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## **BINDING OFFERS IN BUSINESS RESCUE**

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The phrase “binding offer” as set out in s153 of the Companies Act, 71 of 2008 (the **Act**) has led to much confusion and debate since the coming into operation of the Act in 2011, and there have been diverging interpretations of the phrase in different divisions of the High Court .

If a business rescue plan has been rejected at a meeting called for purposes of voting on the plan, s153 provides *inter alia* that any affected person, or combination of effected persons, may make a binding offer to purchase the voting interest of one or more persons who opposed the adoption of the 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.

One interpretation of the “binding offer” has been that parties can effectively compel a creditor who opposes the adoption of a business rescue plan to sell its voting interest for a value of the dividend that it would have obtained in a liquidation scenario. The reasoning being, that in voting against the adoption of the plan, that creditor is effectively accepting that the company will be liquidated and it will receive whatever dividend, or payout, which is due to it in liquidation. In making the offer, the party acquiring the voting interest can potentially influence the vote for the adoption of the business rescue plan and prevent the company being placed in liquidation.

If such an offer is made, is it automatically binding on the party whose voting interest is sought to be acquired?

On 20 May 2015, the Supreme Court of Appeal (SCA) delivered judgment dealing with, *inter alia*, the proper interpretation of the words 'binding offer' as contemplated in s153(1)(b)(ii) of the Act.

## **THE KARIBA JUDGMENT**

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In the matter of *African Banking Corporation of Botswana v Kariba Furniture Manufacturers & others*, the SCA held that a “binding offer” made to a creditor who opposes a business rescue plan is not automatically binding that creditor.

In this case, the shareholders (offeror) indicated at the meeting held for purposes of voting on the business rescue plan that they wished to make a binding offer, to purchase the voting interest of the African Banking Corporation of Botswana (the **Bank** or **offeree**) in terms of s 153(1)(b)(ii) of the Act. The business rescue 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.

The practitioner proceeded to amend the business rescue plan to reflect the change in shareholding as per the "binding offer".

The High Court (of first instance) found that the 'binding offer' as contemplated by the Act 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.

The Bank contended on appeal 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 SCA held that 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. It is a well-established principle of our law that an ambiguous proposal cannot be classified as an offer.

## CONCLUSION

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The SCA has settled the debate by concluding that 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.

Consequently, the Court held that the resolutions taken subsequent to the transfer of the bank's voting interest, including the adoption of the rescue plan, are null and void.

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**For more information about our Insolvency Law practice and services, please contact:**





**Thys Scheepers**

Partner

**Tel:** 031 536 8583

**Cell:** 082 8087 891

**Email:** [tscheepers@coxyeats.co.za](mailto:tscheepers@coxyeats.co.za)



**Callyn Wilkinson**

Partner

**Tel:** 031 536 8509

**Tel:** 076 9412 430

**Email:** [cwilkinson@coxyeats.co.za](mailto:cwilkinson@coxyeats.co.za)

