

REPORTABLE

IN HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 3878/2013

In the matter between:

DH BROTHERS INDUSTRIES (PTY) LTD

Applicant

and

KARL JOHANNES GRIBNITZ NO

First Respondent

DOWMONT SNACKS (PTY) LTD

Second Respondent

THE COMPANIES & INTELLECTUAL

PROPERTY COMMISSION

Third Respondent

JUDGMENT

GORVEN J

[1] Goods and services are the lifeblood of an economy. Business entities, in providing goods and services, generate this lifeblood. Regulatory provisions are geared to assist the lifeblood to flow as efficiently as possible. Companies are the main business entities which provide the goods and services in the South African economy. The Companies Act 71 of 2008 (the Act) regulates Companies. It deals with how they come into existence, how they function, how they can be revived when distressed and how they demise. How they are revived is regulated

by the provisions in Chapter 6 of the Act concerning business rescue (business rescue proceedings). This is a new feature of South African Company Law. It replaces the failed system of Judicial Management which was provided for in the Companies Act 61 of 1973 (the 1973 Act). Unfortunately, a number of the business rescue provisions in the Act are less than clear. Some of these have surfaced in this application.

[2] A basic history is necessary. A resolution dated 16 November 2012 was filed with the third respondent on 22 November 2012, placing the second respondent (Dowmont) under business rescue. At the time, there were two directors of Dowmont. The applicant is a creditor of Dowmont arising from sales concluded between September and November 2012 totalling R3 420 696.30. No payment emerged. The directors stood surety for the due performance of Dowmont's obligations to the applicant. In the affidavit by one of the directors furnished in support of the resolution, it was stated that Dowmont was solvent but illiquid. It owed more than R30m to its creditors and would not be able to pay them as the amounts became due and payable within the next six months. The current value of the assets exceeded the value of the liabilities 'based on the director's valuation'.

[3] The first respondent (Mr Gribnitz) was appointed as business rescue practitioner on 16 November 2012. It is common cause that a business rescue plan (a plan or the plan) was not published within 25 business days of his appointment as is required under s 150(5) of the Act. He sent circular letters by email to creditors on a number of occasions requesting an extension of time to publish a plan. No response was invited or received, either positive or negative. A plan was eventually published on 25 March 2013. A meeting was convened for 3 April 2013 to consider it.

On that date, one of the creditors objected to the notice given and the meeting was accordingly adjourned to 10 April 2013.

[4] Between 3 and 10 April 2013 the applicant launched the present application under s 130(1)(a) to set aside the resolution. At the meeting of 10 April 2013, those present were advised that this had taken place. Mr Gribnitz stated that he would adjourn the meeting so as to table a revised plan which would increase the dividend payable to concurrent creditors. No formal vote was taken for preliminary approval of the plan or to adjourn the meeting. An amended plan was published by email on 11 April 2013. On 19 April 2013 the plan (as amended) was voted upon. The requisite 75% support of those who voted was not achieved.¹

[5] After the vote, an employee of Dowmont, Ms Eveleigh, indicated that she was making a binding offer in terms of s 153(1)(b)(ii) of the Act. It was accepted by the applicant that the binding offer was for the voting interests of all creditors who had opposed the adoption of the plan (the opposing creditors). I shall assume that this was the case although the transcript of the meeting does not make this clear. The offer made was 'at the liquidation rate or R100 whichever is the highest'. Mr Gribnitz purported to accept the offer and advised the meeting that he would adjourn for five business days and request a value independently and expertly determined as to the liquidation dividend which would accrue to the opposing creditors. He thereafter appointed Mr Klein to do so. He also made variations to the plan in a way that he believed appropriately reflected 'the results of the offer'.²

¹ Section 152(2)(a) requires this percentage.

² This is envisaged in s 153(4)(a).

[6] The adjourned meeting was held on 25 April 2013. It was, to say the least, a stormy meeting. Mr Gribnitz reported on the valuation of Mr Klein. The material part of the report stated that 'subject to the information provided to us being accurate...no dividend will become payable to the concurrent creditors' in the event of Dowmont being liquidated. Since R100 was higher than the likely dividend, Mr Gribnitz then offered R100 to each of the seven opposing concurrent creditors whose claims totalled over R12m. All of them rejected the offer. Mr Gribnitz ruled that Ms Eveleigh now owned the claims of all the opposing concurrent creditors. The revision to the plan made prior to the meeting reflected Ms Eveleigh as owner of the claims of the opposing creditors. A vote was then taken on the basis that Ms Eveleigh had acquired the voting interests of the opposing creditors. The plan received support from 98% of those who voted. Mr Gribnitz ruled that the plan had been approved. Without the votes of the opposing creditors exercised by Ms Eveleigh, it is common cause that the plan would not have received the requisite support. The opposing creditors were not allowed to vote.

[7] The founding papers were supplemented after that meeting. The relief now sought by the applicant is the following:³

- 'a. That leave be granted to the Applicant to institute this application in terms of s 133(1)(b) of the Companies Act, 2008 (Act 71 of 2008)... and to proceed therewith.
- b. That the resolution of the board of directors of the Second Respondent in terms of s 129 of the Companies Act, adopted on 16 November 2012, placing the Second Respondent under supervision by a business rescue practitioner, which resolution was filed with the Third Respondent on 22 November 2012, be and is hereby set aside in terms of s 130(1)(a)(ii) read with s 130(5)(a)(i) alternatively (ii) of the Companies Act.

³ Certain of the relief initially sought was not persisted in at the hearing of the application.

- c.
- (i) That the appointment of the First Respondent as a business rescue practitioner for the Second Respondent be set aside;
 - (ii) It is declared that the offer purported to have been made by Trish Wilma Suzanne Eveleigh in terms of s 153(1)(b)(ii) of the Companies Act did not result in the acquisition by her of the applicant's voting interest, and of the voting interests of the other dissenting and opposing creditors, which she purported to exercise in favour of the business rescue plan proposed in respect of the second respondent by the first respondent.
 - (iii) It is declared that the business rescue plan proposed in respect of the second respondent by the first respondent was not one contemplated by Parts A to B of Chapter 6 of the Companies Act, as it unlawfully incorporated a provision that all creditors, including those who opposed the approval of the plan, must cede a portion of their claims to a third party.
 - (iv) It is declared that the offer which the said Eveleigh purported to make in terms of s 153(1)(b)(ii) was not one which fell within the ambit of the provision as it purported to be made for the acquisition of the affected creditors' claims, as opposed to the voting interests.
 - (v) the purported approval by the requisite majority of the creditors of the Second Respondent, of the business rescue plan proposed by the First Respondent, at the meeting of creditors of the Second Respondent, on 25 April 2013, be and is hereby reviewed and set aside.
- d. That the business rescue proceedings in respect of the Second Respondent be converted to liquidation proceedings in terms of s 132(2)(a)(ii) of the Companies Act.
- e. That the costs of the application be part of the costs of administration of the Second Respondent in the said winding up.'

The usual prayers which accompany a provisional liquidation order relating to service and publication were sought as was a prayer directing the relevant Master to appoint a provisional liquidator forthwith.

[8] The third respondent has not opposed the application. I will refer to the first and second respondents simply as the respondents when dealing with them together. The respondents oppose the relief referred to in prayer a. above only on the basis that the balance of the application should be refused. The relief in the rest of the prayers is opposed by the respondents.

[9] The first aspect of the substantive relief sought is the setting aside of the resolution. It is sought on the basis of s 130(1)(a) read with s 130(5)(a). The former entitles an affected person⁴ to bring an application to set aside a resolution. The latter entitles a court to grant such an application. It is accepted that the procedural requirement that the application be launched before a plan has been adopted was met.

[10] This, and further points in this application, requires the interpretation of aspects of Chapter 6 of the Act. This Chapter has its own definitions section in s 128 concerning terms used relating to business rescue and compromises. Section 5 of the Act enjoins courts to interpret and apply the Act in a way which gives effect to the purposes set out in s 7.⁵ It also entitles courts, to the extent appropriate, to consider foreign company law in interpreting and applying the Act.⁶ Section 7, in its turn, lists a wide range of purposes, including the promotion of compliance with the Bill of Rights as provided for in the Constitution.⁷ I respectfully agree

⁴ Defined in s 128(1)(a) as a shareholder, creditor and registered trade union which represents employees of a company. Those individual employees not so represented, or their representatives, are also defined as affected persons.

⁵Section 5(1).

⁶Section 5(2). A succinct and useful summary of the approach to interpretation is contained in *Nedbank Ltd v Bestvest 153 (Pty) Ltd; Essa & another v Bestvest 153 (Pty) Ltd & others* 2012 (5) SA 497 (WCC) paras 18-26.

⁷Section 7(a). The other purposes are to:

‘(b) promote the development of the South African economy by-
 (i) encouraging entrepreneurship and enterprise efficiency;
 (ii) creating flexibility and simplicity in the formation and maintenance of companies; and

that the Chapter as a whole reflects ‘a legislative preference for proceedings aimed at the restoration of viable companies rather than their destruction’⁸ but only of viable companies, not of all companies placed under business rescue.

[11] Three grounds are provided in s 130(1)(a) on which an application can be based to set aside a resolution. The first is that there is no reasonable basis for believing that the company is financially distressed. The second is that there is no reasonable prospect for rescuing the company. The third is that the company has failed to satisfy the procedural requirements set out in s 129.

[12] Each of these grounds is to be evaluated at the time of considering the application, rather than at the time the resolution was taken. This is because the first two grounds are framed in the present tense and the third ground is based on procedural requirements. The procedural requirements relate mostly to actions to be taken after the date of the resolution within

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- (iii) encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation;
 - (c) promote innovation and investment in the South African markets;
 - (d) reaffirm the concept of the company as a means of achieving economic and social benefits;
 - (e) continue to provide for the creation and use of companies, in a manner that enhances the economic welfare of South Africa as a partner within the global economy;
 - (f) promote the development of companies within all sectors of the economy, and encourage active participation in economic organisation, management and productivity;
 - (g) create optimum conditions for the aggregation of capital for productive purposes, and for the investment of that capital in enterprises and the spreading of economic risk;
 - (h) provide for the formation, operation and accountability of non-profit companies in a manner designed to promote, support and enhance the capacity of such companies to perform their functions;
 - (i) balance the rights and obligations of shareholders and directors within companies;
 - (j) encourage the efficient and responsible management of companies;
 - (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; and
 - (l) provide a predictable and effective environment for the efficient regulation of companies.’

⁸ Per Rogers AJ in *Cape Point Vineyards (Pty Ltd v Pinnacle Point Group Ltd & another (Advantage Projects Managers (Pty) Ltd Intervening)* 2011 (5) SA 600 (WCC) at 603E-F.

specified time periods. These include filing the resolution,⁹ publishing the resolution to affected persons,¹⁰ appointing a business rescue practitioner,¹¹ filing a notice of such appointment¹² and publishing a copy of the appointment to each affected person.¹³ The application is therefore not based on whether there was an adequate basis to take the resolution at the time it was taken.

[13] The resolution to begin voluntary business rescue proceedings may be taken only if the board of directors has reasonable grounds to believe that the company is financially distressed and that there appears to be a reasonable prospect of rescuing the company.¹⁴ Both are required in order for the resolution to comply. Clarity has now been given as to what is meant by the requirement that there is a reasonable prospect of rescue in the similarly worded requirement to that effect for an application to court brought in terms of s 131.¹⁵ It is common cause that Dowmont was, and is, financially distressed. In the somewhat unusual circumstances of this application, the business rescue plan has now been published. The applicant submitted that the plan does not comply with one envisaged for business rescue proceedings for reasons which shall be dealt with later. Apart from this contention, it was conceded by the applicant that, if it is competent to adopt it and it is in fact adopted, the plan would form the basis for concluding that there is a reasonable prospect for rescuing Dowmont.

⁹ Section 129(2)(b).

¹⁰ Section 129(3)(a) gives five business days after adoption and filing of the resolution.

¹¹ Section 129(3)(b) gives the same time limit and requires this person to satisfy the requirements of s 138 and to have consented in writing to the appointment.

¹² Section 129(4)(a) - this must be done within two business days after making the appointment.

¹³ Section 129(4)(b) - this must be done within five business days after filing the notice of appointment.

¹⁴ Section 129(1).

¹⁵ *Oakdene Square Properties (Pty) Ltd & others v Farm Bothasfontein (Kyalami) (Pty) Ltd & others* 2013 (4) SA 539 (SCA) held, at para 29, that a 'reasonable prospect' is less than a 'reasonable probability' but more than a 'mere speculative suggestion'. It must be 'a prospect based on reasonable grounds'.

[14] The court is empowered to grant such an application by s 130(5)(a), which provides as follows:

‘(5) When considering an application in terms of subsection (1)(a) to set aside the company’s resolution, the court may -

- (a) set aside the resolution –
 - (i) on any grounds set out in subsection (1); or
 - (ii) if, having regard to all of the evidence, the court considers that it is otherwise just and equitable to do so...’

There are two bases relied on by the applicant for the court to set aside the resolution. The first is a failure to satisfy the procedural requirements set out in s 129.¹⁶ In this regard, the applicant submits that the resolution was not taken by the board of directors of Dowmont as envisaged in this section. The second basis is that it is just and equitable to set aside the resolution.¹⁷

[15] For the first point, the applicant refers to the resolution and accompanying affidavit deposed to by Mr Kelly. The first such document is headed ‘Minutes of a Resolution passed by the Sole Director of Dowmont Snacks (Pty) Limited Registration Number 2004/019894/07 on 16 November 2012 at New Germany, KwaZulu-Natal’. Above the resolutions recorded in the document, it states, ‘Therefore the following resolutions have been passed by the director’. At the foot of the document is a place for two directors to sign the document. There are marks above both of those places. The affidavit deposed to by Mr Kelly in support of the resolution is the second document referred to by the applicant. In it, he states that he is the financial director and one of the shareholders of

¹⁶ Section 130(5)(a)(i).

¹⁷ Section 130(5)(a)(ii).

Dowmont. Towards the end of the affidavit he says, 'therefore the following resolutions have been passed by me as director...'.Hethereafter lists the same two resolutions; one to place Dowmont in business rescue proceedings and one to appoint Mr Gribnitz as business rescue practitioner.

[16] The applicant took the point that only one of the two directors passed the resolution whereas the Act requires a majority of directors to have done so. Mr Gribnitz, who is the only person who has deposed to an affidavit opposing the application, stated that both of the directors had signed the resolution. He did not claim to have been present when the resolution was signed and neither of the directors deposed to an affidavit. The only admissible evidence as to who passed the resolution is that given by Mr Kelly in his affidavit of 16 November 2012 where he positively stated that the resolutions in question were passed by him. No mention is made of any other directors having passed them. It may be, as was asserted by Mr Gribnitz, that the mark above the second position for a director to sign is that of the other director. On the papers as they stand, therefore, this amounts to mere speculation. The plain wording of the document in question, however, styles it as a resolution passed by the sole director and states that the resolutions were passed by 'the director'. This is also what is affirmed on oath by Mr Kelly. It seems to me, accordingly, that it has not been established by Dowmont that a resolution which complies with s 129(1) of the Act was passed. This brings the matter within the ambit of a failure to satisfy the procedural requirements of s 129. That is effectively the end of the matter and the applicant has accordingly made out a case for the resolution to be set aside.

[17] I was urged to deal with the further grounds raised by the applicant for the relief sought. In case I am wrong on the above point, it is

appropriate to accede to this request. The second ground for setting aside the resolution relies on the just and equitable provision of s 130(5)(a)(ii). It must initially be determined on what grounds such an application can be brought. In an application, the notice of motion and founding affidavit, together with its annexures, constitute pleadings and evidence which must justify the grant of the relief sought.¹⁸ Therefore, in the founding affidavit, the applicant must set out facts that are sufficient to disclose the cause of action relied on and evidence establishing that cause of action.¹⁹ Section 130(1)(a) gives to an affected person seeking to approach a court to set aside a resolution only three grounds, or causes of action, on which to base the application. In contrast to this, s 130(5)(a)(ii) empowers a court hearing an application brought under s 130(1)(a) to set aside a resolution on those three grounds but, in addition, to do so 'if, having regard to all of the evidence, the court considers that it is otherwise just and equitable to do so'. On the face of it, the court is empowered to set aside a resolution on four grounds but an applicant is only entitled to base an application on one or more of three grounds. In other words, an application cannot be based on this fourth ground because the application then would not qualify as one brought in terms of s 130(1)(a). The court is only entitled to grant relief in respect of an application brought in terms of s 130(1)(a).

[18] This gives rise to an anomaly. Relief can be granted by the court on a cause of action which cannot be relied on by an applicant. It is no answer to say that, despite the application only being founded on one of the three grounds in s 130(1)(a), the court can invoke the just and equitable ground

¹⁸*Member of the Executive Council for Education in Gauteng Province & others v Governing Body of the Rivonia Primary School & others* [2013] ZACC 34 para 93; *Absa Bank Ltd v Kernsig 17 (Pty) Ltd* 2011 (4) SA 492 (SCA) para 23; *Louw and Others v Nel* 2011 (2) SA 172 (SCA) para 17.

¹⁹*MEC for Education, supra*, para 93; *Skjelbreds Rederi A/S and Others v Hartless (Pty) Ltd* 1982 (2) SA 739 (W).

in granting relief. This would mean that a respondent, brought to court on one of three bases and who founds her or his opposition on the pleadings and adduces no evidence concerning whether it is just and equitable to set aside the resolution, runs the risk of an adverse finding despite not being called upon to meet that cause of action. Conversely, if the applicant was to deal with the just and equitable basis in the application, a respondent would ordinarily be entitled to have that matter struck out as irrelevant. If the court could base a finding on the just and equitable ground, a respondent would be prejudiced. This cannot be what was envisaged by the legislature. Despite the need to interpret a statute using the plain words, the distinction between s 130(1)(a) and s 130(5)(a) clearly arises from a drafting error. In this regard, it was held in *Hatch v Koopoomal* that:

‘If, examining results, you find absurdity or repugnance of a kind, which, from a study of the enactment as a whole, you conclude the Legislature never could have intended, then you are entitled so to interpret the enactment as to remove the absurdity or repugnance and give effect to the intention of the Legislature.’²⁰

This approach also accords with the dictum of Wallis JA in the recently decided matter of *Natal Joint Municipal Pension Fund v Endumeni Municipality* to the following effect:²¹

‘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 only sensible meaning which avoids the absurdity which would otherwise result is to construe the just and equitable basis as an additional ground to the three listed in s 130(1)(a).²² This can therefore be relied on as

²⁰ 1936 AD 190 at 209.

²¹ 2012 (4) SA 593 (SCA) para 18.

²² I might mention that I have found no corresponding provisions in the United Kingdom, Australian, German or United States of America (USA) company law which might assist in construing this section.

a fourth ground or cause of action for relief in an application brought under that section.

[19] Before reaching a conclusion on the just and equitable basis, it is necessary to evaluate all the evidence. It is accordingly desirable to determine whether the plan was adopted and consider other evidence, including the terms of the plan. I shall revert to the just and equitable basis after doing so.

[20] The applicant submitted that the plan has not been adopted, but rejected. It said so for at least three reasons. First, the time within which to publish the plan elapsed and was not extended. Secondly, at the meeting convened to consider the plan on 10 April 2013, it was not approved on a preliminary or final basis and neither was a vote taken to direct Mr Gribnitz to adjourn the meeting in order to revise the plan for further consideration. Thirdly, at the meeting of 25 April 2013 at which Mr Gribnitz announced that the plan had been adopted, opposing creditors were not allowed to vote. Their voting interests were incorrectly regarded as having been acquired by Ms Eveleigh. The vote envisaged in s 152 was thus not taken and the requisite level of support not achieved. I shall deal with each of these submissions in turn.

[21] The first question is whether the time within which to publish the plan elapsed without being extended.²³ Section 150(5)(b) of the Act requires a company to publish a plan within 25 business days after the date on which the business rescue practitioner was appointed or ‘such longer time as may be allowed by...the holders of a majority of the creditors’

²³ Section 150(5)(a) allows a court to allow an extended time period on application. The court was not approached in the present matter and this section accordingly finds no application.

voting interests’.²⁴ Mr Gribnitz was appointed on 16 November 2012. The plan was published on 25 March 2013. The 25 day period had long since elapsed. It is common cause that Mr Gribnitz sent a number of emailed requests to the creditors to extend the 25 day period. It is also common cause that these requests neither invited nor elicited any responses.

[22] The applicant submitted that an extension under s 150(5)(b) requires a formal vote by creditors to extend the time period. This vote must be taken before the 25 day period, or any extension to the period, elapses. What is required is a meeting at which a resolution to extend the time period must be formally voted on and adopted by a majority of the creditors who voted.²⁵ A meeting of creditors can resolve to vote by email but not even this was done. If there is no such vote within the prescribed or extended period, the time limits have not been met and a plan can no longer be published. The business rescue proceedings either come to an end or cannot be taken further.

[23] The respondents, on the other hand, relied on the words ‘may be allowed’. They submitted that this means that no formal meeting or vote is necessary. If a request is directed to the creditors and no adverse response

²⁴ A ‘voting interest’ is defined in s 128(1)(j) as ‘an interest as recognised, appraised and valued in terms of section 145(4) to (6)’. The provisions of s 145(4) read as follows:

‘In respect of any decision contemplated in this Chapter that requires the support of the holders of creditors’ voting interests -

- (a) a secured or unsecured creditor has a voting interest equal to the value of the amount owed to that creditor by the company; and
- (b) a concurrent creditor who would be subordinated in a liquidation has a voting interest, as independently and expertly appraised and valued at the request of the practitioner, equal to the amount, if any, that the creditor could reasonably expect to receive in such a liquidation of the company.’

Section 145(5) sets out the procedure for determining whether a creditor is an independent one and notifying creditors of the determined value of their voting interest. Section 145(6) allows for a challenge by creditors concerning either of those determinations. Neither of these sections is germane to this matter so they will not be set out in full.

²⁵ This is pursuant to s 147(3) which requires a simple majority of the independent creditors’ voting interests voted at all meetings other than one contemplated in s 151 (ie. the meeting to consider a plan).

is received, or adverse responses are received from less than a majority of creditors, this means that a majority of creditors has allowed the extension. In the alternative they submitted that the ultimate vote on the plan tacitly extended the time period because the creditors at the meetings of 19 and 25 April 2013 were prepared to vote on the plan and did. A vote to extend the period can be taken after it has elapsed.

[24] There are two issues to consider, therefore. The first is the consequence of the allotted time for publication of a plan, whether extended or not, elapsing. The second is the manner in which the period for publishing a plan can be extended.

[25] The Act does not anywhere specify the consequence of a failure to publish a plan within the allotted time. This seems to me to constitute yet another drafting lacuna. Section 132(2) lists circumstances which bring business rescue proceedings to an end.²⁶ The failure to timeously publish a plan is not listed. The respondents submitted that this meant that such a failure did not preclude a later publication or vote to extend the allotted time. It is therefore necessary to establish the effect of such a failure. There are a number of pointers which assist in this regard.

²⁶ The full section reads as follows:

‘(2) Business rescue proceedings end when –

- (a) the court –
 - (i) sets aside the resolution or order that began those proceedings; or
 - (ii) has converted the proceedings to liquidation proceedings;
- (b) the practitioner has filed with the Commission a notice of the termination of business rescue proceedings; or
- (c) a business rescue plan has been –
 - (i) proposed and rejected in terms of Part D of this Chapter, and no affected person has acted to extend the proceedings in any manner contemplated in section 153; or
 - (ii) adopted in terms of Part D of this Chapter, and the practitioner has subsequently filed a notice of substantial implementation of that plan.’

[26] Business rescue proceedings place a moratorium on creditors enforcing their claims against the relevant company. This, of course, amounts to a legislative intrusion into a contractual relationship between parties. It is therefore an incursion into existing law territory. It is a well-worn tenet of our law that the legislature does not intend to alter the existing law more than is necessary, particularly if it takes away existing rights.²⁷ There is a presumption against any forfeiture of rights.²⁸ Such a provision or set of provisions must be restrictively interpreted.²⁹ In the context of business rescue the incursion on rights of creditors has been recognised in the following *dictum*:

‘There is also the consideration that the mere institution of business rescue proceedings – however dubious might be their prospects of success in a given case – materially affects the rights of third parties to enforce their rights against the subject company.’³⁰

[27] The intrusion within the context of business rescue proceedings is done for reasons of policy and within tightly set parameters. Business rescue proceedings are geared at providing a window of opportunity to restore an ailing company to financial health and functionality. This is in case the company in question may be able to continue to contribute to the flow of the lifeblood of the economy by way of a plan. In the context of business rescue proceedings, the Act requires a number of formal steps to be taken. It is clear that time is of the essence. In *Koen* it was stated to be ‘axiomatic that business rescue proceedings, by their very nature, must be

²⁷*Dig* (1.3.25); *Voet* (1.3.24); *Van der Linden* (1.1.6 (3) & (5); *Principal Immigration Officer v Bhula* 1931 AD 323 at 333&334; *Rose’s Car Hire (Pty) Ltd v Grant* 1948 (2) SA 466 (A) at 471-472; *Casely NO v Minister of Defence* 1973 (1) SA 630 (A) at 640A-B. In *Van Heerden & others NNO v Queens Hotel (Pvt) Ltd & others* 1973 (2) SA 14 (RA) at 23D-F Beadle CJ, *obiter*, said that, for the purpose of the presumption, existing law includes both common and statute law and neither enjoys pre-eminence.

²⁸*Millman NO v Twiggs & another* 1995 (3) SA 674 (A) at 679B-C.

²⁹*Casely* op cit 640A.

³⁰*Koen & another v Wedgewood Village Golf and Country Estate (Pty) Ltd & others* 2012 (2) SA 378 (WCC) para 10.

conducted with the maximum possible expedition.’³¹ Specific and short time limits are set which must be adhered to, *inter alia*, because of the suspension of the common law rights of a party to a contract. The window of opportunity does not remain open indefinitely. It follows, therefore, that the legislature will impose and retain such a moratorium only where, in addition to there being a reasonable prospect of rescuing the company, the provisions concerning business rescue proceedings are timeously complied with.

[28] I favour the approach that the failure to publish a plan within the given or extended period results in the termination of the business rescue proceedings. This has the benefit of allowing creditors to enforce their rights against the company as soon as the time elapses. The need for certainty is met and the rights of creditors in particular are trespassed on to the least possible extent. Even if the failure to publish a business rescue plan timeously does not, in and of itself, bring an end to the business rescue proceedings, three possibilities emerge. First, and perhaps most likely, the practitioner can file a notice of termination of the business rescue proceedings in terms of s 132(2)(b). Secondly, an affected person would be entitled to bring an application under s 130(1) on the basis that it would be just and equitable for the resolution to be set aside. Thirdly, since one of the bases listed in s 130(2)(a) for the termination of business rescue proceedings is the setting aside by the court of a resolution or order, an application may perhaps be brought under that subsection. Any of these can be done as soon as the 25 day period elapses without being extended. For the purpose of this application it is not necessary to make a positive finding on this issue. However, what is clear is that the stated need for strict adherence to time limits and the need for certainty has as a necessary

³¹ Ibid.

corollary that the time to publish a plan cannot be extended after it has elapsed.

[29] This brings me to the manner in which an extension can be allowed by creditors under s 150(5)(b). As already mentioned, business rescue proceedings contain strict parameters. The business rescue practitioner is vested with certain rights, powers and obligations. Section 145(1)(a) gives each creditor a right to notice of each court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings. Formal meetings of creditors and other affected persons are provided for and envisaged for each step. Section 151(3) makes special provision that the meeting, which is required to be convened within ten days after publication of the plan for its consideration, may be adjourned from time to time. This provision does not lend credence to a submission that the legislature envisaged an informal approach to extending the time period.

[30] There is also no mechanism given in the Act to determine the views of affected persons other than by a vote at a meeting. How would creditors become aware of whether the majority had allowed an extension? Each step of business rescue proceedings is geared to promote certainty as to the status of the proceedings. Certainty would not be achieved by construing a lack of response to the practitioner as a positive agreement to adjourn. The views of affected persons could not be independently established as is the case at a meeting. Affected persons would have to rely on the practitioner as to the outcome of the request because any response would be directed to him or her alone. This is not subject to independent verification or

challenge. The contents of a phone call or face to face communication, for example, would not be verifiable unless recorded by some mechanism.

[31] In addition, in any formal procedure, persons vested with a vote may approve, reject or abstain from voting on a resolution. The failure to vote for or against a measure is taken to be an abstention, not a vote in favour. In effect, assuming that the request in the email of Mr Gribnitz amounted to a call for a vote, the respondents are submitting that an abstention amounts to approval of the request. In this context the word ‘allow’ must mean to approve of or sanction rather than merely to permit.³² Positive action is required. I know of no provisions in legislation, nor was I referred to any, where the word ‘allow’ is interpreted to mean that the persons concerned simply do nothing in the face of a request.

[32] It is my view, on a conspectus of the structure of business rescue proceedings, that a meeting must be convened and a vote taken in order for it to be said that a majority of creditors ‘allowed’ an extension of time. This was not done. No extension was therefore allowed by creditors as envisaged in s 150(5)(b). This means that the business rescue proceedings came to an end after the 25 day period elapsed. If this is not the case, this application can and should bring them to an end by setting aside the resolution on the just and equitable ground.

[33] In case I am wrong in this regard and that the time within which to publish the business rescue plan was properly extended by virtue of the various requests of Mr Gribnitz, it is appropriate to consider the other two points raised by the applicant. The second point of the applicant as to whether the plan was approved was to the following effect. At the meeting

³² These are alternative uses of the word given in *The Shorter Oxford English Dictionary* 3 ed (1973).

of 10 April 2013, because no vote was taken to approve the plan on a preliminary basis and neither was any vote taken to adjourn that meeting, the business rescue plan was rejected. The point is based on the provisions of s 152(1) which provides as follows:

- ‘(1) At a meeting convened in terms of section 151, the practitioner must-
- (a) introduce the proposed business plan for consideration by the creditors and, if applicable, by the shareholders;
 - (b) inform the meeting whether the practitioner continues to believe that there is a reasonable prospect of the company being rescued;
 - (c) provide an opportunity for the employees’ representatives to address the meeting;
 - (d) invite discussion, and entertain and conduct a vote, on any motions to-
 - (i) amend the proposed plan, in any manner moved and seconded by holders of creditors’ voting interests, and satisfactory to the practitioner; or
 - (ii) direct the practitioner to adjourn the meeting in order to revise the plan for further consideration; and
 - (e) call for a vote for preliminary approval of the proposed plan, as amended if applicable, unless the meeting has first been adjourned in accordance with paragraph (d)(ii).’

It can be seen that a formal vote is envisaged for any adjournment of the meeting. It can also be seen that, absent an adjournment for revision of the plan, the practitioner is obliged to call for a vote for preliminary approval of the plan. Mr Gribnitz did neither. He simply announced that, because the applicant had launched this application, the meeting would be adjourned. Once again, I do not consider it to be sufficient to say that because creditors did not propose a motion in opposition to his statement to this effect, an adjournment was acceded to. That being so, s 152(3)(a) provides that, if a proposed business rescue plan is not approved on a preliminary basis, the plan is rejected and may be considered further only

in terms of s 153. The provisions of s 153 were not invoked at the meeting on 10 April 2013 and, accordingly, the proposed business rescue plan was rejected.

[34] The third and final submission of the applicant must now be considered on the basis, once again, that I may be wrong in my conclusions so far. This was to the effect that the plan was not approved at the meeting of 25 April 2013 because the vote required by s 152 did not take place. It will be recalled that sufficient support for the preliminary approval of the plan was not obtained at the meeting of 19 April 2013. Ms Eveleigh then made a 'binding offer' as envisaged in s 153(1)(b)(ii). Mr Gribnitz, after purporting to accept the offer, adjourned the meeting until 25 April 2013 as was required by s 153(4). The applicant submitted that the binding offer required acceptance. Because all the opposing creditors rejected the offer, it submitted that no voting interests were acquired by Ms Eveleigh arising from the binding offer. The respondents submitted that Ms Eveleigh, by making the 'binding offer', thereby acquired the voting interests of the opposing creditors.

[35] Section 153 applies where a plan has been rejected. It contains a set of provisions whereby the business rescue proceedings may be kept alive despite the rejection. These are as follows. The business rescue practitioner is entitled to seek a vote of approval to amend the plan. Alternatively, he or she may approach the court to set aside the result of the vote on the grounds that the vote was inappropriate. If the practitioner does neither, an affected person may take either of those steps. In addition to that, an

affected person may act in terms of s 153(1)(b)(ii)³³ which provides as follows:

‘[A]ny 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.’³⁴

[36] The respondents rely on this section. Boiled down to essentials, they submit that the making of the ‘binding offer’ brings about the acquisition of the voting interest of the creditor to whom it is made. In other words, once an offer is made, it is binding on both the offeror and the offeree. The offeree cannot reject it. What is more, the voting interests are acquired by the offeror by the mere making of the offer. The purchase price at which the voting interests are to be acquired can be determined and

³³ The formulation of this provision has been subjected to scathing critique in the Doctoral Thesis of A Loubser: *Some Comparative Aspects of Corporate Rescue in South African Company Law*, LL.D Thesis, University of South Africa, February 2010 at 138 where she says:

‘The word “binding” seems to imply that the offer, once made, cannot be retracted or changed, although it is far from clear why this should be the case. An explanatory memorandum or report by the drafters to explain the reason behind this condition would, once again, have been of invaluable help.

Then follows an even more curious condition: the payment offered to purchase the voting interests must be equal to the independently and expertly determined, fair and reasonable estimate of what the holder of the voting interests would receive if the company were to be liquidated. The task of obtaining this valuation is specifically given to the practitioner. The valuation is subject to review, reappraisal and revaluation by the court on application by the holder of the voting interest or the person acquiring it.

This provision can best be described as alarming. The question needs to be asked why the offeror is not allowed to offer more than the liquidation value of the voting interest to make the offer more attractive to the offeree. The liquidation value of a concurrent creditor’s claim, for example, would be close to nil and a share in a company unable to pay its debts would definitely be worthless on liquidation. Such a creditor or shareholder would almost certainly rather attempt to have an amended plan prepared than virtually donating his votes to another person, since there would be no advantage for him in such a transaction. This inexplicable condition now raises the fear that the words “binding offer” referred to above do not apply to the offeror only, but in fact also bind the offeree to the offer. The right of the offeree to apply to court for a review of the valuation would be explained by this interpretation, as he would otherwise simply refuse the offer. It is to be hoped that this is not the intended result of the provision, since the possibilities for abuse and exploitation are endless, but it is almost impossible to say with any certainty what this provision is supposed to achieve.’ (References omitted).

Dr Loubser goes on to suggest that the clause be amended to read: ‘any affected person, or combination of affected persons, may offer to purchase the voting interests of one or more creditors or the shares of one or more shareholders who opposed adoption of the business rescue plan.’ Even though I do not share all of her criticisms or interpretations, this seems to me to be an appropriate suggestion.

³⁴ I have found no equivalent for this provision in USA, English, Australian or German law relating to similar mechanisms for company rescue.

paid later without in any way detracting from the immediate acquisition of the voting interests. An opposing creditor has sufficient recourse in asking the court to ‘review, re-appraise and re-value a determination by an independent expert made in terms of subsection (1)(b)(ii)’ as provided for in s 153(6). The respondent submitted that the reason for this is that an opposing creditor will, in any event, receive what it would receive if the company was declared insolvent. If the plan is not adopted, the company is likely to be declared insolvent so the creditor gets what is due. It can no longer frustrate the adoption of the plan and does not have to participate any further in the business rescue proceedings. It was submitted that this approach accords with the intention of the legislature which is that business rescue proceedings should succeed even in the face of opposition.

[37] The respondents find support for this submission in the case of *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd & others*.³⁵ In that matter Kathree-Setiloane J held that what is envisaged by the words ‘binding offer’ is the following:

‘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...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.’³⁶

[38] *Kariba* sets out how this mechanism works as follows. The binding offer ‘is’ a set of statutory rights and obligations. These are not contractual in nature. An offer becomes binding on the opposing creditor ‘the moment

³⁵ [2013] ZAGPPHC 258 (29 August 2013).

³⁶ At para 29.

it is made'.³⁷ The effect is that an opposing creditor's 'claim...will be reduced to what he or she might receive if the company were to be liquidated'.³⁸ It sets in motion a procedure to 'enforce a revised business rescue plan' which must be accomplished within five days.³⁹ 'The determination of the value of the voting interest, by an independent expert, will only be effected after adoption of the revised business plan' and need not be done within the five day period.⁴⁰ Once the determination of value is made, either party can approach the court to review, re-appraise and re-value.⁴¹ The practitioner cannot 'proceed with the *implementation* of the adopted business rescue plan prior to finalising the payment of the binding offer'.⁴² 'The implementation of the business rescue plan is conditional upon the offeror meeting its payment obligations' and, if the offeror fails to make payment, the adopted plan cannot be implemented by the practitioner.⁴³ An offeree is 'divested of his or her voting interest on approval or the adoption' of a plan but 'will not lose his or her right to enforce any debt owed by the company...until payment for the purchase of the voting interest is made by the offeror'.⁴⁴ A distinction must therefore be drawn between 'adoption' of a plan and its 'implementation'.⁴⁵ This distinction appears in the provisions of s 154(2) which says that if a plan has 'been approved and implemented', a creditor is not entitled to enforce any debt owed by the company prior to the beginning of the business rescue process except as allowed for in the plan. Because the creditor is not divested of the right to enforce a debt until implementation, s 154(2) does not preclude an unpaid creditor from enforcing the debt, including by way

³⁷At para 36.

³⁸At para 31.

³⁹At paras 29 & 30.

⁴⁰At para 30.

⁴¹At para 31. This is done under s 153(6).

⁴²At para 33. My emphasis.

⁴³At para 34.

⁴⁴At para 34.

⁴⁵At para 34.

of liquidating the company, if payment is not made.⁴⁶ In answer to a concern that the opposing creditor may be prejudiced by having no say concerning the coming into effect of the set of statutory rights and obligations, *Kariba* held:

‘The offeree is...adequately protected since it cannot receive less than it would receive if the company was to be liquidated.’⁴⁷

[39] I am regrettably unable to agree with this interpretation. Many of the building blocks in this edifice rest on unstable foundations. I will mention a few in passing but will deal in detail later with the crucial aspect of the interpretation to be given to ‘binding offer’. First, on a purely grammatical level, a ‘binding offer’ cannot, itself, be ‘a set of statutory rights and obligations’. It may give rise to them, but this is not what is said. Secondly, I do not understand how, if the opposing creditor is divested of the voting interests ‘on approval or the adoption’ of a plan, the votes can be exercised by the offeror to approve the plan. If this cannot be done, the plan will not be approved (unless the opposing creditor changes its mind which is not something that needs to be considered here). This means that, on the *Kariba* approach, the voting interests must pass prior to adoption of the plan. (As I mentioned above, this is the submission of the respondents in the present matter). Thirdly, whilst the use of both ‘adopted’ and ‘implemented’ in s 154(2) lends superficial attraction to the conclusion drawn in *Kariba*, it cannot mean that a plan can be adopted without being implemented as was held. This is because s 140(d)(ii) imposes a duty on the practitioner to ‘implement any business rescue plan that has been adopted...’. She or he is an officer of the court during the business rescue proceedings which includes implementing an adopted plan.⁴⁸ The Act

⁴⁶ At para 34.

⁴⁷ At para 32. This is done under s 153(6).

⁴⁸ Section 140(3)(a).

nowhere talks of the implementation of the plan being conditional on payment even if the practitioner was not obliged to implement it. It is silent on the issue of payment which, in a non-credit transaction, means that the rights pass on payment and not before. Finally, although not germane to the present matter, the section does not equate a creditor's claim with its voting interests. The section refers only to voting interests.

[40] Turning to the finding in *Kariba* that '[t]he "binding offer" is a set of statutory rights and obligations', there are a number of factors which, in my view, militate against it. In the first place, it flies in the face of the language actually used in the section. There is no reference to a set of rights and obligations. Only the word 'offer' is used. 'Offer' is qualified by the word 'binding' but that does not mean that it amounts to, or gives rise to, a set of statutory rights and obligations. If this was what the legislature envisaged, it could, and presumably would, have said so in so many words. If it had wanted to create rights and obligations in itself, it is unlikely in the extreme that it would have used only the word 'offer'. It could and would have introduced a deeming provision of acceptance on the part of the offeree or have stated that the offer, once made, gave rise to binding obligations between the parties.

[41] Instead, the legislature used the word 'offer'. The dictionary meaning is 'an expression of readiness to do or give if desired', 'an amount offered', 'a proposal', or 'a bid'.⁴⁹ It emanates from one party only. Section 153(1)(b)(ii) is consistent with this approach. The only actor mentioned is the offeror. The only action described is to 'make a binding offer' not to create a set of statutory rights and obligations. More importantly, it has a specific, settled, legal meaning as the legislature must

⁴⁹ Robert E Allen (ed) *The Concise Oxford Dictionary of Current English* 8 ed (1990) at 823.

be presumed have known.⁵⁰ In order to give rise to obligations on the part of both parties, an offer requires acceptance. The plain meaning falls well short of the binding offer creating any obligations on the part of the opposing creditor. It is also important that the offer is 'to purchase'. This, likewise, relates to an established legal concept. It is aimed at concluding a contract of purchase and sale. It is not aimed at creating statutory rights and obligations. The words 'offer' and 'purchase' when used together must mean that a contract is envisaged and, for such a contract to be concluded, there must be an acceptance or agreement. It is nowhere provided that no such acceptance is necessary and that, without it, a contract of purchase and sale has come into existence.

[42] Of course, it must be considered why the legislature used the qualifying word 'binding' and what it means. The word 'binding' qualifies the word 'offer' and nothing else. It does not refer to the opposing creditor, as the offeree. Once again, if this was what the legislature envisaged, the provision could have said that the affected person could make 'an offer, which is binding on the opposing creditor'. As was said by Dr Loubser, 'the word "binding" seems to imply that the offer, once made, cannot be retracted or changed, although it is far from clear why this should be the case.'⁵¹ I agree with both sentiments. Normally an offer may be retracted prior to acceptance or rejection. This result would have been better achieved if 'irrevocable' or 'non-retractable' had been used to qualify 'offer' rather than 'binding'. Although it is not semantically accurate, is an extremely inelegant use of language and is a further example of poor drafting, the

⁵⁰ *Ex parte Minister of Justice: In re Rex v Bolon* 1941 AD 345 at 359-360 where it was made clear that the principle applies only to well settled and well recognised interpretations of language. This clearly applies to the word 'offer'. See also *Fundtrust (Pty) Ltd (in Liquidation) v Van Deventer* 1997 (1) SA 710 (A) at 732A-B where this approach was endorsed and restated.

⁵¹ See footnote 33.

words ‘binding offer’ can only mean that the offeror may not retract the offer until it is accepted or rejected.

[43] I come to this conclusion partly because there are good reasons why such an offer should not be capable of being withdrawn. The purpose of this provision is to give an affected person a third way of attempting to have a plan approved in the face of initial rejection. Section 153(4) requires the practitioner to adjourn the meeting for no more than five business days and that the provisions of s 152 and s 153 apply afresh at the adjourned meeting.⁵² An offer under this section thus necessitates an adjournment of the meeting. It is thus consistent with the time bound nature of business rescue proceedings that an offeror should not be able to make an offer, which has the effect of extending the moratorium brought about by business rescue proceedings, without being obliged to keep open the offer until acceptance or rejection.

[44] If this were not so a cynical affected person, who for whatever reason wanted to keep the business rescue proceedings alive, could make a series of offers and withdraw them prior to each adjourned date of the meeting. This would result in unlimited extensions each time a plan is rejected because the provisions of s 153, in terms of which a binding offer can be made, apply to adjourned meetings.⁵³ In other words, a new binding offer could be made at each consecutive meeting which does not garner the

⁵² Section 153(4) reads as follows:

‘If an affected person makes an offer contemplated in sub-section 1(b)(ii), 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 resumption of the meeting, without further notice, at which the provisions of section 152 and this section will apply afresh.’

Section 152(3)(a) provides that if a plan ‘is not approved on a preliminary basis, as contemplated in subsection (2), the plan is rejected, and may be considered further only in terms of section 153’.

⁵³ In the equivalent, or roughly equivalent, procedures in the foreign company law I have been able to access, all of them have short, carefully defined time limits within which the process must be completed.

requisite support for the plan. A further factor which supports this approach is that an outside expert will generally be required to fix a price. If the offer could be retracted, this would incur wasted expenditure in obtaining the determination of the price with no adverse consequence to the mercurial offeror.

[45] It seems that *Kariba* failed to heed the warning, recently reiterated in *Endumeni*, against making words mean what a court thinks that they should mean, to the following effect:

‘Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax... Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation... 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.’⁵⁴

[46] I have dealt with the language of s 153(1)(b)(ii). The second factor militating against the interpretation of ‘binding offer’ in *Kariba* is that it runs counter to certain provisions of the Act. The first of these is s 145(2)(a). This provides that each creditor has ‘the right to vote to amend, approve or reject a proposed business rescue plan, in the manner contemplated in section 152’. The compulsory loss of the right to vote was aptly described by the applicant in argument as amounting to expropriation. Such a compulsory loss would need to be made clear if it were envisaged.⁵⁵ Apart from general principles to this effect, the legislature chose to confer this unqualified right in the very context of voting for or against the adoption of a plan. If such a clearly formulated

⁵⁴ See footnote 21 para 18 (references omitted).

⁵⁵ I have explained why this is so in para 26 above.

right was to be qualified or taken away, it would have to be done in equally clear terms.

[47] As we have seen, the provisions of s 152 apply afresh at the adjourned meeting. This means that, on the *Kariba* approach, s 145(2)(a) or s 153(4)(b) or both would need to be suitably qualified to exclude a vote at the adjourned meeting by a creditor to whom a binding offer has been made. This has not been done. An opposing creditor to whom a binding offer has been made remains entitled by s 145(2)(a) to vote. This necessarily implies that where this right is not qualified or taken away, an opposing creditor cannot be deprived of the right to vote against his or her will. This has as a necessary corollary that the offer cannot give rise to obligations on the part of the opposing creditor which result in the compulsory loss of its voting interests. The binding offer must thus be construed as an offer which can be accepted or rejected by the opposing creditor.

[48] Another provision of the Act which militates against the approach in *Kariba* and that of the respondents is the following. As adverted to above, if a plan is rejected at a meeting, both the practitioner and affected persons are given mechanisms to attempt to keep it alive.⁵⁶ One mechanism common to them is the right to approach the court to set aside the adverse vote on the grounds that it was inappropriate. Despite rejection, they may also seek a vote of approval to amend the plan. In contrast, opposing creditors are not given the right to approach the court to set aside an approving vote or the acquisition of their voting interests. It seems highly unlikely that the legislature would deprive them of their right to

⁵⁶ Section 153(1)(a) and (b).

vote without their acquiescence without at least giving them the right to challenge the adoption of a plan secured as a result of that deprivation.

[49] The provisions of s 145(2)(b) accord to a creditor a right to 'present an offer to acquire the interests of any or all of the other creditors in the manner contemplated in section 153' if a business rescue plan is rejected. This right is accorded in virtually identical terms to trades unions and employees in s 144(3)(g)(ii), and holders of the company's securities in s 146(e)(ii). It is not clear why these subsections are included since, they are, as affected persons, each and all given that right by s 153(1)(b)(ii) itself. Can these subsections assist in construing the provisions of the latter subsection? It may be thought that the answer lies in the differences between these subsections and s 153(1)(b)(ii).

[50] First, these subsections accord a right to 'present' rather than to 'make' an offer. These words can be used interchangeably without any significant difference. Secondly, the word 'binding' is not used to qualify the word 'offer'. Thirdly, the offer is to 'acquire' not 'purchase'. This is a general term of which 'purchase' is one manner of acquisition but it does not appear to be material. Fourthly, it is the 'interests' not 'voting interests' which are the subject matter of the offer. The word 'interests' is not defined in contradistinction to the words 'voting interest' but, again, no significance appears to attach to it. Fifthly, the offeree is stated to be 'any or all' of the creditors rather than 'one or more persons who opposed adoption' of the plan. This at first blush appears to be significant. But, on careful analysis, it is a distinction without difference. Only creditors' votes have reference. This is made clear in the subsections by their wording. In s 153(1)(b)(ii), the use of the words 'voting interests' refers back to the

definition in s 128(1)(j) which, in turn, refers to s 145(4) to (6), the section dealing with the value to be attached to creditors' votes.

[51] In addition, all of the subsections refer, in terms, to exercising the given right 'in the manner contemplated in section 153' and must therefore be seen as being consistent with it. I cannot find anything of significance in these subsections which may assist in construing s 153(1)(b)(ii). This despite the *dictum* in *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development & another; Executive Council, KwaZulu-Natal v President of the Republic of South Africa & others* to the following effect:⁵⁷

'It is an accepted principle of interpretation that where two subsections deal with the same subject-matter these are usually read together. This rule of construction is applicable in constitutional interpretation. It is consistent with a purposive interpretation of the Constitution.'

The legislature may have thought it necessary to accord these rights separately to all affected persons in case s 153(1)(b)(ii) was not thought to construe rights itself. In my view, however, these subsections are superfluous. Their inclusion is a further example of poor drafting of this part of the Act. If they are at all significant, that significance can only lie in the fact that 'offer' is not qualified by 'binding' but I set no store by this factor. I regard these provisions as neutral in construing s 153(1)(b)(ii).

[52] The final provision I will deal with which militates against *Kariba* is s 153(6) which reads as follows:

'A holder of a voting interest, or a person acquiring that interest in terms of a binding offer, may apply to a court to review, re-appraise and re-value a determination by an independent expert in terms of subsection (1)(b)(ii).'

⁵⁷2000 (1) SA 661 (CC) para 52.

On the approach in *Kariba*, the value of the voting interests is determined only after adoption of a plan. On adoption of a plan, the offeree is divested of those voting interests. At this stage, the offeree is no longer ‘the holder of a voting interest’. On the approach of the respondents in the present matter, the divestiture takes place on the making of the binding offer and the same situation results. In other words, at the time the determination of value takes place, opposing creditors no longer hold voting interests. This means that s 153(6) cannot apply to an offeree and the attempt in this section to do so is redundant. This cannot be the case. The transfer of the voting interests can only pass after the value has been finally determined, at the very earliest. If it passes on determination by the independent expert, the same situation obtains and the court cannot be approached. The earliest it may pass, therefore, is after final determination by a court. But how is it known whether a party is going to challenge the determination of the independent expert? Section 153(6) does not specify a time within which the court must be approached, nor does it provide that, if the court is not approached within a certain period of time, the voting interests pass to the offeror.

[53] The most probable conclusion to draw is that the voting interests pass only on payment of the purchase price as is the case at common law where there is no stipulation to the contrary.⁵⁸ If they pass at any time before payment has been made and are exercised to approve a plan, a situation not envisaged in business rescue proceedings would emerge. That is, the plan would have been adopted and must therefore be implemented. The payment would not have been made and the offeror would therefore have utilised voting interests to which she or he was not

⁵⁸ In *Gandhi v SMP Properties (Pty) Ltd* 1983 (1) SA 1154 (D) at 1157G-H Broome J said ‘in the absence of some clear stipulation to the contrary, payment and transfer take place *pari passu*...’.

entitled. Would that nullify the adoption of the plan which was voted for on the basis that transfer of the voting interests had passed? Surely not. Once a plan is approved there is no mechanism for setting it aside. The only reasonable interpretation is that, before the voting interests pass to the offeror, payment must have taken place.

[54] *Kariba*, invoking a purposive approach, concludes that the purpose of s 153(1)(b)(ii) is ‘to enforce a revised business rescue plan’.⁵⁹ But the purposes in s 7 do not support an interpretation leading to the acceptance of business rescue plans at all costs. If that were so, the 75% majority vote would not be stipulated. Section 7(k), on which *Kariba* relies, says that one purpose is to ‘provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all stakeholders’. Although ‘stakeholders’ is nowhere defined in the Act, creditors must surely fall within its ambit. The business rescue mechanism recognises throughout that they, too, contribute to the lifeblood of the economy. It is important that business rescue must be done in a manner which balances the rights and interests of stakeholders, including creditors. If the rights of creditors were to be ridden over roughshod, this would undoubtedly detract from other overarching purposes of the Act, such as promoting the development of the South African economy,⁶⁰ promoting investment in the South African markets,⁶¹ creating optimum conditions for the investment of capital in enterprises⁶² and providing a predictable and effective environment for the efficient regulation of companies,⁶³ to mention only a few. It was said in *Oakdene*,

⁵⁹Para 29.

⁶⁰Section 7(b).

⁶¹Section 7(c).

⁶²Section 7(g).

⁶³Section 7(l).

obiter, that the intention of creditors to oppose a plan was something that could not be ignored in principle:

‘As I see it, the applicant for business rescue is bound to establish reasonable grounds for the prospect of rescuing the company. If the majority creditors declare that they will oppose any business rescue scheme based on those grounds, I see no reason why that proclaimed opposition should be ignored. Unless, of course, that attitude can be said to be unreasonable or *mala fide*.’⁶⁴

[55] *Kariba* is also incorrect saying as regards a binding offer that ‘[t]he offeree is, therefore, adequately protected since it cannot receive less than it would receive if the company was to be liquidated.’⁶⁵ The purchase price under s 153(1)(b)(ii) must be independently and expertly valued based on ‘a fair and reasonable estimate of the return to that person...if the company were to be liquidated’. The first point is that what is aimed at is, perforce and consciously, an estimate. It is not, and could never be, a calculation of an assured amount for the simple reason that this is only possible with a finalised liquidation and distribution account after liquidation. The second point is that, for a number of reasons, the estimate might well not be capable of being arrived at with any degree of accuracy. It may, for example, be impossible to establish if any impeachable dispositions have taken place. Section 77 holds a director personally liable to the company in certain circumstances. It cannot be predicted whether either of these might find application and, if so, the extent of the liability and likelihood of success in litigation let alone the dividend which might be realised on execution of any judgment. There are also other factors such as estimates of the value of assets. These estimates may not be realised on insolvency. All of these factors, and probably

⁶⁴ Footnote 15 para 38.

⁶⁵ Para 32.

others as well, affect the ability of an expert to arrive at a sufficiently accurate determination.

[56] In the light of this, the determination, whether by the expert or the court, may be thought by the opposing creditor to be insufficiently accurate to warrant acceptance of the offer. In such a case, it is cold comfort to say that a creditor may approach the court to review, re-appraise and re-value the determination. The court is unlikely to be in any better position and, in any event, the creditor may still have valid grounds to believe the determination to be inadequate. The opposing creditor might reasonably take the view that, in those circumstances, insolvency is a preferable option to adoption of the plan. If the practitioner or any affected person regards this view as unreasonable and the opposing creditor votes against the plan, resulting in its being rejected, they have recourse to the court to set aside the vote on the basis that it was inappropriate.

[57] It appears that this provision does not give the court the power to approve the plan although, for the purposes of this judgment, it is not necessary to resolve this issue. Dr Loubser explains that, in English law, if creditors vote against a plan proposed by the administrator:

‘[T]he court may order that his appointment will cease from a specified date, thereby effectively terminating the administration, or make any order it regards as appropriate. The power of the court to make any other appropriate order could be interpreted to mean that the court could approve those proposals despite their rejection by the creditors.’⁶⁶

⁶⁶ See footnote 33 at 212.

Different commentators differ on whether the court can, in fact, impose a plan as part of such an ‘appropriate order’.⁶⁷ In the USA the courts can ‘cram down’ a plan on dissenting creditors within the context of Chapter 11 of the Bankruptcy Reform Act 1978, more commonly known as the Bankruptcy Code.⁶⁸ Dr Loubser explains the position in German law to be the following:

‘A majority of creditors both in value and in number of creditors voting in each group must vote in favour of a plan to constitute approval. Rejection by the majority in every group will result in termination of the proceedings....

However, if the majority of the groups have voted in favour of the plan, a group without the required majority will be deemed to have consented to the plan on condition that the creditors in this group will probably not be placed in a worse financial position by the insolvency plan than they would be without this plan and they are given reasonable participation in any further advantages flowing from the plan....

This provision is derived from the American cram-down rules and intended to prevent abusive or arbitrary obstruction of the plan by creditors. It is thus generally referred to as the rule against obstruction.’⁶⁹

[58] In the Act, s 153(7) does not even accord to the court the power to make an ‘appropriate order’. The court can therefore not cram down a plan. It is limited to setting aside the rejecting vote. The Act is silent on what takes place thereafter. The cram down provision in the Act is contained in s 152(4) which makes a plan binding on the company, all

⁶⁷ See footnote 343 to p 212 of Loubser.

⁶⁸ What is meant by this has been elegantly summarised in Daniel R. Wong: *Chapter 11 Bankruptcy and Cramdowns: Adopting a Contract Rate Approach*, Northwestern University Law Review Vol. 106, No. 4 (2012) 1927 at 1932 as follows:

‘Under Chapter 11, a debtor-in-possession 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 under the terms of the repayment plan. In many instances, however, reorganizations will not proceed so smoothly due to creditors’ refusal to assent to the repayment plan. Congress, in drafting the Bankruptcy Code, anticipated this issue and created § 1129(b) to allow nonconsensual confirmation of a repayment plan. If the requirements of § 1129(b) are met, the court can confirm the plan despite creditors’ objections; essentially, the repayment plan is “crammed down” upon the nonassenting creditors.’ (References omitted).

⁶⁹ Footnote 33, 321.

creditors and all holders of the company's securities whether or not they were present at the meeting which adopted the plan or voted for it. Creditors need not even have proved claims. This means that an adopted plan is crammed down on absent parties and on that percentage of creditors (which must be less than 25%) who voted against it. In the Act, the rule against obstruction is catered for in the ability of the court to set aside a vote rejecting the plan. As can be seen, this finds some echoes in German law. As indicated, however, I do not deem it necessary to decide this matter. Section 153(7) does provide the mechanism to prevent abusive or arbitrary obstruction of the plan by creditors.

[59] Even if the determination is acceptable, a creditor may nevertheless wish to vote against the proposed plan if it believes that it does not carry prospects for rehabilitation. It may also make that decision if, as in the present case, the plan involves a compulsory cession of over 75% of its claim. I shall later show that this means that it relinquishes the right to recover this proportion even from sureties. Such a situation certainly does not support the dictum in *Kariba*. Under insolvency, a creditor would be entitled to sue sureties and the determination can take no account of this.

[60] For all of the above reasons, it is my view that the 'binding offer' of s 153(1)(b)(ii) is an offer which cannot be withdrawn by the offeror. It is open to acceptance or rejection by the opposing creditors to whom it is made. If accepted, it gives rise to an agreement of purchase and sale. It is a sale for cash because '[i]n the absence of an express term as to the sale being for cash or on credit there is a presumption that it is for cash'.⁷⁰ The acceptance or rejection need only take place once the value has been finally determined. The independent expert is therefore obliged to reach a

⁷⁰Per Corbett JA in *Lend Lease Finance (Pty) Ltd v Corporacion De Mercadeo Agricola & others* 1976 (4) SA 464 (A) at 490E-F.

determination by the date of the adjourned meeting. The voting interests are transferred on payment of the determined sum.⁷¹ Once this has taken place, the voting interests are settled and the vote on the plan can take place. If adopted, the plan can and must be implemented by the practitioner. Once it has been substantially implemented, the practitioner must file a notice to that effect and the business rescue proceedings come to an end.⁷² If it is not approved, it is rejected and, if s 153 is not invoked, the business rescue proceedings come to an end.⁷³

[61] There is an additional difficulty for the respondents in the present matter. Mr Klein categorically stated that he had not independently valued the assets and liabilities of Dowmont but had taken these values from others. The determination, accordingly, does not pass muster as complying with the provisions of s 153(1)(b)(ii). The offer made by Ms Eveleigh to the opposing creditors was thus not even an offer as envisaged in that section. In the event, even on this basis, it cannot be concluded that Ms Eveleigh acquired the voting interests of the opposing creditors.

[62] I was urged to consider what is acquired by virtue of an accepted binding offer. The plan, amended in the light of Ms Eveleigh's offer, reflects her as the owner of the applicant's claim of just over R3.4m. Her tender of R100 is reflected as purchasing her 12.25% of that sum, which is what would be paid as a dividend on the plan. *Karibaventures* into this thorny territory in equating voting interests with claims, as has been seen. In doing so, *Kariba* interprets the section in such a way that neither the word 'offer' nor the words 'voting interests' mean what they say.

⁷¹ The obligations are reciprocal, in other words, 'performance, or tender of performance, by the other'. Per AJ Kerr *The Law of Sale and Lease* 3 ed at 222 referring to *Ese Financial Services (Pty) Ltd v Cramer* 1973 (2) SA 850 (C) at 808H-809A.

⁷² Section 132(2)(c)(ii).

⁷³ Section 132(2)(c)(i).

Interesting though that debate may be, it is, once more, not necessary to deal with it in this application and I shall leave it for another court on an occasion where it is germane to the outcome of the matter.

[63] This all means that, since the binding offer of Ms Eveleigh was rejected, she did not acquire the voting interests of the opposing creditors. She should not have been allowed to vote with the voting interests of the opposing creditors at the meeting of 25 April 2013. The vote on that occasion was not a vote of creditors as envisaged in s 152 because the opposing creditors were excluded. This means that the proposed business rescue plan was not adopted. No further steps were taken at that meeting to invoke the provisions of s 153. The plan was therefore rejected in terms of s 152(3)(a). It was agreed that, if this was the finding, the business rescue proceedings came to an end no later than 25 April 2013 in terms of s 132(2)(c)(i). This, in turn, means that they cannot be converted to liquidation proceedings. A provisional winding up order should be granted rather than a conversion order if a case is made out for the liquidation of Dowmont.

[64] The final aspect to consider is whether or not, if I am wrong in all of the above, it is just and equitable to set aside the resolution under s 130(5)(a)(ii) in all the circumstances of the matter. Assuming that the applicant remains a creditor, the plan provides that the applicant would receive 12.25% of the face value of its claim as a dividend. It would cede 75.75% of the claim to the Kleintjie Share Trust. That Trust would in turn subscribe for 1 000 ordinary shares of Dowmont against payment of R4.5m, which would be used to pay the dividend to creditors. It would also convert the ceded claims against Dowmont to ordinary shares in the company which would result in the Trust holding the total share capital of

R25 796 411.00. In this regard, the applicant submitted that the business rescue plan is not one envisaged under the Act because, in essence, it provides for a compulsory cession of 75.75% of the applicant's claim which leaves the applicant unable to claim that portion even against the directors who have provided deeds of suretyship.

[65] This submission depends, to an extent, on whether the plan deprives the applicant and other creditors from proceeding against sureties. The common law provides that the cession of a guaranteed claim carries with it the right on the part of the cessionary to enforce the claim against both principal debtor and surety.⁷⁴ The cedent loses that right because it has perforce ceded its claim against the principal debtor and suretyship is an accessory obligation. Unlike in s 155(9) of the Act, which provides that a scheme of arrangement or compromise under that section does not affect the liability of any person who is a surety of the company, there is no similar provision under business rescue.⁷⁵ Under the 1973 Act it was held that a specific provision in an arrangement allowing for a loss of recourse against a surety as a result of a compulsory cession of a claim was not precluded.⁷⁶ This approach was, with respect correctly, doubted in an *obiter dictum* of Botha JA where he said, '[I]t is a far cry from that to hold that a creditor who has voted against the acceptance of an offer of arrangement is bound to abide by a clause in it providing for the termination of his right to proceed against a surety, for, *ex hypothesi*, he has in fact not contracted out of the protection afforded to him in terms of s 311(3).'⁷⁷

⁷⁴*Pizani & another v First Consolidated Holdings* 1979 (1) SA 69 (A) at 77H-78A. This matter considered whether the cession of the principal debt carried with it the rights against a surety.

⁷⁵ Section 155(1) provides that s 155 applies to all companies, including those which are distressed unless they are engaged in business rescue proceedings.

⁷⁶*Ex parte Voysey Bond Property Investments Ltd* 1978 (2) SA 134 (D) at 138A-B.

⁷⁷In *Incorporated General Insurances Ltd v Cement Distributors (South Africa) (Pty) Ltd* 1990 (1) SA 132 (A) at 136J-137A. The provisions of s 311(3) of the 1973 Act accord with those of s 155(9) of the Act.

[66] The straightforward result of the plan in the present matter is that, since the claims of creditors are ceded and there is no provision retaining the right of the cessionary to enforce the deeds of suretyship, creditors cannot sue sureties if the plan is adopted. The applicants submitted that, because all creditors are bound by an adopted plan, whether they voted for it or not, the legislature would have included a similar provision to that in s 155(9) if it had envisaged that compulsory cessions of claims could form part of a plan.⁷⁸ They submitted that this means that no such provision is competent. This general approach to interpretation is lent further credence by the provisions of s 154. This provides as follows:

‘(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 a 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.’

[67] It can be seen, therefore, that a plan may only provide that a creditor ‘who has acceded to the discharge of the whole or part of a debt’ may be deprived of the right to enforce its claim. Since s 152(4) makes an adopted plan binding on non-consenting creditors and s 154(2) allows enforcement of pre-business rescue debts only to the extent allowed for in a plan, any provision in a plan which goes beyond a voluntary discharge of a whole or part of a debt is not competent. The present plan goes well beyond that. It provides that all creditors are deprived of a part of their

⁷⁸ Section 444H of the Australian Corporations Act 2001 provides:

‘A deed of company arrangement releases the company from a debt only in so far as:

(a) the deed provides for the release; and
 (b) the creditor concerned is bound by the deed.’

Section 444J provides, ‘Section 444H does not affect a creditor's rights under a guarantee or indemnity.’ A deed of company arrangement in the Australian Corporations Act is akin to a plan under the Act.

claim if the plan is approved, regardless of whether or not they voted in favour of it. Not only that, but they are deprived of even the right to attempt to recover that part of their debt from sureties. In this regard, I refer again to the presumption against any legislative deprivation of rights.⁷⁹ It must follow as night follows day that a plan which deprives non-acceding creditors of the right to enforce a claim against a surety does not pass muster on the basis of this clause. The compulsory cession, and certainly one without the cedent retaining the right to proceed against sureties, can therefore not be part of a plan.

[68] In addition, the effect of the plan is that, since the claims are to be converted to shares, the sureties escape liability for 75.75% of the ceded claims. In effect, the directors, as sureties, are the major beneficiaries of the plan. Their personal liability to the applicant will be reduced by R2.57m or more if the plan is adopted, not to mention other creditors who hold their suretyships. This means that no-one can pursue this percentage of these claims against the sureties. This is a further offensive provision of the plan to be weighed in considering the just and equitable leg of the enquiry.

[69] It is clear to me that, in the light of all the evidence and the factors set out above, it would be just and equitable to set aside the resolution pursuant to the provisions of s 130(5)(a)(ii).

[70] There remain two matters to consider. The first is the question whether a provisional liquidation order should be granted. The second is the matter of costs. Since the resolution is to be set aside, it is quite clear that Dowmont is hopelessly insolvent. It is unable to pay its debts. It has, since the inception of the business rescue proceedings, accumulated further

⁷⁹ See para 26 hereof and the authorities referred to.

debt. There is no conceivable reason not to grant a provisional liquidation order. The formalities concerning service and security have been complied with.

[71] As regards costs, these were initially sought from the first and second respondents. During argument, the applicant very properly conceded that no case is made out on the papers for Mr Gribnitz to personally pay costs. He acted in a representative capacity and appears to have held the bona fide belief that he was acting in accordance with the provisions of the Act. Whilst certain criticisms of his conduct appear to have some validity, the situation falls short of one where he would be required to pay costs in his personal capacity. I agree with this submission. The appropriate order as to costs, since Dowmont is to be placed under provisional liquidation, is that the costs of the application form part of the costs in the liquidation.

[72] In the event, I grant the following order:

- a. Leave is granted to the applicant to institute this application in terms of s 133(1)(b) of the Companies Act 71 of 2008.
- b. The resolution purported to have been made by the board of directors of the second respondent in terms of s 129 of the Companies Act, adopted on 16 November 2012, placing the second respondent under supervision by a business rescue practitioner, which resolution was filed with the third respondent on 22 November 2012, is set aside in terms of s 130(1)(a) read with s 130(5)(a) of the Companies Act.
- c. The second respondent is placed in provisional liquidation in the hands of the Master of the High Court, Pietermaritzburg.
- d. A *Rule Nisi* is issued calling upon all interested parties to show cause, if any, to the above Honourable Court on 27 November 2013,

at 09h30 or as soon thereafter as the matter may be heard, why the second respondent should not be finally wound up.

- e. A copy of this order shall be served on the Master of the High Court, Pietermaritzburg forthwith.
- f. A copy of this order shall be published, on or before 6 November 2013, once in The Witness newspaper and once in the Government Gazette.
- g. The Master of the High Court, Pietermaritzburg, is directed to appoint a provisional liquidator for the second respondent forthwith.
- h. The costs of the application shall form part of the costs of administration of the second respondent in the winding up.

DATE OF HEARING: 26September 2013
DATE OF JUDGMENT: 21 October 2013
FOR THE APPLICANT: PJ Olsen SC and RM van Rooyen
instructed by VENNS ATTORNEYS.
FOR THE FIRST AND
SECOND RESPONDENTS: AM Annandale SC instructed by
NICHOLAS & HAINSWORTH
ATTORNEYS.