Business Rescue: Balancing the interests of all the relevant stakeholders

by

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DECLARATION

I confirm that this is the final corrected version of my minor dissertation. I declare that no unethical research practices were used or material gained through dishonesty. I herewith declare that my academic work is in line with the Plagiarism Policy of the University of Johannesburg with which I am familiar.

KAGISO SEPHESU **08 June 2015**

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Chapter 1: Introduction

1.1 Introduction of topic

Being a fairly new concept in South Africa, it is often difficult determining exactly what business rescue aims to do. The Supreme Court of Appeal in *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* [1]has given clarification on the meaning of business rescue. Brand JA held that business rescue means "rehabilitation" and therefore should have one of these goals, namely to return the company to solvency, or to provide a better deal for creditors and shareholders than they would receive through liquidation.[2]

It is clear from the description given above that the rights and interests of stakeholders are important. The 2008 Companies Act aims to protect the rights of employees to a feasible extent during business rescue proceedings.[3] Unlike winding up and insolvency proceedings, business rescue is more responsive to employee rights.[4] These rights are set out in section 144 of the 2008 Companies Act. Thus employees are given the right to participate at the meeting of creditors and therefore have an influence on the manner creditors vote.[5]

Shareholders are not given the right to attend the meeting held for consideration of the business rescue plan or to vote on the business rescue plan unless their rights will be altered by the business rescue plan.[6] Shareholders whose rights will not be altered are ignored.[7]Therefore, it is unlikely that the shareholders will be consulted by the business rescue practitioner before preparing the business rescue plan.[8]Creditors on the other

[1] 2013 3 All SA 303 (SCA).
[2] (n1) par 26.
[3] Davis, et al *Companies and other Business Structures in South Africa* (2013) 250.
[4] Delport et al "*Henochsberg on the Companies Act 71 of 2008"* (loose leaf) 2013 501; Loubser, Joubert "The role of trade unions and employees in South Africa's business rescue proceedings" 2015 36 *ILJ* 21.
[5] Loubser "Shareholders in Corporate Rescue Proceedings: Always On The Outside Looking In?" 2008 20 *SA Merc LJ* 387.
[6] Davis, et al *Companies and other Business Structures in South Africa* (2013) 252.
[7] Loubser (n 5) 387.
[8] Loubser (n 5) 387.

hand have the right to be notified of and participate in all phases of the business rescue proceedings.[9]

Although limited for some than others, what these stakeholders have in common is the right to make a binding offer to purchase the voting interests of the persons who opposed the adoption of the plan in terms of section 153(1)(b)(ii) of the Companies Act 71 of 2008.

The proposal and implementation of the business rescue plan is the most important features of the business rescue process.[10]The 2008 Companies Act prescribes exactly what the business rescue plan must contain.[11]The business rescue practitioner must prepare a business rescue plan after consultation with the creditors, employees, shareholders and management of the company and the proposed plan must contain 'all information reasonably required to facilitate the various stakeholders in deciding whether or not to accept or reject the proposals made in the plan'.[12]A meeting for the consideration of the business rescue plan must be convened within 10 days of the publication of the business rescue plan.[13]The creditors and all holders of security of the company have to decide whether to adopt the business rescue plan or not.

The provisions of the 2008 Companies Act relating to this process are sometimes not clear and therefore result in a lot of questions that need answers, thus our courts in this regard have become very busy in dealing with these uncertainties. There have been different interpretations by the courts in relation to circumstances where the business rescue plan has been rejected. These will be discussed below.

[9]See section 145 2008 Companies Act; Davis et al (n 3).
[10] Delport (n 4) 517.
[11] See section 150 2008 Companies Act.
[12] Delport (n 4) 517; see section 150 2008 Companies Act.
[13] See section 151 2008 Companies Act.

1.2 Problem statement

This dissertation will focus on the interpretation of section 153(1)(b)(ii) of the 2008 Companies Act. It is aimed at determining whether the court in *African Banking Corporation of Botswana v Kariba Furniture Manufacturers & Others*[14] has finally solved the mystery regarding the interpretation of this section. *Africa Banking* was first heard in the High Court of South Africa Gauteng Division, Pretoria.[15] In addition to *Africa Banking*, the current discussion will ensue in light of the decision given in *DH Brothers Industries (Pty) Ltd v Gribnitz No and Others*[16] as the SCA[17] largely relied on it.

It is imperative to determine whether the non-consenting creditor/ holder of securities should be given the option of accepting or rejecting a binding offer by any affected person to purchase their voting interests.

The dissertation will propose an interpretation that upholds section 7(k) of the Companies Act 71 of 2008 which requires that all stakeholders' rights should be balanced during the business rescue procedure.

1.3 Methodology

Chapter 1 introduces the topic, and provides the problem statement.

Chapter 2 introduces the topic of business rescue providing a legislative background of the business rescue procedure; it also discusses the purpose of business rescue discusses the process of considering the business rescue plan, the requirements and consequences of the approval and rejection of the business rescue plan.

Chapter 3 is a discussion of *African Banking* while detail of *DH Brothers* will also be provided given its predominance in the SCA decision. It also contains a comparative study of case law that has dealt with this topic; the various decisions will be compared. Firstly, the meaning of the words binding offer will be unpacked. Secondly, the

[14] (228/2014)[2015] SCA 69 (20 May 2015) (herein referred to as the *African Banking* case).
[15] High Court of South Africa Gauteng Division, Pretoria (Herein referred to as the High Court).
[16] 2014 1 All SA 173 (KZP) (herein referred to as the *DH Brothers* case).
[17] Supreme Court of Appeal of South Africa (Herein referred to as the SCA).

conflicting sections referred to. Lastly, the importance of balancing the interests of all relevant stakeholders will also be divulged.

Chapter 4 provides the conclusion of the dissertation where I will give an opinion on the decision given in *African Banking*.

Chapter 2: Analysis of Business Rescue

2.1 Introduction

The business rescue procedure is aimed at giving temporary mechanisms to facilitate the attempt to rehabilitate the financially distressed company.[18] The company's debts and liabilities, affairs, as well as assets will be re-arranged in a way that increases the likelihood of the company carrying on a solvent basis. However, if this is not possible, it must have the result of obtaining a better return for the company's creditors or shareholders than that which would result from immediate liquidation of the company.[19]

The business rescue process is triggered by financial distress.[20] A financially distressed company is defined as:

> "a company that appears to be reasonably unlikely to be able to pay all its debts as they become due and payable within the immediately ensuing six months or a company that appears to be reasonably likely to become insolvent within the immediately ensuing six months".[21]

In order to determine whether a company is financially distressed, a balance sheet or a test flow test can be applied.[22] Business rescue cannot be invoked where a company is already insolvent.[23]

2.2 Purpose of business rescue

Section 7(k) of the 2008 Companies Act provides that the purposes of the Act include the provision for efficient rescue and recovery of financially distressed companies in a manner that balances the rights and interests of the relevant stakeholders.[24] If the

[18] Bradstreet (n 11) 195.
[19] Bradstreet (n 11) 195; Joubert "Reasonable possibility versus reasonable prospect: Did business rescue succeed in creating a better test than judicial management 2013 76 THHR 554; *Merchant West Working Capital Solutions (Pty) Ltd v* Advanced *Technologies and Engineering Company (Pty) Ltd and Another* 2013 109 (GSJ) par 4; *Prospec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd and Another* 2013 1 SA 542 (FB) par 7; *New City Group (Pty) Ltd v Allan Pellow and Others* 2014 162 (SCA) par 15,*Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* 2013 4 SA 539 (SCA) par 24.
[20] Cassim et al *The Law of Business Structures (*2012) par 20.2.
[21] Section 128(1)(f) 2008 Companies Act.
[22] Delport (n 4) 448.
[23] *Redpath Mining South Africa (Pty) Ltd v Marsden NO and Others* 2013 148 (GSJ) par 47.
[24] Section 7(k) 2008 Companies Act

balance of rights is not achieved, financiers and investors may be reluctant in assisting with funding to rescue the financially distressed company.[25]

Regardless of its name, "the purpose of business rescue is not necessarily to prevent a company or corporation from being wound up or liquidated".[26]The word 'rescue' refers to "a reorganization of as company to restore it to a profitable entity".[27] Although business rescue is contained in the 2008 Companies Act, it does not mean that the Act frowns upon liquidation proceedings within business rescue provisions.[28]

A court will give preference to business rescue over liquidation only where there is a genuine goal to achieve the aims of the Act.[29] On determining whether ensuring a better return for creditors and or shareholders can be pursued as an independent goal of business rescue, it was held that it may, however this does not form part of the scope of this discussion.

2.3 Consideration of the business rescue plan

In terms of section 151(1) of the 2008 Companies Act, after consultation with the creditors, the business rescue practitioner must prepare a business rescue plan for consideration and possible adoption.[30]The consideration of the business rescue plan is an important phase of the business rescue process; where it has to be decided whether or not the business rescue plan proposed by the business rescue practitioner should be adopted or not.[31] The business rescue plan must be published 25 days after the business rescue practitioners' appointment, however the time may be extended by the

[25]http://www.sbp.org.za/uploads/media/Round_Table_-_New_Cos__Act___Business_Rescue_01.pdf.
[26]Burdette "Some Initial Thoughts on the Development of a Modern and Effective Business Rescue Model for South Africa" 2004 *SA Merc LJ* 16 241.
[27]Cassim, et al *Contemporary Company Law* (2012) 861.
[28]Delport (n 5) 444.
[29]Sharrock, Smith and Van der Linde *Hockley's Insolvency Law* (2012) 275*; Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami (Pty) Ltd and Others* 2013 4 SA 539 (SCA) par 29; *Swart v Beagles Run Investments 25 (Pty) Ltd* 2011 5 SA 442 (GNP) par 42 Makgoba J stated that "there is no *basis* for contending that the respondent will be able to carry on business on a solvent basis or that there is any prospect thereof" thus the application for business rescue was dismissed; *Koen v WedgeWood Village Golf and Country Estate (Pty) Ltd* 2012 2 SA 378 (WCC) par 23.
[30] *Gormley v West City West Precinct (Pty) Ltd and Another, Anglo Irish Bank Corporation Ltd v West City Precinct Properties (Pty) Ltd and Another* 2013 JDR 1895 (WCC) par 7.
[31]Meskin *Insolvency Law* (2013) 18.7.2.

court on application by the company or creditors that hold majority of the voting interests may allow for a longer period.[32]

Moreover, a meeting must be convened within ten business days after the publication of the plan where everyone with a voting interest will be given the chance to consider the plan.[33]The business rescue practitioner must deliver a notice of the meeting to all affected persons at least five business days before the meeting.[34] The notice must set out the date and time of the meeting, the agenda of the meeting as well as a summary of the rights of the affected persons to participate in and vote at the meeting.[35]Section 152 has a list of all that must be done by the business recue practitioner at the meeting convened in terms of the section.[36]

The business rescue practitioner is required to inform the meeting whether the practitioner continues to believe that there is a reasonable prospect of the company being rescued.[37]It has been determined in various cases what is meant by the term 'reasonable prospect'.[38]However the discussion of the meaning of 'reasonable prospect' does not form part of this study.

2.4 Approval of the business rescue plan

The business rescue plan must be supported by holders of more than 75 percent of the voting interests as well as at least 50 percent in value of independent creditors who voted, provided that shareholders rights have not been altered then the plan is

[32]Section 150(1) 2008 Companies Act; Sharrock (n 27) 290.
[33] Section 151(1) 2008 Companies Act.
[34] Section 151(2) 2008 Companies Act; *Gormley v West City West Precinct (Pty) Ltd and Another, Anglo Irish Bank Corporation Ltd v West City Precinct Properties (Pty) Ltd and Another* 2013 JDR 1895 (WCC) par 8*;* In *Absa Bank v John Frederick Caine No and Another, In Re; Absa Bank Limited v Caine N.O and Another* 2014 46 (FB) at par 57 the business rescue practitioner had convened such a meeting but one of the major creditors, namely First National Bank objected to the meeting stated that the business rescue practitioner gave short notice. Daffue J held that the practitioner failed to fulfil his duties as he acted without any regard to the time periods required by the 2008 Companies Act.
[35] Section 151(2)(a)-(c) 2008 Companies Act.
[36] Section 152(1)(a)-(e) 2008 Companies Act.
[37] Section 152(1)(b) 2008 Companies Act.
[38]*Swart v Beagles Run Investments 25(Pty) Ltd* 2011 5 SA 422 (GNP) par 42; *Southern Palace investments 265 (Pty) Ltd v Midnight Storm Investments 386 (Pty) Ltd* 2012 2 SA 423 (WCC) par 24; *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* 2012 3 SA 273(GSJ) par 29; *Koen v* Wedgewood *Village Golf and Country Estate (Pty) Ltd* 2012 2 SA 378(WCC) par 17; *Prospec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd* 2013 1 SA 542 (FB) par 11; *Newcity Group (Pty) Ltd v Pellow, China Construction Bank Corporation Johannesburg Branch v Crystal Lagoon Investments 53 (Pty) Ltd* 2013 54 (GSJ) par 24; *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami)(Pty) Ltd and Others* 2013 4 SA 539 (SCA).

considered as finally approved.[39]Preliminary approval is triggered if the plan alters the rights of any shareholders, and in these circumstances a meeting must be convened in order for the plan to be approved by the majority of the relevant shareholders.[40]The business rescue plan that has been adopted in the required manner is binding on the company and all stakeholders regardless of whether they were present at the meeting, voted in favour of the adoption of the plan or proved their claims against the company.[41]

2.5 Rejection of the business rescue plan

The 2008 Companies Act also makes provision for instances where the business rescue plan is rejected.[42] The business rescue practitioner may seek a vote of approval from the holders of voting interests to prepare and publish a revised plan or inform the affected persons at the meeting that the company will apply to court to set aside their votes on the grounds that the majority decision was inappropriate.[43]

The 2008 Companies Act was then amended by the Companies Amendment Act[44]and provides that:

[39] Section 152(2)(a) & (b) 2008 Companies Act; Davis(n 4) 261;The intention of major creditors should be taken into consideration as they have the potential to prohibit the adoption of the business rescue plan as it requires approval of 75 percent of creditors interest and 50 percent of creditors voting interest. In *Employees of Solar Spectrum Trading 83 (Pty) Ltd v Afri Operations Ltd and Solar Spectrum Trading 83 (Pty) Ltd* 6418/2011 8 May 2012 (GNP) par 36 and 37 the court considered the history of the affairs of the second respondent and held that:
" In this regard it was contended on behalf of the first respondent that given the history of the affairs of the second respondent there is no probability that the first respondent will accept any business rescue plan and given its dominant position as creditor it was unlikely that the requirements for the preliminary approval of a business rescue plan as set out in section 152(2)(approval of 75% of creditors voting interest and 50% of independent creditors' voting interest) would be met rendering the relief being sought somewhat academic and of limited duration.
Whatever the position of the first respondent may be and while its cynicism may be justified at some level I would imagine that at the very least there would be an obligation on it to participate in good faith and to consider on its own merits or demerits any business plan proposed. I cannot imagine that it can be contended that it is a foregone conclusion that it will vote against the business plan even before one has been developed"; *Turning Fork (Pty) Ltd t/a Balanced Audio v Greeff and Another* 2014 4 SA 521 (WCC) par 30.
[40] Section 153(1)(b)(a)(i) 2008 Companies Act.
[41]Meskin (n 31)18.17.3, Section 152 (4)(c) 2008 Companies Act; Creditors can't be prejudiced as a result of the business rescue plan not being approved. In *Swart v Beagles Run Investments 25 (Pty) Ltd* 2011 5 SA 422 (GNP) the application for business rescue was opposed by creditors as they were of the view that the business rescue procedure was abused and it was therefore an attempt to postpone payments, the court agreed*; Gormley v West City West Precinct (Pty) Ltd and Another, Anglo Irish Bank Corporation Ltd v West City Precinct Properties (Pty) Ltd and Another* 2012 33 (WCC) par 11 "There must be a measure of certainty in the commercial world. Creditors cannot be left in a state of flux for an indefinite period."
[42] Section 153(1) 2008 Companies Act.
[43] (n 42).
[44]3 of 2011.

> "on an application in terms of section 153(1)(a)(ii) or section 153(1)(b)(i)(bb) a court may order that the vote on a business rescue plan be set aside if the court is satisfied that it is reasonable and just to do so, having regard to (a) the interests represented by the person or persons who voted against the rescue plan; (b) the provision, if any, made in the proposed rescue plan with respect to the interest of that person or persons; and (c) a fair and reasonable estimate of the return to that person or persons if the company were to be liquidated."[45]

If the business rescue practitioner does not take any of the steps, then any affected person who is present at the meeting may do so.[46] Another alternative to try and get the business rescue plan adopted after rejection is that any affected persons or a combination of affected persons may make a binding offer to purchase the voting interests of any of the affected persons who were against the adoption of the business rescue plan.[47]

[45] Cassim et al (n 27) 909; section 153(7) 2008 Companies Act.
[46] Section 153(1)(b) 2008 Companies Act.
[47] Section 153(1)(b)(ii) 2008 Companies Act.

Chapter 3: Case Law Analysis

3.1 Introduction

It is important to note how the judges have interpreted this vague section of the Companies Act. Business rescue is a fairly new concept in South Africa; therefore it has been difficult to determine what the legislator meant when drafting some of the provisions of Chapter 6 of the 2008 Companies Act. Our courts have tried to assist us in solving some of the uncertainty as will be seen from the discussion below..

3.2 *African Banking Association of Botswana v Kariba Furniture Manufacturers (Pty) Ltd and Others* (228/2014)[2015] ZASCA 69 (20 May 2015)

An application was brought by African Bank Corporation of Botswana,[48] seeking relief relating to business rescue proceedings of Kariba Manufacturers (Pty) Ltd[49] and the business rescue plan which was adopted in terms of the provisions of Chapter 6 of the 2008 Companies Act, which was subsequent to a binding offer to purchase the banks voting interests in terms of section 153 (1)(b)(ii) of the Act.

Around October 2006, the bank instituted an action in the North Gauteng High Court, Pretoria against the company and the third and fourth respondents; the claim against them was based on deeds of surety that were signed by them in favour of the bank.[50] The cause of action against the company was based on the money borrowed and advanced to the company by the bank under a credit facility agreement.[51] The banks claims against the company were secured by a notarial bond executed by then company in favour of the bank.[52]

The parties had an agreement and removed the action from the High Court referring it to arbitration.[53] On 7 February 2011 the arbitrator found in favour of the bank and ordered that the company together with the third and fourth respondents were jointly

[48] Herein referred to as the bank.
[49] Herein referred to as the first respondent/the company.
[50] *African Banking* case (n 14) par 2.
[51] *African Banking* case (n 14) par 8.
[52] *African Banking* case (n 14) par 8.
[53] *African Banking* case (n 14) par 9.

and severally liable to the bank for the amount of BWP 5610125,38 as well as interest at the rate of 13 percent per annum compounded monthly.[54]

The defendants[55] made an appeal to a panel of three arbitrators.[56] On 23 January 2012 the appeal tribunal confirmed the award in favour of the bank but discharged the fourth respondents' liability to the bank.[57] Therefore, the company and the third respondent were held jointly and severally liable at the commencement of the business rescue proceedings.[58]

During March 2012 the defendants then delivered an application to set aside the awards in terms of section 33(1)(b) of the Arbitration Act 42 of 1965 but the bank opposes this application.[59] On 31 January 2012 before the review application was delivered, the company's board decided voluntarily to begin business rescue proceedings in terms of section 129(3) of the Act. On 6 February 2012 the second respondent was appointed as the business rescue practitioner.[60]

In order to allow creditors to prove their claims against the company, the first meeting of creditors was held on 17 February 2012.[61] The business rescue practitioner held that the banks claim would be accepted provisionally pending the results of the application to set aside the arbitration awards.[62]

On 21March 2012, the business rescue practitioner then distributed the proposed plan and it stated that 21 cents in the Rand would be paid to the bank over a period of 100 months.[63] The second meeting of creditors was then held within ten days after the proposed plan had been published, this was on 26 March 2012, where the business rescue practitioner invited discussion on the proposed plan or to direct him to adjourn the meeting in order to revise the plan for further considerations in terms of section

[54] *African Banking* case (n 14) par 2.
[55] The company, the third and fourth respondents.
[56] *African Banking* case(n 14) par 2.
[57] *African Banking* case (n 14).
[58] *African Banking* case (n 14) par 2.
[59] *African Banking* case (n 14) par 3.
[60] *African Banking* case (n 14) par 3.
[61] *African Banking* case (n 14) par 4.
[62] *African Banking* case (n 14) par 5.
[63] *African Banking* case (n 14) par 13.

152(1)(d)(1)(i) and (ii)of the Act.[64] He then called for a vote of the creditors for the preliminary approval of the plan because there were no motions.[65]

The only creditors present at the meeting were the bank, the North West Development Corporation and the shareholders.[66] The shareholders voted in favour of the plan, but the bank and the North West Development Corporation voted against it.[67] It is held that the voting interests were in accordance with the percentages reflected in the plan; the bank had approximately 63 per cent, the shareholders 32 per cent and the North West Development Corporation one percent.[68] The shareholders attorney then informed the parties that the shareholders want to make a binding offer for the banks voting interests in terms of section 153(1)(b)(ii).[69]

The business rescue practitioner then treated the offer as if it had been accepted by the bank, and adjusted the voting interests to reflect the bank as a holder of 0 per cent and the shareholders as holders of 95 per cent of the voting interests.[70] The business rescue practitioner then called a meeting without involving the bank, however exercising the voting interest that it had previously exercised on the proposed plan.[71] The banks representatives tried to prevent the creditors from voting on the proposed plan but did not succeed as the business rescue practitioner's attitude was that the binding offer had the effect of taking away the banks rights as creditor and it could therefore no longer vote as a creditor.[72]

The appellant submitted that the offeree cannot be automatically bound by a binding offer made in terms of section 153(1)(b)(ii) of the 2008 Companies Act.[73]It further held that the term binding offer means that the offer could not be withdrawn by the offeror.

[64] *African Banking* case (n 14) par 6.
[65] *African Banking* case (n 14) par 6.
[66] *African Banking* case (n 14) par 6.
[67] ibid (n 65) above.
[68] (n 65) above.
[69] (n 65) above.
[70] (n 65) above.
[71] (n 65) above.
[72] (n 65) above.
[73] *African Banking* case (n 14) par 9.

The 1st, 2nd, 3rd and 4th respondents held that allowing a creditor to accept a binding offer would denigrate from the objectives of business rescue. They further held that "the business rescue process could not be delayed or derailed by a single 'hostile' creditor to the detriment of other creditors".

In *African Banking Corporation of Botswana v Kariba Furniture Manufacturers (Pty Ltd and Others* [74] Kathree-Setiloane J held that "binding offer" is not an "option" or "agreement" in the contractual sense of the term, but rather a set of statutory rights and obligations, from which neither party may resile.[75]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 s153(4) of the 2008 Companies Act.[76]

Furthermore, it was held that from the moment that the offer is made, it becomes binding on the non-consenting creditor.[77] In addition to this, Kathree-Setiloane J held that the effect of the binding offer would then be that the non-consenting creditor would only be entitled to receive what he might receive if the company were to be placed in liquidation and nothing more.[78]

3.3 Comparative study of judgements that dealt with section 153(1)((b)(ii) of the 2008 Companies Act

In a similar case, namely *DH Brothers*, the applicant held that the binding offer made by the employee required acceptance. The employee did not acquire any voting interests because the offer was rejected by all opposing creditors.[79]The respondents held that the employee acquired the voting interests of the opposing creditors by making the binding offer.[80] The respondents relied on section 153(1)(b)(ii) and submitted that the offeror

[74] 2013 6 SA 47 (GNP).
[75] *African Banking* case (n 74). par 16.
[76] *African Banking* case (n 74) par 29.
[77] *African Banking* case (n 74) par 36.
[78] *African Banking* case (n 74) par 31.
[79] *DH Brothers case* (n 16) par 34.
[80] *DH Brothers* case (n 16) par 34.

and offeree are bound by the 'mere making of the offer'[81] The offer cannot be rejected by the offeror.[82]The court held that the offer made did not result in the acquisition by the employee of the voting interests of the non-consenting creditors.

In *DH Brothers* Gorven J disagreed with High Court's decision and held that a binding offer cannot, itself be a set of statutory rights and obligations.[83] Gorven J held that in his view "binding offer" is an offer that the offeror cannot withdraw; however the non-consenting creditor to whom the offer is made has an option to accept or reject the offer.[84]If the offer is accepted it constitutes an agreement of purchase and sale, the reason for this is because in the absence of an express term concerning whether the sale being for credit or cash, there is a presumption that it is for cash.[85]Only when the value has been determined can the non-consenting creditor accept or reject the offer.[86] On payment of the determined, sum by the independent expert the voting interests will be transferred.[87]

Therefore, this discussions aims to determine whether the basic principles of the law of contract in relation to an offer and acceptance applies when dealing with a binding offer to acquire the voting interests of a non-consenting creditor in terms of section 153(1)(b)(ii).This is important, as it has drawn a lot of attention lately as a result of the different interpretations given by the judiciary. This difficulty was anticipated by Loubser in her thesis where she expressed that this provision raised numerous serious questions and doubts.[88]

Loubser stated that the word "binding" is seen to imply that once the offer is made, it cannot be withdrawn or changed, although no reason was given why it should be in this manner.[89] Thus this then means that the offeree is not given the chance to accept or reject the offer but is automatically bound by the mere offering. She stated that a

[81] *DH Brothers* case (n 16) par 34.
[82] *DH Brothers* case (n 16) par 34.
[83] *DH Brothers* case (n 16) par 39.
[84]*DH Brothers* case (n 16) par 60.
[85]*DH Brothers* case (n 16) par 60.
[86]*DH Brothers* case (n 16) par 60.
[87]*DH Brothers* case (n 16) par 60.
[88]Loubser 'Some Comparative Aspects of Corporate Rescue in South African Company Law', (2010 thesis UNISA) 138.
[89]Loubser (n 88) 138.

memorandum or report giving clarification regarding this uncertainty would be vital.[90]It is now evident that clarification is indeed required.

3.4 Offer and acceptance

The High Court held that because the word 'binding' appears before the word 'offer', it describes the distinctive features of the nature of the offer which the legislature envisioned under the section.[91] The learned judge acknowledges that although in ordinary circumstances an offer is made voluntarily without being compelled and may be withdrawn at any time before it is accepted, section 153(1)(b)(ii) of the 2008 Companies Act describes the offer in this section as binding as it may not be withdrawn by the offeror, therefore creating a *vinculum juris* or a legal obligation on the part of the offeror.[92]

It is stated that the 'binding offer' in section 153(1)(b)(ii) is a set of statutory rights and obligations and neither party may withdraw, it is therefore not one where one is given an option, it is not an option or an agreement in the contractual sense.[93]The reason for this is that it needs to be ensured that there is compliance with the process of bringing back to life a business rescue, as well as enforce a revised business rescue plan within the framework of section 153(4) of the Act.[94]Section 153(4) states that:

> "if an affected person makes an offer contemplated in subsection (1)(b)(ii), the practitioner must- (a) adjourn the meeting 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 and this section will apply afresh."

Therefore if a stakeholder votes against a business rescue plan, they will have to bear the risk of renouncing their voting interests as a result of the binding offer procedure where their claim will be reduced to what they would receive if the company were to be

[90]Loubser (n 88) 138;*African Banking* case (n 14) par 43.
[91]*African Banking* case (n 74) par 29.
[92]*African Banking* case (n 74) par 29.
[93]*African Banking* case (n 74) par 29.
[94] *African Banking* case (n 74) par 29.

liquidated.[95]The parties must then decide whether the value is accepted as soon as the claim has been expertly and independently valued.[96]

Gorven J, held that 'a binding offer' itself cannot be a set of statutory rights and obligations, although it may give rise to them.[97] And he gave a number of factors which argue against it.[98]

Firstly, it goes against the language used in the section. There is no reference made to a set of rights and obligations. The legislature only uses the word 'offer' which originates from a single party. Furthermore the only party referred to is the offeror and therefore this approach is consistent with section 153(1)(b)(ii). In addition to this, in order to give rise to obligation on both parties part, acceptance is required for the offer, this is in accordance with the legal meaning. [99] An offer is:

> "a declaration of intention by one party (the offeror) to another (the offeree) indicating the performance that he or she is prepare to make, and the terms on which he or she will make it."[100]

The contractual conception of an offer can be narrated as "an act by which the offeror confers on the offeree the capability or the power to create a legally binding agreement between the two of them by the doing of a further act amounting to an acceptance."[101]

The word offer has a settled and direct meaning and it must be presumed that the legislature knew this.[102] The offer must also be to purchase, as it is aimed at concluding a contract of purchase and sale, not giving rise to statutory rights and obligations.[103]Thus, a contract is anticipated and therefore there must be acceptance or an agreement for such a contract to be concluded.[104]

[95]*DH Brothers* case (n 16) par 31.
[96] *DH Brothers* case (n 16) par 31.
[97]*DH Brothers* case (n 16) par 39.
[98] *DH Brothers* case (n 16) par40.
[99] *DH Brothers* case (n 16) par 41.
[100] Maxwell, Naude *The Law of Contract in South Africa* (2009) 47.
[101]Giliers *Concise Contract Law* (1988) 12.
[102] Cassim (n 20) 531.
[103]Cassim (n 20) 531.
[104] ibid.

A contract is a bilateral juristic act and therefore leads to rights and duties.[105]However, an offer does not lead to rights and duties as it is merely a unilateral juristic act.[106]The offer creates an expectation that if the offer is accepted, rights and duties will exist in future.[107]The contract will only be binding and complete once the offeree accepts the offer.[108]No legal obligation is created amongst the parties by the mere offer, only if the offeree accepts, will it have the potential to create a legal obligation.[109] Van der Merwe and others state that:

> "in its simplest form, 'a contract consists of an invitation to consent to the creation of obligations between two or more parties(called an 'offer'), and an affirmative response (called an 'acceptance')."[110]

From this definition alone it is quite clear that no rights and duties can arise merely by the making of the offer, acceptance is required. In the case of *Rex v Nel*[111] it was held that when parties conclude a contract, acceptance must be communicated to the offeror.[112]

Kathree-Setiloane J's interpretation has been subject to criticism. Van der Linde states that:

> "the court's interpretation is way out of step with the ordinary meaning of the word offer. Moreover, if a binding offer was intended to have the automatic outcome contemplated by the court, it would hardly have been necessary to provide for an adjournment, so that the plan can be revised to appropriately reflect the results of the offer."[113]

The business rescue plan serves contractual obligations. In most regimes the plan becomes a binding contract if it is approved by the required parties.[114] This is another indication that the basic principles of the law of contract cannot be ignored. Thus in

[105] Nagel *Commercial Law* (2011) 53.
[106]Nagel (n 105) 53.
[107]ibid.
[108]Giliers *Concise Contract Law* (1988) 12.
[109]Nagel (n 105) 53.
[110] Van der Merwe, Van Huyssteen, Reinecke, Lubbe *Contract General Principles* (2012) 46.
[111]1921 AD 339.
[112] (n 111) 176; *African Banking* case (n 14) par 18 "In South African legal parlance, an offer is an invitation to consent to the creation of obligations between two or more parties".
[113] Van der Linde "Annual Banking Law Update" 2014 25.
[114] Pretorius, Rosslyn-Smith "Expectations of a business rescue plan: international directives for Chapter 6 Implementation" 2014 *SAbusReview*131.

order to constitute a proper binding offer the SCA held that the offeree is entitled to know who is making the offer, the terms of the offer, the price or determined value as well as where, when and how payment would be discharged.[115]

The SCA has confirmed this position. It held that the High Court relied on the United State of America Bankruptcy code, namely Chapter 11.[116]However the High Court erred in this regard by considering the American Cram-down position because with the United State of America Bankruptcy Code the court has the power to determine whether the non-consenting creditors' decision can be disregarded.[117] Furthermore, in terms of the South African business rescue process, the making of the binding offer is a separate phase and comes before the phase of voting for the business rescue plan.[118]Therefore unlike the United State of America's position "the meaning of 'binding offer' falls to be considered on its own merits and separately from the merits of a rescue plan."[119]

3.4 Conflicting provisions

Gorven J held was that the interpretation given by Kathree-Setiloane J goes against certain provisions of the 2008 Companies Act[120]. The first one is section 145(2)(a) which states 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."

Thus if this right is taken away from them it must be clearly envisaged.[121]The court held that:

> "If such a clearly formulated right was to be qualified or taken away, it would have to be done in equally clear terms."[122]

[115] *African Banking* (n 14) par 19.
[116]*African Banking* case(n 14) par 16.
[117] *African Banking* case (n 14) par 16.
[118]*African Banking* case (n 14) par 17.
[119]*African Banking* case (n 14) par 17.
[120] *DH Brothers* case (n 16) par 46.
[121] *DH Brothers* case (n 16) par 46.
[122]*DH Brothers* case (n 16) par 46.

Therefore because section 145(2)(a) of 2008 Companies Act entitles a creditor to vote, they may not be deprived of this right against their will.[123]It is quite confusing that High Court would disregard this section which clearly grants creditors the right to vote, to amend, approve or reject a proposed business rescue plan. The court has disregarded this right as their interpretation of section 153(1)(b)(ii) of 2008 Companies Act implies that the mere offering of the plan is enough to deprive the offeree of their voting interests without even accepting the offer. Hence the interpretation of binding offer given by Kathree–Setiloane J does not correlate with other provisions of the of 2008 Companies Act.[124]

Moreover, Gorven J further states that the interpretation given in the High Court goes against another provision of the of 2008 Companies Act, as the of 2008 Companies Act provides that in case a plan has been rejected at the meeting, the affected persons as well as the business rescue practitioner are given other alternatives to follow in order to try and keep it alive.[125]The 2008 Companies Act gives them the right to approach the court to set aside the unfavourable vote on the ground that it was inappropriate.[126]

In the case of *Copper Sunset Trading 220 (Pty) Ltd v Spar Group Ltd and Another,*[127] the court dealt with the issue of when a non-consenting creditor's conduct would be considered as 'inappropriate'. It was held that in order to determine whether the conduct was inappropriate, section 153(1)(a)(ii) of 2008 Companies Act would have to be read with section 153(7) of 2008 Companies Act. The court held that we should not only consider the interests of the creditors. The 52 employees who would lose their jobs upon liquidation had to be taken into consideration.[128] It was held that the first respondents' attitude in requiring liquidation is self-serving and unreasonable; this was based on the fact that the respondent would gain at most a R0.45 dividend and is possibly the only creditor.[129] Furthermore, the second respondents' rejection of the plan

[123] *DH Brothers* case (n 16) par 47.
[124] *DH Brothers* case (n 16) par 46.
[125] *DH Brothers* case (n 16) par 48.
[126]*DH Brothers* case (n 16) par 48, reference is made to section 153(1)(a) and (b) 2008 Companies.
[127] 2014 6 SA 214 (LP).
[128] (n 127) par 36.
[129] (n 127) par 37.

was held to be irrational, as the respondent voted against the proposed plan despite the fact that where the plan is absent, it would not receive any dividend in liquidation.[130]

One can be under the impression that the word binding was used for a specific purpose, not only to bind both the offeree and offeror once the offer has been made, but to also make sure that all stakeholders' rights and interests are balanced.[131] The word binding is used to help all affected persons who are trying to have a good business rescue plan approved but are prohibited in this approval by one or more creditors who oppose the plan, and could be opposing for selfish and unjustifiable reasons.[132] Therefore, 'the purpose behind the word binding and the fact that it causes the offer to be binding on both the offeror and the offeree, stops the offeree from unilaterally being able to cause a good plan to be rejected'.[133] However, Steenkamp acknowledges that the balance which is referred to in section 7(k) is harmed by the way in which the offeror is allowed to purchase the offeree's voting interests without the offeree being able to prohibit this.

Although this might be the case, the affected person who might be aggrieved by this and had the intention of voting in favour of the plan still has section 153(1)(b)(i)(bb) of 2008 Companies Act.[134]We must assume that when creditors with voting interests have refused to vote in favour of an entirely sensible business rescue plan 'on grounds that are grossly unreasonable and/ or for spurious or strategic reasons' the court would assist the person affected by this unreasonable refusal.[135]The courts would have to consider whether the vote is prejudicial to the interests of creditors who have voted for the implementation of the plan.[136]

[130] (n 127) par 37.
[131]Steenkamp "Is an offeree really bound by a binding offer in terms of section 153(1)(b)(ii): The disagreement of the two judges" http://www.hoganlovells.com/is-an-offeree-really-boun-by-a-binding-offer-interms -of-section-1531bii-the-disagreement-of-two-juddges-11-26-2013 (7/15/2014); *DH Brothers* case (n 16) par 31-32.
[132]Steenkamp (n 131).
[133]Steenkamp (n 131).
[134] Any affected person present at the meeting may-apply to the court to set aside the result of the vote by the holder of voting interests or shareholders , as the case may be on the grounds that it was inappropriate.
[135]Gootkin "The problem of compelling shareholders to approve business rescue plans" *Without Prejudice* May 2012 13.
[136]Levenstein "Getting Clever with Business Rescue" *Without Prejudice* August 2012 30.

Moreover, in order to amend the plan they may seek approval to do so.[137] As opposed to non-consenting creditors who are not given the right to come before the court to set aside an acceding vote or the appropriation of their voting interests. It therefore seems improbable that the legislature would dispossess them of their right to vote without giving them the right to oppose the adoption of a plan resulting from that deprivation.[138]

This makes it even more evident that if the approach taken by the High Court is followed then there will be discrimination amongst creditors as non-consenting creditors are not given the opportunity to oppose the business rescue plan as any vote against the plan exposes them to a binding offer, whereas affected persons as well as the business rescue practitioner are given alternative mechanisms to follow. Van der Linde states that this cannot be the type of effective rescue that section 7(k) of 2008 Companies Act makes reference to if not even the secondary objective of business rescue which is to get a better return for creditors.[139]

According to Gorven J another provision that goes against the decision given by the High Court is section 153(6).[140]The approach taken by the High Court implies that only after the adoption of the plan will the value of the voting interests be determined.[141]

> "As soon as the claim has been independently and expertly valued as contemplated in section 153(1)(b)(ii) of the of 2008 Companies Act, the parties must decide whether the value is accepted or not. If the parties are not in agreement with the value as independently and expertly determined, either the holder of the voting interest interests or the person acquiring the interest in terms of the binding offer, may apply to court, in terms of section 153(6) of the Act to review, re-praise, and revalue the determination by the independent expert in terms of section 153(1)(b)(ii) of the Act. The Act offers this remedy to both the offeree and the offeror under section 153(1)(b)(ii)thereof."[142]

Furthermore according to the High Court, either of the parties' acceptances of the value independently and expertly determined is the deciding factor of the binding

[137] *DH Brothers* case (n 16) par 48.
[138] *DH Brothers* case (n 16) par 48.
[139] Van der Linde (n 114) 26.
[140] '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).'
[141] *African Banking* case (n 74) par 30.
[142] *African Banking* case (n 74) par 31.

offer.[143]Gorven J states that this would then imply that from the moment that the value is determined, the non-consenting creditors are then dispossessed of their voting rights, therefore section 153(6) will not be able to apply to an offeree, and the attempt to make it applicable is unnecessary.[144]He further states that because section 153(6) does not specify when the voting interests may pass, the most feasible conclusion that can be drawn is that the voting interests may only pass only once the purchase price has been paid; this is what the common law states.[145] He made reference to the case of *Ghandhi v SMP Properties (Pty) Ltd*[146]where Broome J held that "in the absence of some clear stipulation to the contrary, payment and transfer take place *pari passu.*"[147]

Thus if the voting interests are to pass before payment and they are exercised by the offeror to vote for the plan, an unforeseen situation would transpire in business rescue proceedings.[148]This would then mean that the plan must be implemented as it would have been adopted, allowing the offeror to use voting interests not entitled to; with no payment made.[149]Because there is no other method for setting a plan aside once it has been adopted, the only rational interpretation is that there must have been payment prior to the voting interests passing.[150]

The SCA supports Gorven J's interpretation in this regard and held that the High Court ignored the fact that the offeree will be prejudiced as a result of the loss of its voting interest.[151]The SCA held that "although a binding offer may have been made (during the consideration of the rescue plan), finalisation of the aspects relating thereto, including transfer of the voting interest, is not necessarily immediate. This is consistent with the established meaning of an offer. The interpretation accorded by the court *a quo*

[143]*African Banking* case (n 74) at par 33.
[144] *DH Brothers* case (n17) par 52.
[145] *DH Brothers* case (n17) par 52.
[146]1983 1 SA 1154.
[147] (n 146) par 1157G-H.
[148] *DH Brothers case* (n 16) par 53.
[149]*DH Brothers case* (n 16) par 53.
[150]*DH Brothers case* (n 16) par 53.
[151] *African Banking* case (n 14) par 23.

immediately divests interested holders of their interest once the binding offer is made; this is untenable."[152]

It is also held that the High Court's decision is not supported by section 154(2) which states that once the business rescue plan has been approved and implemented, any creditor is precluded from enforcing any debt owing to it immediately before commencement of the business rescue proceedings.[153]Furthermore, it cannot be held that the offer made is a valid offer as the purchase price was not mentioned "nor was a price readily ascertainable therefrom".[154] Accordingly, because there was no valid offer to purchase, it cannot be held that there was a binding offer as provided for in section 153(1)(b)(ii) of 2008 Companies Act.[155]

3.5 Balancing the interests of all stakeholders

In terms of section 7(k) of the 2008 Companies Act one of the purposes of the 2008 Companies Act is to 'provide for the efficient rescue and recovery of financially distressed companies in a manner that balances the rights and interests of all stakeholders'.[156]It aims to do so by using the business rescue procedure.

It becomes problematic when there is no definition given in legislation for words that can be interpreted in numerous ways. In order to determine what the legislature meant by the words "binding offer" one would have to determine their ordinary meaning in light of the purpose of the specific section. In order to understand this provision, we need to look at the intention of section 153(1)(b)(ii) of 2008 Companies Act as well as the nature of business rescue.

[152] *African Banking* case (n 14) par 24, the SCA further held that the interpretation by the High Court does not lead to sensible business like results., the court made reference to *Natal Joint Municipal Pension Board v Endumeni Municipality* 2012 4 SA 593 (SCA) par 18 where the court held that when attributing meaning to words used, a sensible meaning that leads to sensible businesslike results is preferred.

[153] Locke, Esser "Company Law and Stock Exchanges" 2013 *Annual Survey of South African Law* 231.

[154] *African Banking* case (n 14) par 53.

[155] ibid .

[156] Leontsins,Seymour-Cousens, Ireland “The Restructuring Review” Law Business Research (2013) 318; *SA Restructuring and Insolvency Practitioners Association v Minister of Justice and Constitutional Development and Others , and Another Application* 2015 2 SA 430 (WWC) at par 28 it was held that it is important to consider the interest of society as a whole and not only of creditors, this is in accordance with the Bill of Rights to protect the interests of all persons as insolvency proceedings affect a broad scope of society and not only creditors. It also noted that these interest possibly compete with each other and therefore they need to be recognised and given adequate protection by the people appointed to administer business and insolvent estates; *African Banking* case(n 14) par 42

The intention of section 153 of 2008 Companies Act is to give the business recue practitioner and all affected persons other methods to implement, in circumstances where the proposed business rescue plan has been rejected in terms of the provisions of section 152 of 2008 Companies Act.[157]It is further held that:

> "the provisions of this section amount to a last-gasp attempt to have a proposed plan approved by attacking the rejection of the plan by the holders of the creditors' voting interests as inappropriate, by seeking approval for the practitioner to prepare and publish a revised plan or by purchasing the voting interests of one or more persons who opposed the adoption of the business rescue plan."[158]

It is clear that this section aims to try keep the business rescue proceedings alive, by providing creditors to approve the business rescue plan, but the question we should be asking is whether it is appropriate for it to be done while discriminating and prejudicing others.

The third reason given by Gorven J was that the purposive approach followed by Kathree–Setiloane J infers that that the purpose of the section is to 'enforce a revised business rescue plan'.[159]He states that the purposes of section 7 of 2008 Companies Act are not in support of an interpretation that leads us to accept business rescue plans at all cost.[160] If the legislators' intention was to accept the business rescue plan at all cost, it would not have stipulated the 75 percent majority vote.

He further stated that it is of vital importance that the rights and interest of all stakeholders are balanced during business rescue.[161]Where there is a possibility of a statute being interpreted in two ways, the court must pay attention to the purpose of the Act in order to solve the ambiguity.[162]This then assists in determining the legislatures' intention.[163]

Bradstreet makes a very important statement by saying that:

[157]Delport (n 4) 529.
[158]Delport (n 4) 529.
[159] *DH Brothers* case (n 16) par 54.
[160] *DH Brothers* case (n 16) par 54.
[161]*DH Brothers* case (n 16) par 54.
[162] De Ville *Constitutional and Statutory Interpretation* (2000) 246.
[163]De Ville(n 160) 246.

> "Rescuing the company does not mean salvaging the wreck at all costs, but rather making an appropriate use of the business rescue procedure to facilitate an outcome that is in the best interest of all stakeholders."[164]

This statement makes it quite clear that we should be mindful of the fact that there are other stakeholders involved in the business rescue proceedings and all their interests should be taken into consideration. Hence we should not be blindfolded by the aim of rescuing the business at all costs which will then result in discriminating against certain stakeholders.

The manner, in which the offeror may unilaterally acquire the offeree's voting interests without the offeree being able to prohibit this upsets the balance as referred to in section 7(k). However in the very same manner, if the offer can be rejected by an uncontrollable creditor then the whole purpose of section 153(1)(b) of 2008 Companies Act will be compromised.[165] It is proposed that the balance between the two can be restored through section 153(6) of 2008 Companies Act as the offeree can still use this section even after payment has been made to them, and they may procure a higher amount if they are successful.[166] Another manner in which this balance is restored is through the offeror not having access to the offeree's underlying claim when they purchase the voting interest, thus the offeree will receive payment for their voting interests at liquidation value, however in business rescue or liquidation they will still be presented with a dividend.[167]

If the interpretation given by Gorven J in *DH Brothers* is correct, then the status of the secured creditor is protected as its secured right cannot be taken away from it by a binding offer.[168]The interpretation by Gorven J is more in line with the law relating to offer and acceptance, thus if the legislators had the intention for the provision to deviate from the existing law; it would have done so in clear terms.[169]

[164]Bradstreet "Business rescue prove to be creditor-friendly: CJ Claassen J's analysis of the new business recue procedure in Oakdene Square Properties" (2013) *SALJ* 130 51.
[165]Steenkamp (n 131);
[166]Steenkamp (n 131).
[167]Steenkamp (n 131).
[168]Wesso"Business rescue: The position of secured creditors" *De Rebus* September 2014 36.
[169]Wesso (n168) 36.

Van der Linde states that the approach taken by the High Court is narrow as the offeree is given a limited choice when voting on the business rescue plan because they are exposed to a binding offer by any vote against the plan.[170]Therefore their plan to get an improved and revised plan could work at their disadvantage.[171] In addition, Van der Linde is of the opinion that the judgment given by Kathree-Setiloane J shows little evidence of an attempt to try and balance these interest as required by section 7(k) of the 2008 Companies Act which the court however surprisingly relied on so much.[172]Therefore, in her opinion 'the binding offer provision certainly discriminates between creditors who vote against the plan.'[173]

Bradstreet mentions that judicial management and liquidation were implemented in a disproportionate manner which was in the creditors' interests.[174]Therefore, the new procedure of the business rescue process aims to safeguard a wider range of interests.[175]Thus, it is important to uphold this aim and safeguard the interest of the non-consenting creditors.

Moreover, although the purposes of the 2008 Companies Act require effective business rescue in a manner that balances the interests of all stakeholders we must also remember that 'all stakeholders' interests are served by affording sufficient protection to creditors in the first place'.[176]

Gootkin states that he prefers the decision given by Gorven J; it is more persuasive and preferred on the basis of the common law principles of offer and acceptance.[177]This interpretation is correct because it has the effect that the non-consenting creditor who holds voting interests cannot be forced to give away those voting interests to any affected person that makes a binding offer.[178] This interpretation will then have the effect that a shareholder cannot be forced to sell its shares to any affected person, this

[170]Van der Linde (n 113) 26.
[171]ibid.
[172]Van der Linde (n 114) 26.
[173]ibid.
[174]Bradstreet (n 164) 44.
[175]ibid.
[176]Bradstreet (n 11) 195.
[177]Gootkin "The problem of compelling shareholders to approve business rescue plans" *Without Prejudice* May 2012 13.
[178]Gootkin (n 177) 13.

would be the position even if the binding offer provision applied to creditors holding voting interests as well as shareholders.[179]

In the case of *Absa Bank v John Frederick Caine No and Another, In Re;Absa Bank Limited v Caine N.O and Another*[180], Daffue J in the Free State High Court agreed with Gorven J's interpretation of section 153(1)(b)(ii), although he didn't go into detail.[181]This is what he stated:

> "In my view the reference to "binding offer" should be regarded as an offer binding on the offeror and not the offeree who should be entitled to either accept or reject the offer at his will. However it is apparent that there is uncertainty and therefore the legislature is urged to consider the issue afresh and make the necessary amendments. In casu the practitioner believed that a valid binding offer, which also bound the bank was made."

It is unfortunate that the judge in this case didn't discuss this issue in detail. This however is important as it indicates that Gorven J's interpretation is supported although unfortunately no reasons were given.

[179]Gootkin (n 177) 13.
[180]2014 46 (FB).
[181] (n 180) par 37.

Chapter 4 Conclusion

It is submitted that the SCA as well as Gorven J's interpretation of the section is correct as it is in line with the basic principles of the law of contract. The interpretation of the phrase 'binding offer' should not be one that has a wide divergence from the general principles of the law of contract dealing with purchase and sale.[182]In order to give rise to rights and duties, an offer must be accepted. The mere offering without acceptance goes against this principle that has been followed for so many years, and I believe that the legislature couldn't have had the intention to disregard this position. The legislator couldn't have been hoping for duress to be the order of the day in business rescue proceedings.

It cannot be agreed upon that a creditors' intention to oppose a business rescue plan should be ignored.[183]Unless the creditors' attitude towards the plan is said to be *mala fide* or unreasonable.[184] A creditor has to be given a chance to accept or reject an offer and the court will determine whether their rejection is inappropriate or not if there is a need to do so.

The interpretation given by the SCA and Gorven J, is more in line with other provisions of the 2008 Companies Act such as section 7(k) that requires efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders.

In my opinion the interpretation given in the High Court actually prejudices non-consenting creditors as section 145(2)(a) gives a creditor the right to vote, amend, approve or reject a proposed business rescue plan. This right is limited if acceptance is not required when making a binding offer, and the mere offering itself binds both the offeror as well as the offeree. The requirement of the 75 percent majority vote was set for a reason, meaning that we should acknowledge that the business rescue plan cannot be adopted in all cases. Thus section 153(1)(b)(ii) cannot be used as a tool that

[182] Marquand 'Who does a 'binding offer' bind? The offeror or the offeree?" Without Prejudice August 2014 13; See chapter 3.5.
[183](n 1) par 38.
[184](n 1) par 38.

ensures that the business rescue plan is adopted in all circumstances. Creditors cannot be pushed into a little corner and forced to give away their voting interests without their consent, to assist with a business rescue plan being adopted at all costs.

If the interpretation given by the High Court is correct, then it makes it possible for an affected person to take over not just the voting interests, but the non-consenting creditors claim at the liquidation value.[185]This would then lead to the possible abuse of the business rescue proceedings.[186]

Non-consenting creditors would be pressurized 'to vote in favour of any plan that offers a dividend nominally above zero, even if they have, other' perfectly legitimate reasons to vote against the plan'.[187] They would have to deal with the possibility of having their claims 'effectively expropriated'.[188] Creditors who want to ensure that the proposed business rescue plan is approved will have substantial power to force the plan on non-consenting creditors.[189]

Although we need to acknowledge that the interpretation given in the High Court might have been an attempt to safeguard the offeror from the offeree who might attempt to thwart the whole business rescue process for their own benefit, this position cannot succeed because section 153(1)(b)(i)(bb) affords an aggrieved shareholder who would have wanted to vote in favour of the plan to apply to court to set aside the result of the vote by the holders of voting interests or shareholders on the grounds that it was inappropriate. As Gootkin states, we have to assume that a court would assist an affected person where it is clear that those with voting interests have "vetoed an entirely sensible business rescue plan on the grounds that are grossly unreasonable and /or for spurious or strategic reasons."[190]

[185] A Elliot "What is the meaning of 'voting interests' in terms of the section 153(1)(b)(ii)?' Business Restructuring and Insolvency Newsletter, April 2014 http://www.lexology.com/library/detail.aspx?g=c46ffc79-e272-42e2-81db-ac0d294578bb (9/13/2014); African Banking case par 25.
[186]Elliot (n 185).
[187]Elliot (n 185).
[188]Elliot (n 185).
[189]Leontsins,Seymour-Cousens, Ireland (n 154) 328.
[190]Gootkin (n 177) 13.

Therefore. it is important to balance the interests of all stakeholders in business rescue. The procedure must not be open to abuse and thereby prejudicing other stakeholders.

I believe that Loubser's recommendations should be followed. She stated that the following amendments should be made to section 153(1)(b):[191]

> if the practitioner does not take any action contemplated in paragraph (a)-
>
> (i) any affected person present at the meeting and entitled to vote on the approval or rejection of the rescue plan, may-
>
> aa) call for a vote of approval from the creditors of the company 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 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.

It is submitted that this proposition should be followed by the legislator as it clearly states the offeror may make an offer to purchase the offeree's voting interest and thus the offeror will have the choice of accepting or refusing the offer.

Therefore until the legislator clarifies this confusion, it is submitted that the SCA and Groven J's interpretation should be followed as it does not derail too much from existing law such as the basic principles of the law of contract .It also balances the interests of all stakeholders the best. Acknowledging that Kathree–Setiloane J's interpretation was safeguarding the oferror's position from offeree's who would want to jeopardize the business rescue procedure, we must note that this has to be decided on the merits of each case. The court will have to determine whether the offeree's decision was inappropriate. We need to interpret this section in a manner that ensures that it is not subject to abuse by companies.

[191] Loubser (n 88) 376-377.

It is also important to note that we do not have a proper cram down provision as the US Bankruptcy Code. Our courts are not involved in the business rescue process unlike the US Bankruptcy courts.

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