



IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE DIVISION, CAPE TOWN)

**Case No:**

**5225/2020**

In the matter between:

**LOUIS, ALAN N.O.**  
**Applicant**

**First**

**LOUIS, BRIAN WILLIAM N.O.**  
**Applicant**

**Second**

**CLOETE,**  
**Third Applicant**

**LOUIS**

**JACOBUS**

**N.O.**

(trustees for the time being of the Alan Louis Trust)

and

**GLAUM, TREVOR PHILLIP**  
**Respondent**

**First**

**LOUIS GROUP (SA) (PTY) LTD**  
**Respondent**

**Second**

**COMPANIES AND INTELLECTUAL PROPERTY**

**COMMISSION**  
**Respondent**

**Third**

**DOLE SOUTH AFRICA (PTY) LTD**  
**Respondent**

**Fourth**

**SAAD FUND MANAGEMENT (PTY) LTD**  
**Respondent**

**Fifth**

**THE TRUSTEES FOR THE TIME BEING OF**

**THE LGCF TRUST**  
**Respondent**

**Sixth**

**DE WITT, D J C**  
**Respondent**

**Seventh**

**THE STANDARD BANK OF SOUTH AFRICA LTD**  
**Respondent**

**Eighth**

**UKUSOLA TRADING & INVESTMENTS (PTY) LTD**  
**Respondent**

**Ninth**

**NEETHLING, A C**  
**Respondent**

**Tenth**

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**JUDGMENT: 14 JANUARY 2021**

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The judgment was handed down electronically, by circulation to the legal representatives of the parties by email, at no later than 15h00 on 14 January 2021.

**E STEYN**

1. This matter mainly concerns the application and interpretation of sections ('ss') **153(1)(b)** and **153(4)** of the Companies Act 71 of 2008 ('the Act'). In March 2020 the applicants, the trustees of the Alan Louis Trust ('the Trust'), launched an application for an urgent order that the closure, on 10 March 2020, of the creditors' meeting by the business rescue practitioner of the Louis Group (SA)(Pty)Ltd in business rescue, convened in terms of the provisions of s 151 of the Act: (i) be set aside as irregular; (ii) that the practitioner be directed to set a date for the resumption of the meeting, and (iii) that he should apply the provisions of ss 152 and 153 of the Act at such resumed meeting. (Own emphasis or underlining throughout.)

**THE PARTIES**

2. The applicants are businessmen cited in their capacities as the joint trustees of the Trust. The first respondent is cited as the business rescue practitioner ('the practitioner') of the second respondent, the Louis Group (SA)(Pty)Ltd in business rescue ('the company'), a company duly registered and incorporated with its registered address in Cape Town, placed under supervision in terms of the provisions of s 131(7) of the Act on 26 February 2013 by order of this court.

3. The third respondent is the Companies and Intellectual Property Commission, cited as an interested party against whom no relief is sought. The fourth to tenth respondents are cited as affected persons entitled to participate in the application by virtue of the provisions of s 145 of the Act. No relief is sought against them. They were dissenting voters at a meeting convened in terms of s 151 of the Act for the purpose of considering the business rescue plan in terms of s 152 of the Act. The Trust and the fourth to tenth respondents are creditors of the company and are affected persons as defined in s 128 of the Act.

4. On the practitioner's and the company's behalf, who opposed the application, it was denied that the practitioner's actions were irregular or liable to be set aside. The practitioner gave the assurance that he would take no steps to convert the business rescue to liquidation proceedings until this application is finalised, removing the aspect of urgency. Reference to '*respondents*', collectively, is to first and second respondents.

#### SOME STATUTORY PROVISIONS

5. I refer to some sections of the Act for context. Some clauses, sub-clauses and sub-sub clauses of the Act relating to business rescue procedure, do not convey instant clarification of the intention of the legislature. Provisions in some sections are intertwined and linked with other sections, designed to be considered in conjunction with each other; some connective clauses constitute alternative options and others provide additional options relating to conduct or procedures. I deal with the implications of this aspect later.

5.1 Section **150** of Part D of the Act deals with the proposal of a business rescue plan. Section **151** requires of the business rescue practitioner to convene a

meeting of creditors and holders of other voting interests to introduce the plan. Section **152** deals with the consideration of the plan. Section **152(3)** provides that '**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 further **only** in terms of section 153;*

*'(b) 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; or*

Subsection (c) deals with the prescribed conduct of the practitioner in circumstances where the proposed rescue plan does alter the rights of any class of holders of the company's securities (not the present case) — where

*'(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 -

...

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

5.2 Section **153** deals with and applies when there has been a failure to adopt a business rescue plan. Section **153(1)(a)** provides that if a business rescue plan has been rejected, as contemplated in s **152(3)(a)** or **(c)(ii)(bb)** the practitioner may— [choose one of two options, namely he **may**:]

*'(i) seek a vote of approval from the holders of voting interests to prepare and publish a revised plan; or [he may]*

*(ii) advise the meeting that the company will apply to a court to set aside the result of the vote...on the grounds that it was inappropriate.'*

5.3 Section **153(1)(b)** reads that if the practitioner [clearly only after the rejection of a business rescue plan], does not take any action contemplated in paragraph (a), i.e., chooses not to seek a vote to revise the plan or to apply to court to set the vote aside as inappropriate, then

*'(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; [which did not happen] or [alternatively]*

*(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 [not 'and', i.e., if neither of these steps are taken, as in this matter; therefore (ii) (below) is in the alternative, not in addition to the preceding provisions;]*

*(ii) any affected person... 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 ....'*

5.4 Section **153(2)(b)** deals with the position where the affected person informs the meeting in terms of subsection (1)(b)(i)(bb) that an application will be made to court as contemplated in the provisions, when the practitioner must adjourn the meeting until the court has disposed of the contemplated application.

5.5 Section **153(4)** provides that: *'If an affected person makes an offer contemplated in subsection (1)(b)(ii), [see above] the practitioner must-*

(a) *adjourn the meeting ... , as necessary to afford the practitioner an opportunity to make any necessary revisions to the business rescue plan to appropriately reflect the results of the offer; [ which can logically only happen if the offer has been **accepted**] **and***

(b) *set a date for resumption of the meeting, without further notice, at which the provisions of section **152** [voting on the plan, if revised] and this section [153, i.e., when a plan is rejected] will apply afresh.'*

## BACKGROUND

6. Business rescue proceedings commenced when the company was placed under supervision by order of this court. The interim appointment of the practitioner was ratified by creditors at the first meeting of creditors. He published a business rescue plan on 29 November 2019. An amended business rescue plan was published on 7 February 2020, to be considered on 14 February 2020 by the creditors of the company and any other holders of voting interests.

7. A helpful chronology of events and common cause facts were set out in the Heads of Argument ('HoA') of the respondents and in the answering documentation.<sup>1</sup> At the 14 February meeting the business rescue plan, referred to as the '*original plan*' was introduced and put to the vote in terms of the provisions of s 152(1)(e) of the Act. The plan was rejected by the creditors, referred to as '*the first vote*'.

8. Respondents maintain that the original plan, having been rejected, it could only be considered further in terms of the provisions of s **152(3)(a)**, which provides that if a proposed business rescue plan is not approved as contemplated in subsection 152(2), [which is what happened here] '*the plan is rejected, and may be considered further **only** in terms of section **153**;*' Section **152(3)(b)** deals with the

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<sup>1</sup> AA record 126-132

situation when the plan is approved and finally adopted and s **152(3)(c)** deals with the situation and different options where the proposed business rescue plan does alter the rights of any class of holders of the company's securities, which did not happen in this case.

9. As required by the provisions of s **153(1)(a)** of the Act, after the business rescue plan had been rejected, as contemplated in s **152(3)(a)**, which applies in this case (or 152(3)(c)(ii)(bb), which does not apply in this case), the practitioner advised the meeting that he did not intend to seek a vote to prepare and publish a revised (original) plan; nor did he intend, in the alternative, to apply to court to set aside the result of the first vote as inappropriate. He correctly directed the meeting's attention to s **153(1)(b)**, i.e., where the practitioner does not take the actions contemplated in paragraph (a).

10. The first applicant then indicated that the Trust would exercise a right (alternative and optional) set out in s **153(1)(b)(ii)**, namely that it would make binding offers to two of the creditors to purchase their voting interests. In due course the Trust made offers to all the creditors **and** reserved its right to apply to court to have the first vote set aside as inappropriate.<sup>2</sup> The Trust maintains that it did not make a binding offer initially since the value of the voting interests had not yet been determined and argues, referring to authority, that '*an ambiguous proposal cannot be classified as an offer*' as the offer, and its terms must comply with the minimum requirements of a proposed contract.<sup>3</sup> I deal with the interpretation of a '*binding offer*' in the context of this case in due course, with reference to the quoted authority.

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<sup>2</sup> In terms of s 153(1)(b)(i)(bb).

<sup>3</sup> *African Banking Corp of Botswana Ltd v Kariba Furniture Manufacturing (Pty) Ltd* 2015 (5) SA 192 (SCA)

11. After the 14 February meeting was duly adjourned the expert independent valuation was provided,<sup>4</sup> and, as noted, the binding offer was made in accordance with the provisions of the Act. The binding offer was made by the Trust on 6 March 2020 which was irrevocable until 11 March 2020.<sup>5</sup> The valuation formed the basis for the Trust's offers to creditors to buy their voting interests. In his report<sup>6</sup> the practitioner noted, that if the creditors were to accept the Trust's offers, the plan will be put to the vote again in terms of s 152(1)(e) and if the offers were rejected, or not accepted by 10 March, then he, the practitioner, would adjourn the meeting until 17 March, to allow the Trust to apply to court in terms of s '152(2)', the right reserved by them. The reference to this section was an obvious error. The reference should have been to s 153(1)(b)(i)(bb), namely that the Trust would be allowed to make application to court to set aside the first vote as inappropriate.

12. The applicants also maintain that the practitioner is wrong in his contention that the meeting of 14 February 2020 was adjourned to 21 February 2020 *'in terms of Section 153(4),'* as the binding offer was not and could not be made prior to the valuation being obtained. Similar reasoning applies to the adjournment of the meeting from 21 February 2020 to 10 March 2020.<sup>7</sup> Applicants argue that the meeting remained a meeting convened in terms of s 151 of the Act and that s 153(4) only takes effect once an offer has been made – such offer being in compliance with s 153(1)(b)(ii). It submits further that on 10 March 2020, after the new offer had

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<sup>4</sup> Annexure 'FA 4'.

<sup>5</sup> FA Para 32, p 15

<sup>6</sup> Founding Affidavit, annexure FA 3 page 69 of the record

<sup>7</sup> Answering Affidavit: Para 23.7, page 126

Answering Affidavit: Para 36, page 132

Answering Affidavit: Para 42, page 133



been made and rejected, the practitioner *'purported'* to close the meeting and advised that he would proceed to take steps to terminate the business rescue.<sup>8</sup>

13. As noted, on 14 February the meeting was adjourned to 21 February 2020 for the independent expert valuation of the claims of two creditors, who were under no obligation to accept the offers.<sup>9</sup> Using the valuation, the Trust offered to purchase the claims of all the creditors. (Prior to the adjourned meeting all but one creditor had rejected the offer.) On 21 February the meeting was adjourned to 10 March 2020, when it was ascertained that all the creditors had rejected the offer.

14. It was recorded in the practitioner's report of 14 February<sup>10</sup> that he had been required to adjourn the 21 February meeting in terms of the provisions of s 153(4). Whether or not the meeting was adjourned in terms of s 153(4), constitutes a dispute. The practitioner's stance is that as the first vote took place in terms of s 152(2) and the original plan having been rejected in terms of the first vote, the practitioner was only entitled to have the original (rejected) plan further considered in terms of s 153, as required by s 152(3)(a), quoted above.

15. The Trust avers that this was an adjournment in terms of ss 151 and 152 in that the adjournment was a continuation of the meeting in terms of s 151 as read with s 152(1). The Trust expressly avers that the adjourned (10 March) meeting could not have been adjourned in terms of s 153(4).<sup>11</sup> (The report, FA 13<sup>12</sup>, states categorically that the meeting was held on 10 March in terms of s 153(4)). According to the Trust the practitioner did not apply s 153(4) for the first time after the first vote, notwithstanding the Trust's indication that it would be making the binding offer.

<sup>8</sup> Answering Affidavit: Para 23.17, page 128

<sup>9</sup> See report FA 3, p 69 para 8

<sup>10</sup> Para 7, report 'FA 3'

<sup>11</sup> Paragraph 40.1 to the founding affidavit ('FA'), record 19.

<sup>12</sup> FA 13 p 105 of the record

16. The respondents argue that these contentions on behalf of the Trust cannot be correct because it ignores what had happened prior to the Trust indicating that it would be making the binding offer i.e., that the first vote had taken place in terms of s 152(2), the original plan had been rejected, and that the practitioner was thereupon only entitled (in terms of s 152(3)(a)) to consider the original plan further in terms of s 153. I am not aware of any conduct by anyone, in terms of ss 152(1)(d)(i) and (ii), to propose motions relating to an amendment of the plan, nor to direct the practitioner to adjourn the meeting to revise the plan for further consideration.

17. In summary, accordingly, it was recorded in the practitioner's circular to affected persons pertaining to the meeting held on 14 February 2020,<sup>13</sup> that the creditors of the company had failed to approve the business rescue plan that had been put to the vote at the 14 February 2020 meeting, referred to as the first vote in respect of the plan. The first applicant, representing the Trust, then informed the practitioner at this 14 February meeting that he required the voting interests of dissenting voting interest holders to be expertly determined for the purposes of the Trust making a binding offer to purchase the dissenting voting interests, as contemplated in s 153(1)(b)(ii) of the Act.

18. The plan did not alter the rights of the holders of the company's securities and respondents submitted, correctly, that had the creditors voted to approve the plan, it would have been finally adopted in terms of s 152(3)(b), but as it was rejected (on or before 10 March 2020) in terms of s 152(3)(a), the terms of the provisions of this section, as quoted, provide that the plan could only be considered further in terms of s 153. (See s 153(1)(b)(ii)).

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<sup>13</sup> FA3 p 69 of record

19. As noted, the 14 February meeting was postponed to 21 February, when it was further adjourned to 10 March 2020, but before the 10 March meeting none of the creditors accepted the Trust's offers to buy their voting interests, as they were entitled to do. It was recorded in his report that the practitioner had been required to resume the 10 March meeting in terms of the provisions of s 153(4),<sup>14</sup> dealing with the procedure when an affected person makes an offer, as contemplated in ss 153(1)(b)(ii). A disputed issue.

20. The trigger for the application was the fact that after the first vote, the Trust attempted to buy the creditors' voting interests. It is undisputed that before or at the adjourned creditor's meeting on 10 March 2020, none of the creditors accepted the Trust's offers to buy their voting interests, as they were entitled to do.<sup>15</sup> The Trust also confirmed that it would continue with its proposed intention to have the vote on the business rescue plan set aside in terms of s 153(1)(b)(i)(bb).<sup>16</sup>

21. According to the practitioner, and as recorded<sup>17</sup> in his report, following the adjournment of the 10 March meeting a debate ensued as to the interpretation of s 153(1)(b) and whether a creditor was entitled to pursue the options set out in this section 'in the alternative'. The practitioner obtained legal advice during a short adjournment. The position is (in my view correctly) described in the 11 March report of the practitioner<sup>18</sup> relating to the resumed meeting of 10 March in terms of s 153(4):

*'Having considered the relevant sections of the Act ... I advised the meeting that in my view section 153(1)(b) gave a creditor an option either to apply to court to have the vote set aside, or to make an offer to purchase the claims of*

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<sup>14</sup> FA 13 page 105

<sup>15</sup> Pars 11 and 12 of the AA, p 123 of record

<sup>16</sup> FA 13, page 105 paragraph 5 and RA paragraph 23.13 page 129 of record

<sup>17</sup> paragraph 6 his report of 11 March 2020

<sup>18</sup> FA 13 para 7 p 105

*creditors. Having elected to pursue the second course of action (unsuccessfully as it turned out), the Trust was not now in a position to fall back to the first option.'* (Own underlining)

22. The argument on behalf of the applicant is that the first vote on the plan having taken place, and the plan having been rejected, and the creditors then having refused to sell or alter their voting rights, the practitioner advised the creditors that the adjourned creditors' meeting was closed and that he (the practitioner) would be taking steps to terminate the company's business rescue. The Trust argues that once the creditors refused to sell their voting rights to it, the business rescue was not at an end, maintaining that the practitioner was obliged to apply the provisions of s 152 (voting on the plan) and s 153 (when there is a failure by creditors to approve a business rescue plan) afresh; and that such fresh application of s 153 would (in terms of that provision) afford the Trust the opportunity to apply to court to set aside the first vote as inappropriate. It was argued by applicants that the provisions of s 153(4) of the Act become applicable when an offer is made, if given its ordinary grammatical meaning, and that it does not only become applicable where the offer has been accepted. They maintain that the rejection of the offer leaves voting interests unaffected, with the result that the vote rejecting the plan remains unaffected.

23. The position of the practitioner and the company is that once the creditors refuse the Trust's offers to buy their voting interests, the first vote stands, because there cannot be a second vote on the same, unamended business rescue plan. The plan is deemed to be unamended because the creditors refused to sell their voting interests, which accordingly remained unaltered. It is argued that the rejection of the plan on the first vote means that the business rescue plan is at an end and that the

business rescue provisions of the Act do not contemplate multiple rounds of repeat voting on the same unaltered plan, which would be illogical, a waste of time and not at all business-like.

24. The practitioner then declared the meeting closed, (the decision which is under review) and intended to proceed to take the prescribed steps to terminate the company's business rescue proceedings. However, on 11 March correspondence was received from the representative of the Trust referring to the offers made by the Trust to creditors to purchase their voting interests. The representative was aware that the offers had been rejected and that the practitioner had closed the meeting, allegedly without complying with the provisions of s 153(4) of the Act, while advising that he would convert the proceedings into winding up proceedings. This conduct was considered to be irregular and liable to be set aside. The practitioner was requested to issue a notice to affected persons to inform them that his closure decision was made in error and that he was obliged to first comply with the provisions of s 153(4) before closing the meeting, failing which, an urgent application was threatened including a '*adverse*' costs order.<sup>19</sup>

25. It was denied that the actions of the practitioner were irregular and liable to be set aside. The issuing of a notice, as required, was refused. The Trust issued their Notice of Motion dated 20 March 2020 seeking, inter alia, an order that the court sets aside, as irregular, the practitioner's closure of the adjourned creditors' meeting of 10 March 2020. The application was opposed. The applicants maintain that the opposition only raises argument and there are no factual disputes. The disputed issues relate to interpretational aspects, more specifically the interpretation to be placed on the provisions of s 153 and other relevant sections of the Act. The

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<sup>19</sup> FA 14 page107 of the record.

applicants maintain that the practitioner's closure of the meeting deprived the applicants of their remedy under s 153.

## ISSUES

26. The court is requested to determine the interpretation of ss 153(1)(b) and 153(4) of the Act and, the real disputed issue, whether the practitioner adjourned the meeting of creditors convened on 14 February, in terms of s 153(4) or s 151(3) as read with s 152(1). The background to the matter has been described. It is undisputed that before 10 March 2020 all the creditors had rejected the Trust's offers and, the offers having been rejected, the practitioner confirmed that the Trust had reserved its right to apply to set the vote aside as inappropriate.

27. The closure of the 10 March meeting is the decision being reviewed. The practitioner intended to proceed to take the prescribed steps to terminate the company's business rescue proceedings, but then the legal representatives for the Trust conveyed their view that the Trust's offers, having been rejected, the practitioner's closure of the meeting '*without complying with the provisions of section 153(4)*' was irregular and liable to be set aside.<sup>20</sup> It is the practitioner's case that the first vote having taken place in terms of s 152(2), and the original plan having been rejected in terms of the first vote, he (the practitioner) was obliged, in terms of section 152(3)(a), to have the original plan further considered in terms of section 153. It was argued on behalf of the practitioner that since there had been a failure to adopt the original plan, with the result that the plan had to be considered further in terms of s 153, and since the Trust had indicated that it intended to make the binding

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<sup>20</sup> Annexure FA 14 p 131 of record, para 23.20

offer, these facts, in themselves already resulted in an application of s 153 – and accordingly the practitioner was obliged to adjourn the meeting in terms of s 153(4).<sup>21</sup>

28. As noted in paragraph 15 above, the Trust avers that the 10 March meeting was a continuation of the meeting in terms of s 151, as read with s 152(1) and could not have been a meeting in terms of s 153(4) as the practitioner had refused to proceed in terms of s 153(4). There was reference to the debate on the interpretation of s 153(1)(b) and whether the provisions of this section entitle a creditor to pursue the options set out in the section in the alternative or not. The practitioner's view, as quoted above, was and is that s 153(1)(b) gave a creditor an option, either to apply to court to have a vote set aside or to make an offer to purchase the creditor's claims and that having elected to pursue the second course of action without success, the Trust was not then entitled to fall back to the first option.<sup>22</sup>

29. The Trust submits that a consideration of the statutory position shows that s 153(4) caters expressly for a situation where the holder of a voting interest's offer has been rejected and that the meeting is then to resume with the application afresh, by virtue of the provisions of s 152 and 153, i.e., the holder of the voting interest is afforded a further opportunity to exercise the alternative remedies contained in s 153. It maintains that the practitioner's closing of the meeting and informing the trustees that he intended to apply for a conversion of the proceedings into winding-up proceedings, was wrong as he should have proceeded in terms of s 153(4). The statutory framework that I have described selectively was discussed and the conclusion reached that the practitioner is precluded from filing a notice of

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<sup>21</sup> First and Second Respondents' HoA paragraph 16, page 5.

<sup>22</sup> FA para 40 p 12

termination of the proceedings, since the Trust took action as contemplated in s 153(1); that such a notice is irregular and liable to be set aside; that his actions were *ultra vires*, lacked statutory authorisation and that the practitioner should be interdicted from closing the meeting of creditors.

30. The respondents take issue with the contentions of the Trust and maintain that the trustees ignore what had taken place before the Trust indicated that it would be making a binding offer i.e., that when the first vote had taken place (s 152(2)) the original plan had been rejected and the practitioner was statutorily obliged (s 152(3)) to consider the original plan further in terms of s 153. On behalf of the practitioner the argument is that at that point the fate of the original plan had to be decided upon in terms of s 153(1) i.e., the practitioner announced that he would neither seek to publish a revised plan, nor would he apply to court to set aside the first vote as inappropriate – at which point the Trust announced that it would take up one or more of the courses of action available to it in terms of s 153(1)(b) i.e. by making a binding offer **and** reserving its rights to apply to court to set aside the first vote as inappropriate.

31. Respondents, in argument, discussed the scheme of s 153 of the Act, which deals with what happens when a plan has been rejected by creditors, the '*failure to adopt a business rescue plan*', and emphasised that there are essentially three alternative possible courses of action, namely:

31.1 an application may be made to court to set aside the vote as inappropriate; in which case, s 153(2) applies; or

31.2 the plan may be revised or amended; in which case, s 153(3) applies;  
or



31.3 an affected person may make a binding offer; in which case s 153(4) applies (the relevant provision.)

32. Respondents also pointed out and argued that s 153(5) provides that if neither the practitioner nor an affected person takes any of the three possible courses of action, then the practitioner must promptly file a notice of termination of the business rescue proceedings and that it is thus evident that the practitioner was obliged to adjourn the meeting in terms of s 153(4), which he did.

33. Further, as regards the scheme of the relevant sections of the Act, it was argued on behalf of the respondents<sup>23</sup> (correctly in my view) that it appears that s 153(4)(b) only caters for the scenario where a binding offer has been accepted and therefore – ‘and this is of course the entire point of making such an offer’ – voting on the plan must be done afresh (in terms of s 152) to see if the revised plan may now be adopted, the voting interests having been altered; failing which – i.e. if the revised plan is rejected, even by the voting of the altered voting interests, of necessity s 153 (failure to adopt the revised plan) applies afresh, and it was pointed out that in accordance with the scheme of the Act, s 153 follows the previous s 152: i.e. there is a vote on a plan (s 152) and if that vote fails, then s 153 sets out what happens upon the failure of the vote.

34. Respondents point out that it cannot be disputed that by the end of the meeting of 10 March, the Trust’s binding offer had been rejected by the creditors. It must have been apparent that the first vote stood, following the failure by creditors to adopt the original plan, and the Trust then indicating that it intended to make the binding offer and the adjournment of the meeting in terms of s 153(4), because a binding offer was indicated, followed by the independent appraisal of creditors’ voting

<sup>23</sup> See paragraphs 73 and further, page 21 of the respondent’s HoA

interests, which all comprised the first round of applying the provisions of s 153 in the business rescue of the company. It was apparent that there would be no revised plan and there could accordingly be no further voting on the original plan, in terms of s 152. The first vote having been rejected, the business rescue was and is at an end.

35. There was repeated reference to the report of the practitioner to creditors following the 14 February meeting,<sup>24</sup> where it was recorded that (only) if the creditors accept the Trust's binding offer, the (*then revised*) plan will be put to the vote once again;<sup>25</sup> but the practitioner mistakenly initially believed that if the creditors reject the Trust's binding offer, then it (the Trust) will be afforded the opportunity to apply to court to set aside the first vote as inappropriate.<sup>26</sup> On the advice of his legal representatives the practitioner realised that he had been wrong and that the position was that should the binding offer be rejected by creditors, the business rescue was finalised, and the practitioner would be obliged to close the meeting and take steps to terminate the business rescue.

36. The historic background of the matter resulted in the application of s 153, including the 14 February adjournment in terms of s 153(4) in order for the Trust to finalise and make the binding offer. It is clear, as submitted, that because the Trust could not make a finalised offer at the 14 February meeting, this is why the provisions of s 153(4)(a) allow for an adjournment, so that the independent valuation

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<sup>24</sup> FA Annexure **FA3**, record 69-70, paragraphs 10-11.

<sup>25</sup> In terms of s 152(1)(e): it is important to consider when this second vote would occur: i.e., if the binding offer was accepted, the voting interests of creditors would be altered, and the original plan would have to be amended to reflect the altered voting interests. The original plan would then become a different, revised plan, upon which there would and could be another (second) vote. In other words, the second vote is in respect of a revised plan, different to the original plan. It was argued and shown that the result of the first vote in respect of the original plan had to stand.

<sup>26</sup> This was the substance of the practitioner's report, after he originally cited the undisputedly incorrect provision of the Act in the report.

may be obtained, as attended to, and the proposed binding offer, if accepted, may be finalised.

## LEGAL ASPECTS

37. Business rescue procedure was introduced to the South African legal system on 1 May 2011, the date of commencement of the Companies Act, 71 of 2008. Chapter 6, Part A, of the Act deals with business rescue proceedings and commences with definitions in s 128. Part D of Chapter 6 deals with the development and approval of the business rescue plan. '*Business rescue*' is defined as proceedings to facilitate the rehabilitation of a company that is financially distressed, *inter alia*, by providing for certain procedures such as, '*if approved*', a plan to rescue the company by restructuring its affairs, debts and the like in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.<sup>27</sup>

38. The Act describes the purposes of business rescue procedure, relating to the management of companies including the provision of the efficient rescue of financially distressed companies, to promote the development of the South African economy, to promote investments in the South African markets, to balance the rights and obligations of shareholders and directors and to encourage the efficient and responsible management of companies, while providing for the efficient rescue and recovery of financially distressed companies in a manner that balances the rights and interests of all the relevant stakeholders.<sup>28</sup>

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<sup>27</sup> Section 128 (1)(b)(iii) of the Act

<sup>28</sup> The Preamble of the Act and s 7 thereof, specifically s 7 (k).

39. As has been shown, the Trust maintains that s 153 provides multiple or alternative remedies and, relying on a Constitutional Court judgment,<sup>29</sup> interpreting s 252 of the Act, argued that where the Act provides such alternative remedies, the section should be given a construction that will advance the remedy rather than limit it.<sup>30</sup> In the matter under consideration in the said judgment there was scope for the court's wide interpretation of the remedy, as opposed to the provisions of s 153(1), which contain three distinct alternative courses of action, to be read in context with the further provisions of s 153. The provisions are clearly distinguishable. There is no indication that s 153 may be interpreted to advance the remedy beyond its scope as specified in respect of alternative courses of action and their application.

40. As argued by respondents, the Trust appears to submit that s 153 of the act affords affected persons the alternative remedy of recourse to a court to consider the appropriateness of the vote, '*particularly where the offer made was a good one and was rejected by a holder for reasons similarly inappropriate as its vote rejecting the plan*'<sup>31</sup> and seems to maintain that as an affected person may apply to court to set aside a vote on a plan as inappropriate, (ignoring that this applies in certain prescribed circumstances only) such an affected person, the 'offeror', ought to be allowed to apply to court to set aside a creditor's decision not to accept its binding offer, as affected persons are entitled to do in terms of the provisions of s 153(1)(b)(i) (bb), which, in my view, envisage alternative, not additional possibilities.

41. The respondents refer to the oft-quoted and academically discussed Supreme

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<sup>29</sup> **Off-Beat Holiday Club v Sanbonani Holiday Spa Shareblock Ltd** 2017 (5) SA 9 (CC) at para [27]

**Smyth and Others v Investec Bank Ltd** 2018 (1) SA 494 (SCA)

<sup>30</sup> Supra at paragraph [20] and **Donaldson Investments (Pty) Ltd v Anglo-Transvaal Collieries Ltd** 1980 (4) SA 204 (T) at 209 B-F

<sup>31</sup> FA, paragraph 30, page 8 of applicants' HoA.

Court of Appeal 'SCA' judgment of **Kariba**<sup>32</sup> where the court considered the interpretation of this section, noting that this judgment is authority for its argument that a binding offer made in terms of s153(1)(b)(ii) and its acceptance or rejection, is made in terms of the common law (the law of contract), and that the offer is binding only on the offeror, while the offeree is free to accept or reject the offer. The aforesaid argument of the Trust is not in accordance with the SCA decision and as argued, if its argument were correct, it would violate the principles of freedom of contract in our law.<sup>33</sup>

41. There have been a number of reported decisions on business rescue proceedings since the inception of the Act. The meaning of the legislature with regard to some words, clauses and provisions contained in the business rescue sections of the Act have, on occasions, resulted in debate, confusion, academic discussions, court applications and judgments in view of difficulties experienced with interpretation. As noted<sup>34</sup> some relevant sections often comprise sub-sections and sub-sub-sections, often linked to other sections and sub-sections or sub-sub-sections. Some linked sections are designed to be considered in conjunction with other sections.

42. Words that caused confusion and divergent interpretations in this matter include the interpretation of the words '*binding offer*', which are not defined in the act, and further, of relevance in this matter, the use of grammatical conjunctions '**or**' and '**and**' at the end of a clause. I believe the word '**or**' may be inclusive or exclusive

<sup>32</sup> *African Banking Corp of Botswana Ltd v Kariba Furniture Manufacturing (Pty) Ltd* 2015 (5) SA 192 (SCA) at paras [18] and [21].

<sup>33</sup> The Trust takes this argument even further at its paragraph 38 (page 10), where it suggests that where an offer has been rejected for "*commercial, personal or sentimental factors*" the affected person (whose offer has been rejected) ought to be given an opportunity to go back to '*the democratic process or to put the issue before the court for decision*'.

<sup>34</sup> Paragraph 5 above.

and in many cases envisages an alternative option or action, not an additional option, while the word '**and**' indicates an additional option or conduct. Sections must be read in context considering the scheme of Chapter. At times the often-employed words '**or**' logically and sensibly indicate that available options are mutually exclusive.

43. The matter revolves around the interpretation and application of ss 151 to 153 of the act, an aspect about which the applicants and the respondents are not *ad idem*. I have summarised and quoted some relevant sections and the common cause facts as well as the parties' respective contentions for context and background. I refer again, *inter alia*, to paragraphs 14 and 15 of the answering affidavit<sup>35</sup> indicating the crux of the dispute that requires interpretation.

44. The applicants submit that the question to be decided is whether, after a business rescue plan has been rejected by the holders of creditors' voting interests at a meeting held in terms of s 151 of the Act, and a binding offer, made by affected persons to purchase the voting interest of a person who opposed adoption of the plan, at a value independently and expertly determined in terms s 153(1)(b)(ii) of the Act, is rejected, business rescue proceedings must end, or whether the affected person has a further remedy by operation of s 153(4), read with s 153(1)(b)(i)(bb) of the act. They contend that they have such further remedy and that the closure of the meeting by the practitioner on 10 March 2020 was irregular.

45. Applicants submit (not surprisingly) that the principles of statutory interpretation set out in the SCA judgment of **Endumeni**<sup>36</sup> ought to be applied to the

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<sup>35</sup> Answering Affidavit: Paras 14 and 15, page 122

<sup>36</sup> **Natal Joint Municipal Pension Fund v Endumeni Municipality** 2012 (4) SA 593 (SCA)

provisions of the Act with regard to the context in which the provisions appear, their purpose, and an '*objectively sensible meaning leading to a business-like result not undermining the purpose of the provisions*'. The respondents concede that an interpretation that leads to impractical, unbusinesslike or oppressive consequences will ordinarily not be made and that the point of departure is the language of the relevant provision, considered in context with regard to its purpose.

46. The respondents argued that the Trust's arguments are not in keeping with the principles set out in **Endumeni** and that in fact it is the argument on behalf of the practitioner that is in keeping with **Endumeni** from which I quote: <sup>37</sup>

*'...Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed, and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation... The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision ...'*<sup>38</sup>

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<sup>37</sup> Paragraph 18

<sup>38</sup> The importance of the words used was stressed by this court in **South African Airways (Pty) Ltd v Aviation Union of South Africa & others** 2011 (3) SA 148 (SCA) paras 25 to 30.

47. In this regard their view of the scheme of the Act was set out by respondents in their HoA.<sup>39</sup> I have dealt with this aspect. The context of the relevant provisions is that s 153 always follows s 152 in circumstances where there has been a failure to adopt a plan. The plain wording of s153 (4)(b) leads to no different conclusion: it is apparent that ss 152 *and* 153 '*will apply afresh*' together: i.e. a vote needs to fail, to adopt a plan (in terms of s 152) before the provisions of s 153 will apply. Where the original plan is unamended because the binding offer is rejected, the first vote stands (as conceded by the Trust) and there can be no second vote on that plan in terms of s 152 or further application of s 153, that had already been applied, following the first vote, where the original plan was rejected.

48. I agree that it has been established that this interpretation is logical, sensible, business-like and takes into account the context and scheme provided by the Act, while such a conclusion creates certainty, finality, and efficiency. It addresses the slight ambiguity in the Act in s 153(4)(b) where the two different scenarios (the consequences of acceptance of the binding offer *versus* rejection of the binding offer) are not explicitly spelled out. If the provision is interpreted in the way suggested by respondents, the fresh application of s 152 in terms of s 153(4)(b) can only arise where there is a revised plan following altered voting interests, after a binding offer was accepted, to be voted on. But, where the revised plan is rejected, s 153 will follow (as concluded from the scheme of the Act) and will thereby also be applied afresh in terms of s 153(4)(b).

## CONCLUSION

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<sup>39</sup> See Respondents HoA paragraphs 31 and 74



49. I agree with the argument that after the first vote rejected the original plan, the practitioner acted in terms of the relevant provisions of the Act, properly and appropriately, by adjourning the meeting on 14 February 2020 in terms of s 153(4) in order to afford the Trust the opportunity of making a binding offer, which the creditors were entitled to accept or to reject; which was then rejected by all the creditors. Upon its rejection, the first vote stood, the original plan had been rejected and the business rescue fell to be terminated. There could be no further voting in terms of s 152 or any further application of s 153.

50. It follows that the practitioner closed the 10 March meeting properly and appropriately and that his decision was not irregular or liable to be set aside. It has not been established that there are any grounds to order the meeting to resume, or to apply again or afresh the provisions of ss 152 and 153 in this matter.

## **ORDER**

**The application is dismissed with costs, including the costs of two counsel where so employed.**

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**E STEYN**

Judge of the High Court

CAPE TOWN