REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
MPUMALANGA DIVISION, MBOMBELA

(MAIN SEAT)

CASE NUMBER: 549/2021

(1)	**REPORTABLE: YES**
(2)	**OF INTEREST TO OTHER JUDGES: YES**

31/ 05/ 2021	**LEGODI JP**
DATE	**SIGNATURE**

In the matter of:

ARQOMANZI PROPRIETARY LIMITED	**APPLICANT**
and	
VANTAGE GOLDFIELDS PROPRIETARY LIMITED (IN BUSINESS RESCUE)	**1ST RESPONDENT**
BARBROOK MINES PROPRIETARY LIMITER (IN BUSINESS RESCUE)	**2ND RESPONDENT**
MAKONJWAAN IMPERIAL MINING COMPANY PROPRIETARY LIMITED (IN BUSINESS RESCUE)	**3RD RESPONDENT**
ROBERT CHARLES DEVEREUX N.O.	**4TH RESPONDENT**
DANIEL TERBLANCHE N.O.	**5TH RESPONDENT**

VANTAGE GOLDFIELDS SA PROPRIETARY LIMITED	**6TH RESPONDENT**
THE AFFECTED PERSON OF VANTAGE GOLDFIELDS PROPRIETARY LIMITED (IN BUSINESS RESCUE)	**7TH RESPONDENT**
THE AFFECTED PERSON OF BARBROOK MINES PROPRIETARYLIMITED (IN BUSINESS)	**8TH RESPONDENT**
THE AFFECTED PERSONS OF MAKONJWAAN IMPERIAL MINING COMPANY PROPRIETARY LIMITED (IN BUSINESS RESCUE)	**9TH RESPONDENT**
VANTAGE GOLDFIELDS LIMITED	**10TH RESPONDENT**

JUDGMENT

LEGODI JP

[1] A rule nisi that was by agreement between the applicant, the business rescue practitioners of Vantage Goldfields Proprietary Ltd (Vantage), Barbrook Mines Proprietary Limited (Barbrook) and (Maronjwaan Imperial Mining Company Proprietary Limited (Maronjwaan) and other respondents issued on 23 February 2021 by Greyling-Coetzer in terms of which the rescue practitioners were interdicted from further unilaterally implementing the amended rescue plans pending finalization of the dispute between the parties, was laid before this court on 4 May 2021 being the return date of the rule nisi aforesaid. On the latter date, the rule nisi was extended to Thursday 6 May 2021 for the parties to comply with certain directives issued by the court.

[2] At the heart of the dispute the question is whether as a general rule the business rescue practitioners of the companies in business rescue proceedings can unilaterally make substantial amendments to the business rescue plans after they have been adopted by the creditors of the entities under business rescue? The other question of importance

is whether the fourth and fifth respondents (the business rescue practitioners) could disregard an order made by Reclose AJ which directed them to publish amendments to the adopted business rescue plans and to allow the creditors to vote on those amendments that might be so proposed?

[3] At the meeting convened in terms of section 151, the practitioner (referring to business rescue practitioner), must introduce the proposed business rescue plan for consideration by the creditors and if applicable by the shareholder[1]. At the meeting convened in terms of section 151, the practitioner must call for vote for preliminary approval of the proposed plan as amended, if applicable unless the meeting has first been adjourned in accordance with paragraph (d)(ii)[2]. In a vote called in terms of subsection (1)(e), the proposed business rescue plan will be approved on preliminary basis if - (a) it was supported by the holders of more than 75 percentage of the creditors' voting interests that were voted and the votes in support of the proposed plan included at least 50% of the independent creditors interest if any, that were voted[3].

[4] The practitioner must within 10 business days after publishing a business rescue plan in terms of section 150, convene and preside over a meeting of creditors and any other holder of voting, interest, called for the purpose of considering a plan[4]. 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 section 151[5]. The business rescue plan must contain all the information reasonably required to facilitate affected person in deciding whether or not to accept or reject the plan and must be divided into three parts[6].

[1] Section 152 (i) (a) of the companies Act 71 of 2008 (the Act)
[2] Paragraph (e) of section 152 (l) of the Act
[3] Subsection (2) of section 152 of the Act
[4] Section 151(l) of the Act.
[5] Subsection (1) of section 150 of the act
[6] Subsection (2) of section 150

[5]. On 16 February 2017 the creditors of Vantage adopted a business rescue plan presented to them as contemplated in section 152 of the Act and those of Barbrook and Makonjwaan were adopted on 06 August 2018 and 25 May 2016 respectively.

[6]. On 11 November 2019 and after funding model adopted as part of the rescue plans so adopted had failed, Roelofse AJ issued an order and directing the rescue practitioners of relevance as follows:

> *"2. The forth and the firth respondents ("the respondents") are directed to, within 14 (fourteen) days of the order, consult with the first and second respondents ("companies") creditors, the affected persons, and the management of the companies for purposes of proposing amendments of the first, second and third respondent's business rescue plan 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 plan.*
>
> *5. The sixth respondent is ordered to pay the applicant's and the eighth to tenth respondent's costs which costs in respect of applicant shall include the costs consequent upon the employment of two counsels".*

[7] During June 2020 the rescue practitioners published the first version of Barbrook and Makonjwaan and the final version of those plans together with a proposed version of the amended rescue plans for Vantage was supposed to have been published during January 2021 and a meeting of a creditors of each entity should have been convened for the purpose of considering and voting on the proposed amended business rescue plans. This was apparently an attempt to comply with Roelofse AJ's order. However, on 20 January 2021, the sixth respondent, Vantage Goldfields SA Proprietary Limited (Vantage Goldfields) and the tenth respondent, Vantage Goldfields Limited (Vantage Limited) submitted a new offer to the rescue practitioners.

[8] In it, it was proposed that the rescue practitioners are invited to amend the adopted plans unilaterally and that the practitioners were offered an amount of about R18 million and the amount were to be paid fully as a notice of substantial implementation of the business rescue plans.

[9] On the 27 January 2021 and again on the 4 February 2021 the applicant, Arqomanzi Proprietary Limited (Arqomanzi) wrote to the rescue practitioners and raised with them that they (the practitioners) cannot unilaterally amend the adopted plans. Arqomanzi further told the rescue practitioners that court would be approached should the rescue practitioners seek to unilaterally amend the adopted plans as per the proposal or offer made by Vantage Goldfields and Vantage Limited.

[10] The business rescue practitioners in response thereto indicated that they were still considering the proposal by Vantage Goldfields and Vantage Limited and that once a decision is taken, Arqomanzi would be approached. However, on 15 February 2021 and without having notified Arqomanzi the rescue practitioners informed that they had unilaterally amended the adopted plans in accordance with the offer or proposal made by Vantage Goldfields and Vantage Limited.

[11] The communication of relevance reads: "… *the original Business Rescue Plan, as amended by this notice is being implemented with effect from 15 February 2021, and the first tranche of payment to creditors will convene immediately and be completed by 8 March 2021 and the balance within 60 days of 15 February 2021".* This is what prompted the current application. Further background is necessary before I deal with the two issues raised in paragraph [2] of this judgment.

[12] Vantage and Barbrook have been under business rescue proceedings since 12 December 2016. On the other hand, Makonjwaan have been under business rescue proceedings since 4 April 2016. The object of placing a company under business rescue proceeding is *inter alia,* to encourage the efficient and responsible management of companies[7] and to provide the efficient rescue and recovery of financially distressed companies in a manner that balances the rights and interest of all relevant stakeholders[8]. In my view, once the business rescue practitioners are appointed as officers of the court, they are expected to perform their duties diligently, efficiently and expeditiously. This becomes critical for the survival of the distressed company or companies.

[13] In the instant case, Messers Robert Charles Devereux N.O and Daniel Terblanche N.O, fourth and fifth respondents respectively, were appointed as the business rescue practitioners. As indicated earlier in this judgement, on 25 May 2016 the creditors of Makonjwaan adopted its rescue plans as contemplated in section 152 of the Act and those of Vantage and Barbrook were adopted on 16 February 2017 and 6 August 2018 respectively. The adopted rescue plans were aimed at ensuring the existence of the three companies and to save jobs. That however was not to be and it does not appear to be realizable anytime soon judging by the inability of the parties to find each other. I intend to say something more about this at the conclusion of this judgment.

[7] Section 7(j)
[8] Section (i)

[14] In terms of the adopted business plans of Vantage, Barbrook and Makonjwaan an amount of R250 million funding was to be obtained from Flaming Silver Trading 373 (PTY) Ltd ("Flaming and Industrial Development Corporation ("the IDC") to enable the rescue practitioners to develop the access route and to reopen the mines. This is said to have been necessary as the entrance to Lilly Mine which was used as an access route before the collapse of the Lilly Mine in February 2016. The costs to develop such an access route and reopen the mines was estimated at R200 million. It however transpired later that Flaming and IDC were no longer in a position to advance funding as so approved or adopted by the creditors of the three companies under business rescue proceedings. The underlining is mine and its importance will appear later when I deal with the lawfulness or otherwise of the rescue practitioner's unilateral amendments of the adopted plans.

[15] Vantage (first respondent) as an interested party and seemingly a creditor sought to conclude an agreement with Real Win Investment (Pty) Ltd (Real Win) to provide funds which was aimed at implementing the previously adopted plans. Real Win's involvement was meant to replace Flaming and IDC. According to the applicant, exact same amounts were to be paid to the creditors identified in the initial adopted plans. But of course the time frames within which payment was supposed to happen had already passed. For this, Real Investment offered the payment to the creditors within the 30 days after the signing of the agreement with the business rescue practitioners. In terms of section 11 the mineral and Petroleum Pumps Development Act 29 of 2002 approval was also supposed to be obtained.

[16] Before the involvement of Real Win the applicant had also made an offer to the practitioners. According to the applicant it did so in order to rescue the Companies under business rescue proceedings from total financial collapse. On the other hand, the rescue practitioners are said to have initially agreed that the new offer by Real Win would be laid before the creditors to consider the proposed amendments to the adopted rescue plans

and thereafter to allow the creditors to vote on proposed amended plan. A litigation started by Arqomanzi ensued between the parties and on 11 November 2019 Roelofse AJ made an order in its favour as in paragraph 6 of this judgment.

[17] On 13 December 2019 Vantage was granted leave to appeal against an order made by Roelosfe AJ. However, the appeal lapsed on 24 July 2020 for failure to timeously prosecute the appeal. According to Arqomanzi (the applicant) since the order by Roelofse AJ was issued during November-December 2019 a substantial money and effort was invested by Arqomanzi and the rescue practitioners were to prepare the proposed amended business rescue plans for the three companies under business rescue proceedings as per the court order by Roelofse AJ.

[18] In June 2020, the first version of the proposed amended business rescue plans for Barbrook and Makonjwaan were published and that of Vantage only in January 2021. Thereafter, a meeting of creditors of each company under rescue proceedings would have been convened for the purpose of considering and voting upon the proposed amended business rescue plans, so is Arqomanzi's assertion. But shortly before the publication aforesaid, Vantage Goldfields (sixth respondent) and Vantage Limited (tenth respondent) decided to submit a new offer to the rescue practitioners adopted to the vantage proposal which proposed according to Arqomanzi, the rescue practitioners were invited to amend the adopted plan during 2016 and 2017. The rescue practitioners were then offered R18 million which amount was to be paid "upon filing of a notice of substantial implementation of business rescue plan with CIPC. As indicated earlier in this judgement, this is what prompted the urgent application to be launched and laid before Greyling-Coetzer AJ.

[19] The rule nisi that was issued by Greyling-Coetzer AJ on 26 February 2021 of relevance, reads:

"*4. A rule nisi is hereby issued calling upon any interested person to show cause at 10:00 on 04 May 2021 why an order in the following terms should not be granted;*

4.1 That the fourth and fifth respondents are interdicted and restrained from the proceedings with the implementation of the business rescue plans, as purportedly amended by them on 15 February 2021, that were adopted by creditors of the first respondent on 16 February 2017, by the creditors second respondent on 6 August 2018, and by the creditors of the third respondent on 25 May 2016;

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 costs of the application.

5. The rule nisi in the terms as stipulated in paragraph 4.1 above shall as an interim interdict pending the final determination of this application on the return date or any extension thereof.

6. A decision on the costs of this application is reserved from determination on the return date".

I now turn to deal separately with the two critical questions raised in this case.

Can business rescue practitioners amend the adopted rescue plans unilaterally in the present case?

[20] This is an issue which has been raised by Arqomanzi in terms of which it wants this court to declare that the "business rescue practitioners of the companies in business rescue in the present proceedings are not entitled to unilaterally and without the

involvement of the creditors to make substantial amendment to adopted business rescue plans".

[21] The proposed order is mainly resisted by all the companies under business rescue, the two business rescue practitioners in relation thereto and Vantage Goldfields (sixth respondent) and Vantage Limited (Tenth respondent). A submission in paragraph 56 of their written heads of argument is made as follows:

> "*The validity of the amended plans is a matter that falls to be determined in accordance with the original plan that were properly approved by the creditor of the companies in business rescue. Clause 9 of those plans permit the BRPS to amend them provided only that an amendment does not prejudice an affected person and that the BRPS act reasonably*".

[22] "BRPS" is said to be collectively reference to "Terblanche and Devereux NO" both being the business rescue practitioners for the three companies under rescue. True, as indicated in paragraph 56 of their written heads of argument they are bound to act objectively and impartially and also bound "<u>to implement the approved plans</u>" as contemplated in section 140 (1)(d) of the Act. This seems to confirm what is the main contention by Arqomanzi on the issue under discussion.

[23] In paragraphs 45 and 46 of Arqomanzi's written heads of argument, it is contended as follows:

> *"45. The clause in the adopted plan which allows practitioners to amend the plan*
>
> *must accordingly be interpreted restrictively. The amendments that the practitioner would be entitled to make, would be amendments of an administrative nature that do not affect the substance of the plan that was adopted by the creditors. Any amendments of substance must be considered and voted on by creditors.*

46. In the result the practitioners attempted justification for unilaterally amending the adopted plans are legally untenable and stand to be rejected. *Business rescue practitioner do not have the right and cannot unilaterally make substantial amendments to an adopted business rescue plan*".

[24] Returning to what is stated in paragraph 56 of practitioner's written heads, and relying on section 140 (i)(d), one should have a proper appreciation of the essence therein. Sub-section (1)(d) of section 140 of relevance, provides as follows:

"(l) During a company's business rescue proceedings, the practitioner in addition to any other power and duties set out in this chapter

(a)…

(b)…

(c)…

(d) is responsible to-

(i) *develop a business rescue plan to be considered by affected person*

(ii) *Implement any business rescue plan that has been adopted in accordance with part D of this chapter*. (The underlining is my emphasis).

[25] Therefore, any clause in the adopted business plan which gives the business rescue practitioner the general power and duties, has to be seen in the context of the restrictive imperative in sub-section (1) (d) of section 140. The practitioners in acting objectively and with impartiality in the execution of their duties and also looking at the statement that *"…they are also bound to implement the approved plans*" as in paragraph 57 of the business rescue practitioners' written heads, a clear concession is made that any implementation of the plans has to be laid for consideration by the affected person or persons

as contemplated in paragraph (d)(i) and (ii) of section 140(1). That did not happen in the present case. Therefore, the conduct of the business rescue practitioners in the

circumstances should be found wanting and not in accordance with the legislative scheme in the Act including the provisions thereof alluded to in paragraphs [3] and [4] of this judgement.

[26] But even if there was no restrictive exercise of power in the execution of the business rescue function by the practitioners and thus purely relying on clause 9 of the adopted business rescue plans, the business rescue practitioners in the present case would still have a problem.

[27] Look at it this way: An offer having been made to the practitioners which resulted in the proposed amended business plans being published by the practitioners in June 2020, the final version of those plans together with the proposed version of the amended rescue plan for Vantage, were to be published in January 2021. A meeting of the creditors of each company under rescue proceedings were to be convened for the purpose of considering and voting upon the proposed amended business rescue plans. That did not happen.

[28] Instead, on 20 January 2021 and before the publication of the proposed amended business rescue plans, Vantage Goldfields and Vantage Limited (sixth and tenth respondents) submitted a new offer to the practitioners. They also suggested to the practitioners 'to adopt the plan unilaterally'. The practitioners heeded to the proposal or offer by the sixth and tenth respondents coupled with the suggestion that they can unilaterally amend the adopted plans despite Arqomanzi's protestation.

[29] As indicated in paragraph 56 of the business rescue practitioners' written heads, they seem to have relied on clause 9. That being so, one has to look at their conduct. In particular, if the amendment does not prejudice any affected person and whether they acted reasonably. The conduct of the practitioners alluded to above preceded by the decision to unilaterally amend the adopted business rescue plans, in my view, defies reasonableness on their part with the potential to prejudice to Arqomanzi and other affected persons. Therefore, even if reliance was based only on clause 9 to the exclusion

of legislative frame-work, the practitioners would still be found not to have properly exercised and executed their powers and duties. I now turn to deal with another late raised issue hereunder.

Did the business rescue practitioners amend the adopted business rescue plans?

[30] There is even a bigger problem the business rescue practitioners in the present case are confronted with. As quoted in paragraph [21] of this judgment the business rescue practitioners in seeking to unilaterally deal with the adopted plans after having received an offer from Vantage Goldfields and Vantage Limited moved from the premise that 'clause 9 of those plans permit the BRPS to amend them provided only that an amendment does not prejudice an affected person and that the BRPS act reasonably'. Having realised that they cannot legitimately rely on clause 9 of the adopted plans, they then belatedly sought to make a U-turn and only to face a cul-de-sac.

[31] The U-turn started when the business rescue practitioners and other respondents in what is referred to as "Supplementary Written Oral argument'' ordered by the court, as stated in paragraph 4 thereof by contending that '*the matter thus does not concern powers of amendment of duly adopted business rescue plans by BRPS, but with the implementation duly adopted plans'.*

[32] Thus it is no longer "amendment" of duly adopted business plans, but rather "the implementation" of the duly amended business plans. The statement in paragraph [31] above is in stark contrast to the statement referred to in paragraph [30] above, almost like a new defence now being made outside the pleaded papers. The new defence is stated further as follows:

"…the BRPS are simply implementing the plans that have been adopted appears from the annexure hereto. Every single payment contemplated in each of the three plans is provided for in the amended plan. The only difference concerns the source of the funds from which payments will be made. The original plan required funding, funding is now

provided by VGO and adopted plans can be implemented as they are without amendment. Because the funding is provided by the ultimate shareholders of the companies there are no conditions".

[33] Changing a funding entity which formed part of the adopted plans with another entity, is not an insignificant and inconsequential matter. 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. Therefore, the statement: "*the funding is now provided by VGO and the adopted plans can be implemented as they are, without amendment",* does not help to subvert the legislative frame work requiring adoption by creditors of the proposed plans. Neither does it entitle the business rescue practitioners to act unilaterally to implement the plans. The fact that funding is provided by the ultimate shareholder of the company to the exclusion of a properly adopted plans by creditors and other affected parties cannot be a legally based move.

[34] Coming back to the U-turn stance the business rescue practitioners and other respondents resorted to, to face the cul-de-sac, look at it this way: As indicated in paragraph [14] of this judgment, the adopted business rescue plans for the three companies under rescue proceedings made a provision for an amount of R250 million funding to enable the rescue practitioners to develop the access route and reopen mines. This is said to have been necessary as the entrance to Lilly Mine which was used as an access route, collapsed in February 2016.

[35] The dead end the business rescue practitioners are faced with is that in the offer made by the new proposed funders, there is no provision to fund and reopen the Lilly Mine and to develop access route as included in the previously adopted plans of the three companies under business rescue proceedings. The costs to develop such access route and to reopen the mines was estimated at R200 million in the adopted plans.

[36] The statement: "*The steps required to open the mine would have commenced and scores of people would have regained employment to the benefit of the larger community",* has to be seen in context. It has fallen by the way side as in the plans which the business rescue practitioners now want to implement without adoption thereof by the creditors, make no provision for funding of the access route as it was the case with the adopted plans. To suggest that "Arqomanzi, in the circumstances wants to frustrate for nothing more than its own financial gain", as asserted by the respondents in paragraph 17 of the "Oral argument Document" filed on 5 May 2021, has no factual basis. In the circumstances declaratory order is justified. I now turn to deal with another issue.

Did the order of Roelofse AJ place general duty on the practitioners to seek creditors' approval to amend the adopted plans?

[37] The order of Roelofse AJ is quoted in paragraph 6 of this judgement. In paragraph 44 of the respondents' written heads of argument, they start by stating that 'on 11 November 2019 Roelofse AJ ordered the BRPS to consult with the company's creditors and other affected persons for the stated purpose of proposing amendments to the then exact existing plans. The order further directed the BRPS to prepare amendments to the plans and then convene a creditors meeting to consider the amended plans', so they contended.

[38] The order was crafted in a way that will force the practitioners to comply with the legislative frame-work set out in paragraphs [3] and [4] of this judgement read with provisions of section 140 part of which is quoted in paragraph [24] above. I am unable to understand this statement in paragraph 47 of the respondents' written heads:

"When the judgment (referring to Roelofse AJ's judgment) is considered as a whole, it appears that the process described in paragraph 1 to 4 of the order was devised for the BRPS to amend plans not for an obstruct purpose, but for to put into effect the offer that Arqomanzi made at the time..."

[39] There is no merit to this contention. To come to this conclusion as quoted in the preceding paragraph, one has to ignore what is stated in paragraph [24] of this judgment and repeated in a way in paragraph [38] above. One wonders whether the business rescue practitioners who are officers of the court did not make themselves guilty of misconduct or contempt of the court. This appears from this statement of their written heads of argument:

> *"48 That the order is concerned with the Arqomanzi's offer is further illustrated by the time limits set by the court for the steps mentioned therein to be taken: consultation with the affected persons within 14 days of the order; amendments to be prepared within 10 days after consultation and to convene a creditors meeting 10 days after publication of the amended plans. The process envisaged in the order would then have been over within 24 days after the date of the order. That order was granted on 11 November 2019. It cannot be applicable to the offer made by Vantage 14 months later on 20 January 2021".*

[40] The essence of the practitioners' contention as I see it, is that they did not have to comply with the time-lines set by Roelofse AJ. In other words, they were entitled to let the time-frames lapse, and by so doing they move from the premise that the order was no longer in force. If that was to be the case, then there can never be an enforceable order of court.

[41] As correctly argued by Arqomanzi in its written heads of argument, there is another reason why the practitioners could not unilaterally amend the adopted plans in the manner as they did because Roelofse AJ ordered the practitioners to consult the creditors and prepare the amendments to the adopted plans. According to the Arqomanzi, the circumstances surrounding the offer made or proposed by Vantage Goldfield (sixth respondents) and Vantage Limited (tenth respondent) is exactly the same resulting in the same application as the one which was laid before Roelofse AJ. In other words, what Roelofse AJ sought to prevent is repeating itself. That cannot be allowed as to do so will be to subvert Roelofse AJ's order without due process in the form of an appeal which the practitioners elected to abandon along the way.

[42] The only difference, so it is contended 'being that instead Real Win Investment, RWI (new proposed funder) assisted by the sixth respondent wanting to step into the shoes of the IDC (Industrial Development Corporation) and Flaming Silver (Flaming Silver Trading 373 (Pty) Ltd, VGO also assisted by the sixth respondent now wants to step into their shoes'. I tend to agree with the contention. And that too has relevance to the question whether the practitioners acted reasonably in seeking to rely on clause 9 of the adopted business rescue plan.

[43] Therefore, to argue as in paragraph 55 of the respondents' written heads that 'when Vantage offer was made on 20 January 2021, the order had already run its course. The Vantage offer is therefore not subject to the order', in my view, is absurd and offensive to the order of Roelofse AJ. It is almost like saying: 'I let the order to run its course by not complying therewith, and therefore I am entitled to do as I deem fit'. If that was to be allowed, then the whole justice system which must be enhanced by obeying court orders, will turn into a chaotic situation.

[44] The statement: '*there is no case made out in the founding affidavit that the amended plans are in any way prejudicial to the affected persons concerned…*', in my view, suggests that the laws and court orders can just simply be ignored. That would encourage disorder and potential prejudice that can turn into lawlessness and free for all damaging the interest of justice. It would defeat the very purpose as contemplated in the Companies Act. A case has therefore been made to find that the practitioners (fourth and the fifth respondents) cannot disregard an order which directed them to publish amendments to the previously adopted business rescue plans and to allow the creditors to vote on the amendments.

<u>Concerns about the delay and multiple litigations in the matter</u>

[45] The three companies (first, second and third respondents) were placed under business rescue proceedings many years ago with little progress in place. On 25 May 2016, 16 February 2017 and 6 August 2018 the business plans of the third, second and

first respondent were respectively adopted by their respective creditors. However, no implementation of those plans ever took place. First, the initial funding fell by the way side. Second, several litigations and disputes popped in. The order having been made to put forward the process of finalising the proposed amendments to the adopted plans, nothing happened as the order made 11 November 2019 was not carried out. In the process, another litigation chipped in. *Rule nisi* having been issued, the matter ultimately ended up in the hands of this court on the return date. This is what I am seized with.

[46] In the course of time, including the day on when this matter was heard on 4 May 2021, memorandums were presented to this court by the community around the Barberton area where these companies are or were operating. For the community this is a cry for help. The Lilly Mine which collapsed in 2016 remains shut. For this, the community raises a hue cry directed at the court.

[47] I mention all of the above and hopefully the community will understand that as courts, we are not completely in control of the process in particular as to who institutes court proceedings against who, for what and when. But business rescue practitioners, the creditors and other affected persons, are. Courts have no power to dictate who must and who must not challenge actions or inactions of the business rescue practitioners and or creditors in our courts. However, once matters are brought before courts, the courts are guided by what is placed before them and sometimes the decision we make, may make no sense to an ordinary member of the society who is faced with sufferings and hunger due to unemployment.

[48] In the course of considering the issues in this matter as those issues were argued, one was placed with sufficient facts to locate the inordinate delay that had unfolded since the three companies were placed under rescue proceedings. Better measures must be put in place in the form of a court order that would ensure that further unnecessary delays are averted. In my view, the business rescue practitioners could have done better to avoid the long delays. Roelofse AJ having made an order in November 2019, the rescue practitioners failed to comply therewith. First, they challenged the order and on the way

abandoned the challenge. Second, having abandoned the challenge they took their time to implement the order. That too, they also abandoned in January-February 2021 and sought go it alone based on the offer made by the sixth and tenth respondents. The move was challenged. In my view, correctly so. It is for this reason that the court cannot take a backward seat and allow a further delay. Paragraphs 49.3 and 49.4 of the order hereunder is intended to address this concern.

[49] Consequently an order is hereby made as follows:

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.

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

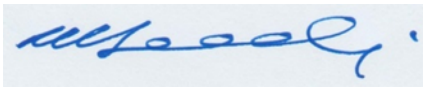
49.3 The rule nisi granted by Greyling-Coetzer AJ on 26 February 2021 and quoted in part in paragraph [19] of this judgement is hereby confirmed and granted as a final relief.

49.4 Should there be any other offers including that of the sixth and tenth respondents and that of the applicant, 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 not later 1 July 2021.

49.5 Should it not be possible by 1 July 2021 to complete the process in terms of the applicable legislative frame-work for the adoption of any proposed amendment to the adopted plans and to start with process of

implementation thereof, the business rescue practitioners and any other affected person shall be entitled to approach the court by not later than 1 July 2021 for an 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.



LEGODI JP

DATE OF HEARING: : 6 May 2021
DATE OF JUDGMENT : 31 May 2021

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