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Surname, Initial(s). (2012) Title of the thesis or dissertation. PhD. (Chemistry)/ M.Sc. (Physics)/ M.A. (Philosophy)/M.Com. (Finance) etc. [Unpublished]: [University of Johannesburg](https://ujcontent.uj.ac.za/vital/access/manager/Index?site_name=Research%20Output). Retrieved from: https://ujcontent.uj.ac.za/vital/access/manager/Index?site_name=Research%20Output (Accessed: Date).

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MINOR DISSERTATION: CASE NOTE

TOPIC: African Banking Corporation of Botswana v Kariba Furniture Manufacturers (Pty) Ltd and others 2015 (5) SA 192 (SCA): A critical analysis of the interpretational glitches of the terms “binding offer” and “reasonable prospect”.

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1. *Introduction*

South African company law has always provided for the rescue of financially distressed companies. This has been the position since 1926 when the legislative procedure of judicial management was introduced by the Companies Act 46 of 1926.¹ However, since its implementation, judicial management has been regarded as an unsuccessful corporate rescue procedure for companies in distress. In fact, judicial management has been sternly criticised for its shortfalls for most of its existence.² Judicial management was subsequently re-enacted in the Companies Act 61 of 1973.³ However this piece of legislation did little to improve the then prevailing state of affairs and subsequently judicial management remained an underutilised and unsuccessful procedure.⁴

In 2011 Parliament introduced a new Companies Act⁵ chapter 6 of the new Companies Act, introduced a procedure known as the business rescue procedure.⁶ This chapter outlines the process on how the business rescue procedure is to be implemented in attempting to resuscitate financially distressed companies that have a reasonable prospect of being resuscitated.⁷ It is therefore important to note that most of the burden to ensure the success of rescuing any ailing business rests or is reliant on this legislative mechanism. However it has been argued that some of these provisions are subject to ambiguous interpretations and connotations which

¹ Hereafter the Companies Act of 1926.

² Joubert “Reasonable possibility” versus “reasonable prospect”: Did business rescue succeed in creating a better test than judicial management?” 2013 *THRHR* 550 552. However this is not the only source that outlines this issue it was a general consensus which is discussed in detail in the cited source.

³ Chapter XV of the Companies Act 61 of 1973.

⁴ Loubser “Judicial management as a business rescue procedure in South African corporate law” 2004 *SA Mercantile Law Journal* 137.

⁵ The Companies Act 71 of 2008 (herein after referred to as the Companies Act 2008).

⁶ s 128 -144 of Companies Act 2008.

⁷ This is based on the preamble of the Companies Act 2008.

have led to controversies around the practical implementation of the business rescue process.⁸

Loubser expressed a similar view stating that:

“...regrettable that the drafters of the provisions regulating the new business rescue proceeding did not exercise more care” and that “the unclear and confusing and sometimes alarming provisions regulating the business rescue proceeding... will certainly not assist in making the procedure more acceptable or successful”.⁹

2. ***Problem statement***

The purpose of this case note is to outline and analyse the interpretation difficulties of two of the phrases contained in chapter 6 of the Companies Act,¹⁰ namely “binding offer” and “reasonable prospect” using the case *African Banking Corporation of Botswana v Kariba Furniture Manufacturers (Pty) Ltd*,¹¹ as a case in point. Although the Act¹² makes provision for the terms binding offer and reasonable prospect, it fails to give these terms proper definitions therefore leaving the interpretation to those who implement the business rescue procedure. This has resulted in these terms being interpreted in various ways by different courts as shall be discussed below. Further this paper will also offer recommendations on how the Act may be amended and/or repealed in order to address the interpretation glitches and improve the implementation of the business rescue procedure.

3. ***African Banking Corporation of Botswana v Kariba Furniture Manufacturers and others 2015 (5) SA 192 (SCA)***

3.1 Facts

Mr Baldwin and Mrs Brigitta Nchite (the third and fourth respondents) were shareholders and directors of the first respondent, Kariba Furniture Manufacturers (Pty) Ltd (herein after referred to as (Kariba Furniture). On or around the 31st of January 2012, the third and fourth respondents resolved that Kariba Furniture was in financial distress and voluntarily filed for

⁸ This has been argued in case law and journal articles most of which will be discussed below.

⁹ Loubser “The Business rescue proceeding in the Companies Act of 2008: concerns and questions (part 2)” 2010 *TSAR* 689 700-701.

¹⁰ Companies Act 2008.

¹¹ 2015 (5) SA 192 (SCA).

¹² Companies Act 2008.

business rescue proceedings in terms of section 129 of the Act.¹³ The third and fourth respondents agreed and nominated Mr Jean Pierre Jordaan (second respondent) for appointment as the business rescue practitioner¹⁴ in terms of section 129 (3)(a),¹⁵ and the latter consented in terms of the requirement in section 129 (3)(b).¹⁶

In February 2012, the creditors held their first meeting of creditors. The second meeting of creditors was held in March 2012 and at this meeting the business rescue practitioner then inquired if any party wished to vote for an amendment of the business rescue plan.¹⁷ None of the affected parties showed any interest in doing so. The practitioner then requested the parties to vote for the initial approval of the plan. A point to note is that the bank had 63% of the voting rights and all the creditors and the shareholder held the remainder. The bank and another creditor rejected the plan. Initially the practitioner had indicated that he would not resort to the provisions of section 153 (1)(a),¹⁸ however immediately after the rejection of the plan by the two creditors the shareholders' attorneys advised that his clients wanted to make a binding offer in terms of section 153 (1)(b)(ii),¹⁹ to purchase the bank's voting interests. The business rescue practitioner instantly declared that the bank was not entitled to respond to such an offer and that the offer was binding on it. The bank's votes were immediately transferred to the shareholders who ended up with 95% voting rights and they voted in favour of the initial approval of the business rescue plan.²⁰

3.2 The High Court Judgement

It was against the circumstances as explained above that the aggrieved bank (African bank) made an application in the North Gauteng High Court (Pretoria). The application was for an order to set aside the ruling and declaration by the business rescue practitioner that the offer that had been made by the shareholders in terms of section 153(1) (b) (ii)²¹ was a binding offer and therefore binding on the bank. Further, the application was also for an order to set aside

¹³ Companies Act 2008.

¹⁴ *African Banking Corporation of Botswana v Kariba Furniture Manufacturers* (n 11) par 2.

¹⁵ Companies Act 2008.

¹⁶ Companies Act 2008.

¹⁷ *African Banking Corporation of Botswana v Kariba Furniture Manufacturers* (n 11) par 6.

¹⁸ Companies Act 2008.

¹⁹ Companies Act 2008.

²⁰ *African Banking Corporation of Botswana v Kariba Furniture Manufacturers* (n 11) par 6.

²¹ Companies Act 2008.

the approval of the business rescue plan under these circumstances and finally, to set aside the resolution taken by directors of the first respondent to place the first respondent under business rescue.²² The judge in this court (Kathree-Setiloane J) dismissed the bank's application. Kathree-Setiloane J, agreed with the reasoning and interpretation given by the business rescue practitioner of the word "binding". Further the court held that the binding offer as provided for in the Act²³ did not anticipate an option or agreement in the contractual sense but rather, a set of statutory rights which once made the offer is binding on both parties.²⁴ This judgement was appealed against in the Supreme Court of Appeal (herein after SCA).

3.3 The Supreme Court of Appeal (SCA) Judgement

3.3.1 Binding offer

The High Court's judgement was based on the judge's interpretation of the phrase "binding offer".²⁵ This interpretation of course differed with the SCA which interpreted the word "offer" differently. The SCA's interpretation of the word "offer" was in accordance with its regular usage which denotes to present or propose something for acceptance or refusal, it is a communication of willingness to do something or give something or an amount of money that someone is prepared to pay for something.²⁶ The court also stated that what distinguishes an "offer" from any other proposal is the expressed or implied intention to be bound by the offeree's acceptance. It was therefore settled that the use of the word "offer" means it is only on acceptance that an offer creates rights and obligation.²⁷ It was further held that in terms of the principle common law in South African law an ambiguous proposal cannot be classified as an offer and that the terms of an "offer" must cover the minimum requirements of the proposed contract.²⁸ In summary the SCA set aside the binding offer made on the 12th of March 2012 at the second meeting of creditors. The adaptation of the business rescue plan was also set aside.

²² *African Banking Corporation of Botswana v Kariba Furniture Manufacturers* (n 11) par 7.

²³ Companies Act 2008.

²⁴ *African Banking Corporation of Botswana v Kariba Furniture Manufacturers* (n 11) par 8.

²⁵ *African Banking Corporation of Botswana v Kariba Furniture Manufacturers* (n 11) par 12.

²⁶ *African Banking Corporation of Botswana v Kariba Furniture Manufacturers* (n 11) par 18.

²⁷ Christie and Bradfield *The law of contract in South Africa* (6th ed) 82.

²⁸ *African Banking Corporation of Botswana v Kariba Furniture Manufacturers* (n 11) par 19.

3.3.2 Reasonable prospect of success

The appellant's counsel submitted that should the court set aside the adaptation of the business rescue plan, then the court should consider the merits related to the application for the setting aside of the resolution to commence business rescue, to which the court agreed.²⁹ The court referred to section 130 (1) (a) (ii) of the Act³⁰ which provides that at any time after the adoption of the resolution until the adaptation of the business rescue plan, an affected person may apply to court for an order setting aside the resolution on the grounds that there was no reasonable prospect of rescuing the company in question.³¹ The court considered that the first respondent had not been operating for at least five years preceding its application to commence business rescue.³² The rescue plan was also defective as it did not have the required information in terms of section 150 (2) and (3)³³ which information was essential for the assessment of reasonable prospect of success of the rescue.³⁴ The financials that were used were very old and this presented a fundamental difficulty for a proper assessment of the prospects of the business rescue.³⁵ In consideration of the above, the court subsequently set aside the resolution taken by the board of the first respondent on the 31st January 2012 to voluntarily begin business rescue proceedings and to place the first respondent under supervision.³⁶

4. *Summary of Business Rescue Procedure*

In this section the writer will briefly summarise business rescue, its historic overview and the procedure as provided for in Chapter 6 of the Act. The purpose of this section is to provide the reader with background on the business rescue procedure, and create context within which the ensuing sections can be understood and interpreted, without getting into much detail.

²⁹ *African Banking Corporation of Botswana v Kariba Furniture Manufacturers* (n 11) par 26.

³⁰ Companies Act 2008.

³¹ *African Banking Corporation of Botswana v Kariba Furniture Manufacturers* (n 11) par 27.

³² *African Banking Corporation of Botswana v Kariba Furniture Manufacturers* (n 11) par 31.

³³ Companies Act 2008.

³⁴ *African Banking Corporation of Botswana v Kariba Furniture Manufacturers* (n 11) par 32.

³⁵ *African Banking Corporation of Botswana v Kariba Furniture Manufacturers* (n 11) par 33.

³⁶ *African Banking Corporation of Botswana v Kariba Furniture Manufacturers* (n 11) par 40.

4.1 Historic overview: Judicial Management

Prior to 2011 the South African business rescue procedure was known as judicial management. It was first introduced in South Africa in the Companies Act in 1926³⁷ section 195. This mechanism was regarded as highly unsuccessful and yet the Van de Vries Commission recommended that it be retained³⁸ in the Companies Act 1973, section 427,³⁹ which was a mere duplication of section 195 of 1926 Companies Act. Section 427⁴⁰ which dealt with the judicial management provided as follows:

“When a company by reason of mismanagement or for any other cause- a) is unable to pay its debts or unable to meet its obligation and b) has not become or is prevented from becoming a successful concern and there is reasonable probability that if it is placed under judicial management it will be able to pay its debts or to meet its obligations and become a successful concern; the court may, if it appears just and equitable, grant a judicial order in respect of the company”.

Among other issues there was uncertainty regarding the exact meaning of the phrase reasonable probability and this rescue mechanism was highly criticised by many writers and was described as an ultimate failure.⁴¹

4.2 Business Rescue: The procedure.

In May 2011 the Companies Act 2008, chapter 6 introduced the long awaited business rescue procedure, replacing the judicial management procedure provided for in the Companies Act of 1973. This new business rescue procedure was formulated to prevent the demise, through winding up, of viable companies making provision for their probable rescue.⁴² The objective of this procedure is to facilitate the rescuing and rehabilitation of a company that is in financial

³⁷ Act 46 of 1926.

³⁸ Joubert (n 2) 552.

³⁹ Act 61 of 1973.

⁴⁰ Companies Act 1973.

⁴¹ Many have described this procedure as a failure, for example Smits in “Corporate administration: A proposed model” 1999 *De Jure* 85; described the procedure as “spectacular failure, Stein and Everingham in “The new Companies Act unlocked (2011) 409; described it as “an abject failure” and Josman J in the case *Le Roux Hotel Management (Pty) Ltd v E Rand (Pty) Ltd* 2001 1 All SA 223(C) referred to judicial management as “a system which has barely worked since its initiation in 1926: Joubert “Reasonable possibility” versus “reasonable prospect” Did business rescue succeed in creating a better test than judicial management?” 2013(76) *THRHR* 550 551.

⁴² Meskin, Galgut “Commentary on Insolvency law” 18.1. (www.mylexisnexis.co.za.ujlink.uj.ac.za)

distress where there is a reasonable prospect of rescuing that particular company to a solvent state.⁴³

In terms of the Act⁴⁴ this procedure can be initiated in one of two ways;

- a) A resolution of the directors of the company in question. This is a voluntary way to commence business rescue and the procedure to be followed is outlined in section 129 of the Act.⁴⁵
- b) By application to court by a shareholder, a creditor or employees or their representative in terms of section 131.⁴⁶

Despite the above provisions, the court has a discretion to either grant the order to commence business rescue or not.⁴⁷ This can be elaborated in the case of *Swart v Beagles Run Investments 25 (Pty) Ltd*⁴⁸ the court was meant to consider a compulsory business rescue application in terms of section 131 of the Act.⁴⁹ In this case the shareholder/director had in terms of section 131 applied for an order to place the company under business rescue. They however wanted some time to sell off some of the company's assets. Thereafter the company would be in a position to pay all known creditors and then under business rescue regime the company will get time to recover and eventually continue business as usual. Several of its creditors opposed this application as they deemed it to be abuse of power and alleging the company to have been trading recklessly. The court weighed between the interests of the company and the interests of the creditors, and also turned to judicial management provisions for guidance and therefore held that the interest of creditors prevailed. The court turned down the application on the basis that it amounted to abuse of power on the company.⁵⁰ Hence the application was not granted, evidencing that the courts will always refer to legislation in applying law although each case will be decided upon its merits.

After commencement of the business rescue procedure the Act grants to the company in question general moratorium against any legal action.⁵¹ The Act therefore contains significant

⁴³ s 129 (1) (a) & (b) of the Companies Act 2008.

⁴⁴ Companies Act 2008.

⁴⁵ Companies Act 2008.

⁴⁶ Companies Act 2008.

⁴⁷ This will be discussed and elaborated in the cases to be discussed later in this paper.

⁴⁸ 2011 5 SA 422 (GNP).

⁴⁹ Companies Act 2008.

⁵⁰ *Swart v Beagles Run Investments* (n 48) par 23-25.

⁵¹ s 133 of the Companies Act 2008.

restrictions against any action by third parties against the company, its property and or possessions within the duration of the proceedings.⁵² This is a critical component of any rescue mechanism, as it allows the company adequate “breathing space” to be able to find a solution to the financial difficulties it is experiencing at that particular time.⁵³

Once a company has been placed under business rescue, a qualified business rescue practitioner is duly appointed, and the affairs of the company are placed under his supervision.⁵⁴ The business rescue practitioner has the onus to develop and implement a business rescue plan.⁵⁵ Execution of the rescue plan is intended to rescue the company by a restructuring which maximises the probability of it remaining in existence on a solvent basis or, if that is not possible, results in a better return for creditors or shareholders than would result from the company’s liquidation.⁵⁶ If the plan is approved and implementation is effective, the formal process is therefore terminated and the business rescue is deemed successful.⁵⁷

If a plan to rescue the company in terms of provisions of chapter 6 cannot be formulated then a plan that would then achieve a better return for creditors would be the next objective.⁵⁸ If none of the objectives provided for in chapter 6 are attainable, the company may end up winding up that is liquidating. Contrary to the above however, in *ABSA Bank Ltd v Newcity Group (Pty) Ltd; Cohen v Newcity Group (Pty) Ltd*⁵⁹ the court declined to grant either a business rescue order or a final liquidation order and discharged the provisional order for winding up that had been issued at an earlier date. Instead, exercising the powers accorded to it in terms of section 347 of the 1973 Companies Act, the court ordered the debtor company to pay the applicant certain amounts subject to certain conditions, including that the applicant

⁵² s 133 of the Companies Act 2008.

⁵³ Meskin (n 42) par 18.2.

⁵⁴ s 150 of the Companies Act 2008.

⁵⁵ s 140 (d) (1) of the Companies Act 2008.

⁵⁶ s 128 of the Companies Act 2008.

⁵⁷ Rushworth “A critical analysis of the business rescue regime in the Companies Act 71 of 2008” *Acta Juridica* 2010 375.

⁵⁸ s 128 (1) (b) of the Companies Act 2008.

⁵⁹ 2013 3 All SA 146 (GSJ).

creditor could approach the court for the winding up of the company if any of the conditions were not met.⁶⁰

It is with this background that I will analyse the case of *African Banking Corporation of Botswana v Kariba Furniture Manufacturers (Pty) Ltd*⁶¹ expounding on the interpretation difficulties of the phrases “binding offer” and “reasonable prospect” within business rescue and the extent at which the judiciary has assisted in providing the interpretation of these two phrases.

5. *Analysis of the case*

Taking into consideration the facts of the case outlined above there seemingly was controversy in the two courts in regards to the interpretation of the words “binding offer”. Further, chapter 6 of the Act does not provide a definition for the phrase “reasonable prospect” and both these phrases are left to the interpretation of the business rescue practitioners and or stake holders. This then does not guarantee that these phrases will be interpreted in line with the intention of the legislatures. I will be discussing in detail the issues that are specifically raised in this case in regards to the interpretation of these phrases and how various court judgments have influenced the interpretation thereof.

5.1 “Binding Offer”

Section 153⁶² makes provision for certain steps to be taken by any affected person in instances where the business rescue plan is rejected. Section 153(1) (b) (ii)⁶³ provides that:

“any affected person, or combination of affected persons, may make a “binding offer” to purchase the voting interest of one or more persons who opposed the 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”.

⁶⁰ In terms of section 347 of the 1973 Companies Act the court may grant, dismiss any application under section 346 or even adjourn the hearing or make any interim order or any other order thereof.

⁶¹ (n 11).

⁶² Companies Act 2008.

⁶³ Companies Act 2008.

Loubser⁶⁴ researched this particular phrase during the discussion and drafting phases of the Act. The author, *inter-alia*, states that the word “binding” in the section 153⁶⁵ seems to denote an offer, which, once made, cannot be withdrawn or changed. She further suggested that an explanatory memorandum or report by the drafters to explain the reason behind this condition would have been of help to those who would have to make use of this section of the Act. This raised the fear that the words “binding offer” referred to above would then not apply to the offeror only, but in fact also bind the offeree to an offer. Loubser hoped that this was not the intended result of the provision, since the possibilities for abuse and exploitation would be then endless.⁶⁶

The concern raised by Loubser above is then indeed encountered in the matter of *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd*.⁶⁷ In the North Gauteng High Court, the court held that the

“binding offer made in terms of section 153 (1) (b) (ii) of the Act “is not an “option” or an “agreement” in the contractual sense but is rather “a statutory right and obligation” from which neither party may resale. These are not contractual in nature”.⁶⁸

According to this court, this interpretation was consistent with the intentions of the legislature to ensure co-operation by opposing creditors in business rescue proceeding. According to Henochsberg⁶⁹ in respect of the above judgement the binding offer projected in section 153⁷⁰ of the Act was an offer that was binding on both the offeror and offeree and once made, and this was mainly to ensure compliance with the procedure to revive a business rescue, and implement a revised business rescue plan within the framework of section 153 (4).⁷¹

Kathree-Setiloane J, held that the offer once it has been made by the offeror to the offeree, instantly binds both parties, meaning the offeror may not withdraw the offer and the offeree

⁶⁴ Loubser *Some Comparative Aspects of Corporate Rescue in SA Company Law* (2010 doctoral thesis SA) 137.

⁶⁵ Companies Act 2008.

⁶⁶ (n 64).

⁶⁷ 2013 (6) SA 471 (GNP).

⁶⁸ *African Banking Corporation of Botswana v Kariba Furniture Manufacturers* (n 11) par 29.

⁶⁹ Delpont et al Henochsberg *Commentary on the Companies Act 71 of 2008* 1 ed (2011) at 532.

⁷⁰ Companies Act 2008.

⁷¹ Companies Act 2008.

has to accept such an offer.⁷² She further states that this should not be regarded as unfair on the offeree since he is “adequately protected” by section 153(6) which states that they (the offeree) cannot receive less than they would have if the company was to be placed under liquidation.⁷³ It is submitted that, the judge’s interpretation of this phrase leans more on protecting the offeror and this somehow upsets the general rule that when one interprets a section of an Act it should be done in light of the purpose of the whole Act. Section 7(k)⁷⁴ declares that the purpose is to provide for the efficient rescue and recovery of financially distressed companies in a manner that balances the rights and interests of all the relevant stakeholders.

According to Van Staden presumptions of statutory interpretations play a very important role in the interpretation of statutes and they are essential components of the South African legal systems.⁷⁵ Referring to one of the presumptions for interpretation of statutes which provides that legislation is not unjust, unfair or irrational, and that the courts where possible ought to prefer the one that does not lead to harshness or injustice.⁷⁶ Taking into consideration the judgement that was given by the court of first instance in the *African Banking* case the offeree seemingly did not have a say after the offer was made they became immediately bound by the offer. This cannot be said to be fair or just to the offeree who is the holder of voting rights who in actual fact should have a say whether they agree to the offer to purchase the voting rights made by the offeror. The decisions made in the cases that subsequently followed the above case agree with this thought pattern.

It is further questioned if the interpretation of the phrase “binding offer” given by Kathree-Setiloane J, is in line with the purpose of the Act or aligned to the contractual laws of the South Africa. The fact that there is the word “offer” to interpret it to assume the one party (offeree) does not have an option to exercise any rights or respond to such an offer places one party at an advantage at the detriment of the other.⁷⁷ The word offer cannot be applied without the definition or requirement of the law of contract. An offer defined by Christie’s law of

⁷² *African banking Corporation of Botswana v Kariba Furniture Manufacturers* (n 67) par 52.

⁷³ *African banking Corporation of Botswana v Kariba Furniture Manufacturers* (n 67) par 52.

⁷⁴ Companies Act 2008.

⁷⁵ Van Staden “A comparative analysis of common-law presumption of statutory interpretation” *Stell LR* 550 553 2015.) 581.

⁷⁶ (n 75) 574.

⁷⁷ Loubser (n 64) 138.

contract is when someone puts forward a proposition with the objective that by its mere acceptance, a contract would then be formed.⁷⁸ This means that the main requirement for an offer to be contractually binding on both parties is the acceptance of the offer. While Kathree-Setiloane J, may have been correct in concluding that the “binding offer” once made is binding in the sense that it cannot be simply withdrawn. The purpose of the word “binding” was not to necessarily bind both parties while taking the rights of the other party away. In fact some authors state that other cases that followed after the above case found the provisions of section 153(1)(b) (ii) to be in fact unconstitutional.⁷⁹ This is not in line with the presumption that legislation must be consistent with the Constitution and be interpreted as such as much as possible.⁸⁰

In addition to the presumptions discussed above there is a presumption that provides that legislation does not alter the existing law more than necessary, it should be interpreted in compliance with existing law.⁸¹ In terms of the law of contract what constitutes a valid offer is the requirement that one party make a proposal to another that if such offer accepted by the party to whom the offer was made then a contract is concluded between the two parties.⁸² In terms of the above then - one can deduce that an offer cannot be an offer that becomes binding on both parties before the other party gets a chance to respond to such an offer. Coming to such a conclusion like the above court did seems to the writer as though they interpreted the legislation to alter the existing laws in this case law of contract. The only way this could have happened is if this was the intention of the legislation. In this case the lack of a definition of this phrase makes it hard therefore for to conclude that this was the intention of the legislation.

The judgement that followed the case discussed above was made in 2013 in the matter of *D H Brothers Industries (Pty) Ltd v Karl Johannes Gribnitz No*⁸³ (“herein after D H Brothers case”) which was heard by Gerven J. The judge in this case did not agree with the judgement of the Kariba case (High Court ruling). Gerven J, to the contrary held as follows:-

⁷⁸ Christie, Bradfield (n 27) 31.

⁷⁹ Meskin (n 42) 18.17.14. Some of the said cases are *DH Brothers Industries (Pty) Ltd v Karl Johannes Gribnitz No* and *ABSA Bank v John Frederick Caine No*.

⁸⁰ (n 75) 574.

⁸¹ (n 75) 558.

⁸² Christie, Bradfield (n 27) 30.

⁸³ 2014 1 SA 103 (KZP).

“A statutory offer cannot itself be a ‘statutory right and obligation’, it may give rise to them but this is not what is said... The word ‘offer’ is qualified by the word ‘binding’”.⁸⁴

According to this court the offer is binding exclusively on the offeror, in that once he has made the offer to the offeree, he is bound by it and cannot withdraw same before the offeror accept or rejects the offer.⁸⁵ The judge argued that if legislature envisioned binding the offeree to the offer, the provision could have read “that the affected person could make an offer, which is binding in the opposing creditor”.⁸⁶ This is however not what the section states. The judge stated that the words “offer” and “purchased”, when used collectively, must then mean that a contract is envisioned and, for such a contract to be established there must be acceptance or agreement. The interpretation of this court in respect to the wording of section 153(1) (b) (ii) evidently deduces that an “offer” to “purchase” should be defined or interpreted as intended in their legal concept.⁸⁷ Govern J, in according to the writer indirectly applied the legal theory of interpretation of legislature known as intentionalism. This entails that that once the real intention of the legislatures has been discerned one’s interpretation of such legislation must full effect to that intention.⁸⁸

In response to Kathree-Setiloane J’s statement that the offeree is “adequately protected” by section 153(6)⁸⁹ Govern J, stated that she was incorrect because at the time when the independent expert valuation is performed no one will be able to accurately calculate the amount an assured would receive on liquidation.⁹⁰ While Kathree-Setiloane J’s interpretation seemed to protect the offeror, Govern J’s, on the other hand protected the offeree. It can be deduced that the word that has caused the two opposing judgements is the word “binding”. According to Govern J, this word was meant to dictate that the offer made is binding on both parties and that the intentions of the legislature was to actually protect the rights and interest of all affected stakeholders.⁹¹ A question can therefore be posed if the word binding was probably incorporated in order to assist an affected person who is earnestly trying to have a good business rescue plan approved and is being disadvantaged by those who are trying to get

⁸⁴ *DH Brothers Industries (Pty) Ltd v Karl Johannes Gribnitz No* (n 83) par 39.

⁸⁵ *DH Brothers Industries (Pty) Ltd v Karl Johannes Gribnitz No* (n 83) par 41.

⁸⁶ *DH Brothers Industries (Pty) Ltd v Karl Johannes Gribnitz No* (n 83) par 42.

⁸⁷ *Ibid.*

⁸⁸ Du Plessis “Commentary on Interpretation of Statutes and the Constitution” last updated June 2012. (www.mylexisnexis.co.za.ujlink.uj.ac.za)

⁸⁹ Companies Act 2008.

⁹⁰ *DH Brothers Industries (Pty) Ltd v Karl Johannes Gribnitz No* (n 83) par 29.

⁹¹ *DH Brothers Industries (Pty) Ltd v Karl Johannes Gribnitz No* (n 83) par 39.

the plan not approved due to selfish reasons? The intentions of the legislature may have been in the right place but the wording used were rather ambiguous. Govern J, states that their desired outcome would have still been achieved even if they had used the word “irrevocable” in place of “binding”.⁹² It is submitted that this is simply an issue of poor drafting.

In 2014, a further judgment concerning the above issue was handed down by Daffue J, in the Free State Division of the High Court. In the matter of *Absa Bank v John Frederick Caine No* (herein after *Absa bank case*),⁹³ Daffue J, concurred with Govern J. He stated that:

“...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”.⁹⁴

This case simply followed the foot prints of the *DH Brothers* case and did not shed as much light in the issue under discussion.

This matter has since been settled by the SCA in *African Banking Corporation of Botswana v Kariba Furniture Manufactures (Pty) (Ltd)*⁹⁵ Dambuza AJA, completely disagreed with the findings of the court of first instance and to a great extent agreed with the judgement passed in *DH Brothers* case. According to this court an offer could not be a valid offer if it was made without the acceptance of the offer thereof. Further that an offer cannot be a binding offer if it does not cover at least the minimum requirements of the proposed contract such as details of the person making an offer, the value and how the payment will be effected.⁹⁶

The court held that if it was the intention of the legislature then they would have introduced a provision of acceptance on the part of the offeree and further state that the offer, once made, gave rise to binding obligations between the parties. However the legislature only mentioned the performer as offeror. The only action described is to “make a binding offer” and not

⁹² *DH Brothers Industries (Pty) Ltd v Karl Johannes Gribnitz No* (n 83) par 41.

⁹³ *ABSA Bank v John Frederick Caine No* 3818/2013 ZAFSHC 46.

⁹⁴ *ABSA Bank v John Frederick Caine No* (n 93) par 27.

⁹⁵ (n 11).

⁹⁶ *ABSA Bank v John Frederick Caine No* (n 93) par 19-25 of the judgement.

creating a set of statutory rights and obligations as stated in the court a quo. The court held further that the provision was aimed at concluding a contract of purchase and sale and not creating statutory rights and obligations.⁹⁷ The judge even quoted part of the *DH Brothers* case judgement which state that:

“...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”.⁹⁸

The SCA also found that the term “binding offer” to be alike in nature to the common law offer, save that to the fact that same may not be withdrawn by the offeror until the offeree responds thereto.⁹⁹ In terms of the common law rules, offers made by offerors to offerees must comply with specific requirements for example:

“the identity of the offeror must be established or known; the terms of the offer must be clear and unambiguous such that the offeror understands it, and can accept it”.¹⁰⁰

Such an offer therefore becomes a binding agreement or contract on its acceptance unless expressed to the contrary, or if expressed to lapse if not accepted by a particular date. In *African Bank*¹⁰¹ case none of these requirements were outlined so interpretation by the high court that the offer that was made by the shareholders in this instance as a binding offer was ruled to be an error. This error could be blamed on the poor or ill drafting of the legislation.

The SCA accordingly concluded that the interpretation of “binding offer” as advocated by the applicant should take precedent and it held that the findings of the North Gauteng High Court could not be said to “lead to sensible, business like results and cannot be supported”.¹⁰² It followed then in its opinion that there was never a “binding offer” made. Consequently the resolutions

⁹⁷ *African Banking Corporation of Botswana v Kariba Furniture Manufacturers* (n 11) par 21.

⁹⁸ *African Banking Corporation of Botswana v Kariba Furniture Manufacturers* (n 11) par 21.

⁹⁹ *African Banking Corporation of Botswana v Kariba Furniture Manufacturers* (n 11) par 21.

¹⁰⁰ *African Banking Corporation of Botswana v Kariba Furniture Manufacturers* (n 11) par 52.

¹⁰¹ (n 11).

¹⁰² *African Banking Corporation of Botswana v Kariba Furniture Manufacturers* (n 11) par 25.

taken subsequent to the transfer of the bank's "voting interest", including the adoption of the rescue plan are null and void.¹⁰³

5.2 "Reasonable Prospect"

A further challenge identified in the case in discussion in regards to interpretation is the term "reasonable prospect". The Act¹⁰⁴ does not provide the definition of the term "reasonable prospect" and it has been left to the courts to determine the definition thereof.¹⁰⁵ As a result this requirement to grant a business rescue order has been subject to conflicting court decisions. Certain court judgements¹⁰⁶ have set the bar of defining reasonable prospect so high for granting an order for compulsory business rescue, while others have taken a more relaxed approach.¹⁰⁷

The procedure that preceded business rescue was judicial management. In regards to this procedure "reasonable probability" was the required yardstick for placing a company under judicial management.¹⁰⁸ However it has been stated that this procedure was not so much of a success in fact it was a failure. Some writers have argued that the interpretation of the word "reasonable probability" as contained in both the 1926 and 1973 Companies Acts were extremely problematic hence the failure of the procedure.¹⁰⁹ Other authors have - noted that the requirement of "reasonable probability" was the second main problem that was experienced with judicial management and further that that it was one of the main reasons why judicial management was unsuccessful in South Africa, according to one "reasonable possibility" would have been the preferred requirement.¹¹⁰

¹⁰³ *African Banking Corporation of Botswana v Kariba Furniture Manufacturers* (n 11) par 25.

¹⁰⁴ Companies Act 2008.

¹⁰⁵ *Meskin* (n 42) 18.4.3.

¹⁰⁶ Some of such judgments are, *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm investment (Pty) Ltd* 2012 (2) SA 423 (WCC), *AG Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd and Others*, *Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd and Others* 2012 (2) SA 378 (WCC); some of these cases I will discuss below.

¹⁰⁷ *Prospec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd, Newcity Group (Pty) Ltd v Pellow NO and Others and Oakdene Square Properties (Pty) Ltd v farm Bothasfontein (Kyalami) Pty Ltd* 2013 4 SA 539(SCA) same will be discussed in more detail below.

¹⁰⁸ *Delport* (n 69) 459.

¹⁰⁹ *Joubert* (n 2) 553.

¹¹⁰ Burdette "Some initial thought on the development of a modern and effective business rescue model for South Africa (part 1)" 2004 *SA Merc LJ* 249.

One would then assume that after all the criticism surrounding regarding the use of the “reasonable probability” requirement the legislature would then exercise more caution in regards to the new legislation that provides for the business rescue regime. However they seem to have overlooked the need to clearly formulate a definition for the objective requirement “reasonable prospect” and this has caused the courts to then resort to defining the term. According to Joubert many writers still recommended the use of term “reasonable possibility” however the legislature preferred “reasonable prospect”.¹¹¹

The Companies Act¹¹² provides two ways in which business rescue can be commenced, one of which is by way voluntary route in terms of Section 129 (1) (a)¹¹³ which provides that;

“subject to subsection (2) (a) the board of a company may resolve that the company voluntarily begins business rescue proceedings and place the company under supervision if the board has reasonable grounds to believe that the company is financially distressed and, there appears to be reasonable prospect of rescuing the company”.

The second of which is in terms of section 131 (4) (a) the court can make an order placing a company under business rescue if they are satisfied that;

“The company is financially distressed...the company has failed to pay over any amount in terms of obligation...it is just and equitable to do so for financial reasons and there is “reasonable prospect” for rescuing the company”

Though these term is found in these two sections authors have stated that the meaning of the term in both sections is basically the same.¹¹⁴

Loubser also criticise the drafting of the legislature more especially in respect of the use of the word reasonable prospect in terms of section 129.¹¹⁵ In terms of this section it is provided that any affected person may apply to court to have the business rescue plan set aside if there is no reasonable basis to believe the company is financially distressed or there is no reasonable

¹¹¹ Joubert (n 2) 553.

¹¹² Companies Act 2008.

¹¹³ Companies Act 2008.

¹¹⁴ Delport (n 69) 530.

¹¹⁵ Companies Act 2008.

prospect that the company can be rescued.¹¹⁶ Her argument is that it is uncertain whether the usage of the present tense in phrasing the first two grounds for setting aside the resolution ("there is no reasonable ...") is just a case of ill drafting, or it was the intention of the legislature that the court may deliberate on the situation of the company at the time of the application, rather than at the time that the resolution was taken. She further states that considering the history of this requirement as far as judicial management was concerned, the drafters should have at least avoided this phrase or at least attempted to specify with more clarity precisely what it entails.¹¹⁷

The fact that the drafters of the Act failed to provide a definition for the phrase "reasonable prospect" opened it up for abuse as one would then misinterpret it to suit their circumstances. Further it being one of the major requirements for commencing business rescue how one defines it will likely influence the procedure and results ultimately. It is one thing for a company to be financially distressed and evidence of that is readily available on any company's financials but it is another to properly ascertain whether a company has reasonable prospect of being rescued. One would then ask how the extent at which a company has reasonable prospect of being rescued is measured because according to the dictionary definition, reasonable prospect speaks of the possibility of a future event occurring.¹¹⁸ Regarding this definition one has to keep in mind that there are many factors that can influence the prospect of future happenings thereby influencing the success of the company in question.

It is important to note and remember that when interpreting the concepts of the phrase "reasonable prospect of rescuing a company", one must have cognisance of the objectives of business rescue as provided in section 128(1) (b).¹¹⁹ This section states that "business rescue" means to facilitate "rehabilitation", which in turn means the achievement of one of two objectives: (a) to return the company to solvency – primary objective, or (b) to provide a better deal for creditors and shareholders than what they would receive through liquidation – secondary objective (section 128(1)(b)(iii)).¹²⁰ It would seem that the achievement of any one

¹¹⁶ s 129 of the Companies Act 2008.

¹¹⁷ Loubser "The business rescue proceedings in the Companies Act of 2008: concerns and questions (part 1) 2010 *TSAR* 501 506.

¹¹⁸ Joubert (n 2) 554.

¹¹⁹ Companies Act 2008.

¹²⁰ Companies Act 2008.

of the two objectives referred to in section 128(1) (b)¹²¹ would qualify as “business rescue” in terms of section 131(4).¹²² To support the above statement further the theories of interpreting legislation namely *purposivism* provides that a legislative provision’s meaning should be in line with the purpose that the provision seeks to achieve in the context of which it forms part of.¹²³

5.2.1 Interpretation of the phrase “reasonable prospect” by the Courts.

As stated earlier since the Act is silent on the definition of the term “reasonable prospect” the judiciary has had to take the role of legislature in a bid to define this term. In case *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 (Pty) Ltd*¹²⁴ the learned judge Eloff AJ, turned to discuss the new requirement contained in the Act and expressly indicated the use of different language in the new act as an indicator that the recovery requirement contained in chapter 6 of the Act was less stringent than the one required in terms of section 427(1)¹²⁵ of the old Company’s Act, namely, a *reasonable probability*. Eloff AJ, mentioned that the fact that “something less” is required in the case of business rescue is a consequence of the different mind-set that is associated with business rescue.¹²⁶ Further, Eloff AJ, considered the definition of the words “reasonable prospect” by looking at various factors that would indicate the existence of a reasonable prospect in a given case.¹²⁷ He acknowledged that every case must be judged on its own merits. However, he created a checklist that must be used before a court can grant a business rescue application. The aspects that need to be proved to a court that a reasonable prospect exists regarding the company’s ability to continue its existence were:

- a) Estimate costs of rendering the company able to continue with its intended business, or to restart their business;
- b) Likely accessibility of the necessary cash to enable the company to meet its day today expenses.
- c) Whether a company will be reliant on loan capital or other facilities... and the list goes on.¹²⁸

¹²¹ Companies Act 2008.

¹²² Companies Act 2008.

¹²³ Ibid.

¹²⁴ *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 (Pty) Ltd* 15155/2011 ZAWCHC 449.

¹²⁵ Companies Act 1973.

¹²⁶ *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386* (n 124) par 21.

¹²⁷ *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386* (n 124) par 24.

¹²⁸ *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386* (n 124) par 24.

The above aspects prove, based on “concrete and objective ascertainable details beyond mere speculation”, that the remedy is sustainable.¹²⁹

The above judgement was criticised in cases that subsequently followed. Some reasons being if one assesses the specifications provided by Eloff AJ, it is clear that some of this information may not always be readily available when one brings the application before court and the bar that Eloff AJ, had set was too strict and tough to attain.¹³⁰ Meskin also outlines that the above requirements are probably available if the business rescue has been commenced in terms of section 129¹³¹ where the board has adopted a resolution to commence business rescue, however if it has been instituted in terms of section 131¹³² an affected person (creditor, employee or shareholder) may not have all this information available to them.¹³³

On the other hand, in the case of *Koen v Wedgewood Village Golf and Country Estate (Pty) Ltd*¹³⁴ Binns-Ward J, agreed with Eloff AJ’s requirement as discussed above that “some concrete and objectively ascertainable details ... going beyond mere speculation” must be present in order for there to be a reasonable prospect of rescuing a company”.¹³⁵ In addition, in the *Prospec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd* case¹³⁶ Van der Merwe J concurred with the interpretation of the phrase “reasonable prospect” by Eloff AJ, in *Southern Palace* case and he further agreed with Eloff AJ, that the Act required something less than the Old Act.¹³⁷ Van der Merwe J, however held in his judgment that Eloff AJ, in *Southern Palace*¹³⁸ case as well as Binns-Ward J, in the *Koen v Wedgewood Village Golf and Country Estate*¹³⁹ case expected too much of the applicants in order to prove to the court that a reasonable prospect does actually exist.¹⁴⁰ According to him Eloff AJ, had set the bar too high. Van der Merwe J, provided for a new test for the recovery requirement by stating that “a reasonable

¹²⁹ *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386* (n 124) par 24.

¹³⁰ Joubert (n 2) 556-557.

¹³¹ Companies Act 2008.

¹³² Companies Act 2008.

¹³³ Meskin (n 42) par 18.4.3.

¹³⁴ 2012 2 SA 378 (WCC).

¹³⁵ *Koen v Wedgewood Village Golf and Country Estate (Pty) Ltd* (n 134).

¹³⁶ 2013 1 SA 542.

¹³⁷ *Prospec Investments (Pty) Ltd v Pacific Coast Investments 97 (Pty) Ltd* (n 136) par 8.

¹³⁸ (n 124).

¹³⁹ (n 134).

¹⁴⁰ *Prospec Investments (Pty) Ltd v Pacific Coast Investments 97(Pty) Ltd* (n 136) par 11.

prospect means no more than a possibility that rests on an objectively reasonable ground or grounds”.¹⁴¹ Therefore Van der Merwe J, considered it pointless to establish a strict checklist to satisfy the recovery requirement, albeit, Van Der Merwe J, did seem to lower the burden of proof required.

In the Western Cape in the case of *Zameka Investments (Pty) Ltd t/a Bonatla Properties (Pty) Ltd v Midnight storm investments 386 Ltd*¹⁴² the question was whether placing this company under business rescue would result in a better return for the creditors. Stelzner AJ, deduced “prospect” to mean “possibility”.¹⁴³ The judge stated that he recognised that there could not be a checklist approach to the business rescue applications¹⁴⁴ however he advised that sufficient facts had to be placed before the court by the applicants to enable the court to decide on the possible success of the plan including as an assessment of the practical possibility of the plan.¹⁴⁵ The judge took the same direction as followed by Eloff AJ, in the *Southern palace*¹⁴⁶ case. The application for business rescue in this case was therefore dismissed and according to the judge no reasonable prospect existed that would therefore benefit the creditors.¹⁴⁷

In *Newcity Group (Pty) Ltd v Pellow NO; China Construction Bank Corporation v Chrystal Lagoon Investments 53 (Pty) Ltd*¹⁴⁸ the court referred back the decisions of *Southern Palace*¹⁴⁹ and the *Prospec Investment*¹⁵⁰ cases when addressing what it termed the “conflicting views on how a court should determine whether there is a reasonable prospect for rescuing a company”. While the judge agreed that the bar should not be set too high to prevent successful business rescue applications, the Court nevertheless indicated that the recommendations laid down by Eloff AJ, in the *Southern Palace*¹⁵¹ decision could not be faulted and were “well considered and helpful”.¹⁵² Further that however the test should be flexible and each case to

¹⁴¹ *Prospec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd* (n 136) par 12.

¹⁴² 2012 4 All SA 590 (WCC).

¹⁴³ *Zaneska Investments (Pty) Ltd t/a Bonatla Properties (Pty) Ltd v Midnight storm investments* (n 142) par 40.

¹⁴⁴ *Zaneska Investments (Pty) Ltd t/a Bonatla Properties (Pty) Ltd v Midnight storm investments* (n 142) par 48.

¹⁴⁵ *Zaneska Investments (Pty) Ltd t/a Bonatla Properties (Pty) Ltd v Midnight storm investments* (n 142) par 51.

¹⁴⁶ (n 128).

¹⁴⁷ *Zaneska Investments (Pty) Ltd t/a Bonatla Properties (Pty) Ltd v Midnight storm investments* (n 142) par 86.

¹⁴⁸ *Newcity Group v Allan David Pellow NO* (577/2013) (2014) ZASCA 162.

¹⁴⁹ (n 124).

¹⁵⁰ (n 136).

¹⁵¹ (n 124).

¹⁵² *Newcity Group v Allan David Pellow NO* (n 148) par 14.

be dealt with on its merits and circumstances and those facts will advise if it will give rise to a reasonable prospect or not.

This matter was basically settled by the SCA in the decision of *Oakdene Square Properties (Pty) v Farm Bothasfontein (Kyalami) (Pty) Ltd*.¹⁵³ The *Oakdene Square Properties*¹⁵⁴ case interpreted the much controversial recovery requirement. In this particular case Brand AJ, considered the judgment in *Southern Palace*¹⁵⁵ case and specifically the checklist approach constructed by Eloff AJ, and he rejected this checklist approach and stated that it would not be “practical nor prudent” to support such an approach.¹⁵⁶ According to this judge Brand J, emphasis should not be on the prospect alone, but rather one that is reasonable, in other words a “prospect based on reasonable grounds”.¹⁵⁷ Brand J, went further and held that “reasonable prospect” does not necessarily mean reasonable possibility, however it means a prospect based on reasonable grounds and not speculative suggestions or averments, meaning an applicant is required to place before the court a factual foundation for the existence of a reasonable prospect that business rescue will achieve the primary or secondary object of business rescue.¹⁵⁸ He pointed his agreement with the decision and judgment handed down by Van der Merwe J, in the *Prospec investments*¹⁵⁹ case, expressing that the applicant is not required to set out a detailed business rescue plan but rather must establish grounds for a reasonable prospect of achieving one of the two objectives in section 128(1) (b) of the Act.¹⁶⁰

The South African legal system operates on *stare decisis*, meaning that a decision of the SCA is binding on all lower courts meaning that the decision of the SCA in *Oakdene Square Properties*¹⁶¹ will set the precedents to be followed in regards to what is meant by the “reasonable prospect of rescuing a company” and will be followed by subsequent High Courts when granting business rescue orders, specifically when interpreting the meaning of “reasonable prospect of rescuing a company”.

¹⁵³ 2013 (4) SA 539(SCA).

¹⁵⁴ (n 151).

¹⁵⁵ (n 124).

¹⁵⁶ *Oakdene Square Properties (Pty) v Farm Bothasfontein (Kyalami) (Pty) Ltd* (n 153) par 30.

¹⁵⁷ *Oakdene Square Properties (Pty) v Farm Bothasfontein (Kyalami) (Pty) Ltd* (n 153) par 29.

¹⁵⁸ *Oakdene Square Properties (Pty) v Farm Bothasfontein (Kyalami) (Pty) Ltd* (n 153) par 29 - 31.

¹⁵⁹ (n 136).

¹⁶⁰ Companies Act 2008.

¹⁶¹ (n 153).

6. *Evaluation*

Considering the facts of *African Bank*¹⁶² case the company might have been financially distressed but could not be categorised as a company that has reasonable prospect of success. Among other things the company had not been operating on the normal course of business. It was actually a dormant company that had not traded in years. Further, it had no actual contracts preceding the voluntary business rescue resolution by directors.¹⁶³ The purpose of rescuing a business is because it has a reasonable prospect of surviving and if a business has no such prospect, then it defeats the purpose of being placed under supervision. My understanding of the phrase would be that a business being rescued is surviving but struggling to make ends meet hence the rescuing, but if a company is actually not trading, it is a different issue altogether. It is submitted that the Act should have defined the words “reasonable prospect” or at least provided guidelines in respect of the intention of the legislature to assist in the application of this phrase thereof.

7. *Recommendations*

Having legislation that governs a new procedure, which is unclear and open to ambiguous interpretation, will hinder the success of the procedure. If the Act is to be an effective mechanism of the business rescue procedure, it has to be clear and distinct in the way it is drafted to those who will have to apply it. To ensure that the provisions of the Act regarding business rescue are fair, clear, transparent and not in conflict with any acceptable and entrenched principles of our law, the following recommendations are therefore made:-

- i) A task team be appointed by the legislature to conduct an investigative analysis of the ambiguous sections of the Act for example sections 153 and 121, as alluded to in this paper. In the analysis, the writer suggests and supports Loubser’s recommendation that section 153 (b) (ii) should for example do away with the word binding and the word

¹⁶² (n 11).

¹⁶³ *African Banking Corporation of Botswana v Kariba Furniture Manufacturers* (n 11) par 54.

offer be left as is.¹⁶⁴ The writer further supports recommendation by the judge in the *DH Brothers* case that;

“Although the use of the word binding is not semantically accurate, it is an extremely inelegant use of language and is further an example of poor drafting; the words “binding offer” can only mean that the offeror may not retract the offer until it is accepted or rejected” he further suggested that the word “irrevocable” or “non-retractable” would have been better word to qualify the word “offer”, rather than ‘binding’”.¹⁶⁵

The suggestions outlined above should be considered by the task team in their recommendation to provide clarity on the meaning of these phrases and better represent the true intentions of the legislation.

- ii) Based on the outcomes of the analysis on (i), the writer recommends that the Act addressing business rescue be amended accordingly to clarify and reflect the true intentions of the legislation
- iii) The business rescue practitioners or stake holders in the business rescue procedure need to update themselves with the developing judicial cases on a regular basis. At present, as discussed in this paper; the Judiciary has played a major role in interpreting the two phrases ‘binding offer’ and ‘reasonable prospect’; and has created Judicial precedence which has in my opinion helped shape this procedure in practice. To that end, users of the procedures would do well by referring to same from time to time to be kept up to date with the development of laws pertaining to business rescue procedure.

8. Conclusion

Business rescue procedure is a fairly new procedure in South Africa and chapter 6 of the Company Act¹⁶⁶ being the main mechanism to provide the procedure in which to follow hence all the stakeholders and business rescue practitioners are reliant on these provisions. As

¹⁶⁴ Loubser (n 64) 377.

¹⁶⁵ *DH Brothers Industries (Pty) Ltd v Karl Johannes Gribnitz No (n 83) par 42.*

¹⁶⁶ Companies Act 2008.

discussed above however there seems to be assumptions that this legislation was poorly drafted ultimately making the application of the principles contained therein somewhat compromised. The above discussion was to shed some light on the interpretational glitches that have characterised the procedure and how the judiciary has assisted the situation thereof. Using the two phrases from the *African banking* case¹⁶⁷ namely “binding offer” and “reasonable prospect” the writer outlined same and ultimately discussed how cases like the *African banking* case and the *Oakdene*¹⁶⁸ case have set precedents for the meaning of these two phrases. Such precedents should then influence the amendment of the Act so that the true intentions of the legislation can be clear.



¹⁶⁷ (n 11).

¹⁶⁸ (n 153).

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