



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 1302/2021

1272/2021

In the matter between:

VANTAGE GOLDFIELDS SA (PTY) LTD

FIRST APPELLANT

VANTAGE GOLDFIELDS LIMITED

SECOND APPELLANT

LOMBARD INSURANCE COMPANY LIMITED

THIRD APPELLANT

and

ARQOMANZI (PTY) LTD

RESPONDENT

Neutral citation: *Vantage Goldfields SA (Pty) Ltd and Others v Arqomanzi (Pty) Ltd* (Case No 1302/2021 and Case No 1272/2021) [2022] ZASCA 185 (22 December 2022)

Coram: DAMBUZA ADP, MOLEMELA and GORVEN JJA and WINDELL and CHETTY AJJA

Heard: 4 November 2022

Delivered: 22 December 2022

Summary: Company Law – Unilateral amendment of adopted business rescue plans by business rescue practitioners not permissible – clause in adopted business rescue plans authorizing unilateral amendments is against the scheme of the Companies Act – order confirming a rule nisi interdicting business rescue practitioners from implementing amended plans correctly granted – appeal dismissed. Civil procedure – declaratory orders not applied for by any party – appeal upheld – orders set aside. Costs – affected party joining the proceedings and opposing the application – liable for costs.

ORDER

On appeal from: Mpumalanga Division of the High Court, Mbombela (Legodi JP, sitting as court of first instance):

- 1 The appeal is upheld in as far as paragraphs 49.1, 49.2, 49.4 and 49.5 of the high court's order are concerned and the orders are set aside.
- 2 The appeal is dismissed in as far as paragraphs 49.3 and 49.6 of the high court's order are concerned.
- 3 The appellants are to pay the costs of the appeal, including the costs of two counsel, jointly and severally, the one paying the others to be absolved.

JUDGMENT

Windell AJA (Dambuza ADP, Molemela and Gorven JJA and Chetty AJA concurring):

[1] This is a consolidated appeal against the whole of the judgment and orders (including the costs order) granted by Legodi JP in the Mpumalanga Division of the High Court sitting at Mbombela (the high court). The appeal is with leave of this Court, leave having been refused by Legodi JP.¹

¹ There were initially two appeals. The first appeal was that of the first and second appellants (Vantage Goldfields SA (Pty) Ltd and Vantage Goldfields Limited) and the second appeal that of Lombard Insurance Company Limited. The said appeals were consolidated by this Court on 11 February 2022.

[2] The main issue to be determined is whether the high court was correct in confirming a rule nisi, interdicting the business rescue practitioners (the practitioners) of three companies in business rescue (Vantage Goldfields (Pty) Ltd (VGL), Barbrook Mines (Pty) Ltd (Barbrook) and Makonjwaan Imperial Mining Company (Pty) Ltd (MIMCO)) (the Vantage companies), from implementing adopted business rescue plans (the adopted plans) after the practitioners purported to amend them (the amended plans). Although it has been six years since the Vantage companies were placed in business rescue, it is, for present purposes, accepted that the Vantage companies are still capable of being rescued.

[3] The first appellant is Vantage Goldfields SA (Pty) Ltd (VGSA). VGSA holds seventy-four percent of VGL's issued shares. It also holds forty-two percent of MIMCO's issued shares, whilst VGL holds the other fifty-eight percent. VGL holds all the shares in Barbrook. The second applicant is VGSA's holding company, Vantage Goldfields Limited (VG Limited). The third appellant is Lombard Insurance Company Limited (Lombard), who joined the proceedings as a creditor and affected party. Lombard's appeal is only against the order of costs granted against it.

[4] The respondent is Arqomanzi (Pty) Ltd (Arqomanzi). It is a private company that is attempting to have its proposed business rescue plans in respect of the Vantage companies adopted and implemented by the practitioners. Although Arqomanzi was not a creditor of the Vantage companies at the time of the adoption of the plans, it is alleged that Arqomanzi is currently the single largest independent creditor of VGL and Barbrook.

[5] The background facts are common cause. MIMCO conducted business as Lily Mine in the vicinity of Barberton in Mpumalanga. Its mining operations came to a halt on 5 February 2016 after the crown pillar at the mine collapsed and three mine employees tragically lost their lives. As a result, MIMCO was placed in business rescue on 4 April 2016 in terms of s 129 of the Companies Act 71 of 2008 (the Companies Act). VGL and Barbrook (which also conduct the business of goldmining) followed suit on 12 December 2016. Robert Charles Devereux N.O and Daniel Terblanche N.O were appointed as business rescue practitioners for all three companies on 12 December 2016 and 23 November 2018 respectively.

[6] Business rescue plans prepared by the practitioners were adopted by the creditors of VGL, Barbrook and MIMCO on 16 February 2017, 6 August 2018 and 25 May 2016, respectively. The adopted plans have not been implemented. Although the full text of the adopted plans was not placed before the high court or this Court, it is not in dispute that they envisaged that the companies would be restored to solvency, after which they would continue as going concerns. An important factor was that the rescue depended upon the availability of finance to underpin the adopted plans. The plan was for MIMCO to acquire third-party funding from the Industrial Development Corporation (IDC) in the amount of R200 million. The grant of the IDC loan was conditional upon, amongst other things, the fulfilment of two conditions. One, a company by the name of Flaming Silver Trading 373 (Pty) Ltd (Flaming Silver), had to acquire all of VGSA's shares in VGL and MIMCO, as well as VGSA's loan claim against VGL. Two, Flaming Silver had to provide equity funding of at least R60 million to the Vantage companies. The acquisition of VGSA's shares in VGL and MIMCO would have resulted in Flaming Silver gaining control of the Vantage companies. The funding of the IDC would be used to repay the creditors of the Vantage companies and reopen the Lily Mine, which would in

turn allow MIMCO to resume its mining operations. It was accepted that the only way that any of these three companies could be rescued, would be if all three were rescued.

[7] During the latter part of 2018, Flaming Silver failed to secure equity funding and VGSA purported to cancel the contract between itself and Flaming Silver in terms of which it acquired the shares in, and the loan claim against, VGL. It became evident to the practitioners that the funding expected from the IDC was not going to materialize. They consequently informed the creditors of the Vantage companies that the business rescue plans had ‘failed’ and invited new offers for funding, after which amended business rescue plans would be prepared.

[8] On 22 July 2019, Arqomanzi submitted an offer to the practitioners to rescue the companies. During August 2019 the practitioners received a second offer from Real Win Investments (Pty) Ltd (RWI). At the time it was understood that both offers were to be reworked into proposed amended business rescue plans that could be presented and voted on by the creditors of the Vantage companies. A meeting of creditors was convened for 4 September 2019. However, during a meeting between, among others, Arqomanzi and the practitioners, Arqomanzi was informed that the practitioners would not call on the creditors to vote on whether they should permit the practitioners to prepare new business rescue plans. Instead, the combined meeting of creditors would be solely for Arqomanzi and RWI to explain their respective offers to such creditors. At the meeting on 4 September 2019, it was proposed by RWI that the adopted plans could merely be ‘revived’ because RWI had the necessary funds to implement the adopted plans. The practitioners made it clear that their preference was for RWI’s proposal.

[9] After the meeting, Arqomanzi sought an undertaking from the practitioners that they would not ‘conclude any transaction with RWI or any third party in terms of, or purporting to act under the authority of, the original approved business rescue plans of the Company [VGL], MIMCO or Barbrook which, by [the practitioners] own admission have failed’. The practitioners advised that they would not grant such an undertaking. This led to an urgent application on 8 October 2019 in which Arqomanzi sought, amongst other relief, an interdict against the practitioners from implementing all or any of the failed business rescue plans (the first application). The first application was opposed by VGSA.

[10] Arqomanzi’s locus standi was challenged in the first application. Roelofse AJ found that Arqomanzi had locus standi and declared Arqomanzi to be an ‘independent creditor of VGL’ (the Roelofse order²). He also found that the adopted plans had not failed and ordered the practitioners to:

- (a) Within 14 days of the order consult with the Vantage companies’ creditors, the affected persons, and the management of such companies for purposes of proposing amendments to the adopted plans.
- (b) Prepare amendments to the adopted plans and to publish them within 10 days after the consultation.
- (c) Convene a creditors’ meeting of the companies within 10 days after the amendment of the plans for purposes of considering and voting on the amended plans.

[11] On 13 December 2019, VGSA was granted leave to appeal the Roelofse order to this Court. Meanwhile, the practitioners proceeded to give effect to the Roelofse

² The application was heard under case number 3651/2019.

order and with the cooperation of Arqomanzi published amended business rescue plans for MIMCO and Barbrook on 22 and 25 June 2020 respectively. An informal meeting of creditors was also held on 6 July 2020 to discuss the proposed amended plans. On 24 July 2020, the appeal against the Roelofse order lapsed as a result of VGSA's failure to prosecute it timeously. Due diligence investigations were conducted and finalised by Arqomanzi during November 2020 and a proposed amended business rescue plan was also prepared for VGL. On 20 January 2021, the practitioners informed all the creditors of the Vantage companies that the proposed amended business rescue plans for all three companies would be circulated shortly, after which a meeting would be arranged to discuss and vote on the amended plans.

[12] A few days later, the practitioners informed Arqomanzi that they had received a proposal from VGSA and VG Limited, who invited them to unilaterally amend the adopted plans by relying on a clause in the adopted plans. This clause permits the practitioners to amend the plans if an amendment would not be prejudicial to the affected persons and if the practitioners acted reasonably. On 15 February 2021, the practitioners informed the creditors and affected persons of the Vantage companies that they had unilaterally amended the plans in the manner proposed by VGSA and VG Limited, and that the amended plans would be implemented with immediate effect. They were further informed that 'the first tranche of payments to creditors will commence immediately and will be completed by 8 March 2021'.

[13] Arqomanzi launched urgent proceedings to stop the implementation of the amended plans. The application was opposed by the practitioners, the Vantage companies, VGSA and VG Limited. They specifically objected to the manner in which the affected parties were given notice of the application. As a result, on 26 February 2021, Greyling-Coetzer AJ issued a rule nisi, returnable on 4 May 2021,

interdicting the practitioners from proceeding to implement the amended plans, pending the final determination of the application. The interim order also called upon all interested parties who wished to be joined in their own name as a party to the application and who wished to oppose the grant of a final order, to file a notice and deliver an answering affidavit. Several affected parties filed affidavits in opposition to the application. Lombard joined the proceedings in its own name and filed an answering affidavit in opposition to the application as an affected party.

[14] On the return day on 31 May 2021, the high court issued an order in the following terms:

‘49.1 It is hereby declared that the business rescue practitioners (fourth and fifth respondents) cannot unilaterally amend the previously adopted business rescue plans of the first, second and third respondents in business rescue [the Vantage companies].

49.2 It is hereby declared that the business rescue practitioners in this case cannot disregard an order that was granted by Roelofse AJ on 11 November 2019 which order is quoted in paragraph 6 of this judgment.

49.3 The rule nisi granted by Greyling-Coetzer AJ on 26 February 2021 and quoted in part in paragraph [19] of this judgment is hereby confirmed and granted as final relief.

49.4 Should there be any offers including that of the sixth [VGSA] and tenth respondents [Vantage Goldfields Limited] and that of the applicant [Arqomanzi], such offers shall be subjected to compliance with the relevant legislative frame-work for proper adoption by the creditors of the entities under business rescue and any such process along the same basis as contemplated in Roelofse AJ’s judgment, shall be completed by no later than 1 July 2021.

49.5 Should it not be possible by 1 July 2021 to complete the process in terms of the applicable legislative framework for the adoption of any proposed amendment to the adopted plans and to start with the process of implementation thereof, the business rescue practitioners and any other affected person shall be entitled to approach the court by no later than 1 July 2021 for appropriate relief;

49.6 The respondents, who opposed the application are hereby ordered to pay the costs of the application jointly and severally, the one paying the other to be absolved.’

[15] Before I deal with the competency of the high court’s orders, the issues in this appeal need to be clarified. It is trite that an appeal lies against an order of court and not the reasons for the order. Thus, despite the contentions in the heads of argument, the appeal is not about the validity of the Roelofse order or the merits of the offers that were received from the different offerors. It is also not about whose offer is better or whether Arqomanzi would be permitted to vote at any subsequent creditors’ meeting.³ On the return date, the only relief Arqomanzi sought before the high court was the confirmation of an interdict against the practitioners to prevent the implementation of the amended plans and to direct them to take steps to ‘reverse, to the extent possible, all payment transactions that were executed in the purported implementation of the amended business rescue plans’. Therefore, the only real issue before this Court is whether the high court was correct in confirming the rule nisi.

The order granted by the high court

[16] Except for the order confirming the rule nisi (paragraph 49.3), the only purpose of the remaining orders was to give effect to the Roelofse order and to hold the practitioners accountable. The high court seemingly adopted a robust approach in an attempt to find a solution to the delay in implementing the adopted plans,⁴ and granted extensive relief that went way beyond what was sought by Arqomanzi or any other party. In doing so, the high court, regrettably, overstepped its judicial powers.

³ Arqomanzi instituted a third application on 21 April 2021 under case number 1399/2021 in which Arqomanzi’s status and voting interests in the Vantage companies were determined. Leave to appeal that judgment was granted to this Court and is still pending.

⁴ *Ekurhuleni Metropolitan Municipality v Dada N O* [2009] ZASCA 21; 2009 (4) SA 436 (SCA) paras 13-14.

[17] In paragraph 49.1, the high court declared that the business rescue practitioners ‘cannot unilaterally amend the adopted business rescue plans’, and in paragraph 49.2 it ‘declared that the business rescue practitioners in this case cannot disregard an order that was granted by Roelofse AJ on 11 November 2019’. Section 21(1)(c) of the Superior Courts Act 10 of 2013, provides for the granting of declaratory orders ‘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’. (Own emphasis.) First, none of the parties sought declaratory orders. It was not an issue before the high court. Second, the declaratory orders were unnecessary. As far as paragraph 49.1 is concerned, the parties accepted before the high court that the Companies Act does not provide for the unilateral amendment of adopted plans, but argued that the clause in the adopted plans permitted them to do so. The order was therefore superfluous and appears to form part of the reasoning for the confirmation of the rule nisi, to which I will return later.

[18] As far as paragraph 49.2 is concerned, relief had already been granted by Roelofse AJ, and Arqomanzi obtained a court order in its favour. If the Roelofse order had not been complied with, then Arqomanzi should have taken the necessary steps to enforce that order. Third, whether the Roelofse order should and could be complied with was not for the high court to decide. Neither was it for this Court to decide whether that order is a *brutum fulmen* as suggested by the appellants. The Roelofse order was not on appeal before the high court (nor is it on appeal before this Court) and there are contempt proceedings pending against the practitioners for their alleged failure to comply with the Roelofse order.⁵ Fourth, declaratory orders

⁵ Case number 3651/2019.

were incompetent and academic in the present matter because they only restated a position that is trite, namely that the Companies Act does not provide for the amendment of adopted business rescue plans and that court orders should be complied with.

[19] The remainder of the orders (paragraphs 49.4 and 49.5 ordering that any future offers shall be subject to the Companies Act along the same basis as contemplated in the Roelofse order) can also not stand. Their only purpose is to order the practitioners to comply with the Companies Act as well as the Roelofse order, and to give advice on something that may or may not happen in the future. The practitioners alone are responsible for the preparation of a plan. As long as the practitioners remain independent, act objectively and impartially, and in the best interest of the Vantage companies,⁶ it is their prerogative to decide whether any plans are ‘satisfactory’ before presenting them to the creditors for adoption.⁷ The duty to consider offers, when, and if they materialize, and to incorporate such offers into proposed plans, is that of the practitioners alone.

[20] The only order that therefore remains is paragraph 49.3, which provides for the confirmation of the rule nisi. But, before considering the correctness or not of such an order, it is necessary to deal with the crux of this appeal, namely whether the practitioners were entitled to unilaterally amend the adopted plans by relying on a clause in the adopted plans.

Can an adopted plan be unilaterally amended?

⁶ *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd* [2015] ZASCA 69; 2015 (5) SA 192 (SCA) paras 35-38.

⁷ Section 152 (1)(d) of the Companies Act.

[21] In terms of section 150(1) of the Companies Act the 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 s 151. Sections 150(1) and 151(3) respectively, provide for publication of a proposed plan and a meeting of creditors and any holders of a voting interest, to consider the plan. In terms of s 152(1)(d), the proposed plan may be amended in a manner satisfactory to the practitioner after discussion. And s 152(1)(e) provides for a vote for preliminary approval of the proposed plan. Section 152(3)(c) provides for the final adoption of the plan and s 153(1)(a)(i) entitles a practitioner, if the proposed plan has been rejected, to amend the proposed plan after seeking and obtaining a vote of approval from the holders of voting interests to prepare and publish a revised plan. Section 152(4) provides that ‘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 ...’.

[22] There is no provision in the Companies Act for the amendment of a business rescue plan once it has finally been adopted. The appellants accept this. They however submit that as each of the adopted plans has a clause allowing for the amendments (being clause 9 of the VGL and MIMCO plans, and clause 12 of the Barbrook plan) they were entitled to amend the plans. It is contended that the practitioners did not reserve that right to themselves, but that it was conferred upon them by the creditors of the Vantage companies. The clause reads as follows:

‘9. Ability to amend the Business Rescue Plan

9.1 Provided that any amendment will not be prejudicial to any of the Affected Persons, the BRP shall have the ability, in his sole and absolute discretion, to amend, modify or vary any provision of the Business Rescue plan, provided that at all times the BRP act reasonably. The amendment

will be deemed to take effect on the date of written notice of the amendment to all Affected Persons.

9.2 It is specifically recorded that the provisions of paragraph 9 shall *mutatis mutandis* apply to the extension or reduction of any timeframes by the BRP.’

[23] The appellants submit there is no prohibition in the Companies Act against a clause in an adopted plan which authorizes the practitioner to amend the plan to cater for contingencies which arise after adoption of the plan. In support of their argument, the appellants rely on *Knoop v Gupta (Knoop)*,⁸ in which this Court remarked that ‘while the BRPs were obliged to try to implement the plan, whether they could do that, or do it within the contemplated timeframe depended on matters not within their control. One cannot treat a business rescue plan as being writ in stone or having the same status as the Laws of the Medes and Persians’.⁹

[24] The dictum in *Knoop* is not authority for allowing practitioners to circumvent the Companies Act. The practitioners cannot ‘improve’ legislation by providing measures or remedies that the statutory enactments do not afford, merely because they find themselves in a predicament.¹⁰ *Knoop* does however make two things clear, the first being that the practitioners are obliged to try and implement a plan once it is adopted and the second that it is accepted that there might be instances where the adopted plan is incapable of being implemented. The court in *Knoop* did not, however, express any opinion on what should happen when the adopted plan cannot be implemented. In *Kransfontein Beleggings (Pty) Ltd v Corlink Twenty-Five (Pty) Ltd*,¹¹ however, this Court stated that ‘the only plan which practitioners can

⁸ *Knoop and Another NNO v Gupta (No 2)* [2020] ZASCA 163; 2021 (3) SA 88 (SCA).

⁹ *Ibid* para 48.

¹⁰ See in this regard, albeit in another context, *Phaladi v Lamara and Another; Moshesha v Lamara and others* [2018] ZAWCHC 1; 2018 (3) SA 265 (WCC) para 8.

¹¹ *Kransfontein Beleggings (Pty) Ltd v Corlink Twenty-Five (Pty) Ltd* 2017 ZASCA 131.

implement is one adopted by creditors in accordance with s 152 of the Companies Act’ and ‘that [t]he court has no power to foist on creditors a plan which they have not discussed and voted on at such a meeting’.¹² To the question on whether a court can partially set aside and amend an adopted plan so as to alter its operation in relation to one or more of the creditors, the answer was a clear “no”. And in *Booyesen v Jonkheer Boerewynmakery (Pty) Ltd and Another (Booyesen)*,¹³ the court held that there is simply no room for a business rescue practitioner to reserve for himself the right to amend a business rescue plan.

[25] The Companies Act is, however, clear on one aspect: business rescue plans are the product of engagement between the practitioner and the creditors. In terms of s 145(1) the creditors are entitled to be informed of ‘each court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings’ and may ‘formally participate in a company's business rescue proceedings to the extent provided for in this Chapter’. As remarked in *Booyesen*, ‘control over the rescue proceedings is to be exercised by democratic majority vote of creditors and affected parties’. A clause in a business rescue plan that provides for the unilateral amendment of the plan by the practitioners is accordingly contrary to the scheme of the Companies Act. At most such a clause in an adopted plan would only allow for amendments of an administrative nature that do not affect the substance of the plan.

¹² Ibid para 18.

¹³ *Booyesen v Jonkheer Boerewynmakery (Pty) Ltd and Another* [2016] ZAWCHC 192; 2017 (4) SA 51 (WCC) para 67. See also *LSO Consulting Engineers (Pty) Ltd and Another v Ndyamara and Others* [2022] ZAGPPHC 49.

[26] The appellants contend that there are no substantial amendments to the adopted plans, and that the amendments are in fact more beneficial to creditors and not prejudicial to the affected persons. The amendments to the adopted plans are set out in a letter dated 15 February 2021 addressed to the creditors and affected parties. There are at least three amendments dealing mostly with the change of the dates for the payments of creditors and the re-opening of the mines. However, there is also another amendment to the adopted plans: the change relating to the identity of the funding entities. The change in funders is no small matter. As the high court correctly stated, it ‘goes into the heart of seeking to resuscitate a distressed company’. The ‘ability and credibility of such a funder is everything which the creditors of the distressed company, including affected persons, would want to know and be sure of’.

[27] The adopted plans were not provided to the high court. It is therefore not possible to compare the adopted plans with the amended plans. It is, however, clear from the limited information available that the replacement of the funder and funding model is not merely an administrative amendment. It is central to the plan. The adopted plans could not be implemented because of a lack of funds. The funding will affect the reopening of the mines, the payment of creditors and employees, and will determine who will retain ownership of the Vantage companies. The practitioners were not entitled to amend the adopted plans in the manner they did.

Confirmation of the rule nisi

[28] Arqomanzi initially applied for relief in the form of interim relief, interdicting the practitioners from implementing the amended plans, pending the final determination of proceedings to be instituted against one or more of the appellants and the practitioners. The order issued by the high court, at the request of Arqomanzi,

was, however, final in effect as the practitioners were permanently interdicted from implementing the amended plans. The requirements for a final interdict are trite. The appellants attack the granting of a final interdict only on the basis that Arqomanzi did not have locus standi to apply for an interdict nor did it establish a clear right.

[29] First, the Roelofse order declared Arqomanzi as a creditor of VGL and found that it has the necessary locus standi in the business rescue proceedings of the Vantage companies on two bases: it is a creditor and it has made an offer, which entitles it to be treated fairly. That finding stands until set aside. Second, it was admitted by the appellants in the answering affidavit that Arqomanzi was a creditor of VGL. The locus standi was therefore not a real issue before the high court and is not an issue before this Court.

[30] Arqomanzi had accordingly established a clear right capable of protection and was entitled to an interdict. The confirmation of the rule nisi by the high court cannot be faulted.

The Lombard appeal

[31] The high court ordered that the respondents who opposed the application are to pay the costs of the application jointly and severally, the one paying the other to be absolved. The high court also granted the costs of the urgent application before Greyling-Coetzer AJ that were reserved on 26 February 2021. Lombard contends that the high court failed to exercise its judicial discretion and erred in granting a costs order against it.

[32] Lombard joined the proceedings pursuant to the order of Greyling-Coetzer AJ granted on 26 February 2021. The relevant portions of the order stated as follows:

‘4. A rule nisi is hereby issued calling upon any interested person to show cause . . . why an order in the following terms should not be granted:

4.1 . . .

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

. . .

6. A decision on the cost of this application is reserved for determination on the return date [of the said rule nisi].

. . .

11. Any interested party who wishes to be joined in own name as a party to this application and to oppose the grant of a final order as provided for in paragraph 4 hereof on the return day, shall . . . give written notice to the applicant’s attorneys at the address stipulated . . . Any party giving such notice shall be joined in own name as a respondent, and shall be entitled to deliver an answering affidavit to the allegations made in the founding affidavit.’

[33] As clause 11 of the order dispensed with the need for an interested party seeking to be joined to deliver a formal application for joinder in terms of rule 12 of the Uniform Rules Court, Lombard was joined as a party in its own name to the application when it gave notice to Arqomanzi that it was opposing the relief. It filed an answering affidavit and heads of argument, and appointed counsel to argue the matter before the high court. Lombard argues that whatever the outcome of the application, those affected parties that were invited to participate, and proceeded to do so, ought not to be mulcted in costs.

[34] In support of its argument Lombard relies on s 145(1)(b) of the Companies Act, which provides that every creditor during business rescue proceedings is entitled to participate in any court proceedings arising during business rescue proceedings. Lombard further contends that affected parties, such as Lombard, who participated and opposed the application on reasonable grounds, ought not to be

discouraged from doing so through the granting of costs orders against them. The argument is misplaced. Section 145(1)(b) does not ‘encourage’ affected persons to become involved in such litigation, but merely affords an affected person the right to participate. If affected persons elect to enter the fray of litigation and actively participate therein, they do so at their own peril.

[35] In *Holmes and Another v Lawrie*,¹⁴ in dealing with a similar argument this Court held:

‘I think this appeal can be decided on a very small point. It is not necessary to go into all the questions of law advanced in argument. We need not consider whether Smit and R. Holmes were properly made parties to the application, because we think that whether they were or not, they accepted that position. Instead of saving on their affidavits "We do not associate ourselves with the election of T. Holmes as chairman, but we stand aside from the contest altogether and, therefore, we ought not to be mulcted in costs," *they associated themselves entirely with the chairman; they fought his battle throughout contending that he had been properly elected. Now they say "We have nothing to do with the matter; and moreover we acted in a representative capacity and reasonably."* The question whether they acted in a representative capacity or reasonably need not be considered. *It is sufficient to say that throughout they identified themselves with T. Holmes. They cannot blow hot and cold. They cannot now say "We stood aside and had nothing to do with the matter."* I think that by reason of the attitude which they took up in their affidavits and in the court below they placed themselves in the same position as T. Holmes and are equally liable for the costs. As regards the question of their having acted in a representative capacity I might point out that argument might equally well have been advanced on behalf of T. Holmes, which would lead to an absurdity. But it is unnecessary to enter into that question. *Having fought the battle for T. Holmes they must take the consequences and with him pay the costs of the proceedings.* The appeal is dismissed with costs.’ (Emphasis added).

¹⁴ *Holmes and Another v Lawrie* 1927 AD 535.

[36] An appeal court will not lightly interfere with the exercise of the discretion of a court of first instance which granted costs, even if it is of the view that it would itself have made a different order.¹⁵ It will only interfere if there was a misdirection or irregularity, or if there was an absence of grounds on which a court, acting reasonably, could have made the order in question.¹⁶

[37] In the leave to appeal judgment, the high court stated that it considered that Lombard aligned itself with the practitioners and that it failed to add any value to the proceedings. This unnecessarily increased the legal costs and wasted time by merely repeating the same issues that had been raised by the other respondents in the court a quo.

[38] The high court applied the general rule, namely that a successful party is entitled to its costs. There is no reason to interfere with the high court's discretion in awarding costs against Lombard and the other parties. Lombard raised no separate grounds of its own and aligned itself with the appellants' grounds of opposition. It must also take the consequences, with them, to pay the costs.

[39] A final word needs to be said about the delay in the business rescue of the Vantage companies. Business rescue proceedings are intended to 'provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interest of all relevant stakeholders'.¹⁷ By their very nature, they must be concluded with the 'maximum possible expedition.'¹⁸ At the time of

¹⁵ *Merber v Merber* 1948 (1) SA 446 (A).

¹⁶ *Attorney-General Eastern Cape v Blom* 1988 (4) SA 645 (A) at 670.

¹⁷ Section 7(k) of the Companies Act.

¹⁸ *Koen and Another v Wedgewood Village and Golf and Country Estate Pty Ltd and Others* [2011] ZAWCHC 464; 2012 (2) SA 378 (WCC) para 10.

the hearing of this appeal MIMCO had been in business rescue for more than six years and VGL and Barbrook for five years and 11 months. There is a pressing need to re-open the mines for the following reasons: First, to try to bring closure for the three families that lost their loved ones and second, because the employees of the companies have been left without work after the companies were placed in business rescue. The loss of employment has created severe hardship for the ex-employees and their families. This was confirmed by the more than 340 affected persons who deposed to affidavits in support of the first application.

[40] The delay in the finalisation of the business rescue proceedings is most regrettable. The matter cries out for finality to be reached. It is devoutly to be hoped that all the parties involved allow this urgency to inform their conduct and that they will co-operate to the maximum extent possible so as to bring finality to the business rescue proceedings one way or another.

[41] In the result the following order is made:

- 1 The appeal is upheld in as far as paragraphs 49.1, 49.2, 49.4 and 49.5 of the high court's order are concerned, and the orders are set aside.
- 2 The appeal is dismissed in as far as paragraphs 49.3 and 49.6 of the high court's order are concerned.
- 3 The appellants are to pay the costs of the appeal, including the costs of two counsel, jointly and severally, the one paying the others to be absolved.

L WINDELL
ACTING JUDGE OF APPEAL

Appearances

For first and second appellants: CE Watt-Pringle SC and HA van der Merwe

Instructed by: Beech Veltman Inc.
Phatshoane Henney Attorneys, Bloemfontein

For third appellant: I Miltz SC

Instructed by: Clyde & Co. Incorporated, Johannesburg
Honey Attorneys, Bloemfontein

For respondent: NGD Maritz SC and A Subel SC

J L Myburgh and M Sethaba
Instructed by: Fluxmans Inc., Johannesburg
Lovius Block Inc., Bloemfontein.