A binding offer

Chapter 6 of the New Companies Act deals with Business Rescue, a process which means facilitating the rehabilitation of a company that is financially distressed by providing for the temporary supervision of the company and of the management of its affairs.

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During these proceedings the affairs of the company are under the control of the appointed Business Rescue Practitioner. The Practitioner is required to prepare a business rescue plan in accordance with s150. The plan then needs to be approved by the creditors.

In some instances the business rescue plan will not receive the support required for approval from creditors. This, however, is not the end of the business rescue plan. In terms of s153(1)(b)(ii), any affected person or a combination of them may, on the request of the practitioner, make a “binding offer" to purchase the voting interests of one or more persons who opposed the adoption of the business plan, at a value independently and expertly determined, to be a fair and reasonable estimate of the return to that person, or those persons, if the company were to be liquidated. This has previously been described as a last-gasp attempt to secure the approval of the business rescue plan.

The focus of this article is of course the “binding offer," a phrase which the Act doesn't define. An agreement, in its everyday meaning, consists of an offer by an indication of one party (the offeror) to another (the offeree) of the offeror's willingness to enter into a contract on certain terms.

The common rule is thus that no contract will come into being unless the offer is accepted. Upon the first reading of the provision it may appear that the binding offer given to the offeree (the opposing creditor) is, in essence, unfair since it suggests that the opposing creditor has no alternative but to accept the offer. The question is then, can an offer become binding if legislation suggests that there can be no other alternative for the offeree. The court had to consider this question in the recent case of African Banking Corporation of Botswana LTD v Kariba Furniture Manufacturers (PTY) LTD and Others 20947/2012 (2013) ZAGPPHC 259.

The Bank voted against the proposed business plan. At the meeting the shareholders wished to make a binding offer for the Bank's voting interest. The offeror treated the offer as immediately and ipso facto bind- ing on the Bank. The voting interest in the business plan was amended – now excluding the Bank but exercising the voting interest that the Bank previously exercised and the plan was adopted.

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The Bank was adamant that the position in relation to the “binding offer" remained unsettled. It sought a declaratory order to confirm that the offer was binding on the offeror only and the offeree is free to accept or reject the offer. It contended that, among others, s153(1)(b)(ii) con -templates an offer that is unconditional to all the material elements, and that this accords with the general principle that an offer must contain definite terms of performance and be unequivocal, positive and unambiguous. Accordingly the Bank contended that it did not know what the terms of the offer were or the amount that it would be paid.

To interpret the “binding offer" contained in s153(1)(b)(ii) the court relied on s7(k) among others. It provides that: “The purpose of this Act is to – (k) Provide for the efficient rescue and recovery of financially distressed companies in a manner that balances the rights and interest of all relevant stakeholders"

When considering and relying on this section it would then mean that the detailed provision of the Act pertaining to business rescue should be purposefully interpreted to give effect to the objective in s7(k). The court found that the word “binding" as it appears before the word “offer," characterises the nature of the offer, which the legislature envisaged under s153 (1)(b)(ii).

While ordinarily an offer is made freely and voluntary and may be with- drawn any time before acceptance, s153(1)(b)(ii) described the offer contemplated in the section, as 'binding' because once it is made it creates a vinculum juris or legal obligation on the part of the offeror and may not be withdrawn. The 'binding offer' envisaged is s153(1)(b)(ii) is, therefore, not an 'option' or 'agreement' in the contractual sense of the term but is rather a set of statutory rights and obligations, from which neither plan within the party may resile. Thus, the binding offer envisaged in s153(b)(ii) once made will be binding on both the offeror and the offeree, predominantly to ensure compliance with the procedure to revive a business rescue plan within the framework of s153(4).

The court thus held that it is clear from s153(1)(b)(ii) that whenever an affected person rejects a business rescue plan, this section will operate to allow another affected person to make a binding offer to acquire the voting interest of the dissenting voter.

The bank, however, contends that this position is fallacious as it presupposes only one offeror, or potential offeror, and only one offeree or potential offeree and, as soon as it recognised that there may be one or more affected persons who may potentially make an offer, the possibility arises for more than one offer to be made, and for it to be immediately binding, not only on the offeree, but also on all other offerors. The court considered the bank's contentions to be unsustainable because s152(1)(b)(ii) permits only one binding offer to be made.

The court held that, in the circumstances, the binding offer is bind- ing on both the offeror and the offeree. The failure to accept the offer is of no consequence and the offer became binding the moment it was made.

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