



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA  
JUDGMENT**

**Reportable**

Case No: 733/2022

In the matter between:

**VANTAGE GOLDFIELDS SA (PTY) LTD**

**FIRST APPELLANT**

**VANTAGE GOLDFIELDS LTD**

**SECOND APPELLANT**

and

**ARQOMANZI (PTY) LTD**

**FIRST RESPONDENT**

**VANTAGE GOLDFIELDS (PTY) LTD**

**SECOND RESPONDENT**

**(in business rescue)**

**BARBROOK MINES (PTY) LTD**

**THIRD RESPONDENT**

**(in business rescue)**

**MAKONJWAAN IMPERIAL MINING COMPANY (PTY) LTD**

**(in business rescue)**

**FOURTH RESPONDENT**

**ROBERT CHARLES DEVEREUX NO**

**FIFTH RESPONDENT**

**DANIEL TERBLANCHE NO**

**SIXTH RESPONDENT**

**THE STANDARD BANK OF SOUTH AFRICA LTD**

**SEVENTH RESPONDENT**

**THE MINISTER OF MINERAL RESOURCES**

**EIGHTH RESPONDENT**

**AND ENERGY**

**KPMG SOUTH AFRICA INC**

**NINTH RESPONDENT**

**LOMSHIYO TRADITIONAL AUTHORITY**

**TENTH RESPONDENT**

**Neutral citation:** *Vantage Goldfields SA (Pty) Ltd & Another v Arqomanzi (Pty) Ltd & Others* (733/2022) [2023] ZASCA 106 (27 June 2023)

**Coram:** PONNAN, MOCUMIE, MBATHA and MATOJANE JJA and MALI AJA

**Heard:** 10 May 2023

**Delivered:** This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 27 June 2023).

**Summary:** Cession in *securitatem debiti* – realisation by way of *parate executie* of property ceded – Mineral and Petroleum Resources Development Act 28 of 2002 - whether consent of the Minister under s 11 required where there has been a change of control in the ultimate holding company.

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## ORDER

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

The appeal is dismissed with costs, including those of the Minister and of two counsel where so employed.

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## JUDGMENT

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**Ponnan and Matojane JJA (Mocumie and Mbatha JJA and Mali AJA concurring):**

[1] The application, the subject of this appeal, was preceded by two earlier high court applications, the second of which was recently disposed of by this Court on appeal. We commend that judgment to the reader, which is reported *sub nom Vantage Goldfields SA (Pty) Ltd and Others v Arqomanzi (Pty) Ltd*.<sup>1</sup> Any attempt at a detailed recitation of the facts or the history preceding this appeal would render this judgment indigestible. In what follows, we will confine ourselves to those facts that are relevant for a proper appreciation of the issues that arise for determination in this appeal.

[2] The second appellant, Vantage Goldfields Ltd (Vantage), is the ultimate holding company of the Vantage group of companies (collectively referred to herein as the Vantage Companies). It holds 100 of the issued shares in the first appellant, Vantage Goldfields SA (Pty) Ltd (VGSA). VGSA, in turn, owns 74 percent of the issued shares in the second respondent, Vantage Goldfields (Pty) Ltd (VGL), and 42 percent of the issued shares in the fourth respondent, Makonjwaan Imperial Mining Company (Pty) Ltd (MIMCO). VGL owns the remaining 58 percent of the issued shares in MIMCO and 100 percent of the issued shares in the third respondent, Barbrook Mines (Pty) Ltd. An

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<sup>1</sup> *Vantage Goldfields SA (Pty) Ltd and Others v Arqomanzi (Pty) Ltd* [2022] ZASCA 185.

Australian company, Macquarie Metals (Pty) Limited (Macquarie), recently acquired a 98 percent stake in Vantage.

[3] This appeal relates to an ongoing dispute between the first respondent, Arqomanzi Proprietary Limited (Arqomanzi) and the appellants in respect of business rescue proceedings of the Vantage Companies. The Vantage Companies faced financial distress after the collapse on 5 February 2016 of the crown pillar at MIMCO's Lily Mine, a gold mine located near Barberton in Mpumalanga, which claimed the lives of three workers and rendered the mine inaccessible. Consequently, MIMCO was placed in business rescue on 4 April 2016. In August 2016, VGL requested an increase of R10 million in its existing banking facilities from the seventh respondent, the Standard Bank of South Africa Limited (Standard Bank), which was granted on condition that certain additional security be provided in the form of a cession to Standard Bank of the VGSA-VGL claim and the VGL-Barbrook claim. The condition was accepted, and on 6 September 2016, the claims were ceded *in securitatem debiti* to Standard Bank. Both cessions entitled Standard Bank, upon any breach, which was not remedied, to sell or otherwise realise the security.

[4] MIMCO's financial turmoil contributed to VGL and Barbrook facing similar difficulties, leading to the placement in business rescue of both on 12 December 2016. The creditors of VGL and Barbrook adopted business rescue plans on 16 February 2017 and 6 August 2018, respectively. The adopted plans were interdependent. Their success was dependent on finance that was principally to be sourced from the Industrial Development Corporation, which was, however, conditional upon a certain Flaming Silver Trading 373 (Pty) Ltd, acquiring VGSA's shares in VGL and MIMCO and providing a minimum of at least R60 million in equity funding.

[5] When it became apparent that the necessary funding for the adopted plans would not become available, Arqomanzi engaged in discussions with Standard Bank with a view to acquiring the VGSA-VGL claim. Standard Bank was willing to cede this claim to Arqomanzi at an agreed price, but only if VGSA failed to remedy its breach after having been given notice to do so. On 23 July 2019, Standard Bank delivered a written demand to VGSA to remedy its breach. In this demand, Standard Bank informed VGSA that should it fail to timeously remedy its breach, then it intended to

dispose of the claim for R8 911 771.35. VGSA failed to remedy the breach and Standard Bank realised its security by selling the claim to Arqomanzi on 1 August 2019 (the sale agreement).

[6] However, the fifth and sixth respondents, the Business Rescue Practitioners (the BRPs) refused to acknowledge Arqomanzi as the owner of the VGSA-VGL claim. Consequently, on 8 October 2019, Arqomanzi issued an application (the first application) out of the Mpumalanga Division of the High Court, Mbombela (the high court). The application, which was opposed by VGSA, succeeded for the most part before Roelofse AJ. In his judgment of 11 November 2019, the learned judge made the following key findings: (i) Standard Bank lawfully and validly ceded the VGSA-VGL claim to Arqomanzi; (ii) Arqomanzi was an independent creditor of VGL; and, (iii) as the funding contemplated in the adopted plans had not been realised, those plans could no longer be implemented. Even though VGSA was granted leave by Roelofse AJ to appeal his judgment, the appeal lapsed when VGSA failed to timeously prosecute it. Thereafter, in compliance with Roelofse AJ's order, the BRPs published amended business rescue plans for MIMCO and Barbrook on 22 and 25 June 2020, respectively.

[7] During July 2020, Arqomanzi negotiated with Standard Bank to acquire the VGL-Barbrook claim. Once again, Standard Bank was willing to cede this claim to Arqomanzi at an agreed price, if VGL did not remedy its breach after having been given notice by Standard Bank to do so. On 17 July 2020, Standard Bank delivered a written demand to VGL to remedy its breach by making payment of the outstanding amount within 10 days. VGL was informed that should it fail to timeously remedy the breach, then Standard Bank intended to dispose of the claim for R1. When VGL failed, Standard Bank realised its security by selling the VGL-Barbrook claim to Arqomanzi on 23 July 2020 (this agreement came to be described in the papers as the 'addendum').

[8] On 20 January 2021, the BRPs intimated that the proposed amended business rescue plans for all of the Vantage Companies would be circulated shortly, after which a meeting would be convened to discuss and vote on the plans. A few days later, however, they informed Arqomanzi that they would no longer be publishing the

proposed amended business rescue plans. They advised that they would instead act in accordance with the appellants' invitation to disregard the order of Roelofse AJ and unilaterally amend the adopted plans, which, in effect, involved replacing the original funders with new ones.

[9] Consequently, on 16 February 2021, Arqomanzi launched urgent proceedings in the high court to stop the implementation of the amended plans (the second application). Greyling-Coetzer AJ issued a rule *nisi* interdicting the BRPs from implementing the amended plans. The rule was confirmed by Legodi JP on the return day, who found that the BRPs could not unilaterally amend the adopted plans. On appeal, this Court made the following key findings: (i) the adopted plans could not be implemented because of a lack of funding; (ii) a clause in a business rescue plan that provides for the unilateral amendment of the plan by the BRPs is contrary to the scheme of the Companies Act 71 Of 2008 (the Companies Act) – at best, such a clause would only allow for amendments of an administrative nature that do not affect its substance; (iii) the replacement of the funders and the funding model was not merely an administrative amendment, it was central to the plans; and, (iv) the BRPs were not entitled to amend the adopted plans in the manner that they did.<sup>2</sup>

[10] Despite Arqomanzi having paid to Standard Bank the purchase price for both the VGSA-VGL and VGL-Barbrook claims in the aggregate amount of R15 482 677 on 15 January 2021, the appellants and the BRPs denied in the second application that Arqomanzi had lawfully acquired the VGL-Barbrook claim. They also contended that the loan account claims were fully subordinated under two subordination agreements dated 7 April 2015 and 23 February 2013. They further asserted that the Vantage proposal (the Vantage proposal) was superior to Arqomanzi's proposed amended business rescue plans because the former would not require the consent of the eight respondent, the Minister of Mineral Resources and Energy (the Minister), under s 11 of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA), whereas Arqomanzi's amendment would. As the issues raised would impact on Arqomanzi's voting interest, when the new business rescue plans were to

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<sup>2</sup> Ibid.

be voted on, Arqomanzi launched a third application (the application the subject of this appeal).

[11] Legodi JP found in Arqomanzi's favour in the third application. In his judgment of 26 October 2021, the learned judge held: (i) the Vantage proposal cannot be implemented without s 11 consent and the BRPs and appellants were interdicted from representing otherwise; (ii) Standard Bank lawfully and validly ceded the VGL-Barbrook claim to Arqomanzi and the latter is an independent creditor of Barbrook; (iii) the subordination agreement of 7 April 2015 in respect of the VGSA-VGL claim, subordinated only R14 million of the claim in favour of VGL's creditors; and, (iv) the subordination agreement of 27 February 2013 in respect of the VGL-Barbrook claim, subordinated only R17 million of the claim in favour of Barbrook's creditors. The appeal against these orders is with the leave of the high court.

[12] The following issues arise in the appeal: First, whether the affected persons (as defined in s 128(1)(a) of the Companies Act 71 of 2008)<sup>3</sup> should be joined as parties to the appeal. Second, whether Arqomanzi had validly and lawfully acquired the loan account claims that had initially been ceded to Standard Bank *in securitatem debiti*. Third, whether Arqomanzi is an independent creditor of VGL and Barbrook. Fourth, whether, by virtue of the two subordination agreements, Arqomani has a voting interest in the Vantage Companies. Fifth, whether MIMCO's and Barbrook's mining rights can be exercised without the consent of the Minister under s 11 of the MPRDA, in circumstances where there has been a change of control in the ultimate holding company of the Vantage Group.

### **Non-joinder**

[13] The appellants appear not to have raised the issue of the non-joinder of affected persons before the high court, consequently that court did not address the issue in its judgment. Nor, does it seem that the issue was raised when the application for leave to appeal was argued before the high court.

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<sup>3</sup> According to section 128(1)(a), an 'affected person', in relation to a company, means-

- (i) a shareholder or creditor of the company;
- (ii) any registered trade union representing employees of the company; and
- (iii) if any of the employees of the company are not represented by a registered trade union, each of those employees or their respective representatives.

[14] Joinder depends 'on the manner in which, and the extent to which, the Court's order may affect the interests of third parties'.<sup>4</sup> In the first instance, Arqomanzi sought an order declaring that the mining rights owned by MIMCO and Barbrook cannot be exercised under the Vantage proposal without s 11 consent and an interdict prohibiting the appellants and the BRPs from contending otherwise. The relief sought was necessary because it had been contended, on the strength of the representation that s 11 did not find application, that the Vantage proposal is superior to the amended business rescue plans proposed by Arqomanzi. The affected persons could hardly have any legal interest in this issue, which is concerned with the interpretation of s 11 of the MPRDA.

[15] In the second, Arqomanzi sought an order declaring that Standard Bank had lawfully and validly ceded the VGL-Barbrook claim to it. The issue concerned the validity of the cession. The only parties that had a legal interest in that issue were Arqomanzi, Standard Bank, VGL and Barbrook, all of whom were parties to the proceedings. None of the affected persons could contribute anything to this dispute. In the third instance, Arqomanzi sought orders interpreting the subordination agreements. The only parties with a legal interest in respect of that issue, were once again Arqomanzi, VGL and Barbrook, as well as VGSA, who like the other three, had been joined to the application. In the fourth instance, Arqomanzi sought an order declaring it an independent creditor of Barbrook. As with the first, this was also concerned with a question of interpretation – the interpretation of the term 'independent creditor', in the context of the Companies Act. None of the affected parties had a legal interest in the subject matter of the litigation concerning this relief.

[16] In the premises, the appellants' belated non-joinder argument falls to be rejected.

### **The loan account claims**

[17] The appellants challenge Arqomanzi's acquisition of the loan account claims from Standard Bank. There are two claims on loan account, which were transferred from Standard Bank to Arqomanzi. The first, is the claim on loan account that VGSA

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<sup>4</sup> *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637(A) at 657.



held in VGL that originated in the following circumstances: By 2014, VGL enjoyed the benefit of banking facilities with Standard Bank, subject to annual review. During August 2016, VGL requested an increase of an aggregate of R10 million over its existing banking facilities, which was approved subject to the furnishing of additional security, including the cession of a loan account in VGL by VGSA, an omnibus guarantee and other guarantees. The security required was provided and R5 million was made available to VGL on 7 September 2016 and the balance on 23 September 2016.

[18] As at 23 July 2019, both VGL (under the facilities agreement) and VGSA (in terms of the omnibus guarantee) were indebted to Standard Bank in the amount of R8 911 771.35, inclusive of interest and costs. Included in the security, which was held by Standard Bank, was the cession of VGSA's rights in and to monies due to it by VGL dated 6 September 2016 (ie the amount due on loan account). On 23 July 2019, Standard Bank demanded payment from VGSA of R8 911 771.35, plus interest (being the facility debt of VGL, for which VGSA was liable) within 10 days, failing which it would exercise its rights in terms of the cession. A demand notice was also sent to VGL. Standard Bank indicated that it, without further notification, would endeavour to dispose of its rights to a prospective purchaser for the sum of R8 911 771.35. VGL and VGSA failed to timeously make payment, entitling Standard Bank to realise its security - as it was entitled to do in terms of the cession.

[19] In terms of the sale agreement, which was concluded on 1 August 2019: (i) Arqomanzi would purchase VGSA's loan account against VGL from Standard Bank; (ii) the purchase price of the loan account of R8,9 million was payable within five days of certain resolutive conditions being either fulfilled or waived; and (iii) the effective date of the purchase of the loan account would be 7 August 2019, on which date the right, title and interest in and to the loan account would vest in Arqomanzi.

[20] The second, pertains to the claim on loan account that VGSA held in VGL that originated in the following circumstances: By July 2020, MIMCO was indebted to Standard Bank in the collective sum of R6 492 168.46, inclusive of interest and costs, arising from its overdraft facilities and instalment sale agreements concluded with the bank, which amount was due owing and payable. In addition, VGL, by virtue of

MIMCO's overdraft and instalment agreement facility and various suretyships that VGL had executed in respect of MIMCO's indebtedness to Standard Bank, was also indebted to the bank in the amount of R6 492 168.46. Barbrook, in turn, was, as at 6 September 2016, indebted to VGL on loan account in the amount of R178 245 000. On 6 September 2016, VGL ceded its loan account claims against Barbrook to Standard Bank. On 17 July 2020, Standard Bank delivered written demands to VGL and MIMCO (as well as the BRPs), demanding payment of the amount of R6 492 168.46, which was then owing, together with interest thereon in respect of MIMCO's overdraft and instalment sale agreement, as well as R 8 990 508.65 (for the debts of VGL).

[21] The letter of demand, specifically advised that should VGL fail to timeously repay the indebtedness, Standard Bank would endeavour to dispose of its rights in terms of the cession to a prospective purchaser for the sum of R1. MIMCO was similarly advised that should it not pay its indebtedness, the MIMCO claims were intended to be sold to a prospective purchaser for the sum of R6 492 168.36. No payments were forthcoming and, on 28 July 2020, Arqomanzi concluded a written agreement (the addendum) with Standard Bank. In terms of the addendum, the parties affirmed that the cession of the loan account, which had been the subject of the sale agreement (ie VGSA's claim against VGL) had become effective on 7 August 2019 and the purchase price thereof was amended to R8 990 508.65. The parties also provided in the addendum for the settlement of the debts due to Standard Bank by VGL, Barbrook and MIMCO by means of the sale agreement. The purchase price specified for MIMCO's debt was the sum of R6 492 168.36 and the purchase price for the loan account was R1. The purchase price was to be payable by Arqomanzi within five business days of the date on which the resolute conditions were fulfilled or waived. The sale and cession of the MIMCO debtors and the VGL loan account in Barbrook was seen as an indivisible transaction. A composite amount was paid for both items, with R1 allocated as the nominal amount in respect of the loan account.

[22] The appellants claim that the sales are invalid. Although a plethora of grounds were raised before the high court, only three are still being persisted with. It is asserted that: first, the sale agreements have lapsed; second, the loan account claims automatically reverted to the original cedents upon payment by Arqomanzi of the

purchase price to Standard Bank; and, third, the sales are invalid because they caused prejudice.

[23] As a precursor to a consideration of each of the three contentions, some preliminary observations: The appellants argue that Standard Bank's decision to realise, by way of *parate executie*, the loan account claims that were ceded to it in *securtitatem debiti*, 'gives rise to a novel legal issue'. Recently, *Grobler v Oosthuizen* settled the doctrinal debate regarding the exact nature and construct of a cession in *securtitatem debiti* in favour of the pledge theory.<sup>5</sup> As far as the *parate executie* (immediate execution) principle is concerned, it permits the cessionary, upon the cedent's default to realise the ceded property, without following any judicial procedure. In *Bock v Duburoro Investments (Pty) Ltd*, this Court reaffirmed the common law rule that *parate executie* is valid as long as it is not enforced in a manner that is against public policy.<sup>6</sup>

[24] Against these introductory remarks, we turn to a consideration of the three grounds upon which it is suggested that Arqomanzi is not the rightful owner of the loan account claims.

*As to the first*

[25] As far as the VGSA-VGL claim is concerned: Roelofse AJ found that Standard Bank lawfully and validly ceded this claim to Arqomanzi. The appellants argue that the cession failed after the judgment by Roelofse AJ, due to the non-fulfilment of certain other conditions. Before the high court, the appellants contended that this caused the sale agreement to lapse, alternatively, if the sale agreement did not lapse, then the addendum lapsed. They no longer persist with the first contention. This is important, because the addendum only revived the sale agreement as a precautionary measure and only to the extent necessary. It follows that if the sale agreement did not lapse, any consideration as to whether the addendum lapsed becomes immaterial to the validity of Arqomanzi's acquisition of the VGSA-VGL claim.

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<sup>5</sup> *Grobler v Oosthuizen* 2009 (5) SA 500 (SCA) (*Grobler*).

<sup>6</sup> *Bock v Duburoro Investments (Pty) Ltd* 2004 (2) SA 242 (SCA) (*Bock*).

[26] Regarding the VGL-Barbrook claim: The appellants, who were not privy to the addendum and had no personal knowledge of the facts relating to its conclusion or implementation, contend that it failed on account of the non-fulfilment of a resolutive condition. According to Arqomanzi, however, the resolutive condition had been fulfilled. Standard Bank confirmed this. In the circumstances, it could hardly have been open to the appellants, who were strangers to the agreement, to assert that the resolutive condition had not been met, particularly where the parties to the agreement had already performed in accordance with its terms.<sup>7</sup>

[27] As Innes JA observed (*obiter*) in *Wilken v Kohler*:

'It by no means follows that because a court cannot enforce a contract which the law says shall have no force, it would therefore be bound to upset the result of such a contract which the parties had carried through in accordance with its terms. Suppose, for example, an . . . [oral] agreement of sale of fixed property . . ., a payment of the purchase price and due transfer of the land. Neither party would be able to upset the concluded transaction on the mere ground that . . . it was in reality an agreement to sell, invalid and unenforceable in law, but which both seller and purchaser proposed to carry out.'<sup>8</sup>

[28] Although, this *obiter* statement did come in for some criticism, it has since received the unequivocal approval of this Court.<sup>9</sup> It may thus not have been open to the parties to the agreement to seek to upset the result of the agreement that had been carried through in accordance with its terms, much less strangers to the agreement, such as the appellants.<sup>10</sup> It follows, that the high court correctly rejected the appellants' argument, in declaring that Standard Bank had lawfully and validly ceded the VGL-Barbrook claim to Arqomanzi.

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<sup>7</sup> *MV 'Tarik III' Credit Europe Bank NV v The Fund Comprising the Proceeds of the Sale of the MV Tarik III and Others* [2022] ZASCA 136; [2022] 4 All SA 621 (SCA) (*MV 'Tarik III'*) para 21.

<sup>8</sup> *Wilken v Kohler* 1913 AD 135 at 144.

<sup>9</sup> *Legator McKenna Inc. and Another v Shea and Others* [2008] ZASCA 144; 2010 (1) SA 35 (SCA) [2009] 2 All SA 45 (SCA) paras 27 and 28.

<sup>10</sup> *MV 'Tarik III'* fn 7 above.

*As to the second*

[29] The appellants argue that when Argomanzi paid the purchase price of the loan account claims to Standard Bank, the principal debt in each instance was extinguished thereby and, as a result, the loan account claims automatically reverted to VGSA and VGL.

[30] Having purchased the loan account claims from Standard Bank, Argomanzi paid the purchase price. The payment by Argomanzi constituted performance under the sale agreement and the addendum. It was not paid (as the appellants incorrectly contend), to repay the debts owing by VGSA and VGL to Standard Bank. Standard Bank applied the proceeds of the sale to satisfy the principal debt that was owing by VGSA and VGL. After Standard Bank realised the loan account claims, it no longer had possession of those claims and VGSA and VGL no longer had any reversionary right in respect of them. What remained, was a reversionary right to be paid the net proceeds of the sale of the claims after the monies owing to Standard Bank had been deducted.

*As to the third*

[31] The appellants contend that the operation of the *parate executie* clause in the cessions *in securitatem debiti* has caused unacceptable hardship. The cessions provide for a 10-day notice before a sale and thus an opportunity to avoid the realisation of the security. It is only if the debt remains unpaid after 10 days that the relevant clause authorises the realisation of the security by private treaty. Standard Bank was entitled to realise its security in terms of the cession, when payment of the debt was not forthcoming. The process of realisation would ordinarily result in a change of the identity of the creditor. That is neither unexpected, nor, per se, prejudicial.

[32] It is accepted that a provision for immediate execution (a *parate executie* clause) in an agreement is valid and enforceable when it relates to movables that are held in pledge.<sup>11</sup> The cession of a personal right *in securitatem debiti* is regarded as a

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<sup>11</sup> *Bock* fn 6 above para 7.

pledge of that right.<sup>12</sup> A debtor may, when the creditor seeks to invoke the *parate executie* clause in an agreement, 'seek the protection of the Court if, upon any just ground, he can show that, in carrying out the agreement and effecting a sale, the creditor has acted in a manner which has prejudiced him in his rights'.<sup>13</sup> The onus, in this regard, would be on the debtor. Despite being notified in advance by Standard Bank, not just that the loan account claims would be sold, but also the amounts at which they were eventually sold, neither VGSA nor VGL took any steps to prevent the sales or to have them declared invalid. The appellants also did not institute a counter application in this matter to have the sales declared invalid. Moreover, insofar as the VGSA-VGL claim is concerned, the prejudice argument was considered and dismissed by Roelofse AJ. The issue is accordingly *res judicata*.

[33] The appellants argue that the sale of the loan account claims was prejudicial to them for two principal reasons: first, because Standard Bank sold the claims for less than their fair value; and, second, because Standard Bank refused to accept a tender of payment from them.

[34] The appellants contend that the value of VGSA's loan account in VGL was recorded to be approximately R369 million in the deed of cession. The suggestion seems to be that this amount (or some other unspecified amount) was the true value of the loan account when the sale agreement was concluded. However, that is a *non-sequitur*. The sale was an arm's length transaction as between a willing buyer and a willing seller. VGL, Barbrook and MIMCO are in business rescue because they are financially distressed. According to the adopted plans, they are both commercially and factually insolvent and have been for several years after the conclusion of the agreements of cession.

[35] VGSA was itself unwilling to settle the debt of VGL. VGSA had been invited to pay the VGL debt prior to the sale and afforded a period of 10 days within which to do so. It did not. It thus declined the opportunity to avoid the sale to Arqomanzi at the disclosed price. The same applied to the VGL loan account in Barbrook. It refused to

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<sup>12</sup> *Grobler* fn 5 above at 508B.

<sup>13</sup> *Bock* fn 6 above para 7.

pay the debt to avoid the sale despite advance notification that the proposed selling price for the loan account in Barbrook was R1 and for the MIMCO claims was approximately R6 million. It is noteworthy that no attempt was made by the appellants to state the true value of the loan accounts – perhaps with good reason. Given the financial distress of VGL, Barbrook and MIMCO, they appear to have had no value beyond what was paid for them. The appellants failed to produce any evidence to establish the real value, which would have been necessary for them to have discharged the onus resting upon them. The appellants accordingly failed to demonstrate with reference to any primary facts that the loan account claims were sold for less than their realisable value.

[36] The contention that Standard Bank rejected the appellants' tender to pay the principal debt owed to it, is factually incorrect as was demonstrated in Standard Bank's affidavit. Correspondence was exchanged between the appellants' erstwhile attorney and Standard Bank's attorney during September and November 2020. Standard Bank's attorney initially declined the tender because it was conditional – having been made on the basis that the loan account ceded to Standard Bank in *securitatem debiti* had to be restored to the bank. By then, the security had been realised and the loan account had been sold to Arqomanzi. In terms of the sale agreement, ownership of the loan account had already passed to the latter. Accordingly, the condition of acceptance could not be met.

[37] In any event, the tender made by VGSA only ever encompassed payment of the debt due by VGL to Standard Bank, as secured by the cession of VGSA's loan account in VGL. No tender was made by VGSA, Barbrook or MIMCO (or any other member of the Vantage Companies) to pay the debt of MIMCO, as secured by the cession of VGL's loan account in Barbrook, as well as MIMCO's cession of book debts. By virtue of the omnibus guarantee and cessions, VGSA, VGL and Barbrook were all liable for the debt of MIMCO.

### **Is Arqomanzi an independent creditor?**

[38] The appellants argue that even if Arqomanzi is the owner of the loan account claims, it cannot be an independent creditor of VGL and Barbrook. Insofar as the VGSA-VGL claim is concerned: This issue was considered and decided by Roelofse

AJ in the first application, in which the learned judge held that Arqomanzi was an independent creditor of VGL. The issue is accordingly *res judicata* and cannot be reconsidered.<sup>14</sup>

[39] Regarding the VGL-Barbrook claim, the reasoning adopted by Roelofse AJ in the first application must apply. The term ‘independent creditor’ is defined in s 128(1)(g) of the Companies Act. The definition makes clear that the identity of the creditor and its relationship to the company in business rescue are the determining factors. It is common cause that Arqomanzi is not related to any of the Vantage Companies. Arqomanzi is therefore an independent creditor of Barbrook.

### **The Subordination**

[40] The appellants contend that this issue is moot. However, the extent of the loan account claims is crucial in determining Arqomanzi’s interest in the Vantage Companies. The appellants and the BRPs asserted that, based on their interpretation of the subordination agreements, the loan account claims afford Arqomanzi no voting interest. Arqomanzi disputes this. Since the resolution of this disagreement will impact on the voting when the BRPs present the amended business rescue plans to the creditors, the interpretation of the subordination agreements is still very much a live issue.

[41] Two subordination agreements are at play: The first was concluded between VGSA and VGL on 7 April 2015 and relates to the VGSA-VGL claim (the first subordination agreement). The second was concluded between VGL and Barbrook on 27 February 2013 and relates to the VGL-Barbrook claim (the second subordination agreement). They are in nearly identical terms. The context within which the subordination agreements were concluded was that the auditors were unwilling to render an unqualified opinion. The purpose of the subordination agreements was thus to render VGL and Barbrook commercially solvent.

[42] Standard Bank was not informed of the existence of either subordination agreement. It was certainly not informed by VGL or VGSA or any other party of the

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<sup>14</sup> *Prinsloo N O & Others v Goldex 15 (Pty) Ltd & Another* 2014 (5) SA 297 (SCA) para 10.



first subordination agreement, when the additional facility was granted to VGL in 2006. It was accordingly unaware thereof. It did, however, have access to the audited financial statements (the AFS) of VGL for the 2014 financial year, which had been signed by its directors on 7 April 2015. The AFS recorded that R14 million (and not the full face-value) of the VGSA-VGL claim had been subordinated. Argomanzi asserted that VGSA's financial statements would confirm that only R14 million of the VGSA-VGL claim had been subordinated and challenged VGSA to provide them. VGSA refused. The appellants failed to deal with this in their affidavits. The audit report is unqualified, albeit that the statement of assets and liabilities reveals factual insolvency. It was noted in the AFS that the loan by VGSA to VGL (which was to become the subject-matter of the cession) had been subordinated by VGSA to the tune of R14 million in favour of other creditors and until the assets fairly valued exceeded its liabilities.

[43] Once again, by reference to the 2014 AFS of VGL, Standard Bank had become aware that the loan to Barbrook (which was to become the subject-matter of the cession) was recorded as a non-current asset in the amount of R137 502 000.46, and had been subordinated by VGL to the tune of R17 million in favour of the creditors of Barbrook, until its assets fairly valued exceeded its liabilities. In Barbrook's AFS for 2014, the subordination of the loan account in favour of VGL to the extent of R17 million was repeated.

[44] After the loan account claims had been ceded to Standard Bank on 6 September 2016, nothing could lawfully have been done that would have adversely affected the bank's security. VGSA and VGL could not, for example, agree to increase the extent of the subordination agreements. That would have been a source of serious concern to Standard Bank, if discovered at the time, as it could potentially have entirely undermined the security offered by the cessions. In the result, the high court was correct in rejecting the appellant's interpretation of the subordination agreements and declaring that only R14 million of the VGSA-VGL, and R7 million of the VGL-Barbrook, claims had been subordinated.

### Section 11 of the MPRDA

[45] The question that arises for consideration is whether the implementation of the Vantage proposal requires the consent of the Minister as contemplated in s 11(1) of the MPRDA, which states that:

'[a] prospecting the right mining right or an interest in any such right, or a controlling interest in a company of close corporation, may not be seated, transferred, let, sublet, assigned, alienated or otherwise disposed of without the written consent of the Minister, except in the case of change of controlling interest in listed companies'.

[46] The shareholders of Vantage held the controlling interest in MIMCO and Barbrook. Each of MIMCO and Barbrook owns a new order mining right. Before the Australian-based Macquarie acquired an interest in Vantage, 34 shareholders owned 100 percent of the issued shares and therefore the controlling interest in Vantage. In 2020, and in order to obtain funding for the implementation of the Vantage proposal, Vantage issued 98 percent of its shares to Macquarie. After the issuing of the shares, Macquarie now holds the controlling interest in Vantage.

[47] The issue of shares to Macquarie resulted in a substantial dilution of the interests previously held by the 34 shareholders. The effect of the issuing by Vantage of the shares to Macquarie was that the 34 shareholders relinquished, by consent, their controlling interest in Vantage. Arqomanzi thus contends that the controlling interest in Vantage, and indirectly in MIMCO and Barbrook, was alienated or otherwise disposed of to Macquarie and that Ministerial consent as contemplated in s 11(1) of the MPRDA is required.

[48] In interpreting s 11(1), the objects of the MPRDA in s 2 must be borne in mind. The provisions of ss 2(a) and (b) are particularly relevant.<sup>15</sup> They are buttressed by ss 3 and 4. Section 11(1) prohibits any change in ownership or control of a mining right or an interest in a mining right, without the consent of the Minister. This seeks to enhance the objects in ss 2(a) and (b).

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<sup>15</sup> Section 2 headed 'Objects of the Act', provides:

- (1) The objects of the Act are to –
- (a) recognise the internationally accepted right of the State to exercise sovereignty over the mineral and petroleum resources within the Republic;
  - (b) give effect to the principle of the State's custodianship of the nation's mineral and petroleum resources.'

[49] Although s 11(2) does not expressly mention 'controlling interest', Coppin J held in *Mogale Alloys* that reference to 'the right' in subsection 2, must include 'the controlling interest' in subsection 1.<sup>16</sup> *Mogale Alloys* further held that where the effect of the alienation or disposal would be that the holder of the controlling interest would lose such control, then the alienation or disposal would require Ministerial consent, even if no one else acquires that controlling interest.<sup>17</sup> Here, the controlling interest in Vantage was held by 34 shareholders before the new shares were issued to Macquarie. The issuing of 98 percent of the authorised shares in Vantage to Macquarie resulted in the controlling interest being 'alienated or otherwise disposed of'. This change in the controlling interest of Vantage, resulted in a change in the controlling interest in MIMCO and Barbrook, both of whom held the mining rights. Macquarie's acquisition of the 98 percent of the shares in Vantage had the effect of essentially disposing of or otherwise alienating the mining right or interest in the mining right as contemplated in s 11 of the MPRDA. Put differently, the new issue by Vantage of shares, which formed part of its authorised but unissued capital to Macquarie, resulted in an alienation or other disposal of such mining rights, since the ultimate owner and controller of such mining rights changed from the 34 Vantage shareholders to Macquarie. This required Ministerial consent.

[50] It would be an absurdity to confine the interpretation of s 11(1) of the MPRDA to direct cessions, transfers, leases, etc, since, by doing so, Ministerial consent (and therefore two of the principle objects of the MPRDA) could easily be thwarted. The interpretation contended for by the appellants is subversive of the objects of the MPRDA. Section 11(1) must accordingly be interpreted as including both direct and indirect cessions, transfers, leases, etc and a change of control by the issue of new shares in a company that controls the mining right. It follows, that the interpretation of s 11(1), which has been advanced by the appellants, was correctly rejected by the high court.

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<sup>16</sup> *Mogale Alloys (Pty) Ltd v Nuco Chrome Bophuthatswana (Pty) Ltd* 2011 (6) SA 96 (GSJ) para 37.

<sup>17</sup> *Ibid* para 38.

[51] The appellants advance no argument as to why, if their interpretation of s 11 is to be rejected, the high court was incorrect in granting the order interdicting them from contending that the Vantage proposal does not require s 11 Ministerial consent.

[52] Accordingly, for the reasons given, the appeal must fail. Costs remain: Costs, including those of two counsel, must obviously follow the result. Standard Bank was cited as the eighth respondent in the application *a quo*, on the basis that it was an interested party in the relief sought. It had filed its own affidavit (and subsequently a supplementary affidavit) in the application 'to avoid speculation and hearsay evidence in respect of the cessions by the other parties'. It did indicate, as before the high court, that it would abide the judgment of this Court and, irrespective of the outcome, it did not seek costs in either court.

[53] The Minister initially did not file any papers, when the affidavits were exchanged in the litigation before the high court. The Minister came to participate in the matter at the instance of the high court. This, to deal with the competing contentions raised in the heads of argument filed by the parties insofar as the interpretation of s 11 of the MPRDA, was concerned. Counsel, who represented the Minister, both before this court and the one below, supported the interpretation advanced by Arqomanzi. In the circumstances, costs were sought on behalf of the Minister in the event of the appeal failing. There was no resistance from the appellants to such an order issuing.

[54] In the result:

The appeal is dismissed with costs, including those of the Minister and of two counsel where so employed.

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VM Ponnar  
Judge of Appeal

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KE Matojane  
Judge of Appeal

## APPEARANCES

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