SECTION 276B(2) OF THE CRIMINAL PROCEDURE ACT: MUST THE COURT FIX A NON-PAROLE PERIOD WHERE CONCURRENT PRISON SENTENCES ARE IMPOSED, AND DOES THE ACCUSED HAVE THE RIGHT TO BE HEARD ON WHETHER SECTION 276B(2) OUGHT TO BE INVOKED AND, IF SO, WHAT SHOULD BE THE LENGTH OF SUCH A NON-PAROLE PERIOD?

***S v Mthimkhulu* 2013 2 SACR 89 (SCA**

OPSOMMING

Artikel 276B(2) van die Strafproseswet: Moet die hof 'n nie-parool tydperk vasstel waar konkurrente termyne gevangenisstraf opgelê word, en het die beskuldigde die reg om aangehoor te word of artikel 276B(2) in werking gestel moet word en, indien wel, wat moet die nie-parooltermyn wees?

Die saak behels die uitleg van artikel 276B(2) van die Strafproseswet. Die hof het bevind dat selfs waar die bewoording van artikel 276B(2) ondubbelsinnig is dit in die konteks van die hele artikel 276B, die aanhef en doel van die Wet, die agtergrond waarteen die Wet in werking getree het, en ander kontekstuele oorwegings uitgelê moet word. Die hof kyk ook na die gebruik van die woord "the" in die frase "fix the non-parole period", en dui aan dat 'n uitleg wat die beskuldigde se reg op 'n billike verhoor bevorder verkies moet word. Die hof beslis dat 'n hof nie verplig is om 'n nie-parooltydperk in te stel waar meer as een termyn van gevangenisstraf konkurrent uitgedien word nie. Die hof bevind verder dat beide partye die reg het om aangehoor te word of artikel 276B(2) ingestel behoort te word en, indien wel, wat die nie-parooltydperk moet wees. Ek argumenteer dat die vertrekpunt van die uitleg steeds die bewoording van die bepaling is en wys daarop dat die betekenis wat deur die Hoogste Hof van Appèl aan die bepaling gegee is ernstig geforseerd is, nie oortuig nie en beteken dat die bepaling heeltemal oorbodig is. Ek bevraagteken die onderskeie aspekte waarop die hof gesteun het om tot sy beslissing te kom. Ek argumenteer dat artikel 276B ongrondwetlik is en beaam dat indien 'n nie-parool tydperk opgelê kan word, die beskuldigde die reg moet hê om aangehoor te word en, indien wel, vir welke tydperk.

1 Background and introduction

The case came before the Supreme Court of Appeal (hereafter also referred to as "SCA") from the KwaZulu-Natal High Court, Pietermaritzburg, and essentially concerns the interpretation of section 276B(2) of the Criminal Procedure Act 51 of 1977 (hereafter referred to as "the CPA"; Koen J sitting as court of first instance). Because section 276B(2) was, *inter alia*, interpreted by the SCA in the context of the whole of section 276B, I quote the entire section to facilitate the appreciation of the issues involved.

Section 276B provides as follows:

"(1) (a) If a court sentences a person convicted of an offence to imprisonment for a period of two years or longer, the court may as part of the sentence, fix a period during which the person shall not be placed on parole.

(b) Such period shall be referred to as the non-parole period, and may not exceed two thirds of the term of imprisonment imposed or 25 years, whichever is shorter.

(2) If a person who is convicted of two or more offences is sentenced to imprisonment and the court directs that the sentences of imprisonment shall

> run concurrently, the court shall, subject to subsection (1)(b), fix the non-parole-period in respect of the effective period of imprisonment."

2 Judgment of the court *a quo*

The appellant was convicted on one count of murder, the possession of an automatic firearm without a licence (count 2), and the possession of five rounds of live ammunition without a licence (count 3).

The appellant was sentenced to 20 years imprisonment for the murder, and 5 years imprisonment for both counts 2 and 3. The court directed that the term of 5 years run concurrently with the 20 years imposed on count 1. The court held that it was enjoined by the word "shall" in section 276B(2) of the CPA to fix a non-parole period and proceeded to fix a non-parole period of 13 years (para 4 read with para 8 of the SCA judgment).

In granting leave to appeal, Koen J indicated that the application of section 276B(2) has led to some difficulties in his division and has not been uniform (para 5 of the SCA judgment).

In raising the question of the procedure to be adopted, the court continued as follows (*ibid*):

> "[S]hould a trial court, in invoking [section 276B(2)], fix a non-parole period specifically whether the possible likelihood of it being invoked, should be raised during the sentencing stage, so that counsel may address the Court fully on whether it should apply to its full extent, that is, not exceeding two-thirds of the sentence proposed, or then some lesser parole period."

3 Questions before the Supreme Court of Appeal

(a) Does section 276B(2) of the CPA enjoin a court to fix a non-parole period where a person is convicted of more than one offence, and the court directs that the prison sentences run concurrently (para 1)?

(b) Does an accused have the right to be heard on whether 276B(2) ought to be invoked, and if so, what length should the non-parole period be (para 1 read with para 17)?

4 Judgment of the Supreme Court of Appeal

The court per Petse JA (Maya, Shongwe, Leach JJA and Mbha AJA concurring) saw the starting point of the enquiry in the provisions of section 276B. More specifically, the court saw the question as to whether the language of section 276B(2) (ie shall . . . fix"), viewed in the context of the inclusive section 276B, can sustain the meaning attributed to it by the High Court *a quo* (para 7).

In addressing the question, the court referred to three cases that dealt with the interpretation of unambiguous language in a statute (paras 9 and 10). In the first case, *Secretary of Inland Revenue v Sturrock Sugar Farm (Pty) Ltd* 1965 1 SA 897 (A) 903, Ogilvie Thompson JA held that even where the language was unambiguous, the purpose of the Act and other contextual considerations may be invoked as aids to a proper construction.

In *Venter v R* 1907 TS 910 914–5 Innes CJ held that, if affording the plain words of a statute their ordinary meaning would lead to a glaring absurdity, it could lead to a result contrary to the intention of the legislature (as shown by the context or by such other consideration as the court is justified in taking into account). In such an event, the court may depart from the ordinary effect of the words to the extent necessary to remove the absurdity and to give effect to the

true intention of the legislature. The court held that this approach allowed one to: look at the preamble of the Act or other express indications in the Act as to the object that has to be achieved; study the various sections wherein the purpose may be found; look at what led to the enactment (the mischief the enactment was intended to deal with); and draw logical inference[s] from the context of the enactment (as authority the court quoted Kellaway *Principles of legal interpretation of statutes, contracts and wills* (1995) 69; *Bhana v Dönges* 1950 4 SA 653 (A) 662; *Aetna Insurance Co v Minister of Justice* 1960 3 SA 273 (A) 284).

In the third case, *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA) para 18, the court indicated that interpretation was the process of attributing meaning to the words used in a document, be it legislation or some other statutory instrument, having regard to the context provided by reading the particular provision(s) in the light of the document as a whole, and the circumstances attendant upon its coming into existence. Consideration must be given to the language used in the light of the rules of grammar and syntax; the context in which the provision appears; and "the apparent purpose to which it is diverted and the material known to those responsible for its production". A sensible meaning is to be preferred to one that leads to insensible or "unbusinesslike" results, or undermines the apparent purpose of the document. The inevitable point of departure is the language of the provision itself, read in context, and having regard to the purpose of the provision, and the background to the preparation and production of the document.

The court in *Mthimkhulu*, referring to *Fraser v Absa Bank Ltd (National Director of Public Prosecutions as Amicus Curiae)* 2007 3 SA 484 (CC), also held that when interpreting a statute, a construction must be adopted that was consistent with the Constitution. In the context of a criminal case, courts were dutybound to favour an interpretation that promoted the accused's fair trial rights (para 11). In *Fraser* the court confirmed this imperative, holding that section 39(2) required more from a court than to avoid an interpretation that conflicts with the Bill of Rights. It demanded the promotion of the spirit, purport and objects of the Bill of Rights. These are to be found in the matrix and totality of rights and values embodied in the Bill of Rights. It could also in appropriate cases be found in the protection of specific rights, like the right to a fair trial in section 35(3), which is fundamental to any system of criminal justice. The spirit, purport and objects of a right to a fair trial, therefore, have to be considered.

The court noted that section 276B was introduced during 2004 by the Parole and Correctional Supervision Amendment Act 87 of 1997, after the SCA had expressed disapproval with fixing non-parole periods (paras 12 13), referring to *S v Mahlakaza* 1997 1 SACR 515 (SCA) where it was held that sentencing jurisdiction was statutory and that courts were bound to limiting their duties within the scope of jurisdiction, and *S v Botha* 2006 2 SACR 110 (SCA) para 25, decided on 28 May 2004, in which Ponnan AJA characterised the suggestion by the court *a quo* that the accused must serve at least two-thirds of the sentence before parole can be considered as an undesirable incursion into another arm of the State, and something which was bound to cause tension between the judiciary and the executive (para 25).

The court further noted that, in the preamble to the Parole and Correctional Supervision Amendment Act, one of the stated objectives was to provide that a sentencing court *may* fix a non-parole period. This the court saw as the intention

of the legislature to give the court overall latitude in deciding to fix a non-parole period (para 14).

Accordingly, if one applied the approach in *Sturrock* and studied the terms of section 276B, ascertained the object the enactment was intended to achieve, and drew a logical inference from the context of section 276B as a whole as well as the use of the word "the" in the phrase "fix the non-parole period" in section 276B(2) which could only denote the non-parole period in terms of section 276B(1)(a), it was evident that the legislature did not intend to limit the discretion of the sentencing court as was held by the court *a quo* (para 15).

A court, therefore, is not obliged to fix a non-parole period when it has imposed two prison sentences to run concurrently. What section 276B(2) does is "to enjoin a sentencing court, once it has exercised its discretion under s 276B(1)(a) against the convicted person, to then fix the non-parole period in respect of the effective period of imprisonment taking cognisance of the provisions of s 276B(1)(b)" (para 16).

The court then dealt with the second issue concerning whether the appellant's fair trial rights dictated that he should have been heard before the court invoked section 276B(2) and, if so, what the length of the non-parole period should be (para 17).

The argument on behalf of the appellant, based on sound authority, was essentially that:

(a) A sentencing court must first determine whether there are exceptional circumstances that commanded the application of section 276B.

(b) If such exceptional circumstances are found, a determination must be made as to what should be the length of the non-parole period.

(c) The facts of the case militated against invoking section 276B. The High Court, itself, had found the appellant to be a good candidate for rehabilitation and "that the commission of the offences of which he had been convicted was 'probably brought about by a unique and exceptional set of facts which [the appellant] faced and had to deal with constituting as it did a threat to [his life]'" (para 18; counsel cited *S v Mshumpa* 2008 1 SACR 126 (ECD) para 79, *S v Pauls* 2011 SACR 417 (ECG) para 15 and *S v Stander* 2012 1 SACR 537 (SCA) para 16 as authority).

The court referred to *Stander* where the court explained that section 276B was an unusual provision and its enactment did not put the court in any better position to make decisions about parole than it was in prior to its enactment. Therefore, the remarks by this court prior to section 276B still hold good. An order in terms of section 276B, therefore, should only be made in exceptional circumstances, when there are facts before the sentencing court that would continue, after sentence, to result in a negative outcome for any future decision about parole. *Mshumpa* offered a good example of such facts, namely, undisputed evidence that the accused had very little chance of being rehabilitated.

In the context of fair trial rights, the failure to afford the parties an opportunity to address the sentencing court might, depending on the facts of the case, constitute an infringement of fair trial rights (para 21).

Finally, the court held that it was common cause that the parties were not afforded the opportunity to be heard with regard to the non-parole period. Counsel agreed that it would be proper to remit the case back to the court *a quo* on this

aspect. However, it was found that in this case the interests of justice would not be served by doing so (para 22). There were numerous factors which operated against the exercise of the discretion against the appellant. Therefore, there did not appear to be any exceptional circumstances which would justify the court *a quo* exercising its discretion under section 276B(1)(a) to fix a non-parole period. The order of the court *a quo* in fixing a non-parole period of 13 years was set aside (para 23).

5 Discussion

Even though most will agree that the reading of section 267B(2) must be the starting point of the present interpretation, it is so that the principle that words must be given their ordinary meaning no longer has the importance it once had in South African law. The principle is only the starting point in the interpretive process.

The legislation as a whole, and the context within which the provision appears, may be invoked in aid of a proper construction of the provision (see, eg, *Sturrock*, *Venter* and *Natal Joint Municipal Pension Fund*). On top of this, the purpose of the legislation can still qualify the text (Botha *Statutory interpretation: An introduction for students* (2012) 111; see also De Ville *Constitutional and statutory interpretation* (2005) 141).

All the factors inside and outside the text which can qualify the initial understanding of the text must be taken into account (Botha 112; De Ville 141ff). The preamble to the Act where the programme of the Act or its intent is stated, therefore, may also be used during interpretation (see, eg, *Qozeleni v Minister of Law and Order* 1994 3 SA 625 (E) and *Khala v The Minister of Safety and Security* 1994 4 SA 218 (W) 221).

However, this does not mean that the application by the SCA of these principles to the legislation in the case under discussion is beyond reproach. The point of departure still is the language of the provision itself. This entails that the interpreter should not give an artificial or strained meaning to the text (Botha 112).

I submit that the contention by the SCA that all section 276B(2) did was "to enjoin a sentencing court, once it has exercised its discretion under s 276B(1)(a) against the convicted person, to then fix the non-parole period in respect of the effective period of imprisonment taking cognisance of the provisions of s 276B(1)(b)" is severely strained and unconvincing.

Section 276B(2) provides for a matter in connection with the fixing of a non-parole-period. In terms of section 276B(2), a sentencing court shall, where two or more sentences of imprisonment are given, and it is ordered that the sentences run concurrently, fix a non-parole period in respect of the effective period of imprisonment.

Legislation should also be interpreted in such a way that no word or sentence is regarded as superfluous or unnecessary (see also *Keyter v Minister of Agriculture* 1908 NLR 522 and *Commissioner for Inland Revenue v Golden Dumps (Pty) Ltd* 1993 4 SA 110 (A)).

If the meaning that has been attached to 276B(2) by the SCA is accepted, section 276B(2) is completely superfluous. There is no need for an extra provision (s 276B(2)) "to enjoin" the sentencing court, once it has exercised its discretion against the convicted person, to fix a non-parole period, taking into account

section 276B(1)(b). Section 276B(1)(a) and 276B(1)(b) provide comfortably for this on their own.

I furthermore submit that the only purpose of section 276B(2) could not have been to clarify that a non-parole period must be fixed on the combined "effective period of imprisonment" and not on each of the individual sentences (see the last part of s 276B(2)). It clearly does much more than that. In the first place, it prescribes that where two or more terms of imprisonment are to run concurrently, a non-parole period must be imposed.

It can also not be said that the legislature had simply been overcautious in guarding against omitting anything important, or that the superfluous words help to ascertain the meaning of other words (see *Secretary for Inland Revenue v Somers Vine* 1968 2 SA 138 (A)). This principle is also related to the presumption that legislation does not contain futile or nugatory provisions (see Hahlo and Kahn *The South African legal system and its background* (1973) 210).

The rationalisation by the court (for its interpretation) that section 276B had been introduced after the SCA had expressed disapproval with fixing non-parole periods, can also be questioned. If the legislature had wanted to heed the guidance by the SCA, one would not have expected the legislature to provide sentencing courts with the power to impose a non-parole period. Instead, sentencing courts were given the power to fix non-parole periods by way of section 276B(1)(a) and (b). To use the prior disapproval with fixing non-parole periods by the SCA as an interpretive guide with regard to section 276B(2), may just be somewhat opportunistic if not misdirected.

The fact that the court saw the preamble of the Parole and Correctional Supervision Amendment Act as an indication that the legislature intended to give the court overall latitude in fixing parole, may be somewhat unfortunate. While a preamble is formulated in wide and general terms, the specific provision contains more detail and is more focused and should be more valuable during the interpretation process (Botha 120).

Even if a detailed analysis of the preamble is made, I do not think that the Amendment Act conveys the intention to give the sentencing court overall latitude in fixing parole. The Amendment Act provides for the implementation of non-parole-periods by inserting a definition of the term "non-parole period" into section 1 of the Correctional Services Act, 1959 and by inserting section 276B into the CPA. Section 276B consists of three parts, namely, section 276B(1)(a) and (b) and section 276B(2). The programme in the preamble provides for these items as follows: "To amend the Correctional Service Act, 1959, so as to define certain expressions" (the definition of non-parole-period is included in this); "to amend the Criminal Procedure Act, 1977 . . . to make provision that a court sentencing an offender to a period of imprisonment may fix a non-parole-period" (s 276B(1)(a)); "and to provide for matters in connection therewith" (referring to the non-parole-period; s 276B(1)(b) and 276B(2); note the plural "matters". There are no other non-parole matters that are provided for in the Amendment Act).

Furthermore, section 276B(1)(b) which limits the non-parole-period, is clearly another instance where the latitude of the sentencing court has been limited. I accordingly submit that the meaning attributed to section 276B(2) by the court *a quo* is not contrary to the purpose of the legislation.

In this postulation, it is my considered view that section 39(2) of the Constitution does not enjoin an interpretation of section 276B(2) that is contrary to the meaning attributed to it by the court *a quo*. One cannot attribute a severely strained, if not contrived, superfluous meaning to an unambiguous provision, and one which is not contrary to the purpose of the legislation because it "promoted the fair trial rights of the accused" (see para 11 of the SCA judgment).

This raises the question whether a person convicted of an offence indeed has the right to be treated fairly during the sentencing phase in terms of section 35(3) as indicated by the SCA. Section 35(3) provides that

> "every accused person has the right to a fair trial, which includes the right . . . (n) to the benefit of least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing".

Clearly, a convicted person is not someone accused of an offence, and the sentencing phase is not a trial. Fair trial rights will accrue when the object of the proceedings is to determine the guilt or innocence of the accused (Currie and De Waal *The Bill of Rights handbook* (2013) 751). It also appears that many of the rights in section 35(3) are not appropriate for a convicted person at the sentencing phase (eg s 35(3)(a) and (b)). It would be nonsensical to bestow these rights on a convicted person at the sentencing phase. Consequently, it may be argued that, apart from paragraph (n), the right to a fair trial (including the other enumerated rights in section 35(3)), do not accrue to a convicted person at the sentencing stage.

Because an aspect of punishment is specifically catered for in section 35(3)(n), the right to freedom and security in section 12 similarly does not provide protection (see *Ferreira v Levin; Vryenhoek v Powell* 1996 1 SA 984 (CC) and *De Lange v Smuts* 1998 3 SA 785 (CC) where the Constitutional Court erected a conceptual wall between the right to freedom and security in section 12 and the rights of persons arrested, detained, or accused in terms of section 35; an examination of this topic falls beyond the scope of this case discussion).

However, it has been confirmed in *South African Broadcasting Corporation Ltd v National Director of Public Prosecutions* 2007 2 BCLR 167 (CC) that the "access to courts" provision in section 34 of the Bill of Rights is able to perform the due process seepage into the criminal process that the Constitutional Court in *Ferreira* and *De Lange supra* erroneously denied the freedom and security clause in section 12.

Section 34 provides that "everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial journal".

A person convicted of an offence, therefore, has a fundamental right to be treated fairly at the sentencing phase. Of course, this does not mean that section 276B(2) which prescribes that a non-parole-period be imposed where two prison sentences run concurrently, impairs that right. Furthermore, not all laws which infringe that right are unconstitutional. It may, nevertheless, be a justifiable limitation of the right in question.

I am of the opinion that it is not the fact that the court is obliged to fix a non-parole-period under the circumstances in section 276B(2) that is the real test for the constitutionality of the subsection. As no minimum non-parole-period is

prescribed, section 276B(2) will most probably survive constitutional scrutiny under section 34 of the Constitution.

Much more problematic is the fact that section 276B empowers the sentencing court to fix a non-parole period in the first instance. As far as the constitutional aspects are concerned, the court in *S v Botha*, referring to *S v Mahlakaza* 521f–i, held that courts do not have the power to prescribe to the executive branch of government how long a convicted person should be in jail, thereby usurping the function of the executive. The court also pointed out that this was unfair to both the accused person and the correctional service authorities (para 26).

In *Makena* 2011 2 SACR 294 (GNP) the full bench on appeal held that given the doctrine of separation of powers, it was best left to the Department of Correctional Services, which was part of the executive arm of government, to determine when an accused should be released on parole without any suggestion or recommendation in this regard from the court (299b–c). Webster J also observed that the Department of Correctional Services does not operate from the premise that those convicted and channelled to it by the courts are incorrigible and beyond redemption from a life of crime, or rehabilitation (299e).

In *Stander* the court explained that the fact of the matter was that the consideration of the suitability of a prisoner to be released on parole required the assessment of facts relevant to the conduct of the prisoner after the imposition of the sentence (para 12). The court concluded that a non-parole-period should only be imposed in "exceptional circumstances" when there are facts before the sentencing court that would continue, after sentence, to result in a negative outcome for any future decision about parole (para 16).

The crux of the problem was also explained in *S v Madolwana* unreported case no CA&R 436/12 (ECG), 19 June 2013, as follows:

> "A non-parole period is in effect a 'present determination' that the convicted person being sentenced will not deserve being released on parole in future, notwithstanding that the consideration of the suitability of a prisoner to be released on parole requires the assessment of facts relevant to his conduct after the imposition of sentence"(para 7).

The court also held that these exceptional circumstances must be relevant to parole and not only constitute aggravating factors with regard to the crime committed (para 8). In *Mshumpa* the court found such exceptional circumstances in the fact that the accused was a "sociopath with psychopathic traits" (para 77) and had very little chance of being rehabilitated (para 82; see also Du Toit *et al Commentary on the Criminal Procedure Act* 28-10Tff loose-leaf updated to 31 July 2014).

The court is consequently given the authority to make a prognosis of the future conduct or behaviour of the prisoner without the court having adequate information to do so, while the correctional authorities, at the time when release is contemplated, are in a more suitable position to decide whether a detainee is a suitable candidate for parole. In this regard, Terblanche in his seminal work *Guide to sentencing in South Africa* (2007) 225 indicates that it is very hard to think of any reason, fundamental to criminal justice, that could justify this power.

I am of the view that the imposition of a non-parole-period under these circumstances infringes the right of the convicted person to be treated fairly. I am

furthermore of the view that section 276B cannot be saved by the limitations clause.

However, if it is accepted that a court has the power to impose a non-parole period, it must be agreed with the court in *Mthimkhulu* that the accused must be afforded the opportunity to put before court any factor which may influence the sentencing court to impose – or not to impose – a non-parole period, and if so, the length thereof. Anything less would be an infringement of his right to be treated fairly (see also *S v Dzukuda; S v Tshilo* 2000 2 SACR 443 (CC) paras 10–12).

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BUSINESS RESCUE: THE UNCERTAINTY ABOUT SURETIES

Tuning Fork (Pty) Ltd t/a Balanced Audio v Jonker
2014 4 SA 521 (WCC)

OPSOMMING

Ondernemingredding: Die onsekerheid oor borge

Die regte van krediteure om die persoonlike borge van maatskappye aan te spreek wat ondernemingredding ondergaan of ondergaan het, het die afgelope tyd die besondere aandag van ons howe geniet. In hierdie vonnisbespreking evalueer die skrywers die regsgevolge wat die aanvaarding van 'n ondernemingreddingsplan op die regte van krediteure teenoor die borge van die maatskappy het. Hierdie evaluering word gedoen aan die hand van die uitspraak in *Tuning Fork (Pty) Ltd t/a Balanced Audio v Jonker* 2014 4 SA 521 (WCC). Die skrywers se gevolgtrekking is dat die aanspreeklikheid van persoonlike borge van die maatskappy nie slegs deur artikel 154 gereël word nie, maar dat die bepalings van die spesifieke ondernemingreddingsplan ook noukeurig oorweeg moet word, tesame met die aksessoriteitsbeginsel wat gewoonlik op borgstelling toepassing vind. Die bespreking neem ook die Hoogste Hof van Appèl se *obiter* opmerkings in *Newcity Group v Allan David Pellow* [2014] ZASCA 162 (1 Oktober 2014) in oënskou, waarna die skrywers tot die gevolgtrekking kom dat die feite van die twee uitsprake wesentlik van mekaar verskil.

1 Introduction

The new business rescue procedure replaced judicial management, which was generally considered unsuccessful and rarely used (*Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* 2012 3 SA 273 (GSJ) para 7) (*Oakdene* (GSJ)). The purpose of business rescue is an attempt to revive financially-distressed companies in order to ensure their survival or, failing this, to procure a better return for creditors should the company be liquidated (s 128(1)(b)(iii) of the Companies Act 71 of 2008 ("the Act")). The general purpose of the Act is to stimulate the economy and to encourage a culture of rescue and survival – rather than one of liquidation (*Oakdene* (GSJ) para 6; *The Employees of Solar Spectrum Trading 83 (Pty) Ltd v Afgri Operations Ltd* Case no 6418/2011, 18624/2011, 66226/201, 666226/2011, 66226A/11) [2012]