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1 Introduction

There are always two sides to every coin that being the good and the bad side. When running a business the same principle is applied. The business can either be a success or a failure. When a business becomes financially distressed, its shareholders may try everything in their power to rescue the business from failure and try to restore it to the profitable entity that it was prior to it becoming financially distressed. This is where the idea of business rescue comes into play.

The focus of this dissertation is based on issues set out in the African Banking Corporation of Botswana v Kariba Furniture Manufacturers and Others.1 The issues that arose in the abovementioned case pertain to an interpretation of a binding offer as per the Companies Act 71 of 2008 as well as the binding effect of an offer made to an offeree and lastly the reasonable prospect of success of the business rescue proceedings under the circumstances.

This dissertation will firstly deal with the brief history of business rescue proceedings previously known as “judicial management” and its development as currently recognized in the Companies Act of 2008.2 This dissertation will then have regard to the facts of the Kariba case, followed by a discussion of the term “offer” as per the common law. It will thereafter take into consideration a conflicting judgment3 as well as the criticisms by the Judges in the two opposing cases. Lastly, this paper will deal with recommendations as to an approach that could be followed in dealing with the issue at hand. All of the above will be considered with the object of understanding a binding offer.

2 Companies Act 71 of 2008 (hereinafter referred to as the Companies Act of 2008).
3 DH Brothers Industries (Pty) Ltd v Gribnitz NO 2014 (1) SA 103 (KZP).
2 Historical Overview

Interestingly enough South Africa was one of the first countries to introduce business rescue into its system. It was not introduced as business rescue but instead as “judicial management”. Judicial management was introduced into the system by means of the Companies Act 46 of 1926. The intention of introducing such legislation was to assist companies that played an important role in our country in terms of contributing to South Africa’s economy. Although the intention was that such legislation was only applicable to companies that contributed to South Africa’s economy, such intention was not reflected in the drafting of the relevant legislation, however the courts made it their duty to interpret legislation strictly so as to avoid any sort of abuse of the system.

According to the Companies Act of 1926 “mismanagement” of the company provided reason to commence judicial management. As a result of judicial management not being very successful under the Companies Act of 1926 the South African Law Commission undertook to review and

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5 Burdette (n 4) 241. The Companies Act 46 of 1926 recognised corporate rescue as judicial management.
7 Loubser (n 6) 157; Paul Omar states that corporate rescue are for companies who are on the verge of an economic collapse and who need to be saved in order to restore production capacity, employment and the continued receipt of capital and investment.
8 Ibid; Kloppers “Judicial management – a corporate rescue mechanism in need of reform?” (1999) *Stell LR* 417 418; 428 – Klopper notes that the judicial management system in South Africa was only available to companies. A “standard scheme” was introduced in order to incorporate corporate rescue into section 311 of the Companies Act 1973. Klopper was of the opinion that the continued use of the “standard scheme was used as a means to gain tax benefits instead of achieving business rescue. This lead to an abuse of the system because the standard scheme was not really aimed at the rescue of the company but instead at the tax benefits of a company in provisional or final liquidation.
9 Companies Act 46 of 1926 (hereinafter referred to as the Companies Act of 1926).
improve the South African Insolvency Law. The South African Law Commission drafted a "Draft Insolvency Bill" which it would use as a framework in its application of the Insolvency law.

The Centre of Advanced Corporate Insolvency Law ("CACIL") in its contribution to the development of Insolvency law used the South African Law Commission's Draft Insolvency Act as a point of departure. "CACIL" then drafted a final report on the Unified Insolvency Law. The final report contained a Draft Insolvency and Business Recovery Bill and these included the law commissions draft insolvency bill as well as provisions from the Companies Act of 1973 pertaining to liquidation of companies, judicial management and compromise.

The court in Le Roux Hotel Management (Pty) Ltd v E Rand (Pty) stated that "although international development supported the idea of a progressive business rescue system proper legislation is required to regulate business rescue". For purposes of development, the concept of "judicial management" was re-enacted in the Companies Act of 1973. The Companies Act of 1973 provided for a procedure when dealing with judicial management and this procedure will be discussed next. In order for judicial management to commence certain requirements had to be met in terms of Section 427(1) of the Companies Act of 1973. A company was placed under judicial management if by mismanagement or for any other cause a company met the following requirements:

1) The company was unable to pay its debts or probably unable to meet its obligations.

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11 Loubser (n 10) 140.
12 Ibid.
13 Burdette (n 4) 243.
14 Loubser (n 10) 140.
15 Ibid
16 [2001] 1 All SA 223
17 Loubser (n 10) 140.
18 Ibid.
19 Section 427(1)(a); Museta The development of business rescue in South African Law (LLM dissertation University of Pretoria 2011) 1. This is also known as commercial insolvency. Commercial Insolvency means that a company's assets exceeds its liabilities but the company is still unable to pay its debts.
20 (n 19).
2) The company has not become or is prevented from becoming a successful concern.\textsuperscript{22}

3) There is a reasonable probability that if a company is placed under judicial management, it will be enabled to pay its debts or meet its obligations and to become a successful concern\textsuperscript{23} and

4) It appears just and equitable to the court.\textsuperscript{24}

The application for judicial management may be made by anyone who is entitled to apply for the winding up of a company.\textsuperscript{25} If the court is satisfied that all the requirements as stipulated in Section 427(1) are met then the court may grant a provisional judicial management order. The court who issued such order will then appoint a judicial manager whose duties include \textit{inter alia} providing a report which sets out the affairs of the company as well as the possibility of future success.\textsuperscript{26} A meeting is then held by the Master of the High Court to consider the report given by the judicial manager and the Master decides if the provisional order should be made final.\textsuperscript{27}

The court will grant the final order if it is satisfied that the company will be become successful and that it is just and equitable to put such company under judicial management.\textsuperscript{28} Once a final judicial management order is granted it can only be terminated by an order of the court that granted

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\textsuperscript{22} Section 427(1)(b); Museta \textit{The development of business rescue in South African law} (LLM dissertation university of Pretoria 2011) – the Companies Act of 1973 does not provide clarity as to when a company will be regarded as not being a successful concern.

\textsuperscript{23} Rajak and Heming \textit{“Business rescue for South Africa”} (1999) \textit{SALJ} 262 267-268 – This requirement is very restrictive and tended to prevent applications from being successful.

\textsuperscript{24} Section 344(h); In the \textit{Makhava and Others v Lukoto Bus Service (Pty) Ltd and others 1987 (3) SA 376 (V)} at pg 394 the court stated that “if the alleged problems were capable of internal resolution by the majority of the shareholders... that it [the court] would preclude itself from finding that it would be ‘just and equitable’ to place [the company] under judicial management’.

\textsuperscript{25} Section 427(2) - The application can be made by the company itself, by one or more of its creditors, by one or more of its members or even jointly by any of them.

\textsuperscript{26} Loubser (n 6) 155. In \textit{Murgatroyd v Van der Hoeve NO and Others [2014] 4 All SA 89(GSJ)} it was held that there is no indication in the Act, that all the functions of a business rescue practitioner must be undertaken and discharged by the practitioner personally. The practitioner’s functions and duties are broad, and require a variety of steps to be taken. It was further held that the very nature of a practitioner’s powers implies that he may, in appropriate circumstances, appoint advisors, valuators, auctioneers, forensic accountants, lawyers and other experts or persons to assist him or her in the carrying out of his functions. As a result, a practitioner by necessary implication has the power to appoint advisors.

\textsuperscript{27} Ibid.

\textsuperscript{28} Ibid; The court in \textit{Tenowitz and another v Tenny Investments (Pty) Ltd; Spur Steak Ranches (Pty) Ltd v Tenny Investments (Pty) Ltd 1979 (2) SA 680 (E)} stated that “the test propounded in section 432 of the Companies Act 1973 for the granting of a final judicial management order is more stringent than that under the old Companies Act 46 of 1926 which only postulated the reasonable probability test”.

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such judicial management order.\textsuperscript{29} Although there was a procedure to be followed in the application for judicial management it was still regarded by many commentators as a dismal failure.\textsuperscript{30}

It is noted that some of the shortcomings from the application of judicial management is as a result of the fact that judicial management was only applicable to companies and not any other forms of business.\textsuperscript{31} Since the Companies Act of 1926 there has not been much development in this area of the law and even though the intention was to “create a system of corporate rescue appropriate to the needs of a modern South African economy” there has rarely been any success regarding judicial management and business rescue in South Africa.\textsuperscript{32} The court in \textit{Western Bank Ltd v Laurie Fossati Construction (Pty) Ltd; Western Bank Ltd v Laurie Fossati Plant Hire (Pty) Ltd}\textsuperscript{33} stated that “the ultimate object was that, by providing the company with efficient management, it might be restored to normal control after gradually paying off the creditors”.

After realizing that the judicial management system was not succeeding in South Africa one would assume that the legislature would have taken note of this unsuccessful procedure and recognize the “urgent need to clarify, rectify or replace” those provisions that are not achieving the desired goals as contemplated in the Companies Act of 1973.\textsuperscript{34} The Companies Act of 1973 was then repealed and replaced by the Companies Act of 2008 in the hopes of achieving greater success.

The provisions relating to business rescue proceedings in this act aim to “provide efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests

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\textsuperscript{29} (n 6) 155.
\textsuperscript{30} Burdette (n 4) 241; Kloppers “Judicial management – a corporate rescue mechanism in need of reform?” (1999) \textit{Stellenbosch Law Review} 417 424-425 – Olver provides three reasons as to why judicial management was unsuccessful. Firstly, people who are not suited to carry out the task are appointed as judicial managers. Secondly, the person appointed as judicial manager does not reveal whether the company should be placed judicial management or under liquidation. Lastly, the fact that judicial management applications are made frivolously meaning that sometimes there are smaller companies that apply for judicial management and they do not have sufficient assets to cover the cost of judicial management. Olver is of the opinion that judicial management is not suitable for smaller companies. Rajak supports Olver’s opinion.
\textsuperscript{31} Loubser (n 6) 157.
\textsuperscript{33} 1974 3 All SA 424 (E).
\textsuperscript{34} Loubser (n 32) 701.
\end{flushleft}
of all relevant stakeholders”. Although there were struggles in trying to implement a system that would smoothly regulate business rescue in the old system, it seems like the drafting of the new business rescue provisions as provided for under the Companies Act of 2008 lacked clarity as to the actual meaning of the provisions in the Act and this contributed to the unsuccessful use of such provisions.

3 Development of the business rescue legislation as considered in the Companies Act 71 of 2008

Business rescue proceedings as provided for in the Companies Act of 2008 are fairly new in South Africa and the purpose thereof is to “facilitate the rehabilitation of a financially distressed company”. To be ‘financially distressed’ at any particular time means that it is reasonably unlikely that the company will be able to pay its debts as they fall due and payable within the immediately following six months or it appears to be reasonably likely that the company will become insolvent within the following six months. Business rescue proceedings will commence after taking into consideration the insolvency test as well as the fact that there is a reasonable prospect that such proceedings will succeed.

According to Section 131(4)(a) the court will allow for business rescue proceedings to take place if it is satisfied that the requirements in that section are met. Business rescue proceedings seem

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36 Section 128(1)(b) “business rescue” means proceedings to facilitate the rehabilitation of a company that is financially distressed by proving for —
   (i) The temporary supervision of the company, and the management of its affairs, business and property;
   (ii) A temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and
   (iii) The development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results is a better return for the company’s creditors or shareholders than would result from the immediate liquidation of the company.
37 Sharrock, Van Der Linde and Smith Hockly’s Insolvency Law (2013) 275.
38 Section 128(1)(f).
40 Section 131(4)(a) requirements to proceed with business rescue:
   (i) The company is financially distressed;
   (ii) The company had failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters; or
to be shifting towards a more creditor friendly system as the aim is to attain results that are more favourable towards creditors rather than settling for liquidation proceedings.41 Business rescue proceedings seek to ensure effective management of businesses as well as the balancing out of rights of stakeholders in financially distressed companies.42 These proceedings can commence either voluntarily in accordance with a resolution adopted by the board of directors or by way of a court order.43

(iii) It is otherwise just and equitable to do so for financial reasons, and there is reasonable prospect for rescuing the company.

41 Bradstreet “The new business rescue: will creditors sink or swim?”(2011) SALJ 352 356; The court in Panamo Properties (Pty) Ltd and another v Nel NO [2015] 3 All SA 274 (SCA) par 8 gave recognition to the fact that “business rescue is a process aimed at avoiding the liquidation of a company if it is feasible to do so”.

42 Klopper and Bradstreet “Averting liquidations with business rescue: Does a section 155 compromise place the bar too high?”(2014) Stellenbosch Law Review 549; Bradstreet “The leak in the chapter 6 lifeboat: Inadequate regulation of business rescue practitioners may adversely affect lenders’ willingness and the growth of the economy” (2010) Merc LJ 195 198 – The new Companies act provides for a better balance between the interest of the stakeholders as compared to the provisions under the judicial management system where the rights of stakeholders were not properly balanced out.

43 Section 129: Company resolution to begin business rescue proceedings:
(1) Subject to subsection (2) (a), the board of a company may resolve that the company voluntarily begin business rescue proceedings and place the company under 11 supervision, if the board has reasonable grounds to believe that—
(a) the company is financially distressed; and
(b) there appears to be a reasonable prospect of rescuing the company.
(2) A resolution contemplated in subsection (1)—
(a) may not be adopted if liquidation proceedings have been initiated by or against the company; and
(b) has no force or effect until it has been filed.
(3) Within five business days after a company has adopted and filed a resolution, as contemplated in subsection (1), or such longer time as the Commission, on application by the company, may allow, the company must—
(a) publish a notice of the resolution, and its effective date, in the prescribed manner to every affected person, including with the notice a sworn statement of the facts relevant to the grounds on which the board resolution was founded; and
(b) appoint a business rescue practitioner who satisfies the requirements of section 138, and who has consented in writing to accept the appointment.
(4) After appointing a practitioner as required by subsection (3) (b), a company must—
(a) file a notice of the appointment of a practitioner within two business days after making the appointment; and
(b) publish a copy of the notice of appointment to each affected person within five business days after the notice was filed.
(5) If a company fails to comply with any provision of subsection (3) or (4) — 12
(a) its resolution to begin business rescue proceedings and place the company under supervision lapses and is a nullity; and
(b) the company may file a further resolution contemplated in subsection (1) for a period of three months after the date on which the lapsed resolution was adopted, unless a court, on good cause shown on an ex parte application, approves the company filing a further resolution.
(6) A company that has adopted a resolution contemplated in this section may not adopt a resolution to begin liquidation proceedings, unless the resolution has lapsed in terms of subsection (5), or until the business rescue proceedings have ended as determined in accordance with section 132 (2).
(7) If the board of a company has reasonable grounds to believe that the company is financially distressed, but the board has not adopted a resolution contemplated in this section, the board must deliver a written notice to each affected person, setting out the criteria referred to in section 128 (1) (f) that are applicable to the company, and its reasons for not adopting a resolution contemplated in this section.”
The idea is to adopt a business rescue plan that will allow for the restructuring of the company in a manner that will result in the solvent trading of that company and if that is not possible then at least result in a better return for the creditors and shareholders as compared to what they would receive should the company be liquidated. When business rescue proceedings are adopted the company is then prohibited from adopting a resolution for liquidation proceedings.

Once business rescue proceedings are in the process of commencing, a business rescue practitioner is appointed to administer the company during these proceedings. The business rescue practitioner must then convene meetings and inform the members of the meeting as to whether there is a reasonable prospect of rescuing the business, prove claims and allow the creditors to establish a creditors committee. It is at this point in the proceedings that a business rescue plan can either be approved and implemented or rejected.

A creditor may vote to amend, approve or reject a proposed business rescue plan and if the plan is rejected then creditors may propose the development of an alternative plan or the creditors can present an offer to acquire the voting interests of the other creditors. If the majority of the holders of voting interests are in support of the adoption of the plan then the plan will be treated as being finally adopted. However, if majority of the holders of voting interest oppose the business rescue plan then the plan is regarded as rejected. It is when a business rescue plan is rejected that Section 153 of the Companies Act is consulted and this section makes provision for an affected person.

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44 Rushworth (n 39) 375.
45 Sharrock, Van Der Linde and Smith (n 37) 278.
46 Rushworth (n 39) 378.
47 Henochsberg on the Companies Act 71 of 2008 (2011) 513. In Southern Palace Investments 26 (Pty) Ltd v Midnight Storm Investments 386 Ltd 2012 (2) SA 423 it was stated that “the court’s interpretation as to what is meant by “reasonable prospect” would be useful in cases where the business rescue practitioner is expected to express an opinion as to whether there is a reasonable prospect of rescuing the company”.
48 Section 145(2)(a).
49 Section 145(2)(b)(i).
50 Section 145(2)(b)(ii).
51 Section 152(3)(c)(ii)(aa).
52 Section 152(3)(c)(ii)(bb).
53 DH Brothers Industries (Pty) Ltd v Grinatisz NO 2014 (1) SA 103 (KZP) par 35.
54 Section 128 (a) an “affected person”, in relation to a company, means
(i) A shareholder or creditor of the company;
(ii) Any registered trade union representing employees of the company; and
to purchase the voting interests\(^{55}\) of creditors who are against the implementation of the proposed business rescue plan.\(^{55}\)

The aim of this dissertation is to discuss the meaning of binding offer and it is at this point in the procedure when a business rescue plan is rejected that the discussion regarding the purchase of voting interests comes into play. In order to make a determination as to the meaning of binding offer there are certain cases that need to be discussed before such determination can be made. Below are the important cases which give rise to the discussion pertaining to a binding offer.

4 Discussion of case law regarding binding offers

4.1 Facts of African Banking Corporation of Botswana v Kariba Furniture Manufacturers & Others.\(^{57}\)

Kariba Furniture Manufacturers (Pty) Ltd (hereinafter referred to as “Kariba”) is the first Respondent in this matter.\(^{58}\) Mr and Mrs Nchite are the third and fourth Respondents as well as the shareholders and directors of Kariba.\(^{59}\) The Appellant in this matter is African Banking Corporation of Botswana (hereinafter referred to as the “bank”).\(^{60}\) The bank instituted action against Kariba for payment of money that was lent to Kariba under a credit facility agreement.\(^{61}\)

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\(^{(iii)}\) If any of the employees of the company are not represented by a registered trade union, each of those employees or their respective representatives.

\(^{55}\) A voting interest is defined in section 128(1)(j) as “an interest as recognised, appraised and valued in terms of section 145(4) to (6)”. The provisions of section 145(4) reads as follows:

‘(4) 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.

\(^{56}\) Section 153(1)(b)(ii).

\(^{57}\) (n 1).

\(^{58}\) (n 1) par 2.

\(^{59}\) Ibid.

\(^{60}\) Ibid.

\(^{61}\) Ibid.
After legal proceedings including arbitration, the arbitrator found that Kariba owed the bank an amount of BWP 14 966 809.20, however Kariba was unable to pay the debt. In 2012 Mr and Mrs Nchite resolved that Kariba be voluntarily placed in business rescue proceedings as per Section 129 of the Companies Act.

A meeting was held in terms of Section 152 and at this meeting the bank and another creditor voted against the proposed business rescue plan for many commercial reasons but the most important reason being that Kariba had ceased trading seven years prior to the proposed business rescue plan. Consideration was then taken of the provisions in Section 153 and Mr and Mrs Nchite’s attorney indicated that his clients wanted to make a binding offer on behalf of the shareholders to purchase the voting interests of the bank in terms of Section 153(1)(b)(ii) of the Act. The practitioner ruled that the bank was not open to respond to such offer, that the offer is binding on the bank and that the voting interests are to be transferred immediately. The proposed

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62 “BWP” is an abbreviation for Botswana Pula.
63 (n 1) par 2.
64 71 of 2008; See (n 1) par 3. Take note that Kariba has ceased trading seven years prior to business rescue proceedings.
65 Section 152 of the Companies Act 71 of 2008, which regulates the proceedings during consideration of the business rescue plan, provides: ‘Consideration of business rescue plan-(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 a opportunity for the employees’ representatives to address the meeting;
(d) Invite discussion, and conduct 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).
(2) In a vote called in terms of (1)(a), the proposed business rescue plan will be approved on a preliminary basis if-
(a) it was supported by the holders of more than 75% of the creditors’ voting interest that were voted; and
(b) the votes in support of the business plan included, at least 50% of the independent creditors’ voting interests, if any, that were voted.
(3) If a proposed business rescue plan-
(a) is not approved on a preliminary basis, as contemplated in subsection (2), the plan is rejected, and may be considered only in terms of section 153....'
business rescue plan was then approved by the shareholders after the transfer of the voting interest.\textsuperscript{69}

The bank then applied to the High Court contending that it could not be bound by an offer that it was unable to respond to.\textsuperscript{70} The bank complained that the offer was improper in that it lacked clarity as to the identity of the offeror (whether it was both Mr and Mrs Nchite or only one of them), what the amount and terms of payment thereof were and whether there were any conditions attached thereto.\textsuperscript{71} Kathree-Setiloane J dismissed the application by the bank indicating that it approved of the procedure adopted by the practitioner regarding the binding offer made.\textsuperscript{72} The bank took the matter up on appeal.\textsuperscript{73}

The Supreme Court of Appeal found that the binding offer made in terms of Section 153(1)(b)(ii) of the Act did not automatically bind the offeree.\textsuperscript{74} The court stated that the intention of the term “binding offer” suggests that once the offer is made it cannot be withdrawn.\textsuperscript{75} The Supreme Court of Appeal found that the “binding offer” was not binding on the Applicant and that the business rescue plan be set aside.\textsuperscript{76}

4.1.1 \textit{Reasons for the judgment in Kariba}

Kathree-Setiloane J in the \textit{court a quo} was of the opinion that the approach taken by the practitioner was correct and that the offer was indeed binding on the offeree.\textsuperscript{77}

The \textit{Court a quo} stated that the binding offer to purchase the banks voting interest would be “at a value independently and expertly determined to be a fair and reasonable estimate of the return to the bank, if Kariba were to be liquidated”.\textsuperscript{78} This was the courts way of justifying the fact that
either way the bank would still receive a reasonable return and which idea many authors disagree with.

The court further stated that "the opposing creditor, whose voting interest was transferred in terms of the binding offer, stood to suffer no prejudice as the value of the transferred interest, which would be determined by an independent expert, would be paid prior to the implementation of the revised plan". This idea that was relayed by the court has been criticized quite extensively by the court in the conflicting judgment of *DH Brothers Industries (Pty) Ltd V Gribnitz NO and Others*. This criticism will be discussed later in this paper as it is clear from the conflicting judgment that the issue lies in the interpretation of the term "binding offer" as provided for in Section 153(1)(b)(ii).

The decision of the High Court in this case seems to be quite dependent on the understanding of the term "binding offer" as provided for in Section 153(1)(b)(ii). It is unfortunate that there are many authors who are in disagreement with the way in which the High Court in the *Kariba case* interpreted the meaning of "binding offer" and that such interpretation could possibly lead to unfair deprivation of property on the part of the holders of voting interests. It is interesting to note that Dambuzo J in the Supreme Court of Appeal took a different stance as compared to that of Kathree-Setiloane J in the High Court pertaining to the judgment of *Kariba*. The Supreme Court of Appeal differs in its opinion regarding offers made in terms of Section 153.

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79 [n 1] par 8.
80 2014 (1) SA 103 (KZP).
83 Section 153(1) provides that-
153. Failure to adopt business rescue plan.- (1)(a) If a business rescue plan has been rejected as contemplated in section 152(3)(a) or (c) (ii) (bb) 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 holders of voting interests of 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- 10
   (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
The idea is to understand the term “binding offer” as provided for in Section 153(1)(b)(ii). Dambuza J indicated that his interpretation of the term “binding offer” in terms of Section 153(1)(b)(ii) simply meant that once an offer is made it cannot be withdrawn by the offeror. The Supreme Court of Appeal was therefore insistent that the nature of the offer being discussed is definitely reflective of the Common Law offer except that such offer may not be withdrawn by the offeror until the offeree responds to the offer. This will however be discussed in detail later where Dambuza J’s criticism is outlined.

4.2 A discussion of “offer” in terms of Common Law

The best way to start is probably from the very basic definition of an offer as provided for in the dictionary. An offer according to the Oxford dictionary is “an expression of readiness to do or give something; or an amount of money that someone is willing to pay for something”. Section 153(1)(b)(ii) states that an offer is made to “purchase” the voting interest and the fact that an offer is made to “purchase” the voting interests of the creditors who did not approve of the proposed business rescue plan is indicative of what is commonly known as a contract of purchase and sale.

An offer under the common law provides that there is an interest by the offeror to contract with the offeree.

In addition to this interest expressed above, there are certain requirements that have to be met in order for an offer to be recognised as a valid offer, namely:

1) “The identity of the offeror must be established or known,
2) The terms of the offer must be clear and unambiguous; and

(i) Any affected person or a 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.”

84 (n 1) par 12.
85 (n 1) par 9.
86 (n 1) par 21.
89 Hutchison and Pretorius (n 88).
3) Such offer unless expressed to the contrary or if expressed to lapse if it is not accepted by a particular date, becomes a binding contract on its acceptance. 90

The legal effect of an offer is that an offer itself cannot give rise to any sort of binding obligation. 91 In order for an offer to be binding on the parties it has to be accepted. 92 The “acceptance” as indicated above also has certain requirements that have to be met in order for such acceptance to be valid and for a contract of purchase and sale to come into being. 93 This point is of extreme importance when trying to ascertain the meaning of a binding offer. It is only once an offer is made and accepted that a binding obligation arises. 94 The court a quo in the Kariba case found that

“[the] binding offer envisaged in Section 153(1)(b)(ii) of the Act is, therefore, not an option or agreement in the contractual sense of the term, but rather is 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 and enforce a revised business rescue plan within the framework of Section 153(4) of the Act”. 95

When reflecting on the offer that was made by the shareholders in the Kariba case, it is clear that there was no provision that indicated that even if the offer is not accepted that the offer will be binding. It is submitted that according to the common law principles as discussed earlier, the offer cannot be binding on the offeree as it does not meet the requirements for offer and acceptance. It is submitted that the Common Law supports the Supreme Court of Appeal in the Kariba case

91 Hutchison and Pretorius (n 88).
92 Hutchison and Pretorius (n 88) 55.
93 Hutchison and Pretorius (n 88) 55 – 56: Requirements for valid acceptance:
  1) The acceptance must be unqualified;
  2) The acceptance must be by the person to whom the offer was made;
  3) The acceptance must be a conscious response to the offer; and
  4) The acceptance must be in the form prescribed by the offeror (if any). In the case of In Re Saratoga Investments (Pty) Ltd 1941 NPD 117 the court acknowledged the fact that offer and acceptance amounts to a contract.
94 This idea is also favoured in the DH Brothers Industries (Pty) Ltd v Gribnitz NO and others (1) SA 103 (KZP).
95 (n 1) par 8.
where the court stated that “there is no indication, in the language used in the provision that the word “offer” had assumed a different meaning from the accepted one”.96

4.3 Conflicting Judgment

4.3.1. DH Brothers Industries (Pty) Ltd v Gribnitz NO and Others 2014 (1) SA 103 (KZP):

In the abovementioned case the board of directors had resolved to begin business rescue proceedings but the applicant in the matter sought to set aside such resolution. The facts are that a certain Ms Eveleigh (an employee of Dowmont) wanted to make a binding offer in terms of Section 153(1)(b)(ii) of the Act.97 The offer was for the voting interest of the creditors who had opposed the adoption of the business rescue plan.98 The offer that was made was “at the liquidation rate or R100 whichever was the highest”.99 The creditors had then rejected the offer of R100 which seemed to be the higher of the two amounts.

The business rescue plan then reflected that the voting interests were acquired by Ms Eveleigh and incorrectly so, the plan was approved and the opposing creditors were not allowed to vote.100 The Respondents in the above matter submitted that the binding offer required acceptance, however all the creditors rejected the offer.101

The purpose of the application of Section 153 of the Companies Act of 2008102 is to try and keep the business rescue proceedings alive even though it has been rejected.103 The respondents in this matter based their argument on the judgment in the Kariba case. They stated that the mere fact that a binding offer was made is a clear indication that the voting interests were acquired by the offeror and that the offeree cannot reject the offer.104 They went on to say that should the opposing creditor be unhappy, there is sufficient recourse for such creditor where it can ask the court to “

96 (n 1) par 24.
97 (n 3) par 5.
98 Ibid.
99 Ibid.
100 (n 3) par 6.
101 (n 3) par 34.
102 (n 64).
103 (n 3) par 35.
104 (n 3) par 36.
review, re-appraise and re-value a determination by an independent expert made in terms of subsection (1)(b)(ii)' as provided for in Section 153(6).

It is submitted that the approach adopted in the *Kariba case* as well as by the Respondents in the abovementioned matter is incorrect and the reason for supporting the decision of the Supreme Court of Appeal in the *Kariba case* and *DH Brothers case* will become evident when taking into consideration the arguments put forward by the judges in the two cases.

4.4 Criticism by Judge Dambuzza, Leach and Gorven:

There is much confusion as can be seen from the two judgments regarding the definition of a binding offer as per Section 153(1)(b)(ii). There are also many interpretations of the wording of the section and that is where the issue lies. There are some loopholes in the drafting of the legislation governing the process of business rescue and that is why there is much confusion as to when an offer is binding and who it is binding on. The Judges in the two cases have provided a comprehensive set of criticism regarding binding offers and have tried to point out the factor causing the confusion. It is submitted that the argument of this dissertation is in favour of the criticisms provided by the Judges as the Judges impart clarity on the issue at hand.

4.4.1 Judge Dambuzza:

Dambuzza J deals with the idea that when there is an offer and it is binding it simply means that once an offer is made it cannot be withdrawn by the offeror before acceptance thereof.¹⁰⁵ This is a clear indication that the Judge in this matter favours the idea that offers are to be dealt with as it would be dealt with in terms of the Common Law. The Supreme Court of Appeal quoted a section from the judgment held by Gorven J in *DH Brothers Industries (Pty) Ltd v Gribnitz NO*¹⁰⁶ which stated that:¹⁰⁷

‘[The legislature] would have introduced a deeming provision of acceptance on the part of the offeree and (would) have stated that the offer, once made, gave rise to binding obligations between the parties… 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.

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¹⁰⁵ (n 1) par 9.
¹⁰⁶ (n 53).
¹⁰⁷ (n 3) par 40-41.
More importantly, ['offer'] has a specific, settled legal meaning — as the Legislature must be presumed to have known. 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.\(^{108}\)

Dambuza J states that the interpretation of the words “binding offer” by Kathree-Setlloane J cannot be supported at all because it does not lead to sensible and business-like results.\(^{109}\) The Judge further concludes that the transfer of the voting interests as well as the adoption of the business rescue plan should be regarded as null and void because there was never a binding offer made in accordance with his understanding of the term “binding offer” as provided for in Section 153(1)(b)(ii).\(^{110}\)

4.4.2 Judge Leach:

Leach J in a concurring judgment agrees with Dambuza J that no binding offer was made and therefore the business rescue plan should not have been adopted.\(^{111}\) He states that he agrees that the purpose of business rescue is indeed to give a “lifeline” to a financially distressed company and to try to keep it afloat for the sake of the stakeholders.\(^{112}\) Leach J goes on to say that once the plan is approved by those holders of voting interests the business rescue plan becomes binding, however if the holders of voting interests reject the plan then various options become available under Section 153 of the Companies Act.\(^{113}\)

\(^{108}\) Ibid.

\(^{109}\) (n 1) para 25.

\(^{110}\) Ibid.

\(^{111}\) (n 1) para 41.

\(^{112}\) Section 7(b).

\(^{113}\) (n 1) para 42.
Leach J states that he believes that “the provisions of the Act relating to business rescue, and Section 153 in particular, were shoddily drafted and had given rise to considerable uncertainty”\(^\text{114}\). He states that there are many questions that the Act does not provide answers for and this is why there is uncertainty as to what a “binding offer” constitutes. He further states that there is no clarity in the Act as to the following:

1) "Whether there is a period of time in which to consider accepting or rejecting of an offer;
2) The effect of an offer being rejected;
3) Whether an offer may be conditional and, if so, what conditions are permissible;
4) Whether the offer excludes the making of a counter-offer or any other offers being made by other affected persons and, if not, how offers are to be ranked.”\(^\text{115}\)

Leach J concurs that an obvious uncertainty that was created by Section 153 pertains to what is meant by a “binding offer.”\(^\text{116}\) He further concurs with Dambuza J that “an offer is only irrevocable in the sense that it cannot be withdrawn by the offeror.”\(^\text{117}\) He further states that it is clear from the facts that the business had no possible prospect of success and therefore that the offer was definitely not binding on the bank.

It is once again clear from the concurring judgment of Leach J that there is definitely an error in the drafting of the legislation. If legislature were to make use of sentences that provided more clarity on certain terms then issues as experienced in the two cases as mentioned above would not have arisen.

4.4.3 Judge Gorven:

Gorven J has criticised three factors that involve the term “binding offer” and these will be discussed separately below. The first factor that will be discussed is the language used in Section 153(1)(b)(ii) that leads to the uncertainty caused. Gorven J does not agree with the idea, in Kariba,
that a "binding offer" creates statutory rights and obligations.\textsuperscript{118} He argues that if this was the intention of the legislature then it would have clearly stated that such offer would create statutory rights and obligations, however legislation did not mention anything to that effect.\textsuperscript{119} He argues that legislature only made use of the word "offer", which in the ordinary sense of the word means a "readiness to do or give if desired".\textsuperscript{120} He further argues that the word "binding" only qualifies the word "offer". It does not consider the opposing creditor as the offeree. He states that if the opposing creditor was to be recognised as the offeree then the legislature would make provision for such terms in the Act.\textsuperscript{121}

He further argues that it is the poor use of language that causes uncertainty when interpreting the words "binding offer"\textsuperscript{122} and he firmly believes that those words can only mean that the offer cannot be retracted or withdrawn before acceptance or rejection thereof.\textsuperscript{123} He reached this conclusion by taking into account Section 153(4) which requires the practitioner to adjourn the meeting for no longer than five days and to allow Sections 152 and 153 to be applied freshly at the adjourned meeting.\textsuperscript{124}

He is passionate about the fact that the court should take note of the paragraph regarding use of language as discussed in the \textit{National Joint Municipality Pension Fund v Endumeni Municipality}\textsuperscript{125} as this case places emphasis on the importance of the type of language that should be used when legislation is being interpreted. In this case the court was against the idea of any court "making words mean what they think it should mean", instead the court suggested that courts should rather use language that is clear and will not result in any sort of ambiguity when interpreting legislation.\textsuperscript{126}

\begin{flushleft}
\textsuperscript{118} (n 3) par 40.
\textsuperscript{119} Ibid.
\textsuperscript{120} (n 3) par 41.
\textsuperscript{121} (n 3) par 42.
\textsuperscript{122} Ibid.
\textsuperscript{123} Ibid.
\textsuperscript{124} (n 3) par 43.
\textsuperscript{125} [2012] ZASCA 13; Also see Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School 2008 (5) SA 1 (SCA) par 16-19.
\textsuperscript{126} (n 125) par 18 - "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 business-like for the words actually used. To do so in regard to a statute or a statutory instrument is to cross the divide between interpretation and legislation . . . . The inevitable point
The second factor against the use of the word "binding offer" is that it contradicts certain provisions of the Act.° Gorven J makes reference to 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". The compulsory loss of a right that was argued by the applicant in this matter should have been envisaged by legislature if this were to be the case.° He argues that the approach used by Kariba and where Sections 145(2)(a) or 153(4) or both are applied, the vote of creditors to whom the binding offer was made should be expressly excluded at the adjourned meeting and this was supposedly not done.° According to Section 145(2)(a) the opposing creditor is still entitled to vote at the adjourned meeting.°

He argues that it is therefore clear that if the right to vote at the adjourned meeting is not taken away then the creditor has the right to vote and cannot be deprived of such right.° He further argues that the previous point is of importance because it indicates that an offer cannot give rise to an obligation which results in the compulsory loss of a right on the part of the opposing creditor.

He is therefore of the opinion that the binding offer must be interpreted to mean that it is an offer that can either be accepted or rejected.° He further argues that although the opposing creditors are afforded the right to approach the court to set aside the vote on grounds that it is inappropriate, the same did not happen in the Kariba case.° He further argues that the legislature would never deprive the opposing creditors of their rights to vote.°

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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'.

° (n 3) par 46.
°° Ibid.
°°° (n 3) par 47.
°°°° Ibid.
°°°°° (n 3) par 47.
°°°°°° Ibid.
°°°°°°° (n 3) par 48; Section 153(7)(a)-(c) provides the grounds which the court will consider when determining whether it would be reasonable and just to set aside a vote on a business rescue plan on grounds of the vote being inappropriate.
°°°°°°°° Ibid.
The final factor that contradicts what was said in the *Kariba case* in terms of the interpretation of "binding offer" is Section 153(6). Gorven J argues that the value of the voting interest is only determined after the adoption of the plan and at this point the holder of the voting interest is separated from the voting interest that (s)he had.

Gorven J argues that if the above is true then Section 153(6) doesn’t apply to the offeree and that the attempt in the section to do so is redundant. Gorven J favours the idea that the voting interests can only be passed from the holders to the purchasers when the value has been determined. An interpretation by Gorven J of Section 153(6) suggests that there is no specific time limit in which a court must be approached and there is no suggestion in the text that should a court not be approached within a specific time that the voting interests will then pass to the offeree.

Gorven J therefore supports the idea as suggested by Common Law and it is rather ideal that the interest only pass upon payment of the purchase price unless there is any stipulation to the contrary. As a result of the price of the voting interests not yet being determined in the *Kariba case* it was incorrect for the voting interests to be passed to the shareholders.

Daffue J in *Absa Bank Limited v Caine NO & Others* completely agrees with Gorven J’s criticism and he also agrees with Loubser who states that “the word ‘binding’ [implies] that the offer, once made cannot be retracted or changed, although it is far from clear why this should be the case”. Daffue J states that in his opinion a ‘binding offer’ should be regarded as binding on the offeror and not the offeree who should be entitled to either accept or reject the offer at his will. His suggestion is that legislature should reconsider the issue afresh and that legislature should make the necessary amendments to avoid uncertainty and ambiguity.

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135 Section 153(6) of the act reads: ‘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).’

136 (n 3) par 52.

137 Ibid.

138 Ibid.

139 Ibid.

140 [2014] ZAFSHC 46.

141 (n 140) par 37.

142 Ibid.

143 Ibid.
From the above criticisms it is clear that an offer cannot simply be binding on the offeree and that the reason that such an issue arose is because of the poor drafting of legislation that allows for uncertainty and ambiguity.

5 Recommendation:

It is absolutely crystal clear from the above critics that there was much uncertainty caused by the drafting of the section pertaining to business rescue proceedings. Legislation should not be drafted the way one might interpret it in one's mind as it may not always be interpreted in the same manner as one might have wanted it to be interpreted. It is therefore submitted that if legislature drafted the section on business rescue in a more clear and concise manner many of the problems that had arisen in the abovementioned cases could have been avoided.

It is further submitted that legislature should amend the relevant sections in a manner that provides clarity on all the issues as discussed by the relevant Judges who are of the opinion that the legislation was poorly drafted.

It is further submitted that this recommendation is drawn from the idea that was suggested by Loubser and the suggestion proposes that the section on business rescue be amended as follows in order to avoid further uncertainty: “any affected person, may offer to purchase the voting interests of one or more creditors or the shares of one or more of the shareholders who opposed the adoption of the business rescue plan”. The idea recommended by Loubser is completely supported by Gorven J.

6 Conclusion:

This set of facts have been very interesting to say the least. South Africa introduced judicial management into the system many years ago. It was introduced by means of the Companies Act of 1926.145 The implementation of the idea of judicial management into the system was successful, however the execution of the idea was unsuccessful. Since the implementation of the Companies Act of 1926146 there has not been much success in the area of law dealing with judicial management.

The idea of placing a company under judicial management was then amended by legislature to be recognized under the Companies Act of 2008 as “business rescue”. It is unfortunate that even after amending legislation there are still issues that have arisen and that contributes to the unsuccessful application of the business rescue proceedings in our country.

At this stage it seems like we are not progressing even though changes have been made to legislation and it seems like we are heading in the same direction as the previous judicial management system. This is simply because of poor drafting on the part of legislature.147 After conducting research there are a few answers that have been obtained regarding the focus of this dissertation and the conclusion is as follows.

It is clear from the Supreme Court of Appeal in the Kariba case as well as the opinions of the Judges in the conflicting judgment of DH Brothers Industries (Pty) Ltd v Gribnitz148 that one cannot simply be bound by an offer that is made by the purchaser of voting interests. The Judges are very firm in their approach and have suggested that the way in which to interpret a “binding offer” as provided for in Section 153(1)b)(ii) should be exactly how one would interpret an offer as per the rules of Common Law.

From the abovementioned criticisms it is clear that an offer should be interpreted as a Common Law offer except that when an offer is made by the offeror it cannot be retracted or withdrawn

145 (n 6).
146 Act 46 of 1926.
147 (n 1) par 43.
148 (n 3).
until such offer has been accepted or rejected.\textsuperscript{149} It is only when the offer is accepted that binding obligations arise between the parties.\textsuperscript{150} There is no other way that this can be dealt with unless of course the matter is referred to the Constitutional Court and the Constitutional court favours the judgment made by the \textit{court a quo} in the \textit{Kariba case}. This is however highly unlikely as the judgment of the \textit{court a quo} in the \textit{Kariba case} does not lead to business-like results and in some instances it takes away rights afforded to the holder of voting interests in terms of Section 25 of the Constitution.\textsuperscript{151}

The second issue that was discovered through this research is that there is a problem with the way in which the legislation governing business rescue was drafted. The Judges are also of the opinion that because of the way in which the legislation was drafted it is not particularly clear as to who is bound by the offer in terms of Section 153(1)(b)(ii).\textsuperscript{152} Govern J provides three very important criticisms, as discussed above, which are very relevant in attacking the drafting of the business rescue legislation. The way in which the business rescue legislation was drafted creates much uncertainty and ambiguity.\textsuperscript{153}

From the discussion above, it is submitted that the criticisms and the reasons that were put forward by the Judges makes sense. It is therefore submitted that a binding offer cannot be binding on the offeree as soon as it is made and that cognizance should be taken of the requirements of a Common Law offer. It is further submitted that the offer can only be binding once it is accepted.\textsuperscript{154}

An additional submission is that the manner in which legislation was drafted causes much confusion as to the interpretation of the word “binding offer”. If the interpretation that was used in the High Court in the \textit{Kariba case} is used in future cases of a similar nature then this will lead to an abuse of the system and an abuse of property rights that are afforded to holders of voting interests. It is submitted that there will definitely be an abuse of the system and this is supported

\textsuperscript{149} (n 1) par 9.
\textsuperscript{150} (n 91).
\textsuperscript{151} (n 1) par 25; Constitution of the republic of South Africa, 1996.
\textsuperscript{152} (n 1) par 43.
\textsuperscript{153} (n 140).
\textsuperscript{154} (n 91).
by a similar opinion provided for by Loubser. Following the decision of the court a quo in the Kariba case provides no clear standard and the application of this decision in the future will be a futile exercise and will just result in similar problems.

The final submission is that the decisions taken by the Supreme Court of Appeal in the Kariba case and by the Judges of the DH Brothers Industries case should be followed as it provides a clear indication as to when an offer is binding on the parties and it also spurs much thought about the poor drafting of the business rescue legislation which essentially adds to the reason for the judgment that was provided by the High Court in the Kariba case. It is also important to take note of Loubser’s suggestion of how the legislation can be amended as this suggestion will assist when courts are expected to interpret Chapter 6 of the Companies Act of 2008 that deals with the business rescue provisions.

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155 (p 144) 138 – “the possibilities of abuse and exploitation are endless, but it is almost impossible to say with any certainty what this provision is supposed to achieve”.
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