THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 598/2021

In the matter between:

ALAN LOUIS N O	**FIRST APPELLANT**
BRIAN WILLIAM LOUIS N O	**SECOND APPELLANT**
LOUIS JACOBS CLOETE N O	**THIRD APPELLANT**

and

NEIL MILLER FENWICK N O	**FIRST RESPONDENT**
LOUIS GROUP SA (PTY) LTD	
(in business rescue)	**SECOND RESPONDENT**
COMPANIES AND INTELLECTUAL	
PROPERTY COMMISSION	**THIRD RESPONDENT**
DOLE SOUTH AFRICA (PTY) LTD	**FOURTH RESPONDENT**
SAAD FUND MANAGEMENT (PTY) LTD	**FIFTH RESPONDENT**
THE TRUSTEES FOR THE TIME BEING	
OF THE LGCF TRUST	**SIXTH RESPONDENT**
D J C DE WITT	**SEVENTH RESPONDENT**
THE STANDARD BANK OF SOUTH	
AFRICA LIMITED	**EIGHTH RESPONDENT**
UKUSOLA TRADING & INVESTMENTS	
(PTY) LTD	**NINTH RESPONDENT**

A C NEETHLING **TENTH RESPONDENT**

Neutral Citation: *Louis N O and Others v Fenwick N O and Others* (598/2021) [2023] ZASCA 59 (28 April 2023)

Coram: VAN DER MERWE, PLASKET and HUGHES JJA and BASSON and SIWENDU AJJA

Heard: Disposed of without oral argument in terms of s 19(*a*) of the Superior Courts Act 10 of 2013

Delivered: 28 April 2023

Summary: Company law – business rescue – binding offer in terms of s 153(1)(*b*)(ii) of the Companies Act 71 of 2008 rejected – consequences of – interpretation of s 153(4) – only applicable when binding offer is accepted.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Steyn J sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Van der Merwe JA and Basson AJA (Plasket and Hughes JJA and Siwendu AJA concurring)

[1] The parties to this appeal agreed, in terms of Rule 8(8) of the Rules of this Court, that the matter is likely to hinge exclusively on a point of law. This is whether, in business rescue proceedings, s 153(4) of the Companies Act 71 of 2008 (the Act) is to be applied after a binding offer made in terms of s 153(1)*(b)*(ii) of the Act has been rejected. More particularly, the issue is whether business rescue proceedings terminate when a binding offer to purchase the voting interests of the person or persons who opposed the adoption of a business rescue plan, is rejected or whether the affected person who made the offer has further remedies in terms of s 153(4) of the Act. We shall revert to the facts after setting out the relevant provisions of the Act.

Statutory framework

[2] Section 151 of the Act requires a business rescue practitioner to convene and preside over a meeting of creditors and holders of other voting interests within ten days after the publishing of a business rescue plan, for the purpose of considering the plan. Section 152 regulates the procedure to be followed in considering the plan. If it is supported by the holders of more than 75 per cent of the creditors' voting interests, and at least 50 per cent of the independent creditors' voting interests (that were voted), the business rescue plan will be considered as approved on a preliminary basis as contemplated by s 152(2). Section 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 of the Act. It is not necessary for purposes of this matter to consider the rights of holders of securities in this regard.

[3] Section 153 is headed 'Failure to adopt business rescue plan'. The subsections of relevance to this appeal read as follows:

'(1)*(a)* If a business rescue plan has been rejected as contemplated in section 152(3)*(a)* or *(c)*(ii)*(bb)* the 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.

. . .

(4) If an affected person makes an offer contemplated in subsection (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.'

[4] Thus, once the business rescue plan is rejected, the business rescue practitioner may, in terms of s 153(1)*(a),* either seek approval, from the holders of voting interests, to prepare a revised plan, or apply to the court for an order setting

aside the result of the vote on the grounds that it was inappropriate.[1] If the business rescue practitioner fails to do so, or decides not to exercise any of these options, this section provides an affected person with three alternative courses of action. The first is to seek a vote of approval to prepare and publish a revised plan.[2] The second is an application to set aside the result of the vote as inappropriate[3] and the third is to offer to acquire, by means of a 'binding offer', the voting interests of any persons who opposed the adoption of the plan.[4] The first and second options are only available to an affected person that is present at the meeting. The third is available to any affected person or combination of affected persons. Once such a binding offer has been made, according to the text of s 153(4), the business rescue practitioner must adjourn the meeting for no more than five business days to afford the practitioner an opportunity to make any necessary revisions to the plan to reflect 'the results of the offer'[5] and set a date for the resumption of the meeting at which the provisions of s 152 would apply afresh.[6] As we have said, the proper interpretation of s 153(4) lies at the heart of the appeal.

Background facts

[5] The appellants are the trustees for the time being of the Alan Louis Trust (the Trust). The second respondent, Louis Group SA (Pty) Ltd (the company), was placed under supervision on 26 February 2013, when business rescue commenced. At a meeting held on 14 February 2020 the first respondent, the business rescue practitioner,[7] placed a business rescue plan (the original plan) to a vote to the creditors of the company in terms of s 151 of the Act. The plan was rejected by the creditors (the first vote).

[6] After the first vote, the business rescue practitioner informed the meeting that he did not intend to proceed in terms of s 153(1)*(a)* of the Act. The first appellant informed the meeting that the Trust would exercise its rights in terms of s 153(1)*(b)*(ii)

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[1] See s 153(1)*(a)*(i) or (ii).
[2] Section 153(1)*(b)*(i)*(aa)*.
[3] Section 153(1)*(b)*(i)*(bb)*.
[4] Section 153(1)*(b)*(iii).
[5] Section 153(4)*(a)*.
[6] Section 153(4)*(b)*.
[7] Mr Trevor Phillips was initially appointed as the business rescue practitioner of the second respondent. Therefore, he was cited as the first respondent in the high court. Upon his passing, a notice of substitution was filed substituting him with Mr Neil Miller Fenwick as the duly appointed business rescue practitioner of the second respondent.

to make binding offers to purchase the voting interests held by two of the creditors of the company, namely the fourth and fifth respondents (eventually the Trust made such offers to all the creditors of the company). The Trust also reserved its right to apply to court to have the first vote set aside as inappropriate in terms of s 153(1)*(b)*(i)*(bb)* of the Act. The meeting was adjourned, to allow the Trust's offers to the creditors to be independently and expertly determined as contemplated by 153(1)*(b)*(ii) of the Act.

[7] These binding offers were thereafter made but were rejected by all the creditors. At a reconvened meeting held on 10 March 2020, the practitioner informed the meeting that, in light of the rejection of the binding offers, the adjourned meeting was closed and declared his intention to apply for the conversion of the business rescue proceedings into winding-up proceedings. The appellants objected and insisted that the business rescue practitioner was required, once the binding offers were rejected, to proceed in terms of s 153(4). The practitioner disagreed, adopting the stance that s 153(4) does not contemplate a further meeting once the binding offer has been *rejected* and that s 153(4) only caters for the scenario where a binding offer has been *accepted*.

[8] It was against this background that the appellants launched an urgent application in the Western Cape Division of the High Court, Cape Town (the high court) for an order: setting aside as irregular the decision of the practitioner to close the reconvened meeting on 10 March 2020; directing the practitioner to set a date for the resumption of the meeting; and directing the practitioner to apply the provisions of ss 152 and 153 at the resumed meeting. The high court agreed with the respondents that s 153(4)(b) only caters for the scenario where a binding offer has been accepted. As a result, it dismissed the application. This appeal is with leave of the high court. Only the company and the practitioner (collectively the respondents) opposed the appeal. However, they agreed with the appellants that the matter be disposed of without oral argument, in terms of s 19(*a)* of the Superior Courts Act 10 of 2013.

The interpretation of s 153(4) of the Act

[9] This Court is required to interpret s 153(4) in accordance with the principles relating to statutory interpretation that have been articulated in a long line of cases,

notably in *Natal Joint Municipal Pension Fund v Endumeni Municipality*, where this Court held:

'The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. 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; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production . . . The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document . . . The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'[8] Fundamental to the process of interpretation, apart from the words used in the statute, are the context and purpose of the provision under consideration. An interpretation that leads to unbusinesslike results or undermines the apparent purpose of the statute should be avoided.[9]

[10] Returning to the statute under consideration, the provisions relating to business rescue in general, and in particular those contained in s 153, have been subjected to criticism from this Court. In *African Banking Corporation of Botswana v Kariba Furniture Manufacturers and Others,* this Court stated:

'I do not believe it is unfair to comment that many of the provisions of the Act relating to business rescue, and s 153 in particular, were shoddily drafted and have given rise to considerable uncertainty. Questions which immediately spring to mind in regard to the procedure envisaged by s 153(1)*(b)*(ii), and to which no answers are clearly expressed in the Act, include (this list is not intended to be all-embracing) . . . *the effect of an offer being rejected*. . .'.[10] (Our emphasis.)

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[8] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA); [2012] 2 All SA 262 (SCA) para 18; See also *Kubyana v Standard Bank of South Africa Ltd* [2014] ZACC 1; 2014 (3) SA 56 (CC); 2014 (4) BCLR 400 (CC) paras 77 & 78.

[9] Ibid paras 25-26.

[10] *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and Others* [2015] ZASCA 69; 2015 (5) SA 192 (SCA); [2015] 3 All SA 10 (SCA) para 43. This sentiment was echoed in a later judgment of this Court in *FirstRand Bank Ltd v KJ Foods CC (In business rescue)* [2017] ZASCA 50; [2017] 3 All SA 1 (SCA); 2017 (5) SA 40 (SCA) (*FirstRand Bank Ltd*) para 74.

[11] This criticism is particularly applicable to the provisions of s 153(4). The literal meaning of s 153(4) is clear. It says that if an affected person makes an offer, the practitioner must act as prescribed in ss 153(4)(*a*) and (*b*). However, the parties rightly accept that s 153(4) could not possibly bear its literal meaning. It is trite that a court may depart from the clear and unambiguous meaning of a statutory provision to avoid an absurdity.[11] The mere making of an offer in terms of s 153(1)(*b)(ii)* could not have been intended to trigger the conjunctive steps mentioned in ss 153(4)(*a*) and (*b)*. And the offer itself could have no 'results': that could only flow from a decision on the offer. The appellants also recognise that a further vote on a rejected plan would make no sense. The interpretative solution that the appellants propose amounts to this. Irrespective of whether the offer is accepted or rejected, the practitioner must proceed in terms of ss 153(4)(*a*) and (*b*). This brings only s 152(3)(*a*) into play. Its provisions – that if a business rescue plan is not approved on a preliminary basis as contemplated in s 152(2), the plan is rejected and may be considered further only in terms of s 153 – must be interpreted to provide the relevant affected person with a further right to call for the approval a revised plan in terms of s153(1)(*b*)(i)(*aa*) at a resumed meeting or to apply for the setting aside of the original vote under s 153(1)(*b*)(i)(*bb)*. In contrast, the respondents submit that on a proper construction, a fresh application of s 153 can only arise where the binding offer is accepted, resulting in an alteration of the voting rights, which would necessitate a second round of voting on a revised plan in terms of s 152 of the Act.

[12] It is not in dispute that the voting interest of a creditor will be altered where a binding offer has been *accepted,* as the voting interest of the creditor who *accepts* the binding offer and sells their voting interests to the offeror will fall away. The creditor's voting interest, as explained by the court in *DH Brothers Industries (Pty) Ltd v Gribnitz NO and Others*,[12] '. . . are transferred on payment of the determined sum. Once this has taken place, the voting interests are settled and the vote on the plan can take place'. Conversely, a creditor who has purchased the voting interests of another will hold an increased voting interest. This alteration in the voting interests of the creditor sensibly and logically necessitates the resumption of the meeting at which the

[11] *Hanekom v Builders Market Klerksdorp (Pty) Ltd and Others* [2006] ZASCA 2; 2007 (3) SA 95 (SCA) para 7.
[12] *DH Brothers Industries (Pty) Ltd v Gribnitz NO and Others* [2014] 1 All SA 173 (KZP); 2014 (1) SA 103 (KZP) para 60.

provisions of ss 152 and 153 will apply afresh to allow for a second vote to take place. Should the second vote be successful, the revised plan will be adopted. If the revised plan is again rejected, s 153 will again apply and the options referred to herein above will once again become available to the business rescue practitioner and to any affected person, should the practitioner decide not to take any action as contemplated in s 153(1)*(a)*. It is also not in dispute that where a binding offer has been *rejected*, the voting interests remain unaffected.

[13] The interpretation of the respondents thus makes good sense. The construction favoured by the appellants, on the other hand, would lead to an absurd result. After the rejection of a binding offer, on the appellants' interpretation, the relevant affected person would again have the right to call for the approval of a revised plan or to apply to the court to set aside the original vote, even though nothing has changed. This would be manifestly absurd.

[14] This conclusion accords with the broader purpose of business rescue proceedings, which is '. . . geared at providing a window of opportunity to restore an ailing company to financial health and functionality'.[13] Business rescue, as stated by this Court in *Diener NO v Minister of Justice and Others*,[14] 'is not an open-ended process. Its very rationale is that it must end, either when its aim has been attained or when the realisation arises that rescue is not attainable'. It follows that once a business rescue plan is *accepted*, it will be implemented by the business rescue practitioner on the terms stipulated therein. But once a business rescue plan has been put to a vote and *rejected* as contemplated in s 152 of the Act and, the parties have unsuccessfully exhausted their remedies as provided for in s 153(1)*(b)*, business rescue must come to an end.

[15] In sum, it could not have been the legislature's intention that a party whose voting interests remains unaltered as a result of the rejection of a binding offer, would be entitled to a further opportunity to exercise one of the alternatives provided for in s 153(1)*(b)*(i)of the Act. The interpretation contended for by the appellants simply does not amount to a sensible and business-like interpretation of s 153(4) and would cause,

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[13] Ibid para 27.
[14] *Diener N O v Minister of Justice and Others (Diener)* [2017] ZASCA 180; 2018 (2) SA 399 (SCA); [2018] 1 All SA 317 (SCA) para 28.

as pointed out by this Court in *Firstrand Bank Ltd v KJ Foods CC (in business rescue)*,[15] a 'never- ending loop'. For these reasons we conclude that s 153(4) of the Act only finds application when a binding offer in terms of s 153(1)(*b*)(ii) is accepted.

[16] The appeal is dismissed with costs, including the costs of two counsel.

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C H G VAN DER MERWE

JUDGE OF APPEAL

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A C BASSON

ACTING JUDGE OF APPEAL

[15] *Firstrand Bank Lt*d fn 10 para 88.

Appearances

For the appellants:	R M van Rooyen
Instructed by:	Strauss Daly, Umhlanga
	EG Cooper Majiedt Inc, Bloemfontein
For the first and second respondents:	G W Woodland SC and C Morgan
Instructed by:	Bowman Gilfillan Inc, Cape Town
	Matsepes Inc, Bloemfontein.