IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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

Today the Supreme Court of Appeal (SCA) dismissed an appeal against the judgment of the Mpumalanga Division of the High Court, Mbombela (the high court).

The second appellant, Vantage Goldfields Ltd (Vantage), is the ultimate holding company of the Vantage group of companies (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 Australian company, Macquarie Metals Proprietary Limited (Macquarie), recently acquired a 98 percent stake in Vantage.

This appeal relates to an ongoing dispute between the first respondent, Arqomanzi Proprietary Limited (Arqomanzi) and the appellants in respect of the 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 the claims were ceded to Standard Bank.

MIMCO's financial turmoil contributed to VGL and Barbrook facing similar difficulties, leading to them being placed in business rescue in 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 and their success was dependent on finance that was principally to be sourced from the Industrial Development Corporation.

When it became apparent that the necessary funding for the adopted plans would not become available, Arqomanzi held discussions with Standard Bank on different occasions with a view to acquiring both the VGSA-VGL and the VGL-Barbrook claims. Following those discussions, Standard Bank sold those claims to Arqomanzi. However, the fifth and sixth respondents, the Business Rescue Practitioners (the BRPs), refused to acknowledge Arqomanzi as the owner of the claims. This led to two earlier high court applications, the second of which was recently disposed of by the SCA on appeal.

Despite Arqomanzi paying the purchase price for the claims to Standard Bank, the appellants and the BRPs denied that Arqomanzi had lawfully acquired the claims. They also contended that the loan account claims were fully subordinated under two subordination agreements. 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, whereas Arqomanzi's amendment would. As the issues raised would likely have an impact on Arqomanzi's voting interest, when the new business rescue plans were to be voted on, Arqomanzi launched a third application (the application the subject of this appeal). The high court found in Arqomanzi's favour. It held that: (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 subordinationagreements subordinated only R14 million and R17 million (and not in each instance the full amount) of the claims in favour of VGL's and Barbrook's creditors respectively.

Five issues were raised by the appellants in the appeal: (a) whether certain affected persons should be joined as parties to the appeal; (b) whether Arqomanzi had validly and lawfully acquired the loan account claims that were ceded to Standard Bank; (c) whether Arqomanzi is an independent creditor of VGL and Barbrook; (d) whether Arqomani has a voting interest in the companies in business rescue; and (e) whether MIMCO's and Barbrook's mining rights can be exercised without the consent of the Minister under s 11, where there has been a change of control in the ultimate holding company of the Vantage Group.

This SCA held: *As to (a)* – that the affected persons could hardly have any legal interest in this issues that arose, the only parties that had a legal interest in those issues were Arqomanzi, Standard Bank, VGL and Barbrook, all of whom were parties to the proceedings. It therefore rejected the appellants' belated non-joinder argument. *As to (b)* – where the parties to the agreement had already performed in accordance with its terms, it could hardly be open to persons in the position of the appellants, who were strangers to the agreements, to challenge the validity thereof. *As to (c)* - the Companies Act makes it clear that the identity of the creditor and its relationship to the company in business rescue are the determining factors. Therefore, because Arqomanzi had validly acquired the claims and was not related to any of the Vantage Companies, it was an independent creditor of Barbrook. *As to (d)* – with reference to the other relevant facts particularly the relevant financial statements of the companies, 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. *As to (e)* - the main object of s 11 is 'to prohibit any change in ownership or control of a mining right or an interest in a mining right, without the consent of the Minister.' Section 11(1) should accordingly be interpreted as including both direct and indirect cessions, transfers, leases, etc'.

In the result, the SCA concluded that the appeal should be dismissed with costs, including those of the Minister and those of two counsel where so employed.

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