PARTIES AGREE ON 3RD PARTY TO ASSESS VALUE OF SHARES IN DISPUTE: VALUER GETS ONE GO ONLY?

Tahilram v Trustees of the Lukamber Trust and Another (845/2020) [2021] ZASCA 173 (9 December 2021)

In shareholders' agreements, provision is usually made to ensure that on the exit of one shareholder, the remaining participants have a pre-emptive right to purchase the shares that now become available. Putting a value on these shares to determine the purchase price, can be tricky if the relations between them are no longer amiable. A clever way to deal with this could be to appoint a third party (such as an auditor) who will have the final say. Imagine the confusion that will arise if the valuer issues his final determination and then amends it subsequently!

The Court here explained why, in the absence of provisions in the agreement to the contrary, such determination by a third party is final and binding. This holds true for the appointment of valuers in all forms of agreements. Only a review court has the power to interfere. And, taking one's cue from this, it is sensible to obtain expert legal advice in the drawing of these clauses and agreements.

The Judgment can be viewed here.

FACTS

A & A Dynamic Distributors (Pty) Ltd runs a business for the sale and distribution of electronic components. The Lukamber Trust ('the Trust') holds 70% of the company's issued shares, and Mr Tahilram holds 30% thereof.

Mr Tahilram was the sales director of the company until his employment with the company terminated on 27 March 2018. On the termination, Mr Tahilram, as shareholder, was required to offer his shares to the Trust in terms of the provisions of a shareholders' agreement. This agreement determined, amongst other things, that in the event of any shareholder's employment by the company coming to an end, that shareholder shall be deemed on the day immediately preceding the termination, to have offered all the shares held by him in and all his claims against the company, to the other shareholders. It also recorded that, in the event of a shareholder exercising its pre-emptive right to purchase the shares of a co-shareholder and a dispute arising relating to the fair market value of such shares, then – and in the absence of agreement on the value of the shares - the value 'shall be determined . . . by the Auditors . . . and the valuation of the Auditors, communicated to the Shareholders in writing, shall be final and binding on the Shareholders.'

The employment of Mr Tahilram with the company was terminated on 27 March 2018 and in terms of the shareholders agreement, he was thus deemed to have offered all his shares in the company to the Trust on 26 March 2018. No agreement was reached regarding the fair market value of Mr Tahilram's 30% shareholding and determination of the value was referred to the company's auditors.

The auditor's valuation determined the fair value of the business to be R4,8 million 'plus any value unlocked on the obsolete stock as agreed on by a willing buyer/willing seller.' The valuer classified all stock that did not move for a 24-month period as obsolete. The auditor (valuer) communicated his written valuation report to the co-shareholders. The valuer thereafter confirmed 'that the stock value … for the year ended 31 March 2018 was R14 971 701.51, but based on our obsolescence tests we believe the fair realisable value to be R4 795 249.18'.

Mr Tahilram ultimately accepted the valuation but insisted that he should acquire 30% of the obsolete stock as well. The Trust's attorneys thereafter notified Mr Tahilram of their acceptance of the valuation and desire to exercise their pre-emptive right to purchase the shares. The Trust, however, continued to maintain that Mr Tahilram owed the company various amounts which should be deducted from the purchase price.

Mr Tahilram proceeded to demanded payment in terms of the valuation, but to no avail. In June 2019, he approached the Court for assistance. The Trust, in response, included in its court documents an *amended* written valuation report obtained from the valuer. Therein, the initial valuation of the net asset value of the company's shares were reduced by some R1,26 million in respect of motor vehicles allocated to a trustee of the Trust. The reason for the new inclusion and reduction in respect of motor vehicles, was not further explained.

The High Court's decision dealt with the question whether the valuer could amend the valuation. It held that the determinations by the valuer were not final and binding on the parties and rejected that Mr Tahilran's argument to the contrary. Mr Tahilran appealed.

The question on appeal was whether the valuer was *functus officio* when he determined the fair value initially and communicated this in a written valuation. In other words, was the valuer legally permitted to unilaterally withdraw his valuation in order to correct or modify it, once his valuation had been communicated to the parties concerned?

HELD

- The effect of the shareholders' agreement between the parties in this matter was to confer finality upon the determination by the valuer of the fair market value of the company's shares in circumstances where the co-shareholders could not reach agreement on such value.
- Once the valuer's valuation had been communicated to the parties, the (validly issued) valuation could not, in the absence of a contractual provision to the contrary, or agreement or waiver by the parties (none of which were suggested), be withdrawn or cancelled by the valuer to correct mistakes of fact or value in it. The shareholders' agreement does not provide to the contrary; if anything, it expressly confirms that there was to be finality as far as the valuer's valuation was concerned. Therefore, once the valuer had issued his written valuation report, he was *functus officio*.
- That being so, the valuer was not legally entitled unilaterally to withdraw or cancel his valuation report and to issue one that altered and amended his definitive pronouncement of the fair market value of the company's shares.
- To hold otherwise would lead to uncertainty and a lack of finality; how many times then may a valuer withdraw his or her valuation and issue an amended one to correct mistakes of fact or value in a previous one? Values of finality and certainty are foundational, especially to administrative law – even an unlawful and invalid administrative decision exists in fact and has legal consequences until it is set aside by a court in proceedings for judicial review.
- Subject to certain limited exceptions and in the absence of a contractual provision to the contrary or agreement or waiver by the parties, whenever parties agree to refer a matter to a valuer, then so long as the valuer arrives at his or her decision honestly and in good faith, the decision is final and binding on them and they are bound by it once communicated to them.

CONCLUSION

The appeal was upheld.

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