

SOUTH AFRICA / JUDGMENT

Central Rand Gold South Africa (Pty) Limited and Another v Central Rand Gold Limited and Another (45200/2011) [2017] ZAGPPHC 275 (13 June 2017)

[2017] ZAGPPHC 275

COURT

North Gauteng High Court, Pretoria

BEFORE

N Janse Van Nieuwenhuizen

CASE / FILE NUMBER

45200/2011

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH AFRICA

Case Number: 45200/2011

13 June 2017

REPORTABLE

In the matter between:

CENTRAL RAND GOLD SOUTH AFRICA (PTY) LIMITED First

Applicant

CENTRAL RAND GOLD NETHERLANDS ANTILLES N.V. Second

Applicant

CENTRAL RAND GOLD LIMITED Third

Applicant

And

PUNO GOLD INVESTMENTS (PTY) LIMITED Respondent

JANSE VAN NIEUWENHUIZEN J

[1] The applicants seek an order in the following terms:

“1. Declaring valid and enforceable:

1.1 the funding call directed by the first applicant and second applicant to the respondent on or about 17 September 2008 for payment by the respondent of R 72 326 573.47; and

1.2 the call option granted by the respondent in favour of the second applicant in respect of the respondent’s shares in and claims

against the first applicant and the exercise thereof on or about 16 February 2009 by the first applicant and

1.3 The discharge, in consequence of the granting of the relief in paragraph 1.1 above of the interdict obtained by the respondent against the first applicant and the second applicant on 13 May 2009 under 2009/14920, which interdict prohibits the first applicant and the second applicant from asserting their rights under the shareholder’s agreement pending the determination by means of an arbitral award or court order of the validity and enforceability of such rights,;”

[2] In the alternative the applicants pray that the issues referred to in prayer 1.1, 1.2 and 1.3 be referred to arbitration. The parties are in agreement that the matter should be determined in these proceedings and as a result the relief claimed in the alternative

falls away.

PARTIES

[3] The first applicant is Central Rand Gold South Africa (Pty) Ltd (“CRGSA), a company duly registered and incorporated in terms of the company laws of the Republic of South Africa.

[4] The second applicant is Central Rand Gold Netherlands Antilles N.V. (“CRGNV”) a company duly registered and incorporated in terms of the company laws of Curaçao.

[5] The third applicant is Central Rand Gold Limited (“CRG Ltd”), a company duly registered and incorporated in terms of the company laws of Guernsey and registered in the Republic of South Africa as an external company. CRG Ltd is listed on both the London Stock Exchange and the Johannesburg Securities Exchange.

[6] The respondent is Puno Gold Investments (Pty) Ltd (“Puno”), a company duly registered and incorporated in terms of the company laws of the Republic of South Africa.

[7] CRGNV is a wholly-owned subsidiary of CRG Ltd. CRGNV owns 74% of the issued share capital in CRGSA and Puno 26%.

[8] Puno obtained its shareholding by subscribing for 260 ordinary shares at par value in the issued share capital of CRGSA and paid the total subscription price of R 260, 00 to CRGSA.

- [9] Puno, furthermore and in terms of cession agreement, acquired from CRG Ltd a loan account claim in the amount of R 39 068 963, 00 against CRGSA. In consideration for the cession and assignment of the aforesaid portion of the loan account claim, Puno had to pay CRG Ltd the amount of R 39 068 963, 00.
- [10] Prior to the cession CRG Ltd had already advanced some R 150 265 244, 00 on loan account to CRGSA. Subsequent to the cession of 26% of the loan account claim to Puno, the remaining 74% vested in CRGNV.

CAUSE OF ACTION

- [11] The applicants' claim is based on a Shareholders Agreement entered into between the parties on 14 June 2007. The present dispute between the parties revolves around the funding obligations of the shareholders in terms of the Shareholders Agreement.
- [12] It is common cause between the parties that clause 11 of the Shareholders Agreement provides for the funding requirements of CRGSA.
- [13] The applicants maintain that Puno failed to honour its funding obligations in terms of the Shareholders Agreement and allege that

they were as a result entitled to exercise the call option provided for in clause 11.9 of the Shareholders Agreement.

- [14] Puno denies that the funding call was validly made and furthermore denies that the applicants were entitled to exercise the call option.

FACTS

- [15] The facts underlying the applicants' cause of action are mostly common cause between the parties. The facts that are in dispute will be fully dealt with when Puno's defences are considered.
- [16] Clause 11.1 and 11.2 provides for the funding options available to CRGSA and reads as follows:

"11.1 The funding requirements of CRGSA as set out in the work programme and budget from time to time will, subject to the provisions of 10, in the first instance be provided by third party funders based on CRGSA's own creditworthiness and on the terms acceptable to the Board.

11.2 Should CRGSA fail to obtain the requisite funding in terms of 11.1 such funding shall be provided by the Shareholders by way of shareholder loans to CRGSA, pro rata to their respective Shareholdings. Such funding shall be provided within 60 days after the Board shall have requested such funding from the Shareholders by notice in writing to them."

- [17] On 14 May 2008, the board of CRGSA, approved a work programme and budget for the period 1 January 2008 to 31 December 2008.

[18] In order to obtain funding for the work programme and budget, the board resolved at the same meeting to mandate Rockbury Services

Incorporated (“Rockbury”) to obtain third party funding. This resolution accords with the provisions of clause 11.1 of the Shareholders Agreement.

[19] It is common cause between the parties that Rockbury was not successful.

[20] Consequently and on 17 September 2008, the board of CRGSA made a funding call, in terms of clause 11.2 of the Shareholders Agreement, on its shareholders to provide the necessary funding.

[21] The call funding letter to Puno reads inter alia as follows:

“As you are aware the Budget, calculated for the period of 01 January to 31 December 2008 is an aggregate amount of R 563,261,568.38.

Although shareholder funding is required for the entire amount and as a result of the inability to procure third party funding, the Board of CRGSA hereby makes an initial call that Puno provide its pro rate portion in respect of the following amounts: actual expenses incurred for the period of 01 January to 30 June 2008 which amount to the sum of R 141,644,142,70, forecast expenses for July 2008 amounting to R 60,173,313,70 and forecast expenses going into August which amount to R 76,361,672.32.

The three amounts above total to R 278,179,128,72 in aggregate and Puno’s pro-rata portion thereof amounts to the sum of R 72,326,573,47.”

[22] In a letter dated 20 October 2008, Puno disputed the validity of the call and invoked the Dispute Resolution Mechanisms contained in clause 30 of the Shareholders Agreement.

[23] The arbitration attempts were not successful and Puno steadfastly refused to adhere to the funding call. Consequently, the applicants opted to invoke the provisions of clause 11.7 of the Shareholders Agreement.

[24] Clause 11.7 reads as follows:

“Should the shortfall referred to in 11.6 not be provided by the other Shareholder, the Shareholding of the Defaulting Shareholder shall be reduced to the extent determined in accordance with the following formula:

where:

X equals the extent of the reduction, expressed as a percentage, which is to be determined;

A equals the amount of the unpaid cash call;

B equals the total shareholders loans provided by Puno and CRGNV together to CRGSA plus the amount of the current cash call on Shareholders for additional funding

and the Non-Defaulting Shareholder's Shareholding shall be increased to the extent of the reduction of the Defaulting Shareholder's

Shareholding as determined in terms of the above formula. The dilution in terms of this clause 11.7 shall be achieved by the issue

of Shares at a price equal to the par value of such Shares to the Non-Defaulting Shareholder to the extent that the Defaulting

Shareholder's Shareholding shall reflect its reduced Shareholding."

[25] The applicants stated in the founding affidavit that A and B of the formula consisted of the following amounts:

A equalled R 72 326 753, 47 (being the amount of the unpaid cash call);

B equalled R 428 444 371, 03 [R 150 265 242, 31 (the total shareholder's loans provided by Puno and CRGNV) plus R 278 179 128, 72 (being the amount of the total cash call).

[26] Applying the aforesaid amounts to the formula, Puno's shareholding was diluted to 16, 88%.

[27] In view of the aforesaid, the applicants exercised the call option provided for in clause 11.9. Clause 11.9 reads as follows:

"If the operation of 11.7 results in Puno's Shareholding diluting to a level below that which is required to maintain the Prospecting

Rights under the MPRD Act, then prior to such dilution being implemented and as an alternative to the provisions of 11.8, CRGNV

shall be entitled, in its sole discretion and by at least 90 days' written notice to CGRSA and Puno, to exercise a call option to acquire the then entire interest of Puno in CRGSA at a price equal to: ..."

[28] The letter informing Puno of its decision was 16 February 2009 and reads as follows:

"i) It (CRGNV) had provided its pro rata funding obligation by 17 November 2008;

ii) Puno had failed to meet its obligations in terms of the call;

iii) any dilution of Puno's shareholding in accordance with the provisions of clause 11.8 of the shareholders agreement with result in Puno diluting below the requisite level of Black Economic Empowerment required by CRGSA to maintain its rights as referred to in the shareholders agreement."

[29] Consequently Puno was afforded 90 days' notice of CRGNV's intention to exercise the call option.

[30] This resulted in Puno launching an urgent application to suspend the operation of both the funding call and the call option. CRGNV and CRGSA were cited as the respondents in the application.

[31] On 13 May 2009, Makhanya J granted the following order:

“1. Pending the final determination by arbitration award or court order of:-

1.1 the validity and enforceability of the fund call by the Respondents on 17 September 2008, for payment by the Applicant of the sum of R 72 326 573,47 to the Second Respondent.

1.2. the validity and enforceability of the call option furnished by the Applicant in favour of the First Respondent in respect of the

Applicant’s shares in and claims against the Second Respondent including the valid exercise of such option by the Second Respondent.

The Respondents are interdicted from:-

1.3. proceeding with the said call and with the exercise of the said option.

1.4. contending that they are lawfully entitled so to do save in the relevant proceedings.”

PUNO DEFENCES

[32] Puno raised several defences in respect of both the validity of the funding call and the exercise of the call option. The defences in respect of the funding call will, first of all, be considered and thereafter the defences in regard to the exercising of the call option.

A. FUNDING CALL

First defence: Rectification

[33] Puno contends that the Shareholders Agreement does not reflect the true intention between the parties and as a result the agreement was rectified during 2008 to “clarify” the position.

[34] The facts underlying the alleged “rectification” are not common cause between the parties and calls for a careful analysis to establish whether a genuine factual dispute as contemplated in *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949*

(3) SA 1155 (T) arises in respect of the dispute.

Puno’s version

[35] In support of its contention that the Shareholders Agreement between the parties was rectified, Puno relies on a letter on the letterhead of CRGSA addressed to its auditing firm Moore Stephens MWM Inc. The letter purports to emanate from both CRGNV and Puno in their

capacities as shareholders of CRGSA and makes provision for the signature of both entities.

[36] The letter pertains to the Subscription and Purchase of Claim Agreement, the Shareholders Agreement and the Loan Agreement and in essence confirm the following:

- i. the agreements do not correctly reflect the intention of the parties at the time of entering into the agreements, in that it was always the intention of the parties that CRG Ltd will fund the exploration expenditure of CRGSA fully and that Puno will not be called upon to make exploration funding available during this period;
- ii. as a result, the agreements should not have provided for a cession of 26% proportional claim which CRG Ltd had against CRGSA to Puno;
- iii. consequently the agreements should not have reflected any loans between the parties;
- iv. pursuant to discussions between the parties as encapsulated in an agreement signed by the parties on 27 April 2008, it has been agreed that the agreements need to be amended accordingly;
- v. any exploration funding made available by CRG Ltd to CRGSA shall not constitute a loan by CRG Ltd to CRGSA; and
- vi. as soon as a Bankable Feasibility Study in respect of CRGSA's proposed mining activities has been completed and approved by the Company, the funding provisions of the Shareholders Agreement will apply.

[37] According to Puno, CRGSA requested that the letter be signed and returned to CRGSA. Puno complied with the request and returned the letter to CRGSA on 27 April 2008. On the same date, Puno also signed an agreement ("amendment agreement") reflecting the contents of the letter, which agreement was drafted and forwarded by Mr Neuwerth ("Neuwerth"), the company secretary of the Central Rand Gold group, to Puno.

[38] Both the letter and amendment agreement are attached to the answering affidavit deposed to by Mr Goosin ("Goosin"), chairperson of Puno. In support of Goosin's averment that Neuwerth drafted and forwarded the letter and amendment agreement, he relied on an e-mail forwarded on 18 April 2008 by Neuwerth to Priyesh Modi ("Modi") from Bowman Gilfillan, Puno's attorneys of record.

[39] Puno contends that the agreement and letter constitutes an offer from the applicants, which offer was accepted by Puno when it signed the letter and amendment agreement. In the premises the agreement was rectified/clarified and as a result the applicants' funding call was not, in terms of the rectified agreement, valid.

[40] The validity of the amendment agreement which according to Goosin was concluded on 27 April 2007, is somewhat tainted by the following

e-mail forwarded by Modi on the evening of 27 April 2008 to Tabacks, the applicants' attorney at the time:

“As discussed, our client is prepared to sign a letter along the following lines: ‘Pursuant to the position of Puno represented by Mr N Majopelo at the board meeting held on 22 April 2008, Puno has noted the shareholder loans reflected in the financials; however, we dispute the shareholder loans and we reserve our rights in this regard.’ This is conditional on the Chairperson of CRG Limited and the CEO of CRGSA agreeing to the following conditions in writing:

1. CRG, CRGSA and CRGNV commit to negotiating and finalising issues relating to shareholders loans as contemplated in the document emailed on 27 April 2008 to yourself, by the end of May 2008.
2.
3.

Please note that my client is available to sign a document to the above effect by this evening or only after 7 May 2008.” (own emphasis)

[41] The e-mail does not confirm that the parties had reached an agreement that was reduced to writing and signed by Puno on 27 of April 2008. Be that as it may, Puno contends that a binding agreement was entered into on 27 April 2008.

The applicant’s version

[42] In response, Neuwerth denied that the letter and agreement purportedly signed by Puno on 27 April 2008 was attached to the e-mail he forwarded to Modi on 18 April 2008.

[43] Neuwerth explains that the exchange of correspondence between the parties was as a result of Puno’s refusal to confirm the extent of its loan account. In the result, Moore Stephens could not finalise and lodge the applicants’ year-end financial reports for 2007, which failure would have had a devastating effect on the applicants as the listing of CRG Ltd was dependent upon the timeous lodging of the reports.

[44] Faced with this dilemma, the directors of the applicants considered having Puno’s loan “written off” to remove the loan from Puno’s books of account for reporting purposes.

[45] Neuwerth alleges that, against the aforesaid background, he forwarded a draft letter and a marked-up draft memorandum of understanding (“MOU”) to Modi on 18 April 2008.

[46] It was not a final document. On 25 April 2008, Neuwerth received an amended MOU and letter, both in marked-up format. The amended

documents contained significant changes made by Puno and the applicants were not willing to sign same.

[47] The draft agreement sent by Neuwerth on 18 April 2008, furthermore included the following clause:

“For the avoidance of any doubt, and notwithstanding anything to the contrary in this agreement, due to the fact that the terms of this agreement is generic, the Parties record that until specific written amendments are made to any previously concluded agreements as are required to give effect to the principles recorded in this agreement, no legally enforceable right and obligations pertaining to the proposed amendments contained in this agreement shall arise.”

[48] I pause to mention, that the Shareholders Agreement has a non-variation clause, providing that no amendment to the agreement shall be valid unless reduced to writing and signed by the parties.

[49] It appears that Moore Stephens had some reservations in respect of the proposed amendment. In an e-mail by Neuwerth to Modi on 23 April 2008, he expressed Moore Stephens’ concern as follows:

“In connection with the ZAR 39 million odd which was the subject of a loan agreement entered into on 15 June 2007 between Rand Central Gold Limited and Puno funding their 26% share in the loan claim against Central Rand Gold SA, our auditors, Moore Stephens have stated categorically that in order for the loan to be reversed out of the books i.e. for accounting purposes no loan was made to Puno by Central Rand Gold Limited, they will need to receive a letter signed by Puno confirming that the loan agreement entered into during June 2007 were at the outset not intended to be entered into.

Their concern is and they have queried as to why Puno and Central Rand Gold, having legal counsel, chose to enter into such loan agreement and now almost a year later are stating that it was not their intention to enter into the agreement.”

[50] Consequently, Neuwerth contends that it was common cause between the parties that the only reason for the proposed amendment was for auditing purposes. Apparently the applicants soon realised that the amendment was neither possible nor advisable in light of tax and other consequences.

[51] Notwithstanding the fact that the parties could not agree on the terms of an amendment, Modi dispatched the e-mail referred to supra to Tabacks on 27 April 2008 to which the two signed versions of the letter and MOU as amended by Puno was attached.

[52] In view of the aforesaid facts, the applicants contend that the shareholders agreement was not “rectified” and that it is the only and definitive memorial of the agreement between the parties.

Puno’s reply

[53] In response to the averments contained in the applicants’ answer, Goosin stated that he was not in the country at the time, had no independent recollection of the events and that he had relied on a reconstruction of the documents to support Puno’s version.

[54] Goosin contends that it was a bona fide error and refuted the applicants’ contention that he attempted to mislead the court.

[55] Goosin then proceed to refer in detail to other correspondence between the parties in support of Puno's assertion that the Shareholders Agreement was rectified. Needless to say, the version relied upon by Puno in the replying affidavit differs substantially from its initial version.

[56] Goosin alleges, inter alia, the following in the replying affidavit:

"12.25 The Respondent had no quarrel whatsoever with the terms of the Subscription and Purchase of Claim Agreement, but was challenging the amount of its indebtedness to the Third Applicant (CRG Ltd) and was insisting upon a full forensic audit in such regard.

12.26 The Applicants were seeking a way to avoid such forensic audit by contending for a reversal of the relevant loans which would result in the aforesaid position that the loans would be disclosed as being between the First (CRGSA) and Third (CRG Ltd) Applicants exclusively, without any involvement of the Respondent.

12.27 The proposed amendments to the terms of the Subscription and Purchase of Claim Agreement were not required or agreed to for auditing or accounting purposes. On the contrary, it had everything to do with the avoidance by the Applicants of a forensic audit. The proposed rectification of the Subscription and Purchase of Claim Agreement constituted an offer of settlement by the Applicants of the dispute raised by the Respondent in regard to its loan, coupled with the insistence by the Respondent on conducting a forensic audit. Such offer was accepted by the Respondent, resulting in the rectification sought by the Applicants."

Discussion

[57] In considering the versions of the parties, it is immediately disconcerting that Goosin had no hesitation to, under oath, give a

version, whilst on his own account he had no personal knowledge of what transpired. I agree with the applicants' contention that Goosin was not bona fide in proffering the initial version. His initial version pertaining to the rectification of the Shareholders Agreement is patently false.

[58] In the replying affidavit, Goosin, furthermore, admits the applicants' version of events as set out in its answering affidavit. This admission removes any dispute of fact and Puno simply did not make out a case for rectification in its "founding affidavit" (founding affidavit in the counter-application).

[59] To cure this problem, Goosin makes an about turn in the replying affidavit and relies on a total different reason for the rectification of the Shareholders Agreement.

[60] The second version does not support a claim for rectification, but rather that of an amendment to the existing Shareholders Agreement. The amendment, according to Goosin was ostensibly necessary because the applicants wanted to avoid a forensic audit.

[61] On the undisputed facts and Puno's own version, I have no hesitation in dismissing the defence of rectification.

Second defence: Absence of Bankable Feasibility Study (clause 18 of Shareholders Agreement)

[62] Puno contends that prior to any funding call being made, the provisions of clause 18 needs to be adhered to. This would first of all entail that a bankable feasibility study must be undertaken. Puno avers that it is common cause between the parties that such a study has not been done and thus a valid funding call could not have been made.

[63] In view of the fact that this clause of the agreement is common cause between the parties, the dispute pertaining to the correct

interpretation of the agreement is capable of being resolved on the papers.

[64] The golden rule applicable to the interpretation of a contract has been reaffirmed by the then Appellate Division as long ago as 1925 in *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1925 AD 245. Kotze JA stated the following at 261:

“[I]t is the duty of the court to construe [the parties’] language in keeping with the purpose and object which they had in view, and so render that language effectual. Such is the clear principle of our law. Thus Pothier (Obligations, para 91ff) citing the lex 219 de Verborum signif, 34 observes: ‘In agreements we should examine what is the common intention of the contracting parties, rather than the grammatical sense of the terms. Moreover we must construe the words in that sense which is most agreeable to nature of the agreement. These rules, which Van der Linden has taken over in his Manual, speak for themselves and are universally recognised.’”

[65] The Supreme Court of Appeal has recently in *G4S v Zandspruit Cash Carry* 2017

(2) SA 24 SCA, emphasised the following approach to the interpretation of a contract:

*“To determine whether or not the respondents’ delictual claims are time-barred, it is necessary to interpret the agreements and in particular clause 9.9 thereof. Whilst the starting point is the words of the agreements, it has to be borne in mind, as emphasised by Lewis JA in *Novardis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 (SCA) ([2015] ZASCA 111) para 27, that this court has consistently held that the interpretative process is one of ascertaining the intention of the parties-in this case, what they meant to achieve by incorporating clause 9.9 in the agreements. To this end the court has to examine all the circumstances surrounding the conclusion of the agreements, i e the factual matrix or context,*

including any relevant subsequent conduct of the parties.”

[66] In ascertaining the common intention of the parties it is important to have regard to the nature, purpose and context of the contract.

[67] Clause 18 should therefore be considered in the context of the agreement as a whole.

[68] As alluded to supra, clause 11 under the heading FUNDING deals extensively with the funding of CRGSA’s operations. The clause consists of nine sub-clauses and provides for a detailed approach to the obligations of the shareholders in respect of CRGSA’s funding requirements.

[69] Three distinct requirements are mentioned in clause 11.1:

- i. first, the clause pertains to funding requirements for “the work programme and budget from time to time”;
- ii. second, any call for funding from a third party funder will be based on CRGSA’s own creditworthiness; and lastly
- iii. any funding provided in terms of the clause must be on terms acceptable to the board.

[70] It is not a requirement that a bankable feasibility study must be obtained prior to a funding call being made in terms of the clause

11.1. The work programme and budget referred to in clause 11.1 is dealt with in clause 16 of the Shareholders Agreement.

[71] Clause 16 reads as follows:

“16.1 CRGSA shall upon an Initial Public Offering Prospectus for CRG being approved by the board of directors of CRG, prepare an Initial Work Programme and Budget which is designed to provide an overview of the scope and potential mineral resources contained in, or under the Project Area.

16.2 The Parties shall procure that CRGSA shall undertake the Initial Work Programme and Budget referred to in 16.1, substantially in accordance with its provisions, subject to amendments from time to time as approved by the Board.”

[72] Clause 18 of the Shareholders Agreement under the heading DEVELOPMENT OF A MINE TO EXPLOIT GOLD AND ASSOCIATED METALS ON THE PROJECT AREA reads as follows:

“Upon completion of the Bankable Feasibility Study and, if warranted in terms of the Bankable Feasibility Study, CRGNV and Puno shall enter into negotiations with a view to reaching agreement on the basis upon which a mine will be developed on the Project Area to exploit gold and associated metals. Funding of the mine development will be in accordance with the respective Shareholdings of the Parties at the time the decision to mine is taken. For this purpose the most tax efficient vehicle (including, amongst others, an unincorporated joint venture) for developing the mine as well as the financing requirements of the Parties will be taken into account.”

[73] Chronologically, therefore:

- i. Clause 11 pertains to funding required for a work programme and budget;
- ii. Clause 16 provides that a work programme and budget must be designed “to provide an overview of the scope and potential mineral resources contained in or under the Project Area”.
- iii. Thereafter and presumably dependent upon the results of the overview exercise, clause 18 provides for the development of a mine to exploit gold and associated metals.

- [74] Having regard to the express wording of the clauses supra, it is clear that a bankable feasibility study is not required prior to a funding call being made for the work programme and budget.
- [75] The conduct of the parties, furthermore, confirms their common intention expressed in the Shareholders Agreement.
- [76] At the board meeting on 14 May 2008, the work programme and budget was accepted and it was resolved to source third party funding in respect thereof as envisaged in clause 11.1.
- [77] A bankable feasibility study, as envisaged in clause 18, was not discussed at the board meeting nor was the undertaking of such a study recorded as a pre-requisite for the sourcing of third party funding.
- [78] The sequence in which the different phases of the business of CRGSA will be conducted as reflected in the Shareholders Agreement, is both logical and makes business sense.
- [79] Without first and foremost determining the scope and potential of mineral resources in the project area, before committing to the finances incumbent upon the full scale development of a mine, would be extremely risky and does not accord with sound business practice.
- [80] Puno's assertion that the provisions of clause 18 must first be met prior to the implementation of clause 11, is not borne out by the clear wording of the clauses and ignores the different stages of operation envisaged in the agreement.
- [81] Consequently, I am of the view that CRGSA did not have to obtain a bankable feasibility study prior to calling for third party funding in terms of clause 11.1 of the agreement.

Third defence: Third party funding was available

- [82] Puno alleges that CRGSA could have obtained funding from a third party as envisaged in clause 11.1. It failed to do so and consequently the provisions of clause 11.2 have not been triggered.
- [83] The applicants allege that the provisions of clause 11.1 were met and that the funding call was validly made.
- [84] The chain of events that preceded the funding call is not in dispute between the parties.
- [85] The board resolved on 14 May 2008 to mandate Gerard Holden of Rockbury to prepare a report concerning potential third party financiers that might be willing to provide funding for the work programme and budget on terms acceptable to the board. In providing the terms upon which third party funding must be sourced, the board made it clear that any form of equity funding would not be acceptable. The board's right to dictate terms upon which third party funding will be obtained emanates from clause 11.1 of the Shareholders Agreement.

[86] At a board meeting on 2 July 2008, a memorandum prepared by Rockbury was presented to the board. Although Rockbury had at that stage already identified eleven potential investors and had already started approaching them, the report stated that “responses received to date have generally indicated a lack of interest by Third Party financiers for this stage of the project”.

[87] On 24 July 2008, Rockbury provided an update at the board meeting. Rockbury indicated in the report that “securing third party (non-equity) funding for the budget from commercial banks or by using capital market instruments would be very difficult if not impossible”. The board resolved to notify Rockbury to proceed with the approaching of potential third party funders.

[88] Rockbury proceeded with its mandate and according to the founding affidavit, the following transpired:

“36.3 Rockbury had approached 11 (eleven) potential third-party funders financiers ‘outlining the board parameters of the funding

opportunity’. Those funders represented ‘a broad cross section of those active in the funding of the South African mining sector.

36.4 Only two of those eleven financiers submitted proposals to take up the offer to invest in CRGSA.

36.5 Both of the latter two financiers that submitted proposals were prepared to provide financing that did not meet the criteria set by CRGSA.” (reference to annexures omitted)

[89] In the premises, the board resolved on or about 17 September 2008 to make a funding call in terms of clause 11.2.

[90] Notwithstanding the aforesaid, Puno avers that CRGSA did not do enough to obtain third party funding. In support of this averment Puno relies on a letter from Macquarie First South Corporate Finance (Pty) Limited (“Macquarie”) dated 4 March 2008 and addressed to CRG Ltd’s financial director.

[91] The letter refers to CRG Ltd’s position to raise debt in US Dollars and South African Rands from South African and International Banks for its projects. The letter further indicates that CRG Ltd’s success in obtaining funding for its projects will depend inter alia on the status of a Bankable Feasibility Study.

[92] According to Puno, the above correspondence addressed to CRG Ltd clearly indicates that CRGSA would need a bankable feasibility study in order to obtain third party funding. CRGSA did not undertake such a study, which explains its failure to obtain third party funding. Furthermore, the Rockbury exercise was a mere guise and undertaken with the sole purpose of triggering the provisions of clause 11.2.

[93] In the final instance, Puno refers to a letter addressed by CRGSA to the Regional Manager of the Department of Mineral and Energy on 25 August

2008. The letter refers to a bankable feasibility study that CRGSA intends undertaking to obtain feature funding.

[94] Puno summarises its attitude towards the third party funding exercise in its answering affidavit as follows:

“59. In view of the above, it is respectfully submitted that the First Applicant (CRGSA) cannot be said to have failed in securing funding from third parties as provided for in clause 11.1 which is a prerequisite before any funding call can be made to shareholders of the First Applicant. In the circumstances, no obligation arose on the part of the Respondent to provide funding in terms of clause 11.2.”

[95] In response to Puno’s assertion and apart from the clear wording of clause 11.1 that third party funding will be provided “on terms acceptable” to the board, which terms were agreed upon at the board meeting, the applicants refer to a letter from Macquarie dated 10 August 2012 in which the following is stated:

“The Macquarie Proposal was neither intended to (nor should it be taken to) imply that any such Debt Financing Options would, in fact, be able to be secured by CRG. At no time did Macquarie, or do we.....express any view on the creditworthiness of CRG. The availability of any Financing Options would, as is always the case, have been subject to the assessment of a number of factors by each potential debt financing provider including, but not limited, to such providers’ assessment of CRG’s creditworthiness,

prevailing market conditions etc.”

[96] It is furthermore noteworthy that clause 11.1 specifies that the procurement of third party funding will depend on CRGSA’s own creditworthiness, whereas the Macquarie proposal was addressed to CRG Ltd and referred to its position in the market.

[97] In the premises, I am satisfied that the provisions contained in clause 11.1 was met and that CRGSA was entitled to make a funding call in terms of the provisions of clause 11.2.

Fourth defence: There was no need for a funding call alternatively the funding call was met by CRG Ltd

[98] The funding call made on 17 September 2008, comprised of the following amounts:

[98.1] R 141 644 142 to cover actual expenses incurred in the period 1 June 2008 to 30 June 2008;

[98.2] R 60 173 313 to cover forecast expenses for the period July 2008; and

[98.3] R 76 361 672 to cover forecast expenses for the period August 2008.

[99] The aggregate amount was R 278 197 128, 72 of which Puno had to pay R 72 326 573, 47 within 60 days, i.e. on or before 17 November 2008.

[100] Puno alleges that there was no need for a funding call because CRG Ltd had provided all the funding necessary for the operations of CRGSA. In support of the aforesaid allegation, Puno refers to the following note in the financial statements of the Gold Rand Group for 31 December 2007:

“Although general matters have been progressing as expected with our BEE partner Puno, there has recently arisen a dispute relating to procedural breaches of the CRGSA shareholders agreement. The dispute surrounds the allocation of intercompany loans which fund the budget and work programme and the incurring of, and level of, certain costs. We have tried to settle any disagreements amicably, but so far without success. The next step, if so required, is for the parties to refer the matter to arbitration pursuant to the dispute resolution mechanism under the shareholders agreement. We believe that ultimately our position will prevail. The directors believe that this will not have any material consequences in respect of the consolidated accounts of the group. Notwithstanding this position, we have pending the outcome of any dispute allocated 100% of the intercompany funding since execution of the shareholders agreement from the company to CRGSA. This additional 26% of intercompany debt excluding interest amounts to ZAR 29, 541, 700 (US\$ 4, 278, 795) between June 2007 and December 31, 2007 and ZAR 12, 161, 285 (US\$ 1, 611, 646) between January 1, 2008 and March 31, 2008.”

[101] The applicants explain in the replying affidavit that the allocation of additional funds by CRG Ltd to CRGSA was a direct cause of Puno’s obstructive attitude and its failure to honour its obligations in terms of the agreement between the parties.

[102] I pause to mention, that in terms of clause 11.3 of the Shareholders Agreement, any funding provided by CRG Ltd to CRGSA will be deemed to be a loan by CRGNV to CRGSA.

[103] When one has regard to the notes appearing on the financial statements, it is clear that the amounts allocated to CRGSA, was pending the finalisation of the dispute pertaining to the intercompany loans that fund the budget and work programme. It does not appear from the notes that the Central Rand Gold undertook to fund Puno’s contribution towards the budget of CRGSA.

[104] Furthermore and in a letter addressed on behalf of the applicants to Puno on 25 September 2008, it is plainly stated that:

“Therefore, according to the books of Central Rand Gold Group, as at 30 August 2008, CRGSA is indebted to Puno in the aggregate amount of R 119 665 497.00 (excluding interest), and Puno is in turn indebted to CRGL and CRGNV in the aggregate amount of R 119 665 497.00”

[105] The applicants conclude that the portion of the letter referred to supra, confirms that CRG Ltd had not relieved Puno of its obligation to provide pro rata funding to GRCSA.

[106] The same note is contained in the end June 2008 financial statements of the group. The amount allocated for 1 January 2008 to 31 March 2008 has, however, been substituted with the amount of ZAR 33, 251, 171 (US\$ 4, 229, 549) for the period 1 January 2008 to 30 June 2008.

- [107] Puno, furthermore, refers to the following averments contained in the applicants' affidavit filed in the May 2009 application: "Puno is well aware that the two disputes originally raised by the Respondents have since become moot in that the Puno loan claim is now fully underwritten by Limited (this is contained in the Annual Report which is in Puno's possession)".
- [108] According to Puno, the aforesaid statement entailed that "...the Puno debit loan account has been replaced by an undertaking by Limited to fund the various item previously debited to the Puno loan account. If the Puno debit loan account ceased to be effective, then the alleged indebtedness, which was said to form the basis of the call made on Puno, was no longer enforceable, even on the Applicants' own version."
- [109] CRG Ltd is not a party to the Shareholders Agreement. In the premises, there was no obligation on CRG Ltd to provide funding to CRGSA. To the contrary, it is clear from clause 11.2 that the obligation to provide funding for CRGSA's work programme and budget rests squarely on CRGNV and Puno.
- [110] The funding call was properly made in terms of clause 11.2 of the Shareholders Agreement. CRG Ltd provided CRGNV's portion of the funding. Consequently and in terms of clause 11.3 of the Shareholders Agreement, the funding provided by CRG Ltd on CRGNV's behalf is regarded as a loan by CRGNV to CRGSA.
- [111] Puno's assertion that the funding provided by CRG Ltd as evidenced by the financial statements and letters referred to supra, absolved it from honouring its obligations in terms of the Shareholders Agreement, is both factually and legally unsustainable.
- [112] Puno did not request CRG Ltd to provide its pro rata funding. If such request was made CRG Ltd and Puno would, no doubt, have entered into a loan agreement reflecting the exact terms and conditions of the loan.
- [113] Puno can simply not be indebted to CRG Ltd without an underlying legal cause for such indebtedness.
- [114] CRG Ltd was not approached to provide third party funding. It was never intended nor agreed between CRG Ltd and CRGSA that CRG Ltd will provide third party funding on terms acceptable to the board of CRGSA.
- [115] In terms of clause 11.3, the additional funding that CRG Ltd provided to meet the full amount required for the work programme and budget, simply increased CRGSA's indebtedness to CRGNV and did not absolve Puno from honouring its obligations in terms of the Shareholders Agreement.
- [116] These defences are similarly without merit.

Conclusion

[117] In the premises, the applicants are entitled to an order in terms of paragraph 1.1 of the Notice of Motion.

B. CALL OPTION

[118] Puno did not comply with its obligations in terms of clause 11.2. Puno, furthermore, did not utilise the provisions of clause 11.5, which clause reads as follows:

“If so requested in writing, and CRGNV agrees, in its sole and unfettered discretion, GRGNV shall make available to Puno so much of Puno’s funding requirements

as may be required to enable Puno to comply with its obligations in terms of this clause 11 on such commercial terms as may be agreed between CRGVN and Puno and subject to such regulatory approvals as may be required, being obtained.” (own emphasis)

[119] In the circumstances, the provisions of clause 11.6 apply. Clause 11.6 reads as follows:

“If at any time either Shareholder fails to meet its funding obligations to CRGSA in terms of clause 11 (“the Defaulting Shareholder”)

the other Shareholder (“the Non-Defaulting Shareholder”) shall be entitled (but not obliged) at any time during the 10 Business Days after the Defaulting Shareholder shall have failed to meet its obligations in terms of clause 11, to provide the shortfall. In such event, the amount of such shortfall so provided shall bear interest at a rate to be agreed between CRGSA and the Non-Defaulting Shareholder.”

[120] CRGNV chose not to exercise the option contained in clause 11.6 and in the result, the provisions of clause 11.7 became applicable.

[121] In the premises, Puno’s shareholding was diluted in terms of the formula provided for in clause 11.7. to 16,88%.

[122] In order to determine whether CRGNV was entitled to exercise the call option, the requisite level of Puno’s shareholding for purposes of the prospecting rights under the MRPD Act needs to be established.

[123] Having regard to the definitions contained in clause 2 of the Shareholders Agreement, “MRPD Act” is described as the Mineral and Petroleum Resources Development Act 28 of 2002, of South Africa.

[124] No reference is made to the shareholding level determined by the MRPD Act in order to retain the prospecting rights in terms of the Act.

[125] The applicants maintain that the requisite level of Puno’s shareholding is 26%. In this regard the applicants referred to

clauses 5; 6.3; 6.10; 10.1 and 12 of the Shareholders Agreement.

[126] In clause 5, the parties acknowledged that they are committed to comply with the empowerment requirements contained in various legislation

and inter alia “the Charter”. In clause 2 “Charter” is defined as “the broad-based socio-economic empowerment charter published in accordance with Section 100 of the MPRD Act.”

[127] Save for the reference to the relevant legislative requirements, the level of shareholding for purposes of clause 11.9 is not defined.

[128] Clause 6.3 determines the number of directors Puno may appoint, which number is determined by the percentage of its shareholding percentage.

[129] Clause 6.10 is cast in similar terms, but refers to the appointment of the chairperson of the board. Clause 10.1 provides that certain actions may not be done without the prior written consent of Puno, for as long as Puno holds at least 26% shareholding.

[130] Clause 12 regulates the alienation of Puno’s shareholding and makes it clear that any change in Puno’s percentage shareholding will not be allowed if such change results in CRGSA failing to comply with the relevant legislative requirements. Clause 12.4 refers to 26% shareholding in a proviso pertaining to the transfer of share capital. The proviso reads as follows:

“....provided that:

12.4.1 such transfer would not result in Puno ceasing to qualify an HDSA (any person or legal entity that satisfies the criteria for an individual or HDSA company – clause 2);

12.4.2 at least 26% of the effective economic interest in CRGSA shall remain held by persons who qualify as HDPs (the meaning assigned to the phrase “Historically Disadvantaged person” in the MPRD Act – clause 2); and

12.4.3”

[131] In the premises, none of the clauses referred to by the applicants bears any relevance to the level requirement referred to in clause 11.9.

[132] In supplementary heads of argument filed on behalf of Puno, Puno denies that the MPRD Act makes any provisions in relation to shareholding

necessary to be held by an HDSA “to maintain any prospecting rights”. Puno further referred to the fact that the applicants had failed in its founding affidavit to allege that the reduction on the percentage of shareholding held by Puno has resulted in the inability on the part of CRGSA “to maintain the prospecting rights”.

[133] It appears from the supplementary heads that section 100 of the MPRD Act does make provision for the Minister to develop a Code of Good Practice for the Mining Industry. The Code was published on 29 April 2009, some two years after CGRNV and Puno entered into the Shareholders Agreement. The Code refers to 15% ownership of equity by HDSA for the first five years and thereafter 26% in ten years.

[134] The Code clearly could not have had a bearing on the intention of the parties at the conclusion of the Shareholders Agreement.

[135] The applicants endeavoured to cure the apparent lacuna in their founding papers, by filing a supplementary replying affidavit, in which reference is made to the general practice in the mining industry in respect of the ownership of equity by HDSA at the time. The 26% relied upon by the applicants, was apparently in accordance with a scorecard that was utilised at the time.

[136] The applicants, furthermore, refer to the negotiations between the parties at the time as evidence for its proposition that it was the common intention of the parties that the applicable level will be 26%. Should the applicants not be successful with the aforesaid

argument, they pray in the alternative for a rectification of the Shareholders Agreement to reflect the aforesaid common intention of the parties.

[137] Puno denies that it was the common intention of the parties that the percentage would be 26%.

[138] The facts underlying the applicants' claim for rectification are clearly in dispute. In the result, the terms of the Shareholders

Agreement stands.

[139] Consequently, the applicants have failed to make out a case in support of the relief claimed in prayer 1.2.

FURTHER DEFENCES RAISED BY PUNO AND CONDITIONAL COUNTER CLAIM

[140] Insofar as I may be wrong in respect of the exercise of the call option, I will shortly deal with Puno's remaining defences.

Breach of reciprocal obligations

[141] Puno alleges that the applicants are in breach of the provisions of clauses 21 and 35.4 of the Shareholders Agreement. Clause 21 provides for the examining of the books and records of CRG Ltd and its subsidiaries and for access to all relevant information.

[142] Clause 35.4 is cast in general terms and imposes on the parties a duty to do all things necessary to maintain the terms and conditions of the Shareholders Agreement. Puno contends that the applicants are in breach with its obligations in terms of the aforesaid clauses and therefore deny that the applicants are entitled to enforce its rights in terms of clause 11.1.

[143] In essence, Puno is raising the defence of exceptio non adimpleti contractus.

[144] Reciprocity in relation to the defence of exceptio non adimpleti contractus, entails that one party to a contract undertakes to perform in exchange for a particular counter performance by the other party to the contract. [See: BK Tooling (Edms) Bpk v Scope Engineering (Edms) Bpk 1979

(1) SA 391 A at 418B.]

[145] The applicants contend that upon a proper construction of the Shareholders Agreement, it cannot be said that the performance envisaged in clauses 21 and 34.5 are reciprocal to the duties of shareholders of CRGSA to provide funding.

[146] I agree. There is no express mention in the Shareholders Agreement that the duties contained in the clauses under discussion are reciprocal. The funding of a company's expenses by its shareholders, is no doubt essential to the successful running of the company. To have access to financial records and to generally do everything necessary to ensure that the terms and conditions of the Shareholders Agreement are complied with can by no stretch of the imagination be considered to be reciprocal to the duty to fund the affairs of the company.

[147] This defence has no merits and is consequently dismissed,

Applicability of section 11 of MPRD Act

[148] Puno avers that the applicants have not complied with the provisions of clause 32.1 of the Shareholders Agreement read with section 11 of the MPRD Act, which clause requires approval from the governmental authority for the acquisition of shares.

[149] Section 11 reads as follows:

“A prospecting right or mining right or an interest in any such right, or a controlling interest in a company or close corporation, may not be ceded, transferred, let, sublet, alienated or otherwise disposed of without written consent of the Minister, except in the case of changing of controlling interest in listed companies.”

[150] The applicants with reference to the judgment of Coppin J in *Mogale Alloys (Pty) Ltd v Nuco Chrome Bophuthatswana (Pty) Ltd and Others* 2011 (6) SA 96 (GSJ) submitted that section 11(1) is only applicable if the “controlling interest” is dealt with as envisaged in the section.

[151] Puno's shareholding in CRGSA is only 26% and consequently section 11 of the MPRD Act does not apply to the call option.

CONDITIONAL COUNTER-APPLICATION

[152] The conditional counter-claim will be considered in view of the finding in respect of the validity of the funding call directed at Puno. Puno contends that the enforcement of the funding call and call option by the Applicants will be unfairly oppressive and prejudicial conduct towards it as contemplated in section 163(1)(a) of the Companies Act 71 of 2008.

[153] Section 163(1)(a) reads as follows:

- (1) A shareholder or a director of a company may apply to court for relief if –
 - (a) any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant;”

[154] The applicants contend that the very conduct that forms the basis of Puno's complaint, formed the subject matter of extensive

negotiations and eventual agreement between the parties.

[155] The funding call could not be deemed to be “oppressive or unfairly prejudicial” to Puno. As discussed supra the funding of the business of a company by its shareholders is essential to the company's survival.

[156] Clause 11 of the Shareholders Agreement encapsulates this basic obligation of shareholders towards the company.

[157] The question then remains whether the option call was “oppressive or unfairly prejudicial”.

[158] It is difficult to envisage another remedy in respect of a minority shareholder that fails to honour its funding obligations in terms of the Shareholders Agreement. Moreover, in the present circumstances where Puno obtained 26% of the shareholding in CRGSA for a trifling amount, it could never be deemed oppressive or unfairly prejudicial to dilute its shares in accordance with its failure to adhere to the funding call.

[159] Puno, once again, agreed to the remedy provided in clause 11.9 and cannot simply when the shoe pinches, cry foul.

[160] The counter application has no merits.

ORDER

[161] In the premises, I grant the following order:

1. The funding call directed by the first and second applicant to the respondent on or about 17 September 2008 for payment by the respondent of R 72 326 573, 47 is declared valid and enforceable.

2. The respondent is ordered to pay the costs of the application.
3. The counter-application is dismissed with costs.
4. Both cost orders include the costs of senior and junior counsel.

N JANSE VAN NIEUWENHUIZEN J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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