

A definite end to an infinite loop – the interpretation of section 153(4) of the Companies Act, 71 of 2008

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It is evident from recent judgments handed down by the Supreme Court of Appeal (the “SCA”) that various provisions of Chapter 6 of the Companies Act, 71 of 2008 (the “Act”) are ambiguous, contain *lacunae* or give rise to different interpretations.

The situation presented itself again and resulted in the recent unanimous judgment, penned by Van Der Merwe JA and Basson AJA, which illustrates the SCA stepping up to the plate to shed light on a murky provision of the Act.

In the matter of *Alan Louis N.O and others v Neil Miller Fenwick N.O. and others*,^[1] the SCA was required to provide clarity on the interpretation of section 153(4) of the Act. The judgment deals with whether business rescue proceedings terminate after a business rescue plan is rejected by creditors and a binding offer is made to purchase the voting interest of the persons who opposed the adoption of the business rescue plan in terms of section 153(1)(b)(iii) and subsequently rejected.^[2]

The SCA dismissed the appeal after considering the rules of statutory interpretation and the context and purpose of the provision. The SCA’s interpretation of section 153(4) of the 2008 Companies Act provided a result which was “*geared at providing a window of opportunity to restore an ailing company to financial health and functionality*”,^[3] as opposed to an interpretation which would lead to absurd and un-businesslike results.^[4]

The statutory framework

Section 152 of the Act regulates the procedure to be followed in considering and voting on the business rescue plan.^[5] If a business rescue plan is presented at a section 151 meeting is supported by the holders of more than 75 per cent of the creditors’ voting interests, and at least 50 per cent of the independent creditors’ voting interests, the business rescue plan will be considered to be approved on a preliminary basis as contemplated by section 152(2) of the Act. However, where the business rescue plan is not approved on a preliminary basis, the business rescue plan is considered to be rejected and can only be considered further in terms of the provisions of section 153 of the Act.^[6]

In instances where the business rescue practitioner decides not to act in terms of the provisions of section 153(1)(a) of the 2008 Companies Act,^[7] in that he or she does not either seek approval from the holders of voting interests to prepare a revised plan or apply to the court for an order setting aside the result of the vote as inappropriate,^[8] the affected persons may

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1. to seek a vote of approval to require the business rescue practitioner to prepare and publish a revised plan;^[9] or
2. apply to court to set aside the result of the vote as inappropriate;^[10] or
3. to make a binding offer to acquire, the voting interests of any affected person who opposed the adoption of the plan.^[11]
4. According to the provisions of section 153(4) of the 2008 Companies Act, once a binding offer has been made, the business rescue practitioner must adjourn the meeting for no more than five business days to afford him or her an opportunity to make any necessary revisions to the plan to reflect ‘*the results of the offer*’ and set a date for the resumption of the meeting at which the provisions of section 152 would apply afresh.^[12]

The facts

On 13 February 2020, the business rescue practitioner (cited as the first respondent in the SCA) of the Louis Group SA (the “BRP”), convened a meeting in terms of section 151 of the Act (the “meeting”). The proposed business rescue plan was introduced for consideration by the creditors and put to a vote. The plan was rejected outright by the creditors present at the meeting. The creditors were subsequently informed by the BRP that he did not intend to seek a vote of approval from the holders of voting interests to prepare and publish a revised plan, nor was he going to apply to court to set aside the result of the vote by the holders of voting interests as inappropriate.[13]

As a result, the Trustees of the Alan Louis Trust (the “Trust”) (cited as the appellants in the SCA) informed the affected parties present at the meeting that the Trustees would, on behalf of the Trust, propose binding offers to purchase the voting interests held by two of the creditors of Louis Group SA (eventually the Trustees approached all creditors of Louis Group SA and made offers to purchase their voting interests), and further reserved its right to apply to have the vote of the creditors set aside as inappropriate.

The meeting was adjourned to allow for the Trustees to approach the creditors with binding offers to purchase the voting interests. The offers made by the Trustees were rejected. At a reconvened meeting on 10 March 2020, the BRP informed the creditors that, in light of the rejection of the binding offers made by the Trust, the adjourned meeting was closed, and the business rescue proceedings would be converted into winding up proceedings. The appellants demanded that the BRP proceed in terms of section 153(4)(b) of the Act and set a date for the resumption of the meeting, without further notice, at which the provisions of section 152 of the Act would apply afresh. The BRP disagreed, advising the parties that section 153(4) is only applicable in circumstances where the binding offers have been accepted by the creditors.

The Western Cape High Court agreed with the BRP’s argument that section 153(4)(b) of the Act only applies in instances where the binding offers made to the creditors were accepted. The court *quo* dismissed the application but granted the Trust leave to appeal to the SCA.[14]

An exercise in interpretation

Before the SCA, the appellants argued that the BRP is statutorily enjoined – irrespective of whether the offer is accepted or rejected – to proceed in terms of sections 153(4)(a) and (b) of the Act and must (i) either apply to court to set aside the (initial) creditors’ vote as being inappropriate; or (ii) proceed in terms of section 153(4)(b) of the Act and set a date for the resumption of the meeting, without further notice, resulting in a fresh application of the provisions of section 152 being undertaken. Notwithstanding the rejection of the binding offer, the affected person would have the right to call again for the approval of a revised plan or to apply to court to set aside the original vote in terms of section 153 – even though there has been no alteration to the voting interests.

The respondents argued that the mere making of a binding offer by a creditor with a voting interest in terms of section 153(1)(b)(ii) could not have been intended to trigger the conjunctive steps referred to in sections 153(4)(a) and (b) in instances where the offer is rejected. Furthermore, such a reading would be nonsensical, as the voting interests would remain unchanged. As a result thereof, the affected parties have exhausted the remedies provided for in terms of section 153(1)(b) of the Act and cannot have a second bite at the cherry.

The SCA agreed with the respondent’s argument, concluding that a further vote on the rejected business rescue plan can only arise where the binding offer is *accepted*, resulting in an alteration of the voting rights, which would necessitate a second round of voting on a revised plan in terms of section 152 of the Act. The SCA, in coming to its decision, stressed that business rescue is not an open-ended process.

Conclusion

In dismissing the appeal, the SCA held that it could never have been the Legislature’s intention that affected persons, afforded with the opportunity to present a binding offer, which is subsequently rejected and results in voting interests remaining unaltered, would be entitled to a further opportunity to exercise one of the alternatives provided for in terms of section 153(1)(b)(i) of the 2008 Companies Act.

It was pointed out in the judgment of *Firststrand Bank Limited v KJ Foods Close Corporation*,[15] and reiterated by the SCA in this judgment, that if the interpretation advanced by the appellants was indeed the Legislature’s intention when drafting the provision, it would cause a “*never-ending loop*”, in that the creditor putting forward a binding offer to purchase the voting interests of other creditors, once rejected, would be able to abuse this provision by using it as an infinite loop in which to seek redress in terms of section 153(1)(b)(i) of the 2008 Companies Act.

This judgment is a welcome effort by the SCA to shed light on a poorly drafted provision of the Act, and to ensure that the purpose and objectives of the business rescue process are promoted.

Footnotes

[1] (598/2021) [2023] ZASCA 59 (28 April 2023)

[2] *Ibid* para 1

[3] *Diener N O v Minister of Justice and Others* [2017] ZASCA 180; 2018 (2) SA 399 (SCA); [2018] 1 All SA 317 (SCA) para 27

[4] (598/2021) [2023] ZASCA 59 (28 April 2023) para 13

[5] Section 152 of the Companies Act, 71 of 2008

[6] (598/2021) [2023] ZASCA 59 (28 April 2023) para 2

[7] Section 153(1)(a) of the Companies Act, 71 of 2008

[8] Section 153(1)(a)(i) and (ii) of the Companies Act, 71 of 2008

[9] Section 153(1)(b)(i)(aa) of the Companies Act, 71 of 2008

[10] Section 153(1)(b)(i)(bb) of the Companies Act, 71 of 2008

[11] Section 153(1)(b)(iii) of the Companies Act, 71 of 2008

[12] (598/2021) [2023] ZASCA 59 (28 April 2023) para 4

[13] [2023] ZASCA 59 (28 April 2023) paras 6 and 7

[14] [2023] ZASCA 59 (28 April 2023) para 8

[15] 2017 (5) SA 40 (SCA) (26 April 2017)



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