11 THE BUSINESS RESCUE PLAN

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Presented by

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The content of the business rescue plan

- The business rescue plan is an important part of the business rescue process
- The Companies Act in section 128(1)(b)(iii) contemplates two kinds of plans –
    1. A turnaround plan that envisages a company trading its way out of financial distress; and
    2. A plan delivering a better return for creditors as compared to a liquidation scenario (controlled wind-down proposal)
- Section 150(1) places a duty on the business rescue practitioner to prepare a business rescue plan for consideration and possible adoption, after consulting with creditors, other affected persons, and the management of the company
- Section 150(2) sets out what should be included in a business rescue plan
- In terms of section 150(2), the business rescue plan must contain all the information reasonably required to facilitate affected persons in deciding whether or not to accept or reject the plan
- The purpose of section 150(2) is to ensure that as much relevant information as possible is included in the plan
- Business rescue plans ought to be drafted in a manner which enables creditors to make informed decisions about the future of the company, subsequent to its discharge from business rescue
- The detail and extent of the suggested restructuring plan must set out the manner and the mechanism that will be adopted to rescue the company from its position of financial distress

The content of the business rescue plan

- Hlumisa Investment Holdings (RF) Ltd and another v Van der Merwe NO and others (77351/2015) [2015] ZAGPPHC 1055 (14 October 2015)
- The applicants in this matter contended that there had been insufficient consultation on the business rescue plan to enable someone reading it to consider it meaningfully
- It was alleged that critical documents had not been made available and that the applicants had not been consulted on items relevant to the preparation of the business rescue plan
- The court held that there had been prima facie unfair treatment by the business rescue practitioner towards the applicants and granted the applicants an interdict preventing the holding of the section 151 meeting to consider the plan
- The judge ordered the business rescue practitioner to provide further relevant documents to the applicants to enable them to consider the proposed business rescue plan properly and meaningfully
- This case assists in understanding the extent of the consultation that must occur between the practitioner and affected person
- A proper and effective exchange of information must occur to enable affected persons to interpret and properly consider the proposed plan

The content of the business rescue plan

- Section 150(2) of the Companies Act provides that a business rescue plan must contain all the information reasonably required to facilitate affected persons in deciding whether or not to accept or reject the plan, and must be divided into Parts A, B and C
- In terms of section 150(2)(a), Part A – Background must include at least—
  - (i) a complete list of all the material assets of the company, as well as an indication as to which assets were held as security by creditors when the business rescue proceedings began;
  - (ii) a complete list of the creditors of the company when the business rescue proceedings began, as well as an indication as to which creditors would qualify as secured, statutory preferent and concurrent in terms of the laws of insolvency, and an indication of which of the creditors have proved their claims;
  - (iii) the probable dividend that would be received by creditors, in their specific classes, if the company were to be placed in liquidation;
  - (iv) a complete list of the holders of the company's issued securities;
  - (v) a copy of the written agreement concerning the practitioner's remuneration; and
  - (vi) a statement whether the business rescue plan includes a proposal made informally by a creditor of the company.

The content of the business rescue plan

- In terms of section 150(2)(b), **Part B - Proposals** must include at least—
  - (i) the nature and duration of any moratorium for which the business rescue plan makes provision;
  - (ii) the extent to which the company is to be released from the payment of its debts, and the extent to which any debt is proposed to be converted to equity in the company, or another company;
  - (iii) the ongoing role of the company, and the treatment of any existing agreements;
  - (iv) the property of the company that is to be available to pay creditors' claims in terms of the business rescue plan;
  - (v) the order of preference in which the proceeds of property will be applied to pay creditors if the business rescue plan is adopted;
  - (vi) the benefits of adopting the business rescue plan as opposed to the benefits that would be received by creditors if the company were to be placed in liquidation; and
  - (vii) the effect that the business rescue plan will have on the holders of each class of the company's issued securities.

The content of the business rescue plan

- In terms of section 150(2)(b), **Part C – Assumptions and conditions** must include at least—
  - (i) a statement of the conditions that must be satisfied, if any, for the business rescue plan to—
    - (aa) come into operation; and
    - (bb) be fully implemented;
  - (ii) the effect, if any, that the business rescue plan contemplates on the number of employees, and their terms and conditions of employment;
  - (iii) the circumstances in which the business rescue plan will end; and
  - (iv) a projected—
    - (aa) balance sheet for the company; and
    - (bb) statement of income and expenses for the ensuing three years, prepared on the assumption that the proposed business plan is adopted.

The content of the business rescue plan

- Commissioner of SARS v Beginsel NO and others 2013 (1) SA 307 (WCC)
- In this case, the court held that substantial compliance with section 150(2) is sufficient and that there is no need for the business rescue plan to contain a precise description of each element set out in each section
- There must be sufficient information which enables interested parties to make an informed decision on the business rescue plan

The content of the business rescue plan

- Section 150(2)(a)(iii) (Part A) refers to the inclusion of the "probable dividend that would be received by creditors, in their specific classes, if the company were to be placed in liquidation"
- This is an important calculation as it enables creditors to decide whether the dividend being offered by the practitioner in the plan represents a better return than that offered by liquidation
- Section 150(3), provides that the projected balance sheet and statement required by section 150(2) must include a notice of any material assumptions on which the projections are based and may include alternative projections based on varying assumptions and contingencies
- In terms of section 150(4), a proposed business rescue plan must conclude with a certificate by the practitioner stating that any actual information provided appears to be accurate, complete and up to date and that all projections provided are estimates made in good faith on the basis of factual information and assumptions as set out in the statement of income and expenses
- Section 150(5) provides that the business rescue plan must be published within 25 business days after appointment of the business rescue practitioner, or within such longer time as may be allowed by the court, on application by the company or the holders of a majority of the creditors' voting interests
- In practice, plans are generally not published within the 25-day period and creditors grant extensions to the practitioner to publish plans well after the 25-day period deadline

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Essential Clauses

- In practice, many business rescue plans incorporate alternative dispute resolution provisions
- In terms of these provisions, any disputes that arise from the plan must be sent to a dispute resolution forum for expeditious resolution – an arbitration clause
- This may include referrals to the Companies Tribunal of South Africa
- The Companies Tribunal was established to adjudicate applications made in terms of the Companies Act 71 of 2008 in order to assist in the voluntary resolution of disputes
- Such dispute resolution mechanisms are useful in that they can prevent business rescue plans from failing, especially where there are tight deadlines for implementation.
- Dispute resolution clauses allow for the speedy resolution of disputes without prolonging the business rescue unnecessarily
- Disputes about creditors' claims, the manner in which the practitioner deals with voting rights, inappropriate votes, the process of making decisions at meetings, and the implementation of the plan could fall to be determined by way of a dispute resolution processes, such as mediation and arbitration
- It must be noted that the dispute resolution provisions cannot prevent an affected person from instituting court proceedings as contemplated in Chapter 6

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The section 151 meeting to determine the future of the company

- Section 151(1) provides that within ten business days after publishing a business rescue plan, the practitioner must convene and preside over a meeting of creditors and any other holders of a voting interest, called for the purpose of considering the plan
- Section 151(2) requires the business rescue practitioner to deliver a notice of the meeting to all affected persons at least five business days before the meeting contemplated in section 151(1)
- The section 151(2) notice must set out –
  - The date, time, and place of the meeting;
  - The agenda of the meeting; and
  - A summary of the rights of affected persons to participate in and vote at the meeting
- In terms of section 151(3), the section 151 meeting may be adjourned from time to time, as necessary or expedient, until a decision regarding the company's future has been taken in accordance with sections 152 (voting on the plan) and 153 (rejection of the plan)
- In the event of ongoing delay of the business rescue process or continuous postponements of section 151 meetings, creditors (as affected persons) may launch proceedings to force the practitioner to place the plan before creditors in terms of section 153 or, if there is little prospect of rescuing the company, request the court to direct the practitioner to place the company into liquidation

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The duties of the practitioner at the section 151 meeting

- At the meeting contemplated in section 151, the business rescue plan must be considered and dealt with on the basis set out in section 152
- Section 152(1) provides as follows –
- At a meeting convened in terms of section 151, the practitioner must –

(a) introduce the proposed business rescue plan for consideration by the creditors, and if applicable, by the shareholders;

(b) inform the meeting whether the practitioner continues to believe that there is a reasonable prospect of the company being rescued;

(c) provide an opportunity for the employees' representatives to address the meeting;

(d) invite discussion, and entertain and conduct a vote, on any motions to—

(i) amend the proposed plan, in any manner moved and seconded by holders of creditors' voting interests, and satisfactory to the practitioner; or

(ii) direct the practitioner to adjourn the meeting in order to revise the plan for further consideration; and

(e) call for a vote for preliminary approval of the proposed plan, as amended if applicable, unless the meeting has first been adjourned in accordance with paragraph (d)(ii).

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The consideration of and voting on the business rescue plan

- From time to time, after discussion at the section 151 meeting, voting on the plan may be postponed or adjourned for the purposes of amending the plan
- In the event that the meeting votes in favour of amending the plan, the practitioner would adjourn the meeting in order to revise the plan for further consideration
- A decision to amend must be moved by a creditor (holding a voting interest) and seconded by another (similarly holding a voting interest)
- The decision to amend must be consented to by the practitioner
- The amendment to the plan may be made at the meeting and the amended plan then voted on in terms of section 152(1)(e)
- Alternatively, if a motion is passed to direct the practitioner to adjourn the meeting in order to revise the plan for further consideration, the practitioner must do so
- In the event that there is a disagreement about the motions, the practitioner must put them to the vote

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Voting on the business rescue plan

- Section 145(4) provides that, 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.
- For the vote contemplated in section 152(2)(a) of the Companies Act, all creditors will vote – including secured creditors, unsecured creditors, and concurrent creditors
- However, contingent creditors cannot vote on a business rescue plan
- This is because contingent claims are generally not due and payable by the company, and therefore contingent creditors will have a voting interest equal to zero, which is the value of the amount "owed" to that creditor by the company as at the date on which the business rescue plan is put to a vote
- Section 152(2) deals with voting on a business rescue plan and provides as follows –
- In a vote called in terms of subsection (1)(e), 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 interests that were voted; and
  - (b) the votes in support of the proposed plan included at least 50% of the independent creditors' voting interests, if any, that were voted.
- It is important to note that in terms of section 152(2), voting interests of creditors who are not present, or who do not vote, are not taken into consideration in determining whether the plan has been approved on a preliminary basis

Amendments to the business rescue plan

- Chapter 6 does not make provision for the ability to amend a plan once it has been approved in terms of section 152(2)
- In practice, however, certain plans make provision for subsequent amendments to the business rescue plan in certain prescribed instances
- It is submitted that in the event that provision is made in the plan for potential subsequent amendments, it must be subject to the proviso that it does not prejudice affected persons who had approved the plan in the first instance
- Certain business rescue plans might reserve the right to amend the plan in the sole and absolute discretion of the business rescue practitioner, provided that
    - the practitioner at all times acts reasonably,
    - it is not prejudicial to any of the affected persons; and
    - the business rescue practitioner acts reasonably

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Voting by the holders of the company's securities

- In terms of section152(3)(a), in the event that a proposed business rescue plan is not approved on a preliminary basis, as contemplated in subsection (2), the plan is rejected, and may be considered further only in terms of section 153
- In terms of section152(3)(b), where the proposed business rescue plan does not alter the rights of the holders of any class of the company's securities, approval of that plan on a preliminary basis in terms of subsection (2) constitutes also the final adoption of that plan, subject to satisfaction of any conditions on which that plan is contingent
- In terms of section 152(3)(c) where the proposed business rescue plan does alter the rights of any class of holders of the company's securities –

  (i) the practitioner must immediately hold a meeting of holders of the class, or classes of securities who rights would be altered by the plan, and call for a vote by them to approve the adoption of the proposed business rescue plan; and

  (ii) if, in a vote contemplated in subparagraph (i), a majority of the voting rights that were exercised –

    (aa) support adoption of the plan, it will have been finally adopted, subject only to satisfaction of any conditions on which it is contingent; or

    (bb) oppose adoption of the plan, the plan is rejected, and may be considered further only in terms of section 153.

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The binding nature of the business rescue plan

- The binding nature of the business rescue plan is set out in section 152(4)
- Section 152(4) provides that a business rescue plan that has been adopted is binding on the company, and on each of the creditors of the company and every holder of the company's securities, irrespective of whether such a person, was present at the meeting; voted in favour of the adoption of the plan; or in the case of creditors, had proven their claims against the company
- This is known as the "cram-down" provision in that once adopted, the plan is "crammed down" on the company itself and on all creditors and holders of company securities, including shareholders
- Accordingly, the business rescue plan is binding on –
    - Creditors and shareholders present at the meeting , who voted against the adoption of the plan
    - Creditors and shareholders who were not present at the meeting
    - Creditors who did not prove claims against the company

The implementation of the business rescue plan

- In terms of section 152(5), the company, under the direction of the practitioner, must take all necessary steps to attempt to satisfy any conditions on which the business rescue plan is contingent; and to implement the plan as adopted.
- In addition, section 152(6) provides that to the extent necessary to implement an adopted business rescue plan –

  (a) the practitioner may, in accordance with that plan, determine the consideration for, and issue, any authorised securities of the company, despite section 38 or 40 to the contrary; and

  (b) if the business rescue plan was approved by the shareholders of the company, as contemplated in subsection (3)(c), the practitioner may amend the company's Memorandum of Incorporation to authorise, and determine the preferences, rights, limitations and other terms of, any securities that are not otherwise authorised, but are contemplated to be issued in terms the business rescue plan, despite any provision of section 16, 36 or 37 to the contrary.
- The implementation of the business rescue plan, as adopted, is an essential requirement in respect of the ultimate discharge provisions set out in section 154
- A business rescue plan will usually include wording confirming that creditors' claims will be discharged once the plan is implemented in accordance with its terms and conditions
- Delays in the implementation of the plan often occur, in such an instance the business rescue practitioner may elect to either file for liquidation, or urgently submit a new or revised plan to all affected persons for further consideration

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The implementation of the business rescue plan

- With respect to pre-emptive rights of shareholders of the company as contemplated in section 39, section 152(7) provides that except to the extent that an approved business rescue plan provides otherwise, a pre-emptive right of any shareholder of the company, does not apply with respect to an issue of shares by the company in terms of the business rescue plan.
- Section 152(8) deals with substantial implementation of the business rescue plan and provides that when the business rescue plan has been substantially implemented, the business rescue practitioner must file a notice of the substantial implementation of the business rescue plan
- Although there is no definition of substantial implementation in the 2008 Companies Act, it is submitted that a business rescue plan has been substantially implemented once the practitioner has implemented the plan in accordance the terms and conditions set out in the plan
- After a business rescue plan has been substantially implemented, a notice of substantial implementation must be filed with the Companies and Intellectual Property Commission (CIPC)
- Once a notice of substantial implementation has been filed by the practitioner with the CIPC, the company exists from business rescue proceedings and continues trading on a solvent basis
- In terms of regulation 6, the practitioner must notify all stakeholders and affected persons, by delivery to each of them of a copy of the notice of substantial implementation, that the company has exited from its business rescue proceedings

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Failure to adopt the business rescue plan

- Section 153(1)(a) deals with the actions that a business rescue practitioner may take when a business rescue plan has been rejected and provides as follows –
- If a business rescue plan has been rejected (not approved) in terms of section 152(3)(a) or section 152(3)(c)(ii)(bb), the business rescue practitioner is obliged to either seek a vote of approval from the holders of voting interests to prepare and publish a revised plan, or advise the meeting that he or she intends to apply to court to set aside the result of the vote by the holders of voting interests or shareholders on the grounds that such vote was inappropriate
- A vote on a plan can therefore be set aside by the court in certain instances
- Section 153(7) provides that on application, a court may order that the vote on a business rescue plan be set aside if the court is satisfied that it is reasonable and just to do so having regard to –
    - The interests represented by the person or persons who voted against the proposed business rescue plan;
    - The provision, if any, made in the proposed business rescue plan with respect to the interests of that person or those persons; and
    - A fair and reasonable estimate of the return to that person, or those persons, if the company were to be liquidated
- Courts will have to deal with applications to set aside votes on the grounds that such dissenting votes were inappropriate, on a case-by-case basis, granting relief where the facts of the case support the setting aside of a vote

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Failure to adopt the business rescue plan

- FirstRand Bank Ltd v KJ Foods CC (in business rescue) (734/2015) [2015] ZASCA 50 (26 April 2017)
- The Supreme Court of Appeal in this case held that a determination by a court that a vote is to be set aside in terms of section 153(1)(a)(ii), read with section 153(7), as inappropriate is a value judgment made after consideration of all the facts and circumstances
- This entails a single enquiry
- A court will set aside a vote on the ground that its result was inappropriate if it is reasonable and just to do so taking into account the factors listed in section 153(7)(a) to (c) and all circumstances relevant to the case, including the purpose of business rescue in terms of the Companies Act
- The effect of the court setting aside vote is that there is no need or requirement for the vote to be retaken at the resumption of the postponed meeting
- Once the vote is set aside, the proposed business plan is considered to have been adopted by operation of law (ex lege)
- No further vote envisaged by the Act

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Failure to adopt the business rescue plan

- Section 153(1)(a), as discussed above, deals with the actions that a business rescue practitioner may take in the event that a business rescue plan has been rejected
- Section 153(1)(b) on the other hand sets out the options available to affected persons where the business rescue practitioner does not take any action as contemplated in paragraph (a)
- Section 153(1)(b) is aimed at ensuring that those affected persons who wish to vote in favour of a plan are able to protect their interests where the practitioner takes no further steps
- Section 153(1)(b) reads as follows –
- If the practitioner does not take any action contemplated in paragraph (a) –

(i) any affected person present at the meeting may –

(aa) call for a vote of approval from the holders of voting interests requiring the practitioner to prepare and publish a revised plan; or

(bb) apply to the court to set aside the result of the vote by the holders of voting interests or shareholders, as the case may be, on the grounds that it was inappropriate; or

(ii) any affected person, or combination of affected persons, may make a binding offer to purchase the voting interests of one or more persons who opposed adoption of the business rescue plan, at a value independently and expertly determined, on the request of the practitioner, to be a fair and reasonable estimate of the return to that person, or those persons, if the company were to be liquidated

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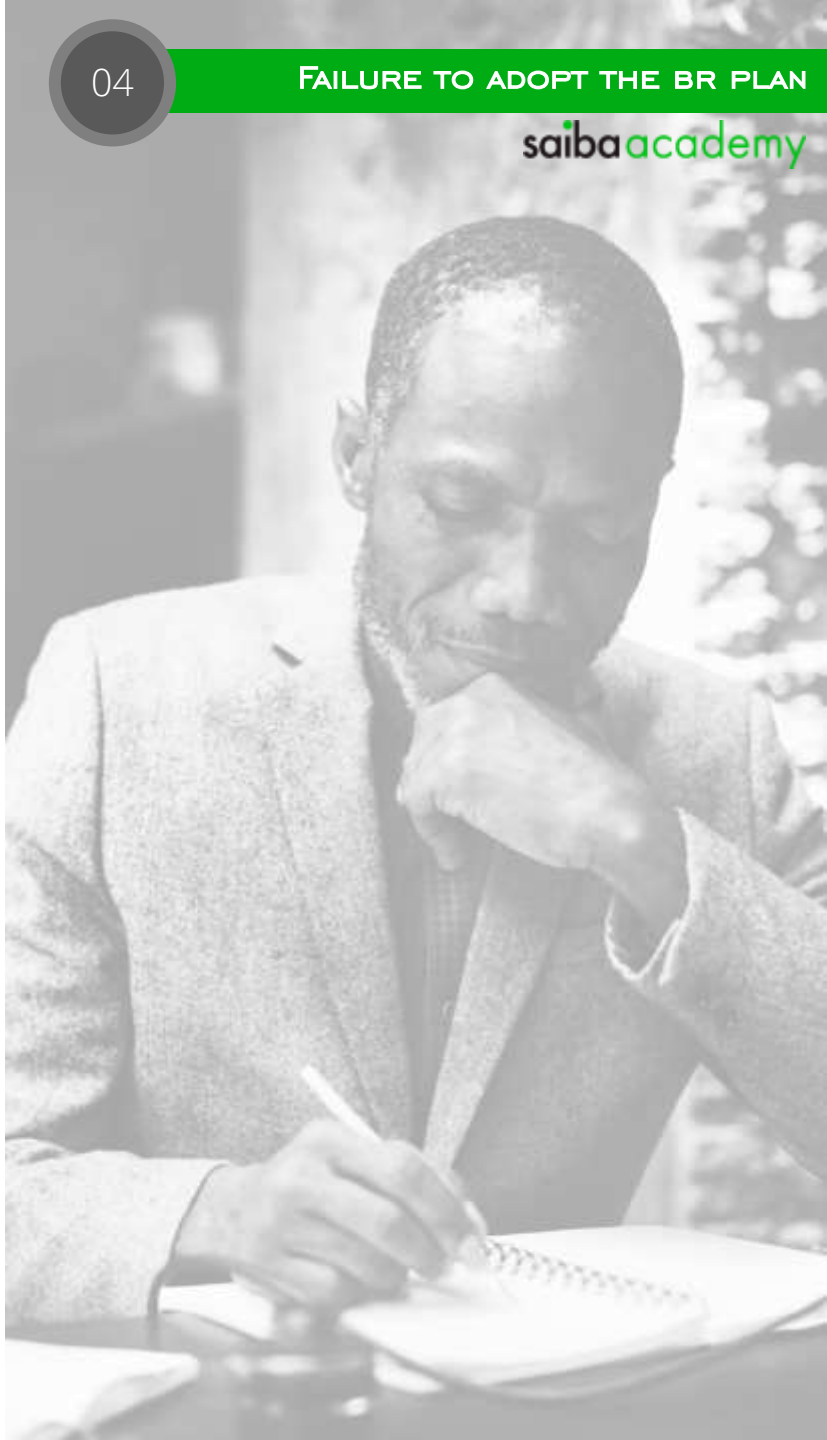
The "binding offer" principle contemplated in section 153(1)(b)(ii)

- The "binding offer" principle contemplated in section 153(1)(b)(ii) is a novel concept in South African law
- In terms of this section, any affected person or combination of affected persons may make an offer to dissenting persons to buy their voting interests at liquidation value (as appraised by an independent expert)
- The aim of section 153(1)(b)(ii) is to ensure that those affected persons who wish to vote in favour of a plan that has not been approved are given an opportunity to buy out voting interests in order to get to the required threshold of 75 per cent as set out in section 152(2)
- This provision prevents deadlocks and forces dissenting or holdout creditors to sell out at negligible value
- All creditors who oppose the adoption of the plan by voting it down are therefore at risk
- If they dissent on the vote, they can be bought out at liquidation value
- Liquidation value refers to a fair and reasonable estimate, independently and expertly determined, of what the holder of a voting interest would receive if the company were to be liquidated
- The task to value the voting interests is given to the practitioner in terms of section 153(1)(b)(ii)
- However, in terms of section 153(6), 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 section 153(1)(b)(ii)



Case law on the binding offer in terms of section 153(1)(b)(ii)

African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and others 2015 (5) SA 192 (SCA)

- The Supreme Court of Appeal had to determine –
  - the meaning of the term "binding offer"; and
  - whether the offer in terms of section 153(1)(b)(ii) was binding on the offeror only or if both the offeror and offeree were bound by the offer once made
- In the court *a quo*, the court held that the binding offer in terms of section 153(1)(b)(ii), (once made) was binding on both the offeror and the offeree
- The Supreme Court of Appeal set aside the judgment of the court *a quo* and held that a binding offer made to a creditor who opposes a business rescue plan is not automatically binding on the offeree
- The court came to this conclusion by virtue of the fact that there is no language in section 153(1)(b)(ii) which suggests the situation where, once a binding offer is made to purchase a voting interest, the holder of the voting interest is summarily divested of it without being able to determine the affordability of the offer on the part of the offeror
- The court held that the legislature clearly envisaged the creation of two categories of persons, namely, holders of voting interests and those in the process of acquiring a voting interest
- The Supreme Court of Appeal was of the view that the court *a quo's* interpretation would immediately divest interested holders of their interest once the binding offer is made, which would be untenable
- It is submitted that this judgment waters down the ability to cram-down the plan on dissenting creditors in that it puts the offeree in a position to determine whether the offer to buy out its voting interest is acceptable or falls to be rejected
- The offeror is therefore not in the position to force the offeree to accept the offer

Filing of a notice of termination of the business rescue proceedings

- Section 153(5) states that if no person takes any action contemplated in subsection (1), the practitioner must promptly file a notice of the termination of the business rescue proceedings
- The notice of termination brings business rescue proceedings to an end
- In all likelihood, this would culminate in the company being placed into liquidation, either on application by the practitioner, a creditor, or the company itself

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The discharge of debts and claims

- Section 154 brings about a full discharge of all debts and claims once the business rescue plan is implemented in accordance with its terms
- No creditor is entitled to enforce any debt against the company which existed before the commencement of the business rescue process
- As aforementioned, section 152(4) provides that a business rescue plan that is adopted is binding on the company, on each of the creditors of the company and on every holder of the company's securities, whether or not such a person was present at the meeting, voted in favour of the adoption of the plan, or in the case of creditors, has a proven claim against the company
- As set out in section 154(1), a business rescue plan may provide that, once it is implemented in accordance with its terms and conditions, a creditor who has acceded to the discharge of the whole or part of a debt owing to that creditor will be prohibited from proceeding to enforce the relevant debt or part of it against the company
- Section 154(1) thus contemplates a compromise of the debt between the company and those of its creditors who acceded to the discharge of debt owing to that creditor
- Accordingly, section 154(1) does not refer to the general body of creditors and the compromise contemplated therein is not pre-emptory
- Only creditors who have acceded to the discharge of the whole or part of the debt owing to that creditor will lose the right to enforce the relevant debt or part of it

The discharge of debts and claims

- Section 154(2), on the other hand, provides that where a business rescue plan has been approved and implemented in accordance with Chapter 6, a creditor is not entitled to enforce any debt owed by the company immediately before the beginning of the business rescue process, except to the extent provided for in the business rescue plan.
- Accordingly, once a business rescue plan has been approved and implemented, all creditors (whether acceding or dissenting creditors) will not be entitled to enforce any debt owed by the company other than to the extent provided for in the plan
- Section 152(4) thus prevents a creditor from enforcing a debt owed immediately before the beginning of the business rescue process once the business rescue plan has been approved

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End of Unit 11

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