

SOUTH AFRICA / JUDGMENT

Arqomanzi Proprietary Limited v Vantage Goldfields Proprietary Limited and Others (Reasons) (549/2021) [2021] ZAMPMBHC 64 (28 August 2021) [2021] ZAMPMBHC 64

COURT

Mbombela High Court, Mpumalanga

BEFORE

Grelying-Coetzer AJ

CASE / FILE NUMBER

549/2021

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IN THE HIGH COURT OF SOUTH AFRICA

(MPUMALANGA DIVISION, MAIN SEAT - MBOMBELA)

Case number: 549/2021

In the matter between:

ARQOMANZI PROPRIETARY LIMITED Applicant And VANTAGE GOLDFIELDS PROPRIETARY LIMITED (IN BUSINESS RESCUE) First Respondent BARBROOK MINES PROPRIETARY LIMITED (IN BUSINESS RESCUE) Second Respondent MAKONJWAAN IMPERIAL MINING COMPANY PROPRIETARY LIMITED (IN BUSINESS RESCUE) Third Respondent ROBERT CHARLES DEVEREUX N.O. Fourth Respondent DANIEL TERBLANCHE N.O. Fifth Respondent VANTAGE GOLDFIELDS SA PROPRIETARY LIMITED Sixth Respondent THE AFFECTED PERSONS OF VANTAGE GOLDFIELDS PROPRIETARY LIMITED (IN BUSINESS RESCUE) Seventh Respondent THE AFFECTED PERSONS OF BARBROOK MINES PROPRIETARY LIMITED (IN BUSINESS RESCUE) Eighth Respondent THE AFFECTED PERSONS OF MAKONJWAAN IMPERIAL MINING COMPANY PROPRIETARY LIMITED (IN BUSINESS RESCUE) Ninth Respondent VANTAGE GOLDFIELDS LIMITED Tenth Respondent

REASONS

FOR RULE NISI INTERIM ORDER

DENISE GREYLING-COETZER AJ

- [1] This application was brought on an urgent basis and was heard by way of remote video conferencing. At the time of calling the matter, only the founding affidavit was before court. The first- to sixth respondents, and tenth respondent (hereinafter collectively referred to as “the respondents”), answering affidavit was served in line with the provisions set out in the amended notice of motion, but not accepted by the Registrar as same was filed after the close of the urgent roll.
- [2] The matter stood down in order for the full set of papers totalling more than 550 pages to be made available to court. By agreement between the parties, and catering for the availability of both senior counsel and their juniors the matter was set down to proceed over two days.
- [3] The applicant, on an urgent basis, primarily sought interim relief pending the institution of proceedings within 10 (ten) days from date of the order, that the fourth- and fifth respondents (herein after jointly referred to as “the business rescue practitioners”):-
- [3.1] be interdicted from proceeding with the implementation of the business rescue plans, as purportedly amended by them on 15 February 2021 (which plans were adopted by the creditors of the first respondent on 16 February 2017, by the creditors of the second respondent on 6 August 2018 and by the creditors of the third respondent on 25 May 2016)[1];
- [3.2] be directed to take any all steps possible to instruct the banking institution, which was used to make payments pursuant to the amended business rescue plans, to reverse (to the extent possible) all payment transactions that were executed in the purported implementation of the amended business rescue plans; and
- [3.3] be directed to report to the court within 5 (five) days from the date of the order with details of exactly when they commenced the implementation of the amended business rescue plans and to what extent the amended business rescue plans had already been implemented by:-
- [3.3.1] 17h50 on 15 February 2021;
- [3.3.2] 22h54 on 15 February 2021;
- [3.3.3] 10h08 on 16 February 2021;
- [3.3.4] the moment of service of this application on them;
- [3.3.5] the time this order was granted.
- [4] The applicant, further sought leave to cite the affected/interested persons of the first respondent collectively as the seventh respondent, the affected/interested persons of the second respondent collectively as the eighth respondent and the affected/interested persons of the third respondent collectively as the ninth respondent, as well as that service on the aforementioned seventh- to ninth respondents be effected by e-mail and publication in various newspapers.

[5] After extensive argument over a period of 2 (two) days[2], and due to this matter competing with other matters on the court roll, only an order was made without providing reasons. The following

interim order was granted:-

“1. The forms and services provided for in the Rules of this court are dispensed with and this matter is heard as one of urgency in terms of Rule 6(12).

2. The moratorium on legal proceedings against the first, second and third respondents is uplifted in terms of section 133(1)(b) of the Companies Act 71 of 2008 for purposes of this application, and the applicant is granted leave to proceed with this application, for as far as it may be required.
3. Subject to the provisions of paragraph 11 of this order, the applicant is granted leave to cite the creditors, ('the affected persons'):

3.1 of the first respondent collectively as the seventh respondent;

3.2 of the second respondent collectively as the eighth respondent; and

3.3 of the third respondent collectively as the ninth respondent.

4. A rule nisi is hereby issued calling upon any interested person to show cause at 10:00 on 04 May 2021 why an order in the following terms should not be granted;

4.1 That the fourth and fifth respondents are interdicted and restrained from proceeding with the implementation of the business rescue plans, as purportedly amended by them on 15 February 2021, that were adopted by creditors of the first respondent on 16 February

2017, by the creditors of the second respondent on 6 August 2018, and by the creditors of the third respondent on 25 May 2016;

4.2 That the existing respondents or any respondents who may hereafter be joined, and who oppose the application be ordered, jointly and severally, to pay the costs of the application.

5. The rule nisi in the terms as stipulated in paragraph 4.1 above shall operate as an interim interdict pending the final determination of this application on the return date or any extension thereof.
6. A decision on the costs of this application is reserved for determination on the return date.
7. The fourth and fifth respondents are directed to furnish the applicant's attorneys, within 3 court days of the grant of this order, with particulars of such email addresses, physical residential addresses, or mobile cellular telephone numbers of the creditors of the first, second and third respondents as are known to them.

8. The applicant's attorneys shall within 5 court days of the information in paragraph 7 above having been furnished, deliver a copy of this order to the creditors of the first, second and third respondents, who have collectively been cited as the seventh, eighth and ninth respondents, either by hand-delivery to such residential addresses, or by sending a copy of this order either by email, or by PDF file attachment to an SMS message, to such email addresses or mobile cellular telephone numbers, as the case may be, of creditors of the first, second and third respondents as are known to the applicant and its attorneys.
9. Service of this rule nisi shall further be effected by the applicant by publication as soon as is practicable, in the Lowvelder Newspaper and Mpumalanga News.
10. Any interested party shall be entitled to obtain a full copy of the papers filed in this application, free of charge, upon written request made within 5 court days after delivery by hand of this order, or the despatch of the email or SMS message as contemplated in paragraph 8, or the publication contemplated in paragraph 9 of this order, whichever is the later, to the applicant's attorneys at the address hereunder:

FLUXMANS INC.

Care of Mr Carl Stein and Mr Lionel Dos Passos

3[...] J[...] Avenue, Rosebank, Johannesburg

Tel: (011) 328 1700

Email: I[...]; c[...]

11. Any interested party who wishes to be joined in own name as a party to this application and to oppose the grant of a final order as provided for in paragraph 4 hereof on the return day, shall within 5 court days after the delivery by hand of this order, or the despatch of the emails or SMS message as contemplated in paragraph 8, or the publication contemplated in paragraph 9 of this order, whichever is the later, give written notice to the applicant's attorneys at the address stipulated in paragraph 10 above. Any party giving such notice shall be joined in own name as a respondent, and shall be entitled to deliver an answering affidavit to the allegations made in the founding affidavit within 10 court days of having given such notice to the applicant's attorneys.
12. The applicant shall with the co-operation of the existing respondents and future respondents as contemplated in 11 above, immediately after expiry of the time period provided for in 11 above, complete and file the required case management form as set out in the January 2020 directives read together with the Covid-19 directives, to ensure the matter is ready for hearing on the return date set out in 4 above.

13. All interested parties who fail to give notice of an intention to be joined to this application and to oppose the relief to be sought in terms of paragraph 4 hereof on the return day, are advised that a final order in such terms or similar terms may be given on the return day in their absence.”
- [6] In the main, this matter concerns whether a business rescue practitioner can unilaterally amend adopted business rescue plans. As alluded to above, the relief was essentially sought against the business rescue practitioners (the fourth- and fifth respondents).
- [7] The facts are largely common cause, alternatively not seriously disputed.
- [8] The first to third respondents commenced business rescue proceedings on various dates during 2016. Subsequently, business rescue plans, as contemplated in Section 152 of the Act, were adopted by the creditors of the first respondent (hereinafter referred to as “VGL”) on 16 February 2017; by the creditors of the second respondent (hereinafter referred to as “Barbrook”) on 6 August 2018 and by the creditors of the third respondent (hereinafter referred to as “Mimco”) on 25 May 2016.
- [9] These adopted business rescue plans were aimed at achieving the primary purpose of the continued existence of the various companies and not aimed at the alternative object of business rescue, which is to secure a better return for creditors.
- [10] Pursuant to it becoming known in September 2019 that the business rescue practitioners intended to implement business rescue plans for VGL, Barbrook and Mimco (collectively “the Vantage Companies”) other than those plans which were adopted by the creditors of the Vantage Companies, the applicant approached the court on an urgent basis for relief prohibiting the business rescue practitioners from doing so. The application was successful, and on
- 11 November 2019 Roelofse AJ inter alia ordered the business rescue practitioners to:-
- [10.1] consult with all affected/interested parties of the Vantage Companies for purposes of proposing amendments to the adopted business rescue plans of the Vantage Companies dated 16 February 2017, 6 August 2018 and 25 May 2016 respectively;
- [10.2] prepare amendments to the approved business rescue plans of the Vantage Companies; and
- [10.3] convene a creditors’ meeting of the Vantage Companies for the purpose of considering and voting on the proposed amended business rescue plans.
- (“Roelofse AJ order”)
- [11] Pursuant to Roelofse AJ’s order, and working together, the applicant and the business rescue practitioners invested a substantial amount of time, money and effort to prepare amended business rescue plans for the Vantage Companies. The first version of the proposed amended business rescue plans for Barbrook and Mimco were published by the business

rescue practitioners in June 2020, and the final version of the said business rescue plans, together with a proposed version of the amended business rescue plan for VGL, were to be published in January 2021.

- [12] Per the business rescue practitioners' December 2020 circular a meeting of creditors of each company would be convened for the purpose of considering and voting upon the proposed amended business rescue plans.
- [13] Shortly before publication of the proposed amended business rescue plans on 20 January 2021, the sixth- and tenth respondents submitted a new offer to the business rescue practitioners (hereinafter "the Vantage proposal"). In respect of this proposal, the business rescue practitioners were inter alia invited to amend the adopted business rescue plans unilaterally.
- [14] Concerned that the business rescue practitioners may be inclined to act in accordance with the Vantage proposal, the applicant wrote to the business rescue practitioners on 27 January 2021 and again on 4 February 2021, explaining to the business rescue practitioners why they cannot unilaterally amend the adopted business rescue plans, and informed the business rescue practitioners that it would approach the court should the business rescue practitioners proceed to unilaterally amend the adopted business rescue plans.
- [15] In response the business rescue practitioners indicated that they were still considering the Vantage proposal and have yet to make a decision.
- [16] On 15 February 2021 after ordinary business hours and without having notified the applicant of their intention to do so, the business rescue practitioners informed the applicant that:-
- [16.1] they had unilaterally amended the adopted business rescue plans in accordance with the Vantage proposal;
- [16.2] the initial business rescue plans (as amended) were being implemented with effect from 15 February 2021; and
- [16.3] the first tranche of payments to creditors will commence immediately and be completed by 8 March 2021, and the balance within 60 (sixty) days of 15 February 2021.
- [17] This conduct resulted in the urgent application being launched. The urgency being justified in my view.
- [18] The applicant contends that the business rescue practitioners acted unlawfully in unilaterally amending the adopted business rescue plans. As a business rescue practitioner, is a creatures of statute and only has those powers expressly conferred upon him or her by the Act. No provision exists in the Act which affords a business rescue practitioner the right to amend a business rescue plan which has been adopted by the creditors. The only powers of amendment are found in Section 152(1)(d)(ii) of the Act, which only allows a business rescue practitioner the right to amend a business rescue plan before it has been adopted by creditors.

- [19] The applicant placed reliance on the matter of *Kransfontein Beleggings (Pty) Ltd v Corlink Twenty Five (Pty) Ltd*[3] wherein it was held that not even a court can alter an approved business rescue plan and foist on creditors a plan which they had not discussed and voted on (a meeting held in terms of Section 152 of the Act) and “the only plan which practitioners can implement is one adopted by creditors in accordance with Section 152 of the Act.”
- [20] It was further argued on behalf of the applicant that in *Booyesen v Jonkheer Boerewynmakery (Pty) Ltd and Another*,[4] upon the question of whether a business rescue practitioner may reserve for himself or herself the right to amend a business rescue plan unilaterally after adoption, it was held that:-

“... there is no room for a business rescue practitioner to reserve to himself the right to amend a business rescue plan. By doing so, he would effectively circumvent the procedure set out in the Act in terms of which the claims, which are to be discharged as per the rescue plan, derive their binding force. In so far as the second respondent thus sought in terms of the provisions of clause 2.4 of the plan to reserve to himself the right to amend the plan, such a right could, at best, only have been a right to amend the proposed – i.e. draft – plan prior to its adoption by the creditors in meeting and not thereafter. Any other interpretation would make nonsense of the process provided for in the Act whereby control over the rescue proceedings is to be exercised by democratic majority vote of the creditors and affected parties, and would allow the business rescue practitioner to unilaterally reduce or compromise creditors’ claims to their prejudice (or even perhaps to increase certain claims at the expense of others), thereby exposing the whole process to uncertainty and possible corruption.”

- [21] In addition, according to the applicant, Section 151(4) supports the proposition that only a creditor may make substantial amendments to an adopted business rescue plan, as it states that a business rescue plan that has been adopted, is binding on the company, on each of the creditors of that company and every holder of the company’s securities.
- [22] It was contended that a business rescue plan is thus analogue to a contract having been concluded between a company and its creditors. In support of this contention, reference was made to Section 154(2) of the Act.
- [23] Therefore, against aforementioned provisions, and by application of the trite principle of the law of contract, one party to a contract is not entitled to unilaterally amend the terms of the contract. It was argued that there is no principle in law which would permit the business rescue practitioners to unilaterally amend a business rescue contract, particularly in circumstances where the vote of the majority bounds all of the creditors to that contract.
- [24] It was contended that the principle of a natural *ipsius rei*, which is applicable to interpretation of statutes, supports the proposition that as the Act vests the original power to adopt a business rescue plan in the creditors, the Act by necessity also empowers the creditors to amend the business rescue plan.

- [25] The applicant submitted that clause 9 relied on by the business rescue practitioners to justify their unilateral amendment must accordingly be interpreted restrictively, and the amendment which the business rescue practitioners would be entitled to make would be an amendment of an administrative nature, which does not affect the substance of the business rescue plans which were adopted by the creditors. Any amendment of substance must be considered by and voted on by the creditors.
- [26] As further justification for the relief sought it was argued that in light of the Roelofse AJ order, the business rescue practitioners were ordered (1) to consult the creditors; (2) to prepare amendments to the adopted business rescue plans and (3) to allow the creditors to vote on the proposed amendments to the adopted business rescue plans. This order cannot be merely ignored. It was contended that the only difference between this application and the previous application before Roelofse AJ, is that in the previous application, instead of RWI (assisted by the sixth respondent) wanting to step into the shoes of the IDC and Flaming Silver, VGL (also assisted by the sixth respondent) now wants to step into their shoes.
- [27] Other than the contentions on the merits, the respondents raised various issues that can be categories as in limine. I will deal with these in turn below, but before doing so and in summation, the contentions on behalf of the respondents in respect of the merits are that the business rescue practitioners:-
- [27.1] were authorised and did not act unlawfully in unilaterally amending the business rescue plans and subsequently implementing same; and
- [27.2] did not unilaterally make the amendments, but they were empowered by clause 9 in the business rescue plans to do so.
- [28] Therefore the question is whether clause 9, which was approved by the creditors, ought to be treated pro non scripto. This specific clause reads as follows:-

“9. Ability to amend the business rescue plan

9.1 Provided that any amendment will not be prejudicial to any of the affected persons, the BRP shall have the ability, in his sole and absolute discretion, to amend, modify or vary any provision of this business rescue plan, provided that at all times the BRP acts reasonably. The amendment will be deemed to take effect on the date of written notice of the amendment to all the affected parties.

9.2 It is specifically recorded that the provision of paragraph 9 shall mutatis mutandis apply to the extension or reduction of any time frames by the BRP.”

- [29] On the aforesaid basis it was contended that the business rescue practitioners were obliged, upon amendment on 15 February 2021, to take all reasonable steps to implement the amended business rescue plans immediately. This entailed that payments of dividends were immediately commenced with. Therefore, the business rescue practitioners merely acted as they are obliged to, and in line with the powers conferred upon them in terms of clause 9.

- [30] It was further argued that it was not clear from Booysen (supra) that “the right” which the business rescue practitioner in that case had reserved for himself was a provision of the adopted plan, or whether this “right” had its supposed origin outside of the plan. The reference to clause 2.4 of the plan in Booysen (supra) is therefore not necessarily to be interpreted to mean that there was a clause in the plan which provided for the business rescue practitioner to make changes to the plan. Clause 2.4 may have provided for something else, such as that the practitioner shall evaluate claims made against the company, and that the practitioner interpreted this as reserving for himself the right to make a change.
- [31] In confirmation of the aforesaid, the fifth respondent confirmed that he was the business rescue practitioner in the Booysen matter (supra), and that there was no provision for amendment in the business rescue plan. He does however not provide clarity as to what clause 2.4 refers to or contained, as referenced by the Sher AJ.
- [32] The respondents submitted that the source of competence to make amendments to a business rescue plan arises squarely within the approved plan, whereas in the Booysen matter (supra), the objection by Sher AJ was to an amendment of a plan after its adoption, in that it offends the democratic processes which give the business rescue plans their binding force. This according to the respondents is not the circumstances in the current matter.
- [33] According to the respondents, the Booysen matter (supra) is also further distinguishable, as clause 9.1 gives the business rescue practitioners a limited discretion, in that the amendment may not be prejudicial to the affected/interested parties, and that they must act reasonably. Whereas in Booysen (supra) the right was not limited.
- [34] It was submitted that the applicant failed to make out a prima facie case inter alia on the following grounds:-
- [34.1] there is no case to be made out that the business rescue practitioners did not comply with Roelofse AJ’s order;
- [34.2] the business rescue practitioners complied with their statutory duties; and
- [34.3] the applicant has not demonstrated that it has secured the funds required to support its offer.
- [35] According to the respondents paragraphs 1 to 4 of the Roelofse AJ’s order was devised for the business rescue practitioners to put into effect the offer that the applicant made at the time, and the order therefore did not place a general duty on the business rescue practitioners to seek creditors’ approval for amendments to the business rescue plans.
- [36] In addition it was contended that the applicant’s offer had lapsed, and therefore when the Vantage proposal was made on 20 January 2021, the order had already run its course. The Vantage proposal was therefore not subject to Roelofse AJ’s order.

- [37] In light of aforementioned it was argued that the original business rescue plans which were approved by the creditors were to be implemented, and in terms of clause 9 thereof, permitted the business rescue practitioners to amend the plans, provided only that an amendment does not prejudice any affected/interested persons, and that the business rescue practitioners act reasonably.
- [38] In justification of their conduct, the business rescue practitioners contended that they are bound to act objectively and impartially, and to implement the approved business rescue plans without delay. This, they contend, they did by issuing the notice on 15 February 2021 and immediately commencing with implementation through pay-outs.
- [39] It was further contended that the applicant has no funding. This was so submitted notwithstanding the statement by the business rescue practitioners in their communication to creditors and that the applicant has proven funding to their satisfaction.
- [40] As mentioned, various in limine aspects were raised by the respondents. I first deal with them in turn.

Effect of the counter-offer dated 18 February 2021

- [41] It was argued on behalf of the respondents that in the present application the applicant seeks to interdict the implementation of the Vantage proposal and to compel the business rescue practitioners to put their offer to the creditors. However, the applicant's counter-offer dated 18 February 2021, in response to the Vantage proposal destroys the original offer of the applicant, and therefore the cornerstone of this application. It was submitted that by making this counter-offer on terms different to the original offer can only be interpreted as revocation of the original offer.
- [42] In conclusion it was submitted that the applicant could no longer be heard to contend that its original offer needs to be put before the creditors of the companies in business rescue as it was replaced by the counter-offer.
- [43] The applicant contends that its case is not that of seeking a vote on an offer, but that the business rescue plans cannot be amended in the manner which the business rescue practitioners have done. In addition, the order of Roelofse AJ did not stipulate that an offer stands to be placed before the creditors, but that the business rescue plans obviously would contain all the offers and that needed to be placed before the creditors for a vote.
- [44] I do not understand the applicant's case to be that of an interdict against the implementation of the Vantage proposal and to compel the business rescue practitioners to put the original offer to the creditors of the companies in business rescue.

[45] The applicant's case is that of interdicting the business rescue practitioners from continuing to implement, what the applicant terms the 'unlawfully amended business rescue plans', therefore to preserve the status quo ante to the extent still possible, until such time as the court has had the opportunity to consider the business rescue practitioners' unlawful conduct and set aside the purported amendment to the original business rescue plans.

Non-Joinder

[46] It was argued on behalf of the respondents that the applicant was not even entitled to seek interim relief without properly citing all the affected/interested persons and serving this application on each of these persons, considering that no case for extreme circumstances justifying an ex parte order has been made out. In this respect the respondents relied on the matter of Absa Bank Ltd v Naudé N.O. and Others.[5]

[47] In the present application the applicant cited the three Vantage Companies (in business rescue), the two business rescue practitioners and the affected/interested persons of the three Vantage companies as the seventh-, eighth- and ninth respondents respectively. The application was served on all the respondents by email

[48] In the notice of motion, at prayers 4, 5 and 6 thereof, the applicant sought leave to cite the affected persons collectively as it has done. In terms of prayers 7 and 8 of the notice of motion, the applicant also sought leave to effect service of the anticipated proceedings for final relief on the affected persons of the three Vantage Companies by way of e-mail as well as through publications in various newspapers.

[49] It was argued on behalf of the respondents that it has been firmly established that once a business rescue plan has been approved, every person who acquires a right in terms of such business rescue plan must be joined as a party in the proceedings in which an order is sought that may impact on the implementation of the approved business rescue plan. In this respect reliance was placed on the matter of Absa Bank Ltd v Naudé N.O..[6] The respondents submitted that the order which the applicant seeks will undoubtedly affect the rights of the persons who have already

benefitted and are entitled to draw a benefit from the approved business rescue plans, and therefore it means that they have to be joined as respondents.

[50] It was further contended that on the aforesaid basis, the applicant is not even entitled to an interim order without properly citing all the affected/interested persons and serving this application on each of them. Furthermore, affected/interested parties enjoy the right to be informed by the Sheriff in respect of the nature and exigency of the application, and that an advertisement in a newspaper or an e-mail is a poor substitute for this right. It was submitted that these considerations should apply with great force for the employees of the companies in business rescue, as at least some of them are in all probabilities not likely able to read English newspapers, and whose first or even second or third language is not English. These affected/interested parties also do not have access to computers, printers or the

internet.

- [51] The applicant submitted that the issue of group citation of the seventh- to ninth respondents, as well as notices to affected/interested parties, can be sufficiently addressed by the issuing of a rule nisi. In this respect a draft order was presented to court (hereinafter “Rule nisi draft order”). The applicant categorised the respondents’ complaint not to be that the creditors, although their full particulars are unknown to the applicant, have not been joined, but that they have not been named and cited individually. It is thus incorrect to term the respondents’ complaint as one of non-joinder, but ought to be that of inadequate joinder.
- [52] Reliance was placed on the matter of *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission*[7] wherein the Appeal Division (as it then was) confirmed that the practice of issuing rules nisi is firmly embedded in procedural law, and that it is usually resorted to in matters of urgency when applicants seek leave to protect their immediate interests, and that such a useful procedure should be encouraged in circumstances where the applicant can show *prima facie* that its rights have been infringed and that it will suffer real loss or disadvantage if it is compelled to rely solely on the normal procedure for bringing disputes to court by way of notice of motion or summons.
- [53] In *Ex parte Saiga Properties (Pty) Ltd*[8] it was confirmed that the practice of issuing a rule nisi developed as a result of (amongst others) the difficulty of identifying substantial numbers of interested parties and the high

cost of serving such applications on them, even if identified. So too the use of a rule nisi was approved by the Supreme Court of Appeal in circumstances where interested parties were not joined to the proceedings, which was contended is not the case in the present matter. The Supreme Court of Appeal in the matter of *Mashike N.O. v Senwesbel Ltd*[9] stated as follows at par [22]:-

“Where there is a non-joinder the court may direct that steps be taken to let the matter stand over until the interested parties have been joined or have indicated they would be bound by the judgment. One way is to let the matter stand over until interested parties have filed their consents to be bound. Another is to issue a rule nisi rather than compelling the applicant to start proceedings de novo.”

- [54] The matter of *Mashike N.O.* (supra) confirms the approach that was adopted in judgments such as *Ex parte Jacobson: In re Alec Jacobson Holdings (Pty) Ltd* 1984 (2) SA 372 (W), where the court resorted to the issuing of a rule nisi to cure the non-joinder of the Minister, whom the court regarded as an interested party.
- [55] The applicant argues that the issuing of a rule nisi would serve as a formal invitation to affected/interested parties to join the application. Should the affected/interested parties, despite the formal notice, not become parties to the proceedings, their inaction may then be deemed to be either a waiver of their rights to be joined and/or as a consent to be bound by the court’s judgment. In aforementioned respect reliance was placed on the matter of *Fluxmans Incorporated v Lithos Corporation of South Africa (Pty) Ltd and Another*. [10]

[56] The matters of Naudé[11], Golden Dividend[12] and Kransfontein[13] are distinguishable from the current matter. In each of these cases the courts of first instance granted final relief and there was no attempt to give notice to the interested or affected parties. So too the relief was that of setting aside a business rescue plan, where in the current matter the applicant seeks the status quo to be preserved. The Naudé matter (supra) is further distinguishable on the fact that the applicant does not seek the undoing of payments nor for the undoing of the vote. What it seeks is the preservation of the status quo and to challenge the actions by the business rescue practitioners of, as a matter of fact, undoing the creditors' vote unilaterally.

None of the creditors' or interested parties' rights will be affected in the manner it was affected in the matters of Naudé, Golden Dividend and Kransfontein.

[57] At worst for the creditors and affected/interested parties, payment in terms of the unilaterally amended business rescue plans would be delayed, the prevailing circumstances being that payment has already been delayed for months. Had the business rescue practitioners not unilaterally amended the adopted business rescue plans, the position would have been much different.

[58] The applicant does not know the individual names of all the affected/interested persons and where these affected/interested

persons reside. The business rescue practitioners claim that there are approximately 800 or so affected/interested persons, and many of them are no longer within the Mpumalanga Province. However, they do not disclose the identities of these affected/interested persons, where they can be found or via which method they can be communicated with.

[59] The applicant has in its possession only the e-mail addresses of the affected/interested persons. Its common cause that these email addresses have customarily been used by the business rescue practitioners when communicating with the affected/interested

persons. These are the same e-mail addresses used by the business rescue practitioners when the notice of the amendment of the adopted business rescue plans were distributed by the, and also the e-mail addresses used by the applicant in serving this application on all the affected/interested parties.

[60] Email has always been the only method of communication utilised by the business rescue practitioners, therefore the argument on behalf of the respondents that the affected/interested persons did not have access to e-mails or even computers, is flawed.

[61] The matter of Amalgamated Engineering Union v Minister of Labour[14] which the respondents argue is the locus classicus of the law of joinder on which the matters of Naudé, Golden Dividend and Kransfontein are based, supports the proposal by the applicant that a rule nisi can be issued to address the concerns raised by the respondents. In this respect reference was made to page 659:-

“...a third party may have a direct and substantial interest without either having that party joined in the suit or, if the circumstances of the case admit of such a course, taking other adequate steps to ensure that its judgment will not prejudicially affect that party's interests..”

- [62] It was submitted on behalf of the respondents that the applicant notwithstanding ought to have asked the business rescue practitioners for details of all the affected/interested parties and creditors and engaged the relevant unions for the purposes of citation and effect service on each affected/interested party by means of the sheriff. I am in agreement with the applicant that it would have been impossible to obtain details of 800 persons overnight. What was done, was commensurate with the available time and in the prevailing circumstances. The applicant did not merely ignore the interested or affected parties, but utilised the emails known to it and catered further as set out in the notice of motion.
- [63] Although it is so that in perfect circumstances it would have been apposite to join each of the affected/interested parties and serve the documents on them individually by the Sheriff, group citations was approved by the Constitutional Court in the matter of Occupiers of Mooiplaats v Golden Thread Ltd and Others.[15] Although the matter of Commissioner for the South African Revenue Services v Louis Pasteur (Pty) Ltd (In business rescue) and Others[16] dealt with substituted service it explained what was required to sufficiently identify the common denominator which qualifies the

individuals as a group, and also that the group has a direct and substantial interest in the outcome of the matter. It was held as follows:-

“The practice to cite persons with a direct interest in litigation collectively as a group without identifying them individually, is not foreign to our current constitutional dispensation, which has received the imprimatur of the Constitutional Court. This practice has been approved notwithstanding the peremptory provision in Rule 17(4) of the Uniform Rules of Court.

The required approach to be followed by the court is a broad approach requiring the affected parties to be sufficiently identified having determining that they have a direct and substantial interest in the subject matter. The court is satisfied that the applicant has identified the affected parties sufficiently that qualify as parties that have a direct and substantial interest in the applicant's

application.”

- [64] In summation the Rule nisi draft order seeks preservation of the status quo, that the business rescue practitioners be directed to furnish the applicant's attorneys with particulars of the creditors, where after the applicant to cause copies of both the order and application be served by way of e-mail, SMS or delivery by hand to said persons. Publication in the Lowveld Newspaper and the Mpumalanga News, with specific provision for free copies of the application to be made available to any party who displays an interest in being cited as an individual respondent.

- [65] It is clear that a balance needs to be struck between the rights and interests of the applicant and the affected or interested parties. I acknowledge that finality of the matter is of utmost importance to all interested or affected parties, however it cannot be blindly pursued in circumstances where there is a challenge to the conduct of the business rescue practitioners and legality of the manner in which the business rescue process has been undertaken.
- [66] I am accordingly of the view that (provided the applicant establishes a case for interim relief) the issuing of a rule nisi will sufficiently protect any interests and rights the creditors and affected/interested parties have in this present application. It will constitute an adequate step to ensure that the judgment in the matter will not prejudicially affect the creditors' and other affected/interested parties' rights and provide all wanting parties an opportunity to participate and be heard before a final order is granted.

Locus Standi

- [67] It was initially argued on behalf of the respondents that the applicant did not have locus standi in respect of all three of the Vantage Companies, as the applicant is a mere creditor of VGL. Pursuant to a concession that the applicant enjoyed locus standi in respect of both VGL and Barbrook, the only issue of contention was whether the applicant therefore has locus standi in respect of Mimco.
- [68] The applicant argued that the Roelofse AJ order was given in respect of all three Vantage Companies, and as such they are judicial creditors in terms of that order. The applicant further relied thereon that it is an offeror which had expended millions of Rands in preparing and proposing amended business rescue plans for the Vantage Companies. Therefore the applicant enjoys the right to be treated fairly and equally to any other person that had made an offer to the Vantage Companies and to have its offer presented to the creditors for a vote.
- [69] It is common cause that the business rescue of the Vantage Companies are indivisible, and as found by Roelofse AJ, all three Vantage Companies (in business rescue) should be rescued in unison.
- [70] In order for the applicant to demonstrate that it has standing, it has to establish that it has a direct interest in the relief claimed. The Roelofse AJ order incorporates Mimco. As such it is unavoidable that the applicant enjoys standing in respect of Mimco, being a Vantage company and interlinked in the business rescue proceedings of Barbrook and VGL. The processes undertaken since the granting of the order by Roelofse AJ do not distinguish between the three Vantage Companies. I therefore find the respondents' attempt to now distinguish between Barbrook, Mimco and VGL are superficial, in light of the undisputed fact that the Vantage Companies' business rescue plans are interrelated and that the success of one depends on that of the other.

[71] Furthermore, considering the extent of engagement between the applicant and the business rescue practitioners, the applicant in my view enjoys the entitlement to challenge what it believes to be an unlawful act by the business rescue practitioners, which would impact the applicant.

Section 133(1)(b) of the Act

[72] The respondents did not particularly challenge the relief sought by the applicant in terms of Section 133(1)(b) of the Act. In terms of *Arendse and Others v Van der Merwe N.O. and Another*[17] it is clear that the moratorium is not an absolute bar to legal proceedings being instituted or continued against a company under

business rescue, as the court retains a discretion to lift or to maintain a moratorium.

[73] With due regard to the circumstances of the case, the business rescue proceedings have been ongoing for years, the previous court order granted, and the time, effort and financial contributions made by the applicant, I exercise my discretion in favour of the applicant to ensure that this dispute is attended to and resolved without delay.

Relief sought

[74] Although the applicant initially sought interim interdictory relief pending the institution of further legal proceedings, the applicant asserted that the legal issues were fully ventilated before the court and are therefore dispositive of the entire application. It was contended for this reason the applicant would be entitled to final relief if the legal issues are decided in its favour and if it is able to establish an injury actually committed in the absence of an alternative remedy. In this respect reliance was placed on the matter of *National Gambling Board v Premier, KwaZulu-Natal and Others*[18] :-

“[52] Ordinarily, an interim interdict is appropriate when the facts which establish a right to a final order are in dispute. It has been held in some cases that an interim interdict is not appropriate when the facts relating to a final order are not in dispute. In such a case the court will proceed to decide the legal issue pertaining to the main dispute. It will then issue or refuse a final order. In other cases it has been held that there may be circumstances in which the court will issue an interim interdict even if the facts pertaining to the main dispute are not in dispute.”

[75] The applicant further placed reliance on the matter of *Fourie v Olivier en ‘n Ander*[19] and the unreported case of *Khumalo and Another v South African Reserve Bank*.[20] In aforementioned it was held that notwithstanding the formulation of relief in a notice of motion, and the formulation of a causa in the founding affidavit, the parties agreed that the relevant facts are before the court, that there are no real disputes of fact and that if the court was to uphold the applicant’s contention regarding ultra vires and/or Regulation 22(d) review, the court should simply grant a final order declaring the notice invalid.

[76] In light of that set out above in respect of the citation and service on the creditors and affected/interested parties, I am not satisfied that this matter ought to be dealt with in a similar fashion as the matter relied on by the applicant above. Although the issues in dispute are of a legal nature, I am of the view that the creditors and affected/interested parties enjoy a right to be heard before a final order is granted against them. Similarly, the value of their contribute should not be pre-judged.

Has the applicant made out a case for interim interdictory relief?

[77] In terms of the legal framework as set out in Sections 145(1), 150, 150(2), 150(5), 151(1), 151(4) and 152 of the Act, a business rescue practitioner cannot unilaterally make amendments to an adopted business rescue plan. A business rescue practitioner, only has those powers expressly conferred upon him or her by the Act, and thus the practitioner may only perform acts which the Act expressly permits him or her to perform. No provisions exist in the Act which afford a business rescue practitioner the right to amend a business rescue plan which had been adopted by the creditors or reserved such a right for him or her.

[78] Section 152(1)(d)(ii) of the Act only allows a business rescue practitioner the right to amend a business rescue plan before it has been adopted by the creditors. In *Kransfontein Beleggings (supra)*, it was held that not even a court can alter an approved business rescue plan and

“... foisted on creditors a plan which they have not discussed and voted on at (a meeting held in terms of Section 152 of the Companies Act, 71 of 2008)” and further that “the only plan which practitioners can implement is one adopted by creditors in accordance with Section 152 of the Companies Act.”

[80] Sher AJ further held that any other interpretation would make nonsense of the process provided for in the Act whereby control over the rescue proceedings is to be exercised by a democratic majority vote of the creditors and affected parties, and would allow the business rescue practitioner to unilaterally reduce or compromise creditors' claims to the prejudice or even perhaps to increase certain claims at the expense of others, thereby exposing the whole process to uncertainty and possible corruption.

[81] I cannot agree with the respondents contention that the Booyesen judgment is wholly distinguishable and that as the source of the competence to make changes to the plans arise squarely from the

approved plans the democratic process mentioned in the Booyesen judgment does not find application.

[82] Even if I am wrong in above respect, and Clause 9 provides the respondents with the authority contended for said clause only permits the business rescue practitioners to make amendments which would not prejudice any affected/interested persons. In contrast to the applicant's offer, the Vantage proposal does not make provision for development of a new access point and the re-opening of the Lilly Mine. Thus the amendment made changes the purpose and effect of the business rescue from securing the continues existence of the

companies to that of securing a better return for creditors.

- [83] Even if the business rescue practitioners were legally entitled to unilaterally amend the adopted business rescue plans in the manner they went about doing so, they could not do so in the face of the Roelofse AJ order.
- [84] It is common cause that Roelofse AJ ordered the business rescue practitioners to prepare proposed amendments to the adopted business rescue plans, to present such plans to the creditors and to allow the creditors to vote on those amendments. This placed a further duty on the business rescue practitioners to seek the creditor's approval when amendments to the plans are made.
- [85] I am satisfied that the applicant has established at least a prima facie right.
- [86] The effect of the business rescue practitioners' action is that the creditors are deprived of an opportunity to vote on the various offers in existence. This in itself embodies a well-founded apprehension of irreparable harm to not only the applicant but the greater body of creditors and affected/interested parties.
- [87] It was argued that the applicant failed to expressly deal with the third requirement, being balance of convenience, but same is evident. The potential consequence of allowing the continued implementation of an amendment which on the face of it, it appears to have been taken not only by questionable conduct but unilaterally, outweighs the prejudice that the creditors and affected/interested persons may or may not suffer by further delay of the implantation of the business rescue plans.
- [88] Differently put, should it be found that the business rescue practitioners indeed acted unlawfully, all the actions taken in terms of such act would be tainted. Undoing such a situation will be undoubtedly catastrophic to all involved.
- [89] I am satisfied that the applicant has no other satisfactory remedy, other than to preserve the status quo in order to effect a proper ventilation of the dispute between the parties.
- [90] On aforementioned basis, the order was granted as per paragraph [5] herein above.
- [91] These reasons were delayed for some time, the circumstances of which warrants mention. Shortly after the order was granted and on 2 March 2021 a request for reasons in respect of the rule nisi interim interdictory order was sought by the respondents. The reasons were prepared in draft form by the end of the same week.
- [92] Before having an opportunity to settle same, the court file was uplifted, for what I was informed to be, the purpose of giving effect to the order. The court file was to be returned for the reasons to be settled.

- [93] The court file was not returned, and could not be traced until 19 April 2021. On locating it, the court file was not made available as the file had to be made available to the legal representatives for indexed and paginated by the for the return date of 4 May 2021. The parties were so informed in response to an enquiry received.
- [94] The return date hearing was allocated to the Judge President, who received the file after preparation in terms of the practise directives. The Judge President handed down his judgment at the end of May 2021. The court file was still not available as the judgment by the Judge President was followed by multiple further hearings during the months of June 2021, July 2021.
- [95] The last of the judgments were finalised and handed down during the last week of July 2021. The file was then again requested without success. Adding to the difficulty to secure the court file was the fact that there are three different case numbers dealing with the same or similar parties each case involving more than one physical court file.
- [96] During the week of 19 August 2021, the court file bearing case number 549/2021 was made available, same however only contained the leave to appeal application documents and not the two lever arch files with this application. Following this, four different files all bearing the correct case number were made available but none of them containing the application. On 27 August 2021 the file containing the application was delivered and these reasons were able to be finalised without a day.

GREYLING-COETZER AJ

- [1] The original relief was adapted per the draft orders dealt with herein below.
- [2] Argument concluding on 25 February 2021
- [3] 2017 JDR 1577 (SCA)
- [4] 2017
- (4) SA 51 (WCC)
- [5] 2016
- (6) SA 540 (SCA)
- [6] 2016
- (6) SA 540 (SCA). This judgment was considered in the matter of Golden Dividend 339 (Pty) Ltd v Absa Bank Ltd 2016 JDR 0965 (SCA) and Kransfontein Beleggings (Pty) Ltd v Corlink Twenty Five (Pty) Ltd 2017 JDR 1577 (SCA)
- [7] 1982
- (3) SA 654 (A)

- [8] 1997
- (4) SA 716 (E)
- [9] 2013 JRD 0662 (SCA)
- [10] 2015
- (2) SA 322 (JG) at par [30]
- [11] 2016
- (6) SA 540 (SCA)
- [12] 2016 JDR 0965 (SCA)
- [13] 2017 JDR 1577 (SCA)
- [14] 1949
- (3) SA 637 (A)
- [15] 2012
- (2) SA 337 (CC) at paragraph [4]
- [16] Unreported, case number 12194/2017 (2018) ZAGPPHC 287 (4 May 2018)
- [17] 2016
- (4) All SA 48 (GJ) at par [15]
- [18] 2002
- (2) SA 715 (CC)
- [19] 1971
- (3) SA 274 (T)
- [20] Case number 50711/08 (handed down on 19 February 2008)
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