

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Numbers: 2018/45883; 2019/40463; 2020/16341

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED: YES / NO
DATE	SIGNATURE

2018/45883

In the matter between:

LULAMA SMUTS NGONYAMA

First Plaintiff

NOKWAZI NOKWAZELELA NGONYAMA N.O.

Second Plaintiff

KHANYA MALUNGELO NGONYAMA N.O.

Third Plaintiff

QHAWE HLOMELO NGONYAMA N.O.

Fourth Plaintiff

(2nd to 4th Plaintiffs cited as trustees of the Khululekile Family Trust)

and

THABO SINDISA KWINANA

First Defendant

THABO SINDISA KWINANA N.O.

Second Defendant

ZOLISILE MTETELELI MAPIPA N.O.

Third Defendant

(2nd and 3rd Defendants cited as trustees of the Eyabantu Development Trust)

In re: Joinder and Rescission application between:

EYABANTU CAPITAL CONSORTIUM (PTY) LTD

First Applicant/Intervenor

EYABANTU CAPITAL (PTY) LTD

Second Applicant/Intervenor

and

LULAMA SMUTS NGONYAMA

First Respondent

NOKWAZI NOKWAZELELA NGONYAMA N.O.

Second Respondent

KHANYA MALUNGELO NGONYAMA N.O.

Third Respondent

QHAWWE HLOMELO NGONYAMA N.O.

Fourth Respondent

THABO SINDISA KWINANA

Fifth Respondent

THABO SINDISA KWINANA N.O.

Sixth Respondent

ZOLILE MTETELELI MAPIPA N.O.

Seventh Respondent

(2nd to 4th Respondents cited as trustees of the Khululekile Family Trust and 6th and 7th Respondents cited as trustees of the Eyabantu Development Trust)

In re: Rescission application between:

DALIKHAYA RAIN ZIHLANGU N.O.

First Applicant

UNATHI MDODA N.O.

Second Applicant

and

LULAMA SMUTS NGONYAMA

First Respondent

NOKWAZI KWAZELELA NGONYAMA N.O.

Second Respondent

KHANYA MALUNGELO NGONYAMA N.O.

Third Respondent

QHAWWE HLOMELO NGONYAMA N.O.

Fourth Respondent

THABO SINDISA KWINANA

Fifth Respondent

ZOLISILE MTETELELI MAPIPA

Sixth Respondent

EYABANTU CAPITAL CONSORTIUM (PTY) LTD

Seventh Respondent

EYABANTU CAPITAL (PTY) LTD

Eighth Respondent

(1st and 2nd Applicants cited as trustees of the Eyabantu Development Trust and 2nd to 4th Respondents cited as trustees of the of Khululekile Family Trust)

In re: Execution application between:

LULAMA SMUTS NGONYAMA	First Applicant
NOKWAZI NOKWAZELELA NGONYAMA N.O.	Second Applicant
KHANYA MALUNGELO NGONYAMA N.O.	Third Applicant
QHAWE HLOMELO NGONYAMA N.O.	Fourth Applicant

and

DALIKHAYA RAIN ZIHLANGU N.O.	First Respondent
UNATHI MDODA N.O. (2 nd to 4 th Applicants cited as trustees of the Khululekile Family Trust and 1 st 2 nd Respondents cited as trustees of the Eyabantu Development Trust)	Second Respondent

2019/40463

In the section 161 application between:

NOKWAZI NOKWAZELELA NGONYAMA N.O.	First Applicant
KHANYA MALUNGELO NGONYAMA N.O.	Second Applicant
QHAWE HLOMELO NGONYAMA N.O.	Third Applicant

and

EYABANTU CAPITAL CONSORTIUM (PTY) LTD	First Respondent
DALIKHAYA RAIN ZIHLANGU N.O.	Second Respondent
UNATHI MDODA N.O.	Third Respondent
EYABANTU DEVELOPMENT TRUST	Fourth Applicant
MASTER OF THE HIGH COURT, PRETORIA	Fifth Applicant
COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Sixth Applicant
THABO SINDISA KWINANA	Seventh Applicant

In the section 26 application between:

NOKWAZI NOKWAZELELA NGONYAMA N.O.

First Applicant

KHANYA MALUNGELO NGONYAMA N.O.

Second Applicant

QHAWWE HLOMELO NGONYAMA N.O.

Third Applicant

and

EYABANTU CAPITAL CONSORTIUM (PTY) LTD

Respondent

JUDGMENT

WINDELL, J

Explanatory Note

[1] On 15 and 17 April 2019, Dosio AJ granted a default judgment in favour of Mr Lulama Smuts Ngonyama and the trustees of the Khululekile Family Trust (collectively referred to as ‘the Ngonyama parties’), hereinafter referred to as the ‘Dosio orders’. The orders were issued against Mr Thabo Sindisa Kwinana (Mr Kwinana) and the trustees of the Eyabantu Development Trust (the Development Trust). Six years and numerous applications, orders, and judgments later, the Dosio orders remain unexecuted.

[2] Presently, five separate but interconnected applications serve before this court, all rooted in the ongoing dispute over the ownership and control of shares in the company, Eyabantu Capital Consortium (Pty) Ltd (Consortium). These include: (i) an application for intervention and joinder brought by Consortium and another shareholder in Consortium, Eyabantu Capital (Pty) Ltd (Capital) (collectively referred to as ‘the intervening parties’), together with their application for the rescission of the Dosio orders; (ii) a separate rescission application of the Dosio orders brought by the Development Trust; (iii) an

application by the Ngonyama parties for leave to execute the Dosio orders; (iv) an application under section 161 of the Companies Act¹ by the Ngonyama parties, against Consortium and others, seeking declaratory and consequential relief recognising the Khululekile Family Trust as a shareholder in Consortium and directing the issuance of a share certificate in its name; and (v) an application under section 26 of the Companies Act, also by the Ngonyama parties, to compel Consortium to disclose certain company records.

- [3] Each application will be dealt with under a separate heading. The determination of several of these matters, particularly those advanced by the Ngonyama parties, depends to a large measure on the outcome of the joinder application. Conversely, if the joinder and rescission applications succeed, the foundation upon which the Ngonyama parties' claims and the relief granted pursuant thereto would fall away, and the action will be re-opened for determination on the merits with the participation of all affected parties.
- [4] For clarity and to avoid confusion, the parties to the original proceedings will be referred to as set out above: Mr Kwinana, the Ngonyama parties (or the plaintiffs), and the Development Trust (or the defendants). Additional parties, who were not part of the initial proceedings, will be introduced in the course of this judgment and referred to in accordance with their respective roles in the applications presently before the court.

Introduction and Background Facts

- [5] In setting out the background facts and the litigation history that follows later, I have drawn extensively from the heads of argument prepared by counsel for the respective parties, Mr Stockwell SC, Mr Morrisson SC and Mr Makola SC, for which I express my appreciation.
- [6] The origins of the dispute over the shareholding in Consortium can be traced back to 2004, when a broad-based black economic empowerment (BBBEE) initiative was conceptualised and negotiated between certain individuals in

¹ 71 of 2008.

collaboration with major mining houses. The objective was to promote the participation of historically disadvantaged individuals in the mining industry. The transaction, which became known as Project Pangolin, was made possible through the cooperation of Anglo South Africa Capital, BHP Billiton South Africa (now known as BHP Group) and the Industrial Development Corporation.

- [7] The transaction concerned valuable iron ore and other mineral assets. These assets were transferred and registered in the name of a company known as Kumba Iron Ore (Kumba). Coal and other heavy mineral assets were in turn transferred and registered in the name of a company known as Kumba Resources (Exxaro). In terms of the transaction structure, a ring-fenced entity referred to as 'BEE Holdco' was established to serve as a special purpose vehicle. BEE Holdco would acquire and hold designated shares in both Kumba and Exxaro.
- [8] To operationalise Project Pangolin, a shelf company, Main Street 333 (Pty) Ltd (Main Street), was used to serve as BEE Holdco. Pursuant to the transaction agreements, Main Street acquired and continues to hold a 50% shareholding in Exxaro and a 20% shareholding in Kumba.
- [9] Consortium was one of several entities that successfully applied for and acquired shares in Main Street. It was allocated a 9.7% shareholding in Main Street, which interest was acquired at a cost of R250 million. The amount was financed by way of a loan agreement, which Consortium had negotiated with Nedbank. As security for the repayment of the amount of R250 million to Nedbank, all the shares, which the first shareholders held in Consortium were ceded, in *securitatem debiti*, to Nedbank. The loan has since been fully repaid. The acquisition of shares by Consortium in Main Street was, however, regulated. Prospective shareholders were required to participate in a vetting process to demonstrate compliance with BBBEE requirements and to show that any dividends received from the shares would be applied towards education and training initiatives.

- [10] Individuals or entities seeking to become shareholders in Consortium also had to satisfy strict eligibility criteria, including BBBEE status, investment capacity, relevant experience and alignment with the project's initiatives.
- [11] Among the successful applicants were two entities: Capital and the Development Trust. Both met the eligibility criteria and were allocated shareholdings in Consortium. The Development Trust was allotted a 13% shareholding, while Capital received 46.56%. The full list of shareholders, along with their respective interests and the restrictions on their shares, appears in the shareholders' agreement.
- [12] To safeguard the long-term objectives of Project Pangolin, clause 17.1 of the shareholders' agreement, signed by all shareholders, prohibited the sale or encumbrance of any shares acquired during the first five years following the project's implementation to any entity or individual. This restriction applied equally to all parties to the agreement. In addition to the five-year moratorium, certain shareholders were further restricted under clause 21.3 of the shareholders' agreement from disposing of their shares for a period of ten years. The Development Trust was one of the shareholders subject to this extended restriction.
- [13] The shareholders' agreement was a foundational component of the broader contractual framework underpinning Project Pangolin. It incorporated and made reference to the overarching transaction framework and Project Pangolin itself. Notably, the original shareholders' agreement was replaced in November 2019, following a restructuring process that occurred after the tenth anniversary of the project. This restructuring gave rise to a so-called Replacement BEE Transaction. Consortium, as an existing shareholder in Main Street, was required to elect whether to reinvest or disinvest. It chose to reinvest. Shareholders within Consortium were similarly given an opportunity to make this election. Some chose to disinvest, thereby necessitating the conclusion of a new shareholders' agreement.

- [14] At its core, this litigation is about a significant financial stake. Main Street, the BEE Holdco created under Project Pangolin, holds major shareholdings in Exxaro and Kumba, two of South Africa's leading and most valuable mining companies. Consortium's 9.7% interest in Main Street gives it an indirect but substantial claim to these nationally important assets. Control over the shares in Consortium determines not only how dividends are distributed, but also who gets a say in the governance of that stake. The dispute over who really owns the shares in Consortium is therefore not just about advancing the goals of BBBEE, but also about influence, accountability, and real financial power.

Summary of the Litigation History

The action

- [15] In December 2018, the Ngonyama parties instituted action against Mr Kwinana and the trustees of the Development Trust, then comprising Mr Kwinana and Mr Mapipa. These trustees were replaced in 2021 by Mr Dalikhaya Rain Zihlangu and Ms Unathi Mdoda (the current trustees). In that action, the Khululekile Family Trust asserted a claim to 50% of the 13% shareholding held by the Development Trust in Consortium.
- [16] In their particulars of claim, the Ngonyama parties alleged that during the period 2005 to 2006, Mr Kwinana, acting on an oral mandate from Mr Ngonyama and in his capacity as Mr Ngonyama's agent and attorney, procured a 6.5% shareholding in Consortium for the benefit of Mr Ngonyama or his nominee, the Khululekile Family Trust. At the time, Mr Kwinana was both the legal representative of the Ngonyama parties and served as 'advisor' and company secretary for both Consortium and Capital. He was also a trustee of the Development Trust. According to the Ngonyama parties, this 6.5% interest was to be held by a nominee shareholder, namely, the Development Trust.
- [17] The Khululekile Family Trust was not registered in 2005. It was only formally created and registered by the Master of the High Court in 2007, approximately two years after the alleged oral agreement was concluded with the assistance of Mr Kwinana. Consortium, Capital and the Development Trust (collectively referred to as 'the Eyabantu parties') dispute the validity of the Ngonyama

parties' claim on this basis. They argue that, when read together with the trust deed of the Khululekile Family Trust, the particulars of claim confirm that the Trust did not exist at the time the agreement was allegedly concluded. It follows, they contend, that no agreement could have come into existence for the benefit of an entity that did not yet exist.

- [18] This issue may be disposed of at the outset, as it should not obscure the real disputes between the parties. The Eyabantu parties' argument, that a trust cannot exist prior to formal registration is legally flawed. In terms of section 2 of the Trust Property Control Act,² a trust may validly be created by oral agreement, and registration is not a pre-requisite for its legal existence. A trust is not a juristic person; it is established by agreement, in terms of which one or more trustees undertake to administer property for the benefit of identified beneficiaries. Its legal existence arises from the intention to create the trust and the conclusion of the trust agreement — not from its registration. This was affirmed by this court in *Groeschke*,³ which clarified that while a trust instrument must ultimately be in writing, the trust itself may originate from an oral agreement, and such agreement is only required to be reduced to writing for purposes of the Act:

'A trust instrument must therefore be in writing. However, that does not mean that a trust cannot be created by oral agreement. But that oral agreement only becomes a 'trust instrument' when it is reduced to writing: in terms of s 2 of the Act, "[i]f a document represents the reduction to writing of an oral agreement by which a trust was created or varied, such document shall for the purposes of this Act be deemed to be a trust instrument".⁴

- [19] That being so, the point raised by the Eyabantu parties loses all cogency, as it incorrectly equates the date of a trust's registration with the date of its legal creation, an assumption that is not supported in law. There is no legal impediment to the validity of the agreement pleaded by the Khululekile Family Trust. The trust could have been validly created by oral agreement prior to its formal registration, without rendering either the agreement or the trust itself

² 57 of 1988.

³ *Groeschke v Trustee for the Time Being of the Groeschke Family Trust* 2013 (3) SA 254 (GSJ).

⁴ *Ibid* at para 15.

invalid or legally impossible. The timing of its registration does not, in law, determine the moment of its creation.

- [20] Returning to the events pleaded, it appears that, pursuant to the oral agreement alleged by the Ngonyama parties, the relevant shares were acquired by the Development Trust, represented by Mr Kwinana. It is thus further alleged in the particulars of claim that in November 2006, Mr Kwinana, acting on behalf of the Development Trust, entered into an oral agreement with Mr Ngonyama, who was said to be acting on behalf of the Khululekile Family Trust. In terms of this alleged agreement, 50% of the income accruing to the Development Trust, arising from its shareholding in Consortium, was to be transferred to the Khululekile Family Trust. The Ngonyama parties allege that, during the period from November 2006 to February 2018, Mr Kwinana and the Development Trust only 'partially accounted' for such income and failed to render a full and truthful account. It is further alleged that they owed the Ngonyama parties a legal duty to provide a complete and honest account of all income derived from the Consortium shareholding.
- [21] The defendants failed to file a plea in the action. As a result, on 15 and 17 April 2019 Dosio AJ granted default judgment in favour of the Ngonyama parties. The Dosio orders directed that (i) the defendants, in their capacities as the trustees of the Development Trust, transfer 6,5% of the Development Trust's shareholding in Consortium, to the plaintiffs or their nominee; and (ii) that Mr Kwinana render an account to the plaintiffs for the purposes of debatement in respect of the 6.5% shareholding in Consortium.
- [22] Subsequent to the granting of the Dosio orders, the defendants launched an application to have those orders rescinded. On 19 June 2020, that rescission application was dismissed with costs by Grenfell AJ. Thereafter, on 6 July 2020, the defendants applied for leave to appeal against Grenfell AJ's judgment. During the hearing of the application for leave to appeal, Mr Stockwell SC, appearing on behalf of Consortium and Capital, submitted that the application for leave to appeal should be deferred pending the determination of two outstanding matters: a joinder application in the main action and an application

brought by the Ngonyama parties under section 161 of the Companies Act. Grenfell AJ, however, declined to enrol the joinder application and instead granted the defendants leave to appeal her order dismissing the rescission application to the Supreme Court of Appeal (SCA).

[23] Consortium and Capital subsequently launched a formal application in the High Court on 5 November 2020, seeking leave to intervene in the action as interested parties and to be joined as the fourth and fifth defendants, respectively. In addition to the relief relating to joinder, they also sought an order rescinding and setting aside the Dosio orders.

[24] Parallel with their joinder application pending before the High Court, Consortium and Capital also applied for leave to intervene in the appeal proceedings before the SCA against the order of Grenfell AJ. On 8 April 2022, the SCA dismissed both the intervention application and the appeal against the dismissal of the rescission application. Delivering the judgment of the court, Matojane AJA held as follows:

'[8] Therefore, the intervening parties had to show a legal interest in the subject matter of the appeal that could be prejudiced by the order on appeal. The subject matter of the appeal was whether the Kwinana parties had made a case for the rescission of the Dosio AJ orders in the court a quo. The intervening parties had no legal interest therein. They only had an indirect interest, in the sense that for the appeal of the Kwinana parties to succeed would suit their interests.

[9] What the intervening parties sought to do, was to obtain a rescission of the Dosio AJ orders at their own instance and on their own grounds, without ever having applied for that relief. That constituted an impermissible attempt to have this Court determine a matter as court of first instance. The remedy of the intervening parties was to institute proceedings for the rescission of these orders, in which the reasons for their delay and the grounds for the rescission would be ventilated and the Ngonyama parties would be afforded a proper opportunity to respond thereto. For these reasons, we dismissed the application for intervention with costs, including the costs of two counsel.'

The joinder and rescission application before Fisher J

[25] At the time judgment was delivered by the SCA on 8 April 2022, the rescission and joinder applications brought by the intervening parties, Consortium and

Capital, were already pending before the High Court. The joinder application had been partially argued before Fisher J in August 2021, who had reserved judgment pending the outcome of the appeal before the SCA. Following the SCA's dismissal of the appeal and the intervention application, the proceedings before Fisher J resumed.

- [26] On 26 April 2022, the Ngonyama parties filed a supplementary affidavit deposed to by their attorney, Mr Njokweni, in which they sought to expand the grounds of opposition to the joinder application. Thereafter, on 14 October 2022, the intervening parties filed a further affidavit addressing, inter alia, the SCA's ruling and introducing additional documents, including the transaction framework agreement and the Memorandum of Incorporation of Consortium (the MOI). The latter had been adopted in 2013, pursuant to the enactment of the Companies Act of 2008. These documents were tendered as further context to the background and structure of Project Pangolin.
- [27] The matter again served before Fisher J on 8 December 2022. On that date, the court granted an order in favour of Consortium and Capital, joining them as parties to the action and rescinding the Dosio orders.
- [28] Following the judgment of Fisher J, the Ngonyama parties served an application for leave to appeal on 23 December 2022. It later emerged that the MOI relied on by the intervening parties, and by Fisher J in granting the joinder and rescission orders had only been adopted in 2013. That MOI stated that shares in Consortium could not be held on behalf of another person, effectively prohibiting nominee shareholding. But the alleged oral agreement between Mr Ngonyama and Mr Kwinana took place long before that and was not subject to the 2013 MOI. In light of this development, the Ngonyama parties launched a separate rescission application, contending that a fraud had been perpetrated on the court. This allegation of fraud formed the principal basis for the rescission relief sought. After the exchange of affidavits, both the rescission application and the application for leave to appeal were again enrolled before Fisher J.

- [29] During the hearing of the rescission and leave to appeal applications, it became apparent that Fisher J had granted her earlier order under a misapprehension regarding the date on which the MOI had come into effect. As noted, the document was only adopted in 2013, which post-dated the alleged oral agreement central to the dispute. In light of this, and for reasons more fully set out in a letter submitted by the attorney representing the intervening parties, those parties consented to the rescission of the order previously granted. Consequently, on 6 June 2023, the order of Fisher J was rescinded by agreement between the parties.
- [30] On 20 June 2023, the Ngonyama parties brought an urgent application. Consortium, Capital, the Development Trust (the Eyabantu parties) and Mr Kwinana were all cited as respondents to this urgent application. They sought an order that Consortium be interdicted from paying further dividends or distributions to the Development Trust, pending the trust accounting to the Khululekile Family Trust and the debatement of that account. Payment of dividends to the Khululekile Family Trust and the signing of share transfer forms, relating to the disputed shares, was also sought. The urgent application served before Movshovich AJ on 4 August 2023. She granted an order in terms of which Consortium was interdicted from paying any further dividends or distributions to the Development Trust pending the final determination of the joinder application or the finalisation of the debatement of an account, whichever occurs last.
- [31] The joinder and rescission applications accordingly remain unresolved. These constitute the first application still pending and are now before this court for determination.

The section 161 application (case number 40463/10)

- [32] While the application to rescind the Dosio orders was still pending, the plaintiffs instituted an application in terms of section 161 of the Companies Act against Consortium and the defendants. Other parties, who were cited as respondents to the section 161 application, included the Master of the High Court and the Companies and Intellectual Property Commission.

- [33] In this application, the plaintiffs sought an order directing Consortium to amend its securities register to reflect the Khululekile Family Trust as a holder of a 6.5% shareholding in Consortium, and to issue a corresponding share certificate in the name of the trust. On 19 May 2020, the plaintiffs obtained a default judgment in the section 161 application before Dippenaar J (the Dippenaar order). On 30 July 2020, the intervening parties brought an application to rescind that judgment.
- [34] Following this, the plaintiffs launched an application to hold Consortium in contempt of court for failing to comply with the Dosio orders and the Dippenaar order. On 19 August 2020, Bhoola AJ granted a contempt order and issued a rule *nisi*, calling upon Consortium to show cause on the return date why the rule should not be made final. On the return date, Consortium opposed the relief and brought a counter-application seeking the suspension of both the Dosio orders and the Dippenaar order, pending the outcome of the rescission and joinder applications. The contempt application, together with the counter-application, subsequently served before Acting Judge Coetzee.
- [35] Coetzee AJ granted an order suspending the operation of the Dosio J and Dippenaar J orders, pending the determination of the joinder application. He further directed that the contempt application may not be re-enrolled for hearing until the joinder application had been finalised. Although the Coetzee order was interlocutory in nature, the Khululekile Family Trust filed a notice seeking leave to appeal. On 30 September 2022, Coetzee AJ granted leave to appeal. The trust delivered its notice of appeal on 28 October 2022 and filed the record on 20 December 2022. However, no further steps have been taken by the trust to prosecute the appeal.
- [36] The Dippenaar order was in the interim rescinded by Bam AJ on 9 February 2021. The section 161 application therefore remains unresolved and accordingly constitutes the second application presently before this court.

The section 26 application

- [37] In addition to the section 161 application, the Khululekile Family Trust launched a further application against Consortium in which it seeks an order permitting

inspection of various company records. Relying on section 26 of the Companies Act, the trust seeks access to Consortium's securities register, Memorandum of Incorporation, annual financial statements, and reports presented at annual meetings. It also seeks access to additional documents, including the company's accounting records, bank statements and related materials.

[38] This application previously served before Manoim AJ, who granted an order on 7 December 2020. In terms of that order, Consortium was directed to make its members' register available for inspection and copying by the Ngonyama parties' attorney. The remainder of the relief sought under section 26(1) in particular, the claim to inspect documents allegedly relevant to the trust's beneficial ownership of shares was postponed pending the final outcome of the joinder application.

[39] This application constitutes the third matter which, by agreement between the parties, is to be consolidated and heard together with the joinder application. I shall return to and address the section 26 application in due course.

The second rescission application and the execution application

[40] The Development Trust has instituted a second rescission application, this time brought in the name of the current trustees, Mr Zihlangu and Ms Mdoda, in which it seeks to set aside the Dosio orders. In parallel, the Ngonyama parties have launched an execution application, seeking an order authorising the enforcement of the Dosio orders.

[41] These two proceedings, the second rescission application and the execution application, constitute the fourth and fifth applications presently before this court. They will also be addressed in due course later in this judgment.

The present state of play

[42] It should by now be apparent that all the applications before the court are interrelated and, in large part, rest upon the validity of the Dosio orders. As previously noted, the parties agreed that the applications should be consolidated and heard together.

- [43] If the applicants were to succeed in both the joinder application and the second rescission application, it would follow that the section 161 and section 26 applications stand to be postponed, pending the finalisation of the reopened action. However, if the joinder application and the rescission applications fail, it will be necessary to consider the remaining applications on their own merits, beginning with the section 161 application.

The Joinder Application

- [44] Before turning to the merits of the joinder application, it is necessary to address two issues raised by the Ngonyama parties: namely, whether the doctrine of *res judicata* bars the present application and whether the intervening parties are prevented from prosecuting their applications as a result of the fraud perpetrated on Fisher J, and thus the court.

Res judicata

- [45] The contention is that the joinder application has already been adjudicated by Grenfell AJ and the SCA, and that the matter is now final. I do not agree.
- [46] First, the judgment of Grenfell AJ did not finally dispose of the joinder application. On the contrary, Grenfell AJ expressly declined to engage with the joinder application, holding instead that the issue should be addressed by the court hearing the joinder application. This is confirmed by her order, which reserved the costs of the intervention application for the court hearing the joinder application. That reservation plainly indicates that the joinder issue was not decided and that any remarks made by her concerning joinder were *obiter*.
- [47] Second, the SCA did not finally determine the issue of joinder. The Ngonyama parties rely on paragraph 8 of the judgment delivered by Matojane AJA in support of their argument. However, when paragraph 8 is read in conjunction with paragraph 9, it becomes clear that at best for the Ngonyama parties, the SCA's remarks are equivocal.
- [48] In dismissing the intervening parties' application to intervene, the SCA expressly observed that their appropriate remedy was to institute rescission

proceedings in the High Court — the court of first instance — where the reasons for their delay and the merits of their case could be properly ventilated, and the plaintiffs afforded a fair opportunity to respond. Crucially, the SCA did not find that they lacked a legal interest in the action itself, but only that they had no legal interest in the specific subject matter of the appeal, namely, whether the Kwinana parties had made out a case for rescission before the court *a quo*. This distinction is material and refutes any suggestion that the SCA conclusively determined the intervening parties' entitlement to be joined in the underlying action.

[49] Third, the present joinder application is the very proceeding contemplated and envisaged by the SCA. At the time when the Development Trust and Mr Kwinana argued their appeal before that court, this application was already pending. Indeed, the matter had previously served before Fisher J, who elected to reserve judgment in the joinder application pending the outcome of the Development Trust's appeal before the SCA.

[50] *Res judicata* requires a final judgment on the merits between the same parties, concerning the same cause of action and the same relief. That threshold has not been met here. The joinder application has not been heard or determined, either on the merits or otherwise, and no final order has been made on that issue.

[51] In the circumstances, the objection based on *res judicata* cannot be sustained and falls to be dismissed. The application must therefore be considered on its merits.

Fraud

[52] The Ngonyama parties argue that the intervening parties should be barred from prosecuting their joinder and rescission application on the basis that they perpetrated a fraud on the court. This contention arises from the reliance placed by them on the provisions of the Consortium's MOI adopted in 2013, which prohibits nominee shareholding. The Ngonyama parties contend that the intervening parties knowingly misrepresented the date of adoption of the MOI and falsely presented it as operative at the time of the alleged oral agreement

in 2006 between Mr Ngonyama and Mr Kwinana. They argue that this misrepresentation misled Fisher J into granting the initial joinder and rescission orders, and that the intervening parties should now be denied a hearing for approaching the court with unclean hands.

[53] The intervening parties dispute that their conduct amounted to fraud. They contend that there was no deliberate misrepresentation, and that their reliance on the MOI was based on the company records then available to them. They submit that any inaccuracy regarding the timing of the MOI's adoption could and should have been corrected in argument, and that there was no intention to deceive the court. Importantly, they note that it was Fisher J herself, having considered the full record, who later rescinded the very orders she had granted on the basis of the MOI. The same court has therefore corrected the position and set aside the impugned orders. It cannot be said, in those circumstances, that the intervening parties are precluded from now pursuing their application afresh, properly supported by full and corrected information.

[54] In my view, while the belated clarification of the MOI's adoption date raises legitimate concerns about the conduct of the intervening parties, it does not rise to the level of fraud sufficient to justify an absolute bar on the intervening parties' right to be heard. Allegations of fraud must be clearly established and are not to be lightly inferred. The record does not show that the intervening parties acted with intent to deceive or that the integrity of the judicial process was irreparably compromised. That the same court has already set aside the impugned orders further undercuts the claim that any ongoing prejudice justifies a procedural bar. The applications for joinder and rescission must therefore be adjudicated on their merits, and the objection based on alleged fraud is dismissed.

The merits

[55] The principal question is whether the intervening parties are entitled to be joined as defendants in the main action. This turns on whether they have demonstrated a direct and substantial legal interest in the relief sought,⁵

⁵ *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) ('*Amalgamated*').

specifically, whether their rights would be prejudicially affected by the judgment in their absence. In *Gordon*,⁶ the test was set out as follows:

‘[T]he issue in our matter, as it is in any non-joinder dispute, is whether the party sought to be joined has a direct and substantial interest in the matter. The test is whether a party that is alleged to be a necessary party has a legal interest in the subject-matter, which may be affected prejudicially by the judgment of the court in the proceedings concerned.’

- [56] Once a party has established that it has a direct and substantial interest in litigation, no further justification is required, and they must be joined.⁷ This is not a matter of discretion or procedural convenience, it is a fundamental rule of practice.⁸ A court will generally not entertain the matter until all necessary parties have been joined.⁹ Similarly, where a court order cannot be sustained or implemented without prejudicing the rights of a third party, that party must be joined as an interested party.¹⁰
- [57] The key question is what amounts to a ‘direct and substantial interest’. Our courts have consistently held that it refers to a legal interest in the right forming the subject matter of the litigation. A mere financial or commercial interest, by contrast, is regarded as indirect and does not warrant joinder.¹¹
- [58] The intervening parties contend that they are parties to a shareholders’ agreement under which Capital has a pre-emptive right in and to the shares held by the Development Trust. They submit that this is a legal right, not a financial interest, and that it gives rise to a direct and substantial interest in any

⁶ *Gordon v Department of Health, KwaZulu-Natal* [2008] ZASCA 99; 2008 (6) SA 522 (SCA) at para 9 (‘*Gordon*’).

⁷ *Khumalo v Wilkins* 1972 (4) SA 470 (N) at 475A-B.

⁸ *Nelson Mandela Metropolitan Municipality v Greyvenouw CC* 2004 (2) SA 81 (SE) at para 9.

⁹ See *Philippi Horticultural Area Food and Farming Campaign and Another v MEC for Local Government* 2020 (3) SA 486 (WCC) at para 29 in which the court stated that it can be raised *mero motu*.

¹⁰ See *Morgan and Another v Salisbury Municipality* 1935 AD 167 at 171; see also *Collin v Toffie* 1944 AD 456; *Amalgamated n 5 above* at 659 and 660; *Toekies Butchery (Edms) Bpk en Andere v Stassen* 1974 (4) SA 771 (T) at 774F-H; *Vandenhende v Minister of Agriculture, Planning and Tourism, Western Cape* 2000 (4) SA 681 (C) at 688 to 690.

¹¹ See *Henri Vijloen (Pty) Ltd v Awerbuch Bros* 1953 (2) SA 151 (O) at 169; see also *Aquatour (Pty) Ltd v Sacks* [1988] ZASCA 86; 1989 (1) SA 56 (A) at 61J-62G; *Burger v Rand Water Board* [2006] ZASCA 150; 2007 (1) SA 30 (SCA) paras 7 to 9.

judgment affecting those shares. Should the Development Trust be ordered to sell or transfer its shares, Capital asserts a prior and superior entitlement to those shares relative to any third party, including the Khululekile Family Trust.

- [59] Consortium further maintains that it is contractually bound to ensure that the Development Trust complies with its obligations under the Shareholders' Agreement, including offering the shares that may be sold or otherwise transferred to existing shareholders before any transfer to outsiders. This obligation, they submit, constitutes an independent legal interest in the subject matter of the dispute.
- [60] In *Rabinowitz and Another N.N.O v Ned-Equity Insurance Co Ltd*,¹² the court affirmed the principle that a party seeking to intervene must establish an interest that would probably be affected, or one that is likely to be affected by the outcome or that a common cause of action or common ground exists with the party with whom joinder is being sought. Our courts have also acknowledged that joinder may be permitted for reasons of convenience, equity, cost-saving, or to prevent a multiplicity of proceedings.¹³
- [61] The Constitutional Court in *SA Riding for the Disabled Association v Regional Land Claims Commissioner*¹⁴ reiterated this foundational principle. It held that if an applicant shows a right that may be affected by the court's order, permission to intervene must be granted. The court emphasised that, as a matter of fairness and due process, no binding order should be issued without affording the affected party a hearing. Once a direct and substantial interest is established, intervention should follow as of right.¹⁵
- [62] In *Amalgamated*,¹⁶ the Appellate Division articulated a two-part test for determining whether a third party has a direct and substantial interest in litigation. First, the court must ask whether the party would have *locus standi* to

¹² 1980 (3) SA 415 (W).

¹³ *Dendy v University of the Witwatersrand* 2005 (5) SA 357 (W) at para 73.

¹⁴ [2017] ZACC 4; 2017 (8) BCLR 1053 (CC); 2017 (5) SA 1 (CC) ('*SA Riding*').

¹⁵ *Ibid* at para 11. See also *Matjhabeng Local Municipality v Eskom Holdings Limited and Others* [2017] ZACC 35; 2017 (11) BCLR 1408 (CC); 2018 (1) SA 1 (CC) at paras 91 and 92.

¹⁶ *Amalgamated* fn 5 above.

claim relief concerning the same subject matter. In this case, the question is whether Capital, as holder of a pre-emptive right, would have standing to assert that the Development Trust's shares must first be offered to it and the remaining shareholders. Second, the court must consider whether the absence of the third party could result in a situation where the court's order (i.e., the Dosio orders) would not be *res judicata* as against that party, and whether the third party will be entitled to approach the court independently in future proceedings concerning the same subject matter.

[63] The intervening parties submit that both questions posed by the *Amalgamated* test must be answered in the affirmative. As to the second question, they argue that the very need for the Khululekile Family Trust to initiate proceedings under section 161 of the Companies Act demonstrates that the Dosio orders cannot be implemented without first making the Dosio orders binding on Consortium. It is submitted that the section 161 application is wholly dependent on the existence of the Dosio orders and has no independent foundation apart from them. Those orders are thus the *fons et origo* of the relief sought. The intervening parties ask: if Consortium was not cited in the original proceedings yet is directly affected by the orders, on what basis can it be denied an opportunity to contest their validity?

[64] They further contend that the Khululekile Family Trust has, in effect, acknowledged that Consortium was a necessary party. In the founding affidavit to the section 161 application, the Khululekile Family Trust stated:
'The applicants [Khululekile] deemed it necessary to bring this application for the reason, amongst others, that the first respondent [Consortium] is not a party to the proceedings mentioned above (the action) and the default judgment is not binding on the first respondent.'

[65] This, the intervening parties argue, is an unequivocal admission that the Dosio orders are not binding on Consortium and that its exclusion from the action was material. It also supports the conclusion that Consortium and Capital were necessary parties, that their non-joinder renders the Dosio orders

unenforceable against them, and that they are accordingly entitled to be heard on the merits of the matter.

- [66] The intervening parties further submit that, even if it were to be found that they lack a direct and substantial interest, or that their interest is merely financial or otherwise indirect, this would not necessarily preclude their joinder. They argue that, in such circumstances, the court still retains a wide and unfettered discretion to order joinder on the grounds of convenience. Unlike the position where a party has a direct and substantial interest, where joinder is obligatory, joinder for reasons of convenience lies within the court's discretion.¹⁷

Evaluation

- [67] The intervening parties assert a direct and substantial interest in the main action, relying primarily on provisions of the shareholders' agreement governing Consortium, particularly the pre-emptive rights afforded to shareholders. They argue that these rights are triggered if any shareholder, such as the Development Trust, intends to sell or otherwise dispose of its shares. The agreement imposes strict limitations on such transactions. Clause 17.1 prohibits any shareholder from selling or encumbering their shares within the initial five-year period from November 2006 to November 2011. Thereafter, additional constraints continue to apply, including a requirement that any proposed transfer must be approved by Anglo South Africa and BHP Billiton South Africa. It is argued that Consortium is contractually obliged to enforce these restrictions and ensure that any intended transfer first be offered to existing shareholders before shares can be transferred to third parties.
- [68] These restrictions are reinforced by clauses 21.3 and 21.4 of the shareholders' agreement, which extend the prohibition on the Development Trust from disposing of its shares for a ten-year period following November 2006. Even thereafter, any intended sale or transfer must be preceded by formal notice to the board and the remaining shareholders, who are afforded pre-emptive rights of first refusal. They submit that, had these provisions been disclosed to Dosio

¹⁷ *Amalgamated* above fn 5 at 659.

AJ, the orders would not have been granted without the joinder of Consortium and its shareholders, whose contractual rights were implicated.

- [69] Beyond the shareholders' agreement, the intervening parties also rely on the transaction framework agreement concluded with the facilitating parties: Anglo Finance, Anglo SA, Anglo Operations, Kumba and the Industrial Development Corporation. Under that agreement, Capital gave binding representations and warranties that the shareholders of Consortium would be as reflected in annexure "C", and that those shareholders would, as at the Project Pangolin completion date, hold the percentages set out therein. These undertakings, they argue, underscore their vested legal interest in the composition and control of shareholding in Consortium.
- [70] The Ngonyama parties oppose the joinder primarily on the basis that the intervening parties lack a direct and substantial legal interest in the subject matter of the action. They argue that the Dosio orders merely recognised the Khululekile Family Trust's existing beneficial ownership of a 6.5% shareholding in the Consortium, an interest held through a nominee relationship with the Development Trust, and did not result in a transfer, sale, or alienation of shares that would trigger the pre-emptive rights contained in the shareholders' agreement. They therefore contend that the intervening parties do not suffer any legally recognised prejudice.
- [71] Moreover, the Ngonyama parties point out that the Khululekile Family Trust has expressly undertaken to be bound by the shareholders' agreement, including the pre-emptive provisions, should any future transfer of shares be contemplated. They further argue that the intervening parties had prior knowledge of the proceedings and elected not to participate, and that their present attempt to intervene constitutes a belated and tactical effort to reargue matters already decided and delay enforcement of long-standing court orders.
- [72] In assessing the arguments of both parties, three important principles must be kept in mind. First, as a general rule, a company has no legal interest in who its shareholders are, provided the procedural requirements of the Companies Act are complied with. This principle is well established in our law and reflects the

separation between company administration and proprietary interests of shareholders. Second, the intervening parties must demonstrate a direct and substantial legal interest in the subject matter of the litigation. In this case, that means showing that the Dosio orders prejudicially affected their rights. Mere financial or commercial interests are not sufficient. Third, section 56 of the Companies Act recognises that shares may be held by a nominee on behalf of a beneficial owner, and that the beneficial interest may be exercised in accordance with instructions from the beneficial owner. This statutory framework reinforces the principle that beneficial ownership is distinct from registered ownership and that nominee arrangements are both recognised and lawful.

[73] The relief sought by the plaintiffs in both the main action and the section 161 application does not involve a sale, transfer, or disposal of shares in Consortium. It merely recognises the Khululekile Family Trust as the beneficial owner of a 6.5% shareholding, which has, from the outset, been held in the name of the Development Trust as nominee. The Dosio orders did not effect a change of ownership; they clarified the true legal position and resolved the dispute between the beneficial owner and its repudiating nominee. Since the beneficial interest existed before the pre-emptive rights in the shareholders' agreement took effect, no new rights were affected.

[74] In *Gordon*¹⁸ it was held that even if a party need only carry into effect a judgment, it must still demonstrate prejudice to warrant joinder. It is not enough that the order affects them operationally; it must do so adversely. This principle was reaffirmed by the SCA in *Judicial Service Commission v Cape Bar Council*,¹⁹ which held that joinder is only necessary if a party has a direct and substantial interest that may be affected prejudicially by the judgment. A mere interest in the outcome, without more, does not justify joinder. The right to raise a non-joinder objection is thus limited and cannot be invoked lightly.

¹⁸ *Gordon* above fn 6 at para 9.

¹⁹ *Judicial Service Commission v Cape Bar Council* [2012] ZASCA 115; 2013 (1) SA 170 (SCA) at para 12 ('JSC').

- [75] The JSC decision further clarified that a court must distinguish between prejudice arising directly from the proceedings, and a situation where the order merely determines the rights of the existing litigants without affecting a third party's ability to assert their rights in another forum.²⁰ The Constitutional Court²¹ has similarly held that applicants for intervention must show a direct and substantial legal interest, that is, a legally recognised right that could be prejudicially affected by the court's order.
- [76] Even if the shareholders' agreement were somehow implicated, the plaintiffs have undertaken under oath to be bound by its terms, including the enforcement of pre-emptive rights. This undertaking addresses any potential prejudice and safeguards the rights of existing shareholders, including the intervening parties. The only prejudice alleged is the potential infringement of pre-emptive rights, which, if valid, remain contractual entitlements. These do not amount to the type of direct legal interest required to justify joinder.
- [77] The intervening parties' asserted interest relates primarily to the entry of the Khululekile Trust into Consortium's share register, a matter that falls within the scope of the section 161 application, not the original action. The Dosio orders resolved a dispute between the Ngonyama parties and the Eyabantu Trust over beneficial ownership, and the intervening parties were not necessary parties to that dispute. Their argument that the section 161 application requires their joinder to the original action is misconceived. That application raises a distinct issue: whether Consortium must implement the Dosio orders by amending its securities register. It also provides the forum in which Consortium may raise any relevant defences. I agree with counsel for the Ngonyama parties that the availability of these remedies undermines the case for joinder.
- [78] Section 56(1) of the Companies Act, read with long-standing case law, affirms the legal efficacy of beneficial ownership. In *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd*,²² the SCA held that a nominee holds shares on behalf of a principal and takes instructions from that principal. The

²⁰ *Ibid* at paras 14 and 17.

²¹ *SA Riding* above fn 14 at para 9.

²² 1976 (1) SA 441 (A) ('*Oakland Nominees*').

nominee is a registered holder in form, but not in substance; ownership does not depend on registration. The SCA confirmed this again in *Standard Bank of South Africa Ltd v Ocean Commodities*,²³ where Corbett JA reaffirmed that the rights comprising a share may vest in a party who is not the registered shareholder, and that companies deal only with the registered holder as a matter of administrative policy, not because that person holds true ownership.

[79] Blackman, in his commentary on the Companies Act,²⁴ explains this apparent tension between *Oakland Nominees* and *Ocean Commodities*: the ‘registered owner’ is the party a company must recognise for administrative purposes, but true ownership may vest elsewhere. In legal terms, the nominee possesses a form of quasi-possession, while the beneficial owner holds substantive rights. Seen in this light, the Dosio and Dippenaar orders merely align the company’s share register with the established beneficial ownership of the Khululekile Family Trust. They do not alter the proprietary landscape or infringe the rights of other shareholders.

[80] In conclusion, the intervening parties have not established a legally sufficient interest to justify joinder. The Dosio orders merely confirmed a long-standing beneficial interest and did not trigger the protections in the shareholders’ agreement. Their claims of prejudice are speculative and unsupported by the facts. Nor can joinder be justified on grounds of convenience: absent a direct and substantial legal interest, considerations of procedural efficiency cannot displace the threshold requirement for joinder as of right. On the evidence, the intervening parties’ application appears motivated more by a desire to delay execution than by a *bona fide* attempt to vindicate legal rights. In the face of clear statutory and common law authority validating nominee shareholding, and in the absence of any demonstrable prejudice, the application for joinder must fail.

The second Rescission Application

²³ 1983 (1) SA 276 at 288H-289B; see also *Smyth v Investec Bank Ltd* [2017] ZASCA 147; 2018 (1) SA 494 (SCA) at para 21 (*Ocean Commodities*’).

²⁴ Blackman “Commentary on the Companies Act of 2008” (Juta) Vol 1 at 2-1193.

- [81] The trustees who initially represented the Development Trust in the action, Mr Kwinana and Mr Mapipa, ceased to hold office on or about 21 October 2021. They were succeeded by Mr Dalikhaya Rain Zihlangu (first applicant) and Ms Unathi Mdoda (the second applicant) and, who were duly appointed as the current trustees of the Development Trust ('the current trustees').
- [82] The Development Trust launched their second application for the rescission of the Dosio orders on 17 September 2024. The legal requirements for rescission under Uniform Rule 31(2)(b), rule 42 or under the common law are well established. An applicant must show 'good cause', which entails: (i) a reasonable explanation for the default; (ii) that the application is brought *bona fide*; and (iii) that the applicant has a *prima facie bona fide* defence to the claim. The jurisdictional thresholds differ depending on the pathway invoked.
- [83] Under rule 31(2)(b), the applicant must show that: (i) the judgment was granted by default and (ii) the application for rescission was brought within 20 days of acquiring knowledge of the judgment. Rule 42(1), by contrast, permits rescission in limited instances: (i) where the judgment was erroneously sought or granted in the absence of a party affected thereby; (ii) where the judgment contains an ambiguity, patent error or omission, but only to the extent of that defect; or (iii) where the judgment was granted as a result of a mistake common to the parties. At common law, rescission is competent on grounds such as fraud, *iustus error*, or the discovery of new documents, as well as in cases of default or consent judgments where good cause is shown.
- [84] An applicant must also comply with the relevant timeframes. Where rule 31(2)(b) is invoked, the application must be brought within 20 days of acquiring knowledge of the judgment. Under Rule 42 or the common law, the application must be launched within a reasonable time.
- [85] The Development Trust now seeks rescission of the default judgment, approximately six years after fact. The application is based on the same core defences previously raised in the rescission application dismissed by Grenfell AJ, which dismissal was upheld by the SCA. While the current trustees rely on the same underlying grounds, they focus their attention on the conduct of Mr

Kwinana. They allege that he acted in a conflicted manner, serving simultaneously as a trustee of the Development Trust and as the legal representative of the opposing Ngonyama parties. He took no steps to defend the trust's interests. The summons and application for default judgment were served at his offices, yet he failed to oppose either. Although he became aware of the default orders within three days of their being granted, he waited five months to bring a rescission application. His explanation, namely that he hoped to resolve the matter through dialogue, was vague and implausible, particularly since court orders are binding and not susceptible to informal resolution.

- [86] The current trustees' primary concern, however, is Mr Kwinana's presentation of two irreconcilable versions before the court. In his 2019 affidavit, he denied the Ngonyama parties' claim, accused them of misleading the court, and maintained that he merely assisted with registering the Khululekile Family Trust. But in a 2024 affidavit, filed ostensibly to assist the court, he reversed his position entirely. He claimed that the shares 'always belonged' to the Ngonyama parties and that the acquisition stemmed from a transaction involving Mr Zihlangu and Ms Mdoda's father. No explanation was offered for this complete reversal. The trustees argue that he must have been dishonest in at least one of the two affidavits.
- [87] They maintain that they were unaware of his dual role until June 2023, when, at a Consortium board meeting, he expressly confirmed that he had acted on behalf of the Ngonyama parties. Prior to that, although the Ngonyama parties had referred to Mr Kwinana as their agent and attorney in their pleadings, this had not been unequivocally confirmed by him. At the board meeting, Mr Zihlangu denied any knowledge of Mr Kwinana's dual representation and any approval of the alleged share acquisition by the Ngonyama parties.
- [88] It was only when the January 2024 affidavit was filed that it became clear to the current trustees that Mr Kwinana was deeply conflicted, serving two opposing interests. His inaction and failure to defend the Development Trust in the face of the Ngonyama parties' claim were now seen as the result of that conflict. His decision to pursue 'dialogue' instead of legal opposition is regarded as an

abdication of his fiduciary duty, and his divided loyalties were unknown to the trustees until well after the default judgment had been granted.

[89] The current trustees submit that there has been no inordinate delay in bringing this application. Throughout the relevant period, the default orders were either under appeal, the subject of a rescission application, or had already been rescinded (though that rescission was later set aside). They assert that they have now provided a credible explanation for Mr Kwinana's failure to act and have raised a *bona fide* defence that, on a *prima facie* basis, enjoys prospects of success. They also pleaded material facts which, if proven at trial, would entitle them to the relief sought. Chief among these is the following: the Ngonyama parties were never party to the shareholder agreements or to the transaction referred to as Project Pangolin; the transactional documents expressly excluded them; and key contractual provisions, such as the requirement for shareholder approval and the enforcement of pre-emptive rights in respect of share transfers, were never satisfied. Moreover, no payment was ever made by the Ngonyama parties for the shares they now claim. The trustees further contend that the legal foundation of the Ngonyama parties' claim, particularly their reliance on an alleged oral agreement with Mr Kwinana, is fundamentally untenable.

[90] They therefore submit that sufficient cause exists for rescission under the common law standard, namely, a reasonable explanation for default and a *bona fide* defence with prospects of success. The matter, they argue, should proceed to trial where the factual disputes can be fully ventilated.

[91] The Ngonyama parties oppose the application and raise four principal grounds of objection: first, that the application constitutes an abuse of process; second, that it is precluded by the doctrines of *res judicata* and issue estoppel; third, that the Development Trust has waived, or at least acquiesced in the default orders; and fourth, the lack of merit in the underlying allegations regarding Mr Kwinana's alleged conflict of interest. In addition, they seek a punitive costs order against the Development Trust. Each of these arguments will be addressed under separate headings below.

Abuse of process

- [92] The Ngonyama parties contend that the Development Trust, together with Consortium and Capital (collectively, the Eyabantu parties), have embarked on a strategy of serial litigation calculated to avoid compliance with the Dosio orders, granted as far back as April 2019. Central to this strategy, they argue, is Mr Zihlangu, who is described as the ‘controlling mind’ behind the various applications. He is said to have orchestrated what amounts to a classic ‘Stalingrad defence,’ marked by repeated and progressively weaker legal challenges aimed at delaying the enforcement of a final judgment.
- [93] The Ngonyama parties further deny that the Development Trust only recently became aware of Mr Kwinana’s alleged conflict of interest. They submit that the factual premise of this claim is both disputed and demonstrably false. Mr Zihlangu, now a trustee of the Development Trust, was aware of these alleged facts at all material times. Notably, even after Mr Kwinana’s removal and the appointment of Mr Zihlangu and Ms Mdoda, the reconstituted board actively implemented the Dosio orders, most significantly by furnishing an accounting to the Ngonyama parties in October 2022. This conduct, the Ngonyama parties contend, constitutes unequivocal acceptance of the judgment. The present rescission application was only launched after the Ngonyama parties sought judicial leave to execute the Dosio orders, further reinforcing the inference that it is driven by an ulterior motive to delay enforcement rather than by any *bona fide* or newly discovered defence.
- [94] Viewed objectively, the manner in which the present application has been initiated strongly suggests that it constitutes an abuse of the court’s process. The timing of the application, launched on 22 April 2024, a mere week before the scheduled hearing of the Ngonyama parties’ execution application, was plainly tactical. The result was a *de facto* postponement of a ripe enforcement application, despite the Deputy Judge President having earlier declined to grant such a postponement. That this occurred against the backdrop of a series of failed or withdrawn rescission attempt lends considerable weight to the conclusion that the application is not driven by legitimate legal grievance, but

rather by a broader litigation strategy to obstruct the execution of a final judgment.

[95] As the Constitutional Court emphasised in *Mineral Sands Resources (Pty) Ltd v Reddell*,²⁵ abuse of process manifests when procedural mechanisms are exploited in a manner inconsistent with their intended purpose, to delay, prejudice, or manipulate outcomes. The strategic deployment of successive rescission applications in this matter, many involving overlapping parties and identical relief has caused substantial procedural and substantive prejudice to the Ngonyama parties and has burdened the administration of justice with piecemeal and repetitive litigation.

[96] In any event, the new defences now advanced by the Development Trust are not only legally irrelevant but also factually implausible. The suggestion that the current trustees were unaware of Mr Kwinana's historical role as attorney and agent for the Ngonyama parties is contradicted by the pleadings and the record. The 2018 particulars of claim made this role explicit, and the trustees were already in office during the appellate proceedings. Moreover, the disputes between Mr Kwinana and his former clients, including the Development Trust, are extraneous to the issues in this matter and cannot now be invoked to undermine the finality of the Dosio orders.

[97] In *Zuma*,²⁶ the Constitutional Court reaffirmed that litigation must, at some point, come to an end. In *Molaudzi v S*,²⁷ the same Court explained that this is because:

'The rule of law and legal certainty will be compromised if the finality of a court order is in doubt and can be revisited in a substantive way. The administration of justice will also be adversely affected if parties are free to continuously approach courts on multiple occasions in the same matter.'

²⁵ [2022] ZACC 37; 2023 (2) SA 68 (CC); 2023 (7) BCLR 779 (CC).

²⁶ *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State* [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) at para 1.

²⁷ *Molaudzi v S* [2015] ZACC 20; 2015 (2) SACR 341 (CC); 2015 (8) BCLR 904 (CC) at para 37.

[98] Having regard to the history of this litigation, the timing and content of the present application, and the legal principles governing the finality of judgments and the permissible scope of rescission, I am satisfied that this application constitutes an abuse of process. It follows that the application falls to be dismissed on this ground alone. That conclusion is further fortified, as I now address, by the doctrines of *res judicata* and waiver/acquiescence, both of which are in my view dispositive of the relief sought.

Res judicata; Issue Estoppel and Waiver/Acquiescence

[99] Even if it is accepted that this application was not brought for improper reasons, it must still be dismissed because it fails on basic legal principles. The principles of *res judicata*, issue estoppel, and waiver or acquiescence are aimed at promoting finality in litigation, preventing the re-litigation of matters already determined, and protecting successful litigants from perpetual legal harassment. These principles are not mere procedural technicalities, they are central to the rule of law, legal certainty, and the efficient functioning of the judicial system. In the present matter, they apply with full force.

[100] The principle of *res judicata* bars a party from re-litigating a matter that has already been finally decided by a competent court. In *Prinsloo NO & Others v Goldex 16 (Pty) Ltd and Another*²⁸ the SCA confirmed the three classic requirements for *res judicata*. They are: (i) the same parties, (ii) the same cause of action, and (iii) the same relief. While courts have relaxed the latter two requirements under the doctrine of issue estoppel, the core principle remains: once a matter has been properly decided by a court, it cannot be reopened simply because the same facts are presented in different words or from a new angle. In *Prinsloo*, the SCA explained that *res judicata* is not based on rigid technicalities but on fairness and the need for finality. It protects parties from having to defend the same dispute again and again, just because the losing party tries to reframe the case. If courts allowed this, there would never be an end to litigation. Ultimately our courts will apply the doctrine of issue estoppel

²⁸ [2012] ZASCA 28; 2014 (5) SA 297 (SCA) at para 23 ('*Prinsloo*').

on a case-by-case basis and not permit the defence where it will potentially give rise to unfairness in subsequent proceedings.²⁹

[101] In this instance, the Development Trust, then represented by Mr Kwinana, previously brought a rescission application, which was dismissed by Grenfell AJ. That decision was upheld by the SCA, which declined to interfere with the High Court's findings, describing it as 'an entirely new rescission application'. The relief now sought is identical: a rescission of the Dosio orders. Although the current trustees present the application under the pretext of newly discovered facts, specifically relating to Mr Kwinana's alleged conflict, the substance of the application remains unchanged. The core issue, namely whether the default judgment was improperly granted, has already been determined.

[102] Moreover, the allegations of conflict or misconduct attributed to Mr Kwinana were either known to the current trustees or, at the very least, reasonably ought to have been known well before the launch of the present application. The assertion that these facts only recently came to light is, on the record, wholly implausible. Following the dismissal of its appeal by the SCA, the Development Trust chose not to approach the Constitutional Court. Instead, having removed Mr Kwinana as a trustee and appointed the current trustees in his place, the trust proceeded to implement the Dosio orders. On 28 October 2022, the trust delivered an accounting to the Ngonyama parties under cover of an email from Ms Mdoda. That accounting expressly recorded that it was provided in compliance with paragraph 1 of the Dosio orders, noted the appointment of the new trustees on 12 October 2021, and bore the signature of the trustee, Ms Mdoda acting on behalf of the trust. This conduct is irreconcilable with the stance of a party who truly believes the judgment was erroneously granted or fatally infected by Mr Kwinana's conflict of interest.

[103] Waiver occurs where a party, with full knowledge of a right, intentionally relinquishes or abandons it. The test is objective: the party's intention is assessed with reference to their outward conduct, whether expressed through

²⁹ Ibid at para 26.

words, actions, or a combination of both. In *Coppermoon Trading 13 (Pty) Ltd v Government, Eastern Cape Province*,³⁰ the court held that where waiver is not expressly stated, the conduct relied upon must, on a reasonable interpretation, be more consistent with an intention to waive the right than to assert it.

[104] The conduct of the Development Trust, particularly after the finalisation of its earlier rescission application and its decision not to pursue a further appeal to the Constitutional Court, supports a finding that it waived any right to challenge the validity of the Dosio orders. As the SCA affirmed in *Road Accident Fund v Mothupi*,³¹ waiver may be inferred not only from silence or delay in asserting a right, but also from conduct that affirms the status *quo*. The delivery of an accounting in express compliance with the court order, signed by the newly appointed trustee, constitutes clear outward conduct incompatible with any ongoing intent to challenge the judgment.

[105] If not waiver, then at the very least the Development Trust's conduct amounts to acquiescence. Acquiescence arises where a party, with knowledge of its rights, acts in a manner that affirms and abides by an existing legal position, thereby forgoing the right to later dispute it. In *Hartley Roegshaan v FirstRand Bank Limited*,³² the court reiterated that a litigant cannot approbate and reprobate — one cannot blow hot and cold or raise objections only when it is strategically convenient. That is precisely what the Development Trust now seeks to do: having accepted the judgment and taken active steps to implement it, it now attempts to resile from that position without sufficient justification, and only at the point where execution is imminent.

[106] Despite being aware of the alleged conspiracy between Mr Kwinana and Mr Ngonyama from as early as 10 December 2020, the current trustees allowed Mr Kwinana to continue administering the affairs of the Development Trust, including its litigation with the Ngonyama parties. They took no steps to remove him as trustee until nearly two years later. More significantly, even with full

³⁰ 2020 (3) SA 391 (ECB) at para 23.

³¹ [2000] ZASCA 27; 2000 (4) SA 38 (SCA) at para 15.

³² [2014] ZAGPJHC 282. See also *Botha v White* 2004 (3) SA 184 (T) at para 31.

knowledge of the alleged impropriety, they proceeded to act on the Dosio orders, most notably by delivering an accounting signed by Ms Mdoda. In these circumstances, the Development Trust cannot now seek to overturn an order it knowingly implemented. Its conduct amounts to clear acquiescence in the judgment and is incompatible with the belated assertion of a right to rescind.

[107] In light of the above, I am satisfied that the present rescission application is barred both by *res judicata* and issue estoppel, and that the conduct of the Development Trust amounts to a clear waiver of its right to challenge the Dosio orders. At best for the trust its conduct constitutes acquiescence, and it is estopped from now seeking to undo a final judgment which it has previously accepted, implemented, and failed to contest within a reasonable time.

[108] In the result, the Development Trust has failed to establish any legal basis for rescinding the Dosio orders. Although the current trustees frame the application as one brought under the common law rather than Rule 42(1)(a), the more flexible standard of 'good cause' still requires a reasonable and acceptable explanation for the default and a *bona fide* defence with reasonable prospects of success. Neither requirement has been met. The application rests primarily on Mr Kwinana's alleged conflict of interest, which, as discussed, is not a sufficient basis for rescission. The judgment was granted in accordance with proper procedure, no procedural irregularity has been demonstrated, and no compelling ground exists to disturb the finality of the Dosio orders. The application must therefore be dismissed.

Costs of the second rescission application

[109] The general rule is that costs follow the result and are ordinarily awarded on the party-and-party scale. However, where the litigation conduct of a party is shown to be manifestly unreasonable, vexatious, or abusive, a court is entitled to depart from the ordinary rule and to grant a punitive costs order on the attorney-and-client scale. Such an order is warranted not as a punishment, but as a mark of the court's disapproval and to indemnify the successful party more fully against the unnecessary expense to which it has been put.

[110] In the present matter, the conduct of the Development Trust has been characterised by serial and repetitive litigation aimed at overturning the same court orders, the Dosio orders, despite those orders having been confirmed by both the High Court and the SCA. The present application constitutes the fifth attempt to achieve, by different means, what has already been judicially rejected. It is a clear example of litigation pursued not with a view to vindicating a right, but rather to delay and frustrate enforcement of a final and binding court order.

[111] This court is satisfied that the Development Trust has acted in a manner that constitutes an abuse of process and that its approach to these proceedings justifies the granting of costs on a punitive scale. While I make no finding of misconduct against its legal representatives, the pursuit of this meritless and repetitive application in the face of adverse precedent and previous judgments cannot be condoned.

[112] Accordingly, the application is dismissed with costs on the attorney-and-client scale, such costs to include the costs of two counsel.

The Section 161 application

[113] In its notice of motion, the Khululekile Family Trust seeks declaratory relief confirming its ownership of a 6.5% shareholding in Consortium. It further seeks a directive compelling Consortium to rectify its securities register to reflect the trust as the holder of this shareholding, and to issue a share certificate accordingly.

[114] Consortium opposes the relief sought in the section 161 application on the same grounds advanced in opposition to the joinder application. In particular, it contends that prayer 1 of the amended notice of motion effectively seeks to reaffirm the Dosio orders, and that such relief should be refused for the same reasons the Dosio orders ought to be rescinded. The core of Consortium's argument is that the original shareholders in Consortium acquired pre-emptive rights under the shareholders' agreement, entitling them to acquire any shares that may be transferred out of the name of the Development Trust, to the exclusion of the Khululekile Family Trust. These rights, it is submitted, are

contractual in nature and binding, and any order recognising the Khululekile Family Trust's shareholding would contravene the express provisions of both the shareholders' agreement and the transaction framework agreement. Granting the relief would, Consortium argues, improperly override these contractual rights and disregard the pre-emptive entitlements of the remaining shareholders.

[115] Secondly, it is submitted that the Khululekile Family Trust has effected a notable turnabout in the position it now advances, as compared to the case originally pleaded in the action. Initially, the plaintiffs alleged that Mr Kwinana was mandated to acquire shares on behalf of the Ngonyama parties. There was no suggestion that, at the time of the initial allocation of shares in Consortium, Mr Kwinana would negotiate for shares to be allocated to the Ngonyama parties directly.

[116] Thirdly, the unchallenged documentary evidence confirms that the first shareholders in Consortium were exclusively those individuals listed in annexure "C" to the transaction framework agreement. These parties are reflected as shareholders in the shareholders' agreement and are accordingly recognised as the original contracting shareholders. Moreover, Capital itself expressly represented to the facilitating parties, including Anglo South Africa Capital, Kumba, and the Industrial Development Corporation, that the shareholders of Consortium "shall be those persons set out in Annex C," and that they would hold their allocated percentage shareholdings as at the Project Pangolin Completion Date.

[117] It is submitted that Clause 5.2.1.4 of the transaction framework agreement clearly requires that the original shareholders listed in annexure 'C' must hold the shares. The agreement does not contemplate, let alone permit, nominee representative shareholding. This obligation is reiterated in clause 15.1.7.1 of the shareholders' agreement, which stipulates that, until the fifth anniversary of the agreement, 'the entire issued ordinary share capital of the Company [Consortium] shall be held by the Shareholders as set out in clause 3.2.2.' Clause 3.2.2, in turn links the shareholding directly to those set out in annexure "C".

- [118] In addition to these provisions governing the identity of shareholders, clause 17 of the shareholders' agreement imposes strict restrictions on the sale or encumbrance of shares. A shareholder may not transfer or sell shares to an outside party unless there has been full compliance with clause 17.2.3, which requires the written approval of Anglo South Africa Capital, BHP Billiton, and at least 75% of the remaining shareholders as to the identity of the transferee.
- [119] The arguments raised in opposition to the section 161 application have already been rejected by this court in the context of the joinder application. I also take into account that none of the other shareholders in Consortium, despite having long been aware of these proceedings, have sort to join or oppose them. Now that the beneficial ownership of the Khululekile Family Trust has been judicially established, Consortium is obliged to record the trust as a shareholder in its securities register, thereby aligning its records with the provisions of its own Memorandum of Incorporation.
- [120] The section 161 application is the procedural mechanism through which the Khululekile Family Trust can give effect to the Dosio orders, specifically, to have its status as shareholder formally recognised. Section 161 of the Companies Act is designed to ensure that the company's securities register reflects legal and beneficial shareholding.
- [121] This court has already determined that the Khululekile Family Trust is the beneficial owner of the 6.5% shareholding currently registered in the name of the Development Trust as nominee. There is no valid legal basis to resist the correction of the register to reflect this position. Compliance with section 161 is not discretionary. Consortium's continued refusal to update its register would constitute a failure to give effect to a binding court order. The relief now sought does no more than enforce judicially recognised rights and bring the register into alignment with both legal obligations and factual reality. No prejudice to Consortium or its shareholders has been shown, and no defensible basis for non-compliance has been advanced. The application must accordingly succeed.

The Section 26 Application

[122] In its section 26 application, the Khululekile Family Trust seeks an order directing Consortium to permit it to inspect and make copies of various company records. These include: (a) the securities register; (b) the memorandum of incorporation, any amendments thereto, and any rules adopted by Consortium; (c) all records relating to the directors of Consortium; (d) reports to annual meetings and annual financial statements from inception to date; (e) notices and minutes of annual meetings and related communications; and (f) all accounting records, including bank statements and accounts operated by Consortium from inception to the date of the order.

[123] Section 26(1) of the Companies Act confers the right on a person who holds or has a beneficial interest in any securities issued by a profit company to inspect and copy the records specified therein. That right now vests in the Khululekile Family Trust, by virtue of the order granted in the section 161 application, which confirmed its beneficial ownership of a 6.5% shareholding in Consortium and directed that its name be recorded in Consortium's securities register.

[124] Given that the rescission application was refused and the section 161 application granted, the Khululekile Family Trust's status as a shareholder is now judicially confirmed. It follows that it is entitled, as of right, to exercise the statutory rights conferred by section 26 of the Companies Act.

[125] The Eyabantu companies correctly accepted that, should the section 161 application succeed and the rescission application fail, the Khululekile Family Trust would be entitled to the records sought. That eventuality has come to pass. The legal foundation for access under section 26 is now firmly established, and Consortium is accordingly obliged to permit the inspection and copying of its records as requested.

The Execution Application

[126] In the execution application, the Ngonyama parties seek to enforce the Dosio orders, which granted relief in relation to both the rendering of an account and the transfer of a 6.5% shareholding in Consortium. These orders have remained unfulfilled for more than six years.

[127] The decision of the SCA in *Capital Appreciation Ltd v First National Nominees (Pty) Ltd*³³ is directly relevant. The SCA confirmed the High Court's authority to grant detailed ancillary relief to give effect to a shareholder's statutory rights under section 164 of the Companies Act. It held that once such rights are established, the court may structure and enforce the relief necessary to implement those rights, including appointing appraisers and compelling procedural compliance.

[128] The present execution application is consistent with that principle. It does not seek new relief but rather the practical implementation of rights already judicially recognised by Dosio AJ. The ancillary relief now sought is a necessary mechanism to enforce the judgment. Like in *Capital Appreciation*, this court may and should craft enforceable, detailed orders to give effect to established rights.

[129] The execution application does not merely replicate the Dosio orders but articulates in precise terms: (a) the steps required to implement the orders; (b) the shareholding implicated; and (c) the amount payable following the accounting. The order sought reads as follows:

- "1. Directing [Dalikhaya Rain Zihlangu N.O. and Unathi Mdoda N.O.] as Trustees of the Eyabantu Development Trust registration No. IT6454/2008 to—
- (a) Pay the applicants [the Ngonyama parties] the sum of R17,033,794.36 (seventeen million and thirty-three thousand, seven hundred and ninety-four rand, thirty-six cents);
 - (b) Pay interest thereon at 9.5% per annum a tempore morae;
 - (c) Complete and sign a CM42 share transfer form in favour of the [Trustees of the Khulelekile Family Trust Reference IT 10495/2007] transferring to the Khulelekile Family Trust 50% of the shareholding registered in the name of the Eyabantu Development Trust in the share register of Eyabantu Capital Consortium (Pty) Ltd;
 - (d) Deliver to the applicant's attorney the completed CM42 form together with the share certificates reflecting the Eyabantu Development Trust's shareholding in the share register of Eyabantu Capital Consortium (Pty) Ltd;
 - (e) Authorising the Sheriff, in the event of the respondents [the Trustees of the Eyabantu Development Trust not complying with the above order within five days of the service hereof on them to:
 - (i) attach all the funds in the bank accounts of the respondents to execute the orders in prayers (a) and (b) above;

³³ [2022] ZASCA 85; 2022 (6) SA 67 (SCA) ('*Capital Appreciation*').

- (ii) sign a CM42 form on behalf of the Khulelekile Family Trust to execute the order in (c) above; and
- (iii) demand that the Eyabantu Development Trust hand over the share certificates referred to in (d) above to the Sheriff and to deliver same with answering affidavit completed CM42 to the applicant's attorney.
- (f) Pay the costs of suit as taxed or agreed on the attorney client scale, such costs to include all costs under the above case number including the costs of two counsel where two counsel were engaged."

[130] Prayers (a) and (b) require the Development Trust to pay a sum of money with interest, being the total dividends received but not paid over to the Ngonyama parties. These sums have been admitted. As such, this part of the order is directed solely at the Development Trust and does not prejudice the Eyabantu parties.

[131] Prayer (c) obliges the trustees of the Development Trust to sign CM42 share transfer forms for 50% of the shareholding registered in their name in Consortium. This provision merely uses the share register as a reference point; it imposes no obligation on Consortium itself. The signing of CM42 forms by the Development Trust does not prejudice the Eyabantu parties, as already established in the section 161 application.

[132] Prayers (d) and (e) provide enforcement mechanisms to give effect to prayer (c) in the event of non-compliance by the Development Trust. These provisions facilitate implementation of the order and do not adversely affect the rights of the Eyabantu parties.

[133] Despite obtaining final relief through due process, the Ngonyama parties have endured years of delay. It is trite that a final judgment, unless set aside or appealed, must be respected and enforced. The Ngonyama parties have established a compelling case for execution and the Development Trust has offered no persuasive reason for further delay in compliance.

The Rescission Application of Consortium and Capital

[134] Given the protracted history of this matter, it is evident that whichever way this court rules, the losing party is likely to appeal. Anticipating that eventuality, and to assist a potential appellate court, I have also considered the merits of the

rescission application on the assumption that the joinder application is upheld on appeal.

[135] There is no need to lengthen this judgment unnecessarily. The facts, as set out, speak for themselves. The present application meets none of the requirements for rescission identified earlier. First, it was not brought within a reasonable time. Second, while this court retains a discretion to grant rescission, there are compelling reasons not to exercise that discretion in the applicants' favour. Third, the intervening parties have not shown that the Dosio orders were erroneously granted. Finally, the grounds advanced in support of rescission are materially identical to those previously raised by the defendants. Those arguments were fully ventilated before Grenfell AJ and later considered by the SCA. Both courts dismissed the relief sought. There is no basis to revisit those conclusions.

[136] The Ngonyama parties have suffered clear and ongoing prejudice in having to contend with prolonged litigation driven by the intervening parties' shifting positions across different courts. This has delayed enforcement of the Dosio orders and raises serious concerns about fairness and the proper use of court processes. Courts cannot allow litigants to undermine the finality of judicial decisions by changing strategies in a calculated manner. A party seeking relief after a delay must provide an adequate explanation. The intervening parties have not done so.

[137] The lack of *bona fides* on behalf of the intervening parties is further demonstrated by the intervening parties' failure to involve other shareholders with allegedly similar interests. As Grenfell AJ noted, and as was conceded before her, none of those other shareholders sought to intervene. Nor have the intervening parties attempted to join them. Mr Zihlangu, now speaking for the intervenors and having replaced Mr Kwinana as trustee of the Development Trust, uses this application to revive arguments already determined by Grenfell AJ and affirmed by the SCA. This obstructs the execution of the Dosio orders and undermines finality.

[138] Rescinding the Dosio orders would cause substantial prejudice to the Ngonyama parties. Mr Ngonyama is elderly. Given the passage of time, memories have faded and documents are likely unavailable. Reopening the matter would, in truth, amount to a fishing expedition aimed at locating a defence where none has yet been found. All the policy considerations outlined in *MEC for the Department of Public Works, Eastern Cape and Another v Ikamva Architects CC*,³⁴ militate against rescinding a judgment that was procedurally and substantively sound.

[139] In *Ikamva*, the SCA stressed that courts must uphold the finality of judgments and guard against attempts to sidestep them through strategic or collateral litigation. The court warned against abuse of process by litigants who, rather than complying with final orders, seek to delay enforcement through inconsistent conduct and procedural manoeuvring. Such tactics undermine the authority of the courts and public confidence in the justice system. These principles counsel against rescission where no proper cause is shown.

[140] Finally, there is no real prejudice to the Eyabantu parties. Capital will have full recourse to the protections of the shareholders' agreement once the Khululekile Family Trust is entered into the share register. At that point, it can assert its pre-emptive rights, if available, against its co-shareholder, but not before.

[141] In summary, even if the intervening parties were entitled to be joined, their application for rescission lacks merit. The requirements under Rule 42 and the common law have not been met, the delay is unjustified, and their litigation conduct lacks *bona fides*. The prejudice to the plaintiffs is ongoing and substantial, while the intervening parties have not shown any real or legally significant prejudice. Granting rescission in these circumstances would undermine finality and the integrity of judicial process. The application must be dismissed.

Costs

³⁴ [2024] ZASCA 95 ('*Ikamva*').

[142] An award of attorney-and-client costs is exceptional but justified where a party abuses court process, acts in bad faith, or litigates in a vexatious or reprehensible manner. The conduct of the intervening parties squarely meets that threshold. Their calculated and unjustified litigation strategy has unnecessarily prolonged these proceedings, imposed significant costs on the plaintiffs, and sought to relitigate issues already decided. They have offered no credible explanation for their delay, failed to join other shareholders allegedly sharing their interests, and advanced arguments previously rejected by the courts. It would be unfair to require the plaintiffs to bear the financial burden of such conduct. A punitive costs order is both necessary to mark this court's disapproval and to indemnify the plaintiffs. Accordingly, the intervening parties are ordered to pay the costs of the joinder application on an attorney-and-client scale, including the costs of two counsel where so employed.

Conclusion

[143] Although the parties have invoked the language of empowerment, compliance, and corporate governance, the underlying contest appears less about preserving the ideals of Project Pangolin and more about securing access to a lucrative asset. The litigation has exposed a struggle not over principle but over profit, masked in part by procedural objections and contractual technicalities. The question that ultimately emerges is whether this dispute is truly about furthering the transformation objectives embedded in Project Pangolin, or whether it is, in truth, a contest over entitlement to the financial rewards now flowing from the Consortium's stake in Main Street. That Capital and Consortium have vigorously opposed the recognition of the Khululekile Family Trust's beneficial ownership, despite the absence of prejudice to them and the Trust's willingness to be bound by the same regulatory framework, raises a credible inference that the real fight is over wealth, not transformation.

Order

[144] In the result the following order is made:

1. The application for joinder by Eyabantu Capital Consortium (Pty) Ltd and Eyabantu Capital (Pty) Ltd is dismissed with costs on an attorney client scale. Order marked "X".
2. The rescission application by the Eyabantu Development Trust is dismissed with costs on an attorney client scale. Order marked "X1".
3. The execution application is granted with costs on a party and party scale, Scale C. Order marked "X2".
4. The section 161 application is granted with costs on a party and party scale, Scale C. Order marked "X3".
5. The section 26 application is granted with costs on a party and party scale, Scale C. Order marked "X4".

L WINDELL

Judge of the High Court,
Johannesburg

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 6 May 2025

Appearances

Case Number: 2019/40463

For the Applicants: L.J. Morison SC and T. Scott

Instructed by: Knowles Husain Lindsay Inc

For the First Respondent: R. Stockwell SC and J.F. Pretorius

Instructed by: Erasmus de Klerk Inc.

Case Number: 2018/45883

For the Applicants: R. Stockwell SC and J.F. Pretorius

Instructed by: Erasmus de Klerk Inc.

For the Respondents: L.J. Morison SC and T. Scott

Instructed by: Knowles Husain Lindsay Inc.

Case Number: 2020/16341

For the Applicants: L.J. Morison SC and T. Scott

Instructed by: Knowles Husain Lindsay Inc.

For the Respondent: B. Makola SC and L. Mnqandi

Instructed by: Madlanga & Partners Inc.

Date of Hearing: 18-19 November 2024

Date of Judgment: 06 May 2025