

**BUSINESS RESCUE: DO EMPLOYEES HAVE
BETTER (REASONABLE) PROSPECTS OF
SUCCESS? COMMENTARY ON**

***Employees of Solar Spectrum Trading 83 (Pty)
Limited v AFGRI Operations Limited*
(North Gauteng High Court, Pretoria
(unreported) 2012-05-16 Case no 6418/2011;
18624/2011; 66226/2011; 66226A/11)**

1 Introduction

Chapter 6 of the Companies Act 71 of 2008 (“the Act”) incorporated business-rescue proceedings to replace judicial management. This change in regime was met with great expectations and excitement. Since one of the first applications for business rescue was heard in *Swart v Beagles Run Investments 25 (Pty) Ltd (Four Creditors Intervening)* (2011 (5) SA 422 (GNP)), our courts have been confronted with applications for business rescue on a regular basis as evident from the number of cases reported since the commencement of the Act on 1 May 2011. The implementation of the new business-rescue regime is under the close watch of academics, legal practitioners and the business sector, more in particular the financial sector. All are hoping that the problems that were encountered with judicial management will be ironed out under the business-rescue regime.

The concept of judicial management had always been regarded as a progressive step towards the corporate rescue of ailing companies. Judicial management was first incorporated in the Companies Act 46 of 1926 and retained the Companies Act 61 of 1973 (“the previous Act”), which replaced the 1926-Act. However, from its introduction in South African company law judicial management failed to materialize into the corporate-rescue procedure everyone had hoped for. This could be ascribed to a number of reasons. One of these reasons was the conservative and restrictive approach of courts to the interpretation of the provisions relating to judicial management, especially section 427(1) of the previous Act (see also *Silverman v Doornhoek Mines Ltd* 1935 TPD 350 353; *Le Roux Hotel Management (Pty) Ltd v E Rand (Pty) Ltd (FBC Fidelity Bank Ltd (under Curatorship), Intervening)* 2001 (2) SA 727 (C) par 39; and Smith “The Major Creditor’s Wishes Usually Prevail” 2001 9 *JBL* 144 148). Courts regarded the granting of orders for judicial management as an extraordinary procedure which had to be used sparingly (Joubert, Van Eck and Burdette “Impact of Labour Law on South Africa’s New Corporate Rescue Mechanism” 2011 27 *Int J Comp LLIR* 65 75; Burdette “Some Initial

Thoughts of an Effective Business Rescue Model” 2004 16 SA Merc LJ 241 247; and Kloppers “Judicial Management Reform – Steps to Initiate a Business Rescue” 2001 13 SA Merc LJ 359, 362 and 377). This unrealistically high burden of proof that was placed on applicants for orders of judicial management contributed to its ineffectiveness. Orders for judicial management were only to be granted if the applicant could prove a “reasonable probability” that the company would become a successful concern (s 427(1); Smith 2001 9 JBL 145; Burdette 2004 16 SA Merc LJ 249; Kloppers 2001 13 SA Merc LJ 363 and 374). Even when applicants had managed to prove the requirements set out in section 427(1) of the previous Act, courts were hesitant to grant orders for judicial management against the wishes of creditors (*Le Roux Hotel Management (Pty) Ltd v E Rand Ltd supra* par 48). Applications for judicial management were then dismissed on the ground that it is not “just and equitable” to grant the requested relief (Smith 2001 9 JBL 146; Burdette 2004 16 SA Merc LJ 248; and Kloppers 2001 13 SA Merc LJ 363 and 375). Another problematic issue that stood in the way of granting applications for judicial management was that creditors had a right to liquidate companies which defaulted on due and payable debts (*De Jager v Karoo Koeldranke & Roomys (Edms) Bpk* 1956 (3) SA 594 (C) 602). The costs related to the initiation and commencement of judicial management had proved to be a further Achilles heel, which hampered its potential success. Judicial management could only commence upon the granting of a provisional court order followed by a subsequent final court order (Burdette 2004 16 SA Merc LJ 249; and Kloppers 2001 13 SA Merc LJ 371).

Now, the Act has replaced judicial management with business rescue. In so doing, the legislature attempted to address many of the weaknesses and problems encountered with the judicial management procedure. One of the improvements is the limited role the courts play in the commencement of business-rescue proceedings.

The business-rescue regime is found in Chapter 6 of the Act. Business rescue can commence either by way of a voluntary board resolution (see s 129(1)) or by an order of court (see s 131(1)). This case note will focus on the commencement of business-rescue applications by order of court.

The commencement of business rescue may be ordered upon the application of an “affected person” (s 131(1); and Joubert *et al* 2011 27 *Int J Comp LLIR* 76). An “affected person” is defined in section 128 of the Act as, amongst others, (s 128(a)(i) includes a shareholder or creditor of a company), any registered trade union representing employees of the company and/or the employees of the company who are not represented by a registered trade union (s 128(1)(a)(ii) and (ii); and Joubert *et al* 2011 27 *Int J Comp LLIR* 77).

Doubts have been expressed about the appropriateness of the inclusion of employees in the definition of “affected person”. Loubser submits that the benefits that business-rescue process holds for employees may open the business-rescue process to abuse by employees (Loubser “The Business Rescue Proceedings in the Companies Act of 2008: Concerns and Questions (Part 1)” 2010 3 *TSAR* 501 510). A further argument can be made

that an imbalance exists in the protection of the interests of employees when compared to the protection of creditors' interest during business-rescue proceedings (Joubert *et al* 2011 27 *Int J Comp LLIR* 84). This imbalance is evident in the preference given to employees' claims for remuneration that become due and payable during the business-rescue process (s 135(1), read with s 135(3)(a)). Not only are the claims of employees regarded as post-commencement finance but these claims rank above the claims of any other providers of post-commencement finance (s 135; and Joubert *et al* 2011 27 *Int J Comp LLIR* 80). This places the claims of employees in direct competition with the claims of other creditors who provided post-commencement finance. This may cause creditors to be hesitant in providing post-commencement finance, knowing that their claims will rank behind those of the employees of a company (Joubert *et al* 2011 27 *Int J Comp LLIR* 67). Joubert *et al* conclude that the legislature may have gone too far in the protection of employees and that this protection erodes the interests of creditors and especially those of creditors who provided post-commencement finance (Joubert *et al* 2011 27 *Int J Comp LLIR* 84).

As pointed out earlier, one of the failures of judicial management as a corporate rescue mechanism was the too conservative approach taken by the courts in granting relief in the form of judicial management. Although in recent judgments the courts have acknowledged the new philosophy underlying business rescue, there are concepts in the Act which are still subject to judicial interpretation. A court may grant an order for the commencement of business-rescue proceedings if the applicant proves any of the requirements in section 131(4)(a)(i–iii) and the existence of “a reasonable prospect for rescuing the company”. The phrase “a reasonable prospect for rescuing the company” is not defined in the Act and is therefore open to judicial interpretation. Many of the cases brought before the courts dealing with business rescue, including the *Employees of Solar Spectrum Trading 83 (Pty) Limited v AFGRI Operations Limited* (North Gauteng High Court, Pretoria (unreported) 2012-05-08 Case No 6418/2011; 18624/2011; 66226/2011; 66226A/11) (“the *Solar Spectrum* case”) case, turned on the question whether there was “a reasonable prospect for rescuing the company” (*Nedbank Ltd v Bestvest 153 (Pty) Ltd* [2012] 4 All SA 103 (WCC) par 63; *Kovacs Investments 571 (Pty) Ltd v Investec Bank Ltd* Western Cape High Court, Cape Town (unreported) 2012-02-22 Case 25051/11 [2012] ZAWCHC 110 par 30; *Zoneska Investments (Pty) Ltd/Bonatla Properties (Pty) Ltd v Midnight Storm Investments 386 Ltd* Western Cape High Court, Cape Town (unreported) 2012-08-22 Case no 9831/2011 & 7811/2012 [2012] ZAWCHC 163 par 78 and 86; and *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* 2013 (4) SA 539 (SCA)).

The phrase “a reasonable prospect for recovery ...” enjoyed special attention in *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd* (2012 (2) SA 423 (WCC); and see also *Koen v Wedgewood Village Golf & Country Estate (Pty) Ltd* 2012 (2) SA 378 (WCC) par 18). The court held that an applicant seeking relief in the form of the commencement of business-rescue proceedings must present to the court enough factual detail to place a court in a position to exercise its discretion

judicially in determining whether a business-rescue practitioner will probably have a viable basis from which business-rescue proceedings can commence (*Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd supra* par 24; *Koen v Wedgewood Village Golf & Country Estate (Pty) Ltd supra* par 19; *Nedbank Ltd v Bestvest 153 (Pty) Ltd supra*; *Essa v Bestvest 153 (Pty) Ltd* 2012 (5) SA 497 (WCC) par 41; and *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd supra* par 30 and 31). The application cannot be based on vague and speculative averments (*Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd supra* par 23 and 24; *Koen v Wedgewood Village Golf & Country Estate (Pty) Ltd supra* par 20; *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd* 2013 (1) SA 542 (FB) par 11; and *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd supra* par 29). The concrete and the objective details that the court will require in granting an order of business rescue must pertain to the likely costs of rendering the company able to commence or resume business; the availability of cash resources to the company to cover daily expenditure; the availability of resources such as raw materials and human capital; and the reasons why it is suggested that the implementation of a proposed business plan will have a reasonable prospect of success (*Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd supra* par 24.1–24.4).

The judicial test as formulated in *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments (supra)* also received attention in *Koen v Wedgewood Village Golf & Country Estate (Pty) Ltd (supra)* and *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd (supra)*. In *Koen Binns-Ward J* approved the approach taken by *Eloff AJ* in *Southern Palace Investments 265 (Pty) Ltd (Koen v Wedgewood Village Golf & Country Estate (Pty) Ltd supra* par 18; and *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd supra* par 8). *Delport and Vorster* are of the opinion that the evidential burden that the court in *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd (supra)* placed on applicants to prove “a reasonable prospect for recovery ...” is far too stringent and it may, in future, lead to the ineffectiveness of the business-rescue procedure (*Delport and Vorster Henochsberg on the Companies Act 71 of 2008* (2012) 465). The evidence and information required by the court to be convinced that there is “a reasonable prospect of recovery” will usually not be accessible to an “affected person” and therefore needs assistance from a business rescue practitioner (*Delport and Vorster Henochsberg on the Companies Act 71 of 2008* 465). It appears that *Delport and Vorster’s* view is shared by *Van der Merwe J* in *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd (supra* par 11 and 15); and see also *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd supra* par 31). *Van der Merwe J* pointed out that to require an applicant to provide minimum concrete and ascertainable details such as “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”, is an unjustified limitation on the availability of business-rescue proceedings to companies (*Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd supra* par 15; and see also *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) supra* par 31). The court further proceeded to interpret the word “prospect” to mean an “expectation” (*Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd supra* par 12). A reasonable prospect of the recovery of a company will be proved if an applicant can prove such a reasonable possibility resting on objectively reasonable grounds (*Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd supra* par 12; and *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd supra* par 29).

On 8 May 2012, the North Gauteng High Court granted an application for the commencement of business-rescue proceedings in the unreported judgment of the *Solar Spectrum supra* case. The *Solar Spectrum* case is of interest for a few reasons. Besides being one of only a handful of cases in which the applicant successfully applied for business rescue, it is also the first case which was brought by the employees of a company. The court also provided guidance on how the test formulated in *Southern Palace Investments* should be applied in determining whether a reasonable prospect for recovery did indeed exist. The judgment further gives valuable insight into the factual detail required in proving “a reasonable prospect of rescuing a company” and how courts could be expected to approach the balancing of various stakeholder interests, in particular those interests of employees against the interests of creditors.

In this case note the author will give a brief overview of the facts and judgment of the *Solar Spectrum* case. The author will then proceed to analyse and comment on some of the important aspects of the judgment. The author will specifically focus on the court’s approach to the phrase “reasonable prospect for success ...” in balancing the interests and rights of creditors against those of the applicant, which were in this case the employees of the second respondent.

2 *The Employees of Solar Spectrum Trading 83 (Pty) Ltd v Afgri Operations Ltd (supra)*

2 1 *The facts*

In this case, the applicants were the employees of Solar Spectrum Trading 83 (Pty) Ltd. The applicants represented 76 temporary and permanent employees of the second respondent, Solar Spectrum Trading 83 (Pty) Ltd (the second respondent). All of the employees worked and lived on the farm of the second respondent.

The first respondent was Afgri Operations Ltd, a secured creditor of the second respondent.

At the time of the application the second respondent was subject to a provisional order for judicial management in terms of the previous Act. The applicant sought relief in the form of the replacement of the provisional judicial management order (made on 8 February 2011 with a return date set on 7 March 2011) with an order for the commencement of business rescue as envisaged by the Act. The first respondent opposed the application on various grounds and sought a conditional liquidation order.

Various extensions were given and the application had finally been set down to be heard on the opposed roll on 21 November 2011. The applicant launched the current application for business on 18 March 2011.

It was common cause between all the parties that the second respondent was financially distressed (*Solar Spectrum supra* par 14). The main dispute in the application was whether there was “a reasonable prospect for rescuing the company ...” as required by section 131(4)(a) of the Act (*Solar Spectrum supra* par 14).

The applicant ascribed the poor performance of the second respondent to the incorrect application of farming methodologies and its problematic operational management. To remedy the poor performance of the second respondent the applicant suggested certain corrective measures. These corrective measures included the improvement of irrigation, better crop choice, proper fertilization and the effective management of production (*Solar Spectrum supra* par 23 and 33). Some of these measures had already been implemented by the time the application was heard.

In opposing the application, the first respondent argued that the second respondent had struggled financially since September 2009 and provisional judicial management had done nothing to improve the second respondent’s situation (*Solar Spectrum supra* par 21). There was no reason to believe that the commencement of business-rescue proceedings would bring about a different result (*Solar Spectrum supra* par 21). The second respondent further argued that the interests of creditors had already been disregarded as no meeting of creditors had been held during the provisional judicial management process, and the judicial manager had not provided the first respondent with any information with regard to the financial position of the company.

2.2 *The judgment*

After considering the purpose of business rescue in section 7(k); the definition of “business rescue” in section 128; and the powers of the court in relation to business rescue as set out in section 131(4); Kollapen J concluded that the purpose of the legislature was to bring about a change in the liquidation culture in South Africa (*Solar Spectrum supra* par 9; Sharrock, Van der Linde and Smith *Hockley’s Insolvency Law* (2012) 275). The Act does not deny the right of a creditor to seek relief in the form of a liquidation order (*Solar Spectrum supra* par 9). Such relief will still be available to creditors in appropriate circumstances. However, the introduction of business rescue is based on the premise that business-rescue proceedings are preferred over liquidation proceedings (Cassim *et al Contemporary*

Company Law (2012) 862; and *Van Niekerk v Seriso* 321 CC Western Cape High Court, Cape Town (unreported) 2012-03-20 Case no: 952/11 and 23929/11 [2012] ZAWCHC 63 par [23]). Business rescue should not only be ordered in exceptional circumstances such as the case had been with judicial management (*Solar Spectrum supra* par 10; see also *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd supra* par 22; and contra *Firststrand Bank Ltd v Imperial Crown Trading 143 (Pty) Ltd* 2012 (4) SA 266 (KZD) par 8).

Under the business-rescue regime the right of a creditor to liquidate must be carefully weighed against the interests of other stakeholders in the company (*Solar Spectrum supra* par 35). Usually these stakeholders are other creditors, employees and shareholders.

The court held that the use of the words “reasonable prospect” instead of “reasonable probability” as the case was in the previous Act, suggested that the legislature required the application of a less stringent test than had been the case in an application for judicial management (*Solar Spectrum supra* par 10; *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (KYLAMI) (Pty) Ltd supra* par 18; and see also Joubert “Ondernemingsredding Uit die Wegspringblokke: Is dit Sterk Genoeg? *Swart v Beagles Run Investments 25 (Pty) Ltd*” 2011 *De Jure* 439 441). Such an interpretation would give effect to the objects stated in section 7 of the Act.

To guard against the use of business rescue for purposes of, and in circumstances for which it was not intended, appropriate weight should be allocated to the various competing interests (*Solar Spectrum supra* par 12).

To determine whether there was “a reasonable prospect of recovery ...” the court referred with approval, to the test applied by Eloff AJ in *Southern Palace Investments* (*Solar Spectrum supra* par 10 and 15; and *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd supra* par 24). For an applicant to be successful in its application it had to be able to present evidence in relation to the cause of the failure of the company (*Solar Spectrum supra* par 15). The applicant should also propose an appropriate remedy or corrective action (*Solar Spectrum supra* par 15). The court should also be convinced of indicators which suggest a reasonable prospect for recovery (*Solar Spectrum supra* par 15). These indicators should not be based on speculation but should be obtainable from concrete and objective ascertainable facts (*Solar Spectrum* case par 15; *Koen v Wedgewood Village Golf & Country Estate (Pty) Ltd supra* par 20). Important considerations that the court would take into account would be the costs of rendering the business of the company, the availability of cash resources and the reasons for believing that a proposed business plan would have a reasonable prospect of success (*Solar Spectrum supra* par 15).

The court explicitly noted the fact that all the employees of the second respondent had been living and working on the farm for a long period of time (*Solar Spectrum supra* par 35). Many of these employees had dependents living with them.

The court made it clear that the responsibility of developing a business rescue plan rested with the business-rescue practitioner (*Solar Spectrum supra* par 19). It was not a requirement that the applicant should approach the court with a proposed business-rescue plan (*Solar Spectrum supra* par 19). Such interpretation would render the Act ineffective.

The test of determining whether “a reasonable prospect of recovery ...” exists hand in hand with a certain level of uncertainty (*Solar Spectrum supra* par 34). It is usually expected from the applicant to place determinable facts before the court to convince the court on the evidence presented that the future prospects of rescuing the company appear to be reasonable in light of the circumstances (*Solar Spectrum supra* par 34).

In casu the applicant managed to convince the court that the implementation of some of its corrective measures had resulted in a positive income and placed the second respondent in a position to repay some of its debts. One of the corrective measures implemented was the appointment of a new manager, one Mr Makanya. The court accepted the applicant's argument on the basis that the applicant could provide a clear indication of the turning point (the appointment of Mr Makanya) in the second respondent's finances. The applicant demonstrated that the second respondent had a substantial growth in income and profit for the period 1 July to 14 November 2011, in contrast to the period 1 March to June 2011 during which the second respondent incurred substantial losses.

The court had the privilege of expert opinions at its disposal. Mr Philip van Rooyen, an agricultural programme manager, was of the view that there was a marked improvement since a new manager in the form of Mr Makanya had been appointed (*Solar Spectrum supra* par 27). He was also of the view that Mr Makanya had managed the farm effectively. He was further satisfied with the financial, production and the cost management of the second respondent. He further indicated that second respondent had also successfully completed a certification process which enabled it to penetrate a higher end of the market and achieve higher prices for its product.

The expert opinion of Mr Francois Boshoff, a creditor and a supplier of fertilizer to the farm, was also obtained. Mr Boshoff substantially corroborated the evidence of Mr Van Rooyen that there had been a significant improvement in the farm's production since Mr Makanya took over the management of the farm (*Solar Spectrum supra* par 28).

The first respondent's expert witness, Mr Malan, was of the view that based on forward-looking projections, the second respondent would be able to comply with all its obligations within two years, should the projected tonnage materialize (*Solar Spectrum supra* par 29). The expert was further of the view that the quality of the second respondent's products was good and that the management of the farm was a telling factor (*Solar Spectrum supra* par 29). The experts identified the approach to the management of the farming as the main cause of the failure of many farming businesses (*Solar Spectrum supra* par 30).

The first respondent's opposition to the application that the failure of judicial management to yield an improvement in the business of the farm,

and therefore a different outcome could not be expected from business-rescue proceedings, was rejected (*Solar Spectrum supra* par 32). The court pointed out that it understood the problems the first respondent had experienced in obtaining reports from the provisional judicial manager. However, the role of the business-rescue practitioner differed materially from that of a judicial manager (*Solar Spectrum supra* par 32). According to the court, a business rescue practitioner had a more hands-on approach (*Solar Spectrum supra* par 32). The Act further provided for the substantial participation of creditors, employees and other parties to the company during the business-rescue process (see s 131(5), which made provision for the ratification of the interim practitioner by independent creditors; s 144(3) and s 148 made provision for the participation by employees; s 145 made provision for the participation by creditors and s 147 made provision for the first meeting of creditors; s 146 made provision for the participation by holders of the company's securities; s 149 regulated the participation in the business rescue process and interaction of committees of affected persons with the appointed business rescue practitioner; s 151–153 provided for the meetings that needed to be held for the consideration, approval, rejection and revision of the proposed business plan; and see also *Solar Spectrum supra* par 32).

Evidence was presented that business rescue would to some degree be successful either by successfully rescuing the company or to achieve a higher return for creditors if the company was liquidated after the development and implementation of an approved business rescue plan. This would provide the business rescue practitioner with a basis from which he could develop a realistic business-rescue plan (*Solar Spectrum supra* par 33). The business-rescue plan would cover aspects such as operational and financial management. It would also address the strategic aspects of the business of the company (*Solar Spectrum supra* par 33).

The first respondent raised the argument that there was no prospect of creditors approving the business-rescue plan (*Solar Spectrum supra* par 36). The court rejected this argument and stated that an obligation rested upon creditors to consider the merits of a proposed business rescue plan in good faith (*Solar Spectrum supra* par 37).

The court concluded that the applicant had succeeded in proving the existence of a reasonable prospect for recovery of the company and ordered the commencement of business-rescue proceedings (*Solar Spectrum supra* par 38).

2.3 *Analysis of and comment on the Solar Spectrum case*

This case is a clear example of the paradigm shift some courts are willing to make when dealing with applications for the commencement of business rescue proceedings. For the current business-rescue regime to be effective, South Africa's liquidation culture needs to change (*Solar Spectrum supra* par 9). Business rescue is to be preferred above the liquidation of companies (*Solar Spectrum supra* par 9). Orders for business rescue should not only be

granted in exceptional circumstances as the case was with judicial management under the previous Act. There are material differences between business-rescue and judicial management (*Solar Spectrum supra* par 9). Business rescue cannot be seen as judicial management with a new identity. Because of the difference in approach between business rescue and judicial management, it cannot be argued that because the judicial-management process was unsuccessful the commencement of business rescue-proceedings will follow suit (*Solar Spectrum supra* par 32). According to the court, one of the main differences between judicial management and business rescue lies with the powers and functions of the business-rescue practitioner. To the court the business-rescue practitioner has a much more “hands-on” approach (*Solar Spectrum supra* par 32).

The paradigm shift courts are willing to do has important implications for creditors. Creditors no longer have an absolute right to liquidate a company because the company has defaulted on a debt which is due and payable. The fact that the company defaulted on payment due to the creditor will only be one factor amongst others that will be considered in deciding either to liquidate a company or to commence with business-rescue proceedings. As long as the ailing company is not “terminally ill” or “chronically ill” courts will give serious consideration in granting orders for the commencement of business-rescue proceedings instead of liquidation (*Solar Spectrum supra* par 12).

The *Solar Spectrum* case touches on various important aspects of business-rescue proceedings. This case provides clarity on how the judicial test for business rescue as laid down in the case of *Southern Palace* should be understood. The second aspect is the approach of the courts in balancing the competing interests of creditors and employees. In balancing the interests of creditors and employees the court considered the time the creditor already had to wait for the payment of its claim; the attitude of creditors towards proposed business-rescue proceedings; and the socio-economic impact the liquidation of a company would have on the employees and the community (see *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (KYALAMI) (Pty) Ltd* 2012 (3) SA 273 (GSJ) par 18, where Claassen explained that the object of business rescue was to prevent the negative socio-economic consequences that were associated with the liquidation of companies; see also the discussion in *Koen v Wedgewood Village Golf & Country Estate (Pty) Ltd supra* par 14; and *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd supra* par 13, on the philosophy underlying business rescue).

The court made it clear that the position of the applicant *vis-à-vis* the company would be considered when applying the test laid down in *Southern Palace Investments (Solar Spectrum supra* par 17). Based on the last-mentioned approach, the criticism that the test for business rescue as applied in the *Southern Palace Investments* case was too stringent and might lead to the ineffectiveness of business rescue, was rejected (see Delport and Vorster *Henochsberg on the Companies Act 71 of 2008* 465, for criticism on the judicial test on the *Southern Palace* case).

When applying the *Southern Palace Investments* test the court needed to consider the applicant's access to information of the company (*Solar Spectrum supra* par 17). This did not mean that a different test was applied for each affected person (*Solar Spectrum supra* par 17). The court explained that, generally, a shareholder would have better access to the company in relation to details of the financial position and financial performance of the company than what an employee might have (*Solar Spectrum supra* par 18). On the other hand, long-standing employees might have a particular knowledge of the operational performance of the company (*Solar Spectrum supra* par 18). Employees might be the source of information such as the history of the company and any problems that the company was experiencing or had experienced in the past (*Solar Spectrum supra* par 18). Employees might also be in the position to identify solutions and could play a vital role in the business-rescue process (*Solar Spectrum supra* par 18).

The Act states unequivocally that the development and implementation of a business rescue plan is the obligation of the business-rescue practitioner (s 140(1)(d)). An applicant is not expected to provide the court with a proposed business plan (*Solar Spectrum supra* par 19). The business-rescue plan is only developed after the appointment of the business rescue practitioner. The business-rescue plan will then be developed by the business-rescue practitioner after an investigation into the affairs of the company and in conjunction with the other stakeholders.

Although business-rescue proceedings substantially affect the interests of creditors, one should not lose sight of the fact that the competing rights and interests of creditors should be balanced against those of employees and shareholders. The Act provides for procedures and mechanisms in which the creditors and employees are made to fully participate in the process and during which adequate opportunity is given to consider the interests of all affected parties (*Solar Spectrum supra* par 35e).

In the context of this case the socio-economic circumstances of the employees and their dependants played a critical role as all the employees and their dependants lived on the farm (*Solar Spectrum supra* par 35). Not only was the employment of the employees at risk, but also the homes of the employees and their dependants, had the second respondent been liquidated (*Solar Spectrum supra* par 35). The first respondent's application for a liquidation order was accordingly denied, although the respondent had not received any payment from second respondent in more than a year. It appears that to the court the socio-economic circumstances of the affected parties and the potential effects of liquidation proceedings on employees of the company to be liquidated were of particular importance when balancing the rights and interests of employees and creditors.

In an attempt to trump applications for business rescue, creditors (especially major creditors) often argue that there is no reasonable prospect for rescuing the company, as the proposed business-rescue plan will fail to receive the required support from creditors to be adopted. These major creditors often vote against proposed business-rescue plans to force the termination of the business-rescue process. In the *Solar Spectrum* case, the court made it clear that it would not always be open to creditors avoiding an

order for business rescue by indicating that the creditors would not approve any business-rescue plan (*The Employees of Solar Spectrum Trading 83 (Pty) Ltd v Afgrif Operations Ltd* par 37; see the following cases on the weight given to creditors' attitude toward the appointment of a business-rescue practitioner to develop a proposed business-rescue plan; *Oakdene Square Properties v Farm Bothasfontein (Kyalami) (Pty) Ltd supra*; *Farm Bothasfontein (Kyalami) (Pty) v Kyalami Events and Exhibitions (Pty) Ltd* (GSJ) par 17; *Gormley v West Precinct Properties (Pty) Ltd (Anglo Irish Bank Corporation Ltd intervening)*; *Anglo Irish Bank Corporation Ltd v West City Precinct Properties (Pty) Ltd* Western Cape High Court, Cape Town (unreported) 2012-04-18 Case 19075/11 and 15584/11 par [22]; and *Zoneska Investments (Pty) Ltd/Bonatl Properties (Pty) Ltd v Midnight Storm Investments 386 Ltd supra* par 67). According to the court, creditors – as stakeholders in the business-rescue process – have an obligation to act in good faith during the development of the business-rescue plan (*Solar Spectrum supra* par 37). Conduct, such as indicating that creditors will vote against a business-rescue plan prior to such a business-rescue plan being proposed, is premature (*Gormley v West Precinct Properties (Pty) Ltd (Anglo Irish Bank Corporation Ltd intervening) supra* par 22; and *Shoprite Checkers (Pty) Ltd v MG Hi-Tech Surveys CC* [2012] ZAWCHC 137 par 13). Therefore not much weight can be attributed to the attitude of creditors to a proposed business-rescue plan when the application for the commencement of business-rescue proceedings is considered. It is implied that if a creditor does not participate in the process of formulating, considering and voting on a proposed business-rescue plan in good faith, the door is opened for a business-rescue practitioner to apply in terms of section 153(1)(a)(ii) to have the result of a vote on the adoption of a business-rescue plan set aside (Loubser "The Business Rescue Proceedings in the Companies Act of 2008: Concerns and Questions (Part 2)" 2010 3 TSAR 689 695, for a discussion on the lack of guidelines on the circumstances in which the rejection of a business plan may be regarded as inappropriate). In the Supreme Court of Appeal judgment of *Oakdene Square Properties (Pty) Ltd* held that the intention of major creditors to oppose a proposed business plan could not in principle be ignored as the applicant was bound to prove a reasonable prospect for rescuing the company (*Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* (SCA) *supra* par 38). The intention of major creditors could only be ignored if they were acting unreasonably or *mala fide* (*Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* (SCA) *supra* par 38).

In previous business-rescue applications the time that a creditor had to wait for payment was considered as an important factor (*Firstrand Bank v Imperial Crown Trading 143 (Pty) Ltd supra*; *Gormley v West Precinct Properties (Pty) Ltd (Anglo Irish Bank Corporation Ltd intervening) supra*; *Anglo Irish Bank Corporation Ltd v West City Precinct Properties (Pty) Ltd supra*; *Kovacs Investments 571 (Pty) Ltd v Investec Bank Ltd supra*; and *AG Petzetakis International Holdings Limited v Petzetakis Africa (Pty) Ltd supra*). In *Solar Spectrum supra* the second respondent was placed under judicial management in February 2011. The order for judicial management was replaced by business rescue proceedings in March 2012. The evidence

before the court indicated that the second respondent would be able to meet all its obligations within two years. (In *Firstrand Bank v Imperial Crown Trading 143 (Pty) Ltd supra* (KZD) par 23 a repayment period of 12 years was regarded as too long. In *Gormley v West Precinct Properties (Pty) Ltd (Anglo Irish Bank Corporation Ltd intervening)*; *Anglo Irish Bank Corporation Ltd v West City Precinct Properties (Pty) Ltd supra* par 11, as repayment of 3 to 5 years was regarded as too long. In *Kovacs Investments 571 (Pty) Ltd v Investec Bank Ltd supra* par 23, a 4-year repayment plan to creditors was proposed; see with regard to the disposal of business-rescue proceedings *AG Petzetakis International Holdings Limited v Petzetakis Africa (Pty) Ltd supra* par 29). At the time of the application the creditor had already gone without payment for over a year, and faced the prospect of waiting for a further two years for the payment of its claim. The claim of the creditor in this case was further delayed due to the fact that the company was subjected to two different regimes of corporate rescue, of which the first had already not produced the desired results.

The second respondent displayed the features of a probable successful candidate for business rescue. The facts in *Solar Spectrum supra* may provide some guidelines for assessing potential candidates for business rescue.

Firstly, it appears that business-rescue proceedings will be more effective and readily granted when companies are experiencing operational problems (*Solar Spectrum supra* par 22 and 23). From previous applications it appears that capital-intensive ventures are to a lesser degree successful in their applications for business rescue. Companies that rely on large amounts of fixed-capital investment usually experience financial difficulty due to a change in market conditions over which the company has no control. Companies experiencing operational problems may gain more value from the business-rescue process than companies that require large amounts of fixed investment. Operational difficulties can usually be addressed by the application of proper and scientific methods. Secondly, a court may be more willing to come to the rescue of a company that protects the interests of its creditors by applying proper financial and cost management (*Solar Spectrum supra* par 27). Thirdly, it is important for a company with a history of poor financial performance to clearly pinpoint a definite turnaround in the business of the company (*Solar Spectrum supra* par 24–26). The company must further be able to link corrective measures to the turnaround strategy of the business (*Solar Spectrum supra* par 27 and 30).

Fourthly, proposed corrective measures must be easy to implement and must be founded on a scientific basis. The proposed corrective action can gain substantial credibility if supported by expert opinion (*Solar Spectrum supra* par 27 and 29). Expert opinion will be particularly valuable in determining whether any forecasts or projects of a company are realistic and based on factual basis. (*Solar Spectrum supra* par 29. For a case on speculative projections see *Kovacs Investments 571 (Pty) Ltd v Investec Bank Ltd supra* par 28 and 30). Fifthly, it has since become accepted that the business which plays an important socioeconomic role in the community

in which it operates, will, more often than not, find favour with the court during the business-rescue application (*Solar Spectrum supra* par 35).

3 Conclusion

The *Solar Spectrum* case is an example of the change that business rescue may bring to the liquidation culture in South Africa. It clearly demonstrates that a creditor no longer has an automatic right to liquidate a debtor which is in default on a payment due to the creditor. Although the courts consider the time for which the creditor has been in default as an important factor when deciding whether relief in the form of business-rescue proceedings should be granted, it cannot be considered in isolation. The merits and circumstances of each case will be considered individually.

The *Solar Spectrum* judgment also provides some direction on how the judgment in *Southern Palace Investments* should be understood pertaining to the nature of the information an affected person must present to a court in an application for business rescue. Kollapen J explained that the *Southern Palace Investments* case should not be read to mean that an affected person should present all the information referred to by Eloff AJ in paragraph 23 and 24 of the judgment. The nature of the information that an affected person will be required to deal with in its application will be dependent on the position of the applicant relative to the company. Employees will usually be the sources of information relating to the operations of the company, while shareholders, for example, will be more often than not rely on financial statements when initiating applications for business rescue. The test to determine whether “a reasonable prospect for rescuing a company” exists is the same in all applications for business rescue irrespective of whom brings the application. According to the *Solar Spectrum* case the information requirements laid down in the *South Palace Investment (2012 (2) SA 423 (WCC))* case should not be interpreted as minimum set of information that needs to be placed before a court in an application for business rescue. Each case should be dealt with on its own merits. The author agrees with the approach suggested by Loubser that when a court has to determine whether a company should be placed under business rescue, it only has to satisfy itself that the company is financially distressed, and that there is a reasonable prospect for rescuing the company (Loubser *Some Aspects of Corporate Rescue in South African Company Law* (LLD Thesis, University of South Africa, 2010) 78). The court should not allow that subjective interests of each affected person influence its discretion (Loubser *Some Aspects of Corporate Rescue in South African Company Law* 78). The considering of the subjective interests of each affected person when adjudicating a business-rescue application will detract the court from the real purpose of business-rescue proceedings (Loubser *Some Aspects of Corporate Rescue in South African Company Law* 78). All affected persons should be dealt with equally in regard to the application for business rescue. When it formulated the Act the legislature carefully considered the interests and socio-economic considerations of each affected person, and formulated the statutory test for business rescue accordingly. It is true that all the categories of affected persons will not be equally privy to information of the company relevant to an

application for business rescue. However, the courts emphasise that an application should be founded on reasonable grounds. The discretion a court exercises in granting an application for business rescue is a value judgment. The importance of this is that an application either complies with the requirements set out in section 131(4) of the Act or not. A court does not have a discretion in the strict sense that at court of appeal will interfere only when it is of the view that the discretion exercised by the lower court does not fall within the range of justifiable conclusions.

The applicant in the *Solar Spectrum* case was in a rare position of being able to present the court with a “pre-packed” business-rescue plan which was already being implemented and yielding some positive results before the application had been served before the court. One cannot keep wondering whether the court would have granted the application if the proposed corrective measures had not yet been implemented and there was no evidence available on the results already yielded.

The court appeared to have attached some considerable weight to the evidence of the two experts. From an evidentiary perspective it may be prudent for an applicant to explain to a court the issues and evidence which may be relevant when hearing an application for the commencement of business rescue, and determining whether the applicant had access to the information needed to evaluate the position of the company.

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