



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO:13917/20

In the matter between:

PIETER WILLEM BASSON

First Applicant

LEGARE BESIGHEIDS TRUST

Second Applicant

Herein represented by

PIETER WILLEM BASON NO

PHILLIPA BASSON NO

and

**PENTAGON FINANCIAL SOLUTIONS
(PRETORIA) (PTY) (LTD)**

First Respondent

**ASSOCIATED PORTFOLIO SOLUTIONS
(PTY) LTD**

Second Respondent

Delivered electronically this 14th day of February 2022 by email to the parties.

JUDGMENT

Introduction

[1] This is an application for an order to compel the Respondent companies to comply with their statutory duties in terms of section 26 and 31 of the Companies Act 71 of 2008, as amended (“the Act”), to make specific company records available to the Applicant shareholders to inspect and copy them. More specifically, the order sought by the Applicants is couched in the following terms:

- “1. Directing the First Respondent to comply with its duty in terms of section 26(1) and (4), as set out in the Request for Access to Information in Form CoR 24, dated 17 July 2020, being Annexure LBT 7 to the founding affidavit.
2. Directing the Second Respondent to comply with its duty in terms of section 26(5) of the Companies Act 71 of 2008 by providing the Second Applicant an opportunity to inspect and copy the information requested in terms of sections 26(1) and (4), as set out in the Request for Access to Information in Form CoR 24 dated 14 July 2020, being Annexure LBT 6 to the founding affidavit.
3. Directing that the costs of this application be paid by the Respondents, on a scale as between attorney and own client, jointly and severally, the one paying the other to be absolved.”

The parties

[2] The First Applicant is an adult businessman residing at 4 Silvertree Heights Estate, Silverboomkloof Road, Spanish Farm, Somerset West, Western Cape. He owns 37% of the shares in the First Respondent.

[3] The Second Applicant is the Legare Besigheids Trust (“the Trust”) and its trustees are the First Applicant and his wife Ms Phillipa Basson. The third trustee, Mr M J Grundling (“Mr Grundling”) resigned during June 2020, and has, according to the papers, not been replaced. The Trust owns 25% of the shares in the Second Respondent.

[4] The Third Respondent, Pentagon Financial Solutions (PRETORIA) (PTY) (LTD) (“Pentagon”), is a company duly registered in accordance with the company laws of the Republic of South Africa and its Western Cape office is situated at St Andrews Building, Ground Floor, 4 De Beers Avenue, Somerset West, Western Cape, and its Gauteng Office at Pentagon House, cnr Cliffendale and Plettenberg Streets, Faerie Glen, Pretoria, Gauteng. It has three shareholders, who are, the First Applicant (37%), Mr C Kruger (“Mr Kruger”) (38%) and Mr Neethling (25%). Mr Kruger is the managing

director of Pentagon and is responsible for ensuring that it complies with its statutory duties.

[5] The Second Respondent, Associated Portfolio Solutions (PTY) (LTD) ("APS") is also a company duly registered in accordance with the company laws of the Republic of South Africa. Its address is the same as that of Pentagon. APS has four equal shareholders, who are the Second Applicant, Mr Kruger, Mr Neethling and Mr Nimmo who each has a 25% shareholding. Mr Kruger is the managing director of APS and is responsible for ensuring that APS complies with its statutory duties.

Factual Background

[6] As earlier alluded to, it is undisputed that the First Applicant is the registered shareholder and owner of 37% of the shares of the First Respondent. The Second Applicant, the Trust, is the registered shareholder and owner of 25% of the shares of the Second Respondent, APS. It is on this basis that they have approached this court seeking the relief set out in the notice of motion. In the founding affidavit deposed by the First Applicant, the Applicants allege that they have at all material times remained registered shareholders and owners of their shares, and as such have retained beneficial interest

which entitles them to exercise the rights attaching to the shares. The prescribed manner for making a direct request for access to company information is set out in regulation 24 of the Companies Regulations, 2011, the relevant parts which read thus:

“(1) Any right of access of any person to any information contemplated in section 26 or in this regulation or in this regulation may be exercised only in accordance with-

(a) . . .

(b) the provisions of section 26; and’

(c) sub-regulations (3) and (4),

(2) A person claiming a right of access to any record held by a company may not exercise that right until-

(a) a request to exercise that right has been made to the company in terms of sub-regulation (3); or

(b) . . .

(3) A person claiming a right of access to any record held by a company must make a written request, as contemplated in section 26(4), by delivering to the company –

(a) a completed Request for Access to Information in Form CoR 24.”

[7] Section 26 of the Act confers a right of access to specified information on persons who hold beneficial interests in securities issued by a profit company.

[8] Flowing from the foregoing, the First Applicant avers that he has a statutory right, in his capacity as a shareholder of Pentagon to inspect and copy, without charge, the information contained in the records of Pentagon. Likewise, so avers the First Applicant, the Trust has a statutory right, in its capacity as shareholder of APS, to inspect the records of the company.

[9] The First Applicant states that he exercised his right of access to Pentagon's information by delivering a completed Request for Access to Information in Form CoR 24 to Pentagon's director, Mr. Kruger, by email on 17 July 2020, in accordance with the requirements of section 26(4) and regulation 24. The record reveals that the request in terms of section 26 of the Companies Act in respect of Pentagon was sent to Mr Kruger by the Trustees of the Trust on 14 July 2020. Subsequent thereto, the First Applicant on 17 July 2020 at 15:04:44 sent the demand for access to Pentagon's financial statements in terms of section 31 by email to Mr Kruger. In that email, the First Applicant apologised for having sent the request

through the Trustees of the Trust whereas he ought to have sent it as a shareholder. In respect of Pentagon, the First Applicant attached a letter he wrote to Mr Kruger (**LBT9**) which reads as follows:

“SUBJECT: DEMAND FOR ACCESS TO FINANCIAL STATEMENTS IN TERMS OF SECTION 31 OF THE COMPANIES ACT

1. The undersigned, P.W Basson, is a shareholder and accordingly holds a beneficial interest in the securities issued by Pentagon Financial Solutions (Pretoria) (Pty) (Ltd), as contemplated in section 31 of the Companies Act (“the Act”).
2. Section 31(1)(b) provides that “a person who holds or has a beneficial interest in any securities issued by a company, is entitled (b) on demand to receive without charge one copy of any annual financial statements of the company required by this Act”.
3. In the exercise of the Shareholders statutory right in terms of section 31(1)(b) of the Act, the Shareholder made a demand, on 30 June 2020, to you, in your capacity as managing director of Pentagon Financial Solutions (Pretoria) (Pty) Ltd for copies of the 2019 and 2020 financial statements of APS.
4. In terms of section 31(4) of the Act it is a criminal offence for Pentagon Financial Solutions (Pretoria) (Pty) Ltd
 - (a) to refuse access to any record that the Shareholder is entitled to inspect or copy;

(b) to impede, interfere with, or attempt to frustrate the reasonable exercise by the Shareholder of the rights set out in section 31 of the Act

To date the Shareholder has:

- (a) not had any response from you or from Pentagon Financial Solutions (Pretoria) (Pty) Ltd in respect of our demand; and
- (b) not received any copies of the annual financial statements that have been demanded.

6. In your capacity as managing director of Pentagon Financial Solutions (Pretoria) (Pty) Ltd your actions are those of the company itself, and its criminal failure or refusal to comply with the statutory demand of the Shareholder is attributable to you.

7. The Shareholder hereby give you notice that if copies of the 2019 and 2020 annual financial statements of Pentagon Financial Solutions (Pretoria) (Pty) Ltd are not made available to the Shareholder by 12h00 on Tuesday 21 July 2020 the Shareholder reserves all his rights to:

- (a) lay a criminal charge against you in terms of section 31(4) of the Act;
- (b) Institute proceedings against Pentagon Financial Solutions (Pretoria) (Pty) Ltd to compel compliance with its statutory duties in terms of section 31 of the Act and in that event, will seek punitive costs."

The annexure attached to the CoR 24 Form sets out the information required from Mr Kruger. According to the Applicant, Mr Kruger did not respond to the request.

[10] Insofar as the Trust' rights of access to APS information are concerned, the Applicants also rely on section 31 (1)(b) of the Act which provides that:

“(2) In addition to the rights set out in section 26, a person who holds a beneficial interest in any securities issued by a company, is entitled –

(a) . . .

(b) on demand to receive without charge one copy of any annual financial statements of the company required by this Act.”

[11] The Applicant avers that the Trust exercised its right as a shareholder in terms of section 31(1)(b) to request copies of the 2019 and 2020 financial statements of the APS by delivering a completed Request for Access information in Form CoR 24 on 10 July 2020. According to the Applicants, Mr Kruger failed and/or refused to respond to the request, conduct which necessitated the present application. Furthermore, so further contend the Applicants, section 26 and 31 of the Act, gives the applicants an unqualified right of access to the information they seek, and it is not necessary for them to explain the purpose for which it is sought as affirmed by the

Supreme Court of Appeal in *Nova Property Holdings Ltd and Others v Corbett and Another* 2016(4) SA 317 (SCA).

[12] The First Applicant further states that the Respondents' unjustified failure, and/or refusal to comply with the requests made in terms of section 26 and 31 of the Act, has made it necessary for him and the Trust to incur costs of bringing this application to enforce their statutory and constitutional rights of access to the specified records of the APS and the Pentagon. For this reason, so contend the Applicants, the Respondent's deliberate contravention of their statutory duties to provide access to the requested information justifies a punitive costs order as a mark of disapproval of the ongoing criminal conduct on the part of Mr. Kruger in his capacity as the managing director.

The answering affidavit

[13] The Respondents, in an affidavit deposed to by Mr Kruger, dispute the Applicant's entitlement to the information it demands from them on the basis that neither the First Applicant, nor the Trust has the requisite *locus standi* to bring this application. More specifically, the Respondents justify their refusal on the ground that the

Applicants' shares in the First and Second Respondents shares were sold in terms of a settlement and agreements concluded by the Applicants and the other shareholders of the respondent companies. According to the Respondents, pursuant to a settlement agreement reached by the parties after a series of disputes between them, the Respondents made an offer which was accepted by the Applicants. The terms of the agreement as set out in the Notice in terms of Rule 34 dated 29 May 2017, were the following:

"NOTICE IN TERMS OF RULE 34

Kindly take notice that the Respondents, entirely without prejudice and without admission of any nature (and in particular without admission that Applicant has been subject to oppressive conduct as envisaged in Section 163 of the Companies Act, 2008) and as an offer of settlement, hereby tender to settle the following issues in the litigation upon the following terms:

1. That the Respondents – pro rata to their current shareholding - undertake to pay to Applicant a fair market value:
 - 1.1 For his shareholding in First Respondent;
 - 1.2 For his shareholding in Second Respondent;
 - 1.3 For his shareholding in Petprops 62 (Pty) Ltd;
2. That the market value payable in terms of paragraphs 1 above.

2.1 shall be determined by an arbitrator to be agreed between the parties and – in the absence of such agreement – to be appointed by the Chairperson of the Cape Bar Council.

2.2 The arbitrator will receive evidence of all matters alleged by either party to be relevant for the determination of a fair market value.

3. This offer does not include an offer to pay any costs. Respondents tender that all questions of costs incurred in this application to date stand over for later determination by the arbitrator, contending that costs are more appropriately argued separately, at the end of the proceedings.”

[14] According to the respondent, the Applicant accepted the above offer unequivocally and in a letter written by his attorneys of record, DGF attorneys, on 30 May 2017 the following is stated:

“Dear Claire

**PIETER BASSON/ASSOCIATED PORTFOLIO SOLUTIONS (PTY) LTD
& ORS**

Arising from a discussion between our respective SC we confirm that:

1. Our client has accepted your clients’ offer as contained in its Rule 34 Notice dated 29 May 2017 relative to the matter being referred to arbitration.

2. That the parties have agreed that Adv John Butler SC be the arbitrator, failing his availability an alternative SC at the Cape Bar to be agreed upon.

...”

[15] The Respondents contend that the Second Applicant, through the First Applicant (who is a trustee of the Second Applicant) had full knowledge of the settlement agreement. According to the Respondents, all that remains is the performance of mutual obligations by the contracting parties, and the Applicant will receive the full purchase price once it has been determined and will then be obliged to transfer the shares to those acquiring same. For this reason, the Respondents dispute that the Applicants have a beneficial interest in the shares as defined in the Act, and accordingly no right to access documentation under section 26.

[16] The Respondents detail the events that led to the settlement and sale agreement and state that on 7 December 2016, the First Applicant launched proceedings in this Court in terms of section 163 of the Companies Act (the 163 proceedings) alleging oppressive conduct on the part of seven parties, including Pentagon, APS and Mr Kruger. According to the Respondents, in the section 163

proceedings, the First Applicant contended that he was personally the owner of shares in both Pentagon and the APS and that he had been oppressed within the purview of the section and excluded from participation in the company. In retort, the Respondents averred that the First Applicant was guilty of multiple malfeasances (including having absconded from the company) and sought:

16.1 his removal from as a director of the companies;

16.2 his dismissal from the First Respondent;

16.3 his debarment under section 14 of the FAIS Act.

[17] The Respondents further state that the First Applicant faced a disciplinary enquiry and was found guilty of egregious misconduct. Upon the recommendation of the independent chair of the disciplinary hearing, the First Applicant was removed as a director of three companies and debarred as a FAIS representative in terms of section 14 of the Financial Advisory and Intermediary Services Act 37 of 2002 ("FAIS"). The First Applicant brought review proceedings to overturn the debarment but was unsuccessful. However, the 163 proceedings were settled, and this culminated in the notice in terms of Rule 34 Notice I have already referred to.

[18] It is common cause that Arbitration proceedings commenced shortly after the settlement agreement was reached, but later fell through. The Respondents allege that in those proceedings, the First Applicant launched a process similar to the present one, in which he sought access to financial records of the Pentagon and the APS. He also sought that a forensic audit be performed on Pentagon and the APS for the 2014 to 2020 financial years. According to the Respondents the aforesaid demands were intended to derail the arbitration proceedings.

[19] The Respondents allege that it is remarkable that the First Applicant does not require the documentation he is seeking in order to complete the arbitration proceedings. In expatiation, they reveal that, prior to bringing this application, the First Applicant applied to the arbitrator for a comprehensive list of documents (far more comprehensive than those in the notice of motion herein) which would – he asserted enable him to advance his rights in the arbitration. The Respondents suggest that the arbitrator (who has advantages which this court does not have, being steeped – as he is in the arbitral process which has been in the pipeline for more than

three years) is fully able to make rulings as to which documents (if any) the Applicant is entitled to.

[20] Insofar as the Second Applicant is concerned, (in addition to the lack of *locus standi* due to the sale of the shares), the Respondents deny that the Trust is properly before court in the light of the fact that the third Trustee, Mr Grundling is reported to have resigned as a trustee. According to the Respondents, "*it is an open question*" whether the Trust can act validly where the remaining trustees after the resignation of Mr Grundling failed to cause new letters of authority to be issued to them by the Master. Furthermore, so contend the Respondents, the current letters of authority in the office of the Master still reflect Mr Grundling as a trustee. The Respondents specifically deny that the resolution of the trustees of the Trust passed on 21 September 2020, authorising the trustees to bring the present proceedings constitutes proper authority. This, according to the Respondents is particularly so because the remaining trustees failed to notify the Master of Mr Grundling's resignation. For this reason, they allege that the Second Applicant is not properly before court.

The replying affidavit

[21] In reply to the Respondents' averments to the effect that the Applicants are not entitled to the documents sought in terms of section 26 and 31, the First Applicant reiterates that the essential facts necessary for the granting of the relief sought are undisputed.

These are that:

21.1 The First Applicant is the registered shareholder of 37% of the shares of Pentagon;

21.2 The Second Applicant (the Trust) is the registered shareholder of 25% of shares of the APS.

In addition, so retort the Applicants, they have at all material times remained the owners of their shares, and as such, have retained their "*beneficial interest*" as defined in section 1 of the Act, which includes "*the right or entitlement of a person through ownership to exercise any or all of the rights attaching to the company's securities.*" Furthermore, no transfer of the securities has been entered in the company's certificated security register in respect of the Applicants' shares.

[22] The Applicants further point out that the Memorandum of Incorporation of both Pentagon and APS stipulate that the transferor remains the holder of securities until the transferee's name is entered into the securities register. Because no transfer of shares has taken place, the Applicants have not ceased to have rights associated with their shares.

[23] Regarding the Respondents' contention to the effect that the Trust is not properly before court because of the resignation of the third trustee, and the failure of the remaining trustees to cause the Master to issue new letters of authority, the Applicants state that it was Mr Grundling who had to notify the Master of his resignation. Furthermore, the two remaining trustees had the necessary power to pass the resolution assailed by the respondents by a unanimous vote in terms of clause 10.1 of the Trust Deed of the Trust which provides that:

“10.1 Besluite wat die trustees nee, geskied:

10.1.1 as daar meer as twee trustees is, by wyse van 'n gewone meerderheid van stemme;

10.1.2 as daar slegs twee trustee is, deur 'n eenstemmige besluit van albei van hulle.”

The Applicants emphasise that based on the foregoing, there is no basis for the Respondents' contention that the Trust is not properly before court.

[24] It is common cause that on 15 February 2021, the Applicants wrote a letter to the Respondents wherein they rescinded the Rule 34 agreement with immediate effect based on alleged fraudulent misrepresentation which had induced the First Applicant to enter into it. The letter sets out a detailed background of the dispute between the parties which led into arbitration proceedings, which, according to the Applicants are equally tainted. According to the letter, the effect of the rescission notice is the following:

24.1 The Rule 34 agreement is void and the Applicant need not invoke the assistance of the court to achieve that result because the act of rescission itself puts an end to the agreement.

24.2 The arbitration agreement cannot stand as it is embedded in a tainted Rule 34 agreement and is itself tainted with fraud.

24.3 Should the Respondents wish to challenge the rescission they must approach the court;

24.4 The arbitrator consequently has no further jurisdiction to deal with issues between the parties;

24.5 The parties need to return to the status quo ante, that being the section 163 application.

[25] According to the Applicants, in the light of the effect of the rescission letter, the Respondents' reliance on the agreement in cannot stand. Against this background, I turn to consider the issues for determination.

The Issues for determination

[26] It is common cause between the parties that:

26.1 the First Applicant is the registered shareholder and owner of 37% of the shares of the First Respondent, Pentagon;

26.2 the Second Applicant, the Trust, is the registered shareholder and owner of 25% of the shares of the Second Respondent, APS.

[27] The Respondents' main basis for refusing the Applicants access to the information they require is that the shares held by both Applicants in both Respondents were sold in terms of a settlement

agreement, concluded by the Applicants and the other shareholders of the companies. The Applicants on the other hand contend that they have, at all material times remained the registered shareholders and owners of their shares, as such, have retained their “beneficial interest” in the shares which entitles them to exercise the rights attaching to the shares. As can be discerned from the foregoing, the issues that must be determined are the following:

27.1 Do the Applicants have the *locus standi* to bring an application in terms of section 26 and 31 of the Companies’ Act? Stated differently, did the Applicants cease to have a beneficial interest in the shares of the First and Second Respondents when the shares were sold in terms of the settlement agreement?

27.2 What is the effect of the Applicants’ rescission letter of 15 February 2021 on the agreement for the sale of the shares?

27.3 Does the Trust have the requisite *locus standi* in the light of the resignation of the third trustee?

27.4 If it is found that the Applicants have the *requisite locus standi* is a punitive costs order against the Respondents justified?

Analysis

[28] It was contended on behalf of the Respondents that the notice of motion evidences that the Applicants seek documentation only in terms of section 26(1) of the Act, and therefore the reliance on the interpretation proffered in *Nova Property Group* is misplaced because the decision dealt only with the interpretation of section 26 (2) of the Act (i.e in that case the media entities seeking access held no shares at all and as such it has no bearing on access under section 26(1).

[29] I deem expedient to deal with this contention first

[30] Section 26 (1) provides that:

“26 Access to company records – A person who holds or has a beneficial interest in any securities issue issued by a profit company, or who is a member of a non-profit company, has a right to inspect and copy, without any charge for any such inspection or upon payment of no more than the prescribed maximum charge for any such copy, the information contained in the following records of the company –

- (a) the Company's' Memorandum of Incorporation and any amendments to it, and any rule made by the company, as mentioned in section 24(3)(a);
- (b) the records in respect of the company's directors, as mentioned in section 24 (3)(b);
- (c) the reports to annual meetings, and annual financial statements, as mentioned in 24(3)(c)(i) and (ii);
- [(cA) the annual financial statements as stipulated in in section 24(3) (c) (ii); clause 4(b) CAB]

- (d) The notices and minutes of annual meetings, and communications mentioned in section 24 (3)(d) to shareholder's meetings, and reference in section 24(3)(e) to communications sent to holders of a company's securities, must be regarded in the case of non-profit company as referring to a meeting of members, or communication to members, respectively; and
- (e) The securities register of a profit company, or the members register of a non-profit company that has members, as mentioned in section 24(4);
- (f) The register of the disclosure of beneficial interest of the company as mentioned in section 56(7) (a) clause 4(c) CAB."

Section 26 (2) provides that:

"(2) A person not contemplated in subsection (1) has a right to inspect or copy the securities register of a profit company, or the members register of

a non-profit company that has members, or the register of directors of a company, upon payment of an

[31] I consider the contention that the Applicants' reliance on the *Nova Group Holdings* judgment to the extent that the interpretation thereof relates only to section 26(2) to be without substance for the following reasons:

31.1 The object of section 26 is to regulate access to company records. The difference between section 26(1) and 26(2) relates to the identity of the person who is entitled to obtain the information. In the case of section 26(1) it is persons who have a beneficial interest and in section 26(2) it is any person not contemplated in 26(1). Section 26(2) confers a specific right in respect of one type of information only – securities registers and director's registers. The Court interpreted section 26 as :

31.1.1 giving effect to the constitutional right to access to information in section 32 of the Constitution; and

31.1.2 conferring strong rights of access in respect of specified types of information held by companies on persons who hold beneficial interests in securities.

The Court explains thus:

“[16] The role that companies play in our society, and their obligations of disclosure that arise from the right of access to information in s 32 of the Constitution, is central to the interpretation of section 26(2) of the Companies Act. Both this Court and the Constitutional Court have recognized that the manner in which companies operate and conduct their affairs is not a private matter.

[17] . . . Most recently, in *ArcelorMittal v Vaal Justice Alliance* 2015(1) SA 515 (SCA) ([2014] ZASCA 184) para 1, this court emphasized that ‘citizens in democracies around the world are growing alert to the dangers of a culture of secrecy and unresponsiveness, both in respect of government and in relation to corporations’, and that Parliament, driven by constitutional imperatives, had rightly seen fit to cater for this in its legislation. The Companies Act gives specific recognition to a culture of openness and transparency in section 7, which lists the core objectives of the Act. Section 7(b)(iii), in particular, provides that a purpose of the Act is to –

'[encourage] transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation.'

Section 26 of the Companies Act is enacted within precisely these objectives in mind. It recognizes that the establishment of a company is not purely a private matter and may impact the public in several ways. It therefore seeks to impose strong rights of access in respect of very specific but ultimately limited types of information held by companies. Section 26 must, therefore, be interpreted in accordance with this purpose. Section 26(1) confers a right of access to information in respect of various kinds of information to a person who holds a beneficial interest in any securities issued by a profit company, or who is a member of a non-profit company."

[32] It is clear from the foregoing pronouncement that the Applicants are fully entitled to rely on the *Nova Property Holdings* judgment.

[33] I now turn to consider the impact of the settlement agreement on the rights of the Applicants in the company's securities.

[34] Counsel for the Respondents contended that the settlement agreement was intended to put an end to the First Applicant's right to participate in the companies, and substitute in its stead, the

entitlement to compensation. In addition, the arbitrator in considering the fair market value took *“into account historical information as it was known at 31 May 2017, together which would reasonably have been of concern to a reasonable buyer and seller, mindful of the particular industry, looking into the future.”* According to this contention, the Applicants would get the benefit of foreseeable cash flows as at May 2017, and not the actual flows. Furthermore, the Applicants’ entitlement to fair market value as at May 2017, and such cash flows is a contractual right which had replaced their entitlement to dividends, and therefore they no longer have the entitlement to *“exercise or cause to be exercised, in the ordinary course, any or all of the rights attaching to the company’s securities.”* According to the Respondents, the right which attaches to the security is the right to participate in dividends, and the Applicants lost that right when they accepted the offer in the settlement agreement. Besides, so goes the contention, a shareholder is not, by virtue of the simple fact of having the securities registered in his/her name, the beneficial owner of those shares.

[35] The Applicants contend that Respondent’s refusal to provide the requisite information on the basis that the shares were sold to

other members of the company in terms of the settlement and sales agreement concluded by the Applicants and other shareholders has no merit as:

35.1 the Applicant's ownership and beneficial interest in the shares remain intact because no transfer of securities has been entered in the company's certificated security register;

35.2 The Applicant rescinded the settlement sale agreements on the basis that of fraud in a letter dated 15 February 2021, which rendered the agreements null and void from inception.

[36] Section 1 of the Act defines beneficial interest thus:

'beneficial interest' 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
- (c) Dispose or direct the disposition of the company's securities, or any part of a distribution in respect of the securities."

In terms section 1 of the Act "*Securities*" means any shares, debentures or other instruments, irrespective of their form or title issued or authorized to be issued by a profit company.

[37] Regarding the APS, in addition to their reliance on section 26(1) of the Act, the Applicants, as reflected in the annexure to the CoR24 Form, also requested the information in terms of clause 3.1 of the company's Memorandum of Incorporation which reads thus:

"3.1 Shareholder's right to information

A shareholder has the right to access information of the company as set out in section 26 of the Act."

Insofar as the Pentagon is concerned, the Applicants based their request for the 2019/2020 financial statements on section 31(b) of the Act. It provides as follows:

"31. Access to financial statements or related information. – In addition to the rights set out in section 26, a person who holds a beneficial interest in any securities issued by a company is entitled –

(a) . . .

(b) On demand to receive without charge one copy of any annual financial statements of the company required by this Act."

[38] In *Oakland Nominees (Pty) Ltd v Gelria Mining and Investments Co (Pty) Ltd* 1976 (1) SA 441 at 453, the then Appellate Division explained the issue of ownership of shares and beneficial shareholders as follows:

“The principal whose name does not appear on the register, is usually described as the ‘beneficial owner’. This is not juristically speaking wholly accurate; but it is a convenient and well-understood label. Ownership of shares does not depend upon registration. On the other hand, the company recognizes only its registered shareholders.”

This position was reaffirmed by the same court several years later in *Standard Bank of South Africa Limited v Ocean Commodities Inc* 1983(1) SA 276 (A) at 289 thus:

“In the same instance . . . the registered shareholders may hold the shares as nominee, i.e agent of another generally, described as the “owner” or “beneficial owner” of the shares. This fact does not appear on the company register . . . The term juristically speaking is not wholly accurate but it is a convenient well-used term to denote the person in whom, as between the himself and the registered shareholder, the benefits of the bundle of rights constituting the share vests.”

[39] The question whether the settlement and sale agreement put an end to the Applicants’ right to participate in the companies and

substituted in its stead the entitlement to compensation must be answered by having regard to section 37(9) of the Act. Section 37(9) of the Act provides as follows:

“(9) A person –

(a) may acquire the rights associated with any particular securities of the company –

(i) when that person’s name is entered into the company’s certificated securities register; or

(ii) as determined in accordance with the rules of the Central Securities Depository in the case of uncertificated securities; and

(b) ceases to have the rights associated with any particular securities of a company –

(i) When the transfer to another person, re-acquisition by the company, or surrender to the company has been entered in the company’s certificated security register; or

(ii) As determined, in accordance with the rules of Central Securities Depository, in the case uncertificated Securities.”

[40] Henochsberg on the Companies Act, 71 of 2008 Volume 1, page 212 comments on section 37(9) as follows:

“This would suggest that if a shareholder divests himself of the shares, eg by contract of purchase and sale, that the purchaser will only acquire the rights associated with the securities if the latter’s name is entered into the

register. Before that moment, the transferor holds all the rights associated with the securities, including dividend and voting rights. If the transferee acquires any of these rights, it must be agrees in terms of the particular contract, either expressly or impliedly. The extent of these rights could then make the transferee the holder of “a beneficial interest” as defined in s 1.”

[41] The Memorandum of Incorporation of the Respondent companies also stipulate that the transferor remains the holder of the securities until the transferee’s name is entered in the securities register. Paragraph 2.7(3) reads thus:

“(3) The instrument of transfer of any security shall be signed by both the transferor and transferee’s and the transferor shall be deemed to remain the holder of such security until the name of the transferee is entered in the securities register.”

[42] In the matter at hand, there is nothing in the settlement and sale agreements which suggests, even remotely, that the Applicants intended to transfer its ownership of the shares to the companies that intended to purchase them on acceptance of the offer. Knowing that the registered shareholders may hold the shares as nominee, for intended “owners”, it seems to me that if the parties had truly intended for the purchasing companies to gain ownership of the

shares and the rights associated therewith on acceptance of the offer by the Applicants, they would have made that clear in the agreements. Furthermore, the supposed acquisition of the Applicants shares in the First and Second Respondents was not entered in the company's certificated security register. The acquisition of the shares by the purchasing companies cannot be inferred from the settlement sale agreements because section 37(9) explicitly sets out the manner in which securities in a company may be acquired and how the rights to them cease. Whereas it is correct that the Act does not explicitly create a presumption that the registered owner by virtue of having securities registered in his/her name, he/she is the beneficial owner of those shares, it is equally clear that by virtue of ownership, a person may participate in the distribution of shares and may exercise or cause to be exercised, in the ordinary course, any or all of the rights attaching to the company's securities. It is plain that the sale of shares in terms of the settlement agreement, which the Respondents rely on for their defence, did not result in the Applicants ceasing to have beneficial interest, or no longer being entitled to exercise the rights associated with the shares in terms of sections 26 and 31 of the Act. On this basis, I find that the Applicants have the requisite

locus standi to demand the information in terms of section 26(1) of the Act in respect of the First Respondent. Whether or not the First Applicant gets the benefit of the foreseeable cash flow as at May 2017 cannot and disentitle him from exercising or causing to be exercised, in the ordinary course any or all of the rights attaching to the shares. In addition, the fact that the First Applicant ceased any involvement in the companies after May 2017, cannot, and does not have an impact on his rights as a shareholders. The First Applicant merely stopped being a director of the companies, and that is unrelated to his ownership of the shares. As I have already alluded to, section 37(9) is clear regarding when a shareholder ceases to be a shareholder. The upshot of this finding is that the Respondents ought to have complied Regulation 24(4) and section 26(5) by providing the Trust with the information it had requested within 14 business days of 14 July 2020. Similarly, Pentagon was required to provide the information requested by the First Applicant within 14 business days of 17 July 2020.

[43] Even if I may be wrong in making the foregoing finding, it is not in dispute that the Applicants, in a letter dated 15 February 2021 informed the Respondents that, based on fraud, they were resiling

from the settlement agreement and the arbitration. It was contended on behalf of the Applicants that the effect of the rescission is that the settlement and sales agreements became void from inception and there is no longer any basis for the Respondents' defence to the effect that the Applicants ceased to have a beneficial interest when shares were sold in terms of the settlement agreement. I agree. When the Applicants communicated to the Respondents their intention to resile from the Rule 34 agreements based on fraud, the effect is that they became void. Christie, *The Law of Contract in SA*-7th ed writes in para 7.3 thus:

"If the innocent party elects to rescind it may not be necessary to invoke the assistance of the court, as the act of rescission itself puts an end to the contract and if the maker of the misrepresentation does not challenge the rescission and no dispute arises that is the end of the matter.

In *Lebedine v Schechter and Haskell* [1931 WLD 247 at 252], Greenberg J explained the part played by the court:

'It seems to me that is is the defrauded party's repudiation which puts an end to the contract and the Court merely decided that this party was entitled to put it to an end. In practice, ths appears to be recognized, because it is quite common in our courts that where a party is suing on a cause of action which arises out his having

entered into a contract which is induced by fraud, he does not ask formally for rescission of a contract, but merely asks for such remedies as follow from rescission of a contract. And this is even clear in the case of a defence to a claim on a contract which is said to have been induced by fraud. It is very unusual for a defendant in such a case to ask that the contract should be set aside: he merely states that he has put an end to the contract, sets out his reasons, and claims that he is free from the consequences of the contract.”

[44] In the present matter, this is precisely what the Applicants did on 15 February 2021. It does not seem that the Respondents after being served with the rescission letter took any steps to vindicate their rights in terms of the agreements. In *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013(5) (SCA) at page 6, the Court said the following:

“[14] . . . The effect of fraud that induces a contract is, in general, that the contract is regarded as voidable: the aggrieved party may elect whether to abide by the contract and claim damages (if it can prove loss) or to resile – to regard the contract as void from inception, and demand restitution of any performance it may have made, tendering return of the fraudulent party’s performance.

[15] The bank chose to treat the settlement agreement as void from inception, and when it made that election the contract effectively ceased to exist. It did not have to be cancelled or rescinded: it was void.”

In the light of the foregoing, it follows that the Applicants’ beneficial interest in the shares is not affected by the settlement and sale agreements.

[45] It remains to be said that the Respondents allege in their papers that the Trust is *‘not properly before court’* as the remaining trustees, after the resignation of Mr Grundling, did not cause new letters of authority to be issued.

[46] Section 7 of the Trust Property Control Act 57 of 1988 (“the Trust Act”) regulates the appointment of trustees by the Master. It provides that:

“7 Appointment of trustee and co-trustee by the Master

(1) If the office of the trustee cannot be filled or becomes vacant, the Master shall, in the absence of any provision in the trust instrument, after consultation with so many interested parties as he may deem necessary, appoint any person as trustees.

- (2) When the Master considers it desirable, he may notwithstanding the provisions of the trust instrument, appoint as co-trustee of any serving trustee any person whom he deems fit.”

The word “*trustee*” is defined in section 1 of the Act to mean “*any person who acts as a trustee by virtue of an authorization under section 6.*” Section 6(1) of the Trust Act provides that “*any person who acts as trustee by virtue of an authorization under section 6.*”

The remaining trustees of the Trust were therefore duly authorised by the Master to act as trustees and the resignation of Mr Grundling did not nullify the authority of the remaining trustees. This is so because section 21 provides as follows:

“Resignation by trustee

Whether or not the trust instrument provides for the trustee’s resignation, the trustee may resign by notice in writing to the Master and the ascertained beneficiaries who have legal capacity, or the tutors or curators of the beneficiaries of the trust under tutorship or guardianship.”

[47] The foregoing provisions clearly do not require co-trustees (the First Applicant and his wife) to advise the Master of the resignation of Mr Grundling. It is the resigning trustee who has an obligation to give a resignation notice to the Master. It has not been suggested in these papers that in terms of the trust instrument, the

remaining trustees were obliged to advise the Master of the resignation of a co-trustee. There therefore is no merit in the contention that the resolution by the two remaining trustees has no force or effect. It is therefore my judgment that this contention is devoid of merit.

Costs of this application

[48] The Applicants seek punitive costs against the Respondents based on an alleged unbecoming manner in which they allegedly conducted the proceedings by their unmeritorious opposition of the matter when all they could have done is provide the requisite information, in line with the principles set out in the *Nova Property Holdings* judgment. In general, as set out in *Ward v Sulzer* 1973 (3) SA 701 (A), the basic relevant principles regarding costs may be summarised as follows:

1. In awarding costs the Court has a discretion, to be exercised judicially upon a consideration of all the facts: and, as between the parties, in essence it is a matter of fairness to both sides.
2. The same principles apply to costs on attorney and client scale. For example, vexatious unscrupulous, dilatory or

mendacious conduct (this list is not exhaustive) on an unsuccessful litigant may render it unfair for his harassed opponent to be out of pocket on the matter of his own and client costs.

[49] In *Public Protector v South African Reserve Bank* 2019 (6) 253 (CC) at para 8 Mogoeng CJ restated the principles relating to costs on attorney and client scale, and said the following:

“[c]osts on an attorney and client scale are to be awarded where there is fraudulent, dishonest, vexatious conduct that amounts to an abuse of the court process.”

The court further referred to *Plastic Converters Association of SA on behalf of Members v National Union of Metalworkers of South Africa and Others* [2016] 37 ILJ (LAC) para 46, wherein the Labour Appeal Court stated thus:

“The scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible manner. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium.”

[50] Counsel for the Applicants in attempting to persuade the court to award punitive costs, placed reliance on *Ward v Sulzer* 1973 (3) SA 701 (A) wherein the Appeal court confirmed an award of attorney and client costs because the appellant's conduct, as found by the court a quo had been reprehensible. The facts in *Ward v Sulzer* are distinguishable from the facts in *casu*. In the former, the appellant's conduct during the trial was found to have been dishonest, and that "*he had gone to great lengths to manufacture evidence, inventing evidence and in expounding untruths*". In the matter at hand, allegations of dishonesty on the part of the respondents are made in the notice of rescission but these have not been tested.

[51] The essence of the Applicants' request for punitive costs, as I have already explained, is that by opposing the application, the Respondents should be regarded as vexatious as they have put the Applicants to unnecessary trouble and expense which they ought not to bear. (See *Alluvial Creek* 1929 CPD 532 at 535). It is so that in *Limpopo Legal Solutions and Another v Eskom Holdings Soc Limited* [2017] ZACC 34 confirmed an order of punitive costs made against the applicant on the basis it misled the court and launched an urgent

application seeking relief for a problem that, to the knowledge of its officers and its legal counsel was there and then being fixed.

[52] In the present matter, the application brought by the Applicants is simply to compel the Respondents to provide it with the information it is legally obliged to provide in terms of section 26(1) of the Act. In the answering affidavit filed on 4 December 2020, the Respondents do not deny that the request was made in accordance with the relevant provisions, instead they advance several reasons as to why the Applicants are not entitled to this information, none of which as I have already found are meritorious. Of note is that the Respondents have made extensive reference to arbitration proceedings which are said to be pending between the parties which have no bearing in the present application. This is particularly so because the information required in the CoR 24 Forms and the accompanying documents is succinct, and is in line with what the Applicants are entitled to receive in terms of section 26(1) of the Act as well as the Memorandum of Incorporation. On 15 February 2021, the Applicants gave notice of its resiling from the rule 34 settlement agreement as well as all arbitration proceedings. The Respondents notwithstanding persisted with their reliance on the arbitration proceedings.

[53] The Applicants state that one of the reasons the Respondents should be ordered to pay punitive costs is that they have committed criminal offences in terms of section 26(9) of the Act by:

53.1 unreasonably refusing access to company records that the Applicants are entitled to in terms of section 26 and 31; and

53.2 impending and frustrating the reasonable exercise by the Applicants of the rights set out in sections 26 and 31.

[54] The Applicants further state that the Respondents were referred to the *Nova Property Group Holdings* judgment wherein the SCA stated (in paragraph 35) that the Applicants' rights in terms of section 26 were "*without qualification and not subject to a discretionary override*" and the "*Applicant were entitled, as of right, to an order compelling access*" and yet still failed to act in accordance with the law.

[55] Notwithstanding the Respondent's conduct described above, there is in doubt in my mind it meets the threshold of vexatiousness that warrants the awarding of punitive costs. This I say because the fact that the Respondents engaged in what the Applicant alleges to

be criminal conduct bears no relevance to the manner in which they conducted their defence. The criminal provision operates on its own and attracts its own sanction. Furthermore, the fact that the Respondents were advised earlier on of the impact of the *Nova Property Group Holdings* does not disentitle them from seeking an interpretation which is at odds with the one proffered by the Applicants. Regarding the conduct of the proceedings, it is so that the Respondents pursued the matter on unsustainable grounds but there is no basis for finding that the sole purpose was to annoy the Applicants. The Respondent's conduct is somewhat borderline in that the fervent pursuit of their defences, albeit unmeritorious, does not translate to certainty that that pursuit is obviously unsustainable. For this reason, I am not convinced that the way the Respondents conducted their defences should attract censure by way of a punitive costs order. The costs the Respondents must pay are ordinary costs, inclusive of the costs of two counsel.

The Respondents' application for punitive costs in the Applicant's Rule 6(5) application

[56] On 13 July 2021, the Applicants filed an application in terms of Rule 6(5) of the Uniform Rules of Court seeking the following relief:

“1. Granting the Applicants leave, in terms of Rule 6(5)(e), to file the supplementary affidavit which is annexed to the founding affidavit “LBT-S”.

2. Granting such further and alternative relief as this Honourable court may deem fit.

3. Ordering the Respondents to pay costs of this application only in the event that they oppose this application.”

In support of the motion, the First Applicant filed an affidavit constituting of 13 of pages. The application was served on the Respondent’s attorneys on 21 July 2021. On 4 August 2021, the Respondents filed its notice to oppose the application.

[57] On 5 August 2021, the Applicants abandoned the application to file the supplementary affidavit and tendered costs on a party and party scale. Shortly after the abandonment, the Respondents filed an application seeking relief couched in the following terms:

“1. The wasted costs of the application in terms of Rule 6(5)(e) under the notice of motion dated 13 July 2021 shall be borne by the Applicants (jointly and severally the one paying, the other to be absolved) upon the scale as between attorney and client.”

[58] In an affidavit deposed to by the Respondent’s attorney of record, Ms Claire Patricia Gaul (Ms Gaul), the Respondents state that

although the Applicant tendered the wasted costs, the tender is unacceptable to them as they are vexed and that they should be awarded attorney and client costs wasted by the applicants, including the costs of two counsel where two are engaged.

[59] The Applicants dispute the Respondent's entitlement to attorney and client costs. In an affidavit deposed to by the First Applicant, they explain that the need to file a further affidavit arose after they had resiled from the arbitration agreement and related processes as they wanted to put the facts and the reason for the rescission before court as the rescission had an impact on the defences raised by the respondents. According to the Applicants, the Respondents in their letter dated 20 July 2021 indicated that:

59.1 They would oppose the admission of the supplementary affidavit;

59.2 If leave to file a supplementary affidavit is granted, they would bring a counter-application and apply for the matter to be postponed;

59.3 a postponement would be an inevitability;

59.4 they would apply for an order directing that interested parties must be joined as respondents and counter-applicants;

59.5 their answer to the supplementary affidavit would require extensive evidence to be placed before court;

59.6 they would endeavour to have all the facts referred to in their letter reduced to affidavit by 11 August.

[60] The Applicants further state that the only reason for the withdrawal of the Rule 6(5)(e) application was to avoid the Respondents' threatened counter-application and postponement of the hearing.

[61] In reply, Ms Gaul points out that all the participants in the arbitration proceedings have a real and substantial interest in the averments made by the First Applicant in the supplementary affidavit, thus joinder of the parties would have been necessary. In addition, both prior to, and thereafter until the First Applicant withdrew the Rule 6(5) application, they had begun the extensive preparations to answer the supplementary affidavit.

[62] Rule 41(1)(a) provides that a person instituting any proceedings may, at any time before the matter has been set down,

and after that by consent of the parties or leave of the court, withdraw such proceedings. The general rule is that the notice of withdrawal is coupled with a tender to pay costs by the party withdrawing or abandoning the application/action. This is what the Applicant has done.

[63] The principles applicable to costs on attorney and client scale have already been outline above. I find nothing indubitably vexatious in the conduct of the Applicants in withdrawing the application to file a further affidavit and tendering costs. In my view the Respondents' application is ill-conceived in that their main complaint of having already commenced with the drafting of the opposing papers mainly relates to the costs expended. The Applicants costs tender must surely cover the aforesaid costs. In the result, the Respondents' application to be awarded costs on attorney and client scale for the Applicants' withdrawal of its application in terms of Rule 6 (5) is dismissed with costs.

Conclusion

[64] In conclusion, I have in this judgment held that the Applicants are fully entitled to invoke section 26 of the Act in seeking the

information relating to the Respondents as set out in the CoR 24 Forms. However, an order for costs on attorney and client scale is unjustified in the circumstances of this matter. Likewise, the Respondent's application for a punitive costs order in the Applicant's Rule 6(5) application, later withdrawn by the latter is equally without justification. In the result, the following order is issued:

64.1 The First Respondent is hereby directed to comply with its duty in terms of section 26(1) and (4), as set out in the First Applicants' Request for Access to Information in Form CoR 24, dated 17 July 2020, being Annexure LBT 7 to the founding affidavit.

64.2 The Second Respondent is hereby directed comply with its duty in terms of section 26(5) of the Companies Act 71 of 2008 by providing the Second Applicant an opportunity to inspect and copy the information requested in terms of sections 26(1) and (4), as set out in the Request for Access to Information in Form CoR 24 dated 14 July 2020, being Annexure LBT 6 to the founding affidavit.

64.3 The Respondents are ordered to pay the costs of this application jointly and severally, the one paying the other

to be absolved. The costs include the costs of two counsel where employed.

64.4 The Respondents' application that the Applicants pay costs on attorney and client scale for the withdrawal of their Rule 6(5) application is hereby dismissed with costs, jointly and severally, the one paying the other to be absolved.



NDITA; J