REPUBLIC OF SOUTH AFRICA

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

CASE NO: 3651/2019

1. REPORTABLE: YES/ NO
2. OF INTEREST TO OTHER JUDGES: YES/NO
3. REVISED.

……………………… ……………………….…

DATE SIGNATURE

ARQOMANZI PROPRIETARY LIMITED Applicant

and

VANTAGE GOLDFIELDS (PTY) LIMITED ` First Respondent
(In Business Rescue)

AND ORHERS Second to Eleventh Respondents

JUDGMENT

Roelofse AJ:

[1] In 1874, Mr. Tom Mc Lachlan found the first traces of alluvial gold in Barberton. Fortune seekers flocked to the area in search of gold.[1] History repeats itself in this matter.

[2] The real discord in this matter is a tug of war between parties who are after the remaining gold in Barberton.[2] The gold is in the Lily and Barbrook mines, situated near Barberton, Mpumalanga. The mines are owned by two companies. Makonjwaan Imperial Mining Company (Pty) Ltd (*"MIMCO"*)[3] owns the Lily mine and Barbrook Mines (Pty) Ltd (*"Barbrook"*)[4] owns the Barbrook mine. Vantage Goldfields (Pty) Ltd (*"the Company"*)[5], owns shares in MIMCO and Barbrook.

[3] The Company, MIMCO and Babrook (*"the Vantage Companies"*) are in business rescue.

[4] Arqomanzi[6] and Real Win [7] have made offers to get to the gold. Vantage Goldfields SA (Pty) Ltd (*"VGSA"*)[8] presently has an interest in the gold. VGSA

[1] South frican History Online: https://sahistory.org.za/place/barberton

[2] The Lily mine has or reserves estimated to be 4.9 million tonnes with the life of the mine to be approximately 11 years. – page 38 of MIMCO's business rescue plan. The tailing storage facility of the Barbrook mine estimates 1736 kg of gold – para. 9.2.2 of Barbrook's business rescue plan.

[3] The third respondent.

[4] The second respondent.

[5] The first respondent.

[6] Arqomanzi (Pty) Ltd, the applicant.

[7] Real Win Investment (Pty) Ltd.

[8] The sixth respondent Vantage Goldfields SA (Pty) Ltd who owns shares in the Company and MIMCO.

obviously wants to block the offers. The Vantage Companies' business rescue practitioners [9] sit in the middle. They have prepared and published business rescue plans (*"the plans"*) for the Vantage Companies and they are duty bund to see that the plans work and to see them through or else the existence of the Vantage Companies terminate. The practitioners proclaim that the plans have failed. The workers who worked the gold[10] are scuffled aside - they are the most vulnerable of all involved and are in misery, observing the spectacle playing out before them. Above Arqomanzi, Real Win and VGSA are the power of offshore companies, who, no doubt, are looking out for a bargain through their local subsidiaries.

[5] When day broke in this matter as I opened the court file for the first time, I was faced with an opaque veil of mist and cloud. A multitude of issues and arguments presented itself. The application was first called before me on 15 October 2019. I issued an order whereby the matter was postponed to 25 October 2019 for hearing. The time lapse brought heat. The heat came when more affidavits and argument were filed. After the heat came, most of the mist and cloud dissipated, the issues became clear and crisp – only until clouds yet again appeared on the horizon with an astounding revelation from VGSA. Despite the crispness of the issues, I still deem it necessary to traverse what I saw before the heat, what I saw after the heat came and what the clouds brought. I do so because somewhere, sometime, and, for some reason someone may want to consider how this judgment and the order that follow came about.

The parties and their connections

[6] Arqomanzi is a wholly-owned subsidiary of Taung Gold Proprietary Limited ("*TGL*"). TGL is a non-wholly-owned subsidiary of Taung Gold International Limited ("*TGIL*"). TGIL is registered in Bermuda – its issued shares are listed on the Hong Kong Stock Exchange. Arqomanzi alleges that it enjoys the financial and technical

[9] Fourth and fifth respondents.

[10] The workers cited as part of the eighth to tenth respondents mostly residing at Lily Valley near the mines.

support of both TGL and TGIL.

[7] Vantage Goldfields Ltd ("VGO"), an Australian company, owns VGSA. VGSA owns 74% of the Company and 42% of MIMCO. The Company owns 58% of MIMCO and 100% of Barbrook. The Company is for its continued existence reliant upon the cash-flows and revenues of the Lily and Barbrook mines. VGSA, and the Vantage Companies forms part of the Vantage Group (*"VGA"*).

[8] Standard Bank[11] sold the security that VGSA has pledged to it to Arqomanzi.

[9] The eighth to tenth respondents are the affected persons, being the shareholders, employees and trade union employees of the Vantage companies (*"the affected persons"*).

[10] Real Win is the eleventh respondent.

[11] Arqomanzi seeks no relief against Standard Bank and the affected persons.

The dispute – a summary

[12] The Vantage Companies have been in business rescue (*"rescue"* or *"rescue proceedings"*) since 2016. Notwithstanding this, their rescue is still ongoing. The practitioners say that the Vantage Companies' business rescue plans (*"the plans"*) have failed.

[13] Arqomanzi wants to prevent the practitioners from executing the plans until the Vantage Companies' creditors have voted on revised business recue plans. Arqomanzi says it is entitled to be recognised by the practitioners as a creditor of the Company because Standard Bank has ceded VGSA's loan account in the Company to

[11] The seventh respondent.

Arqomanzi. Of course Arqomanzi will say so because, Arqomanzi must be of the view that by its innovative manoeuvring to become a substantial creditor of the Company, it that it will be awarded when it has the upper hand when votes are counted and weighed on revised business rescue plans, that is, if revised plans are allowed.

[14] VGSA says there is no such thing as a failed business rescue plan. It also says that, in any event, none of the requirements for the termination of the rescue of the Vantage Companies have been met, therefore the practitioners are obliged to act upon the Vantage Companies' adopted plans. VGSA will say so for in the plans, Real Win will have no presence and Arqomanzi may only have insignificant rights.

[15] The practitioners confirm that the plans have failed due to the lack of funding that underpinned the plans. They say that they are in limbo and plead that the court assist them. The practitioners' view is that, by ordering that they are not allowed to consider offers from other parties interested in acquiring an interest in the Vantage Companies, will unlawfully prevent them from executing their duties.

[16] The affected persons are divided – some support Arqomanzi and some support VGSA and Real Win. However, the affected persons are all in agreement that the matter should be resolved without delay.

The tragedy – Lily mine collapses

[17] On 5 February 2016, the Lily mine collapsed. A portion of the crown pillar on level four of the main mine failed. The collapse occurred at the upper western portion of the mine and adjacent to the mine entrance. Fortunately, all employees working underground at the time of the incident[12] were evacuated. Sadly, three surface employees were tragically buried in the sinkhole when the container they were in

[12] Seventy-five.

during the collapse, disappeared.[13] They are still underground. Despite considerable effort[14], in the interest of safety [15], a decision was made to permanently suspend the rescue operations.

[18] As a result of the tragedy, the Lily mine had to come to a complete standstill. Its core gold reserves cannot be accessed.[16] The additional costs that Barbrook had to carry as a result of the Lily mine collapse caused significant strain on Barbrook's cash flow. In addition, disruptions by the community affected the production of gold at the Lily mine. MIMCO became financially distressed as a result of the disaster. Due to the close connection between the Vantage Companies' business, the disaster materially affected each of the Vantage Companies' prospects to such an extent that became distressed and require rescue.

Course of the business rescue

[19] The Vantage companies resolved to commence business rescue as provided for in Chapter 6 of the Companies Act (*"the Act"*).[17] The practitioners were appointed as the joint business rescue practitioners for the Vantage Companies.

[20] The practitioners prepared business rescue plans in terms of the provisions of section 150(1) of the Act. The Vantage Companies plans were adopted by their creditors.[18]. These plans still stand as they were adopted.

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[13] Mr. Solomon Nyerende, Ms. Yvonne Mnisi and Ms. Pretty Nkambule.

[14] Mine Rescue Services were deployed and MIMCO employees with the assistance of the proto teams spent the next eight days in a desperate attempt to rescue the missing employees. Rescue operations were conducted from the emergency outlet shaft but were suspended when ground conditions were declared unsafe. A new rescue hole was drilled in an attempt to provide a safer second outlet.

[15] The business rescue plans provide for compensation of the employees who were trapped underground and for compensation to the familied of those employees who died.

[16] I rely on the Business Rescue Plan and the Business Rescue Information of MIMBCO (Annexure "MC2" to the company's answering affidavit.

[17] Act No. 71 of 2008.

[18] As contemplated in section 152(1) of the Act on on 16 February 2017, 6 August 2018 and 25 May 2016 respectively.

[21] The Company's plan is based the premise that Lily and Barbrook mines re-open, achieve production capacity and profitability.[19] An important feature of the MIMCO plan is, obviously, that the Lily mine re-open. For this, according to MIMCO's plan, and as a pre-condition, an amount of R200 million needs to be raised by way of loan or equity or both within the Vantage Companies to develop the access decline and re-open the Lily mine. The Barbrook mine needs to re-capitalised for it to reopen and to operate at a profit.[20] Capitalization would come from private funding, an Industrial Development Corporation Loan (*"the IDC loan"*) [21] and the recovery of gold from Barbrook's significant tailings reserves.

[22] On 24 December 2019, the practitioners issued a notice to all affected parties, and the Vantage Companies (*"the first notice"*). In the first notice, the practitioners record that the Vantage Companies' plans have failed. They also say that they are of the opinion that there is a reasonable prospect that the "*Business*" can be rescued and allude to a "*Transparent bidding process*" which would be published and that a creditors' meeting is to take place. In addition, they indicate that they would convert the rescue to liquidation proceedings if they do not secure an offer by 31 January 2019. [22]

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[19] Paragraph 6.2 of the company's business rescue plan.

[20] Paragraph 6.3 of the MIMCO's business rescue plan.

[21] In respect of the IDC Loan and other funding, the practitioners, in the Barbrook's plan records as follows:

> *"The Industrial Development Corporation has granted a loan of R119,000,000.00 on 29 March 2018. Details re [sic] set out in a letter dated 17 July 2018 by Mac Robert Attorneys. The loan is to commission the Lily and Barbrook Mines. Refer to (Annexure E). The agreement is subject to a confidentiality clause.*
>
> *Flaming Silver Trading 373 (Pty) Limited is a special purpose vehicle through which Siyakuhla Sonke Empowerment Corporation (Pty) Limited have acquired 74% of the Vantage Goldfields (Pty) Limited shares.*
>
> *The Company has raised further Capital to continue with the Project and will be addressed by Mr F Arendse the Chief Executive Officer at the Creditor Meeting.*
>
> *This fund will re-open both Mines.*
>
> *Due to the nature of the re-opening it may be too a large a task to re-open both Mines simultaneously."*

[22] The notice included a report for the "*Month ended November 2018*". The practitioners recorded as follows:

> *"The Joint Business Rescue Practitioners ("BRPs") believe all three Business Rescue Plans <u>have failed</u>* (the practitioners' emphasis).

[23] On 8 February 2019, the practitioners addressed a further notice to all the affected parties (*"the second notice"*) and the Vantage Companies. In this notice, the practitioners repeat that plans have failed. They also say that nothing concrete has materialized "*……In terms of our time line set out in our last report…..*". This is clearly a reference to the bidding process that was anticipated, the publication of the new business rescue plans and the creditors meeting that was envisaged. They blame the Flaming Silver transaction and the lack of funding for the inability to keep to the time frames.

[24] In the second notice, under the heading "*Conclusion*", the practitioners recorded as follows:

> *"Given the circumstances above the Practitioners have taken the following to [sic] account;*
>
> - *No proof of funds to reopen the mines have been forthcoming*
> - *The lack of post commencement funds and the deterioration of the assets is exasperated by the fact that we don't know when the mines will open*

The BRPs are however still of the opinion that there is a reasonable prospect that the Businesses can be rescued or for them to, at least, create a better outcome for creditors than under liquidation circumstances. The conversion of Business Rescue proceedings to liquidation would not be in the interest of the affected parties.

The timelines the BRPs have established are as follows:

- *Transparent bidding process to commence on 19 January 2019 and this will end on 31 January 2019. The BRPs may, with support from affected persons for shareholders under approved conditions to accept changes in shareholding. Similarly, the BRPs remain empowered to deal with the assets including shares in subsidiaries in the ordinary course of business rescue.*
- *New business rescue plans to be published by 7 February 2019 and respective creditors meeting to be held on 19 February 2019.*
- *Should the plans be sanctioned it must be implemented by no later than 31 March 2019,*

In the event of the BRPs not securing an offer in respect of the opportunities by 31 January 2019 they will immediately convert to Business Rescue proceedings to liquidations. This will also be the case if the plans are not sanctioned or in the event of a successful party not being able perform [sic] in line with the sanctioned Business Rescue plan."

- *We have not been approached to revise the plans"* [23]

Nothing is mentioned in the second notice by the practitioners over a conversion of the rescues to liquidations.

[25] The Flaming Silver agreement referred to by the practitioners in their notices was poised to obtain funding for the re-opening of the Lily and Barbrook mines upon Flaming Silver acquiring VGSA's shares and loans in the Company. The Flaming Silver agreement is linked to the IDC Loan and Flaming Silver agreeing to make their own money contribution as condition for the IDC Loan. The Flaming Silver agreement contained certain suspensive conditions which were later either deemed to be fulfilled or sought to be extended.

[26] On 17 July 2019, this court gave judgment in an application (*"the Flaming Silver application"*) in terms of which Flaming Silver sought specific performance of the Flaming Silver agreement. The respondents in the Flaming Silver application were VGSA, the practitioners and VGSA's attorneys[24]. One of VGSA's directors, Mr F Dippenaar was granted leave to intervene in the Flaming Silver application. Mr.

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[23] The notice purports to be a "*Report–Month ended as at 31 December 2018 and 31 January 2019*. Under a heading "*The Business Rescue Plans*" the joint business rescue practitioners record as follows:

"The Joint Business Rescue Practitioners still believe all three Business Rescue Plans <u>have failed</u> (the practitioners' emphasis).

In terms of the timelines set out in our last report interest has been shown but nothing concrete has materialised due to the Sale of Shares Agreement between Vantage Goldfields SA (Pty) Ltd and Flaming Silver The lack of progress in respect of these parties this agreement is prejudicing the respective business rescue proceedings. As the appointed business rescue practitioners, we have supported this transaction in an attempt to create value for all the stakeholders concern."

Under heading "*Funding*" the business rescue practitioners record as follows:

"We have no proof of funds to re-open the mines in the immediate short term despite asking for this on a regular basis.

We have not been appraised of the status of the new financial model to re-open the mine a critical issue for practitioners."

[24] Hogan Lovells South Africa Inc.

Dippenaar sought the following relief:

> *"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* [the Flaming Silver agreement] *is null and void due to the non-fulfilment of the suspensive condition contained in Clause 3.1.3 thereof and costs."*

[27] In the Flaming Silver application, this court, amongst other orders, declared that the purported ratification of the signing the fourth addendum to the Flaming Silver agreement is null and void. The effect of this court's order was that the Flaming Silver agreement was no more.

[28] Flaming Silver launched an application for leave to appeal the court's judgment and order. Leave to appeal was refused. Flaming Silver petitioned the Supreme Court of Appeal. According to Arqomanzi, the parties were instructed by the Supreme Court of Appeal to present argument to it. Judgment from the Supreme Court of Appeal is, imminent VGSA said that the Flaming Silver agreement is no longer capable of implementation.[25] Therefore, even if the Supreme Court of Appeal overturns this court's judgment and/or order in the Flaming Silver application, such decision will have no practical effect. The appeal is therefore moot.

The first salvo - the Johannesburg application

[29] On 18 September 2019, Arqomanzi issued an urgent application in the Gauteng Local Division of the High Court, Johannesburg under case number 33012/2019 ("*the Johannesburg application*") seeking the same relief it seeks in this application.

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[25] During the hearing by Mr. Badenhorst.

[30] The notice of motion in the Johannesburg application was published in the Sunday Times, Lowvelder (a locally distributed newspaper), Rapport and the Star.

[31] The urgent part of the Johannesburg application (Part A) was initially enrolled for hearing on 25 September 2019 in that court. The fourth to sixth and eleventh respondents requested more time to consider their positions. An order was made by consent between the parties. In terms of the order: Part A of the Johannesburg application was to be enrolled for hearing on the urgent court roll of 8 October 2019; pending the final determination of the relief in Part A, the business rescue practitioners were interdicted and restrained from implementing the business rescue plans in whatever form, that were adopted by the creditors; and, Aqomanzi, the business rescue practitioners and Real Win were ordered to deliver their answering affidavits to Part A of the Johannesburg application. Costs were reserved for the determination with Part A of the Johannesburg application.

[32] Only VGSA delivered an answering affidavit in the Johannesburg application. In the answering affidavit, VGSA raised a point *in limine* that the Johannesburg High Court does not have jurisdiction to adjudicate the application and that this court is the only court vested with the jurisdiction to determine the matter. Arqomanzi withdrew the Johannesburg application. The notice of withdrawal was filed and served upon VGSA on 8 October 2019. The Johannesburg application was no more.

This application

[33] This application was issued by the Registrar on 10 October 2019. Arqomanzi seeks to rely upon the papers it and VGSA filed in the Johannesburg application[26] and

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[26] In paragraph 13 of Arqomanzi's founding affidavit in this application, the following is recorded:

> *"The applicant accordingly requests that Part A of the application be enrolled for hearing on this court's urgent roll and that the affidavits that were delivered by the applicant and the sixth respondent [in the Johannesburg application] stand mutandis as the founding affidavit, answering affidavit and replying affidavit in this application. Arqomanzi annexed all of the papers founding papers in the Johannesburg application to this application."*

says that this application is a transfer of the Johannesburg application to this court.[27]

[34] Arqomanzi treated the notice of this application different from the Johannesburg application. The practitioners and other respondents were notified of this application in an e-mail dated 8 October 2019 to which e-mail the notice of motion and founding affidavit were attached. [28] Neither the notice of this application nor the notice of withdrawal of the Johannesburg application were published in any printed media.

The relief sought in this application

[35] This application also consists of two parts. Part A is an urgent application and Part B is an application to be heard in the ordinary course. Besides the urgency prayer in paragraph 1 of Part A of the notice of motion, Arqomanzi seeks the following relief:

> "*2. uplifting the moratorium legal proceedings against the first, second and third respondents, all in business rescue, in terms of Section 133(1)(b) of the Companies Act No. 71 of 2008, as amended and granting the applicant leave to proceed with Parts A and B of this application;*
>
> *3. granting the applicant leave to cite the affected persons of the first respondent collectively as the eighth respondent;*
>
> *4. granting the applicant leave to cite the affected persons of the second respondent collectively as the ninth respondent;*

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[27] In paragraph 14 of the founding affidavit in this application, Arqomanzi alleges as follows:

> *"As this application is for all intents and purposes a transfer of the application that was initially launched in the Johannesburg High Court, the respondents had since 18 September 2019 to oppose the application and/or deliver answering affidavits although it is not foreseen that any of the other respondents would oppose this application, the applicant shall nevertheless ensure that this application, together with a new case number and a date on which the case is to be heard, is served on all of the respondents."*

[28] The e-mail notice recorded as follows:

> *"Please be aware that in terms of Section 144 (for ....trade unions), Section 145 (for employees) and Section 146 (for shareholders) of the Companies Act, you are entitled, if you so wish, to participate in these court proceedings."*
>
> *Please send any questions you may have by replying to this e-mail*."

5. granting the applicant leave to cite the affected persons of the third respondent collectively as the tenth respondent;

6. granting the applicant leave to effect service of the application contained in Part B on the eighth, ninth and tenth respondents by means of e-mail;

7. granting applicant leave to publish notice of this application through publication of the notice of motion in the following newspapers:

7.1. The Sunday Times;

7.2. Rapport;

7.3. The Star; and

7.4. The Lowvelder;

8. pending the final determination of the relief in Part B below, the fourth and fifth respondents be interdicted and restrained from implementing all or any of the failed business rescue plans, in whatever form, that were adopted by the creditors of the first respondent on 16 February 2017, by the creditors of the second respondent on 6 August 2018 and by the creditors of the third respondent on 25 May 2016;

9. the costs of Part A be paid by the fourth and fifth respondents (in their personal capacities), in the event of [sic] them opposing this application, alternatively the costs of Part A be reserved for determination with Part B, further alternatively, in the event Part A being opposed, that such opposing parties pay the cost of Part A which costs shall include costs occasioned by employment of two counsels; and

10. further and/or alternative relief."

[36] In Part B of the notice of motion, Arqomanzi prays for relief as follows:

"1. declaring that the seventh respondent lawfully and validly ceded all of the six respondent's loan claims of not less than R389,009,887 against the first respondent to the applicant;

2. declaring that the applicant is an independent creditor of the first respondent for an amount not less than R389,009,887;

3. directing the fourth and fifth respondents to recognise the applicant as a creditor of the first respondent and to allow the applicant to participate *as a creditor in the business rescue proceedings of the first respondent to the full extent provided for in the Companies Act No. 71 of 2008, as amended;*

4. *declaring that the business rescue plans that were adopted by the creditors of the first respondent on 16 February 2017, by the creditors of the second respondent on 6 August 2018 and by the creditors of the third respondent on 25 May 2016, have failed;*

5. *directing the fourth and fifth respondents to convene a combined meeting of creditors of the first respondent, the second respondent and the third respondent within 15 (fifteen) days from the date of this order for the sole purpose of affording such creditors the opportunity to vote on whether they wish to authorise the fourth and fifth respondents prepare new proposed business rescue plans for the first respondent, the second respondent and the third respondent respectively;*

6. *directing the first to third respondents, the sixth respondent and any other party that may elect to oppose this application, pay the costs of Part B of this application and, to the extent that the costs in Part A of this application had not previously been decided, the costs of Part A of this application, jointly and severally, the one paying the others to be absolved, such costs to include the costs occasioned by the employment of two counsels; and*

7. *further and/or alternative relief."*

[37] VGSA and Standard Bank delivered notices of their intention to oppose the application. Standard Bank delivered no papers. The practitioners did not deliver a notice to oppose the application. Initially, they remained tight lipped. On 24 October 2019, the practitioners eventually broke their silence and delivered confirmatory affidavits.

The first hearing on 15 October 2019

[38] The matter was called on the urgent roll. Mr Burger SC and Mr Myburgh appeared for Arqomanzi. Mr Badenhorst SC appeared for VGSA. Mr. Petrus Maseko (*"Mr. Maseko"*). Mr. Maseko informed the court that he was representing affected persons. This was the first sign of heat.

[39] An affidavit deposed to Mr Nhlanhla Harry Mazibuko (*"Mr. Mazibuko"*) was handed up by Arqomanzi's counsel. In the affidavit, Mr. Masibuko alleges that he was an employee of the Lily Mine, that he is the chairperson of Amcu's Health and Safety Committee and an executive member of MIMCO's union branch committee. He also alleges that he is a creditor of MIMCO and therefore an affected person in respect MIMCO. Mr. Masibuko furthermore alleges that in December 2018, he was appointed by the affected ex-employees, the community and the affected families of the workers who had died in the lily mine disaster to be their official spokesperson and since then he has handled all media related matters on their behalf.

[40] I was concerned over the issue that the Johannesburg application was published in the printed media whereas notice of this application was given by e-mail only. In addition, I was concerned that the Johannesburg application was withdrawn on 8 October 2019 without any indication that the withdrawal was communicated to all the affected persons or published, bearing in mind that the affected persons mainly reside in Mbombela and Barberton.

[41] I was concerned that affected parties were directed to Johannesburg where the proceedings were first heard (and later withdrawn) and now Arqomanzi launched its application without the same manner of notice to the affected persons. I requested that the parties to find each other and to agree to an order which would address my concerns. The parties did not find each other. After hearing Arqomanzi and VGSA'a submissions regarding this issue, I made the following order:

> "1. ***PART A*** *of the application is postponed for hearing on 25 October 2019;*
>
> *2. pending the final determination of the relief in* ***PART A****, the fourth and fifth respondents are interdicted and restrained from implementing the business rescue plans, in whatever form, that was adopted by the creditors of the first respondent on 16 February 2017 and/or by the*

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

3. *the applicant shall publish the Notice of Motion as well this order in the Friday, 18 October 2018 edition of the Lowvelder Newspaper;*
4. *notice of the date for which the matter is set down for hearing shall be emailed to all of the respondents;*
5. *the applicant shall deliver its heads of argument on 21 October 2019;*
6. *the sixth respondent shall deliver its heads of argument on 23 October 2019;*
7. *those persons forming part of the eighth to tenth respondents shall deliver their response to the application to the Registrar of this Court by no later than 16h00 on Tuesday, 22 October 2019;*
8. *Costs are reserved for determination with **PART A**."*

[42] I saw the publication of the notice of motion and the order as directed in the Lowvelder of 18 October 2019.

[43] On 23 October 2019, VGSA filed a supplementary answering affidavit and a confirmatory affidavit, the purpose of which, so Mr. McChesney[29] alleges, is to *"... place before the Court an important document, which I am advised, will have a significant bearing on the issues before the court".*[30]

[44] On 23 October 2019, I was furnished with a document headed "*Heads of Argument by Affected Persons*". Mr. Maseko signed the heads of argument "….*as an affected person under the business rescue procedure*…" Appended to the heads of argument, as annexure "**A**", over which Mr. Maseko says[31]: *"We only had a few hours to prepare the opposing affidavit and could not attach all the signatures of employees*

[29] Mr. McChesney deposed to Arqomanzi's affidavits.

[30] I shall address the document, being an alleged subordination agreement, Mr. Mc Chesney thought would have a significant bearing on the issues before the court pater in this judgment.

[31] In paragraph 1.2 of the heads of argument.

and ex-employees on whose behalf I make submissions. Signatures of these persons (additional) hereto attached as Annexure A."

[45] Also annexed to Mr. Maseko's heads of argument was annexures "**B1**" to "**B6**". Mr. Maseko says that it is the statements of individuals *"... who chose to make their own statements and requested me to submit it on their behalf*".

[46] On 23 October 2019, two lever-arch files containing affidavits of affected persons. Volume 1 consists of 117 confirmatory affidavits. The first three affidavits are by persons who allege that they are direct family members of the deceased Lily Mine workers. The fourth affidavit in Volume 1 is a supplementary affidavit by Mr Mazibuko. The second lever-arch file contains 117 confirmatory affidavits. From the sixth affidavit in the first volume up until the last affidavit of the second volume, all of the affidavits read the same. They read as follows:

> *"1. I am an adult employee of the Vantage Goldfields Group (including Lily Mine and Barbrook Mine) and reside in the Matsulu/Louisville Area. I am a member of the community falling under the Lomshiyo Traditional Authority. I am duly authorised to depose to this affidavit.*
>
> *2. As an employee/ex-employee of the Vantage Goldfields Group, I am an affected person with a right to participate in the business rescue proceedings of the Vantage Goldfields Group.*
>
> *3. The facts stated in this affidavit are within my personal knowledge, except where expressly state to the contrary and are, to the best of my knowledge and belief, both true and correct.*
>
> *4. I have read the affidavit of **NHLANHLA HARRY MASIBUKO** dated 14 October 2019, and insofar as same refers to the employees of Lily Mine, the views of the community and members of the Lomshiyo Traditional Authority, I confirm the correctness thereof.*
>
> *5. In particular I confirm that I agree with Mr Masibuko's views that the business rescue plans have failed."*

In each instance, only the deponent's names, written in manuscript, appear in the first paragraph of the further confirmatory affidavits.

[47] On 23 October 2019, the practitioners filed confirmatory affidavits. The fourth respondent deposed to the main confirmatory affidavit. The fifth respondent merely confirmed the content of the fourth respondent's affidavit.

[48] Prior to argument commencing on 25 October 2019, Mr. Burger requested me to accept certain financial statements from the bar. This was apparently in order to address some of the allegations of VGSA's supplementary affidavit. Mr. Badenhorst objected. I ruled that I will give an opportunity to the parties to deal with the practitioners' affidavits and Mr. Mc Chesney's affidavit before judgment is delivered.

[49] Arqomanzi filed supplementary heads of argument. The heads of argument were focussed upon a response to the fourth respondent's affidavit.

[50] On 30 October 2019, VGSA filed a further supplementary affidavit. Arqomanzi responded on 1 November 2019 by delivering a further affidavit in which it dealt with the allegations in VGSA's further supplementary affidavit.

Urgency

[51] Initially, in the Johannesburg application and in this application, VGSA challenged urgency.

[52] The affected persons' views were expressed by Mr. Maseko and Mr. Mazibuko.

[53] Mr Maseko in his heads of argument,[32] he sets out as follows:

> *"Arqomanzi filed this application on an urgent basis. Although failing to set*

[32] Paragraph 4 under heading "Urgency"

out the circumstances to convince the honourable court to why this is urgent, we do agree that it is urgent. We are desperate and cannot wait months or even another year for these matters to be placed again before the court."

[54] In Mr Mazibuko's affidavit[33], he records as follows:

"We would like the whole of this application (not just Part A) to be heard urgently by the court and the final judgment be granted as soon as possible."

"We want the business rescue practitioners to immediately arrange for the affected persons to vote on whether they should publish new business plans incorporating the bids by Arqomanzi and/or Real Win Investments."

[55] It is clear that Mr. Maseko and Mr. Mazibuko, and those they purport to represent, wish that this dispute be dealt on an urgent basis. I agree. The disability under which the Vantage Companies suffered have taken too long to resolve. Time is of the essence in business rescue proceedings. The whole tenor of Chapter 6 of the Act requires a speedy finalization of business rescue[34] – either the company in distress must heal or it must terminate. A business rescue must not endure beyond what is required to prepare, propose, authorise and implement a companies' business rescue plan for a delay is not in the interest of the company, any of its stakeholders or the economy.

[56] I requested the parties if they were aware of anything that would prevent me from resolving the entire application and whether any one of them would be claiming prejudice if I decide to do so. VGSA agreed that the entire application be disposed of subject to caveats in respect of the interim relief sought in prayer 8 of Part A of the Notice of Motion and in respect of the practitioners' affidavit. Because I already resolved and made known that I was going to allow the parties to respond to Mr. Mc

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[33] Paragraphs 21.4 and 21.5.

[34] Section 150(4) – A business rescue plan must be published within 25 business days after the appointment of the business rescue practitioner; Section 151(1) - practitioner must convene and preside over a meeting of creditors and any other holders of a voting interest, called for the purpose of considering the plan within 10 days after publication of the business rescue plan; Section 153(1)(b)(i)(bb) and sub-section 2(a) - the practitioner has 5 days to apply to the court to set aside the result of the vote by the holders of voting interests or shareholders on the grounds that it was inappropriate; or

Chesney's affidavit and the practitioners' affidavits before judgment is given, I saw no possible prejudice for any of the parties.

[57] In any event, the longer the dispute takes to resolve, the longer the Vantage Companies are under disability and the longer the creditors and the affected parties will suffer prejudice. I considered it to be best if I resolve the entire present dispute to the extent that the law allows me to do so.

[58] I first deal with the general moratorium provided for in section 133 of the Act.[35] Then I proceed to VGSA'a challenge to Arqomanzi's standing and thereafter, I address the remaining prayers of Part A and Part B of the notice of motion one by one. Finally, I consider the practitioners' plight and plea for assistance.[36]

Prayer 2 of Part A - Moratorium in section 133(1) of the Act

[59] The relief sought by Arqomanzi in terms of section 133(1)(b) of the Act in Prayer 2 of Part A of the Notice of Motion was not seriously challenged by VGSA, the practitioners or the interested parties. It is common cause that the practitioners have not given their written consent for Arqomanzi to commence or proceed with this application. Therefore, Arqomanzi seeks the upliftment of the moratorium on in respect of the Vantage companies and the court's leave to proceed with the application. The moratorium is not an absolute bar to legal proceedings being instituted or continued against a company under business rescue. [37] The court has a

[35] Section 133(1) of the Act, in relevant part, reads as follows:

> *"General moratorium on legal proceedings against company.—(1) During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except—*
>
> *(a) with the written consent of the practitioner;*
>
> *(b) with the leave of the court and in accordance with any terms the court considers suitable;*
>
> *(c) …."*

[36] I do so under that heading below.

[37] *Arendse and Others v Van der Merwe NO and Another [2016] 4 All SA 48* (GJ) at para. 15.

discretion to lift or to maintain the moratorium. This discretion, as with all instances where the court is left with a discretion, the court's power must be exercised judicially. The court must take into account the purpose of business rescue and balance the interests of the company, creditors and all affected parties.

> *"Whenever relaxation is sought, the rights of the company, affected persons and the practitioner must be protected. It is for the protection of the interests of those persons that the moratorium regime was enacted. This may require an adjournment of the proceedings to enable these persons to consider their positions or to place additional material before the court. In other cases, the opposition to the request for relaxation will be self-evidently frivolous and lacking in substance, an exercise in empty formalism, designed cynically to perpetuate the advantages of immunity from the normal processes of the law which a company can secure for itself under the business rescue regime in the new Companies Act by a stroke of its own pen, and no more."*[38]

[60] In this matter, the rescue proceedings have been ongoing for years and now. The practitioners say that the plans have failed due to the Vantage Companies' inability to recapitalize. The rescue is in limbo. The practitioners ask the court for advice and the affected parties, who suffer the most, seek a speedy resolution of the dispute. I take these factors into account, exercise my discretion, and grant Arqomanzi leave in terms of section 133(1)(b) of the Act for I see no other way to bring the present dispute to a head without any further delay.

Arqomanzi's standing

[61] The main thrust of VGSA's defence is its challenge Arqomanzi's standing. VGSA says that Arqomanzi is not a creditor of either of the Vantage Companies and therefore it lacks *locus standi*.[39]

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[38] *LA Sport 4X4 Outdoor CC and Another v Broadsword Trading 20 (Pty) Limited and Others (A513/2013) [2015] ZAGPPHC 78 (26 February 2015)* at para. 29

[39] I deal with the manner in which Arqomanzi says it has become the Company's creditor and VGSA's challenge thereover later in this judgment.

[62] For Arqomanzi to demonstrate standing, Arqomanzi has to establish that it has a direct interest in the relief that is claimed.[40] For this enquiry, the merits and the question of standing must be separated.[41]

[63] Arqomanzi does not found its standing entirely on it being a creditor of the Company. Arqomanzi, tucks away what appears to be the basis upon which it avers that it has standing. [42] Arqomanzi says the following:

> *"The applicant, in its capacity as offeror, has the right to be treated fairly and equally to any other person that has made an offer to the Vantage Companies. In this regard, the applicant has the right to insist that a fair and transparent process be followed by the Practitioners which includes, but which is not limited to, providing the creditors of the Vantage Companies the opportunity to vote on: ..."*

[64] The allegation that Arqomanzi, in its capacity as offeror, has the right to be treated fairly and equally to any other person that arises from, what Arqomanzi terms "*A legally binding offer ...*" made by Arqomanzi to VGSA on 2 May 2019. This offer

[40] The common law position regarding standing is that only a person who has a direct interest in the relief sought can claim a remedy - *Scippers Four Wheel Drive CC v Leshni Rattan NO (1048/17) [2018] ZASCA 124 (26 September 2018)* at para. 10. In *Dalrymple & others v Colonial Treasurer 1910 TS 372* at 379, Innes CJ said as follows: *"The general rule of our law is that no man can sue in respect of a wrongful act, unless it constitutes a breach of a duty owed to him by the wrongdoer, or unless it causes him some damage in law*."

[41] In *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others 2013 (3) BCLR 251 (CC)*, the following was said over standing in respect of an own-interest litigant:

> *"32. And in determining Giant's standing, we must assume that its complaints about the lawfulness of the transaction are correct. This is because in determining a litigant's standing, a court must, as a matter of logic, assume that the challenge the litigant seeks to bring is justified. As Hoexter explains:*
>
> > *"The issue of standing is divorced from the substance of the case. It is therefore a question to be decided in limine [at the outset], before the merits are considered."*
>
> *33. The separation of the merits from the question of standing has two implications for the own-interest litigant. First, it signals that the nature of the interest that confers standing on the own-interest litigant is insulated from the merits of the challenge he or she seeks to bring. An own-interest litigant does not acquire standing from the invalidity of the challenged decision or law, but from the effect it will have on his or her interests or potential interests. He or she has standing to bring the challenge even if the decision or law is in fact valid. But the interests that confer standing to bring the challenge, and the impact the decision or law has on them, must be demonstrated."* [Footnotes omitted].

[42] In paragraph 119 of its founding affidavit.

provided that Arqomanzi would pay R12 million for the same assets that VGSA sold to Flaming Silver for R10 million.[43] In addition thereto, Arqomanzi alleges: [44]

> *"On 22 July 2019, the applicant submitted a legally binding offer to the practitioners ("the offer") on substantially the same terms as those contained in the non-binding offer that was submitted to them on 3 May 2019. As the applicant was aware of the practitioners' views as expressed in the notice of the affected persons of the Vantage Companies of 24 December 2016, namely that new proposed business rescues plans would only be prepared if office would receive by them and that those proposed business rescue plans would have to be presented to the creditors of the Vantage Companies for voting, the applicant made provision for such a process in the Offer…"*
>
> *"Following the above exchange of e-mails, the creditors of the Vantage Companies received notice dated 21 August 2019 from the practitioners (attached as annexure "FA29"). At the meeting of such creditors had been convened for 4 September 2019 at which meeting:*
>
> *94.1. The offers received from the applicant and RWI would be presented to such creditors, who would be given an opportunity to ask questions to the offerors (no details of the time and venue of the meeting were given); and*
>
> *94.2. The practitioners would seek instructions from the creditors in respect of publication of new business rescue plans."*
>
> *"On 21 August 2019, the fifth respondent addressed an e-mail to the applicant to advise that:*
>
> *95.1. Meeting of creditors (as per the above notice) had been convened for 4 September 2019;*
>
> *95.2. The two offers would be included in a circular to the creditors to be despatched on 28 August 2019; and*
>
> *95.3. Information had been requested from Standard Bank in respect of the acquisition of the Loan Account by the applicant and that, once the information had been received, the practitioners would be in a position to adjudicate on the applicant's status as a creditor of the Company."*

[65] On 4 September 2019, a combined meeting of the creditors of the Vantage

[43] Paragraphs 64, 94 and 95 of the founding affidavit.

[44] Paragraph 68 of the founding affidavit.

Companies was held. Both Arqomanzi and RWI explained their respective offers to the creditors at the meeting and answered various questions which were asked of them by the attendees.[45]According to Arqomanzi[46], at the meeting, *"… the very real and definite impression created by the representative of RWI – which was not corrected by the Practitioners – that RWI will simply revive the failed business rescue plans and make payments to the creditors on dictated by RWI. For example, the RWI representative, Ms Zandile Mdanda, stated to the meeting that RWI would commence making payments of dividends to creditors, including employees, within thirty days of the signing pf the agreement with the Practitioners, and would do so before obtaining approval in terms of Section 11 of the Mineral and Petroleum Resources Act No. 28 of 2002."*

[66] Arqomanzi states[47] that the impression was tacitly endorsed by the practitioners through their concessions and that this tacit endorsement was fortified in the letter of 4 September 2019 by the practitioners' attorneys and the opinion that was furnished to the practitioners regarding the cession of loan account.

[67] VGSA does not deny the offer and that the meeting of 4 September 2019 took place. VGSA does not meet the allegations over the offer and the meeting head on. In its heads of argument, VGSA, over Aquomanzi's reliance upon the offer for it to establish standing, argues as follows:[48]

> *"38. The applicant does not asset any legally cognizable right, for example, qua creditor against Barbrook and MIMCO. This fact is, correctly conceded in paragraph 8 of the applicant's heads of argument.*
>
> *39. Applicant puts up the argument in regard to Barbrook and MIMCO that it is 'an offeror' who is entitled to be treated 'equally and fairly'*
>
> *40. It is trite that a party who has made (or intends to make) an offer does*

[45] Paragraph 112 of the founding affidavit.

[46] Paragraph 113 of the founding affidavit.

[47] Paragraph 114 of the founding affidavit.

[48] Pages 17 and 18 of VGSA's heads of argument.

not acquire any legally enforceable rights which can found locus standi

41. It follows that applicant does not have locus standi to pursue the relief claimed in Part A or Part B against Barbrook and MIMCO. It merely claims to be an offeror. which does not vest it with locus standi to pursue any relief against Barbrook and MIMCO.

42. On this ground alone, Part A of the application must fail as against Barbrook and MIMCO"

[68] I invited Mr. Badenhorst to furnish the court with authority for the submission in paragraph 40 of the heads of argument. He evaded the invitation. I may be wrong, but I got the impression that he did so because there is no authority for such a general proposition. In my view, whether an offer establishes standing must be considered in light of the circumstances under which the offer was made, the object of the offer, the nature of the parties, including their respective expectations and the requirement that parties must act fairly in their dealing with each other.[49]

[69] The Arqomanzi offer cannot be divorced from the circumstances under which

[49] [1] To act fairly is entrenched in the Constitutional values. In *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd 2012 (1) SA 256 (CC)*, at paras. 22 and 23, Jacoob J, writing for the minority, said as follows:

> *"Everfresh contends that the common law should be developed in terms of the Constitution to oblige parties who undertake to negotiate with each other to do so reasonably and in good faith. The contention of Shoprite is that a provision of this kind should not be enforceable because the concept of good faith is too vague. Good faith is a matter of considerable importance in our contract law and the extent to which our courts enforce the good faith requirement in contract law is a matter of considerable public and constitutional importance. The question whether the spirit, purport and objects of the Constitution require courts to encourage good faith in contractual dealings and whether our Constitution insists that good faith requirements are enforceable should be determined sooner rather than later. Many people enter into contracts daily and every contract has the potential not to be performed in good faith. The issue of good faith in contract touches the lives of many ordinary people in our country.*
>
> *The values embraced by an appropriate appreciation of ubuntu are also relevant in the process of determining the spirit, purport and objects of the Constitution. The development of our economy and contract law has thus far predominantly been shaped by colonial legal tradition represented by English law, Roman law and Roman Dutch law. The common law of contract regulates the environment within which trade and commerce take place. Its development should take cognisance of the values of the vast majority of people who are now able to take part without hindrance in trade and commerce. And it may well be that the approach of the majority of people in our country place a higher value on negotiating in good faith than would otherwise have been the case. Contract law cannot confine itself to colonial legal tradition alone."*

it was made. The Arqomanzi offer was made to the practitioners in respect of the business rescue of the Vantage Companies. The offer was not only of importance to Arqomanzi and VGSA but also to the creditors and the affected persons who are desperately awaiting the future of the Vantage Companies. In addition, the practitioners stand in a special relationship with Arqomanzi, VGSA, the Vantage Companies' creditors and the affected parties. They have a statutory duty by virtue of the provisions of section 140 of the Act.[50] In my view, the circumstances under which

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[50] Section 140 of the Act provides as follows:

> "***General powers and duties of practitioners.****—(1) During a company's business rescue proceedings, the practitioner, in addition to any other powers and duties set out in this Chapter—*
>
> > *(a) has full management control of the company in substitution for its board and pre-existing management;*
> >
> > *(b) may delegate any power or function of the practitioner to a person who was part of the board or pre-existing management of the company;*
> >
> > *(c) may—*
> >
> > > *(i) remove from office any person who forms part of the pre-existing management of the company; or*
> > >
> > > *(ii) appoint a person as part of the management of a company, whether to fill a vacancy or not, subject to subsection (2); and*
> >
> > *(d) is responsible to—*
> >
> > > *(i) develop a business rescue plan to be considered by affected persons, in accordance with Part D of this Chapter; and*
> > >
> > > *(ii) implement any business rescue plan that has been adopted in accordance with Part D of this Chapter.*
>
> *(1A) The practitioner must, as soon as practicable after appointment, inform all relevant regulatory authorities having authority in respect of the activities of the company, of the fact that the company has been placed under business rescue proceedings and of his or her appointment.*
>
> *(2) Except with the approval of the court on application by the practitioner, a practitioner may not appoint a person as part of the management of the company, or an advisor to the company or to the practitioner, if that person—*
>
> > *(a) has any other relationship with the company such as would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship; or*
> >
> > *(b) is related to a person who has a relationship contemplated in paragraph (a).*
>
> *(3) During a company's business rescue proceedings, the practitioner—*
>
> > *(a) is an officer of the court, and must report to the court in accordance with any applicable rules of, or orders made by, the court;*
> >
> > *(b) has the responsibilities, duties and liabilities of a director of the company, as set out in sections 75 to 77; and*
> >
> > *(c) other than as contemplated in paragraph (b)—*
> >
> > > *(i) is not liable for any act or omission in good faith in the course of the exercise of the powers and performance of the functions of practitioner; but*

the offer was made and the practitioners' response to the offer entitled Arqomanzi to at least a response whether that response was an acceptance of the offer or a counter-offer or a refusal of the offer, or even, at least, that the offer is either considered or not even considered.

[70] In my view, with regards to VGSA's attempt to differentiate between the Company on the one hand and Barbrook and MIMCO on the other[51] is artificial in light of the undisputed fact that the Vantage Companies' plans are interrelated and the success of the one depends upon the other. Any order granted in respect of the Company will invariably also affect Barbrook and MIMCO.

[71] In Prayer 2 of Part B of the notice of motion, Arqomanzi seeks a declarator that it is a creditor of the Company on the basis that it is declared that Standard Bank has lawfully and validly ceded all VGSA's loan claims to Arqomanzi.[52]

[72] The main thrust of VGSA's opposition to the relief Arqomanzi seeks is its challenge to Arqomanzi's standing to approach court because, so VGSA says, Arqomanzi is not a creditor of any of the Vantage Companies. Closely related to VGSA's challenge to Arqomanzi's standing, is VGSA's view that Arqomanzi has failed to establish a *prima facie* right (in respect of the interim relief sought in prayer 8 of Part A of the notice of motion) and a clear right (in respect of Part B of the notice of motion), also because, so VGSA says, Arqomanzi is not a creditor of the Company (including MOMCO and Barbrook). I do not understand VGSA to have challenged

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(ii) may be held liable in accordance with any relevant law for the consequences of any act or omission amounting to gross negligence in the exercise of the powers and performance of the functions of practitioner.

(4) If the business rescue process concludes with an order placing the company in liquidation, any person who has acted as practitioner during the business rescue process may not be appointed as liquidator of the company."

[51] Paragraph 41 of VGSA's heads of argument.

[52] Prayer 1 of Part B of the notice of motion.

the further requirements for interdicts.

[73] If Arqomanzi is declared to be a creditor of the Company, it must logically follow that VGSA's defence in respect of both standing and the failure by Arqomanzi to establish the *prima facie* right, alternatively, a clear right requirement in respect of the final interdicts Arqomanzi seeks must fail.[53] The declaratory orders Arqomani is seeking, if successful, will confirm its standing to apply for the interdicts it seeks.[54] If Arqomanzi has standing it will also be entitled to the declaratory orders is seeks provided the court exercises its discretion in Arqomanzi's favour.

[74] In order to determine Arqomanzi's standing, I need not decide over the merits of Arqomanzi's allegation that it is a creditor of the company by virtue of the cession. In my view, Arqomanzi has a direct legal interest in the relief it seeks in Part B of the notice of motion. I find that Arqomanzi has established standing to approach this court.

Prayer 1 of Part B – The cession and Loan Account Sale Agreement

[75] VGSA confirms that it has ceded its claim against the Company to Standard Bank (*"the cession"*)[55]. It is common cause that Arqomanzi and Standard Bank the Loan Account Sale Agreement (*"the agreement"*) pursuant to clause 9.1.4 of the cession.[56] It is also not disputed that VGSA's loan to the Company amounted to R 389 009 887.00 when the cession was effected.

[76] VGSA's challenge is on a different front. VGSA challenges the cession on the grounds that: the *merx* in the agreement only included Standard Bank's rights in terms

[53] In prayer 8 of Part A of the notice of motion, Arqomanzi seeks an interim interdict. In prayers 3,5 and 6 of Part B of the notice of motion, Arqomanzi seeks final interdicts.

[54] Prayers 1,2 and 4 of Part B of the notice of motion.

[55] On page 5 of VGSA's heads of argument VGSA says that *"……[VGSA] accepts ….that on 6 September 2016 [VGSA] ceded its claim against the Company to [Standard Bank] in terms of the cession in securitatem debiti.*"

[56] Annexure "FA21".

of the cession (which Standard Bank owned) and not the loan account over which VGSA retained a reversionary right [57] and that no notice was given by Standard Bank to VGSA of Standard Bank's intention to dispose of VGSA's loan account, therefore, the agreement is null and void and of no force or effect as far as VGSA is concerned[58]. Alternatively, VGSA contends that, if notice was given of an intention to sell VGSA's loan account, Standard Bank acted in a manner which was prejudicial to VGSA and for that reason, the sale is invalid.[59]

[77] In our law, a cession *in securitatem debiti* of loan accounts constitutes a pledge of the right to claim performance in terms of, in this instance, the loan account. The right to claim performance of a the loan account is an incorporeal right treated no different from the pledge of a movable.[60] For as long as the secured debt is due, the cessionary is not permitted to deal with or cede the right to recover payment except in the presence of an agreement of *parate executie*.[61] What is important is the content of the right that is ceded being the right to recover payment of the loan account.[62]

[78] I proceed to deal with the *merx* in the agreement. In my view, the starting point is to consider what was ceded to Standard Bank by VGSA in terms of the cession because only that which was ceded could be sold to Arqomanzi by Standard Bank. Clause 1 of the cession provides as follows:

> *"I/we, [VGSA] …("Cedent") cede make over and transfer in security to* [Standard Bank] *or anyone who takes transfer of* [Standard Bank]*'s rights under this cession all the Cedent's rights in and to all moneys due and to*

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[57] The position is summarized in paragraph 23 at page 12 of VGSA's heads of argument where the following is said: *"There is obviously a material difference between 'the Claims' (loan account) over which VGSA retains ownership and in respect of which [VGSA] has a reversionary right, on the one hand, and [Standard Bank]'s rights in terms of the cession which are owned by [Standard Bank] and which [Standard Bank] has not disposed of in terms of FA21."*

[58] Paragraph 26 at page 13 of VGSA's heads of argument.

[59] Paragraph 28 at page 13 of VGSA's heads of argument.

[60] See: Graf v Buechel 2003 (4) SA 378 (SCA) at para. 8.

[61] See: Grobler v Oosthuizen 2009 (5) SA 500 SCA at pages 507 to 508.

[62] See: Grobler *supra*; See: Picardi Hotels Ltd v Thekwini Prop (Pty) Ltd 2009 (1) SA 493 (SCA) at para. 3.

become due to the Cedent by [the Company] *...("loan debtor") and in and to all rights of action arising under those moneys ("claims"), upon the terms and conditions set out in this agreement.*"

[79] The meaning and effect of Clause 1 of the agreement is clear. What was ceded was all of VGSA rights in and to all moneys due to it by the Company by virtue of the loan account. That is, the right to claim performance in terms of the loan agreement between VGSA and the Company. The amount of money is not in dispute. Whether payment of the money was due is not traversed. It does not matter because whether payment by the Company was due or not, VGSA retained all of its rights to claim payment from the Company of the amount due in terms of the loan account.

[80] VGSA argues that Standard Bank was not capable of transferring or selling to Arqomanzi VGSA's "*....rights (i.e. the Claims or loan account)*." I do not agree. Standard Bank sold the rights VGSA ceded to it as that which was ceded by VGSA to Standard Bank was sold to Arqomanzi in terms of the agreement i.e. VGSA's right to recover the loan account from the Company. By virtue of the agreement, Arqomanzi became entitled to recover what was due by the Company on the loan account, nothing more and nothing less.

[81] Arqomanzi retains this entitlement for as long as the Company owes Standard Bank money for whatever reason for it was this entitlement that was ceded. If all of the Company's indebtedness to Standard Bank is confirmed to be settled, the loan account must revert to VGSA by virtue of the reversionary interest VGSA still has in the loan account, being the security. The question is simply this – who owes who after the agreement and, in respect of the loan account, how much is owed. It is not disclosed in the papers how much is still owed by the Company to VGSA or by the Company to Standard Bank. In my view, by virtue of the cession and the agreement, the Company owes Arqomanzi the present amount of the loan account subject to VGSA's reversionary interest in the loan account. If the Company's indebtedness to Standard Bank is settled, VGSA becomes entitled to claim the current amount of the loan account from the Company, if and when due, then making VGSA the Company's

creditor and not Arqomanzi.

[82] I turn to the alleged lack of notice (or the disability thereof) given by Standard Bank to VGSA of its intention to sell the security. Whether or not Standard Bank was obliged to give notice to VGSA must be answered by referring to the cession. Clause 9 of the agreement dealt with "Realization". Clause 9.1 entitles Standard Bank, upon any breach or default in respect of the debts which remains unremedied to enforce all or any of the Standard Banks's rights, powers and privileges including *"...selling or otherwise realizing the claims by public auction or private sale*" subject thereto that, in the case of a private sale, on reasonable notice to VGSA of not more than ten business days as Standard Bank may deem appropriate.

[83] It is common cause that Standard Bank sold the security to Arqomanzi by private sale after giving notice to VGSA. Standard Bank gave notice of its intention to VGSA on 23 July 2019 to sell the cession (*"the notice"*). The agreement was concluded on 1 August 2019. Ten business days have not elapsed between 23 July 2019 and 1 August 2019. VGSA's real challenge to the notice appears to be at another level. I understand VGSA's alternative challenge to be that the notice was defective because Standard Bank could not sell the Company's loan account with VGSA as set out in the notice of 23 July 2019. Notice was therefore given by Standard Bank to VGSA of its intention to do something it was not allowed to do (so the challenge goes) – the selling of the Company's loan account. In paragraph 7 of the notice, Standard Bank notifies VGSA that of its *"intention……to endeavour to dispose of its rights to a prospective purchaser."* Standard Bank did not say that it intends to sell the Company's loan account – it said that it intended to sell its "rights" under the cession. Standard Bank's rights can be nothing else than its right to claim performance by the Company in terms of the loan account, a right VGSA no longer had by virtue of the cession and for as long as the Company owed Standard Bank. There is therefore no merit in VGSA's main and alternative challenge of the notice.

[84] The supplementary answering affidavit and the confirmatory affidavit that was

filed by VGSA on 23 October 2019[63], proverbially through the cat amongst the pigeons. In the affidavit, Mr. McChesney says that it slipped his mind "*....during the rushed and chaotic urgent proceedings brought in the Johannesburg High Court and in this Court....*" he has not previously informed VGSA's legal representatives of a subordination agreement that was concluded between VGSA and the Company in respect of VGSA's loan account against the Company.[64] The subordination agreement preceded the cession to Standard Bank as well as the Lily mine disaster.

[85] The subordination agreement provides that so much of the loan account as was necessary was subordinated to enable all the other creditors of the Company, both present and future to be paid in full. The effect of the subordination was that the *merx* of the agreement was subordinated and subject to the Company's other present and future creditors' claims[65] for as long as the Company incurred further operating losses and until the Company was restored to technical solvency. The Company's other creditors will rank preferentially to VGSA's claim.[66] Mr. McChesney later says[67] that the signatories of the subordination agreement was intended to be for the "entire face value" of VGSA's claim against the Company and that the subordination remains in place until the Company's auditors certifies that he/she has been furnished with evidence which reasonably satisfies him/her that the liabilities [of the Company] do not exceed its.[68]

[86] For obvious reasons, Arqomanzi did not receive this revelation well for, upon Mr. Mc Chesney's belated revelation, the *merx* is worth nothing or very little for as long as the subordination subsists. This revelation may have brought Arqomanzi's innovative manoeuvring to naught, at least so VGSA hopes. Arqomanzi responded by

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[63] The affidavit was deposed to on 22 October 2019.

[64] Paragraph 10 of the supplementary affidavit.

[65] Clause 2.1 of the Subordination Agreement.

[66] Clause 2.3 of the Subordination Agreement.

[67] In paragraph 9.10 of a further supplementary answering affidavit filed by VGSA on 30 October 2019.

[68] Paragraph 9.13 of the further supplementary affidavit of VGSA.

filing an affidavit in order to challenge Mr. Mc Chesney's evidence in VGSA's further supplementary answering affidavit. In my view, I need not deal with Arqomanzi's challenge to the evidence because it is not the value of the *merx* that qualifies Arqomanzi to be the Company's creditor. It is the value of Arqomanzi's claim against the Company that is affected by the subordination, the least of which, upon a proper interpretation of the cession, the agreement and the subordination agreement is the difference between the balance on the loan account and R 14 million.[69]

[87] Standard Bank validly sold (and ceded) all of VGSA's loan claims to Arqomanzi. Arqomanzi's right to claim performance by the Company of its obligations in terms of the loan account remains intact for the agreement was valid and remains in full force and effect.

[88] Consequently, I find that Arqomanzi is a creditor of the Company. Arqomanzi is entitled to an order in terms of prayer 1 of Part B of the notice of motion only to the extent that it confirms Arqomanzi's rights in terms of the agreement. In the absence of proof of the current amount outstanding in terms of the loan, I am not going to declare that VGSA's loan claims are not less than R 389,009,887.

Prayer 2 -Arqomanzi (independent creditor)

[89] Having found that Arqomanzi is a creditor of the Company, the question Arqomanzi seeks to be determined is whether Arqomanzi is an "*independent creditor….for an amount not less than R 389,009,887*". For the reasons given under the previous heading, I decline the request to declare the amount.

[90] The Act sets out what an independent creditor is. An independent creditor is a person who is a creditor of the company [in business rescue] and who is not related to

[69] The cession stood as continuing covering security "…even if the debts [of the Company] are temporarily settled at any time,…" – Clause 3 of the cession. Arqomanzi purchased all Sandard Bank's right, title and interest in and to the [Comoany's] lon account – Clause 1.10 read with clause 2.3 of the agreement.

the company, a director or the practitioner.[70] There are exceptions provided for in sub-section 2 of section 128. The exceptions relate to employees.[71] "Related" in the Act are set out in section 2(1). A juristic person is related to another juristic person if either of them directly or indirectly controls the other, or the business of the other or either is a subsidiary of the other.[72]

[91] Arqomanzi does not fit the description of a related person as it does not (and in business rescue cannot) directly or indirectly control the Company and, Arqomanzi is not a subsidiary of the Company. It follows that Arqomanzi is an independent creditor of the Company. Subject to what I set out above regarding the amount, an order in terms of prayer 2 of the notice of motion must follow.

Prayer 3 – Recognition and participation of Arqomanzi

[92] In light of the finding that Arqomanzi is an independent creditor of the Company, I need not dwell much on Arqomanzi's right to be recognised by the practitioners and its right to participate in the rescue proceedings. Arqomanzi is a creditor of the Company and entitled to all the rights afforded to it under Chapter 6 of the Act.

Prayer 4 – Business rescue plans of the Vantage Companies failed

[93] The Act[73] defines business rescue as follows:

> *"**"business rescue"** means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for—*

[70] Section 128(1)(g)(i) and (ii) of the Act.

[71] This is not relevant for the present determination.

[72] Section 2(1)(c)(i) and (ii).

[73] Section 128(1)(b).

> *(i) the temporary supervision of the company, and of the management of its affairs, business and property;*
>
> *(ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and*
>
> *(iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company;"*

[94] Business rescue has an important purpose. It seeks to enable a company to continue its existence on a solvent basis or, if that is not possible to so continue, to achieve a better return for the company's creditors and shareholders as an alternative to immediate liquidation. In *Booysen v Jonkheer Boerewynmakery (Pty) Ltd (in business rescue) and another [2017] 1 All SA 862 (WCC)*, at paras. 16 and 17, Sher AJ said as follows:

> *"[16] In Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group Ltd and another, Rogers AJ pointed out that the business rescue provisions in the Act "reflect a legislative preference for proceedings aimed at the restoration of viable companies rather than their destruction".*
>
> *[17] In Oakdene Square Properties (Pty) Ltd and others v Farm Bothasfontein (Kyalami) (Pty) Ltd and others, the court expressed the view that the new provisions in the Act were in line with modern trends in corporate rescue regimes in that they attempted to secure and balance the competing interests of creditors, shareholders and employees, and envisaged a shift away from only having regard for creditors' interests, and are predicated on the belief that to preserve a business and the experience and skill of its employees, might, in the end prove to be a better option for creditors and enable them to secure a better recovery of their debts from their debtor.8 In their work entitled Companies and Other Business Structures in SA, the authors have explained that whereas it is fundamental to healthy market-based economies that companies which cannot be competitive will fail, owing to the negative social impact such failures can have on employees and their dependents and considering the effect on sovereign economies as a result of the loss of revenue previously generated by such failed*

companies, since the 1990s there has been a shift in approach in most industrialised nations towards "rescuing" financially distressed corporate entities rather than liquidating them, and indeed, the "straightforward" liquidation of companies has become rather "unfashionable"."[Footnotes omitted]

[95] Section 128(1)(c) of the Act provides that a business rescue plan means a plan contemplated in section 150. Section 150 of the Act provides that the business rescue practitioner, after consulting the creditors, other affected persons, and the management of the company, must prepare a business rescue plan for consideration and possible adoption at a meeting held in terms of section 151 of the Act. Section 150(2) of the Act sets out all the information the business rescue plan must contain that is reasonably required to facilitate affected persons in deciding whether to accept or reject the plan or not.

[96] In *Booysen supra* [74], the scheme of the business rescue plan, the adoption thereof and what happens thereafter is conveniently summarized. I borrow liberally therefrom:

> *"The business rescue practitioner who is appointed to attend to a company in business rescue is responsible for preparing a so-called "business rescue plan" after consulting creditors and other affected persons (including shareholders, employees and management (which is intended to constitute his plan in terms of which the company will be saved and rehabilitated), and is responsible for implementing it once it has been adopted. The plan is required to deal pertinently with a number of issues and must contain all information reasonably required in order to facilitate its proper consideration by affected persons in order to enable them to decide whether to accept or reject it. Amongst other things, it must set out all the secured, preferent and concurrent creditors and which of them have proved their claims, as well as the probable dividend which they would receive were the company to be placed in liquidation instead. The plan is also required to propose how the company is going to discharge its debts, and in this regard must include details as to how any assets which are available may be realised in order to settle creditors' claims, and the order of preference in terms of which the proceeds thereof will be applied to pay creditors. In addition, it must set out a statement of any conditions which must be satisfied in order for it to come into operation and to*

[74] At paragraphs 20 to 22.

be fully implemented, and the effect, if any, that it will have on the number of employees and their terms and conditions of employment, as well as the circumstances in terms of which the rescue process will come to an end.

The plan must be published by the company within 25 business days after the appointment of the business rescue practitioner, and within 10 business days thereafter the practitioner must convene and preside over a meeting of creditors and the holders of voting interests in the company, which must consider its adoption. At the meeting which is so convened the practitioner must introduce the proposed plan to the creditors and shareholders and must provide employees' representatives with an opportunity to address the meeting, and must thereafter invite discussion and conduct a vote on a proposal to adopt or to amend the proposed plan. If the proposed plan is rejected by the meeting the practitioner may seek approval from the holders of voting interests to prepare and publish a revised plan, which must be tabled and sanctioned within 10 business days thereafter.

The Act provides that once a rescue plan has been adopted in meeting, it is binding on the company and on each of its creditors as well as the holders of its securities, whether or not such persons were present at the meeting and voted in favour of the plan or not, and irrespective of whether or not such persons, if they were creditors, had proven their claims against the company. And once the plan has been adopted, the company is required, under the direction of the practitioner, to take all necessary steps to attempt to satisfy any conditions on which the plan may be contingent and to implement the plan 'as adopted'. After the practitioner has substantially implemented the rescue plan, he may terminate the rescue proceedings by giving notice of substantial implementation to the Commission.[The references to individual sections of the Act are omitted]

[97] In business rescue proceedings, the business rescue plan is not only mandatory, it fulfils an important purpose. It guides the company in distress to the goals of the business rescue proceedings and there must be a tangible end-result. The important features of a business rescue plan in business rescue proceedings are: The business rescue practitioner must consult affected parties; he/she must prepare a plan; the plan must include the statutory information; the plan must be considered; the plan must be adopted; the plan must be published; the plan must be implemented by the business rescue practitioner – he/she is in control and he/she must act swiftly for it is

obvious that any inordinate delay would stifle the business rescue.[75]

[98] All of the Vantage Companies' plans foresaw that the companies could be saved to trade in solvent circumstances in future and all of the plans are intertwined. The success or failure of the one would determine the success or failure of the other.

[99] The Company's business rescue plan is based on two premises: job retention and the ability to re-open the Lilly and Barbrook mines and to achieve production capacity and profitability.[76] Certain conditions had to be met for the Vantage companies business rescue to succeed: Post Commencement Funding is required in Barbrook; employees needed to be paid, creditors needed to be paid; the Barbrook Mine needed to be re-opened and operate at a profit; and a management contract between the Company and subsidiaries (MIMCO and Barbrook) had to be entered into.[77]

[100] MIMCO's business rescue plan is based on two premises namely, job retention and the ability to re-open Lilly Mine and achieve production capacity and profitability.[78] The conditions for MIMCO's business rescue plan to succeed, were the following: an amount of R200 million is needed to be raised by way of loan or equity or both within the Vantage Companies to develop the access decline and re-open the mine.

[101] In terms of Barbrook's plan, the Barbrook mine needed to be capitalised to ensure to its sustainability; employees need to be paid, creditors need to be paid; and the mine needs to be re-capitalised and reopen and operate at a profit.[79] The business

[75] See: *Advanced Technologies and Engineering Company (Pty) Ltd (in Business Rescue) v Aeronautique et Technologies Embarquees Sas and Others (GNP) Case No 72522/2011* at para. 26 where Fabricius J said: *".....a substantial degree of urgency is envisaged once a company has decided to adopt the relevant resolution beginning business rescue proceedings."*

[76] Paragraph 6.2 of the company's business rescue plan.

[77] Paragraph 6.3 of the company's business rescue plan.

[78] Paragraph 6.2 of MIMCO's business rescue plan.

[79] Paragraph 6.3 of the MIMCO's business rescue plan.

rescue practitioners deal in Barbrook's business rescue plan with the prospect of rescuing the Company. There appears to be three conditions. The first condition is an Industrial Development Corporation Loan and the recovery from gold from Barbrook's significant tailing dam. In respect of the IDC Loan and other funding, the business rescue practitioners, in the Barbrook's business rescue plan records as follows:

> *"The Industrial Development Corporation has granted a loan of R119,000,000.00 on 29 March 2018. Details re [sic] set out in a letter dated 17 July 2018 by Mac Robert Attorneys. The loan is to commission the Lilly and Barbrook Mines. Refer to (Annexure E). The agreement is subject to a confidentiality clause.*
>
> *Flaming Silver Trading 373 (Pty) Limited is a special purpose vehicle through which Siyakuhla Sonke Empowerment Corporation (Pty) Limited have acquired 74% of the Vantage Goldfields (Pty) Limited shares.*
>
> *The Company has raised further Capital to continue with the Project and will be addressed by Mr F Arendse the Chief Executive Officer at the Creditor Meeting.*
>
> *This fund will re-open both Mines.*
>
> *Due to the nature of the re-opening it may be too a large a task to re-open both Mines simultaneously."*

[102] It is common cause that the Vantage Companies are still in business rescue. The practitioners and Arqomanzi say that the plans of the Vantage Companies have failed. The practitioners gave their reasons in the notices they issued[80]. In the fourth respondent's belated confirmatory affidavit, the practitioners lay the blame for the delays in implementing the plans before the doors of Flaming Silver and VGSA. They say that the delays were occasioned by the litigation between Flaming Silver and VGSA.[81] The practitioners proceed to say that although the Flaming Silver Transaction "*....took place outside of the business rescue proceedings…*", the Company was unable to source funding from the IDC since the funding was reliant

[80] See paragraphs 22 to 25 *supra*.

[81] Paragraph 3 of the fourth respondent's affidavit.

upon Flaming Silver acquiring VGSA's shares in the Company.

[103] Arqomanzi echoes the practitioners' reasons. In addition, Arqomanzi says that all the time-related milestones that were agreed to in the plans have failed months and years ago and for this reason the plans failed *ipso facto.*[82] Arqomanzi is of the view that the practitioners were duty bound either to propose new plans or to wind-up the VGA Companies when it became evident that the plans could no longer be implemented. Aqomanzi accuses the practitioners of a dereliction of their duties.[83]

[104] VGSA does not deny that the plans are still to be implemented. It says that, whereas a business rescue can fail there is no such thing as a failed business rescue plan[84] and, in terms of the plans themselves (which provides for the termination of the rescue) [85] the circumstances for the rescue to terminate have not occurred. In addition, VGSA argues that for as long as the plans remain on foot, it continues to be binding on all persons referred to in section 152(4) of the Act [86]; that the business rescue practitioner remains responsible to implement the business rescue plan[87]; and, that the

[82] Paragraphs 39 and 40 at pages 15 and 15 of Arqomanzi's heads of argument. Arqomanzi relies on the dictum in *Kransfonrein Beleggings (Pty) Ltd v Combrink Twenty Five (Pty) Ltd 2017 JDR 1577 (SCA)* at para. 19.

[83] Paras. 41 on page 15 of Arqomanzi's heads of argument.

[84] In footnote 10 of VGSA's heads of argument, VGSA argues as follows*: "Nowhere in the Act is there any recognition of the concept of a 'failed' business rescue plan*."

[85] As set out in paragraph 6.6 of the Company's plan.

[86] Section 152(4) of the Act provides as follows:

> *"A business rescue plan that has been adopted is binding on the company, and on each of the creditors of the company and every holder of the company's securities, whether or not such a person—*
>
> > *(a) was present at the meeting;*
> >
> > *(b) voted in favour of adoption of the plan; or*
> >
> > *(c) in the case of creditors, had proven their claims against the company."*

[87] Section 140(1) provides as follows:

> *General powers and duties of practitioners.—(1) During a company's business rescue proceedings, the practitioner, in addition to any other powers and duties set out in this Chapter—*
>
> *(a)…..*
>
> *(d) is responsible to—*
>
> > *(i) develop a business rescue plan to be considered by affected persons, in accordance with Part D of this Chapter; and*

business rescue plan can only come to an end when the business rescue practitioner files a notice of substantial implementation with the CIPC or the court orders the conversion of the business rescue to liquidation proceedings. VGSA argues that none of the conditions for the ending of the plans have been met.[88]

[105] VGSA places further reliance upon what the plans themselves provide in respect of namely for the ending of the plans. The practitioners refer to the circumstances under which the plans will end in the heading in paragraph 6.6 of the Company's plan. The body of the text refers to the end of the business rescue itself and not only the plans. What is furthermore set out in the body of the text echoes the provisions of sections 132(2)[89] and 153[90] of the Act and nothing more. In addition,

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(ii) implement any business rescue plan that has been adopted in accordance with Part D of this Chapter."

[88] Therefore, so VGSA argues, prayer 8 of the notice of motion has no basis – paragraph 51 of VGSA's heads of argument.

[89] Section 132(2) of the Act provides as follows:

"Business rescue proceedings end when—

(a) the court—

(i) sets aside the resolution or order that began those proceedings; or

(ii) has converted the proceedings to liquidation proceedings;

(b) the practitioner has filed with the Commission a notice of the termination of business rescue proceedings;....."

[90] Section 153(1) of the Act provides as follows:

"Failure to adopt business rescue plan.—(1) (a) If a business rescue plan has been rejected as contemplated in section 152 (3) (a) or (c) (ii) (bb) the practitioner may—

(i) seek a vote of approval from the holders of voting interests to prepare and publish a revised plan; or

(ii) advise the meeting that the company will apply to a court to set aside the result of the vote by the holders of voting interests or shareholders, as the case may be, on the grounds that it was inappropriate.

(b) If the practitioner does not take any action contemplated in paragraph (a)—

(i) any affected person present at the meeting may—

(aa) call for a vote of approval from the holders of voting interests requiring the practitioner to prepare and publish a revised plan; or

(bb) apply to the court to set aside the result of the vote by the holders of voting interests or shareholders, as the case may be, on the grounds that it was inappropriate; or

section 132 of the Act deals with the duration of business rescue proceedings and not the duration of the business rescue plan. Section 153 of the Act deals with the consequence of a failure to adopt a business rescue plan which is the termination of the business rescue proceedings and not the duration and termination of the business rescue plans. It must be so because some-times plans, no matter how good their intentions are and no matter how easy they appear to follow or to execute, can fail. This happens, not only in everyday life, but may also invariably happen during business rescue proceedings.

[106] The Act does not expressly provide for amended business plans or for the ending of a business rescue plan. The Act provides for notification to CIPC once a business plan is substantially implemented.[91] This does not mean that everything that was set out to be implemented was indeed implemented. The threshold the Act provides is substantial implementation. It therefore presupposes that although substantially implemented, some steps may still need to be implemented. In my view, the Vantage Companies' plans are far from substantially implemented. as a matter of fact, the plans still need substantial implementation. The failure of the Flaming Silver transaction had a disastrous effect on the implementation of the plans and the entire business rescue. The plans are still there, the money is not. The plans have not failed. Consequently, prayer 4 of Part B of the notice of motion cannot be granted.

[107] As an aside, I say that the absence of money for the plans to be implemented must, in all fairness, be laid at the door of the practitioners. They demanded proof of funds in the course of the Flaming Silver transaction from Flaming Silver. Why did

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> *(ii) any affected person, or combination of affected persons, may make a binding offer to purchase the voting interests of one or more persons who opposed adoption of the business rescue plan, at a value independently and expertly determined, on the request of the practitioner, to be a fair and reasonable estimate of the return to that person, or those persons, if the company were to be liquidated."*

Section 153(5) provides as follows:

> *"If no person takes any action contemplated in subsection (1), the practitioner must promptly file a notice of the termination of the business rescue proceedings."*

[91] Section 152(8) of the Act.

they not consider demanding irrevocable guarantees in some form or the other? In this way, those who proclaimed to have money would have had to put their money were there moths were. Well, that is water under the bridge. More important is to consider what must be done now in the best interest of the Vantage Companies, their creditors and other affected parties, the most vulnerable of which is their employees who continues to suffer.

[108] Does this mean that the only option open is the immediate liquidation of the Vantage Companies? I think not. What is clearly needed is funds to implement the plans for no one denies that the plans are still there and achievable if there is money. The Flaming Silver and IDC funding fell through and cannot be miraculously resurrected. The Vantage Companies and the practitioners will have to look elsewhere for money. Both Arqomanzi and Real Win see the pot of gold buried in the Lily mine and and there for the taking in Barbrook mine. If the ultimate goal of business rescue proceeds to prominence, I see no reason why the existing plans cannot be amended to disregard the Flaming Silver and IDC funding and to consider Arqomanzi and Real Win's offers (or any other genuine offers for that matter). Of course, the Flaming Silver transaction and IDC funding took centre stage in the adopted plans. The Flaming Silver transaction and the IDC funding is no more. Therefore, the practitioners will have to consult the Vantage Companies' creditors, other affected persons, and the Vantage Companies' management in order to prepare amended plans to put forward to the Vantage Companies' creditors and shareholders for adoption.

Prayer 5 – Combined meeting of creditors

[109] Arqomanzi wants the court to order the practitioners to convene a combined meeting of the Vantage Companies' creditors for the sole purpose of affording the creditors an opportunity to vote on whether they wish to authorise the practitioners to prepare new proposed business rescue plans for the Vantage Companies.

[110] Once a business rescue plan is adopted, it is binding on the company, on each

of the creditors of the company and every holder of the company's securities. [92] The business rescue practitioner must implement that plan throughout the business rescue proceedings.[93] Provision is only made in the Act for an amended proposed business rescue plan prior to the adoption of the final plan in terms of section 140(2)(4) of the Act.

[111] In this matter, there are adopted plans. The adopted plans still need to be implemented. The plans were not implemented because an important element of the plans, being funding, is still to materialise. I therefore do not see why new plans must be prepared where plans exist and only one part of the plans has failed. To put it differently, save for the funding requirement, there is no indication that any of the other elements of the approved plans have to change. With funding, employees can be paid and the mines can re-open. What amount will now be required to achieve this must obviously be determined due to the delay in the implementation of the plans.

[112] In my view, the practitioners must start to own up to their obligations. They must recalculate what is needed to achieve the goals in the plans and source funding to do so. In any event, the practitioners say in the fourth respondent's belated affidavit that they oppose the relief sought in Part A because it will prevent them from sourcing funding from any other party than any of the parties in this application.[94] I agree – it will wrong to restrain the practitioners and I am not going to do so. They have a duty to comply with. What I deem that needs to be done is to order the practitioners to consult those they must; come up with amended business plans for consideration by the Vantage Companies' creditors and other affected parties and to call a meeting for purposes of approval of the amended business plans.

[113] I see no reason why the practitioners must be ordered to call a creditors' meeting to authorise them to prepare new business rescue plans – the plans are there

[92] Section 152(4) of the Act.

[93] Section 140(1)(d)(ii).

[94] Para. of the fourth respondent's confirmatory affidavit.

and were approved. Their amendment must be authorised. After all, Arqomanzi and Real Win already stand in line with promises of funding and by the look of things, they are serious for what other reason would Arqomanzi mount this challenge.

The practitioners' plight.

[114] The practitioners say that they abide this court's decision in respect of Part B of the notice of motion.[95] The practitioners proclaim their plight should the court grant Arqomanzi the relief it seeks. They say that they anticipate *"....certain legal difficulties surrounding the issue of drawing and/or voting on new business rescue plans."* I agree for there is a real possibility that the loser of any future offer to challenge the process or decision made by the practitioners to accept or reject another potential offer. I simply do not foresee that, in light of the facts of this matter, either Arqomanzi or Real Win, if they remain contenders, will accept defeat. Clearly in anticipation of disputes, the practitioners seek directives from the court in this regard. They pose three questions:

> *"8.1 Whether a shareholder's claim on loan account, which has not and could never have previously been considered to be that of an independent creditor, can by means of a cession on that claim to a third party be considered to be an independent claim for purposes of voting on a new Business Rescue Plan;*
>
> *8.2 Whether, taking into account the rights provided to shareholders as provided for in section 37(3)(b)(i) and 37(3)(b)(i) (read with the definition of "all or the greater part of the assets or undertaking"), the applicants [sic] proposed new Business Rescue Plan requiring the disposal of the first respondent's shares in the second respondent – which shares constitute all or the greater part of the first respondent's asset/s (as defined in the Act) and which disposal is contemplated by the applicant's offer to myself and my co-practitioner vide page 130 to 141 of the Applicant's founding affidavit – would have the effect of altering the rights of the shareholders of the first and/or second respondent; and*
>
> *8.3 should the directive to 8.2 above be in the affirmative, then whether any vote on any such plan/s must be conducted in accordance with the*

[95] Paragraph 8 of the fourth respondent's affidavit.

> *provisions of sections 152 (1) of the Companies Act, 71 of 2008 ("the Act" read with Section 152(3)(c) of the Act and, if so, issuing a directive to that effect."*

[115] The first question is whether the court should assist the practitioners in their plight for what they seek, albeit couched in the form of "directives", are declarators. The second question is should the court accede to the practitioners' request, will the court not them be usurping the practitioners' functions – i.e, would the court not be trespassing on the practitioners' turf?

[116] Section 21(1)(c) of the Superior Courts Act No. 10 of 2013, empowers the court to *"....in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination."*

[117] The practitioners are interested persons and it is they who ask for the court's guidance. Not only are they parties to these proceedings, the order that will issue imposes certain duties upon them. The practitioners therefore satisfy the interested person threshold.

[118] What is more difficult is to determine whether what the practitioners request will require the determination of any existing, future or contingent right or obligation. Whether the practitioners will be able to claim any relief consequential of the determination is, by definition, irrelevant. At first glance, one might be tempted to say – off course, for the order directs them to convene a creditors' meeting where the issue of the voting rights of each creditor will be at issue and, Arqomanzi's deal, which may be voted upon, involves the disposal of the Company's shares in Barbrook which may or may not affect the rights of certain shareholders.

[119] However, the point is this – the further creditor's meeting is yet to take place, what the practitioners question and fear in paragraphs 8.2 and 8.3 of the fourth

respondents' affidavit may or may not be an issue.[96] These disputes are in my view not ripe.[97]

[120] Even if what the practitioners foresee transpire, the court still has a discretion

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[96] The question in paragraph 8.1 of the fourth respondent's affidavit have already been answered in this judgment.

[97] [1] This is what Murphy J said in *Afriform NPC and Others v Eskom Holdings SOC Limited and Others [2017] 3 All SA 663 (GP)* at paras. 104 to 109 over the doctrine of justiciability:

> *"104. The doctrine of justiciability permits courts to avoid rendering decisions where an insufficient legal interest is impacted. Justiciability is not a legal concept with fixed content. Courts apply it in response to subtle pressures regarding the appropriateness of the issues for decision and the actual hardship to the litigants of denying them the relief sought.*
>
> *105. The doctrine teaches that the courts should decide only cases entailing a real, earnest and vital controversy between litigants and not entertain merely hypothetical cases or cases that are only of academic interest. The business of a court is generally retrospective; it deals with situations or problems that have already crystallised, and not with prospective or hypothetical ones. Any claim to be justiciable must present a real and substantial controversy which unequivocally calls for the adjudication of the rights asserted. Litigants should not approach a court if they have not been actually subjected to prejudice or face the real threat of prejudice as a result of legislation or conduct alleged to be unconstitutional or illegal.*
>
> *106. The rules regarding mootness and ripeness are sub-rules of the doctrine which relate to the timing of an application – ripeness discourages a court from deciding an issue too early, mootness prevents a court from deciding an issue when it is too late. Ripeness requires a litigant to wait until a judicial decision can be grounded in concrete relief. A case is moot if it no longer presents an existing or live controversy. The rules apply equally in constitutional and administrative law.*
>
> *107. The mootness barrier therefore usually arises from events arising or occurring after an adverse decision has been taken or a lawsuit has got underway, usually involving a change in the facts or the law, which allegedly deprive the litigant of the necessary stake in the pursued outcome or relief. The doctrine requires that an actual controversy must be extant at all stages of review and not merely at the time the impugned decision is taken or the review application is made.*
>
> *108. The ripeness barrier arises usually in applications for anticipatory relief. Courts are often reluctant to grant declaratory or interdictory relief without a clearly defined record to assure informed and narrow adjudication. The courts must be astute to distinguish between a fear resting on speculative apprehensiveness and a probable threat of specific future harm; and should refuse to give advance expressions of legal judgment upon issues which remain unfocused "because they are not pressed before the court with that clear concreteness provided when a question emerges precisely framed and necessary for a decision from a clash of adversary argument exploring every aspect of a multi-faceted situation embracing conflicting and demanding interests".*
>
> *109. Courts therefore avoid giving advisory opinions on matters in the abstract. In applications for declaratory relief, mootness and ripeness are considered against the statutory requirement that the relief sought must have its basis in an existing, future or contingent right or obligation."*

not to grant the declaratory orders the practitioners seek. This is accordance with the clear wording of section 21(1)(c) of the Superior Courts Act. I exercise my discretion against the order sought by the practitioners because they require me to predetermine possible decisions which they must first consider and determine. For this court to decide on the practitioners' behalf would be wrong for the court will venture upon their terrain.

Costs

[121] There is no reason why costs must not follow the result. Save for prayer 4, and a modified prayer 5 of Part B of the notice of motion, Arqomanzi was successful in the application. In light of the substantial volume of papers that were ultimately filed, and the complexity of the issues raised therein, Arqomanzi's use of two counsel was warranted.

In the premises, I make the following order:

1. It is hereby declared that:

    1.1 the seventh respondent lawfully and validly ceded all of the sixth respondent's loan claims against the first respondent to the applicant;

    1.2 the applicant is declared an independent creditor of the first respondent.

2 The fourth and fifth respondents (*"the respondents"*) are directed to, within 14 (FOURTEEN) days of this order, consult with first, second and third respondents' (*"the companies"*) creditors, the affected persons, and the management of the companies for purposes of proposing amendments of the first, second and third respondents' business rescue plans dated 16 February 2017, 6 August 2018 and 25 May 2016 respectively (*"the plans"*).

3 The respondents are directed to prepare amendments to the plans (*"the amended plans"*) and to publish same within 10 (TEN) days after the date in paragraph 2 above;

4 [The respondents are directed to] convene a creditors' meeting of the companies within 10 (TEN) days of the date in paragraph 3 above for purposes of considering and voting on the amended plans.

5 The sixth respondent is ordered to pay the applicant's and the eighth to tenth respondent's costs which costs, in respect of the applicant, shall include the costs consequent upon the employment of two counsels.

Roelofse AJ

Acting Judge of the High Court

DATE OF HEARING: 15 and 25 October 2019

DATE OF JUDGMENT: 11 November 2019

<u>APPEARANCES</u>

FOR THE APPLICANT: Adv. Burger SC and Adv Mÿburg instructed by Hogan Lovells (South Africa) Inc.

FOR THE SIXTH RESPONDENT: Adv. Bagenhorst SC instructed by Mervyn Taback Incorporated Attorneys