.

[9] Eloff AJ however continued to say the following:

> "[24] While 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, ie 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:
>
> [24.1] The likely costs of rendering the company able to commence with its intended business, or to resume the conduct of its core business;
>
> [24.2] 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;

[24.3] the availability of any other necessary resource, such as raw materials and human capital;

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

[25] In relation to the alternative aim referred to in s 128(1)*(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."

[10] In **KOEN AND ANOTHER v WEDGEWOOD VILLAGE GOLF & COUNTRY ESTATE (PTY) LTD AND OTHERS** 2012 (2) SA 378 (WCC) Binns-Ward J in par. [18] at 384 agreed with what was said in par. [24] of ***SOUTHERN PALACE*** and in par. [19] and [20] made remarks similar to what was said in par. [25] of ***SOUTHERN PALACE***.

[11] I agree that vague averments and mere speculative suggestions will not suffice in this regard. There can be no doubt that in order to succeed in an application for business rescue, the applicant must place before the court a factual foundation for the existence of a reasonable prospect that the desired object can be achieved. But with respect to my learned colleagues, I believe that they place the bar too high.

[12] In my view a prospect in this context means an expectation. An expectation may come true or it may not. It therefore signifies a possibility. A possibility is reasonable if it rests on a ground that is objectively reasonable. In my judgment a reasonable prospect means no more than a possibility that

rests on an objectively reasonable ground or grounds.

[13] This interpretation is in my view also indicated by the context of Chapter 6 of the Act. I refer especially to the underlying philosophy thereof that in order to prevent unnecessary negative economic and social impact, business rescue is to be preferred to liquidation and to the fact that judicial management under the previous Companies Act failed mainly because of the high threshold of proof required. See **OAKDENE SQUARE PROPERTIES (PTY) LTD AND OTHERS v FARM BOTHASFONTEIN (KYALAMI) (PTY) LTD AND OTHERS** 2012 (3) SA 273 (GSJ) at 277 para [7] and 281 – 282 para [18]. It also takes account thereof that an application for business rescue may be brought by a person, such as an employee or a creditor, who does not necessarily have access to or a full picture of the company's financial affairs and that in terms of section 141(1) of the Act a practitioner must investigate the company's affairs, business, property and financial situation as soon as practicable after being appointed.

[14] I therefore agree with C J Claassen J in ***OAKDENE*** that the discretion to make in order in terms of section 131(4)(a) arises whenever the facts show subsection (i),(ii) or(iii) and a reasonable possibility of the company continuing to exist on a solvent basis or of a better return for creditors or shareholders than would result from the immediate liquidation of the company.

[15] In my judgment 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 available, is tantamount to requiring proof of a probability and unjustifiably limits the availability of business rescue

proceedings.

[16] By way of a so-called “Private Placing Invitation” the company invited investors to invest in a project for the development of serviced erven. The development would consist of two phases, whereafter the erven would be sold and the investments repaid together with interest thereon.

[17] In respect of phase I the purpose of the invitation was to raise funds to finance the company’s acquisition of the immovable property known as the remaining extent of portion 18 of the farm no. 799, East London, measuring 16,6 hectares (the property), payment of professional fees relating to the installation of infrastructure on the property and the necessary private placing costs and the promoter’s fee. In respect of phase II it was for the financing of the installation of electrical, civil and bulk services on the property, as well as the necessary private placing costs and the promoter’s fee. The property is situated near Gonubie, East London.

[18] Linked units were offered for subscription at R1 000,00 per

unit. A linked unit consists of one ordinary par value share of 1 cent and one unsecured fixed shareholder's loan of R999,99 "inseparably linked together". Shareholders' loans and interest thereon would be repaid on completion of the project, that is the sale of the erven at the projected prices. Investors were no doubt persuaded to invest in the project by the offer of interest on shareholders' loans of 30% per annum calculated from closing date of the particular offer to date of completion of the project. The closing date of the offer in respect of phase I was 31 October 2007 and in respect of phase II it was 31 March 2008. Marketing of erven was to commence during May 2008 and completion of the project was expected to take place during May 2009. A maximum of 30% of investors could opt for payment of accelerated interest at the maximum rate of 1% per month from date of investment to date of completion of the project, in terms of a loan agreement entered into with the company.

[19] Phase I attracted investments in the amount of R26 152 900,00 and phase II attracted investments in the amount R35 711 000,00. This was in accordance with the projections in

the Private Placing Invitation. These investments were made by a total of 228 investors. The second respondent invested the amount of R145 000,00 and agreed with the company for payment of accelerated interest.

[20] It appears to be common cause that phases I and II were completed and that the projected 205 full title erven and 330 sectional title erven became available for sale at approximately the projected time. According to the photographs that form part of the papers, the development appears to be of good quality and in reasonable condition. Not a single stand has however been sold, naturally causing the company serious financial distress. Payment of accelerated interest ceased by May 2009 and the project grinded to a halt.

[21] The liability of the company for repayment of shareholders' loans and interest thereon amounts to approximately R85 968 831,00. The applicant was the promoter of the project. In terms of the Private Placing Invitation promoters' fees would amount to ± R8 901 197,00. The applicant however

made a loan to the company in order to enable it to pay interest to the investors that opted for payment of accelerated interest. The amount of R7 563 348,00 is owed by the company to the applicant in this regard. Other liabilities amount to R337 046,00. The total liabilities of the company therefore amount to approximately R93 869 225,00.

[22] Apart from the amount of R40 033,00 in savings accounts, the property is the only asset of the company. The company has no employees.

[23] In terms of the Private Placing Invitation the total projected nett profit of the project would be distributed as investors' return on investments. Therefor even after successful completion of the project, the company would be left with no funds and no assets. The applicant's case is also that the property should be sold, either as a whole or by sale of individual erven. It follows that there is no practical prospect of the company continuing to exist on a solvent basis.

[24] In any event there is no proper valuation of the property before me to show that the property or erven may be sold for more than the total liabilities of the company. The valuation placed before me did not purport to value the property as a single entity. Its effect is to place a total sale value on the erven of R102 560 000,00. But this is seriously open to question. The valuation is as at 30 June 2009, that is three years ago. The best proof of the market value of property is the price actually obtained in the open market. As I said, no sales of erven took place at all over a period of approximately three years, let alone at these prices.

[25] The question therefore is whether there is a reasonable prospect that selling of the property by a business rescue practitioner will yield a better return than selling thereof by a liquidator. The applicant says that the problem with the development was the economic downturn as well as the chilling effect of the National Credit Act on obtaining credit from banks. The applicant says that there is improvement in respect of both these impediments. It says that the economy has improved and that “the banks now grant 50% (fifty

percent) loans for the purchase of vacant land and much more favourable building loans". This may be accepted, but is neutral. There is no reason why these factors would not apply equally to a liquidator and a business rescue practitioner.

[26] The applicant in reply relies on an affidavit by a person who is an auctioneer and valuator of some experience. This witness suggests that sales by liquidators generally yield less than market value. Upon close examination however, it is clear that the witness refers to so-called forced sales, such as sales in execution, as opposed to sales in the open market. Again, this may be accepted, but there is no reason why a sale by a liquidator should be a forced sale. In this matter all shareholders are also creditors and there are no employees. The liquidator must act on the directions of the creditors of the company. See sections 40(3)(a), 81(1), 81(3)(a) and 82(1) of the Insolvency Act 24 of 1936, read with Item 9(1) of Schedule 5 to the Act. There is no reason why a liquidator could not on these directions sell the property or erven on exactly the same basis as a business rescue

practitioner would.

[27] In my judgment therefore, the applicant did not show a reasonable prospect of a better return than would be the case in liquidation.

[28] This application was precipitated by an application for liquidation of the company by the second respondent. This application is still pending, but was not placed before me for adjudication. In the circumstances I believe that I should not order liquidation of the company, but that that should be considered in the liquidation application.

[29] The application is dismissed with costs.

C.H.G. VAN DER MERWE, J

On behalf of applicant:	Adv. W.A. van Aswegen Instructed by: Honey Attorneys BLOEMFONTEIN
On behalf of second respondent:	Adv. P.J.J. Zietsman Instructed by: Webbers Attorneys

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