REPUBLIC OF SOUTH AFRICA

**IN THE HIGH COURT OF SOUTH AFRICA,**
**MPUMALANGA DIVISION (MAIN SEAT)**

**CASE NO:** 858/2019

| | |
|---|---|
| 1. REPORTABLE: YES/ NO<br>2. OF INTEREST TO OTHER JUDGES: YES/NO<br>3. REVISED. | |
| ……………………… | ………………………… |
| DATE | SIGNATURE |

In the matter between:

| | |
|---|---|
| **FLAMING SILVER TRADING 373 (PTY) LTD** | Applicant |

and

| | |
|---|---|
| **VANTAGE GOLDFIELDS SA (PTY) LTD** | First Respondent |
| **HOGAN LOVELLS (SOUTH AFRICA) INC.** | Second Respondent |
| **R C DEVEREUX N.O.** | Third Respondent |
| **D TERBLANCHE N.O.** | Fourth Respondent |
| **F DIPPENAAR** | Fifth Respondent |

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**JUDGMENT**

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**Roelofse AJ:**

[1] There is a dispute between the applicant ("*Flaming Silver*"), first respondent ("*Goldfields*") and the fifth respondent (*"Mr. Dippenaar"*)[1] over a written sale of shares agreement that was entered into between Goldfields (as seller) and Flaming Silver (as purchaser) on 1 November 2017 ("*the principal agreement*").

[2] Flaming Silver seeks specific performance by Goldfields of its obligations in terms of the fourth addendum to the principal agreement. Goldfields and Mr. Dippenaar are of the view that Flaming Silver is not entitled to specific performance. The reasons for their stance are different. However, in some respects, their reasons overlap.[2] In order to appreciate the parties' views, I have, in my view, no choice but to traverse material which, at the end, may appear to have been unnecessary in light of the conclusion I ultimately reach.

[3] I approach the matter by briefly dealing with the common cause facts relating to the entering into of the principal agreement, the addenda thereto[3], the relevant terms of the agreements and the events thereafter that lead to the parties approaching this court.

[4] The Lilly Mine (*"the mine"*) is situated near Barberton in Mpumalanga. The

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[1] Mr. Dippenaar is one Flaming Silver's four directors. The other directors are Mr. Frederick Sam Arendse ("Mr. Arendse"), Mr. K Mudziri and Mr. K Maobelo. Arendse is the deponent to the affidavits on behalf of Flaming Silver (save for the opposing affidavit in Goldfields and Dippenaar's the Rule 6(5)(g) application to which reference will be made later).

[2] See paragraphs 33 and 34 below for Goldfields' defence (in the main application) and Mr Dippenaar's cause of action (in the intervention application). These paragraphs summarize Goldfields' and Mr. Dippenaar's views.

[3] Four addenda written were entered into.

mine was operated by Vantage Goldfields (Pty) Ltd through latter's subsidiary company, Makonjaan Imperial Mining Company (Pty) Ltd (*"MIMCO"*). Vantage Goldfields (Pty) Ltd owned 58% of MIMCO's shares. Goldfields owns the remaining shares in MIMCO.

[5] On 5 February 2016, disaster struck the mine. The mine collapsed when a centre pillar in the mine gave way. Ninety miners were trapped underground. Rescue teams spent eight days in a desperate attempt to rescue the trapped and missing miners. The rescue attempt included the drilling of a new rescue hole. Eighty-seven miners were rescued. Sadly, the bodies of three miners remain buried underground until this day. The collapse caused the main entrance to the mine to become totally inaccessible. As a result, mining operations came to a complete standstill.

[6] MIMCO became unable to pay its debts. On 4 April 2016, MIMCO's directors resolved to place MIMCO under business rescue. Thereafter, on 12 December 2016, Vantage Goldfields (Pty) Limited commenced with business rescue proceedings pursuant to a resolution of its directors.

[7] During or about October 2017, the third respondent [4] shared his view with Mr. Dippenaar that the mine has a reasonable prospect of being rescued subject to necessary funding being obtained. The third respondent introduced Mr. Dippenaar to Mr. Arendse. Mr. Arendse and Mr. Dippenaar identified Flaming Silver as a special purpose vehicle for the proposed business venture. Flaming Silver and Goldfields concluded the principal agreement.

[8] The conditions precedent of the principal agreement is of importance. I recite them in full. They read as follows:

*"3.* ***CONDITIONS PRECEDENT***

[4] Who is one of the joint business rescue practitioners of Vantage Goldfields (Pty) Ltd and MIMCO.

*3.1 This agreement is subject to the fulfilment of the following Conditions precedent, namely that –*

*3.1.1 the Purchaser is on or before 31 January 2018 or such later date as agreed to by the parties in writing prior to the expiry thereof able to procure financing on terms acceptable to it and to the BRP (acting reasonably insofar as such financing pertains to VGL, Barbrook and MIMCO in his capacity as BRP in each instance) for funding to be provided to the Purchaser, MIMCO, VGL, Barbrook and/or the BRP from suitable reputable and verifiable sources in the amount of R310,000,000.00 (R310 million) which may be in cash (to the extent of approximately R200,000,000 (R200 million) or to in kind to be provided for value (approximately R110,000,00 (R110 million), as the case may be, including such cash amounts required to discharge the requirements of the approved and/or published Business Rescue Plans in respect of VGL, MIMBCO and Barbrook to enable the Business Rescue Practitioner to resume normal production on the Mines in accordance with such Business Rescue Plans or amended Business Rescue Plans;*

*3.1.2 the Purchaser makes payment of the amount referred to in clause 6.1 on the due date;*
*and*

*3.1.3 all requisite regulatory approvals required shall have been obtained by no later than 31 January 2018 or otherwise agreed to by the Parties.*

*3.2 Should the Condition precedent referred to in clause 3.1.1 not be fulfilled on or before 31 January 2018 or any other Condition Precedent not having been met by the due date thereof and the period for fulfilment thereof not be extended by the Parties in writing prior to the expiry thereof, then this agreement shall lapse and be of no force and effect.*

*3.3 ………..*

[9] Clauses 4, 5, 6 and 7 of the principal agreement sets out the *merx*, price, payment and Goldfields' obligations upon fulfilment of the conditions president. [5] I recite those clauses for what they provide is relevant for purposes of understanding the parties' views and the reasoning in this judgment. These clauses, in relevant part, read as follows:

*"4.* ***SALE***

*4.1 Subject to the Conditions precedent and with effect from the Effective date, the Seller hereby sells to the Purchaser who purchases the Sale shares and the Sale claims from the Seller as one indivisible transaction subject to the*

[5] Clause 1.1.2 of the principal agreement defines "Completion date" as "the date at which all Conditions president have been met.

*terms and conditions of this agreement.*

*4.2 Ownership of the Sale shares and Sale claims shall pass to the Purchaser on the Completion Date.*

*4.3 …………………..*

## *5. PURCHASE PRICE*

*5.1 The purchase price for:*

*5.1.1 the Sale shares is the sum of R1.00; and*

*5.1.2 the Sale claims is the sum of R10,000,000.00 (R10 million).*

## *6. PAYMENT OF PURCHASE PRICE*

*6.1 The Purchaser shall within 60 (sixty) calendar days calculated from the Effective date pay the purchase price for the Sale shares and the Sale claims in cash free of deduction, bank charges, withholding, set-off or counterclaim of any nature to attorneys Martins Weir-Smith Inc. who shall hold the funds in trust pending the Completion date.*

*6.2 On the Completion date, the attorneys referred to in 6.1 shall make payment of the purchase price as follows:*

*6.2.1 R1.00 to the Seller;*

*6.2.2 R10 000 000.00 (R10 million) to the Seller.*

*6.3 ………….*

*6.4 The attorneys referred to in clause 6.1 hereby irrevocably undertake to effect payment of the purchase price in accordance with clause 6.2 to the Seller of the Completion date.*

## *7. COMPLETION*

*7.1 On the Completion date and by not later than 13h00 (or such other time as the Parties may agree to in writing) representatives of the Seller, the Purchaser and the Business Rescue Practitioner shall meet at the offices of the Seller whereupon:*

*7.1.1 the Seller shall subject to the terms of this agreement deliver to the Purchaser –*

*7.1.1.1 the share certificates representing the Sale shares together with duly completed, signed and dated share transfer forms so as to enable registration of transfer of the Shares to take place into the name of the Purchaser or his nominee;*

*7.1.1.2 a resolution by the directors of VGL and MIMCO sanctioning the transfer of the relevant Shares and nominating the individuals designated by the Purchaser to be the directors of VGL and/or MIMCO;*

*7.1.1.3 the written resignations of all the directors of VGL, Barbrook and/or MIMCO;*

*7.1.1.4 in respect of VGL – all books, records, a certified copy of the certificate of incorporation, a certified copy of the memorandum and articles of association/memorandum of incorporation, minute books, accounting records, any other documents vesting in VGL;*

*7.1.1.5 in respect of MIMCO – all books, records, a certified copy of the certificate of incorporation, a certified copy of the memorandum and articles of association/memorandum of Incorporation, minute books, accounting records, any other documents vesting in MIMCO;*

*7.1.2 the Seller shall deliver to the Purchaser a deed of cession in respect of the Sale claims".*

[10] On 21 December 2017, Flaming Silver and Goldfields agreed to extend the date by which the conditions precedent in clauses 3.1.1 and 3.1.3 of the principal agreement were to be fulfilled to 31 March 2018. For this purpose, Flaming Silver and Goldfields entered into the first addendum to the principal agreement. Clause 4.2 of the first addendum provides as follows:

"*4.2* ***Ad Clauses 3.1.1, 3.1.3 and 3.2*** [of the principal agreement] *by amending the date "31 January 2018" and substituting with "31 March 2018" in all relevant places."*

[11] On 3 May 2018, Flaming Silver and Goldfields concluded the second addendum to the principal agreement in terms of which the suspensive conditions in clauses 3.1.1 and 3.1.2 of the principal agreement were deemed to have been fulfilled by no later than 31 March 2018. Clause 3.3 of the second addendum provides as follows:

*"3.3 Subject to the terms set out in this Addendum, the Parties have reached agreement that except for the Conditions precedent referred to in Clause 3.1.3 of the Principle Agreement, ("the Remaining Condition Precedent"), all the other Conditions Precedent are by mutual agreement, deemed to have been fulfilled by no later than 31 March 2018."*

[12] Clause 4.3 of the second addendum required Goldfields to apply for Ministerial Consent for the transaction by no later than 30 July 2018.[6]

[13] On 2 August 2018, Flaming Silver and Goldfields entered into the third addendum to the principal agreement. Clause 4.1 of the second addendum reads as follows:

> *"The date set out in clause 4.3 of the Second Addendum* [date of Ministerial approval] *is amended from "30 July 2018" to "31 October 2018" or such later date agreed in writing between the parties."*

[14] On 31 October 2018, Mr. Arendse (ostensibly on behalf of Flaming Silver), Goldfields and Siyakhula Sonke Empowerment Corporation (Pty) Limited concluded the fourth addendum to the principal agreement, the relevant part of which reads as follows:

> *"3.4 The Parties record the successful completion of the Conditions set out in clause 4 of the Third Addendum and that they currently await the consent of the Minister as contemplated in the Section 11 Application that has been submitted.*
>
> *3.5 Subject to the consent of the Minister referred to in clause 3.4 the Parties have arranged to deliver the requirements of the Completion date as set out in clause 4 of this Addendum.*
>
> *3.6 The Parties and SSC in specific circumstances now wish to vary the Principal Agreement (as amended by the First Addendum, the Second Addendum and the Third Addendum) as set out in this Addendum.*
>
> *4.* ***COMPLETION***
>
> *The Parties agree to effect the following arrangements between them in respect of the Principal Agreement (as amended by the First Addendum, the Second Addendum and the Third Addendum):*
>
> *4.1 The Purchaser shall forthwith transfer the balance of the Purchase Price of R9 000 001 (nine million and one Rand) to the attorneys trust account nominated in writing by the Seller and approved by the Purchaser to be held in trust on behalf of the Purchaser to be released and transferred to the Seller on the date of receipt by the Seller of the Minister's consent to the Section 11 Application.*

[6] Consent in terms of Section 11(1) of the Mineral and Petroleum Resources Development Act 28 of 2002 for the transfer of the controlling interest in Vantage Goldfields (Pty) Ltd to MIMCO, held by Goldfields.

> *4.2 The Seller shall forthwith deliver to the attorneys referred to in clause 4.1 the Completion documents referred to in clauses 7.1.1 and 7.1.2 of the Principal Agreement to be released and transferred to the Purchaser on the date of receipt by the Seller of the Minister's consent to the Section 11 Application against payment to the Seller of the amount referred to in clause 4.1.*
>
> *4.3 Should the Minister refuse the Section 11 Application for any reason, the attorneys referred to in clause 4.1 shall return the funds deposited by the Purchaser to the Purchaser together with any interest earned thereon and shall return the closing documents delivered in terms of clause 4.2 to the Seller."*

[15] On 31 October 2018, Mr. Dippenaar requested that a directors' meeting be held to discuss and vote on whether the "suspensive condition" provided for in the principal agreement should be extended. The board did not heed the request and did not meet on 31 October 2019.

[16] Mr. Arendse and Goldfields signed the fourth addendum during the late afternoon of 31 October 2018.

[17] On 31 October 2018 at 18h02, Mr. Arendse wrote an e-mail to Flaming Silver's directors. He said as follows:

> *"Urgent*
> *Gentlemen,*
> *As you know that today (31 October) is critical date in terms of closing of the transaction and key to this is the renegotiation of either a date extension or a agreed completion, subject to section 11 permission only.*
> *What it means there would be no more conditions precedent between the transacting parties other than what the law requires.*
> *Please provide me with your permission or disapproval to engage, finalize and if the parties agree, sign on behalf of flaming Flaming Silver SPV.*
> *To prevent the potential collapsing of the transaction, this needs to happen today/tonight.*
> *Kindly revert urgently.*
> *Sent from my iPhone"*

[18] On 31 October 2018, at 21h49, Mr. Arendse addressed Mr. Dippenaar in an e-mail. The e-mail was sent to Mr. Dippenaar, Mr. K Moabelo and Mr. Andrew Mthembu (a former director of Flaming Silver).[7] In part, the e-mail it reads as follows:

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[7] Annexure 'FD12'

> *"I am pleased to report that the closing agreement have been signed by VGSA a short while ago, which needs to be ratified by the FS board with or without your vote. I trust that the remaining directors will apply their own mind and do what is right for FS and not entertaining your personal interest and malicious intentions. We have many stakeholders that are depending the success of this transaction."*

[19] Flaming Silver's Board met on 12 November 2018. All the directors attended the board meeting. Item 4 on the agenda provided as follows:

> *"Vote on whether the suspensive condition provided for in the Sale of Shares Agreement of 1 November 2017 should be extended"*

[20] Ministerial approval was given on 21 December 2018. The approval was e-mailed to Goldfields and the second respondent on 9 January 2019.

[21] On 31 January 2019, Goldfields' directors informed Mr. Arendse that the completion of the principal agreement had not been reached. It is recorded in a letter directed to Mr. Arendse. Goldfields, after acknowledging that condition 3.1.1 of the principal agreement was waived, alleges that:

> *"….the waiver does not render the funding requirement of the Sale Agreement pro non scripto. The VGSA* [Goldfields] *position is that the funding by SCC and the IDC was at all relevant times a condition of the Sale Agreement."*

[22] On 14 February 2019, Flaming Silver delivered a written notice of breach, to Goldfields. Flaming Silver alleged compliance by it of its obligations and the fulfilment of the conditions precedent, the consequence of which is that the principal agreement became enforceable as against Goldfields. Flaming Silver demanded specific performance in terms of clause 4.2 of the fourth addendum.

[23] On 20 February 2019, Goldfields responded to Flaming Silver's demand. In their response, Goldfields: acknowledged having received the purchase price and concurred that the effect of the fulfilment of the conditions precedent was that the whole of the principal agreement has become enforceable. However, Goldfields recorded that:

> *"The requirement of adequate funding as contemplated in Clause 3.1.1 of the "Principal Agreement is common cause between the Parties and remains a condition, despite the deemed fulfilment of the Condition precedent in this regard, and any uncertainty in this regard was addressed and removed in Clause 4.11 of the Second Addendum."*

[24] Clause 4.11 of the second addendum reads as follows:

> *"VGSA* [Goldfields] *agrees to endorse the agreed upon and amended Business Rescue Plans as prepared and presented by the Business Rescue Practitioner in consultation with the Seller, the Purchaser and/or SAP (as the case maybe)"*

[25] On 13 March 2019, Goldfields directed a letter to Flaming Silver. In this letter, Goldfields informed Flaming Silver that latter has breached the terms of the principal agreement. The grounds upon which Goldfields believed that Flaming Silver was in breach of the principal agreement mainly related to the funding requirements recorded in clause 3.1.1 of the principal agreement. There were also other breaches alleged which, in my view, is immaterial for the adjudication of this matter. The following demand was directed by Goldfields:

> *"It is hereby demanded in terms of Clause 10 of the Principal Agreement that you remedy your breaches of the Agreement as set out herein within 10 (ten) calendar days of receipt of this communication by performing your contractual obligations in terms of the Agreement. The Seller tenders reciprocal performance of its obligations to deliver documents of title as contemplated in clause 7.1 of the Principal Agreement."*

[26] On 26 March 2019, Goldfields sent a letter to Flaming Silver cancelling the principal agreement on the basis of Flaming Silver's alleged breach of the principal agreement.

[27] The battle lines drawn, the parties brought their dispute to court for adjudication. The applicant launched the main application on 14 March 2018 in the urgent court. Save for the urgency prayer and, seeking authorisation that the third and fourth respondents be cited in the application, the applicant seeks the following relief:

*"2. That the First Respondent forthwith furnish to the Second Respondent:*

*2.1 Share certificates in respect of the shares held by First Respondent in Goldfields Goldfields (Pty) Ltd and Mkhonjaan Imperial Mining Company (Pty) Ltd ("MIMCO") on 1 November 2017;*

*2.2 Completed, signed and dated share transfer forms in respect of the shares referred to in paragraph 2.1 that will facilitate the transfer of the said shares into the name of Applicant;*

*2.3 Written resignations of the directors of Goldfields Goldfields (Pty) Ltd, MIMCO and Barbrook Mines (Pty) Ltd ("Barbrook");*

*2.4 All books, records, the certificate of incorporation, the memoranda and articles of association or the memorandum of incorporation, minute books, accounting records or copies thereof and any other documents vesting therein, of:*

*(a) Goldfields Goldfields (Pty) Ltd;*

*(b) MIMCO;*

*2.5 A deed of cession from First Respondent to Applicant of all claims by First Respondent against:*

*(a) Lomyisho Investments (Pty) Ltd;*

*(b) MIMCO;*

*(c) Goldfields Goldfields (Pty) Ltd.*

*3. That Second Respondent forthwith pay to First Respondent the R9 000 001.00 held by it in Trust in terms of clause 4.1 of the Fourth Addendum to the Sale of Shares Agreement between Applicant, Siyakhule Sonke Empowerment Corporation (Pty) Ltd and First Respondent.*

*4. That Second Respondent release and hand over to Applicant the documents referred to in paragraph 2.1 and 2.5 above3, upon receipt thereof by it."*

[28] The applicant also seeks costs in its favour.

[29] In the intervention application, Mr. Dippenaar sought leave to intervene as fifth respondent together with further relief as follows:

*"3. It is declared that:*

*3.1. The resolution dated 12 November 2018, by the Board of Directors of the Applicant (in the main application) to ratify the signing of the Fourth Addendum to the Sale of Shares Agreement is null and void;*

> 3.2. *The Sale of Shares Agreement dated 1 November 2017 is null and void due to the non-fulfilment of the suspensive condition contained in Clause 3.1.3 thereof"* and costs.

[30] Her Ladyship Ms. Mphahlele J heard the intervention application. Mr. Dippenaar's joinder was not opposed. On 7 June 2019, Mphahlele J dismissed prayers 3.1 and 3.2 of the notice of motion in the intervention application and ordered that Mr. Dippenaar pay the costs. The fundamental basis upon which Mphalele J dismissed the intervention application appears to be a finding that Flaming Silver's Board, at its meeting of 12 November 2018, did not resolve to ratify the signing of the fourth addendum because, based on the minutes of the board meeting, it could not be found that the board in fact took that resolution.

[31] On 1 July 2019, Mr. Dippenaar filed an application for leave to appeal Mphahlele J's judgment and orders. Paragraph 3 of the application for leave to appeal is important in the context of these proceedings. It reads as follows:

> *"3. The learned Judge should have granted prayer 3.2 of the notice of motion* [in the intervention application] *with costs."*

[32] Goldfields opposes the main application on the basis that the Second Addendum is voidable at the instance of Goldfields as a result of an intentional or negligent representation by Flaming Silver and on the basis that Goldfields has elected to cancel the second addendum which resulted in the lapsing of the sale of shares agreement due to non-fulfilment of the suspensive condition contained in clause 3.1.3 thereof.[8]

[33] Mr. Dippenaar opposes the main application on the grounds that:

> *"The Fourth Addendum, which extended the fulfilment of the suspensive condition contained in Clause 3.1.3 of the principal agreement was extended by the Fourth Addendum which was signed without the requisite authority and resolution by*

[8] Paragraph 5.1 of the first respondent's answering affidavit at page 126; and, in the *alternative*, on the grounds that Silver has repudiated the Sale of Shares Agreement *alternatively* was in breach in the terms thereof which it had failed to remedy notwithstanding a demand to do so.

> *Flaming Silver's board to ratify the unauthorised signing of the Fourth Addendum and as such that the Fourth Addendum was invalid null and void; by virtue of the invalidity of the Fourth Addendum, the principal agreement lapsed on 31 October 2018 due to the non-fulfilment of the suspensive condition contained in Clause 3.1.3 of the principal agreement; resulting in that the applicant is not entitled to specific performance in terms of the principal agreement that had lapsed."*

[34] On 19 June 2019, Mphahlele J postponed the hearing of the main application. In addition, she ordered that: Mr. Dippenaar file an amended notice of motion[9]; Flaming Silver supplement its answering affidavit (only if so advised); Mr. Dippenaar to file his reply to the supplementary answering affidavit. Mr. Dippenaar was ordered to pay the wasted costs occasioned by the amendment.

[35] Mr. Dippenaar filed an amended notice of motion. The amended notice of motion in the intervention application introduced a new prayer 3.1A (*"prayer 3.1A"*) as follows:

> *"Alternatively, the resolution dated 31 October 2018 by the Board of Directors of the applicant (in the main application) to ratify the signing the Fourth Addendum to the Sale of Shares Agreement is null and void;".*

[36] Flaming Silver filed a supplementary answering affidavit. In the supplementary answering affidavit, Flaming Silver meets Mr. Dippenaar's challenge to the resolution of 31 October 2018 by alleging that Mr Arendse, Mr Mudziri and Mr. Moabelo *"... retrospectively approved the Fourth Addendum……".* Mr Mudziri and Mr. Moabelo's confirmatory affidavits record as follows in paragraph 2 thereof:

> *"I have read the answering affidavit and supplementary affidavits of Frederick Sam Arendse herein (dated 8 April 2019 and 27 June 2019) respectively and confirm the contents hereof insofar as they relate to me, particularly a round-robin resolution was taken on 31 October 2018 to approve retrospectively the conclusion of the Fourth Addendum to the Sale of Shares Agreement on 1 November 2017."*

[9] During argument I was made to understand that Flaming Silver made application to amend its notice of motion in the intervention application and that same was opposed by Goldfields and Mr. Dippenaar.

[37] On 2 July 2019, Mr. Dippenaar and Goldfields filed an application that they intend to apply to court at the hearing of the application for an order that Goldfields and Mr. Dippenaar be granted leave to cross-examine Mr Arendse, Mr Mudziri and Mr. Mohabelo *"... in respect of and concerning the round-robin resolution allegedly taken on 31 October 2018."* I shall refer to this application as "the Rule 6(5)(g) application".

[38] Mr Arendse, Mr Mudziri and Mr. Mohabelo are named in the notice of motion in the Rule 6(5)(g) application. In addition, Goldfields and Mr. Dippenaar sought leave to subpoena Mr Arendse, Mr Mudziri and Mr. Mohabelo and an order directing them to bring certain documents and electronic equipment and data files to court. In support of the Rule 6(5)(g) application, Mr. Dippenaar alleges that:

> *"I submit that reasonable grounds exist to doubt the veracity of the allegations by the Applicant's directors. On their version, they took the Round-Robin Resolution between approximately 22:00 and 22:00 on the evening of 31 October 2018. This in turn implies that the Resolution attached as Annexure 'RA6' and 'RA7' were drafted during these hours and circulated for signature by the Applicant's directors. This is highly improbable."*[10]
>
> and
>
> *"I respectfully point out that I am unable to present any evidence to dispute the truth of the Applicant's statement that a Round-Robin Resolution was taken on 31 October 2018. The primary facts concerning the Round-Robin Resolution for purely in the knowledge of the Applicant's for abovementioned directors and should be carefully scrutinised. Cross-examination of the Applicant's directors would be the only manner to arrive at the truth."*[11]

[39] Flaming Silver opposed the Rule 6(5)(g) application. Its attorney deposed to its answering affidavit. She alleges as follows [12]:

[10] Paragraph 6 of the affidavit in support of the Rule 6(5)(g) application.

[11] Paragraph 8 of the affidavit in support of the Rule 6(5)(g) application.

[12] Paragraph 3 of the answering affidavit in the Rule 6(5)(g) application.

*"The Applicant's answer to these allegations is that:*

*(a)* *There are indications in the evidential material before the Court that the Applicant's directors were of the view that the conclusion of the Fourth Addendum had to be approved on that date – 31 October 2018. Given that the addendum was concluded after normal hours, the passing of the resolution at the time mentioned, is most certainly not improbable.*

*(b)* *The case made by the Fifth Respondent in his founding affidavit for the invalidity of the resolution to ratify the conclusion of the Fourth Addendum was that he, as a director, had not been furnished with sufficient information to take a meaningful view on the resolution. Cross-examination of the directors of Applicant on the manner of taking the resolution on 31 October 2018 will not advance the case made by the Fifth Respondent in any way. First Respondent deliberately chose not to file supplementary papers when he amended the relief he was claiming. I am advised that authority exists that the process envisaged by Rule 6(5)(g) cannot be used to put up or advance a case not made out in the initial founding papers."*

[40] At the commencement of the hearing of the matter, I requested Adv Stoop SC[13] to address me on whether the main application could proceed considering paragraph 3 [14] of the application for leave to appeal. I specifically raised this issue because should the appeal ultimately succeed, I may have already ordered specific compliance with an agreement which may be found not to exist. Goldfields and Mr. Dippenaar indicated that they resolved to withdraw their notice of application for leave to appeal. I directed them to deliver a notice to that extent by close of business on the day of the hearing. The notice of withdrawal of the application for leave to appeal was filed on 15 July 2019. This removed the bar I perceived to exist to the hearing and deciding the main application including the relief sought in prayer 3.1A.

[41] After hearing argument for the parties in the Rule 6(5)(g) application, I granted an order in terms of the notice of motion in the Rule 6(5)(g) application. I gave an *ex tempore* judgment before I granted the order. I do not intend to repeat herein what I set out in that judgment, suffice to say that I found that it would be impossible to determine the main application on the papers alone and that it would be necessary for

[13] Appearing for Goldfields and Mr. Dippenaar.

[14] See paragraph 31 above. Also see prayer 3.2 of the notice of motion in the intervention application at paragraph 29 above.

the directors, who allegedly made the round-robin resolution to testify in that regard. Mr Arendse was cross-examined by Adv Stoop. I allowed Mr. Arendse to be re-examined by Adv Beaton SC[15].

[42] As I see it, the first and paramount issue I must decide is whether the fourth addendum extended the fulfilment of condition 3.1.3 of the principal agreement (*"condition 3.1.3"*). If the fourth addendum did not extend the fulfilment of condition 3.1.3, it is the end of the matter for Flaming Silver because the principal agreement will then have lapsed. Flaming Silver would not be entitled to specific performance in terms of the principal agreement (or the fourth addendum). If I find that the fourth addendum is null and void as a result of a defect in the conclusion of the fourth addendum, then, depending upon the nature of the defect, Mr. Dippenaar may be entitled to prayer 3.1A.

[43] Central to the lawfulness of the fourth addendum is the issue of the purported ratification of the entering into of the fourth addendum by Mr. Arendse.

[44] Mr. Dippenaar alleges that Mr. Arendse recognised that he acted without authority and that Flaming Silver's Board would have to ratify the signing of the fourth addendum.

[45] I agree that Arendse recognised that he acted without authority and that Flaming Silver's Board would have to ratify the signing of the fourth addendum. This is in accordance with Mr. Arendse's evidence in court and the evidence in the papers, properly considered as a whole. Mr. Arendse testified that he, Mr. Matzuri and Mr. Moabelo had discussions during the course of 31 October 2018. The result of those discussions was that he, Mr. Matzuri and Mr. Moabelo had agreed to enter into the fourth addendum.

[15] Appearing for Flaming Silver.

[46] After being challenged by Mr. Dippenaar in the intervention application over the ratification of the fourth addendum, Flaming Silver seeks to meet the challenge by producing a purported resolution by Flaming Silver's Board that it has ratified the fourth addendum. The purported resolution reads as follows:

> "*RESOLUTION PASSED IN WRITING AT A MEETING OF THE DIRECTORS OF FLAMING SILVER TRADING 373 (PTY) LTD………HELD AT PRETORIA ON 31 OCTOBER 2018*
>
> *"WHEREAS the Company concluded a Sale of Shares Agreement with Vantage Goldfields SA (Pty) Ltd for the purpose of their 74% shareholding in Vantage Goldfields and their 42% shareholding in Makonjwaan Imperial Mining Company.*
>
> *AND WHEREAS the Company concluded and executed a fourth addendum to the sale of shares agreement on 31 October 2018.*
>
> *AND WHEREAS the conclusion and execution of that fourth addendum requires ratification.*
>
> ***RESOLVED THAT:***
>
> 1. *The conclusion and execution of the fourth addendum by Frederick Sam Arendse on behalf of the Company is ratified.*

[47] The resolution appears to be signed by Mr. Arendse, Mr. Matzuri and Mr. Moabelo. The space provided for Mr. Dippenaar to sign on the resolution is empty. Mr. Arendse testified that the resolution was backdated to 31 October 2018 and that the resolution was signed on 1 November 2018 by him, Mr. Matzuri and Mr. Moabelo when they met on 1 November 2018 at Siyakhula Sonke Empowerment Corporation (Pty) Ltd (*"SCC"*)'s premises. Mr. Arendse confirmed that no meeting of the directors took place on 31 October 2018 as is recorded in the resolution. Mr. Arendse explains in his testimony that the resolution was drafted by Flaming Silver's secretary, who is an attorney.

[48] I find that it has been established that: the main agreement was entered into by Flaming Silver and Goldfields; the main agreement was subject to the fulfilment of conditions precedent[16]; if the conditions president were not fulfilled by their due date, or the period for their fulfilment not be extended by the parties in writing, the

[16] Clauses 3.1.1 to 3.1.3 of the principal agreement.

principal agreement would lapse and be of no force and effect; the conditions in clauses 3.1.1 and 3.1.2 of the principal agreement were deemed to be fulfilled; only the condition in clause 3.1.3 of the principal agreement (*"condition 3.1.3"*) remained operative and had still to be fulfilled; the due date of condition 3.1.3 was extended to 31 October 2018; Mr. Arendse signed the fourth addendum on 31 October 2018; the fourth addendum negated condition 3.1.3; in signing the resolution, Mr. Arendse acted without authority; the round-robin discussions and agreement on 31 October 2018 between Mr. Arendse, Mr. Matzuri and Mr. Moabelo ratify the fourth addendum was not a unanimous board decision; Mr. Arendse, Mr. Matzuri and Mr. Moabelo signed the resolution; the resolution was backdated; the resolution was signed on 1 November 2018; and, between the transmission of annexure 'FD12' [17] and the adopting of the resolution, there was no further communication with Mr. Dippenaar over the resolution.

[49] Having made the aforesaid findings, what remains is that I have to consider the status of the resolution for if the resolution was invalid, the fourth addendum was unlawful and the principal agreement has lapsed and is of no force and effect due to the non-fulfilment of condition 3.1.3 of the principal agreement.

[50] Section 66(1) of the Companies Act 71 of 2008 (*"the Act"*) provides that the business and affairs of a company must be managed by or under the direction of its board *".....which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise"*.

[51] The board of directors of a company collectively bear the company's powers. If there is more than one director, an individual ordinary director, as such, has no authority to act for the company for any purpose unless he is authorised expressly,

[17] See paragraph 18 above.

impliedly or ostensibly to do so. [18] Arendse could not enter into the fourth addendum without the Flaming Silver's Board's authority. This is acknowledged by Flaming Silver for there would have been no purpose for Mr. Arendse's request for ratification and the resolution.

[52] In the absence of any allegation that Flaming Silver's Memorandum of Incorporation provided otherwise and in light of the express acknowledgment that the entering into of the fourth addendum had to be ratified and the taking of the resolution, I accept that the fourth addendum could only be entered into by a resolution of Flaming Silver's Board.

[53] A company's decisions are taken at a meeting of the company's board. Only decisions taken by a company's board, properly constituted, are valid.

[54] Section 73 of the Act deals with board meetings. Subsection (4) of section 73 of the Act provides as follows:

> *"The board of a company may determine the form and time for giving notice of its meetings, but—*
>
> *(a) such a determination must comply with any requirements set out in the Memorandum of Incorporation, or rules, of the company; and*
>
> *(b) no meeting of a board may be convened without notice to all of the directors, subject to subsection (5)."*

[55] Subsection (5) of section 73 of the Act provides as follows:

[18] Wolpert v Uitzigt Properties (Pty) Ltd 1961 (2) SA 257 (W) at 267; Rosebank Television & Appliance Co (Pty) Ltd v Orbit Sales Corporation (Pty) Ltd 1969 (1) SA 300 (T) at 303; Tuckers Land & Development Corporation (Pty) Ltd v Perpellief 1978 (2) SA 11 (T) at 15; Kaimowitz v Delahunt and Others 2017 (3) SA 201 (WCC) paras 11 and 15, in particular in para 27 where the following is said: *"In my view, the management of a company in terms of the overall supervision thereof resides in the board as opposed to individual directors. So much is clear from the wording of s 66 (1) of the Companies Act".*; Moraitis Investments (Pty) Ltd and Others v Montic Dairy (Pty) Ltd and Others [2017] 3 All SA 485 (SCA) para 35).

*"Except to the extent that the company's Memorandum of Incorporation provides otherwise—*

*(a) if all of the directors of the company—*

*(i) acknowledge actual receipt of the notice;*
*(ii) are present at a meeting; or*
*(iii) waive notice of the meeting,*
*the meeting may proceed even if the company failed to give the required notice of that meeting, or there was a defect in the giving of the notice;*

*(b) a majority of the directors must be present at a meeting before a vote may be called at a meeting of the directors;*

*(c) each director has one vote on a matter before the board;*

*(d) a majority of the votes cast on a resolution is sufficient to approve that resolution; and*

*(e) ………."*

[56] A meeting of directors is validly constituted as such if it has been properly convened by notice to all the directors within reach and a quorum must be present. [19] It will not be valid notice if it was only given to the majority of the directors, even if the minority is perceived to be conflicted and cannot purportedly vote at the meeting as the company is entitled to the collective wisdom of all the directors.[20] A board that is not properly constituted cannot take a valid board resolution and a purported

[19] Subsection (5) (a) of the Act.

[20] Novick and Another v Comair Holdings Ltd and Others 1979 (2) SA 116 (W) at 128. See also Transcash SWD (Pty) Ltd v Smith 1994 (2) SA 295 (C) at 299 G-H where the following was said: *"The legal position in relation to the absence of a quorum at a director's meeting is succinctly stated in Palmer's Company Law 25th ed (1992) vol 1 para 8.306 at 808.1 as follows:*

*'If the requisite quorum is not present the meeting is irregular and cannot transact business.'*

*See also Blythe v The Phoenix Foundry Ltd, Wilson & Muir 1922 WLD 87 at 91-2 at 91-2 and authorities there cited; Henochsberg on the Companies Act 4th ed vol 2 at 827, 828."*

Also see: South African Broadcasting Corporation Ltd v Mpofu [2009] 4 All SA 169 (GSJ) para 49.

resolution is a nullity. [21]

[57] Mr. Dippenaar was not notified that a board meeting would take place on 1 November 2018 for purposes of ratifying the fourth addendum and he was not furnished with the proposed resolution which contained the purported ratification. Mr. Arendse's explanation for not notifying Mr. Dippenaar of the resolution was that he would in any event not have voted in favour thereof is of no moment. Whether Mr. Dippenaar would have voted in favour or against the resolution does not dispense with the notice requirement in section 73(4)(b) of the Act. There was no compliance with the prescripts of section 73(4)(b) and no valid resolution could be taken by the remaining directors.

[58] The meeting of 1 November 2018 could not validly proceed and no resolution could be voted upon for there is no evidence of any notice of the meeting as required in section 73(4)(b) of the Act. Flaming Silver's Board was therefore not properly constituted due to the non-compliance with the provisions of section 73(4)(b) of the Act, at least in respect of the notice that was required to be given to Mr. Dippenaar. Consequently, the purported resolution to ratify the entering into of the addendum is null and void and of no consequence. Therefore, the fourth addendum was not lawfully entered into and of no moment. As a result, the main agreement lapsed due to on fulfilment of suspensive condition 3.1.3.

[59] In light of my finding that the resolution is null and void and of no consequence, I need not consider the first respondent's remaining defences.[22] However, the finding I made that the meeting of 1 November 2018 could not validly proceed and no resolution could be voted upon destroys the resolution. This entitles Mr. Dippenaar to an order in terms of prayer 3.1A only to the extent that the purported

[21] Panamo Properties (Pty) Ltd and Another v Nel and Others NNO 2015 (5) SA 63 (SCA) at para. 22 where it was said that: *"The consequence of the board not having been properly constituted, (which was not what occurred in the present case), would be that the resolution was not a resolution of the board of directors*."

[22] See paragraph 32 above.

ratification of the fourth addendum to the principal agreement is declared null and void for there was no board decision and therefore no decision to declare null and void.

[60] Lastly, Goldfields avers that SCC should have been joined because it is a party to the third and fourth addendums. On 21 December 2017, Vantage Goldfields (Pty) Ltd and SCC entered into a loan agreement in terms of which SCC loaned R 2 million to Vantage Goldfields (Pty) Ltd. Neither SCC nor Vantage Goldfields (Pty) Ltd are parties to the principal agreement. SCC did not become a party to the principal agreement through either the third or fourth addendums. In the third addendum, SCC undertook *"….in favour of the Seller as a condition to the Principal Agreement to make a monthly payment of R 1.1 million ……. for each of the months of August, September and October 2018 to Vantage Goldfields Proprietary Limited for purposes of post-commencement funding advanced to Vantage Goldfields Proprietary Limited by SCC as lender….."* in the terms of the loan agreement between SCC and Vantage Goldfields Proprietary Limited. In clause 3.6 in the fourth addendum, in respect of SCC, it is recorded that *"The parties and SCC in specific circumstances now wish to vary the Principal Agreement (as amended by the First Addendum, the Second Addendum and the Third Addendum) as set out in this addendum"*. I see no rights nor any obligations for SCC in the main agreement nor are any rights and obligations created for SCC in the third or fourth addendum. The mere fact that a person is a party to an agreement does not by that mere fact give it a real and substantial interest of a legal nature in proceedings. [23] Notwithstanding being a party to the third and fourth addendums, SCC does not have a real and substantial interest of a legal nature in the main agreement or the third and fourth addendum. Therefore, SCC was not a necessary party to the proceedings.

[61] Even if SCC had to be joined, SCC has unequivocally waived its right to be

[23] See: Rosebank Mall (Pty) Ltd v Cradock Heights (Pty) Ltd 2004 (2) SA 353 (WLD)

joined in the main application through a resolution of its directors on 5 April 2019.[24] In Toekie's Butchery (Edms) Bpk en Andere v Stassen 1974 (4) SA 771 (T) at 744F, Colman J, (with whom Nicholas J concurred) states the following:

> *"Joinder can only be dispensed with if the interested party has unequivocally waived his right to be joined and undertaken to be bound by any decision which the Court may make."*

In addition, I see no prejudice caused for any of the respondents in the main application by the non-joinder of SCC.

[62] Flaming Silver seeks an order that the third and fourth respondent be cited in the main application. However, it does not seek relief against those respondents. Due to their capacities as joint business rescue practitioners for Vantage Goldfields (Pty) Ltd and MIMCO, I am of the view that they have sufficient interest in the proceedings to be joined therein. In any event, the third and fourth respondents did not oppose their joinder and neither did Goldfields or Mr. Dippenaar.

[63] There is no reason why costs must not follow the result.

I make the following order:

1. The applicant is authorised to cite the third and fourth respondents in this application (*"the main application"*);

2. The purported ratification of the signing the fourth addendum to the Sale of Shares Agreement of 1 November 2017 is declared null and void.

[24] Annexure "RA10".

3. Prayers 2 to 4 of the Notice of Motion in the main application are dismissed;

4. The applicant is ordered to pay the respondents' costs in the main application.

5. The applicant is ordered to pay the fifth respondent's costs as incurred from 7 June 2019.

Roelofse AJ

Acting Judge of the High Court

| | |
|---|---|
| DATE OF HEARING: | 9 July 2019 |
| DATE OF JUDGMENT: | 17 July 2019 |

APPEARANCES

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|---|---|
| FOR THE APPLICANT: | Adv Beaton SC |
| INTSTRUCTED BY: | Vogel Malan Attorneys |
| FOR THE FIRST AND FIFTH RESPONDENTS: | Adv. B Stoop SC |
| INSTRUCTED BY: | Barnard Inc. Attorneys |