REPUBLIC OF SOUTH AFRICA

NORTH GAUTENG HIGH COURT, PRETORIA

CASE NO: 20947/12

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

29 August 2013
DATE

SIGNATURE

AFRICAN BANKING CORPORATION OF BOTSWANA LTD	Applicant
and	
KARIBA FURNITURE MANUFACTURERS (PTY) LTD (In Business Rescue)	First Respondent
JORDAAN, JEAN PIERRE N.O.	Second Respondent
NCHITE, BALDWIN	Third Respondent
NCHITE, BIRGITTA SVENSSON	Fourth Respondent
COMPANIES AND INTELLECTUAL PROPERTY COMMISSION, REPUBLIC OF SOUTH AFRICA	Fifth Respondent
MINISTER OF TRADE AND INDUSTRY	Sixth Respondent

JUDGMENT

KATHREE-SETILOANE, J:

[1] In this application, African Banking Corporation of Botswana Limited (the Bank) seeks relief pertaining to the business rescue proceedings of the first respondent, Kariba Furniture Manufactures (Pty) Ltd (the company) and a

business rescue plan, which was adopted during the course of those business rescue proceedings (the Plan).

[2] The business rescue proceedings were undertaken and the Plan ostensibly adopted in terms of the provisions of Chapter 6 of the Companies Act, 71 of 2008 ('the Act'), subsequent to a binding offer to purchase the voting interests of the Bank in terms of s 153(1)*(b)*(ii) of the Act. Accordingly, the primary issue for determination relates to the interpretation of the term 'binding offer' in s 153(1)*(b)*(ii) of the Act.

[3] The second respondent is Jean Pierre Jordaan (Jordaan), the business rescue practitioner of the company. The third and fourth respondents are Baldwin Nchite (Baldwin Nchite) and Birgitta SvenssoN Nchite (Birgitta Nchite), the directors and sole shareholders of the company. The Bank and the Nchite's are 'affected persons' as defined in the Act, in the business rescue of the company. Jordaan, on behalf of the company, and the Nchite's oppose the relief sought by the Bank in this application. The fifth and sixth respondents are the Companies and Intellectual Property Commission (the CIPC) and the Minister of Trade and Industry of the Republic of South Africa, respectively. Although no relief is sought against them, the CIPC opposes the application only in respect of the declaratory relief sought in relation to the constitutionality of s 153(1)*(b)*(ii) of the Act.

Leave to sue in terms of s 133 of the Act

[4] Before dealing with the principal issues in dispute, I must first consider the in limine objection to the application pertaining to the necessity for the Bank to have obtained leave to institute these proceedings. Section 133(1) of the Act places a general moratorium on legal proceedings against a company under business rescue, subject to certain limitations. Section 133(1) provides as follows:

'During business rescue proceedings, no legal proceedings, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except-

(a) with the written consent of the practitioner;

(b) with the leave of the court and in accordance with any terms the court considers suitable;

(c) . . . .'

[5] Jordaan and the Nchite's submit that leave of the court to commence legal proceedings, including enforcement action against a company in business rescue under s 133(1)*(b)* of the Act, may only be sought before a business rescue plan is adopted. This contention, in my view, is unsustainable on the plain meaning of the section. On the ordinary wording of the section, the moratorium envisaged by s 133 of the Act is in place for the duration of 'business rescue proceedings'. Although the term 'business rescue proceedings' is not defined in s 128 of the Act, the term 'business rescue' is defined. Section 128(1)*(b)* of the Act defines 'business rescue' as, inter alia 'proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for. . . the development and implementation, if approved, of a plan to rescue the company. . . .' The business rescue proceedings, therefore, clearly extend beyond the adoption of a business rescue plan. In addition, s 132(2) of the Act expressly lists the circumstances in which business rescue proceedings come to an end. Section 132(2)*(c)*(ii) provides that once a business rescue plan has been adopted in terms of the Act, and the business rescue practitioner has filed a notice of substantial implementation of the business rescue plan, business rescue proceedings will come to an end. For as long as the moratorium is in place, s 133(1)*(b)* of the Act permits a court to grant leave to a person to institute legal proceedings.

[6] Thus, s 133(1) allows the institution of proceedings against the company in business rescue with leave of the court, both before and after the adoption of a business rescue plan. Leave to institute legal proceedings has, in this regard, been sought by the Bank in prayer one of part B of its notice of motion. On the ordinary wording of s 133 of the Act, the moratorium is in place for the duration of 'business rescue proceedings'. Therefore, if 'business

rescue proceedings' extend only up to the date on which the business rescue plan is adopted, s 133 would be inapplicable, the moratorium would not be in place, and no leave to sue would be required.

[7] However, and to the extent that s 133 is applicable to the business rescue proceedings in this matter, I consider that the facts demonstrate that this is a proper case in which the court should exercise its discretion in favour of granting the Bank leave to institute these proceedings, since the Bank seeks, in particular, to challenge the conduct of the business rescue practitioner and affected parties during the course of the business rescue proceedings, as well as the constitutional validity of s 153(1)*(b)*(ii) of the Act. In the circumstances, I am of the view that there is no merit in the preliminary objection raised on behalf of the first to fourth respondents that the Bank has been non-suited by operation of s 133 of the Act. I accordingly grant the Bank leave to commence and proceed with the application against the respondents in terms of s 133(1)*(b)* of the Act.

Background

[8] The issues in dispute play out against a factual matrix which is largely common cause. During October 2006 the Bank instituted an action in this court against the company and the Nchite's. The cause of action against the company was based on monies lent and advanced by the Bank to the company under a credit facility agreement. The claims against the Nchite's were based on deeds of surety signed by them in favour of the Bank. The Bank's claims against the company were secured by a general notarial bond executed by the company in favour of the Bank.

[9] By agreement between the parties to the litigation, the action was removed from the High Court and referred to arbitration. On 7 February 2011 the arbitrator handed down an award in which he found in favour of the Bank. The arbitrator ordered that the company and the Nchite's (the defendants), were jointly and severally liable to the Bank for payment of the sum of BWP (Botswana Pula) 5 610 125,38 together with interest at the rate of 13 per cent annum compounded monthly in arrears from 1 July 2004 to date of payment,

save in the case of Birgitta Nchite, whose liability was limited to the Botswana Pula equivalent of R1.5 million. The defendants appealed the award to a panel of three arbitrators. On 23 January 2012, the appeal tribunal handed down an appeal award, which confirmed the initial award in favour of the Bank save in respect of Birgitta Nchite, whose liability to the Bank, the appeal tribunal found, had been discharged.

[10] Thus, as matters currently stand, and at the date of the commencement of the business rescue proceedings, the company and Baldwin Nchite are jointly and severally liable to the Bank, in the sum of BWP 5 610 125,38 together with interest at the rate of 13 per cent per annum compounded monthly in arrears from 1 July 2004 to date of payment. The total liability owing under the award inclusive of interest, as at 31 January 2012, was an amount of BWP 14 966 809,20. During March 2012 the defendants delivered an application in which they sought to have the awards set aside under s 33(1)*(b)* of the Arbitration Act 42 of 1965 (the Arbitration Act). The application is opposed by the Bank. The review application challenging the awards of the arbitrator and the appeal tribunal does not suspend the validity of the awards.[1] In the circumstances, the Bank remains a creditor of the company in the sum of BWP 14 966 809,20 as at 31 January 2012, and Baldwin Nchite is liable with the company for this full amount under the deed of surety signed by him.

[11] On 31 January 2012, subsequent to the handing down of the appeal award, but before the defendants delivered the review application, the Board of the company resolved voluntarily to begin business rescue proceedings and place the company under supervision, in terms of s 129(3) of the Act (the Resolution). Jordaan was appointed as the business rescue practitioner on 6 February 2012. The first statutory meeting of creditors of the company was held on 17 February 2012 (the First Meeting of creditors), with the purpose of affording the creditors an opportunity to prove their claims against the

[1] Section 33(3) of the Arbitration Act provides that the court reviewing an arbitration award may stay enforcement of the award pending its own decision. This indicates that, except when the court so holds, the arbitration award does not suspend the validity of the award.

company. Jordaan accepted the Bank's claim against the company on a provisional basis pending the outcome of the application to court to set aside the arbitration awards.

[12] There were various communications, before and after the First Meeting of creditors, between the Bank's attorney of record, Mr A Moosajee of Norton Rose Fulbright South Africa (Moosajee) and Jordaan in which Moosajee raised queries and concerns. Moosajee was keen to ensure that the right papers were before Jordaan in order to prove the Bank's claim, and that the full extent of the claim, including interest, was proved. He also requested of Jordaan a copy of the company's last set of audited financial statements and, if such was more than six months old, the company's latest management accounts from the date of the last audit to the end of January 2012. These were necessary for the purpose of advising the Bank of its rights, particularly its rights under s 130 of the Act, which allows for the setting aside of a company's resolution to commence business rescue proceedings in certain circumstances. Jordaan's response to such requests varied, including a response that such statements and accounts would be incorporated in the proposed business rescue plan (the proposed Plan).

[13] On 21 March 2012, Jordaan distributed the proposed Plan to the affected parties, the stated purpose of which was *'to revive the business'*. The proposed Plan contemplated in the main that the business will be revived by compromising certain creditors' claims. In particular, the proposed Plan contemplated that the Bank will be paid 21 cents in the Rand over a period of 100 months.

[14] On 23 March 2012, in anticipation of the second statutory meeting of creditors (the Second Meeting of creditors), Moosajee sent Jordaan an email in which he requested Jordaan to address a list of queries at such meeting pertaining to the proposed Plan and certain shortcomings in the Plan. The Second Meeting of creditors was duly held, within ten days after the proposed Plan had been published, on 26 March 2012. At this meeting Jordaan invited discussion on the proposed Plan and called for motions, to amend the

proposed Plan, or to direct him to adjourn the meeting in order to revise the Plan for further consideration in terms of s 152(1)*(d)*(i) and (ii) of the Act. Since there were no motions as contemplated in s 152(1)*(d)*(i) of the Act, Jordaan called for a vote of the creditors for the preliminary approval of the proposed Plan, in terms of which he had indicated that the voting interests were in accordance with the percentages reflected in the proposed Plan, which afforded the Bank approximately 63 per cent, the North West Development Corporation (the NWDC) one per cent and the shareholders (the Nchite's, as creditors) 32 per cent. These were the only creditors present at the meeting.

[15] The Bank and the NWDC voted against the proposed Plan and the shareholders (the Nchite's) voted in favour of it. Mr Cawood (Cawood), the Nchites' attorney of record, then informed the meeting that the shareholders wished to make a binding offer for the Bank's voting interest in terms of s 153(1)*(b)*(ii) of the Act, and Jordaan called a short adjournment of the meeting. Jordaan treated the offer as being immediately and ipso facto binding on the Bank, ostensibly on the basis of s 153(1)*(b)*(ii) of the Act. In other words, Jordaan treated the offer as having been accepted by the Bank. In keeping with his view that the offer had immediately and ipso facto been accepted and became binding upon the Bank, after the adjournment Jordaan amended the voting interest to reflect the Bank as holding zero per cent and the shareholders as holding 95 per cent of the voting interests of the creditors. Jordaan stated that the amendments would also need to reflect that the payment schedule, attached to the proposed Plan, had to be removed and, if not removed, it would mean that the Bank would be paid both in terms of the binding offer, and in terms of the Plan. No further amendments were made to the proposed Plan.

[16] Jordaan called for a vote of the 'creditors' – now excluding the Bank, but exercising the voting interest that the Bank had previously exercised – on the proposed Plan. The representatives of the Bank attempted to prevent a vote on the proposed Plan by the (reconstituted) 'creditors', but failed. Given the attitude of Jordaan that a binding offer in terms of s 153(1)*(b)*(ii) of the Act

had the effect of dispossessing the Bank of its rights as creditor, and that the Bank could therefore no longer exercise a vote as a creditor, the Bank took the view that its continued involvement in the meeting was pointless, and its representatives left the meeting before the vote of the reconstituted creditors was taken.

[17] The remaining 'creditors' – in effect, the Nchite's – approved the adoption of the Plan and it was 'preliminarily approved' in terms of s 152(2) of the Act. Subsequently, the Nchite's also voted in favour of the adoption of the Plan, in terms of s 152(3) of the Act, the effect of which was that it was 'finally adopted', and Jordaan had indicated that he will implement it.

Relief sought

[18] The Bank, no doubt, is adamant that its position in relation to the 'binding offer' remains unsettled. It contends that it is in a materially different position to that which it was prior to the commencement of the business rescue proceedings or the adoption of the Plan. The Bank contends that it has ipso facto been divested of its claim against the company, as well as its secured assets in that claim in the form of a notarial bond over the company's assets[2], and that it is instead left with the cold comfort of an offer – as yet uncertain and its terms undisclosed, with no idea of its value or the repayment period or the proportions in which it is recoverable from either of the Nchite's – of money to be paid to it in the future. In addition, the Bank points out that although it had previously enjoyed a real and material interest in the business rescue proceedings of the company and, as a consequence, any liquidation proceedings that might ensue, it no longer has that interest. Hence, the nub of the Bank's contention is that it is materially worse off than it was previously, and it, accordingly, seeks declaratory relief in the following terms:

(a) an order that the 'binding offer' made on behalf of the Nchite's to purchase the voting interest of the Bank, in terms of s 153(1)*(b)*(ii) of the Act, is not binding on the Bank since s 153(1)*(b)*(ii) contemplates

[2] The notarial bond has not been perfected.

an offer that is binding on the 'offeror' only (in this instance the Nchite's), and the offeree Bank is free to accept or reject the offer, and the Bank did not accept the offer. Alternatively, and in the event of it being held that the offer made by the Nchite's is binding on the Bank, the Bank seeks an order that s 153(1)*(b)*(ii) of the Act is unconstitutional and invalid;

(b) an order setting aside the approval of the Plan which took place at the Second Meeting of creditors, including the creditors' vote for the adoption and preliminary approval of the proposed Plan and the shareholders' vote for the adoption and final approval of the Plan;

(c) an order in terms of s 130(1)*(a)* of the Act setting aside the Resolution in terms of which the Board of the company resolved to voluntarily begin business rescue proceedings and place the company under supervision, alternatively, and in the event that the court does not set aside the Resolution, the Bank seeks an order, in terms of s 130(1)*(b)* read with s 139 of the Act, setting aside the appointment of Jordaan, as the business rescue practitioner, in the business rescue proceedings of the company;

(d) alternatively, and in the event of the court declining to grant any of the relief sough above, an order declaring that neither the adoption of the Plan nor the binding offer made by the Nchite's, in terms of s 153(1)*(b)*(ii) of the Act, to purchase the voting interests of the Bank, affect the rights of the Bank to recover monies from Baldwin Nchite under the deed of surety, executed by the company in favour of the Bank, for any indebtedness owed by the company to the Bank.

The binding offer in terms of s 153(1)*(b)*(ii) of the Act

[19] The concept of a 'binding offer', as contemplated in s 153(1)*(b)*(ii) of the Act, is novel to South African company law. It provides, amongst others, shareholders and creditors of a company in business rescue, as well as holders of the company's securities, with the opportunity to purchase the

voting interests of persons who oppose the adoption of a business rescue plan. The concept of a 'binding offer', contemplated in s 153(1)*(b)*(ii) of the Act, amounts to what has been described as a 'last-gasp' attempt to have a business rescue plan approved. For present purposes, the relevant portions of s 153(1) of the Act are as follows:

'**153. Failure to adopt business rescue plan.** – (1)*(a)* If a business rescue plan has been rejected as contemplated in section 152(3)*(a)* or *(c)*(ii)*(bb)* a practitioner may–

(i) seek a vote of approval from the holders of voting interests to prepare and publish a revised plan; or

(ii) advise the meeting that the company will apply to a court to set aside the result of the vote by the holders of voting interests or shareholders, as the case may be, on the grounds that it was inappropriate.

(b) If the practitioner does not take any action contemplated in paragraph (a) –

(i) any affected person present at the meeting may –

(aa) call for a vote of approval from the holders of voting interests requiring the practitioner to prepare and publish a revised plan; or

(bb) apply to the court to set aside the result of the vote by the holders of voting interests or shareholders, as the case may be, on the grounds that it was inappropriate; or

(ii) any affected person, or combination of affected persons, may make a binding offer to purchase the voting interests of one or more persons who opposed adoption of the business rescue plan, at a value independently and expertly determined, on the request of the practitioner, to be a fair and reasonable estimate of the return to that person, or those persons, if the company were to be liquidated.

(2) . . . .'

[20] The two aspects that arise for consideration from a reading of s 153(1)*(b)*(ii) of the Act are – the legislative meaning of the words 'binding offer' – and the remuneration payable. The Bank contends that s 153(1)*(b)*(ii) contemplates an offer that is unconditional and certain as to all the material elements thereof, and that this accords with the general principle that an offer must contain definite terms of performance and be unequivocal, positive and unambiguous. Accordingly, the Bank submits that no proper offer under s 153(1)*(b)*(ii) was made by the Nchite's since the offer was not unconditional and it was uncertain as to all its material terms, because at the Second Meeting of creditors, when the offer was made on behalf of the shareholders for the Bank's voting interests in terms of s 153(1)*(b)*(ii) of the Act, Jordaan stated that he would circulate the binding offer to the parties. However, the Bank maintains that, at that stage, it was not provided with a written offer, and the terms of the offer were not recorded. The Bank accordingly contends that it did not know what the terms of the offer were, the amount that it would be paid, whether or not there were any conditions attaching to the offer, or what the consequences, if any, were for the Bank's claims against Baldwin Nchite under the suretyship.

[21] In particular, the Bank points out that, immediately after the offer was made, a debate followed regarding how payment would be made in terms of the binding offer, and whether payment would be made in instalments or as a lump-sum. In addition, after making the offer, Cawood indicated that a paragraph should be inserted in the Plan which stated that '[t]he amount that will be received by [the Bank] in terms of the binding offer constitutes full and final settlement of their claim'. Accordingly, the Bank argues that there was no clarity given regarding whether this was intended to mean that the offer would extinguish all of the Bank's claims, including those which it has against Baldwin Nchite in his personal capacity under the surety. On this basis, the Bank submits that no proper offer was made under s 153(1)*(b)*(ii) of the Act, and the alleged 'offer' ostensibly made is not binding on the Bank.

The meaning of the term 'binding offer'

[22] Section 153(1)*(b)*(ii) of the Act makes reference to a 'binding offer', but does not define what this term means. The Bank contends that the 'binding offer' envisaged in s 153(1)*(b)*(ii) of the Act, is an offer that is binding on the offeror only (in the nature of an option) and that the offeree is free to accept or reject it. The respondents, however, contend that the 'binding offer' contemplated in s 153(1)*(b)*(ii) is binding on both the offeror and the offeree, such that the offeree is deemed to have accepted the offer once made, and it is of no consequence that the Bank did not accept the 'binding offer' made by the Nchite's.

[23] The statutory context of s 153(1)*(b)*(ii) of the Act is important in construing the meaning of the term 'binding offer'. Section 5 of the Act, in this regard, affords direction on how the provisions of the Act are to be interpreted. It provides:

'(1) This Act must be interpreted and applied in a manner that gives effect to the purpose set out in section 7.
(2) To the extent appropriate, a court interpreting or applying this Act may consider foreign law.
(3) . . . .'

The purposes or objectives of the Act are set out in s 7. Section 7*(k)*, in particular, pertains to business rescue proceedings. It provides:

'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[3].'

The detailed provisions in the Act relating to business rescue must, therefore, be purposively interpreted to give effect to the objective in s 7*(k)* of the Act. In line with this objective, and as an alternative to the liquidation or winding up of

[3] s 7*(k)* of the Act.

a company, the Act in chapter 6 introduces a business rescue system which is aimed at facilitating and rehabilitating a company that is in financial distress. Section 128(1)*(b)* of the Act defines a 'business rescue' as:

'[P]roceedings 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 right 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.'

[24] The approval of the business rescue plan, which must be prepared and implemented by the business rescue practitioner is thus the eventual goal of the business rescue process. The practitioner is required, for this purpose, to prepare the business rescue plan, for consideration and possible adoption at a meeting to be held in terms of s 51 of the Act, after consultation with the creditors, other affected persons as defined in s 128(1)*(a)* of the Act[4], and management of the company[5]. Section 151 of the Act provides for a meeting of creditors, and any other holders of voting interests, to be convened and presided over by the practitioner, within ten days after publishing a business rescue plan, for the purpose of considering the business rescue plan. The business rescue plan must, in meeting the requirements of s 150 of the Act,

[4] s 128(1)*(a)* defines 'affected person', in relation to a company to mean:
'(i) a shareholder or creditor of the company;
(ii) any registered trade union representing employees of the company; and
(iii) if any of the employees of the company are not registered by a registered trade union, each of those employees and their respective representatives'.

[5] s 150(1) of the Act.

contain all the information reasonably required to facilitate the affected persons in deciding whether or not to accept or reject the plan[6].

[25] Section 152 of the Act provides for the process that must be followed before a proposed business rescue plan is preliminarily or finally adopted. If the plan is not approved on a preliminary basis, it is regarded as having been rejected, and may thereafter only be considered in terms of s 153 of the Act[7]. Where the proposed business rescue plan alters the rights of holders of any class of the company's securities, the practitioner must immediately convene a meeting of the holders of the class or classes of securities, and call for a vote by them to approve the adoption of the plan. If the majority of the voting rights exercised by the holders of the company's securities support adoption of the plan, it will be treated as having been finally adopted, subject only to the satisfaction of any conditions on which it is contingent[8]. If, however, the holders of the company's securities oppose adoption of the plan, the plan is treated as rejected and may only be considered further in terms of s 153 of the Act[9].

[26] Section 153 prescribes the process to be followed by the business rescue practitioner or affected persons as defined in s 128(1)*(a)* of the Act, in circumstances where the proposed business rescue plan has been rejected as contemplated in s 152(3)*(a)* or *(c)*(ii)*(bb)* of the Act. If a business rescue plan is rejected the business rescue practitioner may:

(i) Seek a vote of approval from the holders of voting interests to prepare and publish a revised plan; or

(ii) advise the meeting that the company will apply to a court to set aside the result of the vote by the holders of voting interests or shareholders, as the case may be, on the grounds that it was inappropriate[10].

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[6] s 150(2) of the Act.
[7] s 152(1)*(a)* of the Act.
[8] s 152(3)*(c)*(i) and (ii)*(aa)* of the Act.
[9] s 152(3)*(c)*(ii)*(bb)* of the Act.
[10] s 153(1)*(a)*(i) and (ii) of the Act.

If the business rescue practitioner fails to take the steps set out above, then an affected person present at the meeting may:

(i) call for a vote of approval from the holders of voting interests requiring the practitioner to prepare and publish a revised plan; or

(ii) apply to court to set aside the result of the vote by holders of voting interests or shareholders, as the case may be, on the grounds that it was inappropriate; or

(iii) any affected person or combination of affected persons may make a binding offer to purchase the voting interests of one or more persons who opposed adoption of the business rescue plan, at a value independently and expertly determined, on the request of the practitioner, to be a fair and reasonable estimate of the return to that person or those persons, if the company were to be liquidated[11].

[27] In terms of s 153(4) of the Act, if an affected person makes a binding offer contemplated in s 153(1)*(b)*(ii) of the Act, the practitioner must:

(a) adjourn the meeting for no more than five business days, as necessary to afford the practitioner an opportunity to make any necessary revisions to the business rescue plan to appropriately reflect the results of the offer; and

(b) set a date for the resumption of the meeting, without further notice, at which the provisions of s 152 (relating to the consideration of a business rescue plan) and s 153 (relating to the steps that may be taken when there has been a failure to adopt a business rescue plan) will apply afresh.

Section 153(4) makes it clear that once the offer is made, the practitioner must adjourn the meeting for five days in order to make any necessary revisions or amendments to the business rescue plan to appropriately reflect the results of the binding offer. Having effected such amendments to the

[11] s 153(1)*(b)*(ii) of the Act.

business rescue plan, the practitioner must then set a date for the resumption of the meeting of creditors, in terms of s 151 of the Act, for the purpose of considering the plan afresh in terms of s 152 and 153 of the Act. Sections 152 and 153 relating to the publication and consideration of the revised plan will apply as with the original business rescue plan. The revised or amended business rescue plan will be considered afresh by the remaining creditors and shareholders, and they must then vote in support of, or against the adoption of the plan in terms of s 152 of the Act. Where the majority of the voting rights exercised support the adoption of the plan, it will have been finally adopted, subject only to the satisfaction of any conditions on which it is contingent. The company, under the direction of the practitioner, is required in terms of s 152(5) of the Act to take all necessary steps to attempt to satisfy any conditions on which the business rescue plan is contingent; and implement the plan as adopted.

[28] In terms of s 152(4) of the Act, a business rescue plan that has been adopted is binding on the company, on each creditor and on every holder of securities of the company, whether or not that person was present at the meeting, voted in favour of adoption of the plan or, in the case of creditors, had proven their claims against the company. This phenomenon is known as 'cramdown', and it has its origin in chapter 11 of the US Bankruptcy Code, Bankruptcy Reform Act 1978[12]. One of the most notable features of chapter 11 of the US Bankruptcy Reform Act, is its focus on the reorganising of companies that are in financial distress. Under chapter 11, a debtor-in-possession[13] must file a repayment plan with the bankruptcy court and solicit creditors for acceptance and confirmation. If the court accepts and confirms the plan, the debtor will continue to operate and pay its debts in term of the repayment plan. However, where creditors refuse to assent, the Bankruptcy Code provides for the court to confirm the repayment plan despite creditors' objections, provided that the requirements of s 1129*(b)* of the Code are met, essentially permitting the repayment plan to be 'crammed down' upon the

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[12] 11 USC 1978.

[13] In the USA, existing management is left largely in place. This approach is referred to as 'debtor- in- possession' ie the existing management remains in control of the company and its assets during the business rescue process.

dissenting creditors[14]. 'Cramdowm' is therefore indispensable to the successful implementation of a business rescue plan because it effectively binds dissenting creditors of the company and every holder of the company's securities, whether or not that person was present at the meeting convened to approve the adoption of the plan, voted in favour of the adoption of the plan or had proven his or her claims against the company. Since 'cramdown', is a 'process by which creditors are forced to accept a re-organisation or a business rescue plan, even against their wishes',[15] it has the incidental effect of discouraging creditors from resisting or holding out for better treatment, and it enables a business rescue or re-organisation to proceed despite the objections of one or more disgruntled creditors.[16]

[29] Returning then to the interpretation of s 153(1)*(b)*(ii) of the Act, the word 'binding', as it appears before the word 'offer', characterises the nature of the offer which the legislature envisaged under s 153(1)*(b)*(ii) of the Act. Whilst ordinarily an offer is made freely and voluntarily and may be withdrawn at any time before acceptance, s 153(1)*(b)*(ii) describes the offer, contemplated in the section, as 'binding' because once it is made it creates a *vinculum juris* or legal obligation on the part of the offeror and may not be withdrawn. The 'binding offer' envisaged in s 153(1)*(b)*(ii) of the Act is, therefore, not an 'option' or 'agreement' in the contractual sense of the term, but is rather a set of statutory rights and obligations, from which neither party may resile. Thus, the binding offer envisaged in s 153(1)*(b)*(ii) of the Act will be binding on both the offeror and the offeree once made, predominantly to ensure compliance with the procedure to revive a business rescue, and enforce a revised business rescue plan within the framework of s 153(4) of the Act. As alluded to, s 153(4) prescribes a swift and efficient procedure to be accomplished within five days, the purpose of which is to revive the business rescue procedure after rejection of the business rescue plan, by allowing the purchase of a voting interest of one of more persons, who

[14] Daniel R Wong 'Chapter 11 Bankruptcy and Cramdowns: Adopting a Contract Rate Approach' *North Western University Law Review* 106: 1927 (2012) at 1932.
[15] Farouk H I Cassim, Maleka F Cassim, R Cassim, R Jooste, J Shev, J Yeats *Contemporary Company Law*, 2nd Edition, at 907, footnote 209.
[16] Cassim et al at 907.

opposed the adoption of the business rescue plan. Manifestly, the core objective of the binding offer is to enable the adoption of the business rescue plan at the resumed meeting, to be called by the practitioner, in terms of s 153(4)*(b)* of the Act.

[30] The determination of the value of the voting interest, by an independent expert, will only be effected after adoption of the revised business plan on the request of the practitioner, and as prescribed in s 153(1)*(b)*(ii) of the Act. The Act does not require the determination of the value by the independent expert, and payment of the purchase price of the offer to be made in the five day period contemplated in s 153(4)*(a)* of the Act. That period is reserved purely to afford the practitioner the opportunity to make any necessary revisions or amendments to the business rescue plan, to appropriately reflect the results of the offer, and to set a date for a resumed meeting, at which the revised plan will be considered afresh in terms of s 152 of the Act. The resumed meeting must, however, be held within five business days of the date of adjourning the meeting, in terms of s 153(4)*(a)* of the Act, for purposes of making any necessary revisions to the business rescue plan.

[31] If an affected person votes against a business rescue plan, he or she runs the risk of relinquishing his or her voting interest by virtue of the binding offer procedure, in terms of which his or her claim (or shareholder's interest) will be reduced to what he or she might receive if the company were to be liquidated. As soon as the claim has been independently and expertly valued, as contemplated in s 153(1)*(b)*(ii) of the Act, the parties must decide whether the value is accepted or not. If the parties are not in agreement with the value as independently and expertly determined, either the holder of the voting interest or the person acquiring the interest in terms of the binding offer, may apply to court, in terms of s 153(6) of the Act, to re-view, re-appraise, and re-value the determination by the independent expert in terms of s 153(1)*(b)*(ii) of the Act. The Act offers this remedy to both the offeree and the offeror under s 153(1)*(b)*(ii) thereof.

[32] The Bank contends that no valid offer was made by the Nchite's, in terms of s 153(1)*(b)*(ii) of the Act, because the offer was uncertain as to its material terms, and was not accepted by the Bank. I do not agree. As indicated, the binding offer contemplated in s 153(1)*(b)*(ii) of the Act is not a contract or agreement in the nature of an 'option' as contended for by the Bank. It is rather a set of statutory rights and obligations. Once the binding offer is made, it creates a *vinculum juris* (a legal obligation) on the part of the offeror, from which he or she may not withdraw. Simply put, the binding offer contemplated in s 153(1)*(b)*(ii) of the Act is to place any creditor, voting against the adoption of a business rescue plan, in the same or similar position that the creditor would be if the company concerned was to be liquidated. The nature of the binding offer, and its legal effect, is evident from the prescript in s 153(1)*(b)*(ii) of the Act, which requires the value of the offer to purchase the voting interest to be determined by an independent expert, on request of the practitioner, to be a fair and reasonable estimate of the return to that person, or those persons, if the company were to be liquidated. The offeree is, therefore, adequately protected since it cannot receive less than it would receive if the company was to be liquidated.

[33] The binding offer is, therefore, clearly dependant on either the parties acceptance of the value independently and expertly determined, or an order of court as to the value of the offer, which will only become payable after such determination. Significantly, the practitioner would, in any event, not be able to proceed with the implementation of the adopted business rescue plan prior to finalising the payment of the binding offer. Accordingly, should the offeror default in making payment, as determined by an independent expert alternatively a court, then the business rescue plan cannot be implemented, as contemplated in s 154 of the Act, at which stage a creditor will lose the right to enforce any debt owed by the company immediately before the beginning of the business rescue process. Section 154 provides:

'(1) A business rescue plan may provide that, if it is implemented in accordance with its terms and conditions, a creditor who has acceded to the discharge of the whole or part of the debt owing to that creditor will lose the right to enforce the relevant debt or part of it.

(2) If a business rescue plan has been approved and implemented in accordance with this Chapter, a creditor is not entitled to enforce any debt owed by the company immediately before the beginning of the business rescue process, except to the extent provided for in the business rescue plan.'

[34] Implementation of the business rescue plan is conditional upon the offeror meeting its payment obligations as determined by an independent expert, alternatively a court. It is important to bear in mind the dichotomy between the terms 'adopt or approve' and the term 'implement' as used in chapter 6 of the Act in relation to a business rescue plan. Significantly, the 'adoption' of a business rescue plan must be distinguished from its 'implementation'. Although an offeree is divested of his or her voting interest on approval or the adoption of a business rescue plan in terms of s 152 of the Act, the offeree will not lose his or her right to enforce any debt owed by the company immediately before the beginning of the business rescue process, until payment for the purchase of the voting interest is made by the offeror. Thus, should the business rescue plan not be 'implemented' because of non-payment by the offeror, then s 154(2) would become inapplicable and there would be no bar to the offeree, in this case the Bank, proceeding in any manner which it deems fit in order to vindicate its rights including the institution of liquidation proceedings against the company.

[35] Accordingly, it is clear from s 153(1)*(b)*(ii) of the Act that whenever an affected person rejects a business rescue plan, s 153(1)*(b)*(ii) will operate to allow another affected person to make a binding offer to acquire the voting interest of the dissenting voter. The Bank, however, contends that this proposition is fallacious as it presupposes only one offeror, or potential offeror, and only one offeree or potential offeree, and that as soon as it is recognised that there may be one or more affected persons who may potentially make an offer, the potential arises for more than one offer to be made, and for it to be immediately binding – not only on the offeree, but also on all other potential offerors. I consider the Bank's contentions to be without

foundation and completely unsustainable for the following reasons. First, s 153(1)*(b)*(ii) of the Act permits only one binding offer to be made. This much is clear from the words 'any affected person or a combination of affected persons may make a binding offer' used in the section. These words denote a singular offer by either a single affected person or a combination of affected persons. Accordingly, the potential does not arise for more than one binding offer to be made, which is binding on more than one offeror. The construct of s 153(1)*(b)*(ii) does, however, permit an affected person or a combination of affected persons to make a binding offer to purchase the voting interests of one or more persons who opposed the adoption of the business rescue plan.

[36] In the circumstances, on a proper interpretation of s 153(1)*(b)*(ii) of the Act, the 'binding offer' is binding on both the offeror and offeree once made. Accordingly, the binding offer made by the Nchite's to purchase the voting interests of the Bank is binding upon it. The Bank's failure or refusal to accept the binding offer is of no consequence as the offer became binding upon it – the moment it was made.

The constitutional challenge

[37] Having found that the offer contemplated in s153(1)*(b)*(ii) of the Act is binding on both the Nchite's as well as the Bank, I proceed to consider the constitutional challenge to the section as advanced by the Bank. The Bank contends that the interpretation of s 153(1)*(b)*(ii) of the Act advanced by the respondents, and now accepted by the court, violates the Bank's constitutional rights to property, access to court and equality as provided for in s 25, s 34 and s 9 of the Constitution, respectively. I deal with each of these challenges in turn below.

Right to property

[38] Section 25(1) of the Constitution provides that 'no one may be deprived of property except in terms of a law of general application, and no law may permit arbitrary deprivation of property'. The Bank contends that the effect of the respondents reliance on s 153(1)*(b)*(ii) of the Act, in order to justify the final adoption of the Plan which occurred without the consent of the Bank, is

firstly that the Bank was deprived of its right to exercise its creditor's voting right at the Second Meeting of creditors, prior to the Bank having received any value for its voting interest, and secondly that the Bank is deprived of all the rights which it has to claim payment of amounts owed to it by the company (presently or on insolvency), including the rights which it has in the security over the assets of the company under the general notarial bond executed by the company in favour of the Bank. This deprivation, it contends, occurs by virtue of s154 of the Act.

[39] The Bank submits that both the right to exercise a vote at a statutory meeting in business rescue proceedings, and the right to receive payment from a debtor, constitute property rights, and that the deprivation of these rights is arbitrary. The term 'deprived' or 'deprivation' is a broad term that encompassed any interference with the use, enjoyment or exploitation of private property, as against the person having title or right to or in the property concerned.[17] The critical test for the deprivation of property under s 25(1) of the Constitution is whether it is 'arbitrary'. The Constitutional Court in *FNB* v *CSARS*[18] held that a deprivation of property is arbitrary, as contemplated in s 25 of the Constitution, when the 'law' referred to in s 25 (1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair. Sufficient reason is to be established by evaluating the relationship between the means employed, namely the deprivation in question and the ends sought to be achieved, namely the purpose of the law in question. In addition, regards must be had to the relationship between the purpose of the deprivation and the nature of the property, as well as the extent of the deprivation in respect of such property. Generally speaking, when the deprivation in question embraced all the incidents of ownership, the purpose of the deprivation will have to be more compelling than when the deprivation

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[17] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 57 where the Constitutional Court explained the distinction between 'deprivation' and 'expropriation'.
[18] *FNB v CSARS* para 100.

embraces only some incidents of ownership and those incidents only partially.[19]

[40] Section 7*(k)* of the Act specifically 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'. Thus, the 'end sought to be achieved' by the business rescue regime in chapter 6 of the Act is the efficient rescue or rehabilitation of a company that is financially distressed and in doing so, the interests of all stakeholders are to be taken into account. The Bank contends that although this is a legitimate and important legislative purpose, there is no basis to suggest that rescue and rehabilitation is always preferable to liquidation. It contends that whether it is preferable in any particular case will depend on the facts, and this determination requires a weighing up of competing interests.

[41] Implicit in the scheme of business rescue, is that if a business rescue is unsuccessful, business rescue proceedings may be terminated and the company may then be placed under liquidation.This must be contrasted with the means used by s 153 to achieve the objective of business rescue. The Bank, however, argues that if the respondents' interpretation is correct, s 153(1)*(b)*(ii) will give rise to a total deprivation of the 'affected person's' voting interests, and by operation of s 154 it will deprive the 'affected person' of any claims which it has against the company – the extent and value of which may well be substantial.

[42] The Bank contends that given the relative importance of bringing about the rescue and recovery of financially distressed companies (a process which will often have an uncertain outcome), the complete deprivation of the property right is grossly out of proportion to the purpose sought to be achieved, and the deprivation is therefore arbitrary and inconsistent with the purpose of the business rescue – to preserve a company where there is a reasonable prospect of rescuing it in order to realise better outcomes for

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[19] *FNB v CSARS* para 100.

creditors and shareholders, and generally to take account of all relevant interests. The Bank accordingly claims that it has been deprived of all rights which it had to claim payment from the company, including the right which it has in real security over the assets of the company under a general notarial bond. I point out, in this regard, that no allegation is made on the papers that the general notarial bond has been perfected. The Bank is, therefore, not the holder of real security but only of personal security. Upon insolvency, the general notarial bond is considered a preferent claim, and it ranks after all the other preferent creditors.

[43] Importantly, it must also be recognised that the 'property' referred to by the Bank is not property in the conventional sense of the word, such as corporeal moveable property or immovable property. It is rather 'property' in the form of a claim for payment which the Bank has against the company, and the right to exercise a vote at a statutory meeting convened for the purpose of voting on the adoption of a business rescue plan. In order to seek the protection afforded by s 25 of the Constitution, the right of a creditor to claim payment from a debtor, and the right to exercise a vote at a statutory meeting, convened for the purpose of voting on the adoption of a business rescue plan, must constitute 'property' within the meaning of s 25 of the Constitution.

[44] Although s 25 of the Constitution does not define the term 'property', it does not limit its scope to land.[20] The Constitutional Court has cautioned that assigning a comprehensive definition to the term 'property' was neither possible nor wise, and declined to do so.[21] In determining whether the rights of a credit provider, under a credit agreement, 'to recover money paid or goods delivered' constituted 'property' within the meaning of s 25 of the

[20] s 25(4)(b) provides:

'For purposes of this section–
(a) . . . .
(b) property is not limited to land.'

[21] *FNB v CSARS* para 51; *National Credit Regulator v Opperman* 2013 (2) SA 1 (CC) para 60.

Constitution, Van der Westhuizen J stated as follows in *National Credit Regulator v Opperman*[22]:

'This court has not specifically found that personal rights emanating from contract, delict, or enrichment are indeed *property under s 25.* Our constitutional jurisprudence accepts that deprivation of ownership of corporeal property constitutes deprivation for purposes of s 25. Without discussing the specific point, this court has also accepted a trademark to be property albeit incorporeal, deserving protection under s 25. Intellectual property even though incorporeal, is of course different to an enrichment claim. The right to claim restitution on the basis of enrichment is a personal right. It can only be enforced against a specific party or parties, in this case the consumer who received the money. It is not a real right in property like, for example, ownership or a usufruct, enforceable against all. . . .

[62] In *Law Society of South Africa and Others v Minister for Transport and Another*[23], this court was faced with a right which is not universally enforceable, but sourced in the law of obligations. The court assumed, without finding, that a claim for loss of earning capacity or spousal support is property.

[63] In the circumstances of this case, the recognition of the right to restitution of money paid, based on unjustified enrichment, as property under s 25(1) is logical and realistic. It would be in accordance with developments in other jurisdictions where personal rights have been recognised as constitutional property. Intangible property has become important in modern-day society and *property* should not be so narrowly interpreted at to diminish the worth of the protection given by s 25. In *Law Society of South Africa v Minister for Transport* this court stated that "the definition of property for purposes of constitutional protection should not be too wide to make legislative regulation impracticable and not too narrow to render the protection of property of little worth".'

[45] Returning then to the question of whether the rights contended for by the Bank, in the case before us, constitute property within the meaning of s 25 of the Constitution, I am inclined to find that although not real rights

[22] *National Credit Regulator v Opperman* paras 61-63.

[23] *Law Society of South Africa and others v Minister for Transport and another* 2011 (1) SA 400 (CC) para 84.

enforceable against all, a claim for payment and the right to exercise a vote at a statutory meeting convened for the purpose of voting on a business rescue plan, in terms of s 153(1)*(b)*(ii) of the Act, constitute 'property' within the meaning of s 25(1) of the Constitution, as they would be enforceable against specific parties.[24] Although, as yet, not expressly recognised as such by our courts, debts and claims sounding in money have been recognised as 'constitutional property' in most jurisdictions, including by the European Court of Human Rights in *A & B Company v Federal Republic of Germany*[25], where it was held that a debt is property where the applicant can prove the claim. It bears mentioning, in this regard, that the corollary to the purchase or take-over of a voting interest of a creditor who opposes the adoption of the business rescue plan, in terms of s 153(1)*(b)*(ii) of the Act, is compensation in the amount that the offeree would have received upon liquidation of the company. The failure of the offeror to compensate the offeree for the purchase or take-over of the voting interest as envisaged in s 153(1)*(b)*(ii) of the Act would, therefore, entitle the offeree to enforce the debt owing by the company immediately before the beginning of the business rescue process.

[46] Returning to the question of the constitutionality of the impugned provision, s 153(1)*(b)*(ii) of the Act contemplates that the offeree, in this case the Bank, would be compensated an amount (independently and expertly determined) which it would have received upon the liquidation of the company. This naturally must take into account the ranking of the creditor, more specifically whether it is a secured, preferent or concurrent creditor, or a combination of creditors. Therefore, a party whose claim is taken over by a binding offer, contemplated in s 153(1)*(b)*(ii) of the Act, would be in no worse a situation than had the company been liquidated. In fact, in most circumstances such a person would be in a better situation than those creditors who go through the business rescue proceedings, only to find that the company cannot be rehabilitated and is then liquidated, at which point the dividend payable to creditors is substantially less. For these reasons, I am of the view that there is no disproportion between the means adopted in s

[24] AJ van der Walt *Constitutional Property Law* 3rd Edition, 2011, at 151, footnote 249.
[25] *A & B Company v Federal Republic of Germany* [1978] 14 DR 146 (ECHR).

153(1)*(b)*(ii) of the Act and the end which it seeks to achieve, namely that a viable company is afforded the opportunity to proceed with business rescue proceedings, and not be stifled by recalcitrant creditors. Section 153(1)*(b)*(ii) of the Act serves a compelling and legitimate governmental purpose, and the deprivation of the voting interest in the company accompanied by compensation, which is expertly and independently determined, is not arbitrary. Consequently, the Bank's constitutional challenge to s 153(1)*(b)*(ii) of the Act, in terms of s 25 of the Constitution, must fail.

Right to access to court

[47] Section 34 of the Constitution grants every person the right of access to the courts. This right has been held to be 'foundational to the stability of an orderly society' as it 'ensures peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self-help'. Thus, 'very powerful considerations are required for its limitation to be reasonable and justifiable' under s 36 of the Constitution[26].

[48] The Act makes no provision for the review of the decision to take-over the voting interest of a creditor who opposes the adoption of a business rescue plan, in terms of s 153(1)*(b)*(ii) thereof. The Act does, however, in s 153(6) provide the holder or acquirer of a voting interest with the right to apply to a court to review, re-appraise and re-value a determination by an independent expert. The Bank submits that s 153 of the Act is unconstitutional, as it gives effect to the right of access to court only to challenge the valuation and determination of an independent expert, and not the deprivation itself, thus denying the offeree recourse to the courts in respect of the take-over of his or her voting rights in terms of s 153(1)*(b)*(ii) of the Act.

[49] Although it is arguable that s 153 of the Act constitutes a limitation to the Bank's right to access to court, as provided for in s 34 of the Constitution, because it makes no provision for the review of the decision to take over the

[26] *Lesapo v North West Agricultural Bank and another* 1999 (12) BCLR 1420 (CC) para 22.

voting interest of an offeree, I consider the limitation to be reasonable and justifiable in terms of s 36 of the Constitution. A core purpose of the Act in relation to the business rescue regime, as provided for in chapter 6, 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. In line with this objective, the purpose of the 'binding offer' in s 153(1)*(b)*(ii) of the Act is to ensure that business rescue proceedings are not stifled by recalcitrant creditors who wish to resist the business rescue process or hold out for better treatment. It, therefore, enables the business rescue to proceed despite the objections of one or more disgruntled creditors.

[50] The 'binding offer' becomes binding, once made, predominantly to ensure compliance with the swift procedure, to be accomplished within 5 days, to revive the business rescue process, and enforce a revised rescue plan within the framework of s 153(4) of the Act. In this context, a right to review the decision of an affected person to take-over the voting interests of a person opposing the business rescue plan, would tie up the business rescue proceedings, and the adoption of the business rescue plan, in a protracted and lengthy court battle which will serve to undermine the core purpose of business rescue, which 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 shareholders.

[51] It is precisely for this reason that there is a conscious attempt by the legislature, in chapter 6 of the Act, to keep the role of the court in business rescue proceedings to a minimum. Not only does this assist in making the business rescue process cost-effective, but it also allows for the swift and efficient rescue of the company within a period of three months from the start of the proceedings. Notably, s 132(3) of the Act contemplates that the business rescue process should end within three months subject to an extension of time authorized by a court. If a company's business rescue proceedings have not ended within three months of the start of the proceedings, or such longer time as the court, on application by the practitioner, may allow, the practitioner must prepare a report on the progress

of the business rescue proceedings, and update the court at the end of each subsequent month until the end of the proceedings. Hence, the legislative approach to the duration of business rescue proceedings is that it must be swift, efficient and cost-effective.

[52] As alluded to above, the purchase or take-over of the voting interest is coupled with the payment of compensation, determined by an independent expert alternatively a court, in the amount that the offeree would have received if the company went into liquidation. The denial or deprivation of the voting interest does not lie in its buy-out or take-over, but rather in the failure of the offeror to provide fair and reasonable compensation for the buy-out or take-over of that interest. It is precisely for this reason that the Act provides a two-fold safeguard – the first in s 153(6), which enables the holder of the voting interest (or the person acquiring the voting interest) to apply to court to review, re-appraise and re-value a determination by an independent expert in terms of s 153(1)*(b)*(ii) of the Act, and the second in s 154(2) of the Act – in terms of which a creditor is barred from enforcing any debt owed by the company, immediately before the beginning of the business rescue process, once the business rescue plan is approved and implemented. Section 154(2) implicitly contemplates that if the offeror defaults on the obligation to pay for the voting interest, then the revised business plan as adopted or approved, in terms of s 152 of the Act, cannot be implemented, and s 154(2) will have no application. What this, in essence, means is that the offeree may take any steps it deems necessary to enforce its claim against the company, including the institution of liquidation proceeding.

[53] 'Business rescue' as defined in s 128(1)*(b)* of the Act, is intended to facilitate the rehabilitation of a company that is financially distressed by providing, amongst others things, for a temporary moratorium on the rights of claimants against the company. The moratorium, however, only becomes permanent once the plan is approved and implemented – the offeree having received payment for the take-over of its voting interest in the amount that the offeree would have received if the company was liquidated – and the offeree's claim for any debt owed by the company, immediately before the beginning of

the business rescue process, becomes unenforceable, except to the extent provided for in the business rescue plan. Obviously, however, if no payment is received, the adopted plan cannot be implemented, and the moratorium is lifted leaving the creditor with an entitlement to enforce its claim against the company. In the circumstances, it cannot be said that the Bank's right to access to court, in terms of s 34 of the Constitution, is violated by operation of the binding offer made by the Nchite's under s 153(1)*(b)*(ii) of the Act. Accordingly, I find that s 153(1)*(b)*(ii) of the Act does not violate s 34 of the Constitution.

Right to equality

[54] The Bank contends that because the effect of s 153(1)*(b)*(ii) of the Act is that the interests of one affected person are preferred over those of another, it violates the Bank's rights to equality before the law and equal protection and benefit of the law as provided for in s 9(1) of the Constitution. The crux of its argument is that it is deprived of its rights against the company; that the shareholders' voting interests are preferred to its interests; and that there is no discernible justification for this differentiation.

[55] Having regard to the test, as articulated by the Constitutional Court, in *Harksen v Lane*[27], the court must first consider whether s 153(1)*(b)*(ii) of the Act differentiates between people or categories of people. If so, it must proceed to consider whether the differentiation bears a rational connection to a legitimate government purpose. If it does not then there is a violation of s 9(1) of the Constitution. Turning then to the first question, I am of the view that s 153(1)*(b)*(ii) of the Act does not differentiate between people or categories of people. Any affected person or a combination of affected persons, as defined in s 128(1)*(a)* of the Act, may make a binding offer to purchase the voting interests of one or more persons that opposed the adoption of the business rescue. 'Affected person' as defined in s 128(1)*(a)* of the Act includes creditors, shareholders, and employees of a company and, by virtue of s 146*(e)*(ii) of the Act, holders of the company's securities. Although s

[27] *Harksen v Lane* 1998 (1) SA 300 (CC) para 42.

153(1)*(b)*(ii) of the Act may appear to have the effect of preferring or providing an advantage to the one party over the other, that party is not disadvantaged by the purchase of its voting interest because the take-over or purchase of its voting interests occurs against payment of the amount it would have received, had the company been liquidated at that point in time. Thus, no affected person is preferred over another. Accordingly, s 153(1)*(b)*(ii) of the Act is not unconstitutional as it does not differentiate between people, and categories of people, in violation of s 9(1) of the Constitution.

Impeachment of the business rescue proceedings

[56] The Bank seeks, in prayer three of the notice of motion, an order setting aside the approval of the proposed Plan in the business rescue proceedings of the company, which occurred at the Second Meeting of creditors, including setting aside the creditors' vote for the adoption and preliminary approval of the proposed Plan, and the shareholders vote for the adoption and final approval of the proposed Plan. The respondents contend that it is impermissible for the Bank to seek to review the adoption of the Plan, as the Act does not provide it with a remedy to do so.

[57] However, before dealing with this question, I wish to examine the Bank's principal complaint relating to its challenge to the Plan. The Bank's primary complaint is that, by virtue of the payment proposal in the Plan, the Bank will be paid 21 cents in the Rand over a period of 100 months, and the Plan would leave the Bank considerably worse off than it would be upon the liquidation of the company because, on liquidation, the proceeds of a forced sale of the rescued assets would have been paid to the Bank relatively speedily after the sale. The Bank maintains, in this regard, that on the basis of the payment proposal in the Plan, not only must the Bank wait more than eight years, but there is also no provision for any guarantee to secure these future payments.

[58] I consider this contention to be manifestly unfounded as the Bank wholly misconstrues the nature of the amended Plan, and seeks to rely on the

un-amended one, instead. It is apparent from the minutes of the Second Meeting of creditors, held on 26 March 2012, that after the Nchite's made the binding offer to purchase the Bank's voting interests in terms of s 153(1)*(b)*(ii) of the Act the payment proposal, that the Bank would receive 21 cents in the Rand over a period of 100 months, was amended by Jordaan to reflect that: the voting interest of the Bank (ABCD) was amended to zero per cent; the voting interests of the shareholders (the Nchite's) was amended to 95 per cent; the Bank was removed from the proposed repayment plan; and 'the amount receivable in terms of the binding offer would serve as settlement of the claim against the company'. It was this 'revised' Plan that was considered afresh and ultimately adopted by the Nchite's, in terms of s 152 of the Act, at the resumed meeting of creditors held in terms of s 153(4) of the Act. Hence, 'the original Plan' which proposed that the Bank will get paid 21 cents in the Rand over a period of 100 months was replaced with the revised Plan, which was finally adopted by the Nchite's.

[59] Returning to the question of whether it is permissible for the Bank to challenge the adoption of the Plan, it is clear from a reading of chapter 6 of the Act that it does not provide a remedy to an affected person to challenge the approval and adoption of a proposed business rescue plan, regardless of whether such approval and adoption is preliminary or final. The adoption of a business rescue plan, in terms of s 152 of the Act, is pivotal to the business rescue process. Once adopted, the practitioner is required to manage and conduct the affairs of the company in accordance with the plan. The practitioner is responsible for the implementation of the business rescue plan, and this task is not left to some other authority. Nor, for that matter, is there any need for court approval of the business rescue plan. Accordingly, once adopted or approved in terms of s 152 of the Act, a business rescue plan forms the foundation of the business rescue proceedings, to which all the affected persons are bound. It is binding on the company, on each creditor and on every holder of securities of the company whether or not that person was present at the meeting, voted in favour of adoption of the plan or in the case of creditors, had proven their claims against the company. What occurs is a process of 'cramdown' – in terms of which creditors are forced to accept a

business rescue plan, even against their wishes – thus enabling the business rescue to proceed despite objections by disgruntled creditors. It is with this object in mind that the legislature saw fit not to provide a disgruntled party with a judicial remedy to seek to set aside the adoption of a business rescue plan. It is, therefore not open to any 'affected person' after the plan has been adopted, to seek to set it aside. Nor is it permissible for an 'affected person' to seek to set aside the proceedings of the second meeting of creditors, in terms of which a business plan is adopted. Accordingly, the relief sought by the Bank, in prayer three of the notice of motion, to set aside the business rescue plan which was adopted by the Nchite's at the resumed meeting of creditors, is incompetent and falls to be dismissed.

[60] The Bank seeks in prayer four of the notice of motion an order setting aside the Resolution of the company commencing business rescue proceedings, in terms of s 129 of the Act. Alternatively, and in the event that the court does not set aside the resolution, the Bank seeks an order setting aside the appointment of Jordaan as the practitioner in the business rescue proceedings of the company, in terms of section 130(1)*(b)*(ii) read with s 139 of the Act.

[61] Section 130 of the Act makes provision for the grounds on which a resolution commencing business rescue proceedings in terms of s 129 of the Act, and the appointment of the business rescue practitioner may be set aside by a court. It provides:

'(1) Subject to subsection (2), at any time after the adoption of a resolution in terms of section 129, until the adoption of a business rescue plan in terms of section 152, an affected person may apply to a court for an order –

(a) setting aside the resolution, on the grounds that –

(i) there is no reasonable basis for believing that the company is financially distressed;

(ii) there is no reasonable prospect for rescuing the company;

(iii) the company has failed to satisfy the procedural requirements set out in section 129;

(*b*) setting aside the appointment of the practitioner, on the grounds that the practitioner –

(*i*) does not satisfy the requirements of section 138;

(*ii*) is not independent of the company or its management; or

(*iii*) lacks the necessary skills, having regard to the company's circumstances; or

(*c*) requiring the practitioner to provide security in an amount and on terms and conditions that the court considers necessary to secure the interests of the company and any affected persons.

. . . .'

Section 130 of the Act must be read together with s 139 which provides as follows:

'Removal and replacement of a practitioner -

(1) A practitioner may be removed only-

(*a*) by a court order in terms of section 130; or

(*b*) as provided for in this section.

(2) Upon request of an affected person, or on its own motion, the court may remove a practitioner from office on any of the following grounds:

(*a*) Incompetence or failure to perform the duties of a business rescue practitioner of the particular company;

(*b*) failure to exercise the proper degree of care in the performance of the practitioner's functions;

(*c*) engaging in illegal acts or conduct;

(*d*) if the practitioner no longer satisfies the requirements set out in section 138(1);

(*e*) conflict of interest or lack of independence; or

(*f*) the practitioner is incapacitated and unable to perform the functions of that office, and is unlikely to regain that capacity within a reasonable time.

. . . .'

[62] In terms of s 130 of the Act, any time after the adoption of a board resolution commencing the proceedings until a business rescue plan is adopted, an affected person may apply to court for an order to set aside the

resolution or to set aside the appointment of the business rescue practitioner. However, after the adoption of the business rescue plan, an affected person is not entitled to apply to court for an order setting aside the board resolution commencing business rescue proceedings or an order setting aside the appointment of the practitioner. The Plan was adopted by the Nchite's on 26 March 2012. It is accordingly impermissible for the Bank, in these proceedings, to seek an order setting aside the Resolution and the appointment of the practitioner after the adoption of the Plan.

[63] The Bank was entitled to invoke the provisions of s 130 of the Act prior to the adoption of the Plan at the (resumed) meeting of the creditors to consider the Plan afresh in terms of s 152 of the Act. However, when pressed by the court to provide a reason for not invoking the provisions of s 130 of the Act to set aside the business rescue proceedings, prior to the adoption of the Plan, the Bank's response was that it considered it unnecessary to invoke the provisions of s 130 of the Act to set aside the business rescue proceedings, because the Bank had made an election to use its creditor's muscle at the Second Meeting of creditors. That election, of course, was made upon advice received and, in my view – at its own peril – as the Bank had to have been alive to the provisions of s 153(1)*(b)*(ii) of the Act, and its implications.

[64] Soon after the First Meeting of creditors, the Bank's attorneys had launched an attack on the veracity of the proceedings through lengthy correspondence directed at Jordaan, in which they threatened to launch an application in terms of s 130 read with s 139 of the Act, but the Bank simply never did so. It does not, in my view, befit the Bank, belatedly, to seek to obtain relief under s 130 of the Act, when it had every opportunity to do so prior to the adoption of the Plan. That the Bank had access to the Plan ten days prior to the Second Meeting of creditors cannot simply be ignored.[28] Hence, the contention that the Bank was unable to assert its rights properly, during the period from the resolution to commence business rescue proceedings to the adoption of the Plan, is profoundly unfounded.

[28] In terms of s 151 of the Act, the second meeting of creditors to consider the plan must be held within ten days after the publication of the plan by the business rescue practitioner.

Accordingly, the relief sought by the Bank in prayers four and five of the notice of motion is not competent and falls to be dismissed.

Declarator relating to sureties

[65] In terms of the arbitration awards and his suretyship, Baldwin Nchite is liable jointly and severally with the company for the payment of the company's indebtedness to the Bank. Under the arbitration appeal award, Birgitta Nchite's liability to the Bank under her suretyship was discharged. The company and the Nchite's have launched an application in terms of which they seek to have the arbitration awards set aside. If they succeed in doing so, the full extent of the Bank's claim as formulated in its original particulars of claim will revive, and the Bank's claim against the Nchite's will be based on their respective suretyships.

[66] In terms of the suretyships, the Nchite's are sureties and co-principal debtors for the payments of all sums of money owing by the company to the Bank. The suretyships specifically provide that the Bank's claim against the Nchite's will not, in any way, be affected by any compromise of the Bank's claim against the principal debtor (the company), whether this is caused by 'insolvency, judicial management or liquidation, as the case may be'.

[67] The Bank maintains that the fact that the company was placed under business rescue cannot deprive it of its right to pursue the sureties under the suretyships. Jordaan and the Nchite's, no doubt, have expressed the contrary view. At the Second Meeting of creditors, the Nchites' attorney indicated that the binding offer made by his client was in full and final settlement of the Bank's claim. Jordaan confirmed this at the meeting. In his answering affidavit, Baldwin Nchite states that the Bank's claim 'in terms of the sureties stands to be decided upon the agreements themselves, as well as the status of the business rescue proceedings at the time such actions are instituted'. The Bank, accordingly, seeks a declaratory order to the effect that the adoption of a business rescue plan, in respect of a company placed under business rescue, will not affect the rights which a creditor has under

suretyships executed in favour of the creditor, for the payment of amounts owed by the company placed under business rescue.

[68] There is no express provision contained in chapter 6 of the Act which provides that the adoption of a business rescue plan will deprive creditors of the company in the business rescue, of their rights as against sureties for the debts of the company in business rescue. The effect of such a provision, in my view, would be drastic as it would deprive a creditor of its rights as against a third party (surety) simply by virtue of the adoption of a business rescue plan for the debtor. If the legislature intended that the adoption of a business rescue plan would have such a far reaching consequence, the legislature would have expressly provided for this consequence.

[69] There is, furthermore, no basis to suggest that such a provision could be read into the business rescue regime.[29] As already explained, the express purpose of business rescue is to 'provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the right and interests of all relevant stakeholders'. The emphasis of the business rescue regime is therefore on the company in financial distress, and the relevant stakeholders. There need be no connection between a surety and either the company in financial distress or the stakeholders and, whether or not a creditor is entitled to pursue a surety will, in the ordinary course, have no bearing on the prospects of rescuing a company.

[70] I am, therefore, of the view that the interests of sureties do not fall within the scope of the objective of the business rescue regime. This is clear from the provisions of s 133(1) of the Act, which provides that during the course of business rescue proceedings no legal proceedings, including enforcement action against the company, or in relation to any property belonging to it or in its possession, may be commenced or proceeded with, except under certain circumstances. Section 133(2) provides that during business rescue proceedings, a surety by a company in favour of any other

[29] *Investec Bank Ltd v Andre Bruyns* (2011) JDR 1563 (WCC).

person may not be enforced by any person against the company, except with the leave of the court. In *Investec Bank Ltd v Andre Bruyns,* the question for determination was whether s 133(2) of the Act should be interpreted as providing that during business rescue proceedings, a suretyship given by A in favour of B for the indebtedness of the company may not be enforced by B against A without the court's leave. Rogers AJ (as he then was) held that the section explicitly referred to the stay of a suretyship undertaken by the company, and not to a suretyship undertaken by a third person for the indebtedness of the company. He also held that the statutory moratorium in s 133(1) on claims against the company under business rescue was a defence purely personal to the principal debtor, namely the company, and could not be raised by the surety.[30] It follows that the statutory moratorium in s 133 of the Act does not have the effect of suspending the indebtedness of any surety to the company placed under business rescue.

[71] Thus, the moratorium provided for in section 133 is directed exclusively at protecting the interests of the company in business rescue. By parity of reasoning, if the legislation does not suspend the indebtedness of a surety pending the outcome of the business rescue proceedings, it is difficult to see how it could deprive entirely a creditor of its rights against a surety. In the circumstances, it is clear that the adoption of the Plan will not affect the Bank's claim against Baldwin Nchite as surety for the debts of the company.

[72] The Bank is, accordingly, entitled to the declaratory relief which it seeks in prayer six of the notice of motion putting an end to this dispute. However, at the hearing of the matter, the first to fourth respondents conceded the relief sought by the Bank in prayer six of the notice of motion. They thus urged me not to grant the relief sought by the Bank in this regard, because there was no longer a dispute to be resolved. Whilst this may be the case, I cannot ignore the fact that the relief sought in prayer six of the notice of motion was strenuously opposed until the hearing of argument in this

[30] *Investec Bank v Andre Bruyns* paras 14 -19.

matter. For this reason, I consider the Bank to be entitled to the relief which it seeks in prayer six of the notice of motion.

[73] In the result, I make the following order:

(1) The Applicant is granted leave, in terms of s 133 of the Companies Act 71 of 2008, to commence and proceed with the application against the First Respondent.

(2) The relief sought by the Applicant in prayers two to five of the notice of motion is dismissed with costs including the costs consequent upon the employment of two counsel.

(3) It is declared that neither the adoption of the business rescue plan in respect of the First Respondent, under chapter 6 of the Companies Act 71 of 2008, nor the binding offer made on 26 March 2012 at the second meeting of creditors by the Third and Fourth Respondents, in terms of s 153(1)*(b)*(ii) of the Companies Act 71 of 2008, to purchase the voting interest of the Applicant affect the rights, which the Applicant has to recover monies from the Third Respondent under the deed of surety, executed by the First Respondent, in favour of the Applicant for any indebtedness owed by the First Respondent to the Applicant.

F KATHREE-SETILOANE
JUDGE OF THE NORTH AND SOUTH GAUTENG HIGH COURTS
PRETORIA

APPEARANCES

APPLICANT: B E Leech SC (with him A W T Rowan)
Instructed by Norton Rose Fulbright South Africa

FIRST AND SECOND

RESPONDENTS:	C E Puckrin SC (with him M A Badenhorst SC) Instructed by Jordaan Attorneys
THIRD AND FOURTH RESPONDENTS:	L K van der Merwe Instructed by Cawood Attorneys
FIFTH RESPONDENT:	C E Puckrin SC (with J Janse van Rensburg) Instructed by the State Attorney, Pretoria
Date of Hearing:	3 and 4 June 2013
Date of Judgment:	29 August 2013