IN THE HIGH COURT OF SOUTH AFRICA **Not Reportable**

[EASTERN CAPE LOCAL DIVISION, MTHATHA]

CASE NO: 1958/2015

Heard on: 06/08/2015

Delivered on: 17/09/2015

In the matter between:

INDUSTRIAL DEVELOPMENT CORPORATION OF SA LIMITED **First Applicant**

THE DEVELOPMENT BANK OF SOUTHERN AFRICA LIMITED **Second Applicant**

And

CAROL-ANN SCHROEDER N.O. **First Respondent**

THAMSANQA EUGENE MSHENGU N.O. **Second Respondent**

PATRICK DUMISANI BUWA N.O. **Third Respondent**

MASTER OF THE HIGH COURT MTHATHA **Fourth Respondent**

COMPANIES AND INTELLECTUAL PROPERTY COMMISSION **Fifth Respondent**

KWANE CAPITAL (PTY) LIMITED **Sixth Respondent**

LAMAN (PTY) LTD (In provisional liquidation) **Seventh Respondent**

NATIONAL UNION OF MINEWORKERS **Affected Person**

RISK TRANS INSURANCE BROKERS (PTY) LTD **Affected Person**

JUDGMENT

NHLANGULELA ADJP:

[1] These proceedings concern an application for business rescue in terms of s 131, Chapter 6 of the Companies Act 71 of 2008 (the Act).

[2] As described in the papers, the first applicant is a wholly owned state corporation which is established in terms of s 2 of the Industrial Development Corporation Act 22 of 1940. The second applicant is also a wholly owned state corporation, but which is established in terms of s 2 of the Development Bank of Southern Africa Act 13 of 1997. Both these entities have headquarters in the Province of Gauteng. For the purposes of convenience the applicants will hereinafter be referred to as the IDC and DBSA respectively.

[3] A company described as Laman Proprietary Limited is currently placed under provisional liquidation by virtue of an order of this court issued on 08 August 2014 under Case No. 2107/14 at the instance of IDC and DBSA. This company is cited in this matter as the seventh respondent. It will hereinafter be referred to as Laman for the purposes of convenience.

[4] More must be said about the business object of Laman. It is a private company registered and incorporated in accordance with the company laws of the Republic of South Africa. It carries on business of mining and quarrying at Gungululu Location, being a village situated at approximately 12 kilometres from the central business district of Mthatha.

[5] The first, second and third respondents were appointed by the Court on the request of the Master, the fourth respondent, to act jointly as the Liquidators of Laman. In this application, these respondents have been cited as parties due to the fact that they have direct and substantial interest in the relief sought by the IDC and DBSA against Laman.

[6] Laman, the Companies and Intellectual Property Commission, Kwane Capital (Pty) Ltd, the National Union of Mineworkers and Risk Trans Insurance Brokers (Pty) Ltd are the affected persons who must be served with the application papers as envisaged in s 128 (1) (a) and s 131 (2) of the Act. Save Laman, these have been cited as the fifth, sixth respondents and the Affected Persons respectively.

[7] All the respondents, save the fourth, fifth and seventh respondents, and the Affected Persons oppose the relief sought by IDC and DBSA.

[8] I interpose here to state that a number of members of the community in which Laman is situated have filed affidavits, some supporting and others opposing the relief sought. It would appear that the members of the community were prompted to file their affidavits by virtue on clause 3 of the order granted on 14 July 2015, which reads:

> "All opposing and affected parties are directed to file their opposing and/or supporting papers, if any, by 14h00 on Thursday the 16th July 2015."

[9] It is common cause that the members of the community did not intervene in the matter as is envisaged in Rule 7 of the rules of this Court. Further, they are not the affected persons within the meaning of s 128 (1)(a) and s 131 (2) of the Act and thus, by extension, do not have a direct and substantial interest in the relief sought by the applicants. Remote though the interest of the members of community is in the matter the Court cannot help it but note that the existence of Laman business has a significant impact in the community of Gungululu, and thus in the Eastern Cape Province.

[10] I further digress to reflect, as I think that it is necessary to do so, on the preliminary steps taken up to the day of the argument of the application on 06 August 2015. Following upon the issuance of the practice directive by me that the applicants may bring the application for business rescue on 14 July 2015 on service of the papers upon the first to sixth respondents, then cited on the certificate of urgency, the matter indeed served before me in the urgent court. However, the fourth and fifth respondents did not appear before court, it having been within their rights to oppose the relief sought or to abide the decision of the Court. It transpired later on that they abide the decision of this Court. The matter was postponed for hearing on 23 July 2015, it having been conceded by all the parties that there was a need for the full sets of affidavits to be filed so

that the matter may be adjudicated for hearing in *one-vel-soup.* Other reasons weighed upon the Court's decision to postpone the matter: the facts that Laman had not been joined, the trade union members sitting in the gallery and brandishing some placards exhibited a desire to put their story before the court, the mention by the Liquidators that certain creditors who were not served with the papers might wish to join in the proceedings, that the respondents before Court expressed a desire to supplement their opposing affidavits and that there was a need for the parties to file heads of argument. In a nutshell all the things as aforementioned necessarily had to be done for the matter to be adjudicated on the basis of urgency, and about which I was persuaded did exist to warrant abridgment of the ordinary rules applicable to hearing of applications in the High Court. It was more, or less, on the same considerations that on 23 July 2015 the matter was again postponed to 04 August 2015, and finally to 06 August 2015.

[11] The business rescue application was brought against the backdrop of pending multifarious interlocutory applications arising from the liquidation proceedings, the judgment on which was reserved on 18 June 2015. In substance, IDC and DBSA seek a relief placing Laman under supervision and commencing business rescue proceedings in terms of s 131 (4)(a) of the Act;

discharging the provisional winding-up order granted on 08 August 2014, alternatively, suspending the liquidation proceedings and all related proceedings under Case No. 2107/14 *sine die*. The applicants seek a further relief that one Mr Sipho Sono of OPJS Advisory, Gauteng be appointed as a business rescue practitioner as envisaged in sections 131 (5) and 138 of the Act.

[12] It is common cause that the applicants are qualified, as they are the affected persons in terms of subsection 128 (1)(a) to bring the present application. But that the applicants have satisfied the requirements as set out in subsections 131 (2) and (4) is in dispute. The subsections read as follows:

> "(2) An applicant in terms of subsection (1) must –
>
> (a) serve a copy of the application on the company and the Commission; and
>
> (b) notify each affected person of the application in the prescribed manner.
>
> …
>
> (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; or

(b) dismissing the application, together with any further necessary and appropriate order, including an order placing the company under liquidation."

[13] In my view, nothing much turns on the issue of notice the applicants had to give to the affected persons that the application will be brought. The thrust of the respondents' objection, as raised by *Mr Rall*, counsel for the Liquidators, in

argument is that on the authority of *Taboo Trading 232 (Pty) Ltd v Pro Wreck Scrap Metal CC And Others* 2013 (6) SA 141 (KZN) at 147, paragraph 11.4 the liquidation proceedings already commenced against the company are not suspended by the application for business rescue as envisaged in s 131 (6) of the Act unless the application has been lodged with the registrar, duly issued and a copy thereof served on the Commission and each affected person properly notified of the application. In essence the contention advanced on behalf of the respondents is that the applicants' application is not properly before the Court because of absence of proof that the Sheriff served the application on the Commission, as adumbrated in *Engen Petroleum Ltd v Multi Waste (Pty) Ltd And Others* 2012 (5) SA 596 (GSJ), and that all the known creditors of Laman were notified of the application as envisaged in s 131 (2)(b) read with s 6 (10) of the Act, and Regulations 7 and 124 read with Table CR 3. The upshot of *Mr Rall's* submissions, based on the legal instruments as aforementioned, is that notification by means of electronic transmission or electronic mail showing, *inter alia*, the names of the creditor or description of the intended recipients did not take place, I have said that nothing much turns on the issue of delivery of the application because it soon turned out that the return of service on the Commission and documentary proof of notification to a long list of creditors had been filed of record on behalf of the applicants. The objection with regard to

service to the Commission and notification to the affected persons is, therefore, dismissed.

[14] Without detracting from the decision already made on the notification argument I may state that electronic mail notification would have been addressed to those creditors, pre and post liquidation, which were identified by both parties as is provided in clause 2 of the order dated 23 July 2015 that the Liquidators, in so far as they were concerned with the business affairs of Laman since the order of provisional liquidation on 08 August 2014, must provide the applicants with a full list of creditors of Laman. The Court was not told at any stage that the applicants sent notices of the application to only those creditors known to them. And I have to rely on the *bona fides* of the Liquidators that they did provide the applicants with names of all the creditors, including Risk Trans who chose to oppose the application for business rescue.

[15] I proceed to deal with the jurisdictional factors that are set out in s 131 (4) of the Act, and which must be proved to exist for the application to succeed. And recounting the salient background facts to the matter is necessary. I do so in the paragraphs that follow.

[16] On 03 November 2009 DBSA concluded a written senior loan agreement with Laman in the sum of R133 501 715,10. On 26 March 2012 IDC concluded a written loan agreement with Laman in the sum of R97 890 270,25. As security for the repayment of the loans, on 23 April 2013 DBSA, IDC and Laman concluded an inter-creditor sharing agreement, thus regulating the relationship of the lenders under the loans as well as the obligations of Laman towards the applicants in repaying the loans. As further security, Laman caused its business assets to be notarially bonded in favour of the lenders. In accordance with the loan instruments monies loaned were advanced to Laman, which Laman used to set up the business and commence trading. In breach of the agreed terms for repayment of loans, and Laman having been placed in *mora*, on 13 March 2014, the lenders obtained a final court order perfecting the bond, which allowed the lenders to take possession of the movable assets of Laman with immediate effect. It is not in dispute that as at 08 August 2014, when Laman was placed in provisional liquidation, Laman's indebtedness to the Applicants stood at ± R200 million. And with further interest and other expenses the debt has escalated to ± R250 million. Laman has not been able to repay the debt, making it financially distressed within the meaning of s 131 (4)(a) of the Act.

[17] Up until the middle of July 2014 Laman's business was operating at approximately 30% of its capacity, the situation which led to the provisional liquidation at the instance of IDC and DBSA on 08 August 2014. The application for a final order of liquidation is as yet to be made, the *rule nisi* having been extended from time to time until 15 October 2015. There have been a number of intervening interlocutory applications that started with an application by the Liquidators to extend their powers in order to trade (Case No. 2666/14); the application by the Liquidators to sell the assets of Laman (Case No. 555/15); application by Mlonzi Family Trust (the Trust) to intervene and interdict the disposal of Laman's assets; and the applications by Kwane to intervene, remove the Liquidators, set aside the provisional liquidation and re-instate a provisional liquidation at its instance. None of the substantive issues arising from the main and interlocutory applications have been decided due to the fact that IDC and DBSA have now brought the application for business rescue.

[18] The factual disputes around the question whether the relief sought should be granted range from the periphery to the centre. I do not deem it necessary to delve much into the peripheral disputes, which concern the blame game arising from unpreparedness by any of the parties/stakeholders involved in the business

of Laman to shoulder responsibility for the poor performance of Laman. The blame game would have been heightened by the information received by the applicants on 02 July 2015 that the Liquidators harboured an intention to stop the business of Laman by reason that the actions of Mr Mlonzi, through the Trust and Kwane, in opposing all the efforts made towards keeping the business as a going concern to achieve maximum dividends for the creditors undermined the preservation of value of Laman's estate; and that the applicants were reluctant to give further financial assistance for fear of dissipation of the funds by Mr Mlonzi whilst the Liquidators and other stakeholders remain watching. Trust would breakdown in such circumstances, hence the mudslinging and exchange of hard words between the parties such as: "abuse of power", "hell bent", "extorting", and "own agenda". The ruling that I made that such words be expunged from the record were not helpful for the determination of the issues for the application of business rescue was appropriate. The opportunity that later availed the respondents to respond to the applicants' replying affidavit in which the inflammatory words as aforementioned originated brought a sense of relief for the parties. On the consideration of such words against the *Plascon Evans Paints* rule the Court was put in a position where it had to assess the papers on the basis that the Liquidators have not abused their power to imperil the business of Laman. But the suspicion remains whilst the Liquidators and Mr

Mlonzi, together with his business entities, continue to seek individual and collective exoneration from the poor performance of Laman.

[19] The Court is required to be satisfied that the applicants have proved the existence of any one of the requirements in subsections 131 (4)(a)(i), or (ii) or (iii). See: *AG Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd and Others (Marley Pipe Systems (Pty) Ltd and Another Intervening)* 2012 (5) SA 515 (GSJ) at 521. And critical to the consideration of these requirements, individually or collectively, is the exercise of the court's discretion based on value judgment. See: *Oakdene Square Properties (Pty) Ltd And Others v Farm Bothasfontein (Kyalami) (Pty) Ltd And Others* 2013 (4) SA 539 (SCA) at 549.

[20] In this case the applicants rely on subsections 131 (4)(a)(i) and (iii), contending that based on these requirements which they say are proved by evidence there is a reasonable prospect for rescuing Laman as envisaged in s 128 (1)(b)(iii), which reads:

> "**business rescue"** means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for –

(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."

[21] The applicants' case as encapsulated on affidavit is that when Laman experienced financial difficulties during 2013/2014 the shareholders and creditors of Laman always harboured the intention to effect a turnaround in the business of Laman or to find a prospective buyer for its business so as to achieve maximum value in the Laman's estate for the benefit of all the affected persons, including its creditors. IDC and DBSA who are the majority creditors with secured debts together with smaller creditors who are unsecured would not receive any dividend if the value of Laman's estate is not maximised. It was then thought that it would be proper that, after the provisional liquidation order, instead of closing down the business the applicants would use their concerted efforts to assist Laman in making a financial recovery, alternatively, to assist in the sale of its business as a going concern at the best possible price in the best

interest of its entire body of creditors and save the jobs for the employees. To achieve those goals IDC and DBSA provided funding in the sum of R6.7 million to enable Laman and the Liquidators to preserve the existing assets, assist with the continuation of trading activities and to preserve the employment of the employees. Further, the applicants supported a proposal by the Liquidators to test the market in order to determine whether there would be any interest in the sale of Laman's business. Indeed in February 2015 the market gave a price of approximately R70 million. However, the attempt by the Liquidators to obtain powers through the court to sell the business was opposed by Mr Mlonzi's Trust and Kwane. In the meantime the funds provided by IDC and DBSA were depleted, the employer-employees relations declined and, consequently, the business performance declined. The business of Laman deteriorated to the point of a threat issued by the Liquidators to stop trading unless IDC and DBSA injected further funds into the business, the request which the applicants could not accept due to risks attendant thereto. The applicants see merit in providing funds after the commencement of business rescue regime if the Court allows it. In that event the management of Laman, as the applicants' assert, would be placed under the business rescue practitioner, not Mr Mlonzi who is a suspect in the mismanagement of Laman business and responsible, through the Trust and Kwane, for blocking efforts to continue Laman business as a going concern. The mining licence will be saved from

lapsing. The employment of the employees will be continued under business rescue, rather than terminate. The applicants allege that there is a strong business case for Laman's business operations being rescuscitated in that its products are on great demand, orders for its products are prepaid and the recent post liquidation income statements prepared by the Liquidators as at May and June 2015 reflect a total income of R639 719,00 against expenses of R1,2 million. IDC makes an undertaking that it is willing to advance funds to Laman to cover losses incurred by it and enable Laman to continue trading activities, increase its production capacity and thus preserve the value in the best interest of all creditors. The applicants state further that Mr Sono is a suitable manager who is possessed of skills and experience to serve as a business rescue practitioner. Mr Sono is expected to draw a business rescue plan in the event that the relief sought is granted. They request that Laman be placed under business rescue to turn around Laman business to solvency or maximise the prospects for a far better return for creditors, shareholders and other affected persons than would be achieved in a liquidation scenario.

[22] The Liquidators oppose the application for business rescue on various grounds. They contend that unless the applicants provide more funds at this stage for Laman business to continue the route to final liquidation, rather than

the commencement of business rescue process, must be pursued. They go on to say that as a further pre-condition for their acceptance of business rescue, the costs incurred by them since the commencement of liquidation must be paid by the applicants by way of issuing a guarantee that the business rescue regime will not convert their status prevailing under liquidation as the preferent creditors of Laman. In the eyes of the Liquidators obtaining final liquidation on the return day of the provisional winding up order is free from obstructions as they are confident of success in the application to sell the assets of Laman. The Liquidators contend further that the cost of operations of Laman business until final liquidation would be ameliorated by leasing the business at R200 000,00 per month. They state that the introduction of business rescue is the intervention strategy introduced by the applicants with intention to delay final liquidation that will guarantee equitable dividends to the creditors, payment of liquidators' fees, payment of employee salaries and guarantee continued employment of the employees under a new buyer. For these reasons they see the applicants as having designed the business rescue strategy in order to subvert the process of liquidation to the detriment of the stakeholders.

[23] Further, the Liquidators assert that business rescue process does not have a reasonable prospect for rescuing the Laman business because the applicants'

promise to inject finances post commencement of business rescue is not supported by a proposal based on a fixed amount of money, Laman does not have enough plant and equipment to fully exploit its mining rights, Laman's static crusher has not been commissioned and is not operational, and the canopy's road infrastructure is in a poor state of repair. Arrears for rentals due for the leasing of the mobile crusher in the amount of approximately R500 000,00 has not been paid by Laman. The supplier of the mobile crusher requires a sum of R15 million to commission it. Yet the proposed introduction of working capital does not disclose whether or not it will include the cost of commissioning the crusher.

[24] Kwane is a smaller and unsecured creditor of Laman who opposes the relief sought on the basis that in the absence of an undertaking for payment of R7 million fee due to De Loitte & Touche, the auditors, and the facts showing that Laman can afford to inject R55 million required to turn the business around as assessed for the period up to 2013, the application for business rescue cannot succeed. Kwane is the only party which opposes the appointment of Mr Sono to serve as the business rescue practitioner saying that Mr Sono is just too busy to have time to manage Laman business. There is paucity of evidence supporting these assertions.

[25] Mr Mlonzi, also the managing director of Laman, denies the allegations made against him that the insolvency of Laman is attributably to mismanagement on his part. He alleges that the audit report given by De Loitte & Touche in 2013 exonerated him from such accusations.

[26] Risk Trans opposes the relief sought on the basis that since it is the secured creditor of Laman, and protected under the liquidation regime as the preferent creditor, the business rescue process converts its status to that of a con-current creditor. It maintains that in the absence of a guarantee for payment of fees incurred by it in securing the assets of Laman, the liquidation process must be preferred.

[27] The NUM's opposition is premised on the allegation that the provisions of s 197 (A) read with s 197 of the Labour Relations Act 66 of 1995, not business rescue, will offer protection of the jobs for the employees of Laman after its business has been acquired by the new owner once the winding-up process is finalized. However, some of the members of NUM give support to the applicants. The non-unionised employees of Laman also support the relief sought.

[28] All the respondents opposed to business rescue are also opposing the discharge of the order of provisional winding-up of Laman as sought by the applicants in terms of s 131 (7) read with s 135 (4) of the Act. They rely on the case of *Van Staden v Angel Zone Products CC (*In liquidation) *And Others* 2013 (4) SA 630 (GNP) where the following appears at 635G:

> "[30] I share the view expressed in *Henochsberg on the Companies Act 71 of 2008* vol 1 at 471, wherein it is suggested that it appear for more likely that the provisions of s 131 (7) read with s 135 (4) contemplate the conversion of a liquidation into rescue proceedings no matter how far the liquidation and winding-up proceedings might have progressed."

[29] The co-respondents join issue with the Liquidators in saying that the applicants do not have a plan to rescue Laman business and that, thus, it has not proved the existence of a reasonable prospect for rescuing Laman.

[30] The evidence as set out in the affidavits filed by all the parties in this matter is to a large extent common cause. The ambivalence shown by the NUM members does not take the case of NUM any further. All we now know is that the employees, unionised or not, are concerned about the security of their

employment irrespective of the outcome of this application. I say this because the majority of the 229 employees of Laman have already been retrenched by reason of operational requirements. An outcome which is less than substantial economic recovery of Laman will not provide security for the workers. Simplistic as though my views on the matter may be interpreted, the bottom-line remains only that continued trading in Laman will offer ample security for job creation.

[31] In my view, to the extent that the application before the Court is one of business rescue, the question to be answered is whether the applicants have met test in s 131 (4) read with s 128 (1)(b)(iii) and, as correctly submitted by *Ms Dippenaar* on behalf of the applicants, as further read with the provisions of s 7 (k) of the Act. The provisions of s 7 (k) read as follows:

> "The purposes of this Act are to –
>
> **...**
>
> (k) provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders.
>
> **...**"

[32] On the issue of the purpose of business rescue in general one cannot ignore the statement made by the Supreme Court of Appeal in *Dawid Jacques Richter v Absa Bank Limited* (Case No. 20181/2014) [2015] ZASCA 100 (01 June 2015) issued on 01 June 2015 in the following terms, at [13]:

> "A review of the background to the introduction of the business rescue process into our law gives an insight as to the intention of the legislature in introducing the procedure. Our business rescue regime is adapted from similar concepts in other jurisdictions such as the United States and great Britain. In South Africa it was introduced against the background of general acceptance that the judicial management process provided for under chapter XV of the 1973 Act was failing the local economy because only few, if any, judicial management orders resulted in the saving of companies experiencing financial difficulties. Its purpose is stated as: 'to provide for efficient rescue and recovery of financially distressed companies in a manner that balances the rights and interests of all relevant stakeholders.' It is meant to be a flexible, effective process of extending the lifespan of companies and businesses. A necessary consequence thereof is limitation, to some extent, on the power of creditors to singlehandedly curtail the life of a company. But this is subject to compliance with the procedural and substantive requirements set out as in s 129 of the Act. (per Dambuza

> AJA with Mhlantla, Leach, Pillay JJA and Fourie AJA concurring) (the underlining is mine for emphasis)"

[33] Laman is undeniably in financial distress, and it has even closed down its business on 31 July 2015 on the initiative of the Liquidators because, according to them, applicants have refused to inject funds for the business to be continued. But it would seem that the applicants' refusal to provide additional funds was due to risk of financial exposure caused by protracted litigation and mismanagement of the business. It is common cause that the nature of business of Laman makes it a potentially viable business project. It was argued strenuously on behalf of the respondents that rescuing Laman business is an empty promise, leaving it with no possibility of return to solvency, reliance being made on the statement of Tsoka J in *Anthonie Welman v Marcelle Props 193 CC and Investec Bank Ltd,* Case No. 33958/2011 (GSJ) at page 12 paragraph 28 where the learned Judge said:

> "In my view, business rescue proceedings are not for the terminally ill close corporations. Nor are they for the chronically ill. They are for ailing corporations, which, given time, will be rescued and become solvent."

[34] I do not think that it is fair to be said that Laman business will never recover given that the reason for closure of the business is the absence of capital funding that, if injected, will ensure availability of equipment to enable Laman to exploit its mining opportunities fully. For instance, the crusher will be commissioned to re-activate the production of stone and the products associated therewith. The introduction of a new and different management office that is sufficiently credible could, in my view, alter the management circumstances. With funding at ± R6.7 million injected previously, the business of Laman was able to sustain its business until the Liquidators took a unilateral decision to stop trading on 31 July 2015. A persuasive account for this step is lacking. It seems to me that had favourably circumstances prevailed for more funds to be provided to a credible manager Laman would, at the very least, still be operating its business regardless of the operational capacity at 30%.

[35] It was submitted on behalf of the respondents that Laman has no reasonable prospect of either recovering its business and return to solvency or to provide a better dividend to creditors and shareholders than what they would receive through liquidation. In *Oakdene, supra*, Brand JA stated as follows at 551 - 552:

> "[29] This leads me to the next debate which revolved around the meaning of a 'reasonable prospect'. As a starting point, it is generally accepted that it is a lesser requirement than the 'reasonable probability' which was the yardstick for placing a company under judicial management in terms of s 427 (1) of the *1973 Companies Act* (see eg *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd* 2012 (2) SA 423 (WCC) para 21). On the other hand, I believe it requires more than a mere prima facie case or an arguable possibility. Of even greater significance, I think, is that it must be a reasonable prospect –with the emphasis on 'reasonable' – which means that it must be a prospect based on reasonable grounds. A mere speculative suggestion is not enough, Moreover, because it is the applicant who seeks to satisfy the court of the prospect, it must establish these reasonable grounds in accordance with the rules of motion proceedings which, generally speaking, require that it must do so in its founding papers.

[36] The learned Judge of appeal stated further in the case of *Oakdene, supra* that, adopting the relevant statements in *Prospec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd and Another* 2013 (1) SA 542 (FB) at paras. [11] and [15], there is no need for the courts to set the bar too high in the requirement that

the applicant for business rescue must place before court factual foundation for the existence of a reasonable prospect that the desired object can be achieved. But of greater significance is that the facts stated on affidavit must disclose a prospect based on reasonable grounds. Allied to this point is the argument advanced on behalf the respondents that in so far as the applicants have not given a fixed amount of money that they intend to inject in Laman a plan for the anticipated business rescue process was not made available, the founding affidavit is vague and the business rescue is a speculative and costly exercise which disregards the costs of liquidation already incurred. The arguments advanced overlook the statement in *Oakdene* at 553 that the applicant is not required to set out a detailed plan, which can be left to the business rescue practitioner after proper investigation in terms of s 141 of the Act.

[37] The grounds for the reasonable prospect of achieving the goals in s 128 (1)(b)(iii), a return of Laman to solvency or to provide a better deal for creditors and shareholders than what they would receive through liquidation, have been disclosed in the founding affidavit. The applicants are the majority creditors whose role in the business rescue sought cannot be underestimated. The ± R70 million that the Liquidators hope to recover from the sale of the assets of Laman (and already perfected under the bond in favour of the applicants) cannot

provide a better deal for all the existing creditors and shareholders in where the applicants alone are owed ± R250 million. That situation is exercebated by the closure of the business on 31 July 2015. The applicants are not ordinary commercial creditors but they hold dear to their hearts socio-economic responsibilities towards all the stakeholders. To them, as the champions of development in the Eastern Cape Region, the rescuscitation of Laman business is a matter of priority. The applicants, having provided funds to Laman previously would be expected to know, duly assisted by the practitioner, what problems to look for and resolve in Laman so that the next funding they provide is put to good use. As the development institutions possessed of appropriate mandate and resources for developing projects such as that of Laman it would be unreasonable to doubt their institutional capacities. It is more probable, than not, that the size of funding as assessed by the practitioner will be met at an appropriate time. The potential of Laman as a successful business operation under a sound management will always be matched by the proven demand for its products. These factors are neither vague nor speculative, only if some time may be given for Laman to be subjected to proper supervision.

[38] On the aforegoing, I am of the view that there is a reasonable prospect for rescuing the Laman business and that, taking the interest of all the stakeholders

into account, it is just and equitable to grant an order placing the Laman under supervision and commencing business rescue proceedings.

[39] The opposition to Mr Sono being appointed as the business rescue practitioner has no *merit*. That relief sought by the applicants falls to be granted.

[40] I do not think that the issue of the liquidation fees for the Liquidators and Risk Trans should be the reason for refusing the relief sought. In terms of s 132 (1)(c) of the Act business rescue proceedings begin as soon as a court makes an order placing a company under supervision during the course of liquidation. The liquidation proceedings would have already been suspended in terms of s 131 (6) at the time when the application for business rescue was lodged and served upon the affected persons. The same liquidation proceedings may be converted by the court under appropriate circumstances in terms of s 131 (7) at any time during the course of liquidation proceedings to business rescue proceedings on application having been made. As to what is the meaning of the term "liquidation proceedings" the Supreme Court of Appeal in the case of *Dawid Jacques Richter, supra,* said the following at page 6 para. [9]:

"Generally, in law and in business, liquidation is the exhaustive process by which a company is brought to an end, and the assets thereof, if any, are redistributed. The authors of *Cilliers and Benade;* Corporate Law describe liquidation as follows:

> '(27.01' … The process of dealing with or administering a company's affairs prior to its dissolution by ascertaining and realising its assets and applying them firstly in the payment of creditors of the company according to their order of preference and then by distributing the residue (if any) among the shareholders of the company in accordance with their rights, is known as the winding-up or liquidation of the company.'"

And at para. [12] it said:

"Consequently, the conversion of liquidation to business rescue even after a final liquidation order has been granted, was clearly envisaged by s 136 (4)."

[41] In this case the provisional liquidation order is as yet to be confirmed, meaning that the process of winding-up has not yet started. The issue of fees for the protected creditors has to be seen in that context. Nevertheless, it is not disputed that some fees have been incurred between 08 August 2014 and todate, which would not be substantial taking into account that the actual winding-up process is, theoretically, still outstanding.

[42] Section 143 provides for the remuneration of the business rescue practitioner, not the Liquidators. Section 136 (4) provides that the liquidator is the creditor of the company but without giving preference of such a creditor above others. It would seem that the liquidators' claim against the company is protected only under the liquidation proceedings, and they are the concurrent creditors under business rescue. The protected creditors under liquidation will be best advised not to conflate the processes of liquidation and business rescue. I accept the submission made on behalf of the applicants that the Liquidators may not impose the issue of payment of fees under business rescue as their fees are protected in terms of s 384 (1) of the old Companies Act which reads:

> " (1) In any winding-up a liquidator shall be entitled to a reasonable remuneration for his services to be taxed by the Master in accordance with the prescribed tariff of remuneration: Provided that, in the case of a members'

> voluntary winding-up, the liquidator's remuneration may be determined by the company in general meeting.
>
> (2) The Master may reduce or increase such remuneration if in his opinion there is good cause for doing so, and may disallow such remuneration either wholly or in part on account of any failure or delay by the liquidator in the discharge of his duties."

[43] The changed status of the Liquidators forms the basis for their resistance against the relief sought that the provisional liquidation order be discharged. Discharging a provisional liquidation order is different from suspending liquidation proceedings. A suspension of liquidation proceedings under s 131 (6) does not mark the end of liquidation. For present purposes there is no need to deal with a situation where the application for business rescue is brought on the face of liquidation proceedings that have commenced. In the circumstances it will not be correct to grant an order discharging the order of provisional liquidation without any substantive application having been brought. It seems to me that the provisions of s 354 (1) of the old Companies Act 61 of 1973, not a mere bringing of the application for business rescue, is the relevant machinery to be used for discharging the provisional liquidation order. The subsection reads as follows:

> "(1) The Court may at any time after the commencement of a winding-up, on the application of any liquidator, creditor or member, and on proof to the satisfaction of the Court that all proceedings in relation to the winding-up ought to be stayed or set aside, make an order staying or setting aside the proceedings or for the continuance of any voluntary winding-up on such terms and conditions as the Court may deem fit."

[44] I remain persuaded that this matter is urgent despite obvious difficulties with regard to service, which in my view can be attributed to the fact that all the parties involved in the matter, save Laman, do not reside in the Eastern Cape Province. The service of papers was bound` to be a daunting task as a lot of loose ends had to be closed up and often during an eleventh hour. In some instances the need to secure presence of all the affected parties in court and the filing of papers required postponements to be made. Notwithstanding all that the commercial reasons always dictated that the matter be heard on urgency basis.

[45] I could not find fault, such as a breach of court orders or general dilatoriness, on the part of any of the respondents to warrant any of them being mulcted in costs. The Liquidators and Risk Trans opposed the relief sought out

of concern for loss of protection as the preferent creditors of Laman. Kwane has been used by Mr Mlonzi as an instrument of interference in just about every good step(s) that have been taken by the affected persons in sorting out the problems of Laman. For that reason they are not entitled to any costs. The concern by NUM in this application was to protect their jobs. I do not have a reason to deny costs due to them. Ordinarily the applicants would shoulder the blame for all the postponements for they would have been incurred primarily to enable them to present their application. However, the principle that the cost follows the result cannot find application in this matter because in applications of this nature the costs of the application for business rescue become the post commencement costs.

[46] In the result I make the following order:

1. **That Laman (Pty) Ltd be and is hereby placed under supervision and commencing business rescue proceedings under Section 131 (4)(a) of Act 71 of 2008 ("the Act");**

2. **That the liquidation proceedings and all related proceedings under Case Number 2107/14 be and are hereby suspended;**

3. **That Mr Sipho Sono of OPIS Advisory, Nelson Mandela Square, 2nd Floor, West Tower, Sandown, Sandton, Gauteng be and is hereby appointed as interim business rescue practitioner of Laman (Pty) Ltd, subject to ratification by the holders of the majority of the independent creditors' voting interests at the first meeting of creditors as contemplated in Section 147 of the Act;**

4. **That the costs of this application be costs in the business rescue proceedings, except that the sixth respondent (Kwane) shall pay its own costs.**

5. **That a copy of this order be served by hand delivery, alternatively via electronic email on all affected persons of Laman (Pty) Ltd.**

Z. M. NHLANGULELA

ACTING DEPUTY JUDGE PRESIDENT

Counsel for the applicants	:	Adv. Dippenaar S.C. with Adv. A. Bodlani
Instructed by	:	Cliffe Dekker Hofmeyer Inc c/o Smith Tabata Attorneys MTHATHA .
Counsel for 1st, 2nd and 3rd respondents	:	Adv. A.J. Rall S.C.
Instructed by	:	Grant & Swanepoel Attorneys c/o JH Heunis & Associates MTHATHA
Counsel for the 6th respondent	:	Adv. Quinlan
Instructed by	:	Messrs Lyle & Lambert Attorneys c/o J A Le Roux Attorneys MTHATHA.
Counsel for the Affected Parties	:	Adv. D. Schaup
Instructed by	:	Lister & Lister c/o Keightley Inc MTHATHA.