REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2024-090281

(1) REPORTABLE: NO
(2) OF INTEREST TO O[redacted]
(3) REVISED: YES

2 April 2025 _____ _____

DATE SIGN

In the matter between:

THOMAS COWAN	First Applicant
DIRK CORNELIUS ODENDAAL	Second Applicant
FRONTIER PIPELINE SERVICES (PTY) LTD	Third Applicant
and	
KELLY NORTON	First Respondent
JONATHAN NORTON	Second Respondent
SHADRICK PULE MOTHELESI	Third Respondent
KELLY NORTON N.O. [cited in her capacity as a Trustee of the Phumelela Staff Share Trust]	Fourth Respondent
SHADRICK PULE MOTHELESI N.O.	Fifth Respondent

[cited in his capacity as a Trustee of the
Phumelela Staff Share Trust]

KYLIE-JANE STANDER N.O. Sixth Respondent
[cited in her capacity as Trustee of the
Phumelela Staff Share Trust]

PHUMELELA AIR CONDITIONING (PTY) LTD Seventh Respondent

**THE COMPANIES AND INTELLECTUAL
PROPERTY COMMISSION OF SOUTH AFRICA** Eighth Respondent

JUDGMENT

This judgment is handed down electronically by circulation to the parties' legal representatives by email and by being uploaded to CaseLines. The date and time for hand down is deemed to be 25 March 2025.

DE OLIVEIRA, AJ

Introduction

[1] The protagonist in the application before me is the seventh respondent ("PAC"). PAC is the subject of a shareholder dispute, save to state that the principal issue is whether the third applicant ("FPS") is a shareholder of PAC at all.

[2] The first and second applicants ("Mr. Cowen" and "Mr. Odendaal" respectively) claim to be the true and rightful directors of PAC. They, together with FPS, seek the following relief, all of which stems from whether FPS is a shareholder of PAC or not:

(a) That the demand made by the first respondent ("Ms. Norton") and the fourth to sixth respondents in their capacities as Trustees for the Phumelela Staff

Share Trust ("the Trust") on 1 August 2024, for the directors of PAC to convene a shareholders meeting to adopt a resolution to remove Messrs Cowan and Odendaal as directors of PAC, be declared unlawful and set aside. I mention upfront that this is final relief.

(b) That the appointment of the second and third respondents ("Mr. Norton" and "Mr. Mothelesi" respectively) as directors of PAC be declared unlawful and set aside. This is also final relief.

(c) That, pending finalisation of an action instituted by, *inter alia*, FPS in which it seeks, *inter alia,* a declarator pertaining to its shareholding in PAC, Ms. Norton and the Trust are interdicted and restrained from removing Messrs Cowan and Odendaal as directors of PAC by way of a resolution adopted at a meeting of the shareholders of PAC. This is interim relief *pendente lite*.

[3] The point is this: if FPS is the majority shareholder in PAC,[1] all of the decisions purportedly taken by shareholders of PAC, other than FPS and to its exclusion, are invalid and fall to be set aside.

[4] The application is opposed by the first and seventh respondents on numerous grounds. The eighth respondent did not participate in the proceedings.

Common Cause or Undisputed Facts

[5] On or about 1 April 2021, FPS, Ms. Norton and PAC (the applicants contend that the Trust was also a party) concluded a written agreement styled "Term Sheet".

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[1] FPS contends that it is a shareholder as to 75%, alternatively and at worst for it as to 51%.

The provisions of the Term Sheet appear to me to be rather confusing. In essence, however, and according to the applicants at least, the purpose of the Term Sheet was for FPS to acquire a 51% stake in PAC through the *issue* of additional shares in exchange for funding in the sum of R3.8 million, which FPS would invest or procure to be invested in PAC. Whilst the applicants call the Term Sheet a sale of shares agreement, I do not think this is accurate, for what was plainly envisaged was for further shares to be issued and thereafter transferred to FPS. Neither Ms. Norton nor the Trust agreed to sell their shares to FPS by way of the Term Sheet.

[6] It is common cause that, for one reason or another, PAC did not issue additional shares to those already issued at the time, and which vested in Ms. Norton and the Trust prior to the conclusion of the Term Sheet.[2]

[7] On 14 April 2021, Mr. Cowen and Mr. Odendaal were appointed as directors of PAC. This was envisaged in the Term Sheet.

[8] FPS either injected the sum of approximately R3.8 million into PAC, alternatively procured that such sum be invested into PAC.

[9] In terms of clause 1.3(k) of the Term Sheet, various things were to take place prior to the injection of any funding by FPS. In terms of sub-clause (l), for example, should the "commitments" not be met as per the requirements of the Term Sheet (such as the issuing of shares and the conclusion of a shareholders agreement as soon as possible after conclusion of the Term Sheet, to mention only a few)

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[2] The applicants do appear to contend, however, that PAC issued new shares and that this is evidenced by a particular share certificate; an issue to which I will return later.

"… this Term Sheet will be terminated. Should the parties wish to do so, this clause can be altered through way of mutual written consent."

[10] It was thus that on 31 January 2022, FPS, PAC, Ms. Norton and the Trust concluded a further agreement styled "Addendum Agreement". In terms thereof, it was recorded and acknowledged that, further to the acquisition of 51% of the shares in PAC by FPS pursuant to the Term Sheet (though it is common cause this never happened), certain events had occurred which necessitated a further alteration of the shares in PAC. Such changes where that, as at 31 January 2022, FPS had contributed approximately R5.4 million to PAC, which the parties agreed justified a further adjustment to the shareholding in PAC. The parties further agreed that a certain non-disclosure by the Trust at the time of conclusion of the Term Sheet justified a further adjustment to the shareholding in PAC. The net effect of the Addendum Agreement was that the shares in PAC would henceforth be adjusted to reflect the following:

(a) Ms. Norton as to 12.5% of the shareholding;

(b) the second respondent as to 12.5% of the shareholding; and

(c) FPS as to 75% of the shareholding.

[11] In the last quarter of 2023, the relationship between Messrs Cowan and Odendaal, on the one hand, and Ms. Norton (in particular) on the other, soured considerably.

[12] On 16 November 2023, the applicants received a letter from Richard Meaden Attorneys ("RMA"), purporting to act for and on behalf of PAC, in terms of which the applicants were advised that the Term Sheet had lapsed due to the non-fulfilment of the conditions stipulated in clause 1.3(k) thereof. This prompted the applicants' attorneys to respond by asserting that Mr. Cowan and Mr. Odendaal were, as directors of PAC, being obstructed by Ms. Norton from performing their statutory duties and carrying out their responsibilities. The applicants' attorneys further pointed out that no resolution had been adopted authorising RMA to act on behalf of PAC, and they demanded that access to PAC's bank account, which had been removed *vis-a-vis* Mr. Cowan and Mr. Odendaal, be restored.

[13] On 29 November 2023, the applicants received further correspondence from RMA asserting that RMA was duly authorised to represent PAC by virtue of a shareholders resolution purportedly adopted by Ms. Norton and the Trust. That correspondence further asserted that the applicants henceforth had no right to participate in the business of PAC. It is evident from this letter that the first to seventh respondents had, by then, taken the view and/or been advised that, despite the conclusion of the Term Sheet and Addendum Agreement, FPS had not acquired a shareholding in PAC, let alone the envisaged 75%.

[14] It is further common cause between the parties that, at the time of the aforesaid correspondence, the board of PAC comprised Mr. Cowan, Mr. Odendaal and Ms. Norton. In the meantime, notice was given of an intended shareholders meeting comprising Ms. Norton and the Trust, scheduled to take place on 13 December 2023.

[15] The notice prompted the applicants to reiterate that FPS had acquired 75% of the shares in PAC. The applicants further disputed that the Term Sheet was void or voidable, and recorded that FPS had, to date, invested more than R8 million

into PAC. The applicants furthermore sought to trigger the dispute resolution provisions of the Term Sheet.

[16] On 11 December 2023, a meeting was held between the parties at the offices of RMA. According to the applicants, they informed the first to seventh respondents that FPS had acquired 75% of the shares in PAC in terms of the Term Sheet and Addendum Agreement, and that as a consequence thereof FPS had injected approximately R8 million into PAC. The first to seventh respondents, on the other hand, reiterated that, according to them, the conditions precedent provided for in the Term Sheet had not been fulfilled.[3] Immediately after the meeting concluded, the applicants' attorneys addressed further correspondence to the first to seventh respondents asserting that the alleged shareholders meeting had not been called by the directors of PAC in terms of section 61 of Companies Act 71 of 2008 ("the Act").

[17] On 12 December 2023, Ms. Norton and the Trust caused further correspondence to be sent to the applicants in terms of which they were advised that Ms. Norton and the Trust intended to continue with the shareholders meeting which they had called for purposes of adopting a resolution to remove Mr. Cowan and Mr. Odendaal as directors of PAC.

[18] On 13 December 2023, Ms. Norton and the Trust adopted the threatened resolution in terms of which Mr. Cowan and Mr. Odendaal were removed as directors of PAC. They also appointed Messrs Norton and Mothelesi as directors of PAC. This prompted Messrs Cowan and Odendaal to institute proceedings to set aside the resolution. Notwithstanding that the first to seventh respondents initially opposed those proceedings, they subsequently withdrew their opposition

[3] I pause to mention that, in my view, the clause in question is more in the form of a resolutive condition than a condition precedent.

on advice from RMA. As a result, on 29 July 2024, Mr. Cowan and Mr. Odendaal obtained an order setting aside the resolution. They were also to be reinstated as directors of PAC.[4]

[19] In the meantime,[5] FPS and an associated company ("EPCM") instituted action proceedings against PAC, Ms. Norton and the Trust in which the plaintiffs therein seek the following relief:[6]

(a) An order declaring that FPS is the lawful holder of 75% of the shares in PAC, alternatively that FPS is entitled to 75% of the shareholding in PAC.

(b) An order directing the board of PAC to issue a share certificate to FPS reflecting it as the lawful holder of 75% of the shares in PAC.

(c) An order directing the board of PAC to rectify its share register to reflect FPS as the lawful holder of 75% of the shares in PAC.

(d) Alternatively, repayment of the sums invested in PAC by FPS and/or EPCM.

[20] On 1 August 2024, after the applicants obtained the court order referred to in [18] above, the applicants received a fresh demand from Ms. Norton and the Trust calling upon the directors of PAC to convene a shareholders meeting for purposes of adopting another resolution to have Messrs Cowan and Odendaal removed as directors of PAC ("the 1 August 2024 demand"). The notice further

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4 So far as I understand, Messrs Norton and Mothelesi were subsequently "re-appointed" as directors of PAC.

5 In and during February 2024.

6 This is the action referred to in para [1](c) above.

indicated that Messrs Cowan and Odendaal were suspended with immediate effect because they had allegedly attempted to remove Ms. Norton as the sole signatory on PAC's bank account. The applicants responded and asserted that the impending shareholders meeting was arranged in bad faith and that it sought to achieve an ulterior purpose. They were subsequently informed, however, that Ms. Norton and the Trust intended to continue with the shareholders meeting.

[21] On or about 15 August 2024, a few days after the present application had been instituted, the applicants instituted an urgent interlocutory application to stay the threatened shareholders meeting pending the final determination of these proceedings ("the urgent interlocutory application"). This application was struck from the urgent court roll, with costs reserved.

[22] Save to state that there are, in my view, numerous disputes of fact (to which I will return later), it is with the above background in mind that I turn to summarise the respective cases of the applicants and first to seventh respondents.

The Applicants' Case

[23] As far as the relief pertaining to the 1 August 2024 demand is concerned, the applicants submit that it falls to be set aside for the following reasons:

(a) First, they contend that Ms. Norton's and the Trust's request to convene a board meeting was unlawful in that FPS, as a shareholder in PAC, was not consulted.

(b) Secondly, the demand is said to be improper in that it was made, *inter alia*, to Ms. Norton and Messrs Norton and Mothelesi, whose appointment as directors of PAC was contested on the basis that it was bad in law.

(c) Third, the applicants submit that the demand is vexatious because it sought to unlawfully exclude FPS and its nominated directors from PAC's business in circumstances where they have a clear right, alternatively a *prima facie* right to participate in the running of PAC's business.

(d) Fourth, the applicants submit that the demand is vexatious because Ms. Norton and the Trust did not seek to remove Mr. Cowan and Mr. Odendaal for any valid reason. In this regard, the applicants contend that the purported basis for the impending removal, namely the fraud pertaining to PAC's bank account,[7] was dishonest and fabricated. The applicants point out that this issue was already canvassed in prior litigation and that it was Ms. Norton, who initially changed the log-in details and password of PAC's bank account, that prompted the applicants to make written demand for a restoration of their access to the bank account for purposes of enabling PAC's accountants to obtain and compile financial information, and which then prompted Ms. Cowan to engage with Nedbank directly.

[24] As far as the resolution adopted to summarily suspend Messrs Cowan and Odendaal as directors of PAC is concerned, the applicants seek that it be set aside on the following grounds:

(a) First, the applicants contend that the suspension is *mala fide* and unlawful because it was effected for the sole purpose of achieving a unanimous vote at the impending shareholders meeting, at which the removal of Mr. Cowan and Mr. Odendaal would be debated and resolved.

(b) Furthermore, and in regard to the resolution adopted by Ms. Norton and the Trust confirming that they, to the exclusion of FPS, are the shareholders of

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[7] See in this regard para [20] above.

PAC, the applicants contend that such resolution is unlawful and invalid for the reasons foreshadowed above.

[25] As far as the appointment of Mr. Norton and Mr. Mothelesi as directors of PAC is concerned, it is pointed out by the applicants that from April 2021 until 13 December 2023 (when Ms. Norton and the Trust invalidly removed Mr. Cowan and Mr. Odendaal as directors of PAC), the directors of PAC were Mr. Cowan, Mr. Odendaal and Ms. Norton. The applicants contend that the appointment of Mr. Norton and Mr. Mothelesi as directors of PAC should be set aside for the following reasons:

(a) First, Messrs Norton and Mothelesi were not appointed as directors of PAC by its board of directors, or by PAC's shareholders as required in terms of section 68 of the Act.

(b) Secondly, even if they could have been appointed as directors of PAC at the time that Mr. Cowan and Mr. Odendaal were excluded from the business of PAC, their appointments should be declared unlawful and set aside because they had been appointed as directors for the sole and unlawful purpose of facilitating an unlawful takeover of the business of PAC by Ms. Norton and the Trust.

[26] As far as the interim relief is concerned, the applicants' case is broadly that the issue of PAC's shareholding will be finally determined in the action proceedings, and that in the interim the status *quo ante* should be preserved.

The First to Seventh Respondents' Case

[27] Notwithstanding that for a period of almost three years the parties appeared to be *ad idem* that FPS owned a 75% stake in PAC, and notwithstanding that Mr.

Cowan and Mr. Odendaal served as directors of PAC during that time, the first to seventh respondents oppose the relief sought by the applicants on the following grounds.

(a) First, the first to seventh respondents point out that, as a matter of fact, FPS is not a shareholder in that it is not entered as such in PAC's certificated securities register ("share register"). That register indicates that Ms. Norton is the holder of 49% of the issued shares in PAC and that the Trust is the holder of the balance of the shares, namely 51%. FPS is accordingly not a "shareholder" of PAC as defined in section 1 of the Act. Consequently, FPS has no shareholder rights in terms of the Act, including but not limited to any of the rights in Part F of Chapter 2 of the Act. At best for the applicants, FPS has a contractual claim to become a shareholder of PAC, and this is if any such claim is sustainable in the first place. The first to seventh respondents further point out that FPS took no steps to enforce its contractual claim to become a shareholder of PAC for almost three years since concluding the Term Sheet and two years since concluding the Addendum Agreement. It did this by instituting the action proceedings in and during February 2024.

(b) Second, the first to seventh respondents point out that, in terms of section 38(1) of the Act, it is the board of a company that resolves to issue shares. The board at the time, namely during the period 14 April 2021 until 13 December 2023, and which comprised Ms. Norton and Messrs Cowan and Odendaal, did not resolve to issue new shares to FPS. Moreover, no special resolution was adopted in terms of section 41(1)(b) of the Act, which provides that a special resolution of shareholders is required to issue shares in certain cases, and in particular where shares are issued to a "… person related or interrelated to the company, or to a director or prescribed officer of the company…" Seeing that FPS is related or inter-related to Mr. Cowan and Mr. Odendaal,[8] a special resolution of the shareholders of PAC was

[8] As contemplated in section 2 of the Act.

required but never passed. I pause to mention that both the applicants and the first to seventh respondents rely on the doctrine of unanimous assent to both support their respective arguments and to counter opposing arguments. I will return to this issue later.

(c) Third, even if *prima facie* FPS has a contractual claim against PAC for the issuing of shares comprising a 75% stake in PAC, the first to seventh respondents submit that such a claim is unsustainable for various reasons, including but not limited to the fact that the Term Sheet is void for vagueness, or that it lapsed due to the non-fulfilment of what is said to be the conditions precedent.

(d) Fourth, the first to seventh respondents contend that, if the Term Sheet is void, it follows that the Addendum Agreement is void. In fact, they submit that this is common cause as a result of the applicants' failure to pertinently deal with the issue in response to it being raised in the answering affidavit.

(e) Fifth, the first to seventh respondents dispute that the applicants have the requisite *locus standi* to seek the setting aside of the 1 August 2024 demand in terms of section 61(5) of the Act because Messrs Cowan and Odendaal are not directors of PAC and FPS is not a shareholder.

(f) Sixth, it is contended that Messrs Norton and Mothelesi were validly appointed as directors of PAC in terms of section 68 of the Act. Whilst the applicants counter in their replying affidavit that directors can only be appointed by shareholders pursuant to a shareholders meeting convened by the board, the first to seventh respondents rely on section 61(3) of the Act and the doctrine of unanimous assent. The former provides for the election of directors by way of the written polling of shareholders entitled to

exercise voting rights. As far as the latter is concerned, the first to seventh respondents contend that Messrs Norton and Mothelesi were appointed through the unanimous assent of Ms. Norton and the Trust as PAC's shareholders entitled to exercise voting rights.

(g) Seventh, the first to seventh respondents submit that the relief pertaining to the upliftment of the suspension of Messrs Cowan and Odendaal as directors of PAC has become academic because, on 16 August 2024, Ms. Norton and the Trust resolved to uplift their suspension.

(h) Finally, the first to seventh respondents dispute that the requirements for interim interdictory relief have been met.

The Legislative Framework and Applicable Legal Principles

[28] Before I turn to analyse the competing cases of the applicants and first to seventh respondents, I intend to say something about the legislative framework and the applicable legal principles.

[29] It appears from PAC's share register that 100 of 1000 authorised shares have been issued. It further appears that Ms. Norton is the holder of 49 of the issued shares and that the Trust is the holder of the balance. Bearing this in mind, the parties in terms of the Term Sheet intended, at least *prima facie,* for further shares to be *issued* so as to ensure that FPS would become the holder of 51% of the shares in PAC. A transfer of shares, at least by Ms. Norton and the Trust, was not intended.

[30] The issuing of shares is regulated, in the first instance, by section 38 of the Act, which provides that the board may resolve to issue shares at any time, so long as they are within the classes and to the extent authorised by or in terms of the company's memorandum of incorporation (which was not placed before me by any of the parties).

[31] In recognition of the fact that no shares were or have been issued, other than the original 100, FPS was constrained to assert that it is something other than an actual, registered shareholder.[9] Mr Oosthuizen SC, who appeared before me on behalf of the first to seventh respondents, submitted that the applicants effectively advanced contradictory versions in regard to the issue of shareholding: on the one hand, the applicants assert that, upon signature of the Term Sheet and Addendum Agreement, Ms. Norton and the Trust became obliged to cause FPS to become a 51% and 75% shareholder respectively by procuring that PAC would *issue new shares*. This would appear to create no more than a personal right against (presumably) PAC. On the other hand, the applicants assert that, upon signature of the agreements, FPS *became* a shareholder in PAC, alternatively it *became* a "beneficial owner" of shares.

[32] As already mentioned,[10] FPS is not a shareholder in the strict sense, i.e., it is not registered as such in PAC's share register. Nor, I think, and which I pause to deal with, can FPS be considered to be a shareholder by virtue of the share certificate signed by Mr. Cowan on 12 April 2021. In the first instance, a share certificate can only pertain to those shares that have already been issued by the board. Secondly, as Mr. Oosthuizen SC correctly pointed out, Mr. Cowan was only appointed as a director of PAC on 14 April 2021, two days after the share

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[9] A "shareholder" is defined in section 1 to mean "*...subject to section 57 (1)...the holder of a share issued by a company and who is entered as such in the certificated or uncertificated securities register, as the case may be*..." It is common cause that FPS is not entered as a shareholder in PAC's share register.

[10] Per note 9 above.

certificate was signed by him, and it was also not signed by two persons authorised by PAC's board as required by section 51(1)(b) of the Act.[11]

[33] It is thus to beneficial "ownership" and "beneficial interest" to which one must turn.

[34] A "beneficial owner" is defined in section 1 of the Act to mean "...in respect of a company...an *individual* who, directly or indirectly, ultimately owns that company or exercises effective control of that company, including through..."

[35] An "individual" is further defined in the Act to mean a natural person. Accordingly, for example, if company A is the sole shareholder of company B, and a natural person in turn is the sole shareholder of company A, and the sole director thereof, such natural person would be the "beneficial owner" of company B.[12] FPS cannot be the "beneficial owner" of PAC because it is not a natural person.[13]

[36] "Beneficial interest", on the other hand, is defined in section 1 of the Act to mean:

> *"...when used in relation to a company's securities, means the right or entitlement of a person, through ownership, agreement, relationship or otherwise, alone or together with another person to —*
>
> *(a) receive or participate in any distribution in respect of the company's securities;*
>
> *(b) exercise or cause to be exercised, in the ordinary course, any or all of the rights attaching to the company's securities; or*

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[11] Section 51(1)(b) provides that: "*A certificate evidencing any certificates securities of a company...must be signed by two persons authorised by the company's board*..."

[12] I need not, for present purposes, deal with the foreign concept of "owning" a company as introduced by the Act (for a company is a legal *subject* that cannot be owned, as opposed to a legal *object*).

[13] See further P Delport *Henochsberg on the Companies Act 71 of 2008* (LexisNexis Online) at 22 – 24.

(c) dispose or direct the disposition of the company's securities, or any part of a distribution in respect of the securities,

but does not include any interest held by a person in a unit trust or collective investment scheme in terms of the Collective Investment Schemes Act, 2002 (Act No. 45 of 2002)..."

[37] A summary of the difference between "beneficial owner" and "beneficial interest", although in a different context, appears in the judgment of the Constitutional Court in *Independent Community Pharmacy Association v Clicks Group Limited and others*.[14] In view of the fact that I deem the discussion to be helpful in the present matter, I quote the excerpt in full.[15]

"[231] Since the first judgment equates holding a "beneficial interest" to having "beneficial ownership", I must at the outset say something about the term "beneficial ownership". Of the English law I say nothing, because English property law is very different from ours. In South Africa, ownership is a real right over a thing. A person may become an owner by taking delivery and having possession of the thing personally or through an agent. Where the thing is in the possession of an agent, the owner is still the owner in the true and fullest sense. The owner is not a "beneficial owner" and the agent is not a "nominal owner". There is only one person in whom the real right vests.

[232] The expression "beneficial ownership" tends to be encountered in those cases where the law requires the thing to be registered in the name of a person. Sometimes the registration has no effect on ownership. For example, the person in whose name a car is registered does not, solely by virtue of registration, have ownership of the car. It is different in the case of land. Save in certain exceptional circumstances, not here relevant, the person in whose name the land is registered is in law the owner. The registered owner and another person may have an agreement that all the benefits of ownership will be passed on to the other person and that the registered owner will take instructions from the other person. Although one might call the other person a "beneficial owner", that person is not in law the owner, and his or her rights are not real rights akin to ownership. That person simply has personal contractual rights against the registered owner. So one should not be seduced by the loose expression "beneficial ownership" to regard that person as a species of "owner".

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[14] 2023 JDR 1121 (CC).

[15] Footnotes omitted.

[233] Another class of property which is subject to a statutory system of registration are shares in companies. It is in connection with shares that one most often comes across a distinction between "nominal ownership" and "beneficial ownership". Caution is needed here. A person in whom a personal right vests is not the "owner" of the personal right. Although we commonly say that a person "owns" shares in a company, one should be wary of attaching legal significance to this expression, because a share in a company is a bundle of incorporeal personal rights against the company, and cannot strictly be "owned". This bundle of rights, like other personal rights, is transferred by cession.

[234] The legal significance of share registration depends on the details of company legislation. This case is not the occasion to delve into the details. The legislation may have the effect that the company need not concern itself with anyone other than the registered holder of the shares. However, in this country registration of shares, unlike the registration of land, does not determine "ownership". If, as between the registered holder and a third party, the latter "owns" the shares, the personal rights comprising the shares vest in the third party, but the enforcement of those rights may have to take place through the registered holder, given that the company is not legally bound to recognise anyone other than the registered holder. A legal regime could notionally have the effect that the legal rights comprising the shares vest in the registered holder, with the third party merely having personal rights against the registered holder. In either of these situations, there is only one "owner" of the shares, or – more accurately – only one person in whom the rights comprising the shares vest. There is not one "nominal owner" and another "beneficial owner". The nomenclature of "nominee" and "beneficial owner" in this field is, for purposes of South African law, imprecise, and is a relic of the English law of constructive trusts which does not form part of our law. ”

[38] A beneficial interest in shares and the beneficial ownership of a company is further regulated by section 56 of the Act. The relevant portions of that section provide as follows:

“(1) Except to the extent that a company’s Memorandum of Incorporation provides otherwise, the company’s issued securities may be held by, and registered in the name of, one person for the beneficial interest of another person.

(2) A person is regarded to have a beneficial interest in a security of a public company if the security is held nomine officii by another person on that first person’s behalf, or if that first person—

...

(c) *acts in terms of an agreement with another person who has a beneficial interest in that security, and the agreement is in respect of the co-operation between them for the acquisition, disposal or any other matter relating to a beneficial interest in that security;"*

[39] Mr. Uys, who appeared before me on behalf of the applicants, referred me to the well-known case of *Botha v Fick* 1995 (2) SA 750 (A). That case concerned the question of whether it was necessary to deliver a share certificate in order to effect a valid or complete cession, which is how shares, consisting of a collection of rights of action entitling the holder thereof to a certain interest in the company, its assets and dividends, are transferred by one shareholder to another. The Appellate Division (as it was then known) held that the delivery of a share certificate was not a requirement for the valid transfer of shares. This does not appear to be a contentious part of our law.[16]

[40] The import of the judgment, according to Mr. Uys, is that FPS became entitled to all rights and title associated "...with the shares when the agreements were signed by the parties."[17] Put differently, the argument is that the delivery of a share certificate was not a prerequisite to FPS becoming a shareholder in FPS; the obligatory and transfer agreements are embodied in the Term Sheet and Addendum Agreement themselves,[18] so that when the investment was made, FPS automatically became a shareholder or acquired a beneficial interest in PAC.

[41] As far as the removal and appointment of directors are concerned, this is regulated, in the main, by sections 68 and 71 of the Act. I will deal with these and other peripheral provisions in the analysis below.

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[16] See for example *Etkind and Others v Hicor Trading Ltd and Another* 1999 (1) SA 111 (W) and *Watt v Sea Plant Products Ltd and Others* 1999 (4) SA 443 (C).

[17] Applicants' heads of argument at para 37.4.

[18] It is however reiterated that what was intended was for further shares to be issued (in terms of section 38(1) of the Act) as opposed to for existing shares to be transferred (in terms of sections 51(5) and (6) of the Act).

Analysis

[42] It seems to me that almost everything turns on the question of whether FPS is a shareholder of PAC, or whether it has a "beneficial interest" in PAC, and what the cascading effect of the answer is. I use the word "cascading" to emphasise that, if the applicants establish that FPS either is or has a beneficial interest in PAC as to 51% or 75%, the final relief should be granted, for in that instance Ms. Norton and the Trust could not, to the exclusion of FPS, either have called a board meeting for the purpose of removing Messrs Cowan and Odendaal as directors of PAC, nor could they have purported to appoint Messrs Norton and Mothelesi as directors of PAC.[19] By implication, it would follow that the applicants have at least a *prima facie* right to certain shares in PAC in terms of the Term Sheet and Addendum Agreement, in which case it would only remain to deal with the further requirements for interim relief.

[43] First off, I find the cases dealing with the transfer of shares to be unhelpful.[20] In my view, what was intended by the Term Sheet and Addendum Agreement was that further authorised shares would be issued so as to reflect that FPS became the major shareholder in PAC. Neither Ms. Norton nor the Trust agreed to sell their shareholding in PAC, or a portion thereof to FPS, nor was a price therefor agreed. It was PAC that required funding for working and other capital, and it was PAC that agreed to issue additional shares (which would then be transferred) to FPS as a *quid pro quo* for its "investment" in PAC.

[44] I further agree with Mr. Oosthuizen SC that FPS is not, as a matter of fact, a shareholder in PAC. Not only is it not registered as such in PAC's share register,

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[19] In view of the conclusion to which I come in this judgment, I do not intend to conclusively determine whether such a beneficial interest would have entitled FPS to "voting rights".

[20] Save to state that, if shares had indeed been issued, they would need to be transferred to FPS and this would occur by way of cession.

the question of cession does not arise because a transfer of shares was not intended, at least not between FPS, on the one hand, and Ms. Norton and/or the Trust on the other.

[45] As far as a beneficial interest in PAC is concerned,[21] and bearing in mind that final relief is sought in at least some respects (in regard to which the principles are trite), I also agree with Mr Oosthuizen SC that:

(a) the applicants have failed to demonstrate who holds the shares for the beneficial interest of FPS, or in what proportions; and

(b) the applicants do not contend or prove that FPS' name is on PAC's register of disclosures in terms of section 56(9)(b) of the Act, which provides that the holder of a beneficial interest in a company may only vote at a meeting of shareholders if that person's name is on the company's register of disclosures,[22] or if the holder of a beneficial interest holds a proxy from a registered shareholder, which is also not the applicants' case.

[46] As far as the issuing of shares is concerned, that would have required compliance with the Act. In this regard, PAC's board did not resolve in terms of section 38(1) to issue shares, nor did the board determine "adequate consideration" for the shares in terms of section 40(1)(a)(b). It will be recalled that, until December 2023 at least, the board included Messrs Cowan and Odendaal. In my view, it cannot avail the applicants to argue that such consideration was the sum of R3.8 million, which was to be invested in PAC, because the Term Sheet provided, in rather

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[21] Though I point out that the applicants' case is that FPS is the "beneficial owner" of shares as opposed to it having a "beneficial interest" therein.

[22] The learned author of P Delport *Henochsberg on the Companies Act 71 of 2008* (LexisNexis Online), at p 224(3), appears to suggest that this part of section 56(9)(b) only applies to "affected" companies (as defined in section 117 of the Act), whereas *in casu* there is no indication that PAC is such a company.

convoluted terms, that FPS would in essence recoup its investment of R3.8 million by way of repayment of a loan.

[47] Ultimately, the applicants' allegations and contentions are all pertinently disputed by the first to seventh respondents, not baldly but in significant detail. Whilst I take note of the fact that the first to seventh respondents only raised certain of their arguments some years after concluding the Term Sheet and Addendum Agreement (as a result of which an adverse inference could otherwise have been drawn), the arguments raised, to the extent that they pertain to the facts, have the effect of precluding me from granting final relief.[23]

[48] At best for FPS, it may be that it has a contractual right, presumably against PAC, for shares to be issued and subsequently transferred so as to accord FPS a 75% shareholding in PAC. This does not mean, however, that the applicants have demonstrated that FPS is either a shareholder in PAC or that it has a beneficial interest therein, either as to 51% or to 75%. Whilst it is unnecessary to determine whether such a contractual right is sustainable or not (save perhaps in my determination of whether the applicants have demonstrated a *prima facie* right for purposes of the interim relief), I reiterate that the first to seventh respondents (i) dispute that the Trust was a party to the Term Sheet, (ii) contend that the Term Sheet is contradictory, to the extent that it is void for vagueness and (iii) submit that one or more conditions precedent have not been fulfilled, as a consequence of which the Term Sheet lapsed.

[49] It follows that the final relief cannot be granted because the applicants have not established that FPS is a shareholder of PAC or that it has a beneficial interest therein.

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[23] See generally *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C).

[50] To the extent required, and lest I be mistaken as to whether the applicants have demonstrated this to be the case, the final relief should nonetheless be dismissed for the following reasons:

(a) As alluded to above, FPS does not and cannot have voting rights, as a result of which it could not participate in the shareholders meeting wherein it was resolved that the board should call a meeting for purposes of removing Mr. Cowan and Mr. Odendaal as directors of PAC.

(b) The existing shareholders of PAC were entitled in terms of section 68 of the Act to appoint Messrs Norton and Mothelesi as directors of PAC. Whilst the applicants contend that they could only be appointed pursuant to a formal shareholders meeting convened by the board of directors,[24] section 60(3) of the Act provides that "[a]n election of a director that could be conducted at a shareholders meeting may instead be conducted by written polling of all of the shareholders entitled to exercise voting rights in relation to the election of that director." I agree with the first to seventh respondents that the required consent of the shareholders could and was given by way of the unanimous assent of Ms. Norton and the Trust. This doctrine is to the effect that the unanimous assent of all shareholders of a company, when fully aware of what is being done, is an alternative method of passing valid company resolutions.[25]

[51] I digress to deal with a competing submission in regard to the doctrine of unanimous assent, albeit in a different context. It will be recalled that the first to

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[24] Section 61(1) of the Act provides that the board *may* call a shareholders meeting at any time.

[25] See generally *Gohlke and Schneider and Another v Westies Minerale (Edms) Bpk and Another* 1970 (2) SA 685 (A); *Southern Witwatersrand Exploration Co Ltd v Bisichi Mining Plc* 1998 (4) SA 767 (W) at 774E-F. As an aside, *Quadrangle Investments (Pty) Ltd v Witind Holdings Ltd* 1975 (1) SA 572 (A) is authority for the proposition that acts requiring a special resolution in terms of the Companies Act (1946) and (1973) cannot be made by unanimous assent. In the first instance, not only has it been cogently argued that even special resolutions in terms of the Act can be passed by way of the unanimous assent of all shareholders (see in this regard, and for example Y Kleitman “Can Special Resolution Matters be Passed by ‘Unanimous Assent’” (24 June 2015) available at www.cliffedekkerhofmeyer.com), I cannot see that the demand to the board *in casu* required a special resolution.

seventh respondents contend that, as a matter of fact, no *special* resolution was passed authorising the issue and transfer of shares to FPS as a related or inter-related person to Messrs Cowan and Odendaal in terms of section 41(1)(b) of the Act. In view of the fact that a special resolution is here required, as opposed to an ordinary resolution as mentioned in [50] above, I am bound by *Quadrangle*[26] and find that such a special resolution could not have been granted by way of the unanimous assent of PAC's shareholders and/or directors. Unless and until the Supreme Court of Appeal revisits *Quadrangle* in the context of the 2008 Act, as I see it special resolutions cannot be passed by way of unanimous assent.

[52] The applicants' answer to these and other contentions advanced by the first to seventh respondents, some of which were advanced by way of supplementary heads of argument that were belatedly filed, all presuppose that FPS either is a shareholder of PAC, or for some or other reason had voting rights in regard to PAC. As mentioned, however, I find that the applicants have not established this to be the case.

[53] Finally, I agree with the first to seventh respondents that the issue of the suspension of Messrs Cowan and Odendaal has become academic in view of Ms. Norton's and the Trust's decision to uplift the suspension in August 2024.

[54] To recap, I find that:

(a) The applicants have not made out a case to the effect that FPS either is a shareholder in PAC or that it has a beneficial interest therein. At best, in regard to the shareholding there are various genuine and *bona fide* disputes of fact, all of which means that the final relief cannot be granted.

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[26] Note 25 above.

(b) By implication, Ms. Norton and the Trust were able on their own to call on the board to convene a meeting for purposes of resolving to remove Messrs Cowan and Odendaal as directors of PAC.[27]

(c) Messrs Norton and Mothelesi were validly appointed in terms of section 68 of the Act. To the extent that their appointment was required to be preceded by a shareholders meeting convened by the board, a resolution was passed by way of the unanimous assent of Ms. Norton (*qua* director) and Ms. Norton and the Trust (as shareholders).

[55] It remains to deal with the interim relief. I am prepared to accept that FPS has established at least a *prima facie* right to claim that additional shares must be issued and transferred to FPS. As Mr. Uys correctly pointed out, the events leading up to the litigation show that FPS was at all relevant times considered to be a shareholder of PAC and entitled to exercise voting rights in connection therewith. In addition, the Addendum Agreement acknowledged that, prior to its conclusion, FPS was a shareholder of PAC as to 51%, and Messrs Cowan and Odendaal served as directors of PAC for more than two years.

[56] It is the remaining requirements for interim interdictory relief that merit further consideration; they are a well-grounded apprehension of irreparable harm if the interdict is not granted, a balance of convenience in favour of granting the interdict and the absence of a suitable alternative remedy.

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[27] Whilst the applicants also sought to set aside the demand on the basis of section 61(5) of the Act, it is reiterated that only the company or a shareholder of the company can apply to set aside a demand if it is frivolous or vexatious. If I find that the applicants have not established that FPS either is a shareholder in PAC or that it has a beneficial interest therein, as I have done, it follows that the applicants have no *locus standi* to invoke section 61(5) of the Act.

[57] The problem, as Mr. Oosthuizen SC pointed out, is that nowhere in the applicants' founding affidavit did they enumerate or specifically deal with these requirements. Whilst a well-grounded apprehension of irreparable harm and the absence of a suitable alternative remedy may arguably be implicit from the facts alleged in the founding affidavit, a balance of convenience is not. In this regard, it is trite to state that a court is required to weigh the prejudice to the applicant if the interlocutory interdict is refused against the prejudice to the respondent if it is granted.[28] I feel constrained in this analysis because the requirement was not pertinently dealt with in the founding affidavit.

[58] Whilst the applicants say that FPS' and/or EPCM's investment in PAC will be imperilled if an interdict is not granted (though EPCM is not cited as an applicant), it is noteworthy that FPS and/or EPCM seek the restitution of monies invested (in the alternative) in the action proceedings. There is furthermore no proper analysis of the prospects of success in the action proceedings. In contrast, I am told that FPS and EPCM are not prosecuting the action proceedings with the requisite level of diligence, which is their obligation to do if they want interim relief. I think that I am also entitled to take judicial notice of the very long lead-time in obtaining trial dates in this division, as a consequence of which an interim interdict can have far-reaching and potentially irreversible consequences. In all, I find that the applicants have failed to discharge their onus in regard to a balance of convenience and that accordingly the interim relief falls to be dismissed.

[59] I confess that I have some sympathy for the applicants – for the parties conducted themselves for approximately three years as if FPS was the major shareholder in PAC, and Messrs Cowan and Odendaal were directors thereof – but FPS did not take any steps to compel PAC to issue shares or to procure that PAC's share

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[28] See generally D E van Loggerenberg *Erasmus: Superior Court Practice* (Jutastat E-Publication) at RS25, 2024, D6-30 and the authorities cited in footnote 214 therein.

register was rectified to the extent required, which it could have done in the approximately three years before the acrimony began.

[60] Costs were sought against RMA *de bonis propriis* if the applicants succeeded. In view of the fact that they have not, I need not consider the arguments pertaining to whether RMA should pay such costs, nor by implication RMA's authority to represent PAC as challenged by way of a Rule 7(1) notice.

[61] The first to seventh respondents sought costs if they were successful, such costs to include the costs of counsel on Scale C and which were to include the costs of the urgent interlocutory application, which so far as I can ascertain was struck from the urgent court roll on 16 August 2024. Mr. Uys was unable to proffer a reason why the applicants were not ordered to pay the costs occasioned by the striking off and correctly conceded that these costs (which I think must include the costs of the urgent interlocutory application *in toto*) should follow the result in these proceedings.

[62] After I delivered this judgment, it was brought to my attention by RMA that I had neglected to deal with the wasted costs occasioned by the striking off of the application due to a lack of urgency, which were reserved by Wanless J on 29 August 2024 and which were argued before me on 12 March 2025. It was submitted on behalf of the first to seventh respondents that I can *mero motu* deal with a patent omission (which has been brought to my attention), and I agree. Despite the fact that I afforded the applicants several days to deal with RMA's correspondence, they did not respond.

[63] In view of the fact that the first to seventh respondents have succeeded, and that costs should follow the result, I can see no reason why the aforementioned wasted costs should not be borne by the applicants, more so when the application was struck for lack of urgency and there is no indication why costs were not there and then granted by Wanless J in favour of the first to seventh respondents.

[64] I accordingly vary the below order in terms of Rule 41(2)(b) so as to cater for the wasted costs as aforesaid.

Order

[65] In the circumstances, I make the following order:

(a) The application is dismissed.

(b) The first to third applicants jointly and severally, the one paying the other to be absolved, are ordered to pay the costs of the application, such costs to include the costs of counsel on Scale C as well as the costs of the urgent interlocutory application under notice of motion dated 15 August 2024, and the costs occasioned by the striking off of this application from the urgent court roll, which were reserved on 29 August 2024 by Wanless J.

DE ÓLIVEIRA AJ

ACTING JUDGE OF THE HIGH COURT

JOHANNESBURG

Counsel for the Applicants:	PL Uys
Instructed by:	Gildenhuys Malatji Attorneys
Counsel for the First to Seventh Respondents:	HF Oosthuizen SC
Instructed by:	Richard Meaden & Associates Inc.
Date of hearing:	12 March 2025

Date of Judgment reserved:	12 March 2025
Date Judgment delivered:	25 March 2025
Date Judgment revised:	2 April 2025