



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

Case no: 6020/2023

In the matters between:

SOUTH AFRICAN RENEWABLE GREEN ENERGY

(PTY) LTD

First Applicant

FRANCOIS ROUX FAMILY TRUST

(represented by the trustees thereof for the time being)

Second Applicant

EMMA JANE RITCHIE

Third Applicant

And

CORIA (PKF) INVESTMENTS 28 (RF) (PTY) LTD

First Respondent

THEBE NOBLESFONTEIN (RF) (PTY) LTD

Second Respondent

THEBE NOBLESFONTEIN 2 (RF) (PTY) LTD

Third Respondent

Known as Mindsearch Trade (Pty) Ltd, then Shanduka Renewables (Pty) Ltd and then Phembani Renewables (RF) (Pty) Ltd

MAHUBE INFRASTRUCTURE INVESTMENT 1 (RF) (PTY) LTD

Fourth Respondent

(previously known as GAIA SPV (RF) (Pty) Ltd)

MAHUBE CAPITAL FUND 1 (RF) (PTY) LTD

Fifth Respondent

(previously known as GAIA Financial Services (RF) (Pty) Ltd)

NFONTEIN ONE (RF) (PTY) LTD

Sixth Respondent

NOBLESFONTEIN EDUCATIONAL TRUST

Seventh to Ninth Respondents

SARGE GAIA SPV (RF) (PTY) LTD

Tenth Respondent

SARGE THEBE SPV (RF) (PTY) LTD

Eleventh Respondent

**Consolidated with
THEBE APPLICATION
CASE NO: 16391/2023**

THEBE NOBLESFONTEIN (RF) (PTY) LTD

First Applicant

**THEBE RENEWABLE ENERGY HOLDINGS (RF)
(PTY) LTD**

Second Applicant

And

**SARGE THEBE SPV (RF) (PTY) LTD
NFontein One (RF) (PTY) LTD
CORIA (PKF) INVESTMENTS 28 (RF) (PTY) LTD
ANDRIES MALHERBE
MICHIEL NIEUWOUDT
ANDILE MJAMEKWANA
SOUTH AFRICAN RENEWABLE GREEN ENERGY
(PTY) LTD
FRANCOIS DU TOIT N.O.
MAHUBE INFRASTRUCTURE INVESTMENT 1 (RF)
(PTY) LTD
MAHUBE CAPITAL FUND 1 (RF) (PTY) LTD**

**First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth Respondent
Sixth Respondent

Seventh Respondent
Eighth Respondent

Ninth Respondent
Tenth Respondent**

Coram: JUSTICE J CLOETE

Heard: 1 to 4 September 2025

Delivered electronically: 9 October 2025

Summary: Whether a provision in an agreement concluded between some, but not all, shareholders of a company which conflicts with its Memorandum of Incorporation is hit by the qualification in section 15(7) of the Companies Act 71 of 2008 that such agreement is void to the extent of the inconsistency – whether if so, subsequent amendment of the Memorandum of Incorporation to bring it in line with the conflicting provision permits retrospective validity

ORDER

1. In the main and counter-applications under case number 6020/2023 ('the Sarge application' and 'the Mahube counter-application'):
 - 1.1 It is declared that the words '*pursuant to an agreement entitled "Directors Voting Rights Agreement" executed on or about the Signature Date between inter alios N1, Thebe Noblesfontein, South African Renewable Green Energy Proprietary Limited and certain individuals*' are deemed to be severed from clause 12.29 of the written agreement styled 'SPV1 Preference Share Subscription Agreement' (the 'SPV1');

- 1.2 It is declared that the fourth and/or fifth respondent's entitlement to have a representative exercise the voting rights of one of the two directors of the first respondent appointed by the sixth respondent, pending amendment of the sixth respondent's constitutional documents (being its Memorandum of Incorporation and Restated Shareholders Agreement as amended by the First Addendum thereto) arises from and in terms of: (a) clause 12.29 of the SPV1 (as amended in accordance with paragraph 1.1 of this order) as well as an oral agreement concluded between the sixth respondent on the one hand, and the fourth and/or fifth respondents on the other, during or about September 2017; (b) is currently exercised on their behalf by Mr Gontse Moseneke; and (c) is limited to a total (and no more) of 9% of the total voting rights held by the directors of the first respondent;
- 1.3 Save as set out above, the relief sought by the applicants is refused;
- 1.4 The counter-application is dismissed; and
- 1.5 Each party shall pay their own costs.
2. In the application under case number 16391/2023 ('the Thebe application'):
- 2.1 It is declared that the Director Voting Rights Agreement concluded on 21 September 2017 between the first applicant, and the second and fourth to sixth respondents, is void and unenforceable;
- 2.2 Save as set out above, the relief sought by the applicants is refused; and
- 2.3 Each party shall pay their own costs.

JUDGMENT

CLOETE J:

Introduction

[1] These are three interrelated applications for final relief, all of which are opposed, and which concern the composition and functioning of the board of directors of Coria (PFK) Investments 28 (RF) (Pty) Ltd (hereinafter 'Coria') which is the first respondent in case number 6020/2023 and the third respondent in case number 16391/2023. Case number 6020/2023 consists of the main application and a counter-application between the 'Sarge entities' and the 'Mahube entities'. Case number 16391/2023 is a separate

application brought by the 'Thebe entities' against the 'Sarge entities' but was consolidated with the main application at an earlier stage. There were also three interlocutory applications. One was not persisted with, one was settled and after argument on the third an order was granted which in essence permitted the admission of a further affidavit by the 'Sarge entities' in the main application.¹

[2] Coria owns and operates a highly profitable renewable energy project, supplying Eskom, in the Victoria West district of the Northern Cape, known as the Noblesfontein Wind Farm. It is the brainchild of the late Mr Francois Roux who passed away unexpectedly during August 2021. In about 2010, Mr Roux conceptualised a renewable wind energy project after having been involved in the renewable energy industry for a number of years. During 2011, he was introduced to a group of Spanish investors known as Gestamp. The Roux family farm in the Victoria West district was identified as an ideal site and the Roux family, together with Gestamp commenced business, with Mr Roux in charge of the practical side of the operation. The corporate vehicle for Mr Roux and the Roux family interests is South African Renewable Green Energy (Pty) Ltd ('Sarge') which is the first applicant in the main application, and which together with the sixth to eleventh respondents therein ('N1', 'NET', 'Sarge Gaia' and 'Sarge Thebe') is ultimately owned and controlled by the Francois Roux Family Trust (the 'Trust'). These are the 'Sarge entities'.

[3] Prior to a corporate restructure during 2017 – which is the genesis of the current dispute – the shareholding in Coria was as follows: Sarge -12.5%; Gestamp - 60%; Phembani Renewables (Pty) Ltd ('Phembani') - 25%; and NET - 2.5%. This shareholding was reflected in a Restated Shareholders Agreement concluded on 4 November 2012 (the 'Restated Shareholders Agreement'). Phembani was the B-BBEE 'partner'. At an earlier stage, Phembani was called Mindsearch Trade (Pty) Ltd; subsequently changed its name to Shanduka Renewables (Pty) Ltd; then to Phembani; and then to Thebe Noblesfontein 2 (RF) (Pty) Ltd ('Thebe 2'). It is the third respondent in the main application and, along with the second respondent ('Thebe') are the 'Thebe

¹ The full terms of that order appear from the record but are otherwise not relevant to the merits determination. The interlocutory application which was withdrawn was for a referral to oral evidence by the Mahube entities. The interlocutory application which was settled pertained to whether the Thebe entities' attorneys were authorized to represent N1, the sixth respondent in the main, on the basis that it would not be persisted with but there would be no order as to costs.

entities'. Apart from the Restated Shareholders Agreement, Coria's other constitutional document is its Memorandum of Incorporation ('MOI').

[4] NET was founded by Coria for purposes of establishing community shareholding and participation in its Noblesfontein Wind Power Project. According to Ms Ritchie, who deposed to the founding affidavit in the main application, NET aims to advance the community's upliftment objectives by promoting education and related activities and providing financial support to local communities. NET's beneficiaries are all individuals under the age of 25 years. Ms Ritchie is the widow of the late Mr Roux as well as a businesswoman, although there is a related, not relevant, dispute about the extent of her business acumen and how she landed up on Coria's board after her husband's passing. What is not in dispute is that she serves on Coria's board.

The 2017 corporate restructure

[5] During 2017, Gestamp decided to sell its interest in Coria, consisting of its 60% shareholding and loan claims. The Roux family wished to purchase that interest but did not have sufficient funds. In addition, Phembani was considering exiting Coria. The required finance to fund the purchase was ultimately provided by two outside funders, in the amounts of R320 million and R540 million respectively, against the issue of preference shares in each funder's favour in accordance with their own internal corporate arrangements. The one funder, which provided R320 million, was Mahube Infrastructure Investment 1 (RF) (Pty) Ltd (previously Gaia SPV), the sole shareholder of which is Mahube Capital Fund 1 (RF) (Pty) Ltd (previously Gaia FS) – the fourth and fifth respondents in the main application and the applicants in the counter-application. The other funder, which provided R540 million, was Thebe Noblesfontein (RF) (Pty) Ltd ('Thebe'), the second respondent in the main application and the first applicant in the consolidated application. Its sole shareholder is Thebe Renewable Energy Holdings (RF) (Pty) Ltd ('TREH') – the second applicant in the consolidated application.

[6] What bedevils this matter are the historically changing, and overlapping, names of certain entities involved, but I will do my best. I use abbreviated names at times to assist myself. However, an organogram agreed by the parties for purposes of determining this matter appears a bit later in this judgment, and reflects the de facto

position after the 2017 restructure with exactitude. For convenience the directors of some of the entities are also included.

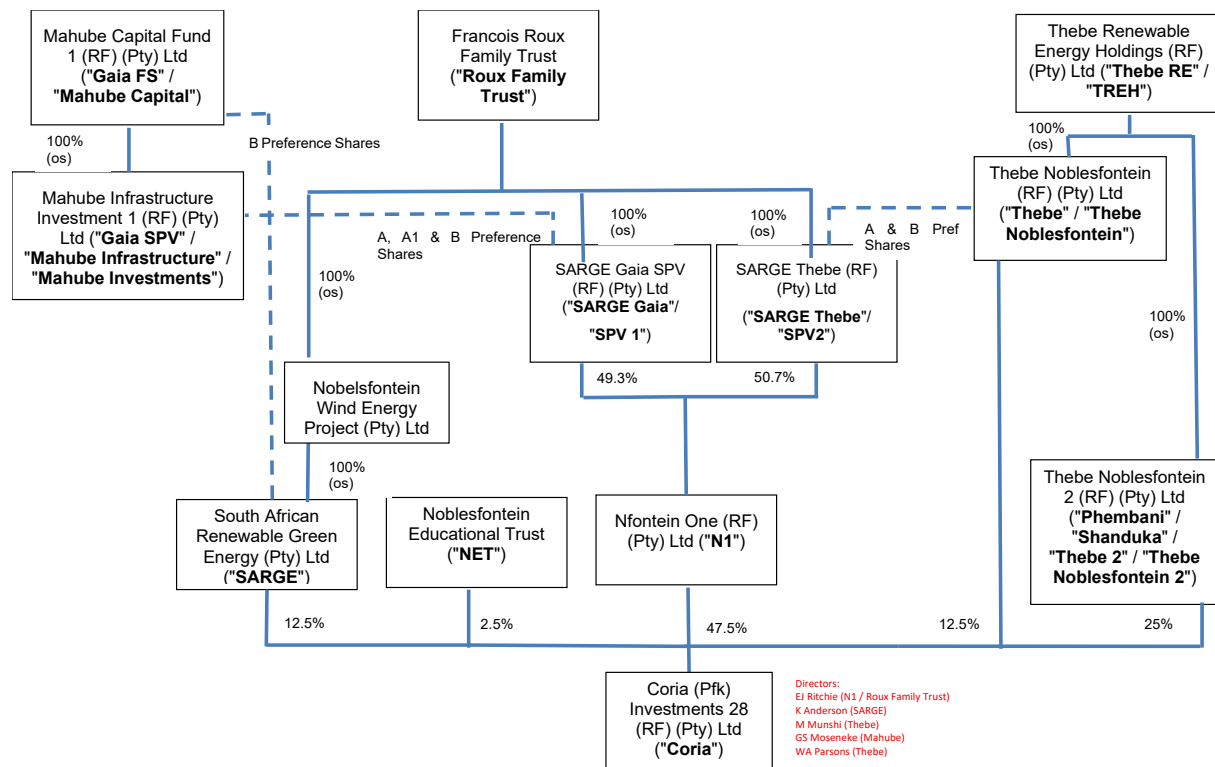
[7] Ms Ritchie deposed to the founding affidavit in the main application. She was not personally involved in the negotiations pertaining to the sale of Gestamp's interest but placed what can fairly be described as the best available evidence in relation thereto before the court, including contemporaneous email communications and various draft and final documents. Affidavits supporting her version were deposed to by Ms Jessica Blumenthal (the attorney who advised Mr Roux and was directly involved in the negotiations) as well as Mr Michiel Nieuwoudt, who at all material times the Sarge entities as well as Ms Blumenthal (and indeed Mr Nieuwoudt himself) understood to be the duly authorised representative of the Gaia/Mahube entities.

[8] According to the Sarge entities, the following were the key features and commercial drivers of the restructure: (1) The Roux family interests would purchase Gestamp's shareholding by way of external funding and become the majority shareholder of Coria; (2) as majority shareholder, the Roux family interests would obtain control of Coria and its business; (3) in accordance with a requirement of what was then known as the Department of Energy ('DoE') the Roux family would sell 12.5% of the Coria shares it obtained from Gestamp to a further B-BBEE 'partner', which was Thebe; and (4) the purchase of Gestamp's shareholding and loan claims was to be funded by the issue of the preference shares to which I have already referred.

[9] It is also their version that the preference share arrangement had the consequence that, while entitled to a preferential and specified return on these shares, the funders would not be entitled, like ordinary shareholders, to appoint directors to Coria's board (save that Thebe, pursuant to the DoE requirement, would also be an ordinary shareholder and entitled in this way to board representation). This was to ensure effective control of Coria by the Roux family, both in terms of shareholding and board representation. The funders contend differently. The Mahube entities say that effectively their exposure to Coria's is at least 21.58%, and that of the Thebe entities' is 59.90 %, as opposed to the exposure of the Roux family of only 16.02%.

[10] The shareholding restructure was ultimately implemented as follows: Gestamp sold its interest to NI, and N1 simultaneously sold 12.5% thereof to Thebe, with the

result that Thebe became both a preferent and ordinary shareholder. The effect of all this was that the shareholding in Coria changed to the following: N1- 47.5%; Sarge – 12.5%; Thebe – 12.5%; Thebe 2 – 25%; and NET – 2.5%. Collectively therefore, in terms of shareholding, the Roux family wearing its various hats- the Sarge entities - achieved a cumulative 61%, the Thebe entities a cumulative 37.5%, and NET 2.5%. The organogram to which I referred earlier is set out hereunder:



[11] However, a complication arose at an advanced stage of the negotiations. While the various parties were aware that the Mahube entities, as one of the major funders, also required - as a component of the transaction - a seat on Coria's board, the Sarge entities at least were allegedly given to understand that this could wait until after deal closure, at which time the Restated Shareholders Agreement would be renegotiated, including director voting percentages. However, the Mahube entities are listed companies and, according to the Sarge entities as well as Mr Nieuwoudt, Mahube's JSE sponsors belatedly insisted that Mahube obtain a board seat on closing. Mahube takes a different view and maintains that in the applicable Indicative Preference Share Facility Term Sheet ('Term Sheet') prepared by Gaia and concluded between Sarge (represented by Mr Roux) and Gaia (represented by Mr Nieuwoudt) on 24 April 2017, provision was already made for such representation prior to financial close. What is noted however is that in the Disclaimer at the beginning of the Term Sheet it is

specifically recorded as follows: 'This [document] was prepared ... in order to indicate, on a preliminary basis, the feasibility of a possible transaction or transactions ... The outline of any terms set out herein are issued for discussion purposes only ...'.

[12] Returning to the complication, the following provisions in Coria's MOI (as amended and dated 31 July 2012) are relevant, although I refer to them out of sequence since to me it makes more sense. Clause 7 is that no amendment to the MOI shall be of any force or effect without the prior written consent of the DoE and the Lender (ie. funder/s). Clause 37.1 is that Coria's board shall comprise of not more than five directors, and clause 41.6.2 is that each director shall have one vote. Clause 13.2 makes provision for Gestamp to nominate three directors, Thebe 2 (at the time known as Shanduka and subsequently Phembani) one director, and Sarge the remaining director. Clause 15.5 is that decisions are taken by majority vote. In terms of clause 2.2, where there is a conflict between a provision of the Restated Shareholders Agreement and MOI, the MOI shall prevail to the extent of the conflict, subject to certain exceptions which are not relevant for present purposes.² Finally clause 2.4 provides that an unalterable or non-elective provision of the Companies Act³ shall prevail to the extent of any conflict between the MOI and that Act. Also relevant are the following clauses in the Restated Shareholders Agreement: clause 12.3, that the board of Coria shall, unless otherwise agreed, at all times consist of five directors; clause 13.2, reflecting Gestamp as having three directors and Thebe 2 and Sarge one each; clause 15.5, that each director has one vote; and clause 40.4, that no modification or amendment is effective unless in writing and duly signed by 'the Parties' ie the shareholders.

[13] On 24 August 2017, Mr Andries Malherbe of N1 wrote an email to Mr Aman Jeawon of Phembani. After expressing his gratitude for Phembani's support during the transaction, and confirming the unconditional approval of the DoE and the unanimous consent of the ' senior lender group' (which I was informed during argument, by counsel for the Sarge entities, was Gestamp backed by Standard Bank) he explained : ' We are aware that you were potentially selling your stake in the Noblesfontein Project

² These are (a) any provision of the shareholders agreement merely supplements, but is not inconsistent with, the MOI; (b) the MOI itself provides for the provision in the shareholders agreement to prevail; or (c) the Companies Act does not require the MOI to take precedence over the particular provision in the shareholders agreement.

³ No 71 of 2008

company, and we have tried to limit any knock-on effects to you, especially anything that could complicate your process or impact your value. However, something has come up and we have to ask your support once more. I know this is a lot to ask, and we would not do so had we not exhausted all other avenues. We would like to ask your support to amend the current shareholders agreement...to expand the board from five to six members... as you know, the DoE insisted that the BEE shareholding be increased by 12.5%, which was taken up by Thebe. They were able to exchange some of their debt funding into equity funding. That came with the requirement of a board seat and the end result was two + one seats for Francois, and one each for Phembani and Thebe, making up five seats’.

[14] He then referred to the ‘late’ board seat requirement of Mahube’s JSE sponsors and wrote: ‘ we are requesting that the shareholders allow the expansion of the board to six members so that everyone can be accommodated’ , adding that Sarge was open to any other solutions Phembani might have, but stating: ‘ it seems that adding one seat is the least disruptive option, especially as it is a short term solution- as a new SHA [ie. shareholders agreement] is needed to deal with all the changes and requirements [as a result of the transaction]. We have approvals from the DoE and the Lenders on the basis that there is a majority owner, who is also responsible for management and we would not like to encroach on that by creating a board where the majority owner actually only has a minority position. One more seat does bring the board to even numbers and it could be considered to give the majority owner a casting vote... I have canvassed this with Thebe and they are supportive of a one seat expansion, with a casting vote for the majority owner. Jacques [Mr Jacques De Wet of Thebe] is happy to talk to you should you want to discuss...’

[15] Mr Jeawon replied later that day. After advising he would circulate the request internally, he wrote: ‘in the interim, my sincere gut feel is that Phembani [now Thebe 2] be allocated 2 seats for its existing 25% and then mathematically allocating to Francois the minimum number of seats (or a casting vote). This is the best and immediate compromise, also least disruptive to all existing parties (ie. from a dilution of existing rights with Gaia [Mahube] coming into the allocation as external funder not as shareholder). Also then ...12.5% stake for Thebe gets them one seat while 25% gets Phembani two seats. All things equal this is probably a fair allocation in the current context. We could also consider a voting schedule that allows voting rights proportional

to specific board seats. As an example (one board seat for Francois = 1.5 votes (higher), while one seat for GAIA [Mahube], Thebe and Phembani = only one vote per seat). This can be done to save from having a very big board with added costs. What do you think? Let's chat tomorrow'. It is apparent therefore that at this time the Lenders, the DoE, Thebe, Phembani and Gaia were all agreed that the Roux family would be the majority owner of Coria.

[16] In emails over the following day between Mr Malherbe, Mr Brett Jordaan who was one of Sarge's financial advisors, Ms Blumenthal (who as previously indicated was the attorney representing the Sarge interests) and others in her team at ENS attorneys, it was agreed that the best idea was to go with a voting regime proportional to shareholding and not to the number of board seats held. Mr Malherbe wrote to them all later the same day to confirm Mr Roux approved but would like Sarge's voting allocation to be '51% + say 9%'; Dr Hendrik Snyman of the Gaia entities (now Mahube) was 'very grateful, and is fine with a nominal vote'; Mr Jeamon of Phembani (now Thebe 2) was satisfied; and that he had tried contacting Mr De Wet (of Thebe) with no luck as yet. On Saturday 26 August 2017, Mr Malherbe sent an email to Ms Blumenthal and her team at ENS which was copied to Mr Roux. He wrote: 'I think we have a solution for the board membership issue. I have discussed this with all the relevant parties, starting with Francois, and including Phembani (who were an early proponent of the idea), as well as Gaia and Thebe. I finally spoke to Jacques late on Friday. We have a consensus to for a weighted voting scheme where the directors vote the shareholding they represent (with some help for Gaia). The plan is that it works as follows: (1) Francois appoints two directors, he votes 51% and I vote circa 9%; (2) Phembani votes 25%, one director although they believe they have appointed two ??; (3) Thebe votes 10%, one director; (4) Gaia votes 2.5% (from Thebe), one director. This ticks all the boxes; Francois has control, Phembani is happy. Thebe is ok and Gaia have a seat. And we don't have to increase the size of the board. There seems to be a lot of comfort with this and I feel this is the way to go. Question is: how do we implement this in the most efficient way? Do we have quorum issues?' On 28 August 2017, Ms Blumenthal recorded the in-principle agreement reached in an email to all the parties' representatives, which changed to final agreement that instead of Gaia having 2.5% it would have 9%.

The suite of written agreements giving rise to the dispute

[17] On 15 September 2017, a preference share agreement was concluded between Sarge Gaia and Gaia SPV, the latter now Mahube Infrastructure (the 'SPV 1'). Relevant are the following: clause 12.2, that Sarge and the other transaction parties (including Gaia SPV, Coria and N1) would comply with their constitutional documents and procure no changes were made without Gaia SPV's prior written consent; clause 12.29(a), that Sarge would procure Coria's Restated Shareholders Agreement was amended to provide for the appointment and retention of a representative of Gaia SPV's choice to Coria's board; clause 27, that all amendments to the SPV1 would have to be in writing and signed by the parties; clause 31, the sole memorial provision; and clause 32, that no party would be bound by any express or implied term, representation, warranty, promise or the like not recorded in any Finance Document. In clause 1 'Finance Documents' were defined as including not only the SPV1 itself but also, amongst others, the Conditions Precedent Agreement and Conditions Precedent ('CP') Fulfilment Notice. In turn the Conditions Precedent Agreement was the funding agreement to which Sarge Gaia was also a party. The signatories to the SPV1 were Mr Roux in his capacity as director on behalf of Sarge Gaia and Mr Nieuwoudt in his capacity as director on behalf of Gaia SPV.

[18] On 18 September 2017, a similar agreement was concluded between Sarge Thebe and Thebe (the 'SPV2'). Relevant are the following: clause 12.16(b), that Sarge Thebe and other transaction parties (including N1 and Coria) would comply with their constitutional documents and procure no change was made thereto without the prior written consent of TREH; 12.30(a), that Sarge Thebe was obliged to procure that a chosen representative of TREH 'is and remains' on the boards of inter alia Thebe, N1 and Coria; clause 30, the sole memorial clause; and clause 31, that no express or implied term, representation, warranty, etc not recorded in any Finance Document would be binding. 'Finance Document' was defined in clause 1 as including, amongst others, the applicable Conditions Precedent Agreement and CP Fulfilment Notice. In turn the Conditions Precedent Agreement was the funding agreement to which Sarge Thebe was also a party. The signatories to the SPV2 were Mr Roux in his capacity as director of Sarge Thebe and Mr Rapulane Mogototoane as authorised signatory on behalf of Thebe.

[19] On 21 September 2017, a Directors' Voting Rights Agreement ('DVRA') was concluded in respect of Coria. That date was the last signature date. The parties to the

DVRA, ex facie the document itself, were N1, Mr Malherbe, Mr Nieuwoudt, Thebe, Mr Andile Mjamekwana, Sarge and Mr Roux. This was also recorded in clause 1.3.14 thereof in which the parties were defined as 'SARGE, Francois, N1, Andries, Mich, Thebe and Andile'. Neither Phembani (now Thebe 2) nor its nominated director were parties. The following portions of the DVRA are relevant. At the outset the Gestamp sale transaction was recorded, as well as that Gestamp was 'no longer a party to' the Restated Shareholders Agreement but that N1 and Thebe were now parties thereto; but clause 1.3.8 did provide that the effective date of the DVRA was the date upon which the Gestamp sale transaction became unconditional and was implemented. Thereafter the representation and voting powers of Coria's directors as contained in the Restated Shareholders Agreement and MOI were set out. Paragraph E of the Recitals clause reads that 'Notwithstanding the provisions of the Shareholders Agreement as recorded in C and the provisions of the MOI as recorded in D above, the Parties have agreed to establish a voting arrangement in respect of the voting rights of each of the Directors and to regulate their rights and obligations insofar as the voting rights that are attached to each of the Directors are concerned'.

[20] In clause 2 it was provided that 'This Agreement shall ... endure until such time as Phembani is no longer a Shareholder and no longer has a nominee on the Board of the Company'. Clause 3 contained a voting regime, namely 'Francois (SARGE)' 52%; 'Andile (Thebe)' 11%; 'Mich (N1)' 9%; and 'Andries (N1)' 2.36 %. It was further specifically agreed that this 'would not affect Aman (Phembani) having 25.64% ...'. Clause 7 stipulates that 'This Agreement constitutes the whole agreement between the Parties relating to the subject matter hereof and supersedes any other discussions, agreements and/or understandings' regarding same. The signatories to the DVRA were Mr Roux both in his personal capacity and as duly authorised representative on behalf of Sarge and N1 (on 21 September 2017); Mr De Wet as duly authorised representative on behalf of Thebe (on 18 September 2017); and Mr Malherbe, Mr Nieuwoudt and Mr Mjamekwana in their personal capacities (Mr Malherbe signed on 21 September 2017, Mr Nieuwoudt on 19 September 2017, and Mr Mjamekwana on 18 September 2017). Again therefore, at that time, it is apparent all the shareholders were agreed that the Roux family would have the controlling vote. Phembani's only concern was that its 25.64% should not be diluted in any way, and although it was not a party to the DVRA, provision was made to that effect therein.

[21] On the same day (ie. 21 September 2017) a First Addendum to the Restated Shareholders Agreement ('First Addendum') was concluded between Phembani (Thebe 2), Sarge, NET, Coria, N1 and Thebe for the stated purpose of amending the Restated Shareholders Agreement. The effect of clauses 2.16 to 2.18 thereof was that: (1) five directors became a maximum of five directors, which brought this provision into line with the corresponding one in the MOI; (2) the one vote per director was removed; and (3) the new director representation would be as follows: N1 – two directors; Thebe 2 – one director; Sarge – one director; and Thebe – one director. Importantly, clause 2.25 amended the previous voting regime of 'one director, one vote' in clause 15.5 of the Restated Shareholders Agreement to make it proportional to shareholding percentages: '... having as many votes as the number of Shares which the Shareholder who nominated or appointed him holds (when expressed as a percentage of the number of Shares held by those Shareholders entitled to nominate a director), divided by the number of Directors ... nominated ...' but 'subject to the amendment of the MOI in the manner contemplated in clause 29 of the Restated Shareholders Agreement. Clause 2.25 also specified, for the avoidance of doubt, such voting percentages to be as follows: Sarge – 12.82%; N1 – 48.72%; Thebe – 12.82%; and Phembani (Thebe 2) – 25.64%.

[22] Clause 29 in its amended form in the First Addendum reads as follows: 'The Parties agree that they shall take all reasonable steps to ensure that the MOI reflects the relevant provisions of this Agreement, and the Parties specifically agree that they will take necessary steps to expedite the required amendments to the MOI to reflect the voting provisions contained in Clause 15.5 of this Agreement, subject to the prior written consent of the Lenders and the DoE'. Clause 5 is the sole memorial provision. The signatories to the First Addendum were Mr Jeawon – in his capacity as duly authorised representative of Phembani; Mr Roux – in his capacity as duly authorised representative of Sarge, NET, Coria, and N1; and Mr Mogototoane – in his capacity as duly authorised representative of Thebe.

Events subsequent to suite of written agreements

[23] According to the Sarge entities, after conclusion of the suite of agreements – and indeed until Mr Gontse Moseneke replaced Mr Nieuwoudt as representative of the Mahube entities on the boards of N1 and Coria in the second half of 2020, there were

no disputes regarding the voting rights of Coria's board of directors or the validity of the agreements. Coria's board functioned in the manner contemplated by the First Addendum, the DVRA, and clause 12.29 of the SPV1 (ie. Mahube's representation on Coria's board) without objection or complaint from any quarter. This allegation was not dealt with in the Thebe entities' answering affidavit. In the Mahube entities' answering affidavit it was alleged that this was simply because all decisions taken at board level were unanimous and for no other reason. In the Thebe entities' replying affidavit in the consolidated application it was alleged that up until 2022, the relationship between the Coria directors was cordial and board decisions were taken unanimously; there was thus no need to refer to the weighting or otherwise of the directors' percentage voting rights, the DVRA, the First Addendum or the SPV1.

[24] During October 2018 – the exact date was not disclosed but nothing turns on this – TREH also purchased the entire shareholding in Phembani, which resulted in the further name change to Thebe 2 in March 2019. Accordingly, whereas previously TREH only owned 100% of the shares in Thebe, it now also owned 100% of the shares in Thebe 2. Although this purchase is common cause, the Thebe entities' stance is that Phembani was therefore no longer one of Coria's shareholders, and no longer had a nominee on Coria's board 'for purposes of clause 2 of the DVRA'. The response of the Sarge entities is that despite the change, Thebe 2 retained the same 25% shareholding in Coria as Phembani and its previous iterations had held since inception. This the Thebe entities admit.

[25] After Mr Roux's passing in August 2021, Ms Ritchie was appointed to the various boards of the Noblesfontein group of companies to effectively replace Mr Roux as the Roux family interests' representative director. Subsequently Mr Malherbe resigned his directorships and Ms Kim Andersen, an acquaintance of Ms Ritchie who she describes as an experienced businesswoman, was appointed to replace him. The Thebe and Mahube entities admit the Sarge entities' averments that the current directors of Coria and their representative capacities are: (1) Ms Andersen – the Sarge appointee; (2) Ms Ritchie – as one of the two N1 appointees; (3) Mr Moseneke – as the other N1 appointee and the representative of the Mahube entities; (4) Mr Sunil Ramkillawan – as representative of the Thebe entities; and (5) Ms Wendy Parsons, as the other Thebe entity representative, who replaced Mr De Wet during late 2022 or early 2023.

[26] According to the Sarge entities, the process of amending Coria's MOI in accordance with clause 2.29 of the First Addendum (ie. from 'one director, one vote' to weighted percentage voting rights proportional to shareholding) only commenced during 2019/ 2020. Because all parties got along there was no real urgency, and – although as previously stated this is disputed by the Thebe and Mahube entities – the board was functioning on a practical level in line with the First Addendum and DVRA. The Thebe entities maintain the process commenced in mid-2021; the Mahube entities do not take issue with the Sarge entities on this score. The Sarge entities allege that as part of the process, attempts were made to amend the Restated Shareholders Agreement to cater for changes in shareholding as well as alignment with the proposed amended MOI. The Thebe entities say that the sole purpose of the proposed amendments to the Restated Shareholders Agreement was in respect of shareholding and nothing more. The Mahube entities did not respond to Sarge's allegation about this in their answering affidavit.

[27] The Sarge entities also say that towards the end of 2021, agreement was reached on most of the amendments. From correspondence annexed in support of this averment, the following. On 14 December 2021, Mr Hennie Hanekom, who it appears was Coria's financial manager, wrote to various representatives and interested parties that 'Mahube' had requested a minor amendment to the MOI to incorporate their contractual right in terms of the SPV1 for a director's representative on Coria's board. He apparently annexed Mahube's proposed tracked changes to the MOI, as well as a letter in which 'the parties agree to act in accordance with the provisions of the Amended and Restated MOI while the transition process is underway and consent is being sought from third parties'. The third parties were the DoE and Lenders. The annexures to which Mr Hanekom referred were not attached to his email placed before the court. However, the draft amended MOI with tracked changes and queries by Mr Moseneke was attached to Ms Blumenthal's affidavit. With reference to clause 41.6.3 (dealt with below) he asked: 'Please explain the reason why we are now attaching varying percentages to director voting power, as opposed to retaining the one vote per director that we have to date'.

[28] On 15 December 2021, Ms Blumenthal wrote to Mr Moseneke (amongst others) in which she confirmed that Mr Hanekom had asked her to provide him with some context around the directors' voting percentages contained in the proposed

amendments to Coria's MOI as set out in clause 41.6.3 thereof, which now reflected the voting percentages as follows: Sarge – 12.82%; N1 – 48.72%; Thebe – 12.82%; and Thebe 2 – 25.64%. Ms Blumenthal continued: 'At the time the acquisition transaction was concluded in 2017 the shareholders agreement of Coria provided that directors would vote in accordance with the percentage of the shareholder who nominated them to the board, however the MOI had not been aligned to this or the Companies Act, 2008 and provided that each director would exercise one vote. It was accepted at the time however between the shareholders of Coria that each director would vote in accordance with the shareholding percentage. Mahube (GAIA at that stage) as you know also required (as was memorialised in the preference share agreement) as a condition of their funding that they have representation on the board of Coria, notwithstanding that they were not a direct shareholder in Coria. This was not accepted by Phembani, shareholder of Coria at the time, or Thebe. As a compromise, N1 agreed to procure a seat for a Mahube representative on the board of Coria. This was accepted by Phembani and Thebe on condition that their voting percentage would not be affected. In order to provide a voting percentage for Mahube, N1 gave up some of its voting percentage (with reference to shareholding). Thebe agreed to give up a nominal amount of their percentage and the percentage which related to NET's shareholding (as NET did not have a director representative on the board) was included in the Mahube slice'.

[29] She continued: 'It was not possible to amend the MOI at that stage given that several consents were required and Phembani also did not want to consent to any amendments to the MOI as they were considering exiting and wished amendments to be made after they had done so. As such in order to accommodate these various requirements the parties agreed at the time to an agreed percentage of voting rights that would be exercised by each director on the board of Coria, and N1 agreed that it would nominate a Mahube representative to hold a board seat on the Coria board. Given that this agreement could not be captured in the MOI at that stage a "gentleman's agreement" was concluded between the individual directors who made up the Coria board at that time, agreeing that when making a decision as a board they would exercise voting rights in the agreed percentages and that the MOI of Coria would be amended as soon as possible to record this. This is the amendment that is being made now. The voting percentages of clause 41.6.3 reflect the agreed position since 2017. Once the MOI amendment is effective the directors voting agreement will fall

away- it is there merely to record the position until such time as the MOI amendment is effective’.

[30] In her supporting affidavit, Ms Blumenthal also explained as follows. At the time of conclusion of the suite of agreements, the Gaia (now Mahube) entities were represented by the Gaia group CEO and its Chief Investment Officer, who were Mr Nieuwoudt and Dr Snyman respectively. During September 2017, an agreement was concluded between N1 and Gaia in terms of which a representative of Gaia would be entitled to exercise the voting rights of one of the N1-appointed directors on Coria’s board on the basis that the voting rights so exercised by Gaia would be 9% of the total voting rights exercisable by Coria’s directors (this is the ‘oral agreement’ to which I refer hereunder). According to Ms Blumenthal that agreement came about as follows. As a preference share funder, Gaia’s position was of course different to that of an ordinary shareholder in that it was not entitled, as of right, to representation on Coria’s board. Gaia appreciated this and its representatives - Mr Nieuwoudt and Dr Snyman – conveyed that Gaia would be satisfied with ‘visibility’ on Coria’s board in the form of a nominal vote. Gaia conveyed – at least initially – that its required board seat could be finalised after the transaction had been closed. This changed relatively late in the day when - in about late August 2017 – Gaia informed the Sarge entities that its board seat in fact needed to be finalised and formalised at the time of closing the transaction, which was then imminent. In the circumstances arrangements had to be made – under considerable time pressure and as a matter of urgency – to accommodate that request.

[31] Ms Blumenthal further explained that N1 – through Mr Roux – agreed to allow Gaia to exercise the voting rights of one of the two N1 appointed directors on Coria’s board on the express basis of 9% (only) and Gaia – represented by Mr Nieuwoudt – accepted this. It was also acceptable to Phembani and Thebe on the basis that their own voting percentages on Coria’s board would not be affected. The 9% oral agreement satisfied Gaia’s requirement while also allowing Mr Roux – as representative of the de facto majority shareholder in Coria to retain control of the Coria board, which was a non – negotiable requirement for Mr Roux. The agreement of 9% (and no more) of N1’s total voting rights was recorded in both the DVRA and clause 12.29 of the SPV1. The relevant portion of clause 12.29 of the SPV1 reads as follows: ‘The issuer [ie. Sarge Gaia] shall procure that ... a representative of ... Gaia [now Mahube] is ... and remains on the board ... of each of SPV1 and N1 ... provided that pending such

appointment ... [that] representative ... is entitled to exercise the voting rights of one of the directors of [Coria] appointed by N1 pursuant to ...the [DVRA]'. Ms Blumenthal confirmed that the Gaia/ Mahube entities are no longer represented by Mr Nieuwoudt or Dr Snyman, and that Mr Moseneke took Mr Nieuwoudt's place as the Gaia/ Mahube representative on Coria's board in late 2020. In his separate supporting affidavit, Mr Nieuwoudt confirmed Ms Blumenthal's affidavit evidence in all respects. He added the intention was that following the anticipated exit of Phembani as a shareholder, the Coria MOI and/or shareholders agreement would be amended to incorporate and record Gaia's agreed 9% voting right.

[32] Returning to the chronology of events, extensive correspondence followed between the various parties after Mr Moseneke raised his query. In sum, the Mahube entities took issue with the version of the Sarge entities, and subsequently the Thebe entities insisted that TREH, in its own right, was entitled to appoint an additional director to Coria's board. This deadlock resulted in the Sarge entities' application being launched on 13 April 2023 (in response to which the Mahube entities opposed and launched a counter- application) and the Thebe entities launching the separate application on 22 September 2023.

Relief sought by Sarge entities

[33] The relief sought by the Sarge entities evolved somewhat during the course of this litigation, but in its finally amended form – handed up by agreement by way of a draft order during argument - they seek the following relief: first, it be declared that the Mahube entities' entitlement to have a representative exercise the voting rights of one of the two directors of Coria appointed by N1 arises from, and in terms of : (a) clause 12.29 of the SPV1 and (b) an oral agreement concluded between N1 and the Mahube entities during or about September 2017; (c) is currently exercised on behalf of these entities by Mr Moseneke; and (d) is limited to a total of 9%. Second, it be declared that the 9% limitation is : (a) a contractually non-severable part of the Mahube entities' right to representation on Coria's board, and (b) is thus unenforceable pending the amendment of Coria's MOI in the manner contemplated in clauses 2.29 and 15.5 of the First Addendum. Third, that Coria and the Thebe entities be directed to take all steps reasonably necessary to expedite the required amendments to Coria's MOI to reflect the voting provisions contained in clause 15.5 of the First Addendum, including (a)

requesting the written consent of the DoE and Lenders for this purpose; and (b) should such consent be provided, proposing and adopting the required special resolution in terms of s 16(1)(c) of the Companies Act and, following its adoption, filing the requisite notice of amendment of the MOI with the CIPC⁴ in terms of s 16(7) of that Act. Fourth, dismissal of the Mahube entities' counter-application and the Thebe entities' application, with costs to be awarded in favour of the Sarge entities in all instances.

[34] Having thought about it and although somewhat unusual, I have decided to deal first with the cases of the Mahube and Thebe entities because of how the relief sought by the Sarge entities evolved, which truncates the latter's case and assists me in focussing on the remaining disputed issues.

Basis of opposition by Mahube entities and counter-relief sought

[35] The Mahube entities' answering affidavit was deposed to by Mr Moseneke, who is a director of both. In limine, they contend that the declaratory relief sought by the Sarge entities in respect of voting percentage rights and Mr Moseneke exercising them is premature since: (1) clauses 7.1 and 7.4.2.2 of Coria's MOI and clause 29 of the First Addendum all require the prior written consent of both the DoE and Lenders for any amendments to the MOI to be of force and effect, and it is common cause such consent has not been obtained, and (2) similarly, the Sarge entities have failed to procure the written consent of both the Mahube and Thebe entities to pass a special resolution or amend Coria's MOI as required by clauses 12.16(b) and (c) of the SPV1 and SPV2, which prohibit these taking place without such consent 'save to the extent necessary to implement the transactions contemplated or permitted in the Finance Documents and the Transaction Documents'. The alternative point in limine is that the DoE and Lenders should have been joined, given their interest in any order the court may make.

[36] On the merits, they deny the conclusion of the oral agreement upon which the Sarge entities rely. They also say that s 16(1)(c) of the Companies Act does not assist these entities, since it expressly provides that a company's MOI may only be amended if a special resolution to that effect: (a) is proposed by the board or shareholders entitled to exercise at least 10% of the voting rights; and (b) is adopted at a

⁴ Companies and Intellectual Property Commission

shareholders meeting, or in accordance with s 60 of that Act. Their challenges to the current enforceability or otherwise of the DVRA need not be dealt with save to the extent below, given the Sarge entities' open concession, made only during argument, that it is unenforceable unless and until the MOI is amended. However, the Mahube entities contend that the DVRA can never be enforceable in future in light of s15(7) of the Companies Act since one of the shareholders, Phembani, was not a party thereto.

[37] Although they say that the allegedly unenforceable DVRA constitutes the foundation of the relief sought against them, they do not take issue with the validity of the First Addendum, and in fact rely on it to argue that the DVRA could not amend it. Put differently they surely accept, by necessary implication, the validity of clauses 2.25 and 29 of the First Addendum, subject of course to consequent amendment of the MOI, which altered the voting regime to one proportional to shareholder representation, and placed an obligation on all shareholders at the time (and who were all parties thereto) to take the necessary steps to expedite that alteration. Their stance on this score is limited to what is set out below in relation to clause 12.29 of the SPV1.

[38] The Mahube entities say the DVRA has in any event fallen away because: (a) in October 2018, Thebe purchased the entire shareholding in Phembani, as opposed to Phembani's shares in Coria (ie .of 25%) and as such Phembani effectively no longer existed as a shareholder of Coria from that date; (b) the Mahube entities were not parties to the DVRA and it cannot bind them; (c) Mr Nieuwoudt's obligations under the DVRA ceased when he resigned as a director of Coria in July 2020: and (d) so too did those of Mr Roux on his passing in August 2021.

[39] As far as the Sarge entities' reliance on a portion of clause 12.29 of the SPV1 is concerned (ie. that pending appointment of a Gaia/Mahube representative to the boards of N1 and Sarge Gaia, the voting rights of one of N1's appointees to Coria's board would be exercised in accordance with the DVRA, ie. 9%), the Mahube entities assert that such reliance is in any event unsustainable since, in terms of that clause, the appointment had to happen within 180 days of 20 September 2017, which was the CP Fulfilment Date and has long since passed. They also contend that the Sarge entities do not suggest 'the proposed amendment to the shareholders agreement was intended to limit the voting rights of Mahube Capital's nominated director'. Their interpretation that the DVRA was clearly intended as a temporary arrangement is borne out, they

submit, by 'amended clauses 13.2(a) and 15.5 of the Amended Restated Shareholders Agreement [the First Addendum] which, in essence, provide that N1 is entitled to nominate two directors to the board of Coria and that the two N1 directors' votes will constitute 48.72% of the total votes'.

[40] They accordingly contend in their answering affidavit that in the absence of agreement between Coria's individual directors the Mahube entities are entitled to 24.36% of the Coria voting rights, being half of N1's 48.72%. Mr Moseneke's answering affidavit contained a bare denial of the existence of the oral agreement relating to the 9% in the face of the direct evidence of Ms Blumenthal and Mr Nieuwoudt to the contrary (who I might add were on 'opposing sides'). He did however also say he was unable to refute the version of the Sarge entities, confirmed by Ms Blumenthal and Mr Nieuwoudt. The Mahube entities also filed an affidavit by Mr Khalipa Mbalo, who from 2015 until February 2023 was a director of Mahube Capital (the fifth respondent in the main application). His evidence was that the alleged oral agreement concluded in 2017 between N1 and the Mahube entities, ie. that Mahube Capital would use of N1's two seats on Coria's board on an interim basis, was not brought to the attention of Mahube Capital's board and nor was its approval sought or provided in relation thereto. In addition, says Mr Mbalo, Mahube Capital's board was not made aware, and had no knowledge, of the DVRA, and this only came to that board's attention through 'updates provided' by Mr Moseneke. Mr Mbalo also maintained Mr Nieuwoudt was not authorised to bind Mahube Capital in the manner contemplated in the alleged oral agreement purporting to limit its voting rights to 9%. During argument it was clarified that, in this respect, Mr Nieuwoudt had allegedly exceeded his authority.

[41] In this regard, and as alluded to earlier, there was no suggestion that Mr Nieuwoudt was otherwise not authorised to represent the Mahube entities' predecessor, Gaia, in the negotiations pertaining to the 2017 restructure. In his supplementary affidavit, Mr Nieuwoudt expressly confirmed he had been authorised to conclude the oral agreement as well (and which was recorded in one way or another in both the DVRA and First Addendum). He also confirmed, as pointed out in the Sarge entities' replying papers, that several Mahube representatives were privy to relevant emails concerning, amongst others, the DVRA and the agreed limitation on Mahube's voting rights. The emails in question, one from Ms Blumenthal and the other from Mr Rabie Smal (another attorney from ENS), both dated 1 September 2017, recorded the agreed

position and were despatched to all the respective parties' representatives, including Mr Nieuwoudt, Dr Snyman and Mr Tumi Leie for Gaia; Mr Mogotoane, Mr De Wet and Mr Mjamekwana for Thebe, as well as Mr Roux. These emails referred in terms to 'the voting percentages which have been agreed ...between N1, SARGE, Thebe and Gaia'. The 'agreement (side letter)' referred to in those emails was the DVRA which – as stated previously- recorded Gaia/Mahube's entitlement to exercise 9%.

[42] In the Sarge entities' replying affidavit (which was also the answering affidavit to the Mahube counter-application), Ms Ritchie's evidence was that not only were the relevant parties privy to these email communications, but so too were their respective legal representatives (Gaia/Mahube were represented by Cliffe Dekker Hofmeyr ('CDH') and Thebe by Webber Wentzel ('WW')). On 4 September 2017, CDH, which had by then seen the draft DVRA and draft First Addendum, responded to all that 'other than the numbering errors in the sub-clauses of the new clause 15.5, no further comments from CDH on the [First Addendum]. We also have no comments on the Directors Voting Right Agreement'. On 5 September 2017, Mr Mogototoane (Thebe's Chief Legal Officer at the time) responded to all concerned that 'Thebe has no further comments on this version of the shareholders agreement'. No affidavits were filed by any of the legal representatives involved on behalf of the Gaia/Mahube or Thebe entities at the time to refute the versions of Mr Nieuwoudt and Ms Ritchie on this score. The only retort of any substance by the Mahube entities is that it 'makes sense 'that CDH had no comment on the DVRA because the Mahube entities were not a party thereto'. Mr Moseneke also insinuated that Mr Nieuwoudt had some sort of falling out with Mahube prior to his resignation in 2020 and thus had an axe to grind. This was denied by Mr Nieuwoudt, but in any event during argument I was informed by counsel for Mahube that I could ignore that insinuation.

[43] The other leg of the Mahube entities' opposition in support of their reliance on clause 12.29 of the SPV1 as the overriding provision, is that their exposure to the equity of Coria is at least 21.58% as opposed to that of the Roux family of 16.02% (and that of the Thebe entities of 59.90%). Accordingly, they say, they have a material commercial interest in Coria and 'it is this interest that was sought to be protected, partially by Mahube Capital being granted a seat on Coria's board' in terms of clause 12.29. They say that support for the board seat requirement is evidenced inter alia by the following further provisions of the SPV1, namely that within 5 days in each instance, Sarge Gaia :

(a) must supply them with all board packs and minutes of board meetings of each Transaction Party [ie including Sarge Gaia, N1 and Coria]; (b) all documents dispatched by each transaction party to its shareholders; (c) details of any changes to be made to each transaction party's constitutional documents; and (d) upon receipt of a request by Mahube Capital, such further information regarding Coria's financial position, business and/or operations as it may reasonably require from time to time. To my mind, the other way of looking at it is that the purpose of these built-in safeguards is to provide the very protection Mahube requires for its commercial exposure as preference shareholder. However, this was not a point raised in reply by the Sarge entities, and I thus leave it there.

[44] The answering affidavit of Mr Moseneke was deposed to on 14 June 2023. In paragraph 78 he stated: 'I am in discussions with RMB who ultimately provided the preference share funding and may deliver an affidavit relating to, inter alia, the allegation of an individual (ie. Roux) retaining "control" of the Coria board. RMB's affidavit is unlikely to be finalised and available for delivery together with this affidavit, but will be delivered as soon as it is available'. This affidavit was never filed.

[45] The relief which the Mahube entities now seek – also handed up as a draft order by agreement during argument - is the following: first, that Sarge Gaia SPV (the tenth respondent) be directed to procure that Coria's shareholders agreement is amended to provide for the appointment and retention of a representative of Mahube Capital (to the satisfaction of Mahube Infrastructure) to Coria's board within 30 days of an order to that effect; second, in the event that Coria's MOI is amended pursuant to the new clauses 15.5 and 29 of the First Addendum, and for so long as Mahube Capital occupies a seat on Coria's board, it be declared that the vote of Mahube Capital's representative shall be a percentage equal to 48.72% divided by the seats occupied by N1's representatives [ie. currently two] plus Mahube Capital's representative, which as I understand it would thus afford the Mahube Capital representative 16.24% of the voting rights; third, it be declared that pending any amendment to Coria's MOI in respect of director voting rights, such voting rights will be on the basis of ' one director, one vote' with decisions taken by simple majority, in accordance with clauses 14.6.2 and 42.1 of the current MOI; and fourth, dismissal_ of the relief which the Sarge entities seek against the Mahube entities.

Basis of Thebe entities' opposition and relief which they seek

[46] The Thebe entities' founding affidavit in the separate consolidated application was deposed to by Mr Mogototoane, who is now the Chief Investment Officer of Thebe Investment Corporation (Pty) Ltd, on behalf of Thebe and TREH, which he says are the direct and indirect subsidiaries of Thebe Investment Corporation. To the extent he has no personal knowledge, he relied on that of Mr Johann Bester, Ms Parsons, Mr Sunil Ramkilliwan and Mr Muhammed Munshi, all of whom filed confirmatory affidavits. The respondents in the Thebe entities' application are Sarge Thebe, N1, Coria, Mr Malherbe, Mr Nieuwoudt, Mr Mjamekwana, Sarge, the executor of the late Mr Roux's estate (as far as I can gather), and the Mahube entities.

[47] According to Mr Mogototoane, Thebe and Mahube Infrastructure provided all the funding (through funds generated by way of preference shares), and Mr Roux and his various entities none at all. The response of the Sarge entities is that Thebe and Mahube Infrastructure financed their participation, not through 'own funding' but by raising external finance from Standard Bank and RMB, and the 'mere' fact that external financing was raised by the 'Roux family interests' cannot mean that the family made no contribution. Mr Mogototane's evidence is further that – as stated by the Mahube entities – the overall exposure of the Thebe entities to the equity in Coria is effectively 59.90%. The preference share funding of the Thebe entities was provided to Sarge Thebe on the strength of TREH's balance sheet. In light of the significant amount provided, it was a requirement of TREH that its chosen representative 'oversee the investment at a Coria level'. One of the protections in the SPV2 was the right of TREH to appoint a director to the boards of Sarge Thebe, N1 and Coria (amongst others). While TREH's nominations to the boards of Sarge Thebe and N1 (both in the form of Mr Ramkilliwan) have been accepted, its nomination to the board of Coria has not. This is something separate, says Mr Mogototoane, from the ordinary shareholder board representation of Thebe on Coria's board (in the form of Mr Munshi, who replaced Mr Ramkilliwan for Thebe 2, and Ms Parsons for Thebe) as a consequence of the B-BBEE requirement of the DoE, for which Thebe and Thebe 2 paid an additional amount of R 465 million.

[48] The Thebe entities oppose the main application of the Sarge entities, in the first instance, on the same in limine basis, ie. lack of prior consent by the Lenders, DoE,

Mahube and Thebe entities to amendment of the MOI in accordance with clause 2.25 of the First Addendum (ie. the shift to weighted voting percentages). In the second instance, their grounds of opposition are that: (a) the DVRA itself provided it would only endure for so long as Phembani was a shareholder and had a nominee on Coria's board, which is no longer the case; (b) its purpose was only to establish a voting arrangement in respect of the voting rights of each of the signatory directors in accordance with clause 2.25 of the First Addendum, and because the signatory directors are no longer directors of Coria, all having been replaced by different directors, the DVRA is no longer of any force and effect; (c) the DVRA cannot amend the Restated Shareholders Agreement because of the latter's no variation clause (unless reduced to writing and signed by all shareholders); and (d) it is in any event void in terms of s 15 (7) of the Companies Act since it conflicts with the MOI's 'one director, one vote' provision.

[49] The Thebe entities dispute the Sarge entities' version that Thebe, Thebe 2 and TREH currently share representation on Coria's board. They say this cannot be so, since it conflates the separate and independent rights of the ordinary shareholders with the preference shareholders. They maintain that TREH has no representation on Coria's board as a result of Sarge Thebe's refusal to give effect to clause 12.30 of the SPV2. Mr Mogototoane referred to a written resolution of TREH's board – which it is noted is only dated 29 September 2022, some five years after the event – in which reference was made to the SPV2, and it was resolved that he be appointed as that representative, with Mr Bester as his alternate. Its exact wording is that 'Rapulane Mabelane which all parties accept was meant to be a reference to Mr Mogototoane] be and is hereby nominated for appointment to the board of directors of Coria. Johann Bester be and is hereby nominated for appointment to the board of directors of Coria as ... alternate director'. Other than what follows, not explained is how TREH protected its material commercial interest in Coria, or exercised its oversight at Coria level, from date of conclusion of the SPV2 ie. 18 September 2017 (which as I have said was signed by Mr Mogototoane himself), or shortly thereafter from deal closure, until 29 September 2022. It is also noted that the first occasion on which demand was made for Sarge Gaia to act in accordance with clause 12.30 was on 30 September 2022.

[50] In response to the demand of 30 September 2022, Ms Ritchie, on behalf of the Sarge entities, referred to an email dated 7 May 2021 from Mr Sizwe Mncwango, the

Chief Executive Officer of Thebe Investment Corporation, to Mr Hanekom (Coria's financial manager) and Mr Roux in which they were informed that Thebe Investment Corporation 'requires that Mr Johann Bester will serve as a shareholder representative /director on behalf of' TREH, Thebe and Thebe 2 on Coria's board, with Ms Parsons as his alternate with immediate effect'. The explanation for this notification letter by the Thebe entities in their founding affidavit was that 'There is no reason why one person could not be nominated as director acting for each of [these] three entities ... this would be the prerogative of those entities and would not detract from the separate voting interests exercised by each person when wearing each separate proverbial hat'. They further alleged that in any event, by way of an email dated 28 October 2022, Thebe Investment Corporation 'sought to clarify its position by addressing a letter to SARGE in which it confirmed that the letter of 7 May 2021 and the historical appointment of previous directors of Coria bore no relevance to the matter at hand, particularly since Bester has since resigned from the board of directors of Coria ... what mattered was the composition of [that] board, which had to be constituted in accordance with ... clause 13.2 of the Restated Shareholders Agreement'.

[51] In this regard, the following. First, the *ex post facto* 'separate proverbial hat' hypothesis, which is unsupported by any contemporaneous objective communication to anyone else involved, or any direct affidavit evidence, appears to be pure speculation. Second, even if one were to accept it as correct, business people of this level of sophistication would surely have applied their minds as to how those voting percentages would operate amongst themselves, since otherwise no purpose would have been served by the notification letter. Third, the 28 October 2022 email did not, as alleged, emanate from Thebe Investment Corporation but from Mr Bester himself in his capacity as director of Thebe, and on behalf of Thebe, as is clear from numbered paragraph 2 thereof. Fourth, clause 13.2 of the Restated Shareholders Agreement deals with the pre-2017 restructure position in terms of which Gestamp had three board seats and Phembani and Sarge one each.

[52] When Ms Ritchie did not simply accept this, a Thebe board resolution was allegedly prepared for Mr Mogototoane's appointment as 'shareholder representative (but not director) of Thebe in relation to Coria', in addition to his nomination under the 29 September 2022 resolution. I say 'allegedly' because, despite apparently annexing it, this was not in the papers before me. The Thebe entities further submitted that, given

that Coria's MOI currently makes provision for only five directors, the appointment of a TREH representative will have to be achieved in one of two ways: (a) Sarge Thebe procuring that it gives TREH one of its two N1 seats together with 24.36% of the voting rights if the MOI is amended; or (b) Sarge Thebe procuring, through N1, an increase of five to six directors, with each director to have one vote.

[53] The Thebe entities seek the following relief, also in terms of a draft order handed up during argument by agreement: first, the DVRA be declared void and unenforceable; second, that TREH is independently entitled to nominate a director for appointment to Coria's board in terms of the SPV2; third, (a) until amendment of Coria's MOI, each director has one vote; and (b) if the MOI is amended, the 48% (more accurately, 48.72%) voting interest of N1 be split equally, with TREH being entitled to exercise 24% thereof (more accurately, 24.36%); fourth, that the directors of Sarge Thebe, N1 and/or Coria take all steps and sign all documents necessary to procure the appointment of the TREH representative within 10 days of an order granting such relief, and costs against Sarge and Mr Roux's estate.

The stance of the Sarge entities

[54] The Sarge entities say Mahube's denial of the oral agreement is without merit. Mr Moseneke accepts, as he must, that he is unable to dispute the truth of the facts alleged in this regard in the Sarge founding affidavit and those of Ms Blumenthal and Mr Nieuwoudt. Similarly, Mr Ramkillawan (of Thebe) admits he has no personal knowledge thereof. Both Mr Moseneke and Mr Ramkillawan are manifestly not able to personally put up any countervailing evidence since they had no involvement at all in the Noblesfontein Wind Farm at the time that agreement was concluded in 2017. Mr Mogototoane had the opportunity, but he did not do so. Accordingly, the bald denials of the Mahube and Thebe entities that such an agreement was concluded do not give rise to a genuine dispute of fact. The Sarge entities also submit both Mr De Wet and Mr Mjamekwana, who were Thebe's representatives at the time of conclusion of the oral agreement and DVRA, in fact indirectly support their version. Both deposed to confirmatory affidavits for Thebe, but neither disputed the conclusion of that agreement. I note the following in this regard. Mr De Wet was careful only to confirm the correctness of two sub paragraphs in Mr Ramkillawan's affidavit insofar as they related to him, namely 19.6.3 and 31.1.11. These were first, when Phembani exited, Mr

Jeawon was replaced on Coria's board by Mr De Wet (as nominee of Thebe 2). Second, Mr Roux recognised at time of conclusion of the 2017 transaction he would not exercise control over Coria due to the preference shareholders' involvement, but still required majority shareholding in Coria so that it could allow him to exercise control upon full redemption of the preference shares; hence Sarge and Coria received the funding and granted the preference shareholders the rights in the SPV1 and SPV2 that limited the control the Roux Family Trust would have enjoyed in the absence of the funding. Mr Mjamekwana was similarly careful. He only confirmed the correctness of two sub paragraphs of Mr Ramkillawan's affidavit insofar as they related to him, namely 19.1 and 35.2. These were that he was the director appointed by Thebe who concluded the DVRA on its behalf and in his personal capacity; and that since the First Addendum, Coria board decisions had been taken unanimously and there was thus no need to refer to voting regime percentages.

[55] The Sarge entities also say that after receiving Ms Blumenthal's explanatory email of 15 December 2021, Mr Moseneke did not reject that explanation. He wrote: 'Your note is well received and is most useful in providing some context ... The material that has been available to Mahube to date points to one vote per director (We had only recently had sight of the Directors Voting Agreement)'. On 16 December 2021, in response to an email from Mr Hanekom, Mr Moseneke wrote this was the first time he had seen the First Addendum, and Mahube was endeavouring to 'complete our understanding of these arrangements'. On the issue of Mr Nieuwoudt allegedly exceeding his authority by concluding the oral agreement, the Sarge entities point out that Mr Mbalo's version does not squarely deal with it. All he says is that the oral agreement was not brought to the attention of Mahube Capital's board, and nor was its approval sought or provided in relation thereto.

Discussion

[56] The only truly relevant factual aspect placed in dispute is whether the oral agreement was concluded. The other disputes all turn on matters of law, including interpretation. As regards the oral agreement, I am of course not permitted to infer its existence and terms only from the email correspondence exchanged at the time. However, two deponents with personal knowledge of the relevant facts squarely put their heads on the block, as it were, namely Ms Blumenthal and Mr Nieuwoudt. Neither

has any interest in the outcome of this litigation. They acted for opposing sides. Both confirm the conclusion and terms of the oral agreement. The emails exchanged serve to support what they say. The evidence above, which I have deliberately set out in detail, mostly speaks for itself. Having regard to that evidence, as well as what I have already noted in relation thereto, I am persuaded that the Sarge entities have made out a solid case on this score, and the Mahube and Thebe entities have failed to raise a genuine or bona fide dispute of fact. Accordingly, applying the Plascon-Evans rule, the version of the Sarge entities in relation to the conclusion and terms of the oral agreement must prevail.

[57] As far as Mr Nieuwoudt exceeding his authority is concerned *Wightman*⁵ makes clear that when facts averred are such that the disputing party must necessarily have knowledge of them and be able to provide countervailing evidence, but instead relies on a bare or ambiguous denial, the court will generally have little difficulty in finding the absence of a genuine and bona fide dispute of fact. The best the Mahube entities came up with was the ambiguous denial of Mr Mbalo. When I raised with counsel for Mahube the absence of any clear evidence of what Mr Nieuwoudt was, and was not, authorised to do on Gaia's behalf at the time, which would surely have been recorded in at least a resolution of some sort given the importance of the 2017 transaction, he fairly drew my attention to a single paragraph in Mr Moseneke's replying affidavit and said he could take it no further. That is paragraph 66.2 which reads in relevant part that: 'I only became aware of the DVRA and the First Addendum during late 2021. Such documents were not in the document repository of the Mahube entities, with services in this regard having been provided by Gaia Infrastructure Partners Proprietary Limited ("GIP") to the Mahube Entities. Upon termination of the management agreement with GIP during 2020, it appears there was not a proper hand-over of records and documents from GIP'. This was disclosed for the first time in reply. No evidence was placed before the court why the Mahube entities had not taken the trouble to obtain the allegedly missing handover records and documents and to satisfy themselves of the actual extent of Mr Nieuwoudt's authority if they genuinely intended to challenge it. Moreover, there was no suggestion by anyone else involved for Gaia at the time, including its own legal team which represented it in the 2017 transaction, that Mr Nieuwoudt exceeded his authority, apart from Mr Mbalo's unsubstantiated and vague averments. Having regard to all this,

⁵ *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) at para 13

and again applying the Plascon-Evans rule, the version of Mr Nieuwoudt and the Sarge entities must similarly prevail.

[58] I now turn to the issue of whether or not the DVRA is valid. Section 15(7) of the Companies Act provides as follows:

‘The shareholders of a company may enter into any agreement with one another concerning any matter relating to the company, but any such agreement must be consistent with this Act and the company’s Memorandum of Incorporation, and any provision of such an agreement that is inconsistent with this Act or the Company’s Memorandum of Incorporation is void to the extent of the inconsistency.’

[59] In their papers neither the Thebe nor Mahube entities contend that the oral agreement, if found proven, falls within the ambit of s 15(7) and accordingly I am not required to determine this. Neither maintained that the oral agreement is void or unlawful on any other basis, and neither seek declaratory relief to the effect that it is. I must thus assume, without deciding, that for purposes of the matters before me, the oral agreement (between N1 and Gaia/Mahube) is both valid and binding on the parties thereto. The Thebe entities instead seek an order declaring the DVRA to be void ab initio on the basis of s 15 (7). They say this is not a matter of interpretation or commercial preference but a statutory mandate: any agreement inconsistent with a company’s MOI is ‘void to the extent of the inconsistency’. They say the Sarge entities’ attempt to circumvent this through what they refer to as ‘temporal sleight of hand’ – claiming that the DVRA will become valid upon future MOI amendment – misconstrues fundamental principles of commercial law. An agreement that is void at inception cannot be retrospectively validated. Moreover, they say, the First Addendum itself acknowledged this legal reality by making the weighted voting regime in the DVRA expressly subject to amendment of Coria’s MOI. As previously stated, the Mahube entities adopt the same stance although they do not seek any declaratory relief in this regard.

[60] The Thebe entities rely, amongst others, on *Gihwala*⁶ where the Supreme Court of Appeal held s 15(7) operates where there is a ‘direct conflict’ between a shareholders agreement and the MOI:

⁶ *Gihwala and Others v Grancy Property Ltd and Others* 2017 (2) SA 337 (SCA) at para 54

‘The qualification that the shareholders’ agreement may not be inconsistent with the Act and the Memorandum of Incorporation deals with situations where there is a direct conflict between them, not with a qualification in the shareholders’ agreement on the manner in which general powers are to be exercised, which may constrain the exercise of those powers.’

[61] They say that a situation analogous to the present one is seen in *Blue Nightingale*⁷ where the High Court applied s 15(7) as well as *Gihwala*. In that matter a company’s MOI provided that where there were less than three directors, the quorum for a board meeting would be two, and where there were more than three directors, a quorum would be three. The court held that a provision in the shareholders agreement that ‘the quorum shall be one director present nominated by each of [Nkwe Ltd] and [Nightingale]’ was in conflict with the MOI and therefore void.⁸

[62] The Thebe entities also argue that even were this court to find the DVRA possessed some initial validity, it still fails on other independent grounds. First, it operated solely as a personal agreement between the named individuals who executed it in their personal capacities only. Directors who have since replaced them (all) cannot be bound by their predecessors’ personal undertakings, and there is no provision in the DVRA that it is binding on successors in title. Second, it has terminated by effluxion of time following Phembani’s exit, which occurred through the transfer of its shares to TREH rather than a direct sale of its Coria shareholding, although this difference in structure does not alter the commercial substance that Phembani, as originally constituted, ceased to be a shareholder when its ownership changed completely.

[63] The Thebe entities’ arguments regarding s 15 (7) of the Companies Act have, as their starting point, the assumption that the DVRA was an agreement concluded between shareholders. This must be so because otherwise, on its plain wording, it is not hit by the qualification in s 15(7). There thus appears to be a disjunct between their reliance on s 15(7) and the separate submission that it was an agreement concluded between the directors personally at the time. Be that as it may, this calls into question

⁷ *Blue Nightingale 709 (Pty) Ltd v Nkwe Platinum South Africa (Pty) Ltd* 2021 JDR 2747 (GJ)

⁸ At paras 33 and 45. See also *Derby Downs Management Association v Assegaai River Properties (Pty) Ltd and Another* 2022 (2) SA 71 (KZP) at para 36; *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Another* 2018 (3) SA 157 (GJ) at para 8.

the meaning of an agreement between ‘the shareholders’ of a company for purposes of s 15 (7). The Sarge entities rely on the following passages in Henochsberg⁹:

‘Subsection (7) requires the agreement to be between ‘the shareholders’, which implies an intention that all the shareholders must be a party to that contract, otherwise only “shareholders” would have been used. Therefore, if an agreement is not between “ [T]he” shareholders, but only between some shareholders, s 15(7) does not apply. The addition of the company and/or directors to this agreement could also determine whether it is an agreement envisaged by s 15(7): *Derby Downs Management Association v Assegaai River Properties and Another* ¹⁰. Even if that is the case, the agreement should comply with the qualification, ie. it should not be in contravention of the Act or the Memorandum of Incorporation...

It is uncertain what the situation will be if the Memorandum of Incorporation is subsequently amended, also based on an agreement to that effect in the shareholders’ agreement ... with the effect that the inconsistency in the Memorandum of Incorporation is subsequently removed. The basic principles should indicate that due to the fact that the provision is void (and not voidable) ... the amendment to the [MOI] cannot resuscitate the void (non-existent) provision. However, to require the shareholders eg. to conclude a new agreement that incorporates the erstwhile “void” provision to make it valid would seem to be nonsensical. It is therefore submitted that an interpretation of sub-s (7) to the effect that a void provision in the shareholders’ agreement cannot be validated *ex nunc* [retrospectively] with an amendment to the [MOI] would lead to “insensible or unbusinesslike results” and cannot be correct: *Natal Joint Municipal Pension Fund v Endumeni Municipality*¹¹. [my underlining]

[64] The first quoted passage in Henochsberg thus postulates that even where the agreement is concluded between some (not all) the shareholders, its provisions should nevertheless comply with both the Act and the company’s MOI. I therefore do not see how this helps the Sarge entities, since what then is the real difference in effect between an agreement concluded between all the shareholders and only some of them for purposes of s 15(7)? In my respectful view, it leads to an ‘insensible or unbusinesslike result’ to interpret s 15(7) as strictly as Henochsberg suggests, because then some kind of uncertain validity is conferred on an agreement between some of the shareholders, despite its provision(s) being in conflict with the Act or MOI, whereas the opposite applies if it is concluded between all of them . As far as the second quoted passage is concerned, if a provision is void, it remains void. One cannot breathe life

⁹ Henochsberg on the Companies Act 71 of 2008, commentary on s 15 at 78(5) and 78(6A)

¹⁰ See fn 8 above

¹¹ 2012 (4) SA 593 (SCA) at para 18

into it ex post facto under the guise of avoiding an insensible or unbusinesslike result. This would be sweeping away a trite principle of the law of contract, and would require reading into s 15(7) something that was plainly not intended or the provision itself would have said so. I am thus compelled to disagree with Henochsberg on both aspects, and it necessarily follows that objectively that portion of the DVRA which is in conflict with Coria's MOI must be void. That however is not the end of the enquiry in relation to the DVRA. Although clause 8 thereof allows the void provision pertaining to weighted percentage voting rights to be severed from the remainder of that agreement, neither the Thebe nor Mahube entities ask for this. Both contend that the entire DVRA is void as a result. Indeed, the Sarge entities themselves do not seek severance if it is found that the DVRA falls within the qualification contained in s 15(7). It is thus not for me to sever it of my own accord. This being the case, clause 7.1 of the DVRA which provides that its terms supersede 'any other discussions, agreements or understandings regarding the subject matter hereof' also falls away and has no bearing on the validity of the proven prior oral agreement relating to the Gaia/Mahube 9% voting right. So too does clause 2 of the DVRA upon which reliance was placed by both the Thebe and Mahube entities to advance the contention that its terms are in any event not binding since Phembani's exit.

[65] To recap, in terms of the proven oral agreement concluded between N1 and Gaia/Mahube, the latter's voting right on Coria's board would be limited to a total of 9% on an interim basis. The next question is whether those parties' consensus as to Gaia's right of representation on Coria's board can stand without the DVRA (or more specifically, without the agreed 9% limitation recorded in the DVRA and carried over into the SPV1 concluded between different parties, namely Sarge Gaia and Gaia SPV/Mahube Infrastructure). The term 'Finance Documents' in the SPV1 is defined as including the SPV1 itself. Clause 25 thereof bears the heading 'Partial Invalidity' and reads as follows: 'If, at any time, any provision of the Finance Documents is or becomes illegal, invalid, unenforceable or inoperable in any respect under any law of any jurisdiction, neither the legality, validity, enforceability or operation of the remaining provisions nor the legality, validity, enforceability or operation of such provision under the law of any other jurisdiction will in any way be affected or impaired ...' This is thus the severability provision. The Sarge entities rely on *Sasfin*¹² where the court was

¹² *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (AD) at 16 F - H

dealing with a provision in an agreement contrary to public policy, and when interpreting a much wider severability clause, held as follows:

‘Sasfin and Beukes could not have contemplated severance resulting in an agreement significantly different from that which they originally contemplated. They could not have intended that the deed of cession could be judicially snipped and pruned ... to the extent that its ultimate form and import differed meaningfully from that which it was originally intended to have... In any event, it is in my view not open to parties to a contract to say to a court “ take our agreement, such as it is, excise from it all that is bad, and retain what is good, and provide us with a contract that is legal and enforceable, even though it may not be what we originally had in mind”... [s]uch an approach would offend the fundamental rule that the Court may not make a contract for the parties..’

[66] Accordingly, so counsel for the Sarge entities submitted, to remove the reference to the DVRA in clause 12.29 of the SPV1 would effectively be making a new contract for the parties. However, counsel for the Mahube entities argued that Mahube has an immutable right ‘that flows from the primary portion of [clause] 12.29 to a seat on the board. It does not flow from the DVRA, it does not flow from the alleged oral agreement... so there was never an intention, until the Phembani problem arose, that Mahube would get a seat on the board that has limited powers’. He contended that *Sasfin* does not apply in the present instance because no-one is seeking to strike down the SPV1 because of the ‘wrinkle’ of the void DVRA; rather, he submitted, severing the void portion from clause 12.29 would not alter the fundamental purpose of the SPV1, namely the procurement of a board seat for Mahube. In my view, counsel for Mahube must be right, particularly given the express provisions of the severability clause (ie. clause 25) of the SPV1. But, to my mind, this does not have the necessary consequence that I must ignore both the oral agreement about percentage voting rights and the terms of the void DVRA. Even though I have found the DVRA to be void, I can still have regard to it in order to determine the facts, or more specifically for present purposes, those parties’ joint intention at the time, since to do otherwise might result in ‘a gross injustice’: *Zuvaradoka v Franck*¹³. Objectively speaking, the only explanation for the specific and varied percentages agreed in the DVRA is that they conferred on Gaia (Mahube) 9% of the Coria board voting rights, which it was willing to accept; and the DVRA may be void, but the oral agreement is not.

¹³ 1981 (1) SA 226 (ZA) at 229E – 230B

[67] As I see it, there is therefore nothing to preclude me from declaring that all reference to the DVRA in clause 12.29 of the SPV1 shall be deemed as severed from the remainder of that clause. Mahube's entitlement to exercise the voting rights of one of the two directors of Coria appointed by N1 would then arise from clause 12.29 (as amended) as well as the oral agreement. Further, on the application of the Plascon-Evans rule, I am persuaded that the Sarge entities are also entitled to the orders they seek that the Mahube seat on Coria's board is currently exercised on its behalf by Mr Moseneke, and until amendment of the shareholders agreement and MOI, it is limited to 9%. I am however not persuaded that the Sarge entities are entitled to an order that the 9% limitation is a contractually non-severable part of Mahube's right to representation on Coria's board (in terms of the SPV1) since it was, on the version of the Sarge entities' themselves, only intended to govern the interim position; or that the right to such representation is per se unenforceable pending amendment of the shareholders agreement and MOI (since no-one has suggested that the oral agreement is unenforceable if the DVRA is found to be void). Having reached this conclusion, the relief sought by the Mahube entities cannot succeed.

[68] Turning to the Thebe entities. They have been successful to the extent that I have found the DVRA to be void. In respect of the relief they seek that TREH is independently entitled to nominate a director for appointment to Coria's board in terms of the SPV2, their counsel understandably placed square reliance on clause 12.30 thereof, which entrenches the obligation of Sarge Thebe to procure that this occurs. However, as dealt with in my consideration of the evidence, and again on the application of the Plascon-Evans rule, I am not able to find on the papers before me that the Sarge entities' version, which is in essence that TREH already exercises that right through one or other director(s) of entities in the Thebe group, is so far fetched or improbable that it falls to be rejected. Moreover, no evidence was put up by the Thebe entities to support their allegation that following Phembani's exit from Coria, they somehow became entitled to ignore its 25.64% voting right allocation, which it is beyond dispute Phembani itself insisted it retain because it did not want to compromise its exit by the dilution of its rights in any way. It is improbable that having done this, it would have represented to the Thebe entities that it actually had even less voting percentage rights, ie. one half of 48.72%, being 24.36%, which is the second leg of the relief the Thebe entities now seek. I am therefore not persuaded that I should grant that relief.

[69] The Sarge entities also ask for an order that Coria, Thebe and Thebe 2 be directed to take all steps reasonably necessary to expedite 'the required amendments' to Coria's MOI to reflect the voting percentages contained in the amended clause 15.5 of the First Addendum, including requesting the written consent of the Lenders and DoE (which effectively dispenses with the points raised in limine by the Mahube and Thebe entities) and, if such consent is obtained, by proposing and adopting the required special resolution in terms of s16(1)(c) of the Companies Act and filing the requisite notice of amendment with the CIPC in terms of s 16(7) thereof. I have the following difficulties with this. First, amendment of the Coria MOI will not be limited to the shift in voting percentages. This much is evident on the Sarge entities' own version, as counsel for the Thebe entities pointed out. Even if the consent requirements could somehow otherwise be satisfied, the Sarge entities have not yet presented their complete and final version of the proposed MOI amendments for consideration by the relevant parties. Third, the MOI cannot simply be amended in isolation from a number of conflicting provisions in the shareholders agreement as amended by the First Addendum. The Thebe entities' lead counsel handed up a schedule reflecting no less than nine other amendments that would be required to bring the MOI and First Addendum in alignment with each other. These encompass clauses relating to share capital, board composition and other fundamental governance matters that were not addressed in the First Addendum's limited focus on director voting arrangements. To this I would add that, even way back in 2017, those involved in the restructure negotiations were alive to the fact that a number of consequential amendments would be required to Coria's constitutional documents. In these circumstances, to order steps to be taken to effect one isolated amendment to the MOI does not sit comfortably with me, and in any event will not bring about an overall resolution of the dispute. It is also the reason why I am not prepared to order, as the Sarge entities would have it, that the interim position contained in both the oral agreement and clause 12.29 (to be amended as dealt with above) applies, as far as the Mahube entities are concerned, beyond the amendment of Coria's constitutional documents. The parties will have to sit down and negotiate their way through these amendments and if they are unsuccessful, any litigation that may follow is for another court to determine.

Costs

[70] Each of the Sarge and Thebe entities have been partially successful. Although the Mahube entities have not, I must take into account that, as with the Thebe entities, they were obliged to deal with a fundamental iteration of the Sarge entities' previous case, namely that the DVRA was immediately enforceable on grounds other than the issue of voidness, with the attendant cost. That stance was only abandoned on the second day of argument. I am accordingly of the view that the appropriate order to make is that each party should bear their own costs.

[71] **The following order is made:**

1. In the main and counter-applications under case number 6020/2023 ('the Sarge application' and 'the Mahube counter-application'):

1.1 It is declared that the words '*pursuant to an agreement entitled "Directors Voting Rights Agreement" executed on or about the Signature Date between inter alios N1, Thebe Noblesfontein, South African Renewable Green Energy Proprietary Limited and certain individuals*' are deemed to be severed from clause 12.29 of the written agreement styled 'SPV1 Preference Share Subscription Agreement' (the 'SPV1');

1.2 It is declared that the fourth and/or fifth respondent's entitlement to have a representative exercise the voting rights of one of the two directors of the first respondent appointed by the sixth respondent, pending amendment of the sixth respondent's constitutional documents (being its Memorandum of Incorporation and Restated Shareholders Agreement as amended by the First Addendum thereto) arises from and in terms of: (a) clause 12.29 of the SPV1 (as amended in accordance with paragraph 1.1 of this order) as well as an oral agreement concluded between the sixth respondent on the one hand, and the fourth and/or fifth respondents on the other, during or about September 2017; (b) is currently exercised on their behalf by Mr Gontse Moseneke; and (c) is limited to a total (and no more) of 9% of the total voting rights held by the directors of the first respondent;

- 1.3 Save as set out above, the relief sought by the applicants is refused;
 - 1.4 The counter-application is dismissed; and
 - 1.5 Each party shall pay their own costs.
2. In the application under case number 16391/2023 ('the Thebe application'):
- 2.1 It is declared that the Director Voting Rights Agreement concluded on 21 September 2017 between the first applicant, and the second and fourth to sixth respondents, is void and unenforceable;
 - 2.2 Save as set out above, the relief sought by the applicants is refused; and
 - 2.3 Each party shall pay their own costs.

J I CLOETE

Judge of the High Court

Appearances

For applicants **Adv Matthew Blumberg SC**
(Sarge) **Adv Gavin Cooper**
Instructed by: Potgieter Joubert Inc

For 2nd & 3rd respondents: **Adv John Dickerson SC**
(Thebe) **Adv Duncan Wild**
Instructed by: DLA Piper Inc

For 4th & 5th respondents: **Adv Michael Antonie SC**
(Mahube)
Instructed by: Werksmans Inc