



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

Reportable

Case no: A214/2025

In the matter between:

NUMACON (PTY) LTD

First Appellant

MICHAEL IOANNOU

Second Appellant

ADAM BHAYAT N.O.

Third Appellant

RASHIDA BHAYAT N.O.

Fourth Appellant

RUCHSANA BHAYAT N.O.

Fifth Appellant

GADIJA BHAYAT N.O.

Sixth Appellant

HYMAN BRUK N.O.

Seventh Appellant

VREES INVESTMENTS (PTY) LTD

Eighth Appellant

XENOPHON DEMETRIADES N.O.

Ninth Appellant

JOAN DEMETRIADES N.O.

Tenth Appellant

ALEXANDRA MARIKA DEMETRIADES N.O.

Eleventh Appellant

KIMON ANDREAS DEMETRIADES N.O.

Twelfth Appellant

HELEN CONSTANTINIDES N.O.

Thirteenth Appellant

CHRISTODOULAKIS CONSTANTINIDES N.O.

Fourteenth Appellant

DEMETRIOS CONSTANTINIDES N.O.

Fifteenth Appellant

MARIA CONSTANTINIDES N.O.	Sixteenth Appellant
LUKAS CORNELIUS SERFONTEIN (SNR) N.O.	Seventeenth Appellant
LUKAS CORNELIUS SERFONTEIN (JNR) N.O.	Eighteenth Appellant
PHILIPPUS CAREL PRINSLOO N.O.	Nineteenth Appellant
GORDON MANN N.O.	Twentieth Appellant
SONJA MANN N.O.	Twenty-First Appellant
ENTEGRA TRUST (PTY) LTD	Twenty-Second Appellant

and

HERWIG TILLO CORNELIUS LELEU N.O.	First Respondent
MARLEEN AUGUSTA MARIE LELEU N.O.	Second Respondent
BERNARD KATZ	Third Respondent

Coram : **SALDANHA AND NZIWENI JJ AND JONKER AJ**

Heard : 13 March 2026

Delivered : 9 September 2026 (electronically)

Summary : Jurisdiction – Private valuation – Settlement agreement – Final and binding clause – Exclusionary effect – Grounds for judicial challenge – failure to comply with the contractual mandate – Restrictive interpretation. Waiver – Onus of proof – Knowledge and intent – Abandonment of rights by conduct. Compromise and Performance – Extinction of debt – Mutual intention – Insufficiency of unilateral performance.

ORDER

1. The appeal is dismissed with costs;
2. Costs to include the costs of two counsel and to be taxed on scale C;

3. The patent error in the order of the court a quo is corrected, by deleting all references to, or relief directed against the First Respondent.

JUDGMENT

NZIWENI J (SALDANHA J and JONKER AJ concurring)

Introduction

[1] This is an appeal against the whole of the judgment and orders delivered by the court a quo on 5 May 2025. The appeal is brought with the leave of the court a quo. The appellants contend, inter alia, that the court a quo erred in granting the orders contained in paragraph 64 of its judgment.

[2] The court a quo made the following order:

‘(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.’

[3] Quite an amount of the factual background to these proceedings is not in dispute and I turn, therefore, to that factual background.

[4] In September 2018, the Trust launched an application for the compulsory buyout of its 10.02% interest in the first appellant (‘Numacon’) in terms of section 163 of the

Companies Act 71 of 2008. The appellants opposed the application. Ultimately, judgment was granted in favour of the Trust; the court ordered the buyout relief and directed the majority shareholders to purchase the Trust's 10.02% shareholding in proportion to their respective holdings.

[5] The appellants appealed to the Supreme Court of Appeal against the entire judgment. On the day of the hearing, the matter was stood down for settlement negotiations. On 1 September 2022, the parties reached the settlement agreement. In terms of clause 3.2 the appellants undertook to purchase the shareholding of the Trust for fair value, subject only to the determination of what the agreement defined as the residual dispute. The residual dispute meant whether the purchase price for the shareholding was subject to a minority discount. The settlement agreement also provided that the parties could make representations to the valuer regarding the valuation. Pursuant to the valuer accepting his brief on 31 August 2022, the first to twenty-second appellants proposed to the valuer that certain further discounts, namely, portfolio valuation and marketability discounts, should be applied. The respondents opposed that proposal on the footing that the settlement agreement made no provision for either discount.

[6] The valuer delivered his report on 18 April 2023. The valuer recorded both contentions in his report, quantified both discounts at 20 percent, and set out in the table at paragraph 41.2 of his report the figures which resulted.

[7] As agreed in the settlement agreement, the valuer's report was referred to the initial arbitrator, Justice Brand, to resolve the residual dispute. The arbitrator agreed with the proposition that he lacked jurisdiction to interfere with the valuer's valuation. He further agreed that he had no jurisdiction to decide whether or not the valuer had exceeded his mandate. Justice Brand [the arbitrator] found that whether the two additional discounts apply to the determination of fair value is a matter of law that falls within the province of the arbitral tribunal. The award was then taken on appeal to a tribunal of three retired judges, which handed down its award on 4 June 2024.

[8] The arbitration appeal tribunal stated that it found it difficult to accept the arbitrator's finding that the valuer had not decided whether the two additional

discounts needed to be taken into account. The tribunal held that this was clear from the language of the report, read together with the appended valuation tables. They also opined that, for present purposes, it was highly arguable that the valuer undertook his task by deducting the two additional discounts, despite having reservations as to whether this was legally correct and assuming this question could be resolved by the arbitrator. The tribunal subsequently agreed that the valuer was wrong. However, they further stated that this did not mean it was open to the arbitrator to engage in an exercise of interpreting the valuation.

[9] The arbitration appeal tribunal also noted that the valuation was final and binding. Consequently, if it required interpretation, or was thought to have been produced outside the scope of the mandate given to the valuer, that was a matter to be determined by a court.

[10] On 10 June 2024 the respondents were informed that the appellants intended to transfer R19 797 723 into the trust account of their attorneys, that amount being the figure yielded by the report after the deduction of the portfolio valuation and marketability discounts. The amount was to be paid over against delivery of the original share transfer forms signed in blank by the trustees and of the original share certificates representing the 2 247 shares. The share transfer documents were delivered, the payment was made and the shares were transferred. Neither the proposal for payment nor the receipt of it was accompanied by any communication reflecting that the payment was made or received in full and final settlement.

[11] The respondents launched the application in the court a quo on 8 October 2024. They contended that the valuer had never determined the two further discounts to be applicable, alternatively that the settlement agreement provided only for a minority discount, and in the further alternative that if the valuer had determined the two further discounts to be applicable, he had exceeded his mandate. They claimed payment of R11 136 219, being the difference between the amount already paid and the value of their shareholding before the deduction of those two discounts. On 5 May 2025 the court a quo upheld the application, reviewed and set aside the valuation report, and ordered payment of that amount together with mora interest from 18 April 2023. It is against that judgment and order that the present appeal is brought.

[12] The court a quo was principally concerned with a review application for declaratory relief brought by the first and second respondents, to the effect that:

- (a) The valuer's valuation report did not determine the two further discounts (a portfolio valuation discount and a marketability discount), to be applied to the fair value of the shareholding in the first appellant ('Numacon').
- (b) Alternatively, an order declaring that on proper interpretation of the settlement agreement, alternatively, a tacit term thereof that the only discount(s) that fell to be applied to the fair value of the twenty-second appellant's ('the Trust') shareholding was a minority discount;
- (c) In the valuer's valuation, to the extent that it held the two additional discounts to be applicable, falls to be ignored and treated as *pro non scripto* for purposes of establishing fair value of the Trust's shareholding.
- (d) Further alternatively, and should the court a quo hold that the valuer did not find the portfolio valuation discount and the marketability discount to be so applicable, to that extent, his valuation be reviewed and set aside, because;
 - (i) he exceeded his powers / mandate / jurisdiction in doing so;
 - (ii) the valuation, to the extent that it determined that the two 'additional' discounts were applicable, were not the exercise of the judgment of a reasonable person, but rather, exercised unreasonably, irregularly or wrongly that lead to a patently inequitable result.
- (e) An order that the Second to Twenty Second Respondents, 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 the date of the valuation report by the valuer as being 18 April 2023.

[13] I accept that the gravamen of the question confronting this Court on appeal is, in substance and for all material purposes, identical to the issues defined by the appellants, namely:

- (a) Whether the court a quo had jurisdiction to grant the relief for the interpretation of the settlement agreement; and/or a possible review of the valuer's report.
- (b) Whether the respondents waived their right to review the valuation; and

- (c) Insofar as the court had jurisdiction and /or whether the respondents were entitled to the review on a proper interpretation of the settlement agreement; whether the parties agreed only on the application of the minority discount and whether the valuer exceeded his mandate.

[14] During the hearing of the appeal, the parties agreed that the court a quo's reference in its order to the 'first to twenty-second respondents' constituted a patent error and should have been 'second to twenty-second respondents'. The parties further agreed that the setting aside of the entire valuer's valuation report likewise constituted a patent error.

The appellant's submissions

[15] The appellants contended that the settlement agreement established a clear, multi-stage procedural framework. The appellants also contended that under this agreed mechanism, the valuation by the valuer was to be final and binding, leaving any residual disputes, specifically the applicability of a minority discount and the effective date of the buyout, to be referred to a single arbitrator. The arbitrator's subsequent award would then be subject to an appeal before a panel of three arbitrators.

[16] The appellants contended that following the conclusion of the settlement agreement, the valuation took place and the residual dispute being referred to the initial arbitrator, and the subsequent appeal heard by the three-arbitrator panel. The respondents accepted the resulting appeal award and fully implemented the sale of shares.

[17] During the appeal, it was contended on the appellants' behalf that the cause of the whole dispute arose from clause 3.2 of the settlement agreement. This specific clause concerned the purchase of shares and the determination of the price to be payable for the equity. The determination of price was referred to the valuer to obtain the fair value (that would equate to the price) and the determination of the minority discount, that would be either applicable or not. The arbitrator had to decide whether the minority discount was applicable.

[18] The appellants contended that the entire process was concluded without any party seeking a review of the appeal award. They therefore contended that the matter was finalised; consequently, the court a quo lacked the requisite jurisdiction to grant relief regarding either the interpretation of the settlement agreement or any prospective review of the valuer's report.

[19] According to the appellants, upon finalisation of this appellate process, a reciprocal exchange was to occur: the appellants would pay the purchase price to the Trust against the concurrent delivery and transfer of the respondents' shareholding in the company. The appellants argue that this entire process was in fact executed, as contemplated.

[20] The appellants also contended that the first arbitrator misconstrued the settlement agreement. They are of the view that the two discounts form part of the valuation process and had nothing to do with the discount to be given. According to the appellants, the two discounts were part and parcel of the determination of fair value. To this end, the appellants contend that the court a quo erred in finding that the valuer wrongfully exceeded his mandate when he applied the two further discounts.

[21] It was submitted on behalf of the appellants that the valuer had an unfettered discretion to determine the fair value of the shares subject only to the determination of such value 'with or without any discount for shares representing a minority holding and with regard to the financial condition of the Company'.

[22] The appellants contended that the way the valuer prepared its report was simply to arrive at a fair value and then determine what had to be discounted as far as the minority discount were concerned. The appellants assert that the valuer decided that the two discounts had to apply, and the arbitrator may decide if he acted out of his scope to apply to the two discounts.

[23] The appellants further contended that it was wrong to claim that the valuer did not determine the applicability of the two further discounts. The mere reading of the

valuer's report they contend makes it clear that he had in fact applied the two discounts.

[24] To bolster the assertion that the two discounts were applied by the valuer and had to be taken into account to determine the fair value of the equity, the appellants place their reliance on paragraph 41.2 of the valuer's report. To that end, the appellants contend that prayer 1 of the notice of motion is inconsistent with the clear reading of the valuer's report. Paragraph 41.2 of the valuer's report reads as follows:

'However, the valuation has subtracted a Portfolio Valuation discount and a Marketability discount prior to the Minority discount, so to the extent that the Arbitrator rules that either or both should not apply then the table below would need to be recast.'

(My
emphasis.)

[25] As far as the alternative relief sought by the respondents is concerned, the appellants maintain that this Court has no material on the record to determine a tacit term of the contract.

[26] As far as prayer 3 of the notice of motion is concerned, the appellants contend that the correct question was whether the valuer randomly added further discounts and reduced the fair value of the shareholding or determined that the two discounts do apply in arriving at fair value. According to the appellants, in arriving at the fair value, the valuer did apply the two additional discounts; and if that is how the report is to be read; that was the end of the matter.

[27] According to the appellants' counsel, the court should construe the expert report and the settlement agreement and determine whether the valuer did apply the two discounts as part of the fair value.

[28] It was argued on behalf of the appellants that the respondents sought to make the valuer's report the origin of the claim. According to the appellants, there is no arbitral decision binding the parties to a purchase price. The appellants further contended that

because no arbitral decision granted the respondents 11 million rand, there was no basis for them [the respondents] to claim additional funds or to approach this court.

[29] The appellants submitted that prayer four could not be sustained, as there was no basis in law to grant such relief and the underlying transaction had already been concluded.

The respondents' submissions

[30] According to the respondents, the discounts were treated as a separate issue rather than an element of determining fair value. They submit that the settlement agreement handles this separation through distinct mechanisms: first, it restricts the residual dispute solely to the existence of a minority discount to the exclusion of all others; second, it limits the valuer's mandate strictly to quantifying the fair value; and third, it explicitly reserves the legal applicability of minority discount for the arbitrator, rather than the valuer.

[31] The respondents contended that the review was conditional upon a finding as to whether the valuer had applied the additional discounts; if he had not applied them, there was nothing to review. It was submitted that the appellants are reading findings in the appeal tribunal findings that are not borne out by the findings. The only issue that was before the appeal tribunal (the arbitrators) was the issue pertaining to the minority discount. All the other issues, the tribunal said, should go to court unless the parties could resolve them. According to the respondents, the appeal tribunal found in the respondents' favour and said that the minority discount does not apply.

[32] It was contended on respondents' behalf that this Court had jurisdiction to deal with the dispute.

[33] The respondents contended that the valuer's report established the cause of action, setting the fair value at over R30 million.

[34] The respondents further argue that the appellants were seeking to deduct R11 million. According to the respondents, the appellants sought to argue that the element

of the two discounts are part and parcel of the fair value determination. They contended that because the majority was absorbing the minority interest to consolidate total control, applying any further discounts would result in an inequitable windfall for the majority. The respondents' counsel argued that nobody raised any other discount but a minority discount.

[35] According to the respondents, the valuer did not assess or decide upon the discounts; he simply applied them to the final calculation. The respondents submit that while the appellants insist on deducting two separate discounts totalling R11 million, such deductions are legally impermissible. The respondents clarified that they are not seeking an additional award, but were strictly claiming the over R30 million net amount, resisting the appellants' attempts to further devalue the shares. They point out that the arbitrator made a factual finding that the valuer did not apply the two additional discounts. Consequently, counsel for the respondents argued that the appellants have no legal basis to insist on deductions that the valuer did not determine. According to the respondents, the valuer did not have legal expertise and as he was dealing with a special case of an inhouse buyout, he deferred the decision to the arbitrator.

[36] It was further contended on behalf of the respondents that the settlement agreement makes no mention of the two additional discounts, but rather, by its silence, precludes their application. The valuer was tasked to do the valuation and quantify the minority discount and not decide the applicability thereof. It was submitted that, it is unfair to apply further discounts in the circumstances of the matter.

[37] According to the respondents, when the valuer mentioned marketability, portfolio discounts, or JSE shares, he introduced irrelevant factors. They submitted that these concepts have no bearing on the specific, narrow mandate given to the valuer under the settlement agreement. The respondents maintain that the valuer's observations regarding marketability were made purely in a broader, theoretical context, rather than within the specific legal context of this matter.

[38] According to the respondents, the appellants improperly conflate an election with a compromise. They contend that a payment in full and final settlement requires an

express declaration, which was entirely absent from this case. The underlying dispute was ultimately resolved through arbitration, with the arbitrator's award explicitly declaring that a minimum sum of R19 million remains payable.

[39] Additionally, they asserted that, that meant that Numacon owed the Trust at least R19 million. They maintained that the payment of this R19 million did not constitute a compromise, as it was not tendered or accepted in full and final settlement of the remaining claims.

Evaluation

Whether the court a quo had jurisdiction to grant relief for the interpretation of the settlement agreement and/ or possible review of the valuer's report?

[40] For the sake of convenience, the analysis under this heading will co-extensively resolve the separate inquiry as to whether the parties intended to limit the scope of permissible deductions exclusively to the minority discount and whether the valuer exceeded his mandate.

[41] I am aware that ordinarily, a private valuer's determination is contractually insulated from standard judicial review where parties have agreed that such an evaluation will be final and binding. However, under common law and statutory principles, a valuer's valuation is not entirely immune and may be challenged and set aside in court on the following recognised grounds:

- (a) fraud or dishonesty: where the valuer acts in bad faith or behaves with a lack of integrity;
- (b) improper procurement: where the valuation was procured by corruption, fraud, collusive behaviour, or a manifest lack of good faith;
- (c) exceeding lawful contractual power (*ultra vires*): where the valuer executes their duties outside the strict parameters, rules, or guidelines specified in the governing agreement; and

- (d) gross mistake: where the valuer committed an error so fundamental or gross that it demonstrates a failure to have applied his mind to the contractual mandate.

[42] The Supreme Court of Appeal in *Vodacom (Pty) Ltd v Makate and Another* [2024] ZASCA 14; 2024 (3) SA 347 (SCA); [2024] 2 All SA 1 (SCA) para 13¹, held that:

‘The standard of review applicable to the CEO’s determination is one articulated some 40 years back in the judgment of *Bekker v RSA Factors* that postulates that, where a third person is nominated to fix a price or make a valuation, such a person is expected to exercise the judgment of a reasonable person. Courts have interpreted mandates of this nature to mean that, whenever two parties have agreed on this type of mandate, the decision is final and binding on them. However, should a valuer or third person exercise their judgment in such a manner that it is unreasonable, irregular and wrongly constituting an inequitable outcome, then the affected person would not be bound by the valuer’s determination, and such a determination would then be subject to rectification on equitable grounds. This test was applied in *Perdikis v Jamieson* where this Court stated the following:

“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.’

[43] One of the principles to be deduced from these authorities is stated in *Perdikis v Jamieson* 2002 (6) SA 356 (W) at 366I, as follows:

‘The legal position as I comprehend it is therefore the following: where, as in the present case, manifestly incorrect or unjust valuation has taken place, practically

¹The order of the Supreme Court of Appeal in *Vodacom* was subsequently set aside, and the appeal remitted for hearing before a differently constituted panel, in *Vodacom (Pty) Ltd v Makate and Another* [2025] ZACC 13; 2025 (6) SA 352 (CC). Nothing in this judgment turns on that restatement: the applicable test remains the one formulated in *Bekker v RSA Factors* 1983 (4) SA 568 (T).

speaking there has been no determination in terms of the contract between the parties.'

[44] The above is of course not exhaustive. However, it highlights the precise legal grounds upon which the respondents relied in challenging the valuation in the present matter. Specifically, the respondents contend that by introducing marketability and portfolio discounts, the valuer acted *ultra vires* the strict mandate as was carved out in the settlement agreement.

[45] The appellants' assertion overlooked a fundamental principle: if a valuer commits a manifestly unjust error or acts outside their mandate, the courts retain inherent jurisdiction to review and set aside that determination. Counsel for the respondents argued that judicial oversight survived even the completion of a subsequent arbitration process, as contractual arrangements cannot insulate an *ultra vires* act from judicial scrutiny.

[46] The respondents argued before the court *a quo* that they sought to set aside the application of the two further discounts on the ground that a proper construction of the valuation report evinced that the valuer did no more than postulate the potential applicability of the further discounts and deferred the issue as to their applicability to the arbitrator. Alternatively, if it was found that the valuer applied the two discounts, then the respondents contended that he exceeded his mandate and the valuation should be reviewed and set aside.

[47] In essence, before the court *a quo* the respondents argued that the valuer had exceeded the scope of his powers if it was found that he applied the two discounts. The appellants, before the court *a quo* maintained that the two further discounts were applicable and an allowance by way of deduction from the fair value of the shares should be made. They further maintained that the valuer did not exceed his powers or commit any gross irregularity which would render the valuation susceptible to review.

[48] The court *a quo* held as follows regarding the aspect under consideration:

‘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.

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.’²

[49] Two questions arise. The first is what the valuer in fact determined. The second is whether, on a proper interpretation of the settlement agreement, any discount other than the minority discount fell to be applied to fair value. Perhaps more significantly, the appellants do not deny that the two further discounts were applied. In the circumstances of the valuer’s report, the appellants’ concession is correct.

[50] Thus, the court a quo correctly found that the valuer wrongfully exceeded his powers by applying the two additional discounts, which effectively amounted to an impermissible unilateral variation of the terms of the settlement agreement.

[51] The text of the report itself confirms this overreach. The valuer stated the following:

‘Marketability Discount

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

² *Leleu N.O and Another v Numacon (Pty) Limited and Others* (19065/2024) [2025] ZAWCHC 192 (5 May 2025) paras 41 & 42.

- 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. . .
37. Conclusion on Marketability Discount
- 37.1. The PWC Survey indicates a Marketability discount of just above 15%. The PWC Survey, whilst extremely useful, is a survey of respondents and not an empirical study. . .
- 37.5 I have determined under the circumstances that a Marketability discount of 20% would be reasonable. . .
39. The Arbitrator has been tasked with deciding on the applicability of the Minority discount.
40. There may be legal reasons whether in the framing of the mandate or 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. . .
- 41.2 However, the valuation has subtracted a Portfolio Valuation discount and a Marketability discount prior to the Minority discount, so to the extent that the Arbitrator rules that either or both should not apply then the table below would need to be recast.

(My emphasis.)

	30-Jun- 22	30-Jun-20
	R	R
Nett Asset Valuation of Numacon before any discounts	308 721 975	347 711 390
Portfolio Valuation discount (20%)	<u>61 744 395</u>	<u>69 542 278</u>
	246 977 580	278 169 112
Marketability discount (20%)	<u>49 395 516</u>	<u>55 633 822</u>
Valuation of Numacon before Minority discount	197 582 064	222 535 289

Minority discount (20%)	<u>39 516 413</u>	<u>44 507 058</u>
	<u>158 065 651</u>	<u>178 028 231</u>
Valuation of 10,02 shareholding before any discounts	30 933 942	34 840 681
Valuation of 10,02 shareholding after Portfolio Valuation discount	24 747 154	27 872 545
Valuation of 10,02 shareholding after Portfolio Valuation discount and Marketability discounts	19 797 723	22 298 036
Valuation of 10,02% shareholding before Minority discount	19 797 723	22 298 036
Valuation of 10,02% shareholding after Minority discount	15 838 178	17 838 429

[52] The excerpt clearly demonstrated that despite acknowledging he lacked the legal authority to decide on the applicability of these discounts, the valuer went ahead and mathematically subtracted them anyway. Moreover, it is worth considering that the valuer explicitly noted that the only way these two unauthorised deductions would disappear is if arbitrator actively stepped in to 'recast' the table.

[53] An expert valuer's authority is strictly bound by the contract of appointment. The settlement agreement explicitly detailed the valuation framework without providing for marketability or portfolio discounts, the valuer possessed no lawful power to apply them. By giving effect to Numacon's extra-contractual demands the valuer committed material error beyond its terms of reference.

[54] Furthermore, the settlement agreement provided clear and explicit boundaries regarding what could be referred to the arbitrator following the publication of the report. While clause 3.4.1 expressly empowered the arbitrator to determine the applicability of a minority discount, it bestowed no authority on the valuer or the parties to refer a residual dispute regarding any other discounts to arbitration.

[55] Accordingly, the question of whether these two additional discounts applied, fell entirely outside the scope of the agreed arbitral framework. By attempting to enforce these extra contractual deductions, the appellants sought to unilaterally expand the carefully ring-fenced mandate of both the valuer and the arbitrator.

[56] Because the mandate of the valuer was confined strictly to determining the actual fair value of the shareholding based on the contractually agreed formula, the court a quo was entirely correct in setting aside the application of the two further discounts.

[57] This conclusion is reinforced by the material terms of the settlement agreement entered between the parties, which reveal the following structured dispute resolution process:

- '3.3.6 The valuer's determination will be final and binding on parties and not subject to an appeal.
- 3.4 On publication to the parties of the valuer's determination, the Residual Dispute will be referred to arbitration before the Arbitrator, who will determine:
 - 3.4.1 whether or not the shareholding is to be purchased with or without the minority discount;
 - 3.4.2 whether the shareholding is to be valued as at 30 June 2020 or at 30 June 2022;
 - 3.4.2.1 whether the interest is to run on that value from 12 October 2022 date of final payment; and
 - 3.4.2.2 if that is answered in the affirmative, what rate of interest shall apply;
 - 3.4.3 the costs of the Litigation, the Valuer and arbitration.
- 3.5 The arbitrator will make his/her finding on affidavits delivered in the Application and on oral submissions made by the parties.
- 3.6 The arbitrator's decision will be subject to appeal before three arbitrators jointly appointed between the parties. Failing agreement on arbitration panel, each party shall be entitled to appoint one arbitrator and the two arbitrators then appointed shall determine the identity of the third arbitrator. The arbitration panel shall be entitled to determine its own procedure.
- 4 BREACH
In the event of either of the Parties ("defaulting party") committing a breach of any of the terms of this Agreement and failing to remedy such breach within a period of 14 (fourteen) days after receipt of a written notice from the other party ("aggrieved party") calling upon the defaulting party so to remedy, then the aggrieved party shall be entitled, at its sole discretion to claim specific performance of the terms of this agreement or to cancel the Agreement forthwith and without further notice and in either case to claim (sic) and recover damages from the defaulting party. . . '

[58] Viewed in light of the above considerations, the terms of the settlement agreement, it was evident that the settlement agreement established a dual-jurisdiction framework that cleanly splits operational dispute resolution from contract enforcement. The arbitrator was granted a strict, limited mandate under Clauses 3.4 and 3.5 to resolve the 'Residual Dispute' based on the affidavits filed, specifically determining the minority discount, the valuation date, interest terms, and cost allocations. Any appeal of *this initial arbitral* decision was barred from the courts and had to be handled by an internal, three- person arbitration appeal panel under Clause 3.6.

[59] The valuer's report itself was contractually deemed final and non-appealable under clause 3.3.6. However, the high court retained a vital supervisory and enforcement jurisdiction. Crucially, under the breach provisions of clause 4, if a party defaulted and failed to remedy the breach within 14 days, the aggrieved party held the sole discretion to bypass the entire arbitration mechanism and approach the court directly to claim specific performance, contract cancellation, or damages.

[60] It is a curious and distinct structural feature of the settlement agreement that the arbitration process was not bestowed with exclusive adjudication of all disputes arising from it. In standard commercial contracts, parties typically include an all-inclusive arbitration clause designed to completely oust the court's jurisdiction. In this context, it is significant that the parties consciously decided to depart from that practice. Under clause 3.4, the private arbitrator's mandate *is strictly ring-fenced and restricted exclusively to resolving the defined Residual Dispute*. The arbitrator possesses no contractual mandate or jurisdiction to adjudicate wider contractual non-compliance, material breaches, or the ultimate dissolution of the agreement.

[61] Crucially, as previously indicated, clause 4 of the settlement agreement governs breaches and explicitly created a parallel, independent path to this Court. It provided that in the event of an uncured breach, the aggrieved party is entitled, at its sole discretion, to claim specific performance, or to cancel the agreement and claim damages. By pairing a heavily restricted arbitral scope with an unfettered contractual right to elect court remedies under clause 4, the agreement creates a fragmented

dispute resolution framework. It is clear therefore that any fundamental breakdown in performance or enforcement of the agreement shifts directly back into the court system.

[62] Insofar as the valuer acted *ultra vires* by adjudicating upon matters outside his powers, the court a quo was correct in finding that the application of the two further discounts warranted review. Nevertheless, the court a quo committed a patent error by failing to sever the flawed findings, as it ought to have set aside only those distinct portions of the report applying the portfolio and marketability discounts. Put differently, the court a quo ought to have found that the valuation report stood to be reviewed and set aside solely in respect of the valuer's application of the portfolio and marketability discounts.

[63] The valuer's *ultra vires* conduct established that the court a quo possessed the requisite jurisdiction to entertain the review. The appellants' contention that the determination was immune from judicial scrutiny is, in my view, flawed.

[64] In any event, and even if the valuation report were not susceptible to review, the declaratory relief sought in prayers 1 and 2 of the notice of motion was competent to grant. The court, in its discretion and at the instance of any interested person, is empowered to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination³. The respondents' interest is neither remote nor abstract. Their right to be paid fair value arises from clause 3.2 of the settlement agreement, and the extent of that right turns precisely on which discounts, if any, fell to be applied. Clause 3.3.6 renders the valuer's determination final and binding, but it does not, and could not, place beyond the reach of a court the anterior question of what the parties agreed the valuer was to determine.

[65] A declaration as to the proper construction of the settlement agreement, and as to what the valuer's report did and did not determine, produced a concrete and tangible result. The valuer's table set out the fair value of the 10,02 percent shareholding before any discounts at R30 933 942, and the appellants paid R19 797 723, being the

³ Section 21(1)(c) of the Superior Courts Act 10 of 2013.

figure yielded only after the portfolio and marketability discounts had been subtracted. The declaration thus fixed the balance remaining payable against a transfer of the shareholding that had already taken place, and the order for payment of R11 136 219 followed as relief consequential upon it.

[66] The second strand of the appellants' argument may be described as follows, that the Trust waived and/ or elected not to pursue its rights to review the valuer's decision.

Did the respondents waive their right to review?

[67] The appellants pointed out that the respondents had considered reviewing the valuation after it was delivered on 18 April 2023. That, pursuant to that decision, the Trust obtained legal advice and expressly elected to abandon any review of the valuation. Rather than challenging the report, the Trust chose to accept the valuation as it stood and affirmatively elected to proceed with the arbitration process.

[68] The appellants bolstered this submission by contending that, in addition to proceeding with arbitration, the respondents sought to actively implement the valuation via an urgent application launched in September 2023, wherein they claimed an interim payment from the appellants.

[69] Furthermore, the appellants assert that in correspondence dated 31 August 2023, the respondents' attorneys explicitly confirmed that the valuer's determination was final and binding.

[70] First and foremost, the parties in this matter are governed by the terms of the settlement agreement. It is significant to note that the terms of the settlement agreement stipulate the following:

- '6.1 This agreement constitutes the whole of the agreement between the Parties relating to the matters dealt with herein and, save to the extent otherwise provided herein, no undertaking, representation, term or condition relating to the subject matter of this Agreement not incorporated in this Agreement shall be binding on any of the Parties.

- 6.2 No addition to or variation, deletion or agreed cancellation of all or any clauses or provisions of this Agreement will be of any force or effect unless in writing or signed by the Parties.
- 6.3 No waiver of any of the terms and conditions of this Agreement will be binding or effectual for any purpose unless in writing and signed by the Party giving the same. Any such waiver will be effective only in the specific instance and for the purpose given. Failure or delay on the part of any Party in exercising any right, power or privilege hereunder will not constitute or be deemed to be a waiver thereof, nor will any single or partial exercise of any right, power or privilege preclude any other or further exercise thereof or the exercise of any other right, power or privilege.'

[71] In a letter to the appellants' attorneys dated 7 August 2023, the respondents' attorney wrote:

- '2. We have now received instructions from our client not to proceed with the Application to review the valuation.
3. The matter may accordingly proceed to Arbitration for the determination by the Arbitrator of what the settlement agreement refers to as the "residual dispute".
4. The arbitrator will accordingly have to make a ruling as to:
- 4.1 whether or not the shareholding is to be purchased with or without a minority discount;
- 4.2 whether the shareholding is to be valued as of 30 June 2020 or as at 30 June 2022 and if the former, whether interest is to run on that value from 12 October 2022 to date of final payment;
- 4.3 and if the aforementioned question is answered in the affirmative, what rate of interest will apply. . . '

[72] On 31 August 2023, the respondents' attorneys wrote a letter to the appellants' attorneys that states:

- '1. In terms of clause 3.2 of the settlement agreement your client undertook to buy-out- our client's shareholding in the company for fair value, subject (only) to the determination of the residential dispute.

2. In terms of clause 3.3.6 thereof the valuer's determination is final and binding.
3. Even should the two extra discounts provided for by the valuer be taken as part of the residual dispute (which they cannot) this means that the minimum figure your client currently owes our client amounts to R15 838,178.
4. We accordingly ask you to advise us as at the meeting later today as to whether:
5. Your client accepts liability for the payment of this amount forthwith; and
6. Alternatively, that the arbitrator may be tasked to resolve this issue so as to avoid the Court proceeding which our client will, unfortunately be enjoined to otherwise embark upon.'

[73] Whether an election or waiver existed was a question of fact. The court a quo was correct in stating that the appellants bore the burden of proving that the waiver occurred. There is moreover a strict legal presumption against a waiver of any right. As such, the onus rested squarely on the party asserting the waiver to prove that the other party, with full knowledge of its rights, definitively decided to abandon such rights. This intention must be expressed clearly or shown through conduct that was plainly inconsistent with exercising the right. Did the letter dated 7 August 2023, prove that a waiver occurred? I think not. The appellants in my view, failed to discharge the burden it bore of proving the alleged waiver.

[74] Moreover, the letter dated 7 August 2023 did not establish that a waiver occurred, as the review and the arbitration were not two conflicting options under the settlement agreement. When the respondents elected to proceed with the arbitration, they did not give up their right to a review of the valuation.

[75] The settlement agreement did not frame the private arbitration and a High Court review as mutually exclusive remedies. Instead, it established a sequential, multi-staged dispute resolution framework wherein the arbitration process logically followed the publication of the valuation report. Consequently, participating in the contractually mandated arbitration phase under Clause 3.4 was consistent with the terms of the settlement agreement. Compliance with these mandatory, sequential contractual steps

could not be construed as an implied waiver or an unequivocal election to abandon the right to review what it regarded as a fundamentally flawed valuation.

[76] It is therefore concluded, upon a comprehensive evaluation of all the circumstances, that the text of the 7 August 2023 letter cannot be construed as a waiver. The letter concluded with the following: ‘if you are in agreement with our proposal we will provide the judge with the record; we await your reply,’ the correspondence was objectively nothing more than an open-ended litigation proposal. A conditional offer that was dependent on a future response could never constitute clear, unequivocal evidence of an intention to surrender its entitlement. Furthermore, the proposal was presented as an integrated, indivisible packaged arrangement, it could thus not operate to unilaterally deprive the respondents of their right to launch review proceedings.

[77] I am moreover of the view that the appellants have not established any arguable point so far as the doctrine of election arose. Election only applies when a party is faced with two choices that are mutually exclusive (meaning if you choose one, the other becomes physically or legally impossible to perform). In *Segal v Mazzur* 1920 CPD 634 at 644–645, the court stated the following:

‘Now, when an event occurs which entitles one party to a contract to refuse to carry out his part of the contract that party has the choice of two courses. He can either elect to take the advantage of the event, or he can elect not to do so. He is entitled to a reasonable time in which to make up his mind, but when once he has made his election, he is bound by the election and cannot afterwards change his mind. Whether he has made an election one way or the other is a question of fact to be decided by evidence.’

[78] To conclude the mere fact that the letter dated 7 August 2023 stated that the respondents’ attorneys received instructions ‘not to proceed with the application to review the valuation’ did not unequivocally establish a waiver or a binding election. For conduct to be unequivocal, it must be incapable of any other reasonable interpretation. The 7 August 2023 letter was in my view no more than an ‘administrative roadmap’ and did not amount to a binding contractual election.

Compromise

[79] During oral argument, counsel for the appellants invited this Court to address two distinct questions arising from the payment of the R19 million. First, whether this sum constituted a part-payment of the purchase price or payment of the purchase price in full. Second, what legal intent or meaning was conveyed by the instruction that payment was to be made strictly 'against transfer'.

[80] While it is not in dispute that the Trust accepted payment of R19 797 723, it cannot be construed as the Trust thereby having waived its right to claim the further amount it was entitled to nor does the acceptance constitute a compromise (*transactio*). In *ABSA Bank Ltd v Van de Vyver NO* [2002] ZASCA 8; 2002 (4) SA 397 (SCA) paras 18 and 19 the following is stated:

'Sending one's creditor a cheque "in full settlement" coupled with a denial of liability would almost certainly signify an offer of compromise. But there may be an offer of compromise if there is no admission of liability accompanying the payment. And one may have to do with an offer of compromise even if there is an admission of liability. In the latter instance the line between an offer of compromise and payment of an admitted liability would naturally be finer than in the other two cases. In *Paterson Exhibitions*, for example, the admission was, in effect, no more than that something was owing, but without admitting how much or that the payment offered represented the admitted indebtedness.

[19] The caveat that requires mention, of course, is that debtors who express themselves inadequately in their intentions to achieve a compromise run the risk of having their words interpreted against them: *Christie* 533. There is therefore much to commend in the ways suggested by the learned author at 533-534 and by Professor Zeffert at 48 of the Law Journal article, in which clarity can be promoted when offers of compromise are formulated.'

[81] It is thus settled that a unilateral acceptance of a payment does not extinguish the underlying cause of action unless the payment was explicitly made and accepted 'in full and final settlement' of the entire dispute. In the absence of such restrictive language, the transaction is legally categorised as a mere payment on account.

[82] Compromise necessarily entails the termination of an existing obligation by mutual agreement. According to the learned authors *Van der Merwe et al Contract: General Principles* 6 ed, the subjective element of a discharge by performance requires more than a mere intention to tender performance. It demands a concurrent intention between the parties to extinguish the obligation entirely; an element that is demonstrably absent from the context of this payment. The Trust's receipt of the undisputed amount of R19 797 723 did not invoke any concession to abandon the remainder of its claim or its right to review the valuer's report.

[83] Hence, when examining the facts in this matter in light of the above authorities the respondents' reliance on the learned authors are not misplaced. *Van Huyssteen et al* state the following:

‘According to the courts, the effect of such an offer depends on the intention with which it is made. A distinction is drawn between offers made *animo solvendi* in other words with the intention to fulfil the obligation, and those made *animo contrahendi*, in other words with the intention of concluding a compromise with their creditor, usually accompanied by an offer of payment in the form of a cheque. In the latter case, acceptance of the cheque concludes a settlement, which binds the claimant to the terms of the offer and precludes a claim for the balance allegedly due to her. If the offer of compromise is rejected, the claimant must return the payment. Where, however, the offer was made in payment of a liability admitted by the debtor, the debt is discharged to the extent of the payment and the condition of payment “in full and final settlement” will have no effect if the creditor does not agree to it. The creditor is then entitled to retain the cheque and claim the balance of debt. . .

Because there was neither a subjective nor an objective basis for a compromise, the creditor was entitled to sue for the balance . . .

In the final analysis, an offer to pay may be construed *contra proferentem* as having been made *animo solvendi* if the offeror has not made their intention clear.’

[84] The payment of R19 797 723 for the shares remains uncontested and common cause between the parties, as the Trust elected not dispute the amount. Consequently, while the precise figure of R19 797 723 is settled and requires no further evidentiary

proof, the broader justiciable disputes regarding contractual enforcement, performance, and ultimate liability remain live between the parties.

[85] As mentioned previously, there is nothing in the evidence to show that the Trust intended to enter into a compromise; it is therefore fully entitled to claim the outstanding balance. The facts demonstrate that while the appellants may have intended the payment to serve as a final compromise, the Trust accepted it merely as a partial payment. Absent a concurrent intention to extinguish the obligation, no contract of compromise was concluded.⁴ To this end, the payment of a baseline admitted debt does not constitute a legal compromise, even if so labelled 'in full settlement' (an explicit declaration that was, in any event, entirely absent in this matter).

[86] In my view, taking account of all the foregoing facts and circumstances, the appellants failed to prove the existence of a compromise.

Conclusion

[87] For the reasons set out above, I have determined that the appeal fails on all grounds and stands to be dismissed. However, the order of the court *a quo* must be varied to correct a patent error regarding the reference to the first respondent and the setting aside of the valuer's report. In the result, I propose the following order:

Order

1. The appeal is dismissed with costs;
2. Costs to include the costs of two counsel and to be taxed on scale C;
3. The patent error in the order of the court *a quo* is corrected, by deleting all references to, or relief directed against the First Respondent.

⁴ *Paterson Exhibitions CC v Knights Advertising and Marketing CC* 1991 (3) SA 523 (A) at 529

CN NZIWENI
JUDGE OF THE HIGH COURT

I agree, and it is so ordered.

VC SALDANHA
JUDGE OF THE HIGH COURT

I agree.

EM JONKER
ACTING JUDGE OF THE HIGH COURT

Appearances:

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For the first and
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