BUSINESS RESCUE

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TO AGREE OR NOT TO AGREE

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Gribnitz and Appelbaum, in their book *G&A Compass Methodology to Business Rescue and Compromise Offers* (2015), argue that creditors have three fundamental rights when involved with business rescue:

- the right to information;
- the right to participate in business rescue proceedings; and
- the right to make an offer in terms of s153 of the Companies Act (71 of 2008) as amended.

When a business rescue plan is prepared, it must contain the liquidation value for the different classes of creditors as contemplated in an insolvency. Once the Plan is published, it affords all creditors the right to participate in the meeting, make proposals to amend the Plan and to vote for (or against) it at a meeting convened in terms of s152. If, at this meeting, the creditors do not obtain the required percentage to adopt the Plan, a mechanism exists for those creditors who voted in favour of a business rescue plan to make an offer to acquire the vote of the dissenting creditors at the indicated liquidation value. The implementation of such an offer is dealt with in s153(1)(b)(ii), which states:

> *"any affected person, or 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 persons, or those persons, if the company were to be liquidated."* (Our emphasis).

The question which arises on a reading of this provision is: **Is this offer binding on both parties?**

Judge Gorven J held in *D H Brothers Industries (Pty) Ltd v Gribnitz NO* 2014 (1) SA 103 (KZP) para 40-41:

> *"[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. . . . 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 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.' which view was also held by the Supreme Court of Appeal (SCA) in African Banking Corporation of Botswana v Kariba Furniture Manufacturers & others (228/2014) [2015] ZASCA 69 (20 May 2015)."*

Section 158 requires the courts to create Common Law to promote the spirit, objectives, purpose, realisation and enjoyment of the Act. Section 7 states that the purpose of the Act is to promote compliance, development of the economy, promotion of investment, creation of employment, to achieve social benefits and to provide an efficient rescue and recovery of financially distressed companies that balances the rights and interest of relevant stakeholders.

Section 153(1)(b)(ii) places a dilemma before the court where the rights of an individual Affected Party (who can afford it) have to be compared to the rights of the collective or the other stakeholders, which includes all the Affected Parties. The problem is that the rights of the collective during court proceedings are usually not separately represented by counsel, and these rights are at best only partially protected by the Company defending the matter. Since the Company, which may already be insolvent, does not have the ability to be involved in long, protracted legal battles that may end up in the Appeal Court, the judgements made on business rescue matters appear to have been promoting the exclusive issue of compliance.

Making an offer which is not binding on both parties, as reflected in the judgements mentioned, means that one party will be able to unfairly influence (or even blackmail) the other creditors, employees and investors into paying that party more to change their vote. In fact, this is precisely what happened in the *DH Brothers* case, where they demanded special treatment. In other words, they wanted to be paid more than was offered in the plan, because they could block the vote and they believed that any offer to acquire the vote was not binding in terms of s153(1)(b)(ii).

However, in application of the very same principles used in the SCA judgement already mentioned, in order for an agreement or contract to be valid, there must be, *inter alia*, a meeting of the minds, which gives rise to another view on this matter. This principle is the basic foundation of any agreement, and is embodied in the doctrine of quasi-mutual assent. The doctrine is meant to aid in resolving disputes on the existence of an agreement. In situations where s153(1)(b)(ii) is applicable, a major creditor or group of creditors are able to dictate the outcome of the vote and, therefore, the future of the Company. By voting against the proposed Business Rescue plan, the dissenting creditor has reconciled itself to the idea that their claim will be paid out in terms of the liquidation dividend

embodied in the very plan they have rejected. Therefore, if the Affected Parties make an offer to acquire the dissenting creditor's vote, they are effectively converting the dissenting creditor's intention to receive the liquidation dividend into a reality by making an offer to pay the dissenting creditor and continuing with Plan. By implication, there is a "meeting of minds" between the creditors resulting in the offer being binding on both parties.

The African Banking Corporation of Botswana SCA judgement takes issue with the fact that the offer is binding. It, therefore, does not afford the majority creditor the opportunity to accept or reject the offer. It is our opinion that acceptance is exempt in this engagement as the offer embodies the majority creditor's original intention by voting against the plan. To further support this view, consideration must be given to the following statement in paragraph 53 of the judgement in *Pillay v Shaik* 2009 4 SA 74 (SCA) :

it, it will have accepted the liquidation value of its claim. Therefore, an agreement arises through the action of the dissenting creditor voting against the plan, and the acceptance that their claim will be paid out in terms of what the dissenting creditor expects to receive in the event of a liquidation. Once the offer is made by the offeror, who accepts the responsibility to pay the liquidation value of the claim to the dissenting creditor, the offer should be binding.

Section 153(6) also provides relief in the case where a party is discontent with the valuation of their claim. In such a case they can approach the court to provide for a re-evaluation. We are of the view that s153(6) is a clear indication of the legislature's intention, and recognition that s153(1)(b)(ii) should be binding on both parties. It provides a form of relief to the dissenting and offering creditor, since the offer is considered to be binding. This section provides a mechanism for the dissenting and offering creditor to approach the court to have the amount to be paid or

Gribnitz

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Lowery

"...this raises the question as to whether the doctrine of quasi-mutual assent can be applied in circumstances where acceptance does not take place in accordance with a prescribed mode but the conduct of the offeree is such as to induce a reasonable belief on the part of the offeror that the offer has been duly accepted according to the prescribed mode. Viewed in the light of basic principle, the question must surely be answered in the affirmative because the considerations underlying the application of the reliance theory apply as strongly in a case such as present as they do in case where no mode of acceptance is prescribed and the misrepresentation by the offeree relates solely to the fact that there is no consensus."

In this judgement it is clear that acceptance does not need to be made in accordance with a prescribed mode. If the conduct of the dissenting creditor is such that the offeror reasonably believes that the dissenting creditor does not want to participate in the Plan by electing to vote against

received reviewed by the court, furthering the argument that the offer is automatically binding and purposefully included by the Act.

The saying goes "actions speak louder than words", which is true in this case. Once the vote has occurred the dissenting creditor has elected and demonstrated their election through their actions. Their vote actually triggers the process of binding offer, as the offeree accepts the election by the dissenting creditor to opt out of the Plan, and that they are willing to settle for an amount equivalent to the liquidation dividend. The "meeting of the minds" occurs when the offer is made as it is an acceptance of the intent of the dissenting creditor, and therefore becomes binding on both parties.

We contend that to agree is agreeable!

Lowery is a professional assistant at Warrenerlaw and is reading for a post-graduate diploma in Company Law. For more information on Gribnitz refer to www.GnAcompass.co.za.