THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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Louis N O and Others v Fenwick N O and Others (598/2021) [2023] ZASCA 59 (28 April 2023)

Today the Supreme Court of Appeal (SCA) dismissed an appeal with costs including costs of two counsel.

The issue before the SCA was whether in business rescue proceedings, s 153(4) of the Companies Act 71 of 2008 (the Act) is to be applied after a binding offer made in terms of s 153(1)*(b)*(ii) of the Act has been rejected. More particularly, whether business rescue proceedings terminate when a binding offer to purchase the voting interests of the person(s) who opposed the adoption of a business rescue plan is rejected, or whether the affected person(s) who made the offer has further remedies in terms of s 153(4) of the Act.

The appellants are the trustees for the time being of the Alan Louis Trust (the Trust). The second respondent, Louis Group SA (Pty) Ltd (the company), was placed under supervision on 26 February 2013 when business rescue commenced. At a meeting held on 14 February 2020 the first respondent (the business rescue practitioner), placed a business rescue plan (the original plan) to a vote to the creditors of the company in terms of s 151 of the Act. The plan was rejected by the creditors (the first vote).

After the first vote, the business rescue practitioner informed the meeting that he did not intend to proceed in terms of s 153(1)*(a)* of the Act. The first appellant informed the meeting that the Trust would exercise its rights in terms of s 153(1)*(b)*(ii) to make binding offers to purchase the voting interests held by two of the creditors of the company, namely the fourth and fifth respondents (eventually the Trust made such offers to all the creditors of the company). The Trust also reserved its right to apply to court to have the first vote set aside as inappropriate in terms of s 153(1)*(b)*(i)*(bb)* of the Act. The meeting was adjourned in terms of s 153(4), to allow the Trust's offers to the creditors to be independently and expertly determined as contemplated by 153(1)*(b)*(ii) of the Act. These binding offers were thereafter made but were rejected by all the creditors. At a reconvened meeting held on 10 March 2020, the practitioner informed the meeting that, in light of the rejection of the binding offers, the adjourned meeting was closed and declared his intention to apply for the conversion of the business rescue proceedings into winding-up proceedings. The appellants objected and insisted that the business rescue practitioner was required, once the binding offers were rejected, to proceed in terms of s 153(4). The practitioner disagreed, adopting the stance that s 153(4) does not contemplate a further meeting once the binding offer has been rejected and that s 153(4) only caters for the scenario where a binding offer has been accepted.

It was against this background that the appellants launched an urgent application in the Western Cape Division of the High Court, Cape Town (the high court) for an order: setting aside as irregular the decision of the practitioner to close the reconvened meeting on 10 March 2020; directing the practitioner to set a date for the resumption of the meeting; and directing the practitioner to apply the provisions of ss 152 and 153 at the resumed meeting. The high court agreed with the respondents that s 153(4)*(b)* only caters for the scenario where a binding offer has been accepted. As a result, the high court dismissed the application.

The SCA, in coming to a conclusion, held that the literal meaning of s 153(4) is clear in that it says that if an affected person makes an offer, the practitioner must act as prescribed in ss 153(4)(*a*) and (*b*). It further held that it is trite that a court may depart from the clear and unambiguous meaning of a statutory provision to avoid an absurdity and that the mere making of an offer in terms of s 153(1)(*b)*(ii) could not have been intended to trigger the conjunctive steps mentioned in ss 153(4)(*a*) and (*b)*.

Lastly, the SCA went further to state that it could not have been the legislature's intention that a party whose voting interests remains unaltered as a result of the rejection of a binding offer, would be entitled to a further opportunity to exercise one of the alternatives provided for in s 153(1)*(b)*(i) of the Act, holding that the interpretation contended for by the appellants simply does not amount to a sensible and business-like interpretation of s 153(4) of the Act.

In the result, the SCA held that s 153(4) of the Act only finds application when a binding offer in terms of s 153(1)(*b*)(ii) is accepted, thus dismissing the appeal with costs including costs of two counsel.

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