

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

Case No.: 19065/2024

Before the Hon Madam Justice Slingers

Hearing: **27 February 2025**

Judgment Delivered: **05 May 2025**

In the matter between:

HERWIG TILLO CORNELIUS LELEU N.O.

First Applicant

MARLEEN AUGUSTA MARIE LELEU N.O

Second Applicant

[in their capacities as co-trustees of
the HTC Leleu Family Trust T2711/03]

and

NUMACON (PTY) LIMITED

First Respondent

MICHAEL IOANNOU

Second Respondent

ADAM BHAYAT N.O

Third Respondent

RASHIDA BHAYAT N.O

Fourth Respondent

RUCHSANA BHAYAT N.O

Fifth Respondent

GADIJA BHAYAT N.O

Sixth Respondent

HYMAN BRUK N.O

Seventh Respondent

[in their capacities as trustees for the time being of
Bhayat Mohammed Family Trust]

VREES INVESTMENTS (PTY) LTD

Eight Respondent

XENOPHON DEMETRIADES N.O

Ninth Respondent

JOAN DEMETRIADES N.O

Tenth Respondent

ALEXANDRA MARIKA DEMETRIADES N.O

Eleventh Respondent

KIMON ANDREAS DEMETRIADES N.O

Twelfth Respondent

[in their capacities as trustees for the time being of
Foveros Family Trust]

HELEN CONSTANTINIDES N.O

Thirteenth Respondent

CHRISTODOULAKIS CONSTANTINIDES N.O

Fourteenth Respondent

[in their capacities as trustees for the time being of
Dempar Family Trust]

DEMETRIOS CONSTANTINIDES N.O

Fifteenth Respondent

MARIA CONSTANTINIDES N.O

Sixteenth Respondent

[in their capacities as trustees for the time being of
Dimaria Trust]

LUKAS CORNELIUS SERFONTEIN (SNR) N.O

Seventeenth Respondent

LUKAS CORNELIUS SERFONTEIN (JNR) N.O

Eighteenth Respondent

PHILIPPUS CAREL PRINSLOO N.O

Nineteenth Respondent

[in their capacities as trustees for the time being of
Serfontein Family Trust]

GORDON MANN N.O

Twentieth Respondent

SONJA MANN N.O

Twenty First Respondent

ENTEGRA TRUST (PTY) LTD

Twenty Second Respondent

[in their capacities as trustees for the time being of
The @Work Trust]

BERNARD KATZ

Twenty Third Respondent

This judgment is handed down electronically by circulation to the parties' legal representatives' email addresses. The date of hand-down is deemed to be 05 May 2025.

JUDGMENT

SLINGERS J

Introduction

[1] In this opposed application the applicants seek the following substantive relief:

- '1. *An order declaring that the 23rd Respondent, as per his valuation report annexure HL6, did not determine the two further discounts, namely a portfolio valuation discount and a marketability discount, to be applied to the fair value of the shareholding in Numacon.¹*

2. *Alternatively:*
 - 2.1 *An order declaring that on a proper interpretation of the settlement agreement, annexure HL4, alternatively as a tacit term thereof, the only discount(s) which fell to be applied to the fair value of the Trust's shareholding was a minority discount;*

 - 2.2 *In the result the Twenty Third Respondents valuation, to the extent that it held the two additional discounts to be applicable, falls to be ignored and treated as pro non scriptio for purposes of establishing fair value of the Trust's shareholding.*

3. *Further Alternatively, and should this Honourable Court hold that Twenty third Respondent did find the portfolio valuation discount and the marketability discount to be so applicable, that, to that extent, his valuation be reviewed and set aside, because:*
 - 3.1 *He exceeded his powers / mandate / jurisdiction in doing so;*

 - 3.2 *The valuation, to the extent that it determined that the 2 "additional" discounts were applicable, was not the exercise of the judgment of a reasonable man, but rather, was exercised unreasonably, irregularly or wrongly so as to lead to a patently inequitable result.*

¹ In this judgment the portfolio valuation discount and the marketability discount will be referred to as the **'two further discounts'**.

4. *An order that the Second to Twenty Second Respondents², jointly and severally and in proportion to their shareholding in Numacon, make payment to the Trust of the amount of R11, 136, 219 together with mora interest thereon as from date of the valuation report by Laroki Corporate Finance (Pty) Ltd being 18 April 2023.*

The Settlement Agreement

- [2] As is evident from the relief sought, central to this application is the valuation report prepared by the twenty-third respondent, who was appointed as a valuer (**'the valuer'**) in terms of a settlement agreement concluded between the applicants and the first to twenty second respondents. In terms of the settlement agreement the valuer was appointed to determine:

*'The fair value of the shareholding calculated pro-rata the total issued share capital of the Company, with and without any discount for the shares representing a minority holding and without any discount on account of any contractual restrictions that might have been agreed between the parties, or provided in the Company's Articles of Association on the disposal of the shares, other than as between existing shareholders (**"the minority discount"**) ...'³*

- [3] The settlement agreement further provided that the fair value of the shares would be determined with regard to the financial condition of the Company as at 30 June 2020 and as at 30 June 2022. The settlement agreement clothed the valuer with full discretion to determine his own processes. In terms of the settlement agreement, the residual dispute would be referred to the parties' agreed arbitrator after the valuer made his determination.

² The first to twenty second respondent will be referred to as **'the respondents'** in this judgment.

³ The company was defined as the first respondent in clause 1.2.4 of the settlement agreement.

- [4] The settlement agreement defined the residual dispute in the following terms:

'means whether the purchase price for the Respondents' shareholding in the Company is subject to a minority discount.'

- [5] The settlement agreement was concluded to put an end to the litigation instituted by the applicants seeking the compulsory buyout of its 10.02 percent interest in the first respondent in terms of section 163 of the Companies Act, Act 71 of 2008.

- [6] In terms of clause 3.2 of the settlement agreement, the respondents agreed to buy out the applicants' shareholding in the first respondent for fair value, subject to the determination of the residual dispute. While the settlement agreement defined the term *residual dispute*, it did not define the term *fair value*.

- [7] The following clauses of the settlement agreement are noteworthy:

- (i) clause 3.3.1 which provided that the fair value of the shares would be determined with regard to the financial condition of the Company as at 30 June 2020 and as at 30 June 2022;
- (ii) clause 3.3.2 which provided that each party would have the right to make representations to the valuer within 15 days of his appointment. Thereafter, the other party would have the right to reply to those representations within 10 business days of receipt thereof;
- (iii) clause 3.3.3 which provided that the valuer would be entitled to request any further information and/or documentation from either party;

(iv) clause 6.1 which provided that the settlement agreement constituted the whole agreement between the parties relating to the matters dealt therein; and

(v) clause 6.2 which provided that any variation, deletion or addition not in writing and signed by the parties would be of no force or effect.

[8] Thus, while the settlement agreement allowed the parties to make representations to the valuer, these representations could not to vary or amend the terms or substance of the settlement agreement.

[9] In correspondence dated 31 August 2022 the valuer confirmed acceptance of his brief. He recorded that he understood the settlement agreement to require four valuations, which were the fair value as at 12 October 2020 with and without a minority discount and the fair value as at 30 June 2022 with and without a minority discount.⁴

[10] On 18 April 2023 the valuer handed down his valuation report. The valuer states that his mandate was that the valuation be based on *'fair value, subject to the determination of the Residual Dispute'* and that *'other than the minority discount which was the subject of the residual dispute'* his mandate was silent on other potential discounts and that it was not apparent whether other potential discounts were applicable or not.⁵ The valuer elected not to invoke the provisions of clause 3.3.3 to obtain clarity on the applicability of the two further discounts. It is not

⁴ See paragraph 3.3.3 of the valuer's letter of engagement as to why he used the date of 12 October 2022.

⁵ Paragraphs 9 and 14 of the valuation report

disputed that the respondents proposed the applicability of the two further discounts to the valuer.⁶

- [11] In the valuation report it is recorded that the applicants distinguished between fair market value and fair value. The applicants contended that fair market value was the price at which an asset would change hands between a willing buyer and a willing seller and that discounts would apply for lack of control and lack of marketability. Fair value would not include discounts for lack of marketability and lack of control.

- [12] The valuer specifically states that:

- '15. It is possible that fair value may have a specific legal meaning which differs from its valuation and accounting meaning particularly in matters of shareholder disputes. Whether this is the case in South Africa is beyond my expertise and some brief informal discussions with senior lawyers did not reveal a coherent view.*
- 16. The Settlement Agreement provides the power to "appoint an expert to assist". However, the applicability of a minority discount is subject to arbitration and in my view the matter of whether any other discounts are applicable should therefore also be left for the Arbitrator to decide.*
- 17. For the reasons provided above I will proceed on the basis that discounts (over and above the Minority discount) must be taken into account. I will leave it to the Arbitrator to determine whether there are legal considerations which override the fair value determination based on taking discounts into account.'*

⁶ Paragraph 14 of the founding affidavit read with paragraph 74.1 of the answering affidavit.

[13] In dealing with a marketability discount, the valuer states that:

'Marketability Discount'

30. *Numacon and Leleu dispute whether a Marketability discount should be applicable:*

30.1 *Numacon correctly states that the marketability of a private company such as Numacon is far less than a listed entity.*

30.2 *Leleu correctly states that the Settlement Agreement does not refer to a Marketability discount.*

31. *Regarding the applicability of a Marketability discount I reiterate the following points:*

31.1 *From a purely economic standpoint as a valuer of a company, clearly a discount for marketability would be applicable. Lack of marketability detracts from the value of a shareholding.*

31.2 *The question of whether a Marketability discount is applicable or not to this valuation is a legal matter which as previously mentioned I will leave to the Arbitrator to decide.'*

[14] It is evident from the valuation report that the portfolio valuation discount would apply to shares which are traded on the Johannesburg Stock Exchange ('JSE'). This differs from the situation where shares are being sold in terms of a compulsory buyout of a shares in a private, unlisted company.

[15] Under the heading of Summary of Results and Conclusion, the valuer states that:

'40. There may be legal reasons whether in the framing of the mandate or the definition of fair value which would result in the Portfolio Valuation discount and/or the Marketability discount not being applicable. I will leave that decision to the Arbitrator.'

- [16] Notwithstanding the valuer explicitly stating that it should be left to the arbitrator to decide whether any other discounts (other than a minority discount) were applicable, he proceeded to apply both a marketability and a portfolio valuation discount. However, in doing so, he goes on to state that *'...so to the extent that the Arbitrator rules that either or both should not apply then the table below would need to be recast.'*

Arbitration

- [17] After the valuation report was made available, the residual dispute was referred to the parties' appointed arbitrator for a decision. In arriving at his award, the arbitrator declined to interfere with the introduction of the two further discounts. The arbitrator reasoned that the arbitration tribunal, unlike the High Court, had no inherent jurisdiction and therefore, he had no jurisdiction to determine whether the valuer exceeded his mandate. The arbitrator further found that the question in respect of whether the valuer exceeded his mandate is a matter of review for the courts.

- [18] Thereafter, the arbitration award was appealed to an arbitration appeal tribunal consisting of three retired judges. It handed down its award on 4 June 2024. In paragraph 55 of the award, the appeal panel stated that:

'...As we read the settlement agreement, the valuation was final and binding and if it needed interpretation, or was thought to have been produced outside the

mandate given to the valuer, that was a matter for a court. It was not for the arbitrator to construe it, because it was not within his mandate to do so or to make any finding as to the applicable valuation. Likewise, it is not open to us to construe I and we have merely set out the contrary construction to illustrate that the interpretation of the valuation is contested on proper grounds.'

- [19] The arbitration appeal tribunal held that the question whether the valuer was correct in applying the two further discounts was not for it to decide. Similarly, it was not for the arbitration appeal tribunal to determine whether any findings made by the valuer in respect of applicability of the further two discounts should be ignored. The arbitration appeal tribunal also held that it was not open to it to interpret the settlement agreement.

Discussion

- [20] The applicants seek to set aside the application of the two further discounts on the ground that a proper construction of the valuation report evidences that the valuer did no more than postulate the potential applicability thereof and deferred the issue as to the applicability to the arbitrator. Alternatively, if it is found that the valuer applied the two discounts, then the applicants contend that he exceeded his mandate and the valuation should be reviewed and set aside.
- [21] This follows from the valuer's mandate to only establish the fair value of the applicants' shareholding and to establish what the extent of a minority discount should be, should the arbitrator find it applicable.
- [22] The applicants argued that within the context of the compulsory buyout of the applicants' shareholding in the first respondent in terms of section 163 of the Companies Act, discounts for lack of control and lack of marketability would not

apply. This was not a case of willing buyer willing seller which called for the application of the fair market value. On the contrary, the situation called for the application of a fair value which did not include discounts.

[23] The applicants argued that the settlement agreement provided only for the potential application of the minority discount and not of the other two discounts. This is clear from the provisions of clause 1.2.6 of the settlement agreement which defined the term *residual dispute*. Thus, this was the only disputed issue between the parties which remained to be determined.

[24] Furthermore, at no stage did the respondents raise the potential application of the further two discounts prior to the referral to the valuer per calculation of the fair value.

[25] It is the respondents' case that the two further discounts were applicable and that an allowance by way of a deduction from the fair value of the shares should be made. Furthermore, they argue that the valuer did not exceed his powers or commit a gross irregularity which would render his valuation susceptible to review.

[26] The respondents argued that the relief sought by the applicants is unsustainable as the valuation has been implemented and the sale of the Trust's shares to the respondents have been completed. The respondents argued that the two further discounts were to be applied and that the applicants waived their right to review the valuation.

[27] The argument that the applicants abandoned its right to review the valuation is based on the following:

- (i) on 9 May the applicants informed the respondents that counsel would be briefed to advise on an application to set aside the valuation based on procedural irregularity and/or material mistake;
- (ii) on 28 June 2023, correspondence was sent to the arbitrator that the applicants instructed its legal representative to review the valuation; and
- (iii) on 7 August 2023, the respondent's legal representatives were informed that the applicants' legal representative have received instructions not to proceed with the review application.

[28] Therefore, by proceeding with the arbitration process, the applicants abandoned its right to review the valuation. Upon finality of the arbitration process, the application proceeded with the sale of its shares which resulted in the transfer of ownership and a completed sale. This rendered any review of the valuation moot.

[29] Put differently, by proceeding with the arbitration, the applicants accepted the risk of arguing the valuation and expressly abandoned the right to review.

[30] The applicants argued that the correspondence of 7 August 2023 should be understood as conveying the sentiment that the applicants did not intend to proceed with the review **at that stage**. And that at no stage was it their intention to permanently abandon or waive its right to review the valuation report.

[31] In *Coppermoon Trading 23 (Pty) Ltd v Government, Eastern Cape Province and Another*⁷ the court dealt comprehensively with election and waiver. In dealing with the requirements of waiver, that court held that it is the intentional and unequivocal renunciation or relinquishment of a known right whereas election

⁷ 2020 (3) SA 391 (ECB)

postulates a choice between two inconsistent rights, each of which has different legal consequences.

[32] Christie states that the doctrine of election is not a mechanical rule of law but that it is a combination of waiver and estoppel. The respondent/defendant as the party invoking the doctrine of election bears the onus to show that on the facts, that the applicants/plaintiff waived its right to this remedy, failing such proof that the applicants/plaintiff is estopped from claiming it.⁸

[33] The doctrine of election finds application only where the applicants/plaintiff is faced with inconsistent remedies which are mutually exclusive and not where the applicants/plaintiff has alternative remedies available to it where the pursuit of one remedy cannot exclude the other.⁹

[34] As the respondents allege that the applicants waived its right to review, they bear the onus to not only plead such waiver but also to establish the facts on which it is based.¹⁰

[35] There is a presumption against election which is a form of waiver.¹¹ The respondents have the onus to show that the applicants, with full knowledge of its rights decided to abandon it.¹² Furthermore, the conduct from which waiver is inferred must be unequivocal and inconsistent with any other hypothesis.¹³

[36] In *Road Accident Fund v Mothupi*¹⁴ the Supreme Court of appeal held that waiver is first and foremost a matter of intention with the starting point being the will of the party alleged to have waived its right / remedy / privilege / power / interest or

⁸ R H Christie *The Law of Contract* 7th ed at 639

⁹ *Total South Africa (Pty) Ltd v Bekker* NO 1992 (1) SA 617 (A)

¹⁰ R H Christie *The Law of Contract* 7th ed at 639

¹¹ *Ibid*, at 510

¹² *Moyce v Estate Taylor* 1948 (3) SA 822 (A)

¹³ *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA)

¹⁴ 2000 (4) SA 38 (SCA)

benefit and that an objective test is applied to determine whether there was an intention to waive.

[37] Therefore, whether there was intention to waive is adjudged by outward manifestations which are adjudged from the perspective of a reasonable person in the shoes of the party concerned. Any mental reservations that are not communicated have no legal consequences.

[38] The respondents argued that as the buyout of the applicants' shares could only take place after the arbitral determination of the residual dispute which itself could only take place after the valuation, the referral to arbitration meant that the applicants could no longer review the valuation.

[39] On the facts of the application, it cannot be said that the applicants intentionally and unequivocally renounced or relinquished their right to challenge the valuation. On the contrary, they consistently expressed their dissatisfaction therewith.

[40] The respondents aver that the applicants unreasonably delayed in bringing a review of the application and that by proceeding with the arbitration the applicants effectively abandoned its right to review the valuation.

[41] At both stages of the arbitration, the correctness of the applicability of the two additional discounts and the interpretation of the settlement agreement arose. At both the initial arbitration and at the appeal arbitration stages the arbitrators engaged with these questions with the initial arbitrator finding that upon an interpretation of the valuation that the valuer did not determine the applicability of the further two discounts. However, the arbitration appeal tribunal found that the arbitrator, like itself, lacked jurisdiction to interpret the settlement agreement or to

determine the correctness of the applicability of the two additional discounts. This finding of the arbitration appeal tribunal rendered the review process necessary. Had the initial arbitrator and/or arbitration appeal tribunal determined differently in respect of their jurisdiction to interpret the settlement agreement and/or to determine the correctness of the applicability of the additional two discounts, it could have rendered any review application unnecessary.

- [42] Therefore, on a consideration of the facts of the matter and the applicable legal principles, the argument that the applicants waived its right to review cannot be sustained.

The Sale of the Shares

- [43] On 10 June 2024, the applicants were informed that the respondents intended to transfer R19 797,723 into their attorneys' trust account. This amount of R19 797, 723 would be paid over into a bank account nominated by the applicants against delivery of the original share transfer forms signed in blank by the applicants' trustees and delivery of the original share certificates representing the 2,247 shares held by the applicants.

- [44] The applicants received the payment of R19 797, 723 and duly delivered the original share transfer forms and original share certificates. The respondents argue that the acceptance of this payment constituted a waiver of the applicants' rights to challenge the valuation and constituted a compromise.

- [45] Neither the proposal for payment of R19 797, 723 nor the receipt thereof was accompanied by any communication which reflected this payment to be in full and final settlement.

- [46] As the respondents allege that the applicants' acceptance of the payment of R19 797, 723 resulted in a compromise, it must be ascertained whether the proposal to pay the amount of R19 797, 723 objectively construed not only intended to create binding legal obligations on the applicants but also whether it appeared that way to the applicants.¹⁵
- [47] Payment to a creditor, depending on the circumstances, could either result in a compromise or a payment towards an admitted liability. In such circumstances, it has been held that debtors who express themselves inadequately in their intentions to achieve a compromise run the risk of having their words interpreted against them.¹⁶
- [48] It is trite that compromise is the agreed settlement of disputed obligations. The onus rests on the party alleging that a compromise has been affected. To discharge this onus, it must be shown that there was a clear and unambiguous waiver of existing or claimed rights.¹⁷
- [49] On the facts of the matter, it cannot be shown that the payment of R19 797, 723 was made to the applicants as a compromise or that the applicants accepted this payment as acceptance of an envisaged compromise.
- [50] Certainly, the payment of R19 797, 723 and the acceptance thereof was consistent with the receipt of payment towards the minimum amount owed to the applicants. Therefore, the payment and acceptance of R19 797, 723 did not evidence a clear and unambiguous waiver of the applicants' rights.

Did the valuer exceed his mandate

¹⁵ *BE BOP A LULA Manufacturing and Printing CC v Kingtex Marketing (Pty) Ltd* 2008 (3) SA 327 (SCA)

¹⁶ *Absa Bank Ltd v Van De Vyver No 2002 (4) SA 397 (SCA)*

¹⁷ *Christi*, pg 528

- [51] In the valuation report, the valuer unequivocally states that he was uncertain whether the additional two discounts were applicable. In paragraph 31.2 of the valuation report the valuer explicitly states that the applicability of a marketability discount was a legal issue. He also recognized that the applicability thereof fell outside his area of expertise. Similarly, the valuer recognized that the application of the portfolio valuation discount was a legal issue outside his area of expertise.
- [52] The settlement agreement was reached as a mechanism to put an end to the parties' litigation. Thus, it can be accepted that it was produced after the parties engaged one another on the contents thereof and after grappling with the mechanisms of implementation and enforcement.
- [53] The introduction of the further two discounts, in my view, amounted to a variation and/or amendment of the substance of the settlement agreement which was prohibited by clause
- [54] It is incomprehensible that the parties would agree that the application of a minority discount would fall to an arbitrator to determine but would leave the possible application of the two further discounts to the valuer, especially when it is acknowledged by the valuer that the application of these two further discounts are legal issues which fell outside his area of expertise.
- [55] The valuer was mandated to perform calculations to arrive at a value. He was not mandated to decide the applicability of discounts when performing those calculations, which were legal issues beyond the scope of the valuer's expertise.
- [56] When the principles of interpretation are applied to the definition of *residual dispute* as it appears in the settlement agreement, it leads to the conclusion that the only dispute between the parties that required resolution was whether a

minority discount had to be applied when determining the fair value of the applicants' shareholding.¹⁸ 6.1 and 6.2 of the applicability of the two other discounts raises substantive legal issues which contradicts the definition of "residual dispute" agreed to by the parties.

[57] Thus, the valuer wrongfully exceeded his mandate when he went beyond his expertise to apply the two further discounts. It may be that the respondents proposed the application of the two further discounts but the application thereof amounted to a variation and/or amendment of the terms of the settlement agreement. This was contrary to clauses 6.1 and 6.2 of the settlement agreement.

[58] It is clear from paragraphs 30 and 31 of the valuation report that the valuer applied the marketability discount as it would apply within a purely economic standpoint and not within the context of a compulsory buyout. The valuer also applied the portfolio valuation discount in circumstances where it was not applicable as the buyout pertained to a private unlisted company.

[59] It is undisputed that the calculation of the fair value of the applicants' shareholding occurred outside the context of a willing buyer and willing seller. As correctly held by the appeal arbitration tribunal, the notion of fairness indicated that an element of achieving an equitable balance between the parties is involved. The appeal arbitration tribunal went on to hold that:

'When a superior bargaining position is exploited in order to secure a fortuitous profit at the expense of a co shareholder with whom the other shareholders have

¹⁸ *Natal Joint Municipal Pension Fund v Endumeni* 2012 (4) SA 593 (SCA). The context within which the settlement agreement was reached is set out in paragraphs 51 and 52.

had a lengthy, profitable and generally co-operative business relationship over a number of years, the unfairness is in our view manifest.'

[60] When the valuation of the shares was calculated incorrectly as if the sale thereof was to take place between a willing buyer and a willing seller and after the application of the further discounts which had no application, it cannot but fail to reach an equitable balance between the parties. Rather, it would result in a skewed balance which would be manifestly unfair to the seller in the compulsory buyout.

[61] As the valuer was appointed to calculate the value of the applicant's shareholding, he was expected to exercise the judgment of a reasonable person.¹⁹ As set out in the settlement agreement and as have been held by our courts, the decision of the valuer is generally final and binding on the parties. However, where the valuer exercises his/her judgment in an unreasonable manner, irregularly or wrongly in such a manner as to cause an inequitable outcome, then the affected party is not bound thereby and the determination can be rectified on equitable grounds.²⁰ In *Perdikis v Jamieson*²¹ the SCA held that:

'It was held in Bekker v RSA Factors 1983 (4) SA 568 (T) that a valuation can be rectified on equitable grounds where the valuer does not exercise the judgment of a reasonable man, that is, his judgment is exercised unreasonably, irregularly or wrongly so as to lead to a patently inequitable result.

'This is also the position in respect of the referee's report — it can only be impugned on these narrow grounds.'

¹⁹ *Bekker v RSA Factors* 1983 (4) SA 568(T); *Vodacom (Pty) Ltd v Makate and Another* 2024 (3) SA 347 (SCA)

²⁰ *Vodacom (Pty) Ltd v Makate and Another* 2024 (3) SA 347 (SCA)

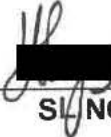
²¹ 2002 (6) SA 356 (W)

[62] The valuer applied the two further discounts in circumstances where he was uncertain of their applicability; when the application was beyond his area of expertise; to circumstances in which they would not be generally applicable without explaining why he applied them to the particular circumstances of the parties; and left it to the arbitrator to make a final determination in respect of their applicability. In the circumstances, it cannot be said that the valuer exercised his judgment reasonably. On the contrary, he acted wrongly which resulted in a patently inequitable result.

[63] Therefore, it is this court's finding that the valuation report stand to be reviewed and set aside as the valuer exceeded his mandate when he applied the further discounts, and he did not exercise the judgment of a reasonable valuer as he exercised his judgment wrongly and irregularly.

[64] Therefore, I make the following orders:

- (1) the First to Twenty Second Respondents, jointly and severally and in proportion to their shareholding in Numacon (Pty) Ltd, make payment to the Trust of the amount of R11,136,219 together with *mora* interest thereon as from date of the valuation report by Laroki Corporate Finance (Pty) Ltd, being 18 April 2023.
- (2) the costs of the application shall be borne by the First to Twenty Second Respondents, jointly and severally, the one paying to absolve the other, which costs shall include the costs of two counsel where so employed.
- (3) the costs shall be on scale C.


SLINGERS, J
S.S. 2025