



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 22734/2022

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

12 April 2024


EJ FRANCIS

In the matter between:

GUNTHER FRANZ RECKMANN

Applicant

and

BUSANI MABUNDLA N.O.

First Respondent

EMPOWA MABUNDA N.O.

Second Respondent

ANDREW ADAM SIPSHITZ

Third Respondent

ROCKFIRE SA PROPRIETARY LIMITED

Fourth Respondent

RAINER SCHORR

Fifth Respondent

LAURINEE CASTLE

Sixth Respondent

WALTER FISCHER

Seventh Respondent

JUDGMENT

FRANCIS J*Introduction*

1. This is an application to review and set aside two determinations made by the first respondent in terms of the provisions of the Arbitration Act 42 of 1965 (the Arbitration Act) alternatively the common law and to set aside the first respondent's appointment as an expert.
2. The second and third respondents opposed the application and brought a counter application to make the determinations an order of court.

The parties

3. The applicant is Gunther Franz Reckmann an adult male businessman and the owner of 30% share capital in and a director of the fourth respondent which is Rockfibre SA (Pty) Limited (Rockfibre).
4. The first respondent is Busani Mabundla N.O. an adult male attorney who is cited as an expert appointed in terms of a shareholders agreement.
5. The second respondent is Empowa Investments (Pty) Limited a company duly registered and incorporated with limited liability in terms of the company laws of the Republic of South Africa which owns 25.1% of the share capital of Rockfibre.

6. The third respondent is Andrew Adam Lipshitz and adult male businessman who is the owner of 10% of the share capital of Rockfibre.
7. The fifth respondent is Rainer Schorr, an adult male businessman who is the owner of 25.1% of the share capital of Rockfibre.
8. The sixth respondent is Laurinne Castle, an adult male businessman who owns 4.8% of the share capital of Rockfibre.
9. The seventh respondent is Walter Fischer, an adult male businessman who owns 5% of the share capital of Rockfibre.
10. The first and third to seventh respondents were cited as interested parties against whom no relief was sought save in the event of such respondents opposing the granting of the relief sought in which case costs would be sought against them, jointly and severally, the one paying and the other to be absolved.

The background facts

11. In mid-2020, a dispute arose between the shareholders of Rockfibre concerning alleged breaches of the company's shareholders agreement by the applicant.

12. Those breaches, and the applicant's failure to remedy them, resulted in the issuing of notices which together triggered clause 14.4.1 read with clause 13.3.1 of the shareholders agreement deemed transfer provision. In terms of the aforesaid provisions, the applicant was deemed to have given notice of his intention to sell his shareholding in Rockfibre.
13. The applicant's refusal to give effect to the deemed transfer of his shareholding gave rise to a dispute between the second and third respondents which sent a letter to Rockfibre requesting that those disputes be referred for expert determination in terms of clause 15.1 of the shareholders agreement. The applicant did not respond to the said letter.
14. Clause 15 of the agreement deals with the procedures to be followed in the event of any dispute arising in relation to any matter pertaining to the shareholders agreement (other than as relates to the value of the sale equity) which would be dealt with in terms of clause 13.4.3.
15. The first respondent's appointment as an expert was made by the Legal Practice Council after the parties could not reach an agreement on the expert as provided for in the shareholders agreement. His appointment was made in terms of the shareholders agreement that the parties had concluded on 18 April 2007. This was after the second and third respondents attorneys had approached the Legal

Practice Council on 13 May 2021 suggesting three attorneys who could act as an expert in terms of the shareholders agreement which ultimately lead to the appointment of the first respondent to determine the dispute. Clause 15.4.1 of the shareholders agreement provides that the expert shall in all respects act as an expert and not as an arbitrator.

16. Pursuant to the appointment of the first respondent, the second and third respondents specified the dispute to be referred for determination as follows:
 - 16.1 whether the notice issued on 22 July 2020 remains extant or whether it was revoked pursuant to the resolution purported to be passed on 31 July 2020 and pursuant to the letter dated 14 August 2020; and
 - 16.2 in the event that the expert found that the notice was extant, whether or not there had been an acceptance of the applicant's deemed offer pursuant to his alleged failure to remedy material breaches of the shareholder's agreement, within a period of 30 days after receipt of the notice, as required by clause 14.4.1 of the shareholders agreement.
17. The first respondent made an award on 31 May 2002 striking out the applicant's defence and thereafter granted a default award on 16 September 2022 in favour of the second and third respondents.

18. The applicant felt aggrieved with the awards and brought this review application.

The proceedings before the first respondent

19. On 14 June 2021, correspondence was addressed to the first respondent by the second and third respondents attorneys in which the first respondent was advised that his details had been provided to the attorneys by the Chairperson of the Legal Practice Council. A meeting via video conference was requested for the purposes of confirming the first respondent's appointment in terms of clause 15 of the shareholders agreement.
20. On 24 June 2021, a meeting was held between the parties and the second and third respondent's attorneys sent a letter to the applicant's attorneys confirming such meeting stating that the Uniform Court Rules would apply. The discussions are contained in the second and third respondent's attorneys letter dated 9 July 2021 as well as the timeline agreed to.
21. The first respondent was required to determine the issues referred to in paragraph 16 above.
22. On or about 9 July 2021 the second and third respondents delivered a statement of claim in which they sought declaratory relief in the following terms:

- 22.1 the applicant would be deemed to have given a transfer notice in terms of clause 14.4.5 of the shareholders agreement on 26 August 2020; and
 - 22.2 the second and third respondents had in terms of clause 13.3.1 of the shareholders agreement, validly accepted the applicant's transfer notice and were entitled to *pro rata* such shareholding to their shareholding with the value of the applicant's shareholding in the company to be determined in terms of the provisions of clause 13.4 of the shareholders agreement.
23. Such relief was sought based on the allegation that the applicant had breached the shareholders agreement in:-
- 23.1 preventing the adopting of a policy of declaring and paying not less than 60% of Rockfibre's net profit after tax as dividends as required by clause 11 of the shareholders agreement;
 - 23.2 preventing Rockfibre from preparing and circulating to its shareholders monthly management accounts as required by clause 8.6 of the agreement;
 - 23.3 refusing to give effect to a resolution passed by the Board of Directors of Rockfibre held on 22 May 2020 to immediately make payment of an amount of R6 202 500.00 as a dividend;
 - 23.4 preventing Rockfibre from circulating to the shareholders monthly management accounts as required by clause 8.6 of the agreement for the months January 2020 to April 2020; and

- 23.5 during 2018/2019 (the precise date unknown) binding Rockfibre to an agreement of lease with an entity named Glassfibre Properties SA (PTY) Limited without a resolution authorising the conclusion of the lease.
24. On the basis of the breaches alleged and the issuing of a notice in terms of clause 14 of the agreement and the failure to remedy the breaches, the second and third respondents alleged that the applicant was by virtue of clause 14.4.5 of the shareholders agreement, deemed to have given a transfer notice as envisaged in clause 13.3.1 of the shareholders agreement.
25. The second and third respondents statement of claim is dated 9 July 2021 and was served by email.
26. The applicant's statement of defence is dated 8 August 2021 and was served by email. Rockfibre also served a counterclaim dated 8 August 2021.
27. The second and third respondent's replication is dated 17 August 2021 as well as their statement of defence to the counterclaim which was emailed to all the parties.
28. The applicant alleged in the statement of defence that at the time of the conclusion of the agreement, it was the shareholders' intention that: -

- 28.1 the second and third respondents (together with the other shareholders) would acquire shares in Rockfibre from the applicant;
 - 28.2 the second and third respondents would, on demand, contribute funding to Rockfibre in the amounts and the manner as recorded in clause 9.1 to 9.5 of the shareholder's agreement (the funding);
 - 28.3 in the event that funding was not paid on demand, then and in such event the party not making payment would cease to be a shareholder in Rockfibre and cease to be a party to the agreement.
29. The applicant alleged that the shareholder's agreement did not accord with the common intention of the parties and that the agreement stood to be rectified by the addition of the following wording at the end of clause 3.1 thereof:
- "Should any such amount not be paid, on demand, to the company, the party not making payment shall cease to be a shareholder in the company and shall cease to be a party to this agreement."*
30. The applicant disputed the version of the second and third respondents, as claimants on the basis that:
- 30.1 subsequent to the conclusion of the agreement the parties never

enforced clause 7.2 of the agreement and as such and based on the parties conduct waived compliance with clause 7.2 of the agreement;

- 30.2 net after tax profits would be paid as dividends subject to the availability of distributable reserves sufficient to pay dividends and having regard to the working capital requirements of Rockfibre;
- 30.3 Rockfibre and the applicant would be required to prepare and circulate to all the shareholders monthly management accounts;
- 30.4 in terms of the provisions of section 46 of the Companies Act 71 of 2008, Rockfibre could not make any proposed distribution unless, *inter alia*, the board of the company, by resolution, had authorised the distribution and it reasonably appeared that Rockfibre would satisfy the solvency and liquidity test immediately after completing the propose distribution and the board of the company acknowledged and applied the solvency and liquidity test;
- 30.5 monthly management accounts were prepared and circulated to the shareholders by the 20th day of month following the month to which those management accounts related, or within a reasonable time after the month to which those monthly accounts related; and
- 30.6 having waived clause 7.2 of the agreement the conclusion of the lease agreement was justified and permitted.

31. In terms of the counterclaim, Rockfibre sought payment from the second respondent in the sum of R5 512 500.00 together with ancillary relief thereto and from the third respondent payment of the sum of R13 464 036.43 together with ancillary relief thereto. However, Rockfibre's counterclaim was abandoned, and certain separated issues were to be heard by the first respondent (being whether the shareholders agreement should be rectified as contended for in the statement of defence and whether, as further contended in the statement of defence, the claimants failed to make their funding contributions under clause 9.1 of the shareholders agreement and therefore ceased to be shareholders in Rockfibre).
32. The separated issues were to have been heard by the first respondent on 30 and 31 August 2021. Thereafter, by agreement the separated issues were to have been heard on 13 and 14 September 2021. However, due to illness the applicant sought, and was granted by the first respondent a postponement to 28 and 29 October 2021.
33. On 28 and 29 October 2021, the matter was placed before the first respondent and the separation of issues was argued. A punitive costs order was granted against the applicant including the costs of the hearing on 28 and 29 October 2021.
34. On 8 February 2022, the second and third respondents attorneys addressed email correspondence to the applicant's attorneys and the

first respondent and the applicant was requested to provide certain documentation.

35. An undertaking was provided on 22 February 2022 that the documentation would be provided by not later than 23 March 2022.
36. The documentation was not provided by such date. The applicant alleges that this was due to the fact that despite a diligent search by him the majority of the documentation was not in his possession (such either never had been in his possession or which was no longer in his possession).
37. On 24 March 2022, the second and third respondents attorneys addressed an email dated 24 March 2022 to the applicant's attorneys requesting copies of the documentation by not later than 17h00 on Friday 25 March 2022, failing which they threatened to approach the first respondent for an order to compel him to produce the requested documents.
38. A response was provided to the second and third respondents attorneys on 25 March 2022 and the documents requested in paragraphs 5.2, 5.3, 5.6, 5.13, and 5.19 of the second and third respondents attorneys correspondence of 8 February 2022 were confirmed not to be in his possession. Insofar as the remaining documentation were concerned, the applicant either provided such

documentation or advised that he had approached Rockfibre's accountant for such documentation and that such would be forwarded upon receipt thereof.

39. On 1 April 2022 a rule 35(3) notice was delivered under cover of correspondence from the second and third respondents attorneys.
40. The applicant states that there was no need for the delivery of such notice in that he had already cooperated in providing the documentation and information which he had, and if the documentation was not in his possession he undertook to provide further documentation once he had obtained such documentation.
41. The second and third respondents thereafter elected to proceed with an application in terms of rule 35(7) alternatively in terms of clause 15.4 of the shareholders agreement, to compel compliance with the rule 35(3) notice.
42. The rule 35(7) application was brought on the allegation that the second and third respondents would be prejudiced in preparation for the hearing which had been arranged to take place from 29 August 2022 to 2 September 2022.
43. The first respondent on 26 April 2022 granted the relief sought by the second and third respondents namely compelling the applicant to

provide such documentation within 5 days from the date of the order in compliance with rule 35(3). The applicant was required to make available copies of the documentation itemised in the rule 35(3) notice. Failing compliance therewith the second and third respondents were granted leave to apply on the same papers, duly supplemented where necessary, for an order striking out the applicant's defence to the second and third respondents claim. At the time of the granting of such order the majority of the documentation had not been provided by the applicant.

44. On 6 May 2022 the second and third respondents launched an application to strike out the applicant's defence to their claim with costs.
45. On 11 May 2022, the applicant's attorneys sent correspondence to the first respondent in which the first respondent was advised:
 - 45.1 that the applicant had indicated in the correspondence dated 25 March 2022 that he was not in possession of the documentation requested (he had provided that documentation which was in his possession);
 - 45.2 of his willingness to depose to an affidavit should the first respondent require such an affidavit to confirm that he was not in possession of the majority of the documentation;

- 45.3 that the first respondent made an order compelling him to produce documentation which was not in his possession and which was therefore an impossibility;
- 45.4 that he had been advised by Mr Zindel that Rockfibre was in the process of compiling documentation and that it would be Rockfibre that would provide the documents;
- 45.5 that his rights would be reserved in the event of his defence being strike out; and
- 45.6 that he trusted that the parties would be guided accordingly and given the fact that Rockfibre was already in the process of compiling the requested documents, the relevance of which was yet to be made apparent, he failed to see the purpose of proceeding with the application.
46. On 11 May 2022, the applicant's attorneys delivered a notice of intention to oppose the application.
47. The first respondent in a covering letter dated 31 May 2022 enclosed an order which is as follows:
- "1. *Having perused and considered the 1st and 2nd claimants (Claimants) application to strike of first defendant's defence of the claimants claim;*
2. *Having considered the 1st defendant's correspondence through his attorneys in relation to the application to strike out the first defendant's defence to the claimants claim;*

3 *Having considered the second defendant's correspondence through its legal representation;*

4 *Having considered the correspondence between all parties in relation to striking out application I grant order as follows:*

4.1 *The first defendant's defence to the claimants claim is struck off;*

4.2 *First Defendant is ordered to pay the costs of the strike out application on an attorney and client scale".*

48. On 16 September 2022 the first respondent granted declaratory relief in the following terms:

48.1 The applicant was deemed on 26 August 2020 to have given a transfer notice in terms of clause 14.4.5 of the shareholders agreement;

48.2 The second and third respondents had in terms of clause 13.3.1 of the shareholders agreement validly accepted his transfer notice and were entitled to the *pro rata* of their shareholding *inter se* Rockfibre to acquire all the shares held by the applicant in Rockfibre on the basis that the value of his shareholding in Rockfibre to be determine in accordance with the provisions of clause 13.4 of the shareholders agreement;

48.3 the parties were to pay for the costs of the first respondent in equal shares, i.e. 50% of the expert's statement of account;

48.4 the applicant was ordered to pay for all the costs of the second and third respondents, being costs incidental to such

proceedings including the costs of the first respondent as incurred by the second and third respondents, the transcriber and the costs of Counsel for the second and third respondents, and two Counsel if so employed.

The issues for determination

49. The relief sought in the main application is three-fold:

- 49.1 First, the applicant seeks the setting aside of the awards made first respondent on 31 May 2022 and 16 September 2022, namely striking out the applicant's defence and granting a default award in favour of the second and third respondents. This relief is sought in terms of the provisions of section 33(1) of the Arbitration Act, alternatively in terms of the common law namely that the first respondent's conduct in granting the awards is capricious, unreasonable and/or irregular such leading to an inequitable result on this basis the awards fall to be set aside.
- 49.2 Second, the applicant seeks an order in terms of section 13(2) of the Arbitration Act setting aside the appointment of the first respondent, in terms of the shareholder's agreement, as an expert.
- 49.3 Third, to prevent any delay in the finalisation of the dispute the applicant seeks the appointments of an alternate expert and the *de novo* hearing of the dispute before the alternate expert,

50. The counter application seeks to enforce the first respondent's award. As such, in the event that the Court finds in favour of the applicant in the main application, then the counter-application must fail and be dismissed.
51. In deciding the first issue the court will have to decide whether the first respondent was appointed as an expert or arbitrator in terms of the shareholder's agreement. If he was appointed as an expert the provisions of the Arbitration Act would not be applicable and the court will have to decide whether any case has been made out in terms of the common law to set aside his determinations.
52. If the first respondent was appointed as an arbitrator the court must determine whether the applicant has established any grounds of review in respect of the first respondent's determination and, more specifically; whether the first respondent had the power to strike-out the applicant's defence; whether the first respondent issued the determination in the absence of the applicant; whether the first respondent ought to have afforded the applicant an opportunity to remedy its default, or placed him on terms; whether the first respondent was biased whether the applicant was denied a fair hearing whether the relief sought by the applicant is appropriate or permissible and whether the applicant's late filing of its replying affidavits be condoned.

The parties submissions

53. The applicant contended that the first respondent was appointed as an expert for the determination of the referred disputes. Having regard to the shareholders agreement, the conduct of the parties, the nature of the issues and evidence that require determination and the applicable legal principles it is evident that the first respondent was in fact appointed as an arbitrator.
54. The applicant contended that the first respondent conducted the proceedings and made awards in the absence of the power to do so; in the absence of the applicant; without affording the applicant and opportunity to remedy the default alternatively placing the applicant on terms; with bias and without affording the applicant a fair hearing.
55. The applicant contended further that the first respondent made awards which were grossly irregular, alternatively the first respondent misdirected himself in the ambit of his powers. The applicant has good cause to seek an order setting aside the appointment of the first respondent. The dispute between the parties ought to proceed *de novo* before another expert.
56. The second and third respondents contended that the first respondent was appointed under the shareholders agreement as an expert. The shareholders agreement provided in clause 15 that he was to act in all respects as an expert and not as an arbitrator. The disputes envisaged

under clause 15, and the powers granted to the first respondent were those typically associated with an expert, and not an arbitrator. The parties recognised that the first respondent was an expert and not an arbitrator, sought rulings from him on that basis, and even negotiated over whether to appoint him as an expert than as an arbitrator.

57. The second and third respondents contended that the applicant has not established any grounds of review in respect of the first respondent's determination and the first respondent had the power to strike-out the applicant's defence. He was not bound to follow strict principles of law in arriving at his decision but was vested with entire discretion as to the procedure and manner to be followed in arriving at his decision. As such he could and did opt to adopt one procedure and when that proved to be unsuitable, opted to strike-out the defendant's plea. This was an anticipated possibility when he provided initially for the application of the Uniform Rules of Court, which in turn envisaged that he could strike-out defences for failures to make proper discovery.
58. The second and third respondent's contended that first respondent did not issue the determination in the absence of the applicant. The applicant was not absent. He through his attorneys, made written submissions before the first respondent made his determination to strike-out the applicant's plea. He was not absent when the expert heard evidence and submissions on the merits. His representatives

attended the merits hearing, sought a postponement, and then left. They were not absent.

59. The second and third respondents contended that the first respondent was under no obligation to have afforded the applicant an opportunity to remedy its default, or placed him on terms. The applicant made no effort to do so.
60. The second and third respondents contended that the applicant was not biased. In the events preceding the striking-out of the applicant's plea, the first respondent made several preliminary determination in the applicant's favour, evidencing even-handed impartiality. His subsequent findings in his written determination were warranted by the applicant's procedural history of delay and obstruction. There was no objective basis for the inference of bias, whether actual or reasonably apprehended.
61. The second and third respondents contended that the applicant was not denied a fair hearing. He had no right to a fair hearing since these were proceedings before an expert. In any event, the expert treated the applicant with scrupulous fairness. At some point fairness also requires fairness to the other parties, and the expert quite correctly acted to protect his own procedures, and so protected the second and third respondents entitlement to a final and binding determination.

62. The second and third respondent's contended that the main application should be dismissed with costs. However, even if the court found that there was some merit to the grounds of review, it would not follow that the first respondent's appointments should be set aside. The shareholders agreed separately that the expert's appointment would be final and binding. Nor would an order setting aside the first respondent's appointment be warranted by the grounds of review, It would significantly prejudice the second and third respondent's by causing even further delays, and imposing significant wasted and duplicated costs on the parties.
63. The second and third respondents contended that the applicant's replying affidavit were filed out of time and should not be admitted as no proper case for condonation has been made out, nor is there a notice of motion for the late filing of the second replying affidavit. The condonation of those affidavits were not addressed in the applicant's written submissions, and it appears that they have abandoned those affidavits. Those affidavits are accordingly not addressed further in the main arguments and the replying affidavits should be struck out with costs on a punitive scale.
64. The second and third respondents contended that in their counter application they seeking and order to make the expert determination an order of court.

Analysis of the facts and arguments raised

65. There is no application before me for condonation for the late filing of the replying affidavit and as such I do not have to decide that and the replying affidavit will be ignored.
66. The applicant was at all material times represented by legal representatives at the proceedings before the first respondent who would have been familiar with the provisions relating to discovery, failure to discover and the consequences that would flow from such a failure which ultimately would lead to striking of a defence and granting of the relief sought by the second and third respondents. Once a defence is struck off there is no need for the defaulting party to be informed of the repercussions of such an order.
67. There is no real dispute between the parties that the first respondent, a practising commercial attorney of more than 10 years standing, was validly appointed as an expert in terms of the shareholders agreement of the parties by the Legal Practice Council.
68. The applicant wants this court to infer from the nature of the dispute that the applicant was called upon to determine the dispute as an arbitrator. This is rather a strange submission bearing in mind that the provisions of the shareholders agreement was clear about the issue of an expert. The first respondent was appointed as an expert in terms of

a shareholders agreement that was concluded between the applicant and the second to seventh respondents on 18 April 2007.

69. The starting point is to look at the provisions of the shareholders agreement that deals with how disputes are to be resolved. The source of the power comes from the shareholders agreement.
70. The applicant's alleged refusal to give effect to the deemed transfer of his shareholding gave rise to a dispute between the second and third respondents which addressed a letter to Rockfibre requesting that those disputes be referred for expert determination in terms of clause 15.1 of the shareholders agreement. The provisions of clause 15 of the shareholders agreement are therefore applicable in this matter.
71. Clause 15 of the shareholders agreement deals with the procedures to be followed in the event of any dispute arising in relation to any matter pertaining to the shareholders agreement (other than as relates to the value of the sale equity) which would be dealt with in terms of clause 13.4.3.
72. Clause 15.1 of the shareholders agreement provides *inter alia* that if any dispute arises between the parties in relation to any matter pertaining to this agreement (other than as relates to the value of the sale equity which shall be dealt with in terms of clause 13.4.3), then such dispute shall be referred to a single expert.

73. Clause 15.3 provides that should a dispute arise, any shareholder or director shall be entitled to require by written notice to the company that the dispute be referred to such expert and a copy of such written notice shall be send immediately by the company to all shareholders and directors.
74. Clause 15.4, 15.4.1, 15.4.2, 15.4.3 and 15.4.4 provides that the expert shall in all respects act as an expert and not as arbitrator; not be bound to follow strict principles in law in arriving at his decision but shall be vested with entire discretion as to the procedures and the manner to be followed in arriving at his decision; be entitled to investigate or cause to be investigated any matter, fact or thing which he considers necessary or desirable in connection with the dispute and for that purpose shall have the widest powers of investigation to investigate all the books and records of the company and the right to take copies or make extracts therefrom and the right to have them produced or delivered at any reasonable place required by him for the aforesaid purposes; be entitled to interview and question, under oath, any of the shareholders.
75. Clause 15.5 provides that notwithstanding the provisions of clause 15.4, each party shall be entitled to make written or oral representations for the expert and to reply to representations made by any other party.

76. Clause 15.6 provides that the expert shall endeavour to determine the dispute within 14 (fourteen) days after such dispute has been declared by either party. The expert's decision and appointment shall be final and binding on the parties affected thereby, shall be carried into effect and may be made an order of any competent court at the instance of any of the parties.
77. It is clear from the provisions of clause 15.4 that the parties including the applicant had agreed that the first respondent was not bound to follow strict principles in law in arriving at his decision but was vested with an entire discretion about the procedures and the manner to be followed in arriving at his decision. This is precisely what the applicant did.
78. The application is brought in terms of sections 13(2) and section 33(1) of the Arbitration Act. Section 13(2)(a) of the Arbitration Act provides of the that a court may at any time on the application of any party to the relevant proceedings, on good cause shown, set aside the appointment of an arbitrator or umpire or remove him from office.
79. Section 33 of the Arbitration Act provides that an award may be set aside on certain grounds, namely where the arbitrator or umpire:
- 79.1 has misconducted himself in relation to his duties; or
- 79.2 has committed gross irregularities in conduct of the proceedings;
- or

79.3 has exceeded his powers; or

79.4 an award has been improperly obtained.

80. The provisions of the shareholders agreement are clear that the first respondent was appointed as an expert and not an arbitrator. This clause in effect ousted the jurisdiction of an arbitrator or the provisions or applicability of the Arbitration Act. The wording of the shareholders agreement are clear and precise on this point. *Res ipsa loquitur*. As such the provisions of the Arbitration Act are not applicable and no relief can be granted to the applicant in terms of the Arbitration Act.
81. It is clear that the first respondent had rendered a final determination, which the parties had agreed would be final and binding.
82. This brings me to the alternative grounds of review namely that the determinations should be set aside in terms of the common law. The applicant contended that insofar as the Arbitration Act was not applicable to the first respondent, the relief was sought on the basis of the conduct of the first respondent in granting the order to strike out the applicant's defence and granting declaratory relief in favour of the second and third respondents and the award made by the first respondent granting declaratory relief in favour of the second and third respondents was capricious, unreasonable and/or irregular, such leading to an inequitable result.

83. The applicant has not made out any proper case to review the determinations in terms of the common law. Those grounds of review are clearly an afterthought and are not supported by any shred of evidence and facts. I had pointed out that the applicant was at all material times represented by a legal practitioner. The parties had met with the first respondent and timeframes were agreed upon. It was also agreed that the uniform rules of court would be applicable. The rules make provision for the striking out of a defence if no discovery is made and after the defaulting party was called upon to do so. Once the defence is struck off the matter becomes unopposed and judgment can be granted against the defaulting party. This is fairly trite.
84. The application stands to be dismissed.
85. There is no reason why the counter application should not be granted and it stands to be granted.
86. There is no reason why costs should not follow the result. The costs are on a party and party scale.
87. In the circumstances the following order is made:
- 87.1 The application is dismissed.
- 87.2 The applicant and the fourth respondent are obliged to comply with the expert determination of the first respondent, dated 16 September; that:

87.2.1 the applicant is deemed on 26 April 2020 to have given a transfer notice in terms of clause 14.4.5 of the shareholders agreement;

87.2.2 the second and third respondents, have in terms of clause 13.3.1 of the shareholders agreement, validly accepted the applicant's transfer notice and are entitled pro-rata to their shareholding, *inter se*, in the fourth respondent to acquire all the shares held by the applicant in the fourth respondent on the basis that the value of the applicant's shareholding in the fourth respondent is to be determined in accordance with the provisions of clause 13.4 of the shareholders agreement;

87.2.3 the applicant on the one hand and the third and fourth respondents on the other are to pay the costs of the first respondent in equal shares;

87.2.4 the applicant is ordered to pay all of the costs of the second and third respondents, associated with the expert proceedings before the first respondent, including all the costs of the first respondent, the transcriber and the costs of counsel.

87.3 The applicant is to pay the costs of this application.


FRANCIS J

JUDGE OF THE HIGH COURT
GAUTENG DIVISION

APPEARANCE

FOR APPLICANT : L HOLLANDER & N S BEKET
INSTRUCTED BY SWVGINCORPORATED

FOR 2 & 3 RESPONDENTS : D WATSON INSTRUCTED BY
WERKSMANS ATTORNEYS

DATE OF HEARING : 6 NOVEMBER 2023

DATE OF JUDGMENT : 12 APRIL 2024

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 14h00 on 12 April 2024.