THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no**:** 228/2014

In the matter between:

AFRICAN BANKING CORPORATION OF BOTSWANA LTD	**APPELLANT**
and	
KARIBA FURNITURE MANUFACTURERS (PTY) LTD	**FIRST RESPONDENT**
JEAN PIERRE JORDAAN NO	**SECOND RESPONDENT**
NCHITE, BALDWIN	**THIRD RESPONDENT**
NCHITE, BIRGITTA SVENSSON	**FOURTH RESPONDENT**
COMPANIES AND INTELLECTUAL PROPERTY COMMISSION, REPUBLIC OF SOUTH AFRICA	**FIFTH RESPONDENT**
MINISTER OF TRADE AND INDUSTRY	**SIXTH RESPONDENT**

Neutral Citation: *African Banking Corporation of Botswana v Kariba Furniture Manufacturers & others* (228/2014) [2015] ZASCA 69 (20 May 2015)

Coram:	Mpati P, Mhlantla, and Leach JJA, Schoeman and Dambuza AJJA
Heard:	03 March 2015
Delivered:	20 May 2015

Summary: Company – Business Rescue – meaning of a 'binding offer' made in terms of s 153(1)*(b)*(ii) of the Companies Act 71 of 2008 – a binding offer made to a creditor who opposes a business rescue plan is not automatically binding on the offeree - no valid binding offer was made - – business rescue having no reasonable prospects of success - resolutions to commence business rescue and to adopt business rescue plan set aside.

ORDER

On appeal from: Gauteng Division, Pretoria (Kathree-Setiloane J sitting as court of first instance): judgment reported *sub nom African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd* 2013 (6) SA 471 (GNP).

(1) The appeal succeeds with costs, including costs of two counsel; such costs to be paid by the second, third and fourth respondents jointly and severally, the one paying, the others to be absolved.

(2) Paragraphs (2) and (3) of the order of the court a quo are set aside and replaced with the following:

'2.1 The application succeeds.

2.2 It is declared that the "binding offer" made on 26 March 2012 at the second meeting of creditors, on behalf of the Third and/or Fourth respondents in terms of s 153(1)*(b)*(ii) of the Companies Act 71 of 2008, to purchase the voting interest of the applicant, was not binding on the applicant.

2.3 The approval of the proposed business rescue plan which occurred at the meeting of affected persons held on 26 March 2012, is set aside.

2.4 The resolution taken by the Board of the first respondent on 31 January 2012, to voluntarily commence business rescue proceedings and to place the first respondent under supervision is set side.

2.5 The costs of this application shall be paid by the second, third and fourth respondents, jointly and severally, the one paying, the others to be absolved.'

JUDGMENT

Dambuza AJA (Mpati P, Mhlantla JA and Schoeman AJA concurring):

Introduction

[1] The provisions relating to the business rescue procedure which were introduced into our company law with the enactment of the Companies Act 71 of

2008 (the Act) have been the subject of varying interpretations in the various Divisions of the High Court. This appeal, with the leave of this Court, concerns, first, the interpretation of the words 'binding offer' as they appear in s 153(1)*(b)*(ii) of the Act. More particularly, the issue is whether a binding offer, as provided for in that section, is binding on the offeree once it is made. A further issue is the assessment of whether reasonable prospects of a successful business rescue exist in this case and whether the resolutions to commence business rescue and to adopt a business rescue plan fall to be set aside consequent to that assessment.

The Background

[2] The third and fourth respondents, Mr Baldwin and Mrs Brigitta Nchite (Mr and Mrs Nchite) were shareholders and directors of the first respondent, Kariba Furniture Manufacturers (Pty) Ltd (Kariba). In October 2006, the appellant, African Banking Corporation of Botswana (the bank), instituted action against Kariba in the Gauteng Division, Pretoria, for payment of moneys lent and advanced to Kariba under a credit facility agreement. Mr and Mrs Nchite were Kariba's co-defendants by virtue of deeds of suretyship executed by them in favour of the bank. The bank was also a holder of a general notarial bond executed in its favour by Kariba as security for the loan. By agreement between the parties to that litigation, the action was removed from the Gauteng Division and referred to arbitration. The arbitrator found in favour of the bank and held Kariba and Mr and Mrs Nchite jointly and severally liable to the bank for payment of BWP 5 610 125.38[1] together with interest at 13 per cent per annum from 1 July 2004 to date of payment. The arbitration award was confirmed on appeal, but the appeal tribunal found that Mrs Nchite's liability, which had been limited to R1.5 million, had been discharged. As at 31 January 2012 the total liability of Kariba and Mr Nchite to the bank was BWP 14 966 809.20.

[3] On 31 January 2012, Mr and Mrs Nchite resolved that Kariba voluntarily begin business rescue proceedings in terms of s 129 of the Act. On the same day they nominated the second respondent, Mr Jean Pierre Jordaan, for appointment as the business rescue practitioner (the practitioner). He consented on the same day. On 6 February 2012, he was appointed as the practitioner for Kariba by the Companies and Intellectual Property Commission of South Africa (CIPC).

[1] Botswana Pula, the currency abbreviation of which is BWP.

[4] On 17 February 2012, the first statutory meeting of creditors of Kariba was held. At that meeting Mr Mapata, the bank's Credit Manager, raised several concerns. Some of the concerns had been expressed in correspondence exchanged between the parties in the days preceding the meeting. Chief amongst these was the lack of recently audited financial statements relating to Kariba. These concerns were not resolved at the meeting, but the practitioner undertook to email Kariba's audited financial statements for the 2005 financial year to the bank's attorneys. At this early stage I may as well state that, as will become clearer in the paragraphs that follow, the absurdity of resolving to commence business rescue proceedings seven years after Kariba had last conducted business was central to the bank's opposition to those proceedings.

[5] Subsequent to the first meeting of creditors, further correspondence was exchanged between the practitioner and the bank's attorneys regarding the concerns raised by the bank. These related to the provisional admission of the bank's claims at the first meeting of creditors, the reluctance by the practitioner to admit the bank's claim for interest, the basis for evaluation of Kariba's machinery and raw material, and the lack of post-2005 audited financial statements and management accounts. These remained unresolved even when the practitioner distributed the proposed rescue plan on 12 March 2012. Correspondence regarding the concerns raised by the bank's attorneys continued until 26 March 2012 when the second meeting of creditors was held.

[6] During that meeting, the practitioner inquired if any party wished to vote for amendment of the rescue plan as provided for in terms of s 152(1)*(d)* of the Act.[2]

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[2] Section 152 of the Act, which regulates the proceedings during consideration of the business rescue plan, provides:
'Consideration of business rescue plan-(1) At a meeting convened in terms of s151 the practitioner must-
(a) Introduce the proposed business plan for consideration by the creditors and, if applicable, by the shareholders;
(b) Inform the meeting whether the practitioner continues to believe that there is a reasonable prospect of the company being rescued;
(c) Provide a opportunity for the employees' representatives to address the meeting;
(d) Invite discussion, and conduct vote, on any motions to-
(i) amend the proposed plan, in any manner moved and seconded by holders of creditors' voting interests, and satisfactory to the practitioner; or
(ii) direct the practitioner to adjourn the meeting in order to revise the plan for further consideration; and

When none of the affected parties showed interest in doing so, the practitioner called for a vote by the creditors for preliminary approval of the plan in terms of s 152(1)*(e)*. In terms of the plan, the bank held a voting interest of 63 per cent, while ABSA Bank Limited held 2 per cent, the North West Development Corporation (NWDC), another creditor, held 1 per cent, the Municipality of Hammanskraal held 1 per cent, and the shareholders held the balance. The bank and NWDC rejected the plan.[3] After the practitioner had indicated that he would not invoke the provisions of s 153(1)*(a)* of the Act, the shareholders' attorney indicated that his clients wished to make a binding offer on behalf of the shareholders, to purchase the bank's voting interest in terms of s 153(1)*(b)*(ii) of the Act. The practitioner immediately ruled that it was not open to the bank to respond to the offer; that the offer was binding on the bank and that the bank's voting interests had to be transferred to the shareholders immediately. He proceeded to amend the plan to reflect the bank as holding zero per cent interest and the shareholders 95 per cent. The representatives of the bank left the meeting. Mr van der Merwe, who represented NWDC, registered his principal's opposition to the rescue plan and then also left the meeting. Thereafter a vote on the proposed

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(e) call for a vote for preliminary approval of the proposed plan, as amended if applicable, unless the meeting
has first been adjourned in accordance with paragraph *(d)* (ii).
(2) In a vote called in terms of (1)*(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 interest that were voted; and
(b) the votes in support of the business plan included, at least 50% of the independent creditors' voting interests, if any, that were voted.
(3)If a proposed business rescue plan-
(a) is not approved on a preliminary basis, as contemplated in subsection (2), the plan is rejected, and may be considered only in terms of section 153….'

[3] 'Failure to adopt business rescue plan. –(1)*(a)* If the business rescue plan has been rejected as contemplated in subsection 152(3)*(a)* or *(c)* (ii)*(bb)* the practitioner may –
seek a vote of approval from the holders of voting interests to prepare and publish a revised plan; or
(i) advise the meeting that the company will apply to a court to set aside the result of the vote by the holders of voting interests or shareholders, as the case may be, on the grounds that it was inappropriate.
(b) If the practitioner does not take any action contemplated in paragraph (a)-
(i) any affected person 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
(iii) any affected person or a combination of affected persons, may make a binding offer to purchase the voting interests of one or more persons who opposed adoption of the business rescue plan, at a value independently and expertly determined, on the request of the practitioner, to be a fair and reasonable estimate of the return to that person, or those persons, if the company were to be liquidated.' (My emphasis.)

business rescue plan was undertaken by the reconstituted creditors (excluding the bank) and they voted in favour of preliminary approval of the plan.[4]

The high court proceedings

[7] It is against this background that the bank launched an application in the Gauteng Division, Pretoria, seeking resolution of the issues already set out in the opening paragraph of this judgment. In the court below, the bank contended that it could not be bound by an offer which it had not been allowed to respond to. It complained that the offer was improper in that it lacked clarity as to the identity of the offeror, ie whether it was both Mr and Mrs Nchite or only one of them, what the amount and terms of payment thereof were and whether there were any conditions attached thereto. All that was stated was that the binding offer to purchase the bank's voting interests would be 'at a value independently and expertly determined to be a fair and reasonable estimate of the return to the bank, if Kariba were to be liquidated'. There was also the outstanding issue of whether Mr Nchite would remain liable to the bank under the deed of suretyship.

[8] The court a quo (Kathree-Setiloane J) dismissed the application by the bank. It approved the procedure adopted by the practitioner in dealing with the binding offer as made, holding that he had applied s 153(1)*(b)*(ii) properly. It found that 'the binding offer' envisaged in s 153(1)*(b)*(ii) did not anticipate an 'option' or an 'agreement' in the contractual sense, but was rather 'a set of statutory rights and obligations, from which neither party could resile', and that the offer was automatically binding on both the offeror and the offeree once made. According to the court a quo, this interpretation was consistent with the intention of the legislature to ensure 'co-operation' by opposing creditors in business rescue proceedings. The court also found that the opposing creditor, whose voting interest was transferred in terms of the binding offer, stood to suffer no prejudice as the value of the transferred voting interest, which would be determined by an independent expert, would be paid prior to implementation of the revised business plan. It refused to set aside the approval of the business rescue plan prepared by the practitioner and the resolution taken by Kariba's board to voluntarily commence business rescue proceedings. It is against this decision that the bank appeals to this court.

[4] In terms of s 152(2) of the Act.

The appeal

[9] On appeal the bank contended that a binding offer made in terms of s 153(1)*(b)*(ii) of the Act did not automatically bind the offeree. Instead, the use of the term 'binding offer' in the section is intended to convey that the offer, once made, could not be withdrawn by the offeror. The bank also insisted that the resolution to commence business rescue falls to be set aside as there were no reasonable prospects, on the basis of the rescue plan, that Kariba could be rescued. It was submitted on behalf of the bank that the rescue proceedings were a sham and were instituted for an ulterior and improper purpose. It was further submitted that, even if this court were to find that the offer was binding on the bank, the practitioner should be removed from office as he had failed to exercise the required degree of care in the performance of his functions. In this regard the bank also sought leave to lead further evidence pertaining to the practitioner's conduct subsequent to the adoption of the rescue plan. In essence the evidence relates to an alleged undue delay by the practitioner in obtaining the valuation of the bank's voting interest subsequent to the adoption of the business rescue plan. Because of the view I take on the main issues on appeal, I do not deem it necessary to deal with that application and nothing more needs be said about the further evidence sought to be introduced.

[10] On the other hand Kariba, the practitioner and Mr and Mrs Nchite tendered a concerted argument that the business rescue process could not be delayed or derailed by a single 'hostile' creditor to the detriment of other creditors. They argued that to allow a situation where a creditor must accept a binding offer would detract from the objectives of business rescue. Counsel for Kariba submitted that the court a quo was correct in finding that the intention of the legislature was to impose the shareholder's offer upon recalcitrant creditors to facilitate business rescue.

[11] Submissions were also made on behalf of the CIPC regarding the constitutionality of s 153(1)*(b)*(ii). The issue was whether s 153(1)*(b)*(ii) amounted to

unjustified deprivation of property, contrary to the provisions of s 25 of the Constitution. However, again, it is not necessary to decide that issue.

Binding offer

[12] The approach adopted by the high court in considering the issues before it was largely motivated by its understanding of the term 'binding offer' as provided in terms of s153(1)(*b*)(ii) of the Act. For this reason an intimate examination of the term is required. A broad summary of the business rescue scheme as provided for in the Act would be beneficial to a proper interpretation of the term. Business rescue has been defined as proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for: first, temporary supervision of the company and of management of its affairs, business and property; second, a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; third, the development and implementation of a plan to rescue the company by restructuring its affairs, business, property, debt, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if that is not possible, fourth, a plan that would achieve a better return for the company's creditors than the payment they would have received if the company had simply been liquidated.[5]

[13] The process begins with a resolution taken by the board of a company, in terms of s 129 of the Act, that the company voluntarily begins business rescue proceedings. Within five days after adoption of the resolution to commence business rescue the company must appoint a practitioner in terms of s 129(3)*(b)*. Alternatively, an affected person may apply to court in terms of s 131 of the Act for an order placing the company under supervision and commencing business rescue proceedings. The court may also appoint a practitioner, subject to ratification by holders of a majority of independent creditor's voting interest.[6]

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[5] Professor P Delport et al *Henochsberg on the Companies Act* 71 of 2008 1 ed (2011) at 446.
[6] Section 131(5) and s 147.

[14] During business rescue proceedings no legal proceedings, including enforcement of action against the company, may be commenced or continued in any forum.[7] As soon as practicable after appointment, the practitioner must investigate the affairs of the company and consider whether there is any reasonable prospect of the company being rescued.[8] Within ten business days of being appointed the practitioner must convene and preside over the first meeting of creditors.[9] A meeting of employees' representatives must also be convened by the practitioner within ten business days of appointment.[10] After consulting the creditors, other affected persons, and management of the company, the practitioner must prepare a business rescue plan for consideration and possible adoption at a meeting to be held in terms of s 151.[11] In that meeting, the practitioner must introduce the proposed business plan for consideration by creditors and shareholders, inform the meeting whether he or she continues to believe that there is a reasonable prospect of the company being rescued, provide opportunity for employees' representatives to address the meeting, invite discussion and conduct a vote on motions to amend the proposed plan or adjourn the meeting in order to revise the proposed plan for further consideration, and call for a vote for preliminary approval of the proposed plan. If the proposed plan is accepted it will be implemented; if it is not approved on a preliminary basis, the plan is rejected and may be considered further only in terms of s 153 of the Act.[12]

[15] Section 153(1) provides that-

> '153. Failure to adopt business rescue plan.- (1)*(a)* If a business rescue plan has been rejected as contemplated in section 152(3)*(a)* or *(c)* (ii) *(bb)* the practitioner may-
>
> (i) seek a vote of approval from the holders of voting interests to prepare and publish a revised plan; or
>
> (ii) advise the meeting that the company will apply to a court to set aside the result of the vote by holders of voting interests of shareholders, as the case may be, on the grounds that it was inappropriate.
>
> *(b)* If the practitioner does not take any action contemplated in paragraph *(a)*-
>
> (i) any affected person present at the meeting may-

[7] Section 133.
[8] Section 141.
[9] Section 147.
[10] Section 148.
[11] Section 150.
[12] Section 152 subsecs (1), (2) and (3).

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

As already stated, in this case it is in the context of the majority voting interest holder having rejected the rescue plan proposed by the practitioner that the intention to make a binding offer for the bank's voting interest was expressed.

[16] In finding that the legislature intended to exclude an opposing creditor's consent to a binding offer, the court a quo relied on United States of America (U.S.) Bankruptcy legislation. Indeed Chapter 11 of the U.S. Bankruptcy Code provides for rearrangement of the debt structure of a business and protection of the company from enforcement of claims by creditors whilst its business continues. However it seems to me that certain factors distinguish the process as provided for in our Act from the procedure provided for in the U.S. Bankruptcy Code. First, under the U.S. Bankruptcy Code it is the court that makes the decision as to whether rejection of a business plan by a creditor should be ignored. Obviously that decision would be taken after due consideration of all relevant factors. In *s 1129(a)* of the U.S. Bankruptcy Code the requirements that must be satisfied before a court can confirm a rescue plan are listed. And the provisions of this section are peremptory.[13] The requirements include that the plan must have been proposed in good faith, each 'impaired' class of creditors must have either accepted the plan or each creditor must stand to receive no less than it would receive under liquidation, each class of creditors must accept the plan or be 'unimpaired', and there must be no likelihood of

[13] Section 1129 of the Act provides that: "The court shall confirm a plan only if the following requirements are met …"

confirmation of the plan being followed by a liquidation or further business 'reorganisation'.

[17] A further and more pertinent distinguishing factor is that the making of the binding offer in our business rescue procedure is a step separate and antecedent to the second round of voting on the adoption of the rescue plan. Therefore the meaning of 'binding offer' falls to be considered on its own merits and separately from the merits of a rescue plan.

[18] The term 'binding offer' must be appreciated against the meaning of 'offer' as hitherto understood in this country. In everyday use, the word 'offer' signifies a presentation or a proposal to someone for acceptance or rejection; it is 'an expression of readiness to do or give something; [or] an amount of money that someone is willing to pay for something'.[14] In South African legal parlance, an offer is an invitation to consent to the creation of obligations between two or more parties.[15] 'What distinguishes a true offer from any other proposal or statement is the express or implied intention to be bound by the offeree's acceptance.'[16] Therefore, the settled meaning, both in the general use and in the more technical legal use of the word "offer" is that it is only on acceptance that an offer creates rights and obligations.[17]

[19] It is a well-established principle of our law that an ambiguous proposal cannot be classified as an offer.[18] And the terms of an offer must cover the minimum requirements of the proposed contract. A mere regurgitation of the provisions of s 153(1)*(b)*(ii) (that the offer was or would be to purchase the voting interest at a value to be independently determined) could not constitute a proper binding offer. The bank was entitled to know who exactly was making the offer and what the details thereof were, including the price or determined value, and where, when and how payment would be effected. It was therefore correct in insisting that it could not be held bound to an offer, the terms of which were never divulged. The attorney's indication that his clients wanted to make an offer under s 153(1)(*b*)(ii) could in itself not be an offer under that section.

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[14] *Concise Oxford English Dictionary* 12 ed (2011).
[15] S W Van der Merwe et al *Contract: General Principles* 4 ed (2012) at 46.
[16] Ibid.
[17] R H Christie and G B Bradfield *Christie's The law of contract in South Africa* 6 ed (2011) at 82.
[18] Christie's fn 18 *supra* at 32.

[20] Provision, in s 153(1*)(b)*(ii), for the making of a binding offer presupposes that the rescue plan will contain sufficient detail from which a determination of the value of the bank's (and other creditor's) voting interest can be readily and reliably ascertained, such that a binding offer will embody the price or value at which the offer is made. Section 150(2) provides that the business rescue plan must contain all the information reasonably required to enable affected persons to decide whether or not to accept or reject it. Details of the required information are set out in the section. It is the same details which will form the basis for calculation of fair and reasonable value of the voting interests. In this case, where available information about Kariba's business only related to 2004, there was no proper basis for determination of a fair and reasonable value of creditors' voting interests in 2012. Therefore, even if the bank wished to respond to the 'binding offer' made by the shareholders, as it was entitled to, there was no valid binding offer to which it could respond.

[21] In addition, not only must there be an offer but it must be binding. The significance of this description can only be once that the offer is made it cannot be withdrawn by the offeror, in contrast to the ordinary meaning ascribed to an offer (that it becomes binding on acceptance and may be withdrawn before then). It is highly unlikely that the legislature intended such an extraordinary procedure as postulated by Kariba, the practitioner and Mr and Mrs Nchite; the effect of which would be to deprive an offeree of an established right to accept or reject an offer. Had that been the intention, the legislature would not have used a word which connotes an expectation of a response. As Gorven J held in *DH Brothers Industries (Pty) v Ltd Gribnitz NO*:[19]

> 'The legislature] would have introduced a deeming provision of acceptance on the part of the offeree and (would) have stated that the offer, once made, gave rise to binding obligations between the parties.
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> . . . The only actor mentioned is the offeror. The only action described is to 'make a binding offer' not to create a set of statutory rights and obligations. More importantly, ['offer'] has a specific, settled legal meaning – as the Legislature must be presumed to have known. In order to give rise to obligations on the part of both parties, an offer requires acceptance. The plain meaning falls well short of the binding offer creating any obligations on the part of the opposing creditor. It is also important that the offer

[19] *D H Brothers Industries (Pty) Ltd v Gribnitz NO* 2014 (1) SA 103 (KZP) para 40-41.

> is to "purchase". This, likewise, relates to an established legal concept. It is aimed at concluding a contract of purchase and sale. It is not aimed at creating statutory rights and obligations. The words "offer" and "purchase" when used together must mean that a contract is envisaged and, for such a contract to be concluded, there must be an acceptance or agreement. It is nowhere provided that no such acceptance is necessary and that, without it, a contract of purchase and sale has come into existence.' [20]

Consequently, a binding offer remains predominantly similar in nature to the common law offer, save that it may not be withdrawn by the offeror until the offeree responds thereto.

[22] Difficulties that arise from the court a quo's finding that once a binding offer is made to purchase a voting interest, the holder thereof is summarily divested of its voting interest include the following: the holder of the voting interest in question is divested of its interest without any determination of affordability on the part of the offeror. Regarding prejudice that a creditor might suffer as a result of the inability of the offeree to comply with his or her obligations under the binding offer, the court a quo found that:

> 'Although the offeree is divested of his or her voting interest on approval or adoption of the rescue plan in terms of s 152 of the Act, the offeree will not lose his or her right to enforce any debt owed by the company immediately before the beginning of the business rescue process, until payment of the purchase price of the voting interest is made by the offeror.'

[23] Counsel for Kariba submitted that as found by the court a quo, this concern is adequately covered in the Act as the rescue plan will only be implemented after payment in terms of the valuation. But he could not refer us to any supporting provision in the Act. Moreover, this argument, and the finding by the court below ignore the prejudice that the offeree will have suffered as a result of the loss of its voting interest.

[24] As already concluded, there is no indication, in the language used in the provision, that the word 'offer' had assumed a different meaning from the accepted one. Section 153(6) provides that:

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[20] See also *Christie* fn 17 *supra* at 31.

> 'A *holder of a voting interest*, or *a person acquiring that interest* in terms of a binding offer, may apply to a court to review, re-appraise and re-value a determination by an independent expert in terms of subsection (1)*(b)(ii).'* (My emphasis.)

The legislature has made express provision for two categories of persons: those who are holders of voting interests and those *in the process of acquiring* a voting interest. This suggests that although a binding offer may have been made (during consideration of the rescue plan), finalisation of the aspects relating thereto, including transfer of the voting interest, is not necessarily immediate. This is consistent with the established meaning of an offer. The interpretation accorded by the court a quo immediately divests interested holders of their interest once the binding offer is made; this is untenable.

[25] In my view, the interpretation of a binding offer in the terms advocated by the respondents cannot be said to lead to sensible, business-like results and cannot be supported.[21] It follows that there was never a binding offer made. Consequently the resolutions taken subsequent to the transfer of the bank's voting interest, including the adoption of the rescue plan, are null and void.

Reasonable prospects of success.

[26] In this regard counsel for the appellant submitted that if we decided that the adoption of the rescue plan fell to be set aside, it would be open for us to consider the merits related to its application for the setting aside of the resolution to commence business rescue. I agree.

[27] Section 130(1*)(a)*(ii) of the Act provides:

> '(1) Subject to subsection (2) at any time after the adoption of a resolution in terms of section 129, until the adoption of a business rescue plan in terms of section 152, an affected person may apply to a court for an order-
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> *(a)* Setting aside the resolution, on the grounds that-
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> (i) . . . .;
>
> (ii) There is no reasonable prospect of rescuing the company; or
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> (iii) . . . .'

[21] *Natal Joint Municipal Pension Board v Endumeni Municipality* 2012(4) SA 593 (SCA) at para 18.

[28] In *Oakdene Square Properties v Farm Bothasfontein (Kyalami)*,[22] this court stated that it was generally accepted that 'a reasonable prospect' is a lesser requirement than 'reasonable probability' which was the measure for placing a company under judicial management in terms of s 427(1) of the Companies Act 61 of 1973. But the court pointed out that a reasonable prospect 'require[d] more than a mere prima facie case or arguable possibility.' Brand JA said:

> 'Of even greater significance, I think, is that it must be a reasonable prospect – with the emphasis on "reasonable" – which means that it must be a prospect based on reasonable grounds. A mere speculative suggestion is not enough.'[23]

[29] The requirement of reasonable prospects of rescue originates in s129 (1) of the Act which provides:

> '(1) Subject to subsection (2)*(a),* the board of a company may resolve that the company voluntarily begin business rescue proceedings and place the company under supervision, if the board has reasonable grounds to believe that-
>
> (a) the company is financially distressed; and
> (b) there appears to be a reasonable prospect of rescuing the company.'

[30] I am mindful of the warning by this court in *Oakdene*[24] against being prescriptive about the assessment of reasonable prospects of rescue. But there can be no dispute that the directors voting in favour of a business rescue must truly believe that prospects of rescue exist and such belief must be based on a concrete foundation.[25] Given the apparent state in which Kariba's affairs were when the resolution to commence business rescue was taken, there could have been no true basis, on 31 January 2012, for Mr and Mrs Nchite to believe that there were reasonable prospects of Kariba's rescue.

[31] The bank had complained repeatedly to the practitioner about the contents of the business rescue plan. In the business rescue plan, the purpose of the process was stated to be to 'revive' the business of the company. Kariba had not been operating for, at least, the five years preceding the resolution to commence business

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[22] *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami)(Pty) Ltd* 2013(4) SA 539 (SCA) para 29.
[23] Para 29,
[24] Para 29.
[25] *Henochsberg* at 456. It has been suggested that the directors must have subjectively believed and there must have been reasonable grounds for the belief.

rescue. It was said that its operations had stopped because of litigation between it and African Bank (Pty) Ltd, a different company from the appellant. Kariba had received R5 million on settlement of the litigation. It is apparent from the affidavit filed by Mr Nchite in terms of s 129 of the Act that when the resolution was taken to commence business rescue, it was anticipated that this settlement amount would form part of the rescue plan capital. According to the business rescue plan the company assets consisted of machinery for furniture manufacture and motor vehicles, some of which were subject to instalment sale agreements with ABSA Bank and others subject to the notarial bond with the bank (for R453 083.03). Secured creditors were the bank for the BWP 14 966 809.20 and ABSA Bank for the R453 083.03. There were also various unsecured concurrent claims and claims of shareholders for their loan accounts. It was said that Kariba would complete the manufacture of the furniture which had been interrupted by the litigation in 2004. The proceeds from the sale, and a cash injection of R450 000.00 from the shareholders, together with the machinery, would provide capital for production of new furniture. Provision was made for a probable dividend of 21 cents in the Rand and 51 cents in the Rand for the two secured creditors to be paid over a maximum period of 100 months respectively but a nil dividend for unsecured creditors.

[32] But the reality was that the rescue plan fell woefully short of providing the information required in terms of s 150(2) and (3) of the Act and of providing information on which an assessment of reasonable prospects could be made. The R5 million settlement amount that was to be part of the capitalisation of the rescue process did not appear anywhere on the business rescue plan. In fact, the practitioner indicated that the amount had hardly been sufficient to even cover the costs of litigation with African Bank. But, despite repeated inquiries by the bank, the practitioner could not produce any document relating to the said legal costs. On the other hand there was no indication of what had happened to the money. Inquiries by the bank as to ability and willingness of shareholders to provide the R450 000.00 loan went unanswered. The estimated value of the assets last used in 2004 was based on the practitioner's assessment (a forced sale value of R3 177 631) rather than an expert evaluation. No details of the 'on-going role of the company' or existing agreements could be furnished because Kariba had not been operating for a number of years preceding the commencement of business rescue. Apart from mentioning that in 2004 Kariba used to supply furniture to Ellerine Holdings (as one of two major

customers) there were no supply contracts in place. The plan only stated that: 'The Company will carry on trading'. There was no provision in the plan for increase in the 'skeleton staff' which Kariba was said to have maintained whilst not in operation. Provision for rental was made at a reduced amount of R10 000.00 instead of the correct rental of R30 000.00. When the practitioner's attention was drawn to this discrepancy, his only remark was that rental would be renegotiated and that Mr van der Merwe should relay to his client that everybody was 'taking a knock'. As stated, the contents of the projected balance sheet and statement of income and expenses for the ensuing three years could not be said to be reliable given the absence of proper evaluation of the assets of the company.

[33] The fact that both the resolution to commence business rescue and the business rescue plan were based on financial statements which were more than five years old, presented a fundamental difficulty for a proper assessment of prospects of business rescue. Generally, the factual basis for assessment of the true financial position of a company is its (latest) financial statements (and, where necessary, its management accounts). And the business rescue plan must conclude with a certificate by the practitioner that the actual information provided appears to be accurate, complete and up to date.[26] Although the business plan had the required certificate, it was clearly not correct. For obvious reasons, the 2005 financial statements could not, on their own, in January 2012, form a proper basis for an assessment of reasonable prospects of rescuing Kariba.

[34] The true state of Kariba's affairs as at January 2012 and its anticipated operations could not be established without an update of the books of account, conducted on sound accounting principles, proper valuation of the company assets, and substantiated prospective income and expenditure. All these were lacking and no cogent case was made to support an opinion of reasonable prospects of rescue.[27] Consequently, the resolution to commence business rescue was taken without a proper basis and falls to be set aside.

[35] In view of this conclusion, it is not necessary to consider the application by the bank for the setting aside of the practitioner's appointment in terms of s130(1*)(b)*(ii)

[26] Section 150(4)(a) of the Act
[27] See *Oakdene* para 30 including the authorities cited therein.

of the Act.[28] However, the conduct of the practitioner in this case raises serious concerns. This is because of the responsibility he had, as a business practitioner under the Act, which he does not seem to have appreciated. A business rescue practitioner must be held to a high professional and ethical standard. In addition to the powers and duties specifically conferred on business rescue practitioners by Chapter 6, they are also officers of the court (s 140(3)*(a)*) and have the responsibilities, duties and liabilities of a director as set out in ss 75 to 77 (s 140 (3)*(b)*).[29] It was the duty of the practitioner in this case to conduct a careful assessment of Kariba's affairs and to prepare a plan that adequately reflected the prospects of Kariba's rescue. Against this standard, and the standard expected of the practitioner as an attorney, the attitude displayed by the practitioner in regard to serious concerns expressed by the bank regarding what it considered to be the shortcomings in Kariba's affairs and the rescue plan, is disturbing.

[36] When representatives of the bank expressed concern about the 2005 financial statements, coupled with the unavailability of management accounts, the practitioner explained that the lengthy litigation that Kariba had been involved in had 'tapped the resources of the company such that preparation of financial statements became unviable and superfluous'. He nevertheless certified that the information contained in the business rescue plan was 'accurate, complete and up to date'. It appears that he never considered that updated books of account and properly substantiated information had to form the basis of the rescue plan. Nor was he concerned about the fact that the plan included information that turned out to be unfounded. For example, Kariba's expenses included reduced rental of R10 000.00 per month for the premises from which it would have conducted its business. But the evidence was that Mr van der Merwe, who represented the landlord, NWDC, at the meeting of creditors, pointed out that rental payable was in fact R30 000,00 and that an agreement previously reached for reduced rental had only been limited to the period of the protracted litigation. Equally concerning is the practitioner's apparent contentment with the non-inclusion in the rescue plan of the R5 million that Mr Nchite had declared, under oath, only six weeks before, as being available for business rescue.

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[28] Based on the premise that the practitioner was not independent of the company or its management.
[29] *Henochsberg* at 488. In terms of s 138 of the Act a business rescue practitioner can only be a member in good standing of the legal, accounting or business management profession accredited by the Commission (CIPC).

[37] In response to an enquiry as to why he thought reasonable prospects of business rescue existed, the practitioner stated that all that was required 'for the business to be rescued was a viable business rescue plan and successful implementation thereof.' He never attempted to obtain an objective assessment of facts upon which he could make a proper assessment of prospects of success. He relied on information supplied by Mr and Mrs Nchite and his own unsubstantiated assessment. He ignored, and was even hostile to, inquiries by the bank's representatives when such inquiries related to aspects which were the core of his function as a business rescue practitioner. The impression gained by the bank's representatives that he acted as a representative of Kariba, rather than as an independent practitioner, was justified. The apparent lack of appreciation, by the practitioner, of the seriousness of the office he held is unacceptable.

[38] In addition, the practitioner was expected to act objectively and impartially in the conduct of the business rescue proceedings. So too when it came to the institution of legal proceedings, was an objective and impartial attitude to be expected. This was lacking in the extreme. Not only did the practitioner file the principal answering affidavit to the appellant's application in the court a quo, but he actively engaged both in the proceedings in the court below and in this court. He sought to act in his capacity as an attorney to represent not only himself in his capacity as the business practitioner but as Kariba's representative on whose behalf he prepared and signed the heads of argument filed in this court. It was only when the propriety of his doing so was questioned by the registrar upon the request of the President of this court, and his attention was drawn to the decision in *Carolus v Saambou Bank*,[30] that he was replaced by counsel who argued the appeal in his stead. As appears from this, the practitioner personally entered the lists of litigation, and, whilst ordinarily a practitioner is not liable for any act or omission performed in good faith in the course of exercise of powers and performance of functions of practitioner,[31] there is no reason for the practitioner in this case not to be obliged to pay the appellant's costs as would any other ordinary unsuccessful litigant. Section 140(3)*(c)*(ii) of the Act does make provision holding a practitioner to be held liable 'in accordance with any relevant law for the consequences of any act or omission amounting to gross negligence in the exercise of the powers and performance of the

[30] *Carolus v Saambou Bank* 2002 (6) SA 346 (SE
[31] Section 140*(c)*(i) of the Act

functions of a practitioner'. In this case, the practitioner's grossly improper conduct was deliberate; he should therefore pay the appellant's costs jointly and severally with Mr and Mrs Nchite.

[39] In regard to the appellant's aborted application to lead further evidence there should be no order as to costs. This is because, although the application proved to be unnecessary, the appellant was justified in doing all in its power to bring the impropriety of the practitioner's conduct to the attention of the court.

[40] Consequently, I make the following order:

(1) The appeal succeeds with costs, including costs of two counsel; such costs to be paid by the second, third and fourth respondents jointly and severally, the one paying the others to be absolved.

(2) Paragraphs (2) and (3) of the order of the court a quo are set aside and replaced with the following:

'2.1 The application succeeds.

2.2 It is declared that the "binding offer", made on 26 March 2012 at the second meeting of creditors, on behalf of the Third and/or Fourth respondents in terms of s 153(1)*(b)*(ii) of the Companies Act 7 of 2008, to purchase the voting interest of the applicant was not binding on the applicant.

2.3 The approval of the proposed business rescue plan which occurred at the meeting of affected persons held on 26 March 2012, is set aside.

2.4 The resolution taken by the Board of the first respondent on 31 January 2012 to voluntarily begin business rescue proceedings and to place the first respondent under supervision is set side.

2.5 The costs of this application shall be paid by the third and fourth respondents, jointly and severally, the one paying, the others to be absolved.'

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N Dambuza

Acting Judge of Appeal

LEACH JA (Mpati P, Mhlantla JA and Schoeman AJA concurring)

[41] I have had the privilege of reading the judgment of Dambuza AJA. Although I agree with her and the order she proposes, I wish to add certain additional reasons for reaching my conclusion.

[42] As its very name suggests, the purpose of a business rescue plan is to throw a lifeline to a company in financial distress to help keep it afloat in a manner that balances the rights and interests of all relevant stakeholders.[32] The process involves the preparation of a rescue plan designed either to assist the company's return to solvency or, should that goal be impossible, to provide a better return for creditors and shareholders than would be the case than were the company to be immediately wound up. This plan is considered at a meeting of creditors and other holders of 'a voting interest' as defined in s 128(1)(*j*) of the Act at which, inter alia, representatives of the employees of the company are entitled to express their views.[33] Should the plan be approved by those having a voting interest, the formal process comes to an end and the plan becomes binding. But if it is not approved, various options become available under s 153 of the Act, including an affected person acquiring the voting interest of a person opposed to the plan.[34]

[43] I do not believe it is unfair to comment that many of the provisions of the Act relating to business rescue, and s 153 in particular, were shoddily drafted and have given rise to considerable uncertainty. Questions which immediately spring to mind in regard to the procedure envisaged by s 153(1)(*b*)(ii), and to which no answers are clearly expressed in the Act, include (this list is not intended to be all-embracing) whether an offeree has a period of time, a *spatium deliberandi*, in which to consider whether to accept or reject an offer; the effect of an offer being rejected; whether an offer may be conditional and, if so, what conditions are permissible; whether an offer excludes the making of a counter-offer or any other offers being made by other affected persons and, if not, how offers are to be ranked. It is therefore not surprising that Dr A Loubser has expressed the view that it was 'regrettable that the drafters of the provisions regulating the new rescue proceedings did not exercise more care'

[32] Section 7(*k*).
[33] Section 152(1).
[34] Section 153.

and that the 'unclear, confusing and sometimes alarming provisions regulating the business rescue proceedings . . . will certainly not assist in making the procedure more acceptable or successful'.[35]

[44] One of the obvious uncertainties created by the section is what is meant by a 'binding offer'. It can of course be accepted that the offer is to be regarded as irrevocable in the sense that it may not be withdrawn or varied by the offeror. However, opinions have diverged on whether the offeree will also be bound thereby, whether it likes it or not. Thus the court below concluded that a 'binding offer' had to be seen not in its normal contractual sense but rather as 'a set of statutory rights and obligations from which neither party may resile'.[36] On the other hand in *DH Brothers Industries (Pty) Ltd v Gribnitz NO* 2014 (1) SA 103 (KZP), Gorven J held that an 'offer' in our law does not assume the creation of rights and obligations and that an offer, albeit one that could not be withdrawn by the offeror, had to be accepted before both parties were bound. This latter interpretation was followed by Daffue J in *Absa Bank Limited v Caine NO*.[37] It also enjoys the weight of academic opinion.[38] Inter alia, the decision of the court a quo in the present case was criticised, and that in *DH Brothers* supported, in the 2013 Annual Survey as follows:[39]

'The court held that the business rescue practitioner would not be able to proceed with the implementation of the business rescue plan before finalisation of the payment of the binding offer . . . . It is unclear on what grounds the court came to this conclusion. No provision of the Act was cited as authority, nor could we find any provision that bars the implementation of the business rescue plan before such an offer is finalised . . . . Section 154(2) provides that after the approval and implementation of a business rescue plan, any creditor is prohibited from enforcing any debt owing to it immediately before commencement of the business rescue proceedings, unless provided for in the business rescue plan. Implementation of the business rescue plan before finalisation of the binding offer would mean that section 154(2) becomes operative against the offeree, while he or she is excluded from the voting process and his or her interests are not reflected in the revised business rescue plan. This is a clear indication that the interpretation given to the effect of section

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[35] Dr A Loubser 'The Business Rescue Proceedings in the Companies Act of 2008: Concerns and Questions (Part 2)' (2010) *TSAR* 689 at 700-701.
[36] Para 29.
[37] *Absa Bank Limited v Caine NO* [2014] ZAFSHC 46 (2 April 2014) para 27.
[38] Professor P Delport et al *Henochsberg on the Companies Act* 71 of 2008 1 ed (2011), and N Locke and I Esser 'Company Law and Stock Exchanges' (2013) *Annual Survey of South African Law* 231 at 279-286.
[39] Above at 282.

153(1)(b)(ii) in *Kariba* cannot be correct. Instead, the interpretation in *DH Brothers* is preferable, namely that the business rescue plan may only be voted on once payment for the voting interests has been received. After adoption of the business rescue plan, the plan must be implemented by the business rescue practitioner (s 140(1)(*d*)(ii) . . . .

There are certain other matters that the decision in *Kariba* did not take into account. On the interpretation given by the court, it is unclear whether the inability of the offeror to pay the offeree *after* determination of the value of the voting interests, would mean that the business rescue plan had not been validly adopted and would have to be reviewed and reconsidered by the creditors. Nothing in chapter 6 of the Act suggests that the inability of the offeror to honour its binding offer would have this effect. This would mean that the business rescue practitioner would have to wait for legal processes against the offeror to be finalised before it could implement the business rescue plan. If the appropriate legal process is the liquidation of the offeror, this could postpone the implementation of the business rescue plan for a very long time. Keeping in mind that the business rescue proceedings are supposed to be finalised within three months (see s 132(3)), it seems doubtful whether such a potential obstacle to the finalisation of the business rescue was intended.

Furthermore, if the offeror is unable to pay the offeree, and its estate cannot realise enough to settle the amount owing to the offeree in full, the rights of the offeree are certainly prejudiced by the binding offer provisions in section 153(1)(*b*)(ii). The judgment assumed that the offeree would receive the full value independently and expertly determined, in which case the binding offer is not prejudicial . . . . However, if the interpretation in *Kariba* is correct, the offeree's original debtor, the company, is substituted with the offeror without any need for the offeror to show that he or she is financially able to satisfy the offer . . . The court seemed to assume that the company will again become the debtor of the offeree if the offeror is unable to satisfy the value determined by the independent expert . . . but there is nothing in section 153, or in chapter 6 generally, to support this conclusion.'

[45] The reasoning in this passage seems to me to be correct and, on the strength thereof and the reasons set out by Dambuza AJA, I am of the view that the interpretation of Gorven J in *DH Brothers* was correct and that the court a quo erred in concluding that an offer under the section bound both parties. In addition there is a further fundamental reason why the appeal must succeed.

[46] Attention has thus far been focused on the issue of who is to be regarded as bound by an offer made under s 153(1)(*b*)(ii), but sight should not be lost of the initial requirement that the offer must be one to purchase. This immediately raises a further

issue not dealt with by the legislature, namely, whether the mere offer in itself is sufficient or whether, in order to create any obligations inter partes, it should be accompanied either by a tender of payment of cash or the provision of adequate security for payment. In this regard it is necessary to recall that at common law a tender needs to be made 'met opene beurse en klinkende gelde' (with open purses and clinking money)[40] and that an offer of settlement must be 'made by a person capable of making a payment, since a person who has no capacity to pay has no capacity to make a tender'.[41] It is hardly conceivable that the legislature intended that a party lacking the wherewithal to pay could interfere with the flow of business rescue proceedings merely by making an offer it could not implement. Indeed the failure to make specific provision in the Act in regard to this issue provides support for an interpretation that an offer only binds both parties once it has been accepted.

[47] Reverting to the content of what the respondents contend was a binding offer to purchase under the section, the high water mark of the respondents' case was that the attorney representing Mr and Mrs Nchite informed the practitioner that his clients 'wished to purchase' the appellant's voting interest. Conceptually there is a substantial difference between expressing a wish to make an offer to purchase and actually doing so, especially where the price to be paid is unknown. Be that as it may, although it may be somewhat doubtful whether an offer to purchase was ever in fact made, the parties appear to accept that whatever was said constituted an offer and I intend to proceed on that basis.

[48] However, it is common cause that no price was mentioned, the offer merely having been one to purchase 'at a value independently and expertly determined, on the request of the practitioner, to be a fair and reasonable estimate of the return' to the appellant should the company be liquidated (the practitioner stressed that the offer had been in the precise terms of the section).

[49] At the time this offer was made, the fair and reasonable return to the appellant had not been independently and expertly determined. The respondents contended that the amount which the appellant would become entitled to receive was only to be

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[40] Compare *Odendaal v Du Plessis* 1918 AD 470 at 475 and *Boland Bank Bpk v Steele* 1994 (1) SA 259 (T) at 266 A-C.
[41] Wessels *The Law of Contract in South Africa* 2 ed (1951) vol 2 para 2341.

determined at a later date once the necessary independent valuation had been obtained and that, if the parties did not agree thereto on the valuation when it became available in due course, the court could determine the amount under s 157(6). Thus they argued that an offer to pay whatever amount might be determined in due course was sufficient to constitute an offer to purchase as envisaged by the section, and that the appellant's argument that the valuation has to be determined before an offer is made conflicts with the clear scheme of the Act.

[50] In my view the respondents' argument in this regard is, in truth, contrary to the scheme of the Act. As the learned authors of *Henochsberg* point out, the value independently and expertly determined will already be known by the practitioner in a case of concurrent creditors as the practitioner, in terms of ss 145(4) and (5), would before the meeting have been obliged to obtain the necessary valuation in order to determine their voting interests. Moreover as Jonathan Rushworth, a member of the International Reference Team for Company Law Reform in South Africa, has commented:

'The possibility of an offer to purchase the debts due to creditors or the shares of those who voted against the plan is a novel concept. Such an offer would provide employees, creditors or shareholders who continue to support a business rescue plan with the opportunity to seek funding to buy the other interests and then approve the plan and procure its implementation. Registered trade unions representing employees and employees not represented would be able to make an offer to acquire the interests of creditors and shareholders.'[42]

[51] It is almost inconceivable that a bank or other financial institution would be prepared to agree to provide funding to trade unions or any other interested persons for the purchase of the voting interests of creditors in companies in financial difficulties where the value had not been fairly and expertly determined, let alone in respect of an amount which would still have to be determined in the future.

[52] Importantly, at common law it is essential for a valid contract of sale for the parties to be agreed on the price or that the price be readily ascertainable. Agreement that the price is to be determined at a later date is insufficient.[43] As a contract of sale pursuant to an offer is envisaged by the section, there is no reason to

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[42] Jonathan Rushworth, 'A critical analysis of the business rescue regime in the Companies Act 71 of 2008' (2010) *Acta Juridica* 375 at 407.

[43] See eg *H Merks & Co (Pty) Ltd v The B-M Group (Pty) Ltd* 1996 (2) SA 225 (A) at 233G-234A.

depart from the common law position that the price is to be determined from the terms of the offer. Indeed there is every reason to conclude that the common law position was envisaged. It would for example hardly be fair to hold an offeror to a purchase at a price far beyond what it imagined or an offeree to a price far less than what the true value of its interests proves to be.

[53] The inevitable conclusion from all of this is that the offer in the present case cannot be construed as being a valid offer to purchase as no mention was made of a price nor was a price readily ascertainable therefrom, despite the prospect of the value of the voting interest purportedly purchased subsequently being determined, possibly by a court. As there was no valid offer to purchase there could thus be no 'binding' offer to do so as envisaged by the section.

[54] As there was no valid offer to purchase the voting interest of the appellant, it was never acquired by Mr and Mrs Nchite. Accordingly, the business rescue plan was approved on the strength of Mr and Mrs Nchite exercising a voting interest they did not have, and its adoption has to be set aside. Moreover, as the business rescue plan was never validly adopted, the appellant is entitled under s 130(1)(*a*)(ii) to apply to set aside the resolution to commence business rescue on the basis that there is no reasonable prospect of rescuing the company.

[55] Dambuza AJA has dealt with the relevant facts relating to the prospect of rescuing the company and it would be superfluous for me to attempt to add thereto. Suffice it to say that the company was clearly hopelessly insolvent and effectively dormant in that it had not traded for years and had no business contracts in place. This is not a case in which an on-going business was likely to be rescued. It is a matter in which there was at best a forlorn hope, unsupported by any objective facts, that the company might arise from the dead. Consequently I agree that there was no reasonable prospect of achieving the ends of a business rescue and that the resolution to go to business rescue should be set aside.

[56] I also support my learned colleague's criticism of the manner in which the second respondent conducted himself as practitioner. He showed a distinct lack of objectivity and supported a business rescue plan without making a proper assessment of its prospects of success. Nor for that matter when the prospects were

challenged in the court a quo, does it appear to have dawned on him that in this case the vast majority of the creditors were justified in opposing a business rescue plan. I am not surprised that the appellant applied to have him removed as practitioner, and I therefore agree with the costs orders my learned colleague proposes in her judgment.

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L E Leach

Judge of Appeal

APPEARANCES

For Appellant:	AE Bham SC (with him S Budlender and P Romano) Instructed by: Norton Rose Fulbright South Africa, Sandton Webbers, Bloemfontein
For 1st & 2nd Respondents:	JA Klopper Instructed by: Jordaan Attorneys, Potchefstroom Ben Van Der Merwe Attorneys, Bloemfontein
For 3rd & 4th Respondents:	LK Van Der Merwe Instructed by: Cawood Attorneys, Pretoria Botha De Jager Inc, Bloemfontein
For 5th Respondents:	JL Van Der Merwe SC (with him J Janse van Rensburg) Instructed by: The State Attorney, Pretoria The State Attorney, Bloemfontein