IN THE SOUTH GAUTENG HIGH COURT (JOHANNESBURG)

DELETE WHICHEVER IS NOT APPLICABLE

REPORTABLE: YES/NO
OF INTEREST TO OTHER JUDGES: YES/NO
REVISED

_____ _____
DATE SIGNATURE

Case Number: 2011/35199

In the matter between:

OAKDENE SQUARE PROPERTIES (PTY) LTD	1st Applicant
EDUCATED RISK INVESTMENTS 54 (PTY) LTD	2nd Applicant
DIMETRYS THEODOSIOU N.O.	3rd Applicant
ANTONYS THEODOSIOU N.O.	4th Applicant

And

FARM BOTHASFONTEIN (KYALAMI) (PTY) LTD	1st Respondent
NEDBANK LIMITED	2nd Respondent
IMPERIAL HOLDINGS LIMITED	3rd Respondent

As Well As:

Case Number: 2011/24545

FARM BOTHASFONTEIN (KYALAMI) (PTY) LTD	Applicant

And

KYALAMI EVENTS AND EXHIBITIONS (PTY) LTD	1st Respondent
MOTORTAINMENT KYALAMI (PTY) LTD (IN PROVISIONAL LIQUIDATION	2nd Respondent
NORMAN KLEIN N.O.	3rd Respondent

ENVER MOHAMED MOTALA N.O. 4th Respondent

SOLOMON STANLEY ISAKA BOIKANYO N.O. 5th Respondent

ADRIAAN VAN ROOYEN N.O. 6th Respondent

JUDGMENT

C. J. CLAASSEN J:

INTRODUCTION

[1] I have before me two applications under case numbers 35199/2011 and 24545/2011. Inter-related to these two applications, are, two actions and another application. Their relevance will appear from the judgment below. I shall commence dealing with case no 35199/2011 and thereafter with case no 24545/2011.

[2] The papers are voluminous and the disputes many and complicated. Unfortunately, the Legislature has deemed it fit to prescribe motion proceedings in matters where an order is sought for the business rescue of a company. Despite that being the case, litigants and their legal representatives must count the costs of bringing matters to court on motion where disputes are to be expected. Litigants should be reminded of what Harms DP stated in regard to motion proceedings not long ago:[1]

> "Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's…affidavits, which have been admitted by the respondent...together with the facts alleged by the latter, justify such order. It

[1] See **National Director of Public Prosecutions v Zuma** 2009 (2) SA 277 (SCA) at 290 para [26]; **Agrico Masjienerie (Edms) Bpk v Swiers** 2007 (5) SA (SCA) para [3] at page 307

> may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of facts, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers."

Harms DP went on to say that in motion proceedings the question of onus does not arise and the approach set out above governs irrespective of where the legal or evidential onus lies.[2]

Case Number: 35199/2011

THE PARTIES

[3] The parties to this application are as follows:

1. The first applicant, Oakdene Square Properties (Pty) Ltd ("Oakdene"), sues in its capacity as a cessionary of certain rights.
2. The second applicant, Educated Risk Investments 54 (Pty) Ltd ("Educated Risk"), sues in its capacity as a 40% shareholder in the first respondent.
3. The third applicant, Dimetrys Theodosiou, is an alleged authorised representative of the first applicant and a director of both the second applicant and the first respondent.
4. The fourth applicant, Antonys Theodosiou, (the brother of the third applicant), sues in his capacity as a director of the first and second applicants.
5. The first respondent, Farm Bothasfontein (Kyalami) (Pty) Ltd, takes centre stage in both applications. I shall refer to the first respondent as "the Company".
6. The second respondent, Nedbank Ltd ("Nedbank"), is joined as the bond holder of a mortgage bond registered over the

[2] See **National Director of Public Prosecutions v Zuma** *supra* at p 291A – B

immovable property owned by the Company and also as a 30% shareholder of the company.

7. The third respondent, Imperial Holdings Ltd ("Imperial"), is joined in its capacity as a 30% shareholder of the Company.

RELIEF SOUGHT UNDER THE ACT

[4] 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 as follows:

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

[5] It is common cause that the Company complies with the definition of "financially distressed" in section 128(1)(f). This term is defined as follows:

> "'**financially distressed**', in reference to a particular company at any particular time, means that:
> (i) it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months;[3] or
> (ii) it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months[4];"

[3] This is the so-called "balance sheet insolvency" or "commercial insolvency",
[4] This is actual insolvency.

BUSINESS RESCUE PROVISIONS IN GENERAL

[6] The need for a change in our corporate insolvency law has been propogated since the late 1980's.[5] This need arose from the fact that South Africa had a traditional liquidation system with a liquidation culture. By law a creditor of an ailing company had a right *ex debito justitiae* (as of right) to liquidate the company.[6] In terms of the previous Companies Act 61 of 1973, a company experiencing difficulty to pay its debts, but which did not want to be liquidated, had basically only two alternative options that could be regarded as "corporate rescue" procedures – judicial management and compromises[7].

[7] Judicial management has been termed a "spectacular failure"[8], "an abject failure"[9]. The main reason for its disuse was the high threshold of proof required ("reasonable probability" and not merely a possibility[10]) for an order and the requirement that creditors' claims were to be paid "in full". Empirical studies indicated a success rate of between 15% and 20%.[11] Judicial managers were appointed largely from practicing liquidators, many of whom lacked the mindset of saving the Company, invariably resulting in its liquidation.[12] Judicial management had a negative effect on the credit worthiness of the company, thereby

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[5] See Anthony Smits, "Corporate Administration: A Proposed Model" 1999 De Jure pages 80 – 107.

[6] See **Le Roux Hotel Management (Pty) Ltd and Another v E Rand (Pty) Ltd (FBC Fidelity Bank Ltd (under Curatorship), intervening.** 2001 (2) SA 727 (CPD) at 739 paragraph [42] referring to **Bahnemann v Fritzmore Exploration (Pty) Ltd** 1963 (2) SA 249 (TPD) at 250H – 251A.

[7] See sections 427 and 311 respectively of Act 61 of 1973.

[8] See Anthony Smits supra at page 85. Unfortunately, Australia "imported" the South African judicial management procedures into its corporate law calling it "official management". For similar reasons to the failure of judicial management in South Africa, Australia jettisoned its official management procedures in 1992 with the advent of its "voluntary administration" procedures in Part 5.3A of the Corporatons Act 2001.

[9] See Stein and Everingham, "The new Companies Act Unlocked" page 409

[10] See Anthony Smits supra at page 96 paragraph 4.2; David Burdette, "Unified insolvency legislation in South Africa: Obstacles in the path of the unification process" 1999 De Jure page 44 at pages 57 and 58

[11] See Anthony Smit supra at page 86 note 25.

[12] "… to appoint a liquidator as a business rescue practitioner may be compared, for the sake of argument, to appointing an executioner to act as a nurse or paramedic!" per Richard Bradstreet supra 2010 SA Merc LJ 195 at 207. The learned author regards the business practitioner as the "weakest link" for creditors in a business rescue proceeding, at 211.

undermining financial assistnce from financial institutions to recapitalise the company. It does not trigger a *concursus creditorum* as in the case of liquidation.[13]

[8] Although compromises were regarded as a simple and relatively speedy remedy, it had a major drawback in that it provided no stay of past and future legal proceedings. Litigants had to be overcome this *lacuna* by applying for either provisional liquidation or provisional judicial management. Hence the attempt to save the company became expensive and self defeating.

[9] South Africa had the advantage of learning from various rescue provisions that had been in place in various other countries such as the United States of America, the United Kingdom, Canada, France, Germany and Australia. In this regard, Prof Michael Katz[14] states:

> "For the first time in South Africa companies' legislation we have not been rooted to English company law. In fact the New Companies Act is not anchored in the Company law of any foreign jurisdiction. The New Companies Act represents the best of breed, borrowing in each particular concept from the best in the particular jurisdiction. In certain respects we have home-grown innovations. All of this combines to enable South Africa to take its place amongst the best of company law jurisdictions."

[10] Similarly, a business rescue system must be tailor made for a particulr country's social and economic conditions. It is therefore virtually impossible to transplant the rescue systems of the United States, England, Canada, Germany, France or Australia.[15]

[11] Successful rescue provisions have taken various forms. Anthony Smit mentions some of the various forms such provisions can take:

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[13] See **C.C.A. Little & Sons v Niven N.O.** 1965 (3) SA 517 (S.R., A.D.) at 520.
[14] See "The Corporate Report" Volume 1 issue 2 August 2011 at page 6.
[15] See **Le Roux Hotel Management** supra at paragraphs [55] – [60] pages 743 – 744.

> "On the one extreme end of the spectrumis the view that a corporate rescue is only successful if the corporation itself is saved, not merely the business and jobs of the corporation. In other words, that the the current shareholders continue their control of the business with some form of debt restructuring. An example would be the confirmation of a plan of reorganisation under Chapter 11 of the United States Bankcruptcy Code where the debtor remains in control of the whole business after confirmation. Another example of a successful rescue may be the sale of the entire business to a third party thereby preserving the ongoing enterprise, but allowing the debtor corporation to slip into liquidation. Still others will argue that a successful rescue is one which results in creditors receiving more than they would have done under a liquidation. A final example would be the successful continuation of the business enterprise and the preservation of jobs, with little or no emphasis on creditor recovery as is the case in France."[16]

THE SCHEME OF THE NEW BUSINESS RESCUE PROVISIONS IN THE NEW COMPANIES ACT

[12] The general philosophy permeating through the business rescue provisions is the recognition of the value of the *business* as a going concern rather than the juristic person itself. Hence the name "**business** rescue" and not "**company** rescue". This is in line with modern trend in rescue regimes. It attempts to secure and balance the opposing interests of creditors, shareholders and employees.[17] It encapsulates a shift from creditors' interests to a broader range of interests. The thinking is that to preserve the business coupled with the experience and skill of its employers may, in the end prove to be a better option for creditors in securing full recovery from the debtor.[18] To rescue the business, provision is made to "buy into" the procedure without fear of losing such investment in an ailing company by securing repayment as a

[16] See Anthony Smit supra at page 84.

[17] See Richard Bradstreet, "The new business rescue: will creditors sink or swim?" 2011 SALJ 352 at 355; Richard Bradstreet, "The leak in the Chapter 6 lifeboat: Inadequate regulation of business rescue practitioners may adversely affect lenders' willingness and the growth of the economy" 2010 SA Merc LJ 195 and note 2; Section 7(k) states that one of the purposes of the Act is to "provide for the efficient rescue and recovery of financially distressed companies, in a manner that **balances the rights and interests of all relevant stakeholders".** (Emphasis added). This does not mean that the Act shuns liquidation proceedings within the business rescue provisions. On the contrary, liquidation proceedings are still regarded as a possibility in several sections: 129(6), 131(8)(a), 132(2)(a)(ii), 135(4), 140(4), 141(2)(a)(ii), 145(4)(b), 150(2)(a)(iii), 150(2)(b)(vi), 155(3)(a)(iii) and 155(3)(a)(vi).

[18] See Dr Colin Anderson "Viewing the proposed South African Business rescue provisions from an Australian Perspective" PER 2008(1) at page 9 note 26; Richard Bradstreet supra 2010 Merc LJ 195 note 14.

preferential repayment as part of the "post-commencing financing".[19] Post-commencement creditors are thus offered a "super-priority" as an incentive to assist the company financially.[20] The facility of a business rescue is now also available to Close Corporations.[21]

[13] The scheme of the Act permits a company to adopt a resolution to commence with business rescue proceedings.[22] In the absence of a company resolution, the court may be approached by any "affected persons" as defined in section 128(1)(a)[23] for an order placing the company under supervision and commencing business rescue proceedings.[24] There need only be "a reasonable prospect for rescuing the company"[25] for a court to grant such an order. In the alternative, the court is authorised to dismiss the application and grant an order placing the company in liquidation.[26] In the present case it is common cause that the second applicant is an affected person as contemplated in the aforesaid definition. However, the *locus standi* of the first, third and fourth applicants are in dispute. This dispute need not for present purpose be resolved.

[14] If the court grants an order to commence with business rescue, it shall also appoint a business rescue practitioner who will exercise the prescribed statutory functions in order to attain the goal of restructuring the company back to health. Such an order places a moratorium on any legal proceedings instituted against the company.[27] In doing so, the practitioner is afforded the management and control of the company in

[19] See section 135(2)(3) and (4). This benefit prevails even if liquidation supersedes the business rescue. See section 135(4).
[20] See Richard Bradstreet supra at page 360.
[21] See section 66(1A) of the Close Corporation Act 69 of 1984.
[22] See Section 129 of the Act.
[23] They may be a shareholder, a creditor, any registered trade union representing employees of the company or employees themselves who are not represented by a union.
[24] See Section 131(3) and (4) of the Act.
[25] See further paragraph [18] below.
[26] See Section 131(4)(b) of the Act.
[27] See Section 133 of the Act.

substitution for its board and pre-existing management.[28] In exercising these functions, the directors of the company are obliged to cooperate and assist the practitioner.[29] After convening a meeting with the creditors, the practitioner is then duty bound to prepare a proposal for a business rescue plan.[30] Thereafter, notice is given to the creditors and other affected persons of the proposal and the practitioner convenes a meeting for the consideration thereof.[31] At the meeting the proposal is put to a vote and will only be approved if supported by the holders of more than seventy five percent of the creditors' voting interests plus at least fifty percent of the independent creditors' voting interests.[32] If the proposed business rescue plan is not approved and is rejected, the practitioner shall proceed in terms of section 153 of the Act. The practitioner shall either prepare an amended business rescue plan for submission to and approval of the creditors, alternatively, if approval cannot be attained, the practitioner has to issue a notice terminating the business rescue proceedings.

[15] The rescuing of a company means achieving the goals set out in the definition of "business rescue" as stated in paragraph (b) of section 128(1) of the Act referred to above in paragraph [4].[33] It appears that this goal is primarily directed at the prevention of unnecessary liquidations of companies and the consequent loss of its employees' employment. Employees stand to gain substantial benefits from business rescue proceedings which precede a liquidation. The Company is obliged to retain their services and their salaries are regarded as post-

[28] See Section 140 of the Act. This provision places our rescue provions in the class of "management displacement" as opposed to the "debtor-in-possession" system. An example of the latter system is the Chapter 11 procedure in the United States where the debtor continues to be in charge of the business but subject to judicial control. See Richard Bradstreet, "The leak in the Chapter 6 lifeboat: Inadequate regulation of business practitioners may adversely affect lenders' willingness and the growth of the economy" 2010 SA Merc LJ 195 pages 199, 200 and 212; Anthony Smits supra at page 102 paragraph 4.2.10.
[29] See Section 142 of the Act.
[30] See Section 150 of the Act.
[31] See Sections 151 and 152 of the Act.
[32] See Section 152(2) of the Act.
[33] See further Section 128(1)(h).

commencement expences and thus have super-preferential status.[34] This is confirmed by the fact that section 144 of the Act deals in great detail with the rights of employees during a company's business rescue proceedings.[35] The philosophy is to try and prevent the negative social results following upon companies in distress having to lay off or retrench its employees. Of course, where a company has no employees, these considerations may not apply and the court will have to take this fact into consideration when excersising its discretion whether or not to grant a business rescue order. Furthermore, in such circumstances, liquidation of the company may not necessarily have any negative social consequences. The immediate suspension and subsequent termination within 45 days after appointment of the final liquidator, will, therefore, be of little concern to the court when adjudicating whether to grant a business rescue or liquidation order.

[16] The requirements for a court order commencing business rescue proceedings, are set out in section 131(4) which reads as follows:

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

It is quite evident that this subsection grants a court a discretionary power to issue or refuse an order for the business rescue of a company.[36]

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[34] See sections 136(1)(a) and 135(3)(a); Anneli Loubser, "The business rescue proceedings in the Companies Act of 2008: concerns and questions (part 1) TSAR 2010 3 at page 510 paragraph 4.1.

[35] See also section 131(4)(a)(ii)

[36] See **Swart v Beagles Run Investments 25 (Pty) Ltd (Four creditors intervening)** 2011 (5) SA 422 (GNP) at paragraph [37] page 431.

[17] The phrase "it is otherwise just and equitable to do so for financial reasons" is extremely vague.[37] The immediate question arises: "for financial reasons of whom, the company, the creditors, shareholders or the employees? Since the company cannot apply to court for a business rescue order, as it is not an "affected" person, one can immediately say that the financial reasons of the company are not referred to. However, that would render this provision absurd as it is primarily the financial health of the company which is at stake. I have little doubt that the Legislature never intended such absurdity. I would, therefore, hold that financial reasons relating to all the stakeholders, except that of the practitioner, contemplated in the business rescue provisions, are to be considered by the court when applying this provision.

[18] The next issue is to determine the meaning of the phrase that there should be a "reasonable prospect for rescuing the company". In this regard, I respectfully agree with the statement by Eloff AJ in the unreported case of **Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Limited and Others** in the Western Cape High Court under case number 15155/2011 where it was held that the phrase "reasonable prospect" indicates that "something less is required than that the recovery should be a reasonable probability". I would add that if the facts indicate a reasonable **possibility** of a company being rescued, a court may exercise its discretion in favour of granting an order contemplated in section 131 of the Act. Anneli Loubser[38] expresses the view in her doctoral thesis, that it would be "disastrous for the new procedure" if the same high threshold test used for a judicial management order of "reasonable probability" is to apply to this provision. The philosophy underlining the grant of a business

[37] See Anneli Loubser supra at page 510 paragraph 4.2.
[38] Anneli Loubser supra at page 506.

rescue order contemplates that the court cannot "second guess" the rescue plan which will ultimately be approved by the creditors' meetings. It would seem to me that this conclusion is in line with the intention of the Legislature to prevent the negative impact on economic and social affairs by rescuing companies rather than liquidating companies. I would respectfully agree with Eloff AJ that the intention was to legislate for business rescue as a "preferred" solution to companies in distress.[39] Each case will, however, have to be adjudicated on its own facts.

THE FACTS

[19] The Company is the owner of certain immovable property described as the Remaining Portion 169 of the Farm Bothasfontein No 408, Registration Division JR, Transvaal, measuring 69.1577 hectares, and Portion 176 (a portion of Portion 169) of the Farm Bothasfontein No 408, Registration Division JR, Province of Gauteng, in extent 3.5535 hectares, together with all fixed improvements situated thereupon including, without derogating from the generality of the aforegoing, the following:

1. A 4.3 km Grand Prix motor racing circuit;
2. Two motor racing pit complexes commonly known as the Kyalami New Pits and Old Pits respectively;
3. An exhibition and conference centre of approximately 10000m²;
4. Approximately 32 hospitality suites commonly known as "the Bomas"; and
5. Workshops, skid pans, press rooms, office blocks, grand stands, parking areas and the like.

[39] See Paragraph 21 of **Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd** *supra*.

[20] The Company is also the owner of two adjoining properties described as:

1. Erf 5, Kyalami Hills Extension 2 Township, Registration Division JR, the Province of Gauteng, measuring 2.2801 hectares, held by Certificate of Registered Title No T150083/2002; and
2. Erf 6, Kyalami Hills Extension 2 Township, Registration Division JR, the Province of Gauteng, measuring 1.2734 hectares, held by Certificate of Registered Title No T150083/2002.

[21] The above properties jointly constitute what is commonly known as the "Kyalami racetrack complex", and will hereinafter collectively be referred to as "the immovable property of the Company".

[22] The shareholders of the Company are presently:

1. Nedbank: 30%
2. Imperial: 30%
3. The MJF Trust: 40%

2004

[23] The 30% shareholding of Nedbank was previously held by Imperial Bank Ltd ("Imperial Bank"). Nedbank acquired the business of Imperial Bank and all its assets and liabilities, including Imperial Bank's shares in the Company, with effect from 1 October 2010 in terms of section 54 of the Banks Act, 94 of 1990. In short, Nedbank is the lawful successor in title to the 30% shareholding in the Company formerly owned by Imperial Bank.

[24] Imperial Bank and Imperial each acquired their above mentioned respective 30% shareholding in the Company pursuant to the terms of a Memorandum of Understanding[40] entered into between the MJF Trust, Imperial and Imperial Bank on 29 June 2004. As appears from the Memorandum of Understanding, the MJF Trust had acquired all the shares in the Company from the Automobile Association of South Africa ("the AA") during the period of March to May 2004.

[25] The intention of the MJF Trust was to develop vacant land forming part of the Company's immovable property, to sub-divide portions thereof, and to sell it to end users at a profit.

[26] It was a suspensive condition of this acquisition that the Company had to repay R42 million of its debt owing to the AA. In order to repay the said indebtedness to the AA, the Company had to obtain a loan. During or about March 2004 it applied to and was granted a loan by Nedbank against registration of a mortgage bond over the immovable property.

[27] Nedbank was prepared to advance only R28 million in terms of the above mentioned loan, and was only prepared to proceed with the transaction if the MJF Trust raised the shortfall of R15 million. During June 2004 Mr Michael John Fogg ("Fogg"), one of the trustees at the time of the MJF Trust, persuaded Imperial and Imperial Bank to advance the shortfall of R15 million in terms of the Memorandum of Understanding referred to above.

[28] Immediately after Imperial and Imperial Bank were registered as members, they discovered that on 1 July 2004, Fogg had caused the Company to enter into a seven year lease agreement, back dated to that date (including a renewal period for a further seven years terminating on

[40] See Annexure "N6" pages 233 to 237 of the second respondent's answering affidavit.

3 July 2018) with a company known as Motortainment Kyalami (Pty) Ltd (now in provisional liquidation) ("Motortainment"). The MJF Trust held and still holds all the shares in Motortainment. Fogg did this behind the backs of Imperial and Imperial Bank, and in breach of the provisions of the Memorandum of Understanding. The validity of the disputed lease has been challenged on a number of grounds in the so-called "lease action" instituted under case number 2006/17401, which case has not yet been finalised.

2006

[29] At or around the end of March 2006 Imperial and Imperial Bank discovered that on 18 March 2006 (six days before Imperial and Imperial Bank were registered as members of the Company) Mr and Mrs Fogg purported to resign as trustees of the MJF Trust pursuant to an alleged cession in terms of which the beneficiaries of the MJF Trust, then Mr and Mrs Fogg and their two children, purported to cede their rights in the Company to Educated Risk which is controlled by the Theodosious brothers.

[30] The Theodosious were purportedly appointed as new trustees in the shoes of Mr and Mrs Fogg. This transaction is disputed and forms the subject matter of the so-called "pre-emptive rights application" instituted under case number 2006/14803. This application has also not been finalised.

[31] The Theodosious are also directors, (in March 2011 a third director was apparently appointed) and the controlling minds behind a company known as Kyalami Events and Exhibitions (Pty) Ltd ("Kyalami Events"), which has its principal place of business at Gate House, Kyalami Grand Prix Circuit, corner Allandale and Kyalami Main Road, Kyalami.

[32] The Theodosious are no strangers to litigation. Through their various vehicles (trusts and companies) the Theodosious assembled a substantial portfolio of shopping centres in Roodepoort, Lonehill and Fourways. The Theodosious and their various companies to a large extent received funding from ABSA Bank Ltd ("ABSA") for their developments. During 2007 several of their companies, as well as the Theodosious themselves, signed cross-guarantees and suretyships in favour of ABSA (and/or Universal Guarantee SPV (Pty) Ltd, a subsidiary of ABSA), with regards to the combined indebtedness of those entities to ABSA.

[33] In addition, judgment has been entered against the three Theodosiou brothers jointly and severally for payment of the sums of R937 762 034.14 and R948 071 628.00 to ABSA and/or Universal Guarantee SPV (Pty) Ltd together with interest and costs on the attorney and client scale under North Gauteng High Court case numbers 2010/56808, 2010/56810 and 2010/56809.

2008

[34] During February 2008 the Company sought to re-finance its indebtedness in terms of the 2004 bond to Nedbank. The Company (represented by Dimetrys Theodosiou, with the consent of the board of the company) and Imperial Bank (duly represented by one Wessels) entered into a written loan agreement pursuant to which Imperial Bank agreed to lend and advance to the Company the amount of R31 247 099.00.

[35] It appears that the Company's only source of income was rental received from Motortainment in terms of the disputed lease, which rental was described in the lease application to be equal to the monthly interest payable in terms of the 2004 Nedbank bond. As more fully dealt with

below, the Company has since March 2011 not received any rental, it defaulted in terms of the 2008 bond, and summary judgment in the amount of R31 247 099.00 was granted against it.

[36] The financial statements of the Company reflected that it had disposed of its development rights to Motor Mall Developments (Pty) Ltd at a price of R112 530 000.00, as an interest free loan with no fixed terms of repayment. The auditors recorded a qualification to the effect that they were unable to verify the recoverability of the said amount of R112 530 000.00.

2010

[37] A board meeting of the Company was held on 13 December 2010. A resolution was passed with regards to the setting aside of an alleged cession of the Company's entire revenue stream to the MJF Trust and the purported disposal of the Company's development rights.

[38] Further to the alleged cession of the "revenue stream", the Company resolved that:

> "all revenue streams enjoyed by the MJF Trust or Motortainment (Kyalami) (Pty) Ltd, in terms of whatsoever agreement, resolution, head lease, lease and/or leases are pledged and ceded **to Oakdene Square Properties (Pty) Ltd**." (Emphasis added)

[39] At the time when the termination of the loan became imminent, Dimetrys Theodosiou intimated that the Company should sell the immovable property to pay its debt. Despite the effluxion of the term of the loan, the Company failed to repay the full balance to Nedbank together with interest calculated in terms of the agreement on the date of expiration of the loan period, being 15 April 2011.

[40] In the circumstances, Nedbank, having acquired the said assests and liabilities of Imperial Bank, with effect from 1 October 2010 in terms of the Banks Act, became entitled to repayment of the aforesaid capital amount of R31 247 099.00 together with interest, which the Company failed to pay. The Company was not in a position to make payment of this debt as it received no income.

2011

[41] During late January 2011 the Theodosious and Kyalami Events, represented by attorneys Hirschowitz Flionis, contended for the first time, that Kyalami Events was entitled to occupation of the immovable property under the disputed lease. There had allegedly been a "cession" of the rights in the lease from Motortainment to Kyalami Events as early as September 2008.

[42] As a result, the Company represented by the directors other than the Theodosious brothers, launched the so-called "eviction application" under case number 2011/24545 in order to evict Kyalami Events and Motortainment from the Company's immovable property. This application is still pending.

[43] In the eviction application the Company advanced the case that the purported cession is a sham, recently contrived and invalid and that it could not have been concluded without the consent of the Company, and that no valid consent had been given.

[44] Consequent upon the Company's failure to pay its debt owed to Nedbank, Nedbank issued summons against the Company under case number 23688/2011 on 24 June 2011.[41] Although an "Intention to defend" was filed on behalf of the Company, Nedbank obtained

[41] See Annexure "N26" attached to the Second Respondent's Answering Affidavit.

summary judgment on 16 August 2011.[42] The Company was ordered to make payment of the amount of R31 578 095.11 plus 12% interest as from 1 June 2011 and costs of suit on an attorney and client scale. The three properties owned by the Company were declared specially executable and warrants of execution were granted. Interest at the rate of R320 000.00 per month is currently increasing the debt because the Company is not liquidating any of it. Nedbank was in the process of arranging the attachment of the properties for sale in execution when the present application was launched, thereby placing a moratorium on such action. Nedbank and Imperial have now indicated that they would rather have the Company liquidated and the properties sold in order to pay the Company's debts. Hence a counter-application for the liquidation of the Company was included in their answering affidavits[43].

[45] In the counter-claim for liquidation Nedbank and Imperial contend that the liquidator would be entitled to sell the immovable property either by private treaty or public auction at a fair market value. They further contend that a liquidation will not be detrimental to any employees as the company has no employees. The counter application further complies with all the statutory requirements for purposes of granting a valid liquidation order.

[46] Nedbank and Imperial rely upon the expert opinion of a valuator, Mr Roland Feldman, who is of the view that the joint value of the properties owned by the Company amounts to R129 million. In contrast, the applicants rely on expert valuators alleging the market value of such properties, conservatively stated, is in the region of R300 million. However, the actual or correct valuation of the immovable property need not be determined in these proceedings.

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[42] See Annexure "N29" attached to the Second Respondent's Answering Affidavit.
[43] See paras 152 to 171 at pages 171 to 176

THE BUSINESS RESCUE APPLICATION

[47] Nedbank and Imperial oppose the business rescue application on the simple basis that any rescue proposal put forward by the practitioner will be rejected as, having sixty percent of the vote, they will vote against it.

[48] It further appears from the papers that it is common cause that neither party seeks the rehabilitation and continued existence of the company. The point of dispute is 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 is based on the assumption that a business rescue practitioner will 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. It would appear to me that both sides to the dispute are interested in selling the immovable property at best in order to liquidate the Company's debts and thereafter to distribute the balance amongst the shareholders.

[49] I have come to the conclusion that in this case an order for business rescue is not appropriate. There a number of reasons which have driven me to this conclusion:

1. I have difficulty in understanding why a liquidator will be less successful in realising a proper market value for the immovable property than a business rescue practitioner. Provided a sale of the properties is effected at market related prices, whether by private treaty or at an execution sale, I can see no reason why a liquidator would not be equally successful in obtaining the best price for the immovable

property. Despite the negative connotations surrounding liquidations, they are not *per se* negative since they may, in certain cases, yield a better financial return for creditor.[44] No factual evidence was placed before me by the applicants which justifies a different conclusion.

2. The fact that the applicants have become embroiled in a litany of pending court cases, in my view, militates against the granting of a business rescue order. Any business rescue plan devised by the practitioner will have to take into account the uncertainties of the various pending applications and actions. These uncertainties would necessarily make any plan proposed by the practitioner, subject to a variety of contingencies and outcomes which he/she would not be able to define in advance in precise terms to the creditors, in order for them to make a properly informed decision as to whether they should vote for or against the plan. Nor was any factual evidence placed before me by the applicants which would render a reasonable calculation of the financial implications of the cost and/or the proceeds of the actions and applications, as compared to the financial implications of a business rescue proceeding. The imponderables related to the length of these court proceedings, taking into account possible appeal proceedings, have also been impossible to fathom, let alone calculate in numbers.

3. It is 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. It is common cause that the total indebtedness of the Company towards all of its various creditors amounts to approximately R67 million. The Company's only source of revenue was the

[44] See Richard Bradstreet supra 2011 SALJ 352 at 364.

rental received in respect of the immovable property. This revenue stream has allegedly been pledged and ceded to Oakdene. Since March 2011, the Company has received no rental. In order for this revenue to continue and/or to be properly discounted for purposes of a rescue order, the court case in regard to the disputed lease will either have to be successfully completed or settled or the loss occasioned to the Company in having to forfeit the rentals, will have to be calculated. All of these various options will be neatly obviated if the Company is placed into liquidation.

4. Dimetrys Theodosiou has refused to disclose the Company's lates financial statements save for the disputed statement of 2005. The absence of these statements will be of no moment to a liquidator as his/her duties are to gather the compnay's property and liquidate the same, with or without any financial statements. However, a business rescue practitioner is subject to certain statutory duties which requires him/her to have access to the Company's financial statements in order to complete the statutory investigations.[45] In the absence of such statements, the practitioner will be obliged to enforce the provisions of section 142[46] of the Act against any defaulting director who refuses to deliver up all books of account and other records, which may further extend the rescue proceeding and/or increase the costs.

5. The developmental rights registered over the immovable property have allegedly been disposed of at a price of approximately R112 million. In these circumstances, it is important to bear in mind that the authority which a liquidator has *by law* to sell the Company's immovable property without a lease, is not available to a business rescue practitioner. If,

[45] See section 141(1) of the Act.
[46] See in particular the minimum statutory duties of directors in terms of section 142(3).

indeed, the developmental rights have been disposed of and there is a valid lease of the properties (as is alleged in this case), I am of the view that a business rescue practitioner will be far less effective than a liquidator to unravel this complicated and intertwined conundrum.

6. 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 are open-ended, and could probably include further applications to court and carry on for a considerable period of time.[47] This would be even more so if there are parties involved who are seeking to obstruct the creditors of the relevant Company as the applicants have been accused of doing. These conditions will make the task of a business practitioner who has to seek the cooperation[48] of the directors, management and creditors extremely difficult.

7. In my view, the interests of the creditors as opposed to that of the Company, should carry more weight in the circumstances of this case. There is no "business" of the Company to be rescued. The benefit of placing the business of the Company on its feet again does not arise in this case. The applicants' counsel, however, relied on the provision in the definition of "business rescue" to the effect that,[49]

> "… 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".

[47] The time frame of 3 months stipulated in section 132(3) is totally unrealistic in a case such as this where there are numerous court proceedings still pending. See Anneli Loubser supra 2010 TSAR at page 698 paragraph 8.1. Furthermore, it is "open-ended" in the sense that the 3 months period can always be extended by court application (see section 132(3)) which will further increase the costs occasioned by ordering a business rescue as opposed to a liquidation.
[48] See section 142 of the Act.
[49] See section 128(1)(b)(iii).

It is correct that this is a "secondary" goal of business rescue.[50] It has been held in Australia in **Dallinger v Halcha Holdings**[51] that such statutory rescue machinery should also be available:

> "where, although it is not possible for a company to continue in existence, an administration is likely to result in a better return for creditors".

The application of this provision to the facts of the present case begs the question, "well, will business rescue render a better return for the creditors?" Nedbank and Imperial are of the view that it would not do so. No facts were placed before me by the applicants in support of the contrary view. I have to decide this dispute on the allegations made by the respondents.[52] Applying this rule, the applicants failed to show that business rescue will yield a better return for the Company's creditors.

8. Liquidation would be more appropriate in a case of a deadlock, as is the position in the present case. The Company is a private company. Where deadlocks occur in private or domestic companies, liquidation has often been regarded as the most appropriate remedy to unravel the deadlock in existence between the directors and/or the shareholders.[53] If a business rescue order were to be granted in this case, it is highly likely that it will be terminated and converted to liquidation proceedings in terms of section 132(2)(a)(ii) as a

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[50] The comparable provisions in the UK also recognize this ground as a "secondary goal" when applying for an administration order. See UK Insolvency Act, schedule B1 paragraph 3; Phillip Wood, "Principles of International Insolvency" (2007) at page 2002 note 1.
[51] (1996) 14 ACLC 263 at 268.
[52] See paragraph [2] above.
[53] See **Apco Africa (Pty) Ltd and Another v Apco Worldwide Inc** 2008 (5) SA 615 (SCA) paras [29] and [30] at pages 628 and 629; See further Richard Bradstreet supra 2011 SALJ at 357 paragraph ©.

result of the deadlock and unwillingness of the antagonists to cooperate.

9. The advantage of a business rescue practitioner mediating, cannot apply to this case because of all the disputes. Counsel for Nedbank has listed them in paragraph 47.14 of his heads of argument and it may be fruitfully repeated herein:

> "47.14.1 The First Applicant's alleged status as creditor of the Company and the alleged loan accounts upon which its contentions are based;
> 47.14.2 The Second Applicant's alleged status as shareholder in the Company;
> 47.14.3 The MJF Trust's alleged status as shareholder in the Company;
> 47.14.4 The validity of the appointment of the Third and Fourth Applicants as trustees of the MJF Trust;
> 47.14.5 The disputed lease forming the subject matter of the lease action;
> 47.14.6 The disputed cession (of the disputed lease) forming the subject matter of the eviction application;
> 47.14.7 The unlawful occupation of the immovable property by Kyalami Events, forming the subject matter of the eviction application;
> 47.14.8 The purported disposal of the development rights over the immovable property at a price of R112.25 million, which has not been paid;
> 47.14.9 The alleged cession of the 'income stream' of the Company;
> 47.14.10 The collection of rentals generated by the immovable property by parties other than the Company;
> 47.14.11 The disputed financial statements of the Company;"

10. There is no provision for the taxation of the fees, costs and expenses of a business rescue practitioner, whereas a liquidator's costs are subject to taxation. There is, therefore, independent control over the costs of a liquidation whereas there is currently none in the case of a business rescue procedure. This aspect may be for the Legislature to consider when further amendments to the Act are proposed.

11. Sections 26 – 31 of the Insolvency Act 24 of 1936 are available to a liquidator to impeach certain dispositions which are not available to a business rescue practitioner. The power of a business practitioner to suspend "any obligation of the

company that arises under an agreement"[54] is highly contentious. It may lead to "cherry picking" where the practitioner selects certain obligation best suited to the Company for suspension.[55] The possibility that the exercise of these powers in the present case would lead to further litigation is not without substance considering the current state of all the pending court proceedings.

12. Finally, since a director of a company could be held personally liable for voting in favour of business rescue if it later appears to have been unfounded, creditors who are also directors of the present Company will be loath to vote for business rescue. So apart from the majority vote referred to above, the directors of the Company other than the Theodosious will likely block any reolution for business rescue.

[50] I have come to the conclusion for all the reasons set out above that the application can not succeed. The order I make will appear at the end of this judgment and is crafted to suit the particular circumstances of this case.

Case Number: 24545/2011

[51] The applicant in this application for eviction is the Company, i.e. the first respondent in the business rescue application. 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 has no longer any standing to proceed with the application. It is for the liquidator to decide whether or not this application should proceed or not.

[54] See section 136(2)(a) of the Act.
[55] See Anneli Loubser 2010 TSAR at 690 and 691.

[52] In accordance with item 9 of Schedule 5 of the Act, certain transitional arrangements apply to the liquidation of companies. Item 9(1) states as follows:

> "(1) Despite the repeal of the previous Act, until the date determined in terms of sub-item (4), Chapter 14 of that Act continues to apply with respect to the winding-up and liquidation of companies under this Act, as if that Act had not been repealed subject to sub-items (2) and (3)."

[53] In terms of section 359 of the Companies Act 61 of 1973, all civil proceedings by the company shall be suspended until the appointment of a liquidator. Upon the appointment of a liquidator, a decision will then have to be made subject to the approval of the creditors, whether or not the action for eviction is to proceed or not.

[54] The order I make is as follows:

Case no 2011/35199:

1. The application is dismissed with costs which are to include the costs of two counsel where applicable.
2. The Company is placed into final liquidation.
3. The costs of the counter-application will be costs in the liquidated estate which are to include the costs of two counsel where applicable.
4. The provisional liquidator or final liquidator is ordered to sell the Company's immovable property for not less than R129 000 000-00 in the open market.

5. If after a period of 6 months a sale for the price referred to in 4 above cannot be concluded, the liquidator is authorised to sell the Company's immovable property at best.

Case no 24545/2011;

6. This application is suspended in terms of the provisions of section 359 of the Companies Act 61 of 1973 for determination as to its future conduct by the liquidator appointed in case no 35199/2011.
7. Costs will be determined by any future court alternatively by the liquidator after submission and consideration of any such claims for costs pursuant to the provisions of section 359 of Act 61 of 1973.

DATED AND HANDED DOWN ON THE 17th DAY OF FEBRUARY 2012 AT JOHANNESBURG.

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C. J. CLAASSEN
JUDGE OF THE HIGH COURT

In the matter of 2011/35199 (Oakdene Square v Farm Bothasfontein):

Counsel for the Applicants:	Adv R. D. Levin SC and Adv M. Nowitz
Counsel for the Second Respondent:	Adv J. J. Brett SC and Adv E. Kromhout
Counsel for the Third Respondent:	Adv A. Subel SC and Adv A. C. Botha

Attorney for the Applicants: Schindler Attorneys
Attorney for the First Respondent: Tugendhaft Wapnick Banchetti and Partners
Attorney for the Second Respondent: Lowndes Dlamini Attorneys
Attorney for the Third Respondent: Tugendhaft Wapnick Banchetti and Partners

In the matter of 2011/24545 (Farm Bothasfontein v Kyalami Events):

Counsel for the Applicant: Adv A. Subel SC and Adv A. C. Botha
Counsel for the Third Respondent: Adv R. D. Levin SC and Adv M. Nowitz

Attorney for the Applicant: Tugendhaft Wapnick Banchetti and Partners
Attorney for the First Respondent: Schindlers Attorneys
Attorney for the Second Respondent: Allan Levin & Associates Attorneys

Argument in the matters was heard on 1 December 2011