THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 845/2020

In the matter between:

RAJKUMAR TAHILRAM **APPELLANT**

and

THE TRUSTEES FOR THE TIME BEING OF
THE LUKAMBER TRUST **FIRST RESPONDENT**

A & A DYNAMIC DISTRIBUTORS (PTY) LTD **SECOND RESPONDENT**

Neutral citation: *Rajkumar Tahilram v Trustees of the Lukamber Trust and Another* (845/20) [2021] ZASCA 173 (9 December 2021)

Coram: Zondi, Dambuza, Plasket, Hughes JJA and Meyer AJA

Heard: 3 November 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives via e-mail, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 09h45 on 9 December 2021.

Summary: Sale – price – to be fixed by third party's valuation – subject to limited exceptions and in the absence of agreement to the contrary or waiver by the parties, whenever parties agree to refer a matter to a valuer, then so long as the valuer arrives at his or her decision honestly and in good faith, the decision is final and binding on them and they are bound by it once communicated to them – valuer is then *functus officio* insofar as the valuation and matters pertaining thereto are concerned – valuer is then not permitted to unilaterally withdraw or cancel the valuation in order to alter or amend it – only a court has the power to interfere with the valuer's decision in review proceedings - judicial ambit of the court's power to interfere is severely circumscribed.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Sibuyi AJ sitting as court of first instance):

(1) The appeal is upheld with costs.

(2) The order of the court a quo is set aside and replaced with the following:

'*(a)* The first respondent is to pay the amount of R2 878 574.70 to the applicant, being the purchase consideration for the sale of his shares in the second respondent to the first respondent.

(b) The first respondent is to pay interest at the rate of 10.25% per annum *a tempore morae* on the aforementioned amount from the date of this order until final payment.

(c) The first respondent is to pay the costs of the application.'

JUDGMENT

Meyer AJA (Zondi, Dambuza, Plasket, Hughes JJA concurring):

[1] This appeal raises the question, when parties agree to refer a matter to an expert valuer, whether the valuer is legally permitted to unilaterally withdraw the valuation in order to alter or amend it, once the valuer's valuation has been communicated to the parties concerned. The appeal, with leave of the High Court, is against the judgment and order of the Gauteng Division of the High Court, Johannesburg (Sibuyi AJ) delivered on 07 August 2020, dismissing the claim of the appellant, Mr Rajkumar Tahilram (Mr Tahilram), against the first respondent, the three trustees of the Lukamber Trust (the trust), his sole co-shareholder in the second respondent, A & A Dynamic Distributors (Pty) Ltd (the company), for payment of the purchase consideration for his shareholding in the company in the amount of R2 878 574.70 plus interest and costs. In dismissing Mr Tahilram's application, the High Court held that the expert valuer was legally permitted to withdraw his valuation

in order to modify and correct it, and that he was not *functus officio* once he had communicated his valuation to the parties.

[2] The facts relevant to the determination of the appeal are straightforward and uncontentious. The business of the company is the sale and distribution of electronic components. Mr Andrew Kayser is one of the trustees of the trust, which holds 70% of the company's issued shares, and Mr Tahilram holds 30% of its issued shares. Mr Kayser is the managing director and responsible for the day-to-day affairs and activities of the company. Mr Tahilram was the sales director of the company until his employment with the company terminated on 27 March 2018. On the termination of Mr Tahilram's employment, he was required to offer his shares in the company to the trust.

[3] On 29 August 2014, the trust, Mr Tahilram and the company concluded a shareholders agreement. It contains an arbitration provision, which stipulates-

9.1 '*Save where otherwise provided in this Agreement,* should any dispute arise between the Parties in connection with-

9.1.1 the formation or existence of;

9.1.2 the implementation of;

9.1.3 the interpretation or application of the provisions of;

9.1.4 the Parties' respective rights and obligations in terms of or arising out of this Agreement or the breach or termination of;

9.1.5 the validity, enforceability, rectification, termination or cancellation, whether in whole or in part of;

9.1.6 any documents furnished by the Parties pursuant to the provisions of; this Agreement or which relates in any way to any matter affecting the interests of the Parties in terms of this Agreement, that dispute shall, unless resolved amongst the Parties to the dispute, be referred to and be determined by arbitration in terms of this clause 9.'(Own emphasis.)

[4] As I shall demonstrate, the shareholders agreement provides 'otherwise' in the event of a shareholder exercising its pre-emptive right to purchase the shares of a co-shareholder and a dispute has arisen between the co-shareholders relating to the fair market value of such shares. In presently relevant parts, clause 6.2.1 and its sub-clauses provide that '[s]hould any one of the Shareholders . . . cease to be employed by the Company for whatsoever reason, then [he] shall be deemed on the day . . .

immediately preceding his . . . cessation of employment with the Company . . . to have offered . . . all the shares . . . held by [him] in and all [his] claims against the Company . . . to the other Shareholders . . . on, *mutatis mutandis*, the terms and conditions set out in 6.1 . . .'. It continues to provide that the purchase price for the shares shall 'be a fair value therefore between a willing buyer and a willing seller determined on the basis provided in 5.1.8 and 5.1.9.'

[5] In the absence of agreement between the shareholders on the market value of the company's shares, clause 5.1.8 provides that the fair market value of shares 'shall be determined . . . by the Auditors . . . and the valuation of the Auditors, communicated to the Shareholders in writing, *shall be final and binding on the Shareholders*.' (Own emphasis.) Clause 1.1.3 defines 'Auditors' to mean 'the auditors of the Company presently being Odendaal and Co or such other auditors appointed by the Company from time to time'. Clause 5.1.9 further provides that '[t]he Auditors shall value the shares having regard to the fair value of the Business of the company and its subsidiaries, if any, as a going concern on the basis of an arm's length transaction between a willing vendor and a willing purchaser, and disregarding any restrictions in this Agreement or the Articles of Association of the Company concerning the transfer of shares'. The offer to sell the shares to a co-shareholder must be accepted by such co-shareholder within a stated period of time from the date of the determination of the purchase price for such shares.

[6] The relationship between Messrs Kayser and Tahilram soured for reasons that are presently not relevant. Ultimately, the employment of Mr Tahilram with the company was terminated on 27 March 2018. That event triggered the operation of clause 6.2.1 of the shareholders agreement and he was deemed on 26 March 2018 to have offered all his shares in the company to the trust. Mr Tahilram and the trust did not reach agreement on a fair market value of Mr Tahilram's 30% shareholding of the company. That, in terms of clause 6.2.1, triggered the provisions of clauses 5.1.8 and 5.1.9, and the company's auditors, still Odendaal & Co, were requested to determine the fair market value of the company's shares.

[7] Mr Herman Odendaal of Odendaal & Co (the valuer) determined the fair value of the company's business to be R4,8 million 'plus any value unlocked on the obsolete

stock as agreed on by a willing buyer/willing seller.' He classified 'all stock that did not move for a 24-month period . . . as obsolete'. His written valuation report dated 4 July 2018 was communicated to the company's co-shareholders. The valuer thereafter confirmed 'that the stock value as per the detailed inventory list supplied by [the company] for the year ended 31 March 2018 was R14 971 701.51, but based on our obsolescence tests we believe the fair realisable value to be R4 795 249.18'. His written valuation report dated 13 July 2018 was communicated to the company's co-shareholders.

[8] In a letter dated 1 August 2018, Mr Tahilram disagreed with the valuation for reasons that are presently not relevant, except for his contention that he should acquire 30% of the obsolete stock. In response, the valuer advised his attorneys in a letter dated 8 November 2018, that he notes Mr Tahilram's disagreement with his valuation and respects his right to disagree. The valuer made it clear that he was not prepared to change his valuation. Mr Tahilram ultimately accepted the valuer's determination of the fair market value of the company's shares. In a letter dated 15 February 2019, from the attorneys of the trust, represented by Mr Kayser, addressed to Mr Tahilram's attorneys, Mr Tahilram was notified that the trust accepted the valuer's determination of the fair market value of the company's shares, and that the trust accepted Mr Tahilram's offer to purchase his 30% shareholding. In this regard the following is stated in the letter:

'7. In light of the cessation of your client's employment with the Company and in light of the fact that your client's shares have been offered up for acceptance in terms of the Shareholders Agreement, our client herewith accepts the offer to purchase your client's 30% (Thirty Percent) shareholding in the Company.

8. In light thereof and at the request of our client, the Auditors of the Company on 17 January 2019 confirmed that the Company had a nett asset value of R4,877,427.00 (Four Million Eight Hundred and Seventy-Seven Thousand Four Hundred and Twenty-Seven Rand) as at 31 March 2018. The value for your client's shares in terms thereof is R1,625,809.00 (One Million Six Hundred and Twenty-Five Thousand Eight Hundred and Nine Rand).

. . .

13. In any event, we note that your client is of the view that he should acquire 30% (Thirty Percent) of the obsolete stock and in terms thereof, we place under your attention the following:-

13.1 As at 31 March 2018, the stock value was approximately R15,000,000.00 (Fifteen Million Rand) (hereinafter referred to as the *"Stock Value Figure"*).
13.2 R4,800,000.00 (Four Million Eight Hundred Thousand Rand) was not considered obsolete stock and was included in the Net Asset Value calculation by the auditors and will thus need to be deducted from the Stock Value Figure above.'

[9] The trust, however, maintained that various amounts which Mr Tahilram allegedly owed to it should be deducted from the purchase price it was to pay to Mr Tahilram. The nature and amounts comprising such alleged indebtedness on the part of Mr Tahilram to the trust, are presently irrelevant. Mr Tahilram also accepted the valuer's determination of the fair market value of the company's shares and, to no avail, demanded payment from the trust of an amount equivalent to 30% of the fair market value of the company's shares as determined by the valuer. On 6 June 2019, motion proceedings were instituted in the court *a quo* wherein he claimed such amount plus interest and costs.

[10] The trust's answering affidavit was deposed to by Mr Kayser on 22 July 2019, and filed on the same day. Annexed thereto was an amended written valuation report by the valuer dated 16 July 2019. Therein, he reduced his initial valuation of the net asset value of the company's shares by an amount of R1 260 775. Such deduction, ex facie the amended valuation report, was for motor vehicles allocated to Mr Kayser that were included in his original valuation. In this regard Mr Kayser said the following in the trust's answering affidavit:
'18.60. In preparation of the answering affidavit, I consulted with Odendaal on 16 July 2019 and relayed the content of the Applicant's founding affidavit to him, more particularly the calculation relied upon to arrive at the claimed amount. He immediately remarked to me that the reliance by the Applicant is misplaced if regard is had to the earlier objections registered by the Applicant on 1 August 2018.
18.61 After our consultation, Odendaal supplied me with an updated valuation taking into account further aspects and arriving at a revised value of R3, 600, 000.00. A copy of the aforesaid valuation is attached hereto as annexure "AK44.1" and was sent to the Applicant's legal representatives on 19 July 2019 before the delivery of the answering affidavit herein.'

[11] It is remarkable that the reason for the valuer's reduction of an amount of R1 260 775 in respect of motor vehicles allocated to Mr Kayser from the net asset

value of the company's shares as initially determined by him, is not explained by Mr Kayser in the answering affidavit or by the valuer, nor did such deduction form part of Mr Tahilram's initial objections to the valuer's initial valuation report or of the deductions which Mr Kayser maintained should be made from the purchase price payable by the trust for 30% of Mr Tahilram's shares in the company.

[12] The High Court a quo found that '[i]t is obvious that the parties dead locked on the purchase price' and that 'the applicant was obliged to invoke the arbitration clause to resolve the deadlock on the purchase price and or the value of the obsolete stock'. However, instead of 'calling a halt for arbitration', the High Court a quo exercised its discretion 'to tackle the dispute itself'. It considered the merits of the application and found the question 'whether or not the valuation of the auditors is final and binding on the parties to be dispositive of the matter'. The High Court a quo accordingly dealt with that question and concluded that 'valuers function not as arbitrators but as estimators of value', 'that such final and binding clauses of non judicial officers are not final and binding on the parties' and 'that the applicant's argument that the valuation is final and binding on the parties has no merit'. The High Court accordingly dismissed the application with costs on that basis. Subsequently, the High Court granted the applicant 'leave to appeal to the Supreme Court of Appeal only in respect of the application of the *functus officio* principle to this matter'.

[13] Unsurprisingly, this court also refused the appellant's application for leave to appeal on the question whether the dispute between the parties relating to the variation of the written valuation report was, in terms of the shareholders agreement, an arbitral dispute. Furthermore, the President of this court, on application to her in terms of s 17(2)*(f)* of the Superior Courts Act 10 of 2013, refused to refer such decision to this court for reconsideration. For, as was held by Didcott J in *Parekh v Shah Jehan Cinemas (Pty) Ltd and Others* 1980 (1) SA 304 (D) at 305G-H:

'Arbitration itself is far from an absolute requirement, despite the contractual provision for it. If either party takes the arbitral disputes straight to Court, and the other does not protest, the litigation follows its normal course, without a pause. To check it, the objector must actively request a stay of the proceedings. Not even that disruption is decisive. The Court has a discretion whether to call a halt for arbitration or to tackle the disputes itself. When it chooses the latter, the case is resumed, continued and completed before it, like any other. Throughout,

its jurisdiction, though sometimes latent, thus remains intact. That all this is so emerges from such cases as *Davies v South British Insurance Co* (1885) 3 SC 416; *Walters v Allison* 1922 NLR 238; *Rhodesian Railways Ltd v Mackintosh* 1932 AD 359; *Yorigami Maritime Construction Co Ltd v Nissho-Iwai Co Ltd* 1977 (4) SA 682 (C).'

[14] I, therefore, turn to the question on appeal before us. It is whether the valuer was *functus officio* when he determined the fair value of the company's business to be R4,8 million 'plus any value unlocked on the obsolete stock as agreed on by a willing buyer/willing seller', communicated in his written valuation report dated 4 July 2018 to the company's co-shareholders, and when he determined the realisable value of the obsolete stock to be R4 795 249.18, communicated in his further written valuation report dated 13 July 2018 to the co-shareholders (the valuer's valuation). In other words, the issue for decision is whether the valuer was legally permitted to unilaterally withdraw his valuation in order to correct or modify it, once his valuation had been communicated to the parties concerned.

[15] One of the issues which this court in *Transnet National Ports Authority v Reit Investments (Pty) Limited* [2020] ZASCA 129; 2020 JDR 2104 (SCA) was required to determine concerns the circumstances in which the determination made by an expert valuer or umpire jointly appointed by two parties to a contract is susceptible to being reviewed and set aside by a court. In this regard Petse DP said the following:

'[32] Before the contentions of the parties are considered, it is appropriate to say something about Mr Seota's role as umpire. It is common cause between the disputants that Mr Seota was an expert valuer and not an arbitrator. The fundamental significance of this distinction lies in this. Our law has for over a century now always drawn a clear distinction between an arbitrator and a valuer. Thus, in *Estate Milne v Donohoe Investments (Pty) Ltd and Others* 1967 (2) SA 359 (A) at 373H-374C, Ogilvie Thompson JA said the following:

"This argument assumes something in the nature of an appeal to the arbitrator against the decision of the auditor. That is, however, not the position. In making his valuation, the auditor hears neither party. He is not a quasi-judicial function. He reaches his decision independently on his knowledge of the company's affairs. His function is essentially that of a valuer (*arbitrator, aestimator*), as distinct from that of an arbitrator (*arbiter*), properly so called, who acts in a *quasi*-judicial capacity. The distinction between *arbitri* and *arbitratores* was well known to our writers (see e.g. *Voet*, Bk. 4, 8, 2; Wassenaer, *Praktijk Judicieel,* Ch. 26, sec. 17; *Huber,* Bk. 4, chap. 21, secs 1 and 2 and other authorities listed by *Gane* at p. 93 of vol. 2

of his translation of that work). See also *Sachs v Gillibrand and Others,* 1959 SA 233 (T) at p. 236, and *Divisional Council of Caledon v Divisional Council of Bredasdorp,* 4 S.C. 445. *Voet*, in the above-mentioned passage, distinguishes between the respective functions of an arbitrator (*arbiter* and a valuer or referee (*arbitrator*)) and, in relation to the latter uses the phrase *in quibus viri boni arbitrio opus erat*. This phrase is rendered by Sampson (p. 110) as "requiring the arbitrament of an impartial person", but by Gane (vol. 1, p. 738) as: "in which there is need of the discretion of a good man". Although the use of the word "discretion" may perhaps be open to criticism, *Gane's* translation appears to me to reflect *Voet's* meaning more correctly. The *arbitrator* or *aestimator* need not necessarily be an entirely impartial person. In discharging his function he is of course required to exercise an honest judgment, the *arbitrium boni viri*; but a measure of personal interest is not necessarily incompatible with the exercise of such judgment (see *Dharumpal Transport (Pty.) Ltd., v Dharumpal,* 1956 (1) SA 700 (A) at p. 707)."

[33] This distinction serves an important purpose in review proceedings because, as Ponnan JA put it in *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* [2007] ZASCA 143; 2008 (2) SA 448 (SCA) para 22: ". . . A finding that Andrews was a valuer would not assist Lufuno and does not require decision. Unlike an arbitrator, a valuer does not perform a quasi-judicial function but reaches his decision based on his own knowledge, independently or supplemented if he thinks fit by material (which need not conform to the rules of evidence) placed before him by either party. Whenever two parties agree to refer a matter to a third for decision, and further agree that his decision to be final and binding on them, then, so long as he arrives at his decision honestly and in good faith, the two parties are bound by it. . . . "

[34] Accordingly, the power of the court to interfere with an expert's decision in review proceedings is severely circumscribed. The judicial ambit of this power was described by this Court in *Wright v Wright* [2014] ZASCA 126; 2015 (1) SA 262 (SCA) para 10 as follows:

"The position of a referee under s 19b is, as the high court correctly found, similar to that of an expert valuator who only makes factual findings but dissimilar to that of an arbitrator who fulfils a quasi-judicial function within the parameters of the Arbitration Act 42 of 1965. In this regard the dictum of Boruchowitz J in *Perdikis v Jamieson* is apposite:

"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.'

[16] I revert to the crux of the appeal. Counsel for the trust relies solely on the following dictum in the majority decision of the full court (Boruchowitz J, Mlambo J concurring) in *Perdikis v Jamieson* 2002 (6) SA 356 (W) para 9, in support of its contention that the valuer was not *functus officio* once he had determined the fair value of the company's business and had communicated his valuation to the company's co-shareholders, and that he was at liberty to change his valuation.

[17] There, Boruchowitz J held as follows:

'[9] I turn now to the question whether it was competent for Chasey – as opposed to the court – to rectify the valuation. Recent cases have confirmed the general power of the Court to correct a manifestly unjust determination. See *Hurwitz and Others NNO v Table Bay Engineering (Pty) Ltd and Another* 1994 (3) SA 456E-H. The question whether a valuer can rectify an award once made is a matter which did not arise for consideration in any of the cases to which I have referred and no authority regarding this question was drawn to our attention.

Although the Court has a general power of correction there is nothing in the decisions to which I have referred which establishes that it is only the Court that has the power to grant relief by way of rectifying manifestly unjust valuations. The principle stated in ***Bekker's*** case *supra* at 573E-F [*Bekker v RSA Factors* 1983 (4) SA 568 (T)] and in particular the words "kan die vasstelling of waardasie om billikheidredes reggestel word" do not preclude a valuer rectifying his award. It must be borne in mind that it is the valuer, possessed of the requisite skills, that the parties have designated to perform the valuation and not the Court. Moreover, as a valuer is liable for negligence in the discharge of his functions it is proper that he be entitled to correct a manifestly wrong award so as to avoid or ameliorate any loss.

[10] The legal position as I comprehend it is therefore the following: where, as in the present case, a manifestly incorrect or unjust valuation has taken place, practically speaking there has been no determination in terms of the contract between the parties. The agreement does not *ipso facto* lapse but remains executory leaving it open for the valuer to still make a correct determination (see ***Hurwitz's*** case *supra* at 456*i*). Once made there is no reason why the correct determination should not bind the parties. *In casu*, the contract did not impose any time constraint for the making of the determination and a reasonable time for so doing had not elapsed. A similar approach to that advocated was followed by Hartzenberg J in *Van Heerden v Basson* 1998 (1) SA 715I-719B. There, in the context of a dispute concerning the rectification of a price to be determined by a third party, Hartzenberg J stated the following:

"Die partye het ooreengekom hoe die prys bepaal sou word en indien dit bepaal word in ooreenstemming met die terme van hulle ooreenkoms is hulle uit die aard van die saak

gebonde daaraan. Wanneer die vasstelling van die prys nou foutiewelik gemaak word, druis dit juis in teen die wesenlike grondslag van hulle ooreenkoms, naamlik dat die derde 'n behoorlike korrekte prys vasstel. Gevolglik is daar, prakties gesproke, geen prys bepaal nie. Een van die *essentialia* van die ooreenkoms ontbreek. Daar is dus nog nie 'n ooreenkoms nie. Dit doen egter nie afbreuk aan die ander bepalings van hulle ooreenkoms nie. As daar in so 'n geval later 'n korrekte vasstelling uit die lig (sic) uit sou val in ooreenstemming met hulle voorskrifte dan kan daar in beginsel nie enige rede wees waarom beide partye nie gebonde sou wees aan die oorenkoms nie."'[1]

[18] In his dissenting judgment, Van Oosten J said this at 368J-369E:

'I regret, however, that I am unable to agree with the further conclusion that Chasey could unilaterally and without reference to the respondent alter his first determination. I shall briefly explain my reasons for differing with that conclusion. It is a well-established principle in our law that a Court can rectify the award of a third party appointed by parties to an agreement to perform a valuation function. It is not necessary to embark upon a detailed discussion of the authorities relating to the rule. For present purposes a reference to *Bekker v RSA Factors* 1983 (4) SA 568 (A) at 572E as well as the more recent discussion of Marais J (as he then was) of the Court's general powers to correct an award in *Hurwitz and Others NNO v Table Bay Engineering (Pty) Ltd and Another* 1994 (3) SA 449 (C) at 456 will suffice. The question whether an appointed valuer himself can rectify his award unilaterally has, as far as I have been able to establish, not been considered before. Nor have we been referred to any direct authority concerning this issue.

Counsel for the appellant submitted that the authorities do not establish that it is only a Court that has the power to rectify an erroneous determination. He contended that the valuer himself is empowered to correct his determination. In support of the contention counsel relied on the following passage in the judgment of Hartzenberg J in *Van Heerden v Basson* [quoted in the majority judgment]. . . . On a parity of reasoning counsel submitted that the words 'uit die lug sou val'[2] would allow for a new unilateral determination simply substituting the erroneous determination with the result that the parties become bound thereby. I cannot accede to this argument. In *Van Heerden v Basson* dealt with an exception raised to an application for an

[1] The parties agreed how the price should be determined and if it is determined in accordance with the terms of their agreement they are naturally bound by it. When the determination of the price is made erroneously, it offends against the fundamental foundation of their agreement, namely that the third determines a proper correct price. Consequently, there is, practically speaking, no price determined. One of the essentialia of the agreement is lacking. There is then not yet an agreement. It does, however, not detract from the other provisions of their agreement. If subsequently in such a case a correct determination should fall from the sky in accordance with their prescripts, then in principle there cannot be any reason why both parties would be bound by the agreement. (Own translation.)

[2] [S]hould fall from the sky. (Own translation).

amendment to the plaintiff's particulars of claim regarding the valuation by a third party of the subject-matter of a contract. In the present matter different considerations apply. The issue is not whether an agreement was formed, but rather whether the valuer could unilaterally correct his determination. What the learned Judge said in *Van Heerden v Basson* was not in the context of illustrating the powers the third party may have to correct unilaterally his own determination, which in any event was not one of the issues he was required to determine.

In my view the fact that Chasey was not acting as an arbitrator or performing functions of a quasi-judicial nature in determining the valuation did not empower him to rectify his determination unilaterally. Having pronounced his determination, legal consequences resulted and his authority over the subject-matter he was required to determine, ceased. He therefore became *functus officio*. (Compare *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A).) I see no good reason for justifying a distinction between judicial functions on the one hand and *quasi-judicial* functions on the other, where a determination or judgment falls to be corrected. This is for obvious reasons: Once the valuer has made his determination, the question whether it was erroneously made, no longer requires him to conduct a valuation. The only issue would be whether an error was made. Generally, unless one of the exceptions referred to in *Firestone v Genticuro* applies he would not have the authority to correct the error. *In casu* on the face of the award there is no error. What happened is that Van der Bijl advised Chasey thereof. Chasey thereupon arranged a further consultation with the appellant and Van der Bijl whereupon his final determination, in which the error had been taken into account, was made. In my view it has not been shown that the first valuation was, *ex facie* the letter in which the determination was made, wrong. It was only after further investigation by Chasey that the casting error in the documents supplied to him was discovered. Chasey was therefore not required merely to correct an error in expressing his determination. Even if one assumes that Chasey acted upon patently and materially incorrect information with the result that the parties would not be bound by the first valuation, it would, in my view, still not be competent for the valuer himself to consider that issue. It follows from what I have said that Chasey was not empowered or entitled to correct the determination unilaterally.'

[19] In *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A), referred to in the minority judgment, Trollip JA said the following at 306F-308A:

'The general principle, now well established in our law, is that, once a court has duly pronounced on a final judgment or order, it has itself no authority to correct, alter or supplement it. The reason is that it thereupon becomes *functus officio*: its jurisdiction in the case having been finally exercised, its authority over the subject-matter has ceased. See *West Rand*

Estates Ltd. v New Zeeland Insurance Co Ltd., 1926 A.D. 173 at pp. 176, 178, 186-7 and 192; *Estate Garlick v Commissioner of Inland Revenue,* 1934 A.D. 499 at p. 502.

There are, however, a few exceptions to that rule which are mentioned in the old authorities and have been authoritatively accepted by this Court. Thus, provided the court is approached within a reasonable time, it may correct, alter, or supplement it in one or more of the following cases:

(i) The principal judgment or order may be supplemented in respect of accessory or consequential matters, for example, costs or interest on the judgment debt, which the Court overlooked or inadvertently omitted to grant (see *West Rand* case, *supra*). . . .

(ii) The court may clarify its judgment or order, if on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter "the sense and substance" of the judgment or order (see the *West Rand* case, *supra* at pp. 176, 186-7: *Marks v. Kotze,* 1946 A.D. 29).

(iii) The Court may correct a clerical, arithmetical or other error in its judgment or order so as to give effect to its true intention (see, for example, *Wessels & Co, v. De Beer,* 1919 A.D. 172. *Randfontein Estates Ltd. v. Robinson,* 1921 A.D. 515 at p. 520; the *West Rand* case, *supra* at pp. 186-7). This exception is confined to the mere correction of an error in expressing the judgment or order; it does not extend to altering its intended sense or substance. Kotzé. J.A. made the distinction manifestly clear in the *West Rand* case, *supra*, at pp. 186-7, with reference to the old authorities, he said:

"The Court can, however, declare and interpret its own order or sentence, and likewise correct the wording of it, by substituting more accurate or intelligent language so long as the sense and substance of the sentence are in no way affected by such correction: for to interpret or correct is held not to be equivalent to altering or amending a definitive sentence once pronounced."

. . .

(iv) Where counsel has argued the merits and not the costs of a case (which nowadays often happen since the question of costs may depend upon the ultimate decision on the merits), but the Court, in granting judgment, also makes an order concerning the costs, it may thereafter correct, alter or supplement that order (see *Estate Garlick's* case, *supra*, 1934 A.D. 499). The reason is (see pp. 503-5) that in such a case the Court is always regarded as having made its original order "with the implied understanding" that it is open to the mulcted party (or perhaps any party "aggrieved" by the order – see p. 505) to be subsequently heard on the appropriate order as to costs.

But, of course, if after having heard the parties on the question of costs, either at the original hearing or at a subsequent hearing (as happened in the present case), the Court makes a final order for the costs, there can then be no such "implied understanding", and such an order

is as immutable (subject to the preceding exceptions) as any other final judgment or order. . . . ’

[20] In *Civair Helicopters CC v Executive Turbine CC and Another* 2003 (3) SA 475 (W), Wasserman AJ acknowledged that he was bound by the majority judgment in *Perdikis* that an ‘expert valuer is free to rectify a manifestly unjust valuation or a patent error in his report even after the delivery of same’, but he nevertheless expressed his views on the issue since the question that had arisen in the case before him was whether an expert valuer ‘would have been *functus officio* after he had issued his report’. He expressed the view that the majority decision in *Perdikis* ‘is probably not correct’ and he agreed ‘with the views expressed by the dissenting Judge on these issues’. He concluded that ‘[t]he correct position therefore appears to be that even an expert will be *functus officio* once he has performed his mandate, ie once he has delivered his award’.

[21] In reaching that conclusion, Wasserman AJ reasoned as follows (para 39):

‘The position of an expert is, in my view, no different from that of an architect or engineer, acting as a quasi-arbitrator, who also has to arrive at a decision honestly and impartially. The expert is *functus officio* when he has exhausted his mandate. In the case of an engineer or architect, he is *functus officio* once he has issued the final certificate. Absent a contrary provision in the contract, he is thereafter not permitted to correct or modify previous certificates (*Construction Law* (*supra*) at 487 [Loots *Construction Law and Related Issues* Juta & Co Ltd, 1st ed]). The position of an architect, acting as a quasi-arbitrator was summarised by the Appellate Division in *Ocean Diners (Pty) Ltd v Golden Hill Construction CC* 1993 (3) SA 331 (A) at 341-2 as follows:

‘I proceed to consider the two remaining defences raised in the plea. The first of these is based on the purported cancellation of the certificate by the architect. There is in my view no substance in this defence. If the effect of a contract is to confer finality upon a certificate (which clause 25.7, assuming its validity, does), a certificate validly issued (such as the one we are dealing with) cannot, in the absence of a contractual provision to the contrary, or agreement or waiver by the parties (neither of which is suggested), be withdrawn or cancelled by an architect in order to correct mistakes of fact or value in it (*Hudson’s Engineering Contracts* 10th ed at 484). The contract does not provide to the contrary; clause 26, if anything, confirms that there was to be finality as far as the architect was concerned. The only person empowered by clause 26 “to open up, review or reverse any certificate” is an arbitrator if a dispute

concerning a certificate is submitted to arbitration (which was not the case here). Once therefore the architect had issued the certificate he was *functus officio* insofar as the certificate and matters pertaining thereto were concerned (*Halsbury's Laws of England* 4th ed, vol 4(2) para 432). That being so, he was not entitled unilaterally to withdraw or cancel it."

It is implicit in the referral of a dispute to an expert for determination, that finality should be achieved. Therefore, the principles enunciated in the judgment of *Ocean Diners* (*supra*) are also of application to the powers vesting in an expert. Despite the provision in the contract conferring finality upon the certificate, I see no reason why the same principles would not also apply to the final report of or an award made by an expert. Absent a contrary term forming part of the referral agreement, an expert similarly would be precluded from correcting patent mistakes which will have the effect of changing or varying the effect of the report or award. It is significant to note also that an engineer has the power to correct an interim certificate even in the absence of a specific term in the contract (compare *Lawrence v Kern* [1910] 14 WRR 337 Ca1). A distinction therefore can be drawn between the powers vesting in an engineer acting as a *quasi*-arbitrator when issuing a final certificate as opposed to performing his functions in correcting interim certificates. Whereas it is permissible for a court to address and correct an ambiguity, obscurity or uncertainty in an order, there is a rule against variation, addition or contradiction [*Firestone South Africa (Pty) Ltd v Genticuro AG* (*supra* at 307)]. These principles were held to be applicable to awards made by an arbitrator [*Friedman v Mendes* 1976 (4) SA 734 (W) at 736B-G]. In my view these principles also apply to the award made or report issued by an expert.'

[22] I subscribe to the views expressed by Van Oosten J in his minority judgment in *Perdikis* and those expressed by Wasserman AJ in *Civair*. I am respectfully unable to endorse the reasoning and conclusion reached in the majority judgment in *Perdikis* on the question under consideration. The distinction between the function of an expert valuer, who does not perform a *quasi*-judicial function, and that of an arbitrator, who fulfils a *quasi*-judicial function within the parameters of the Arbitration Act 42 of 1965, has in principle or in logic, no bearing on the question whether a valuer has the power or authority to alter or amend his or her valuation once made and communicated to the parties. One of the arguments raised in *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* [2007] ZASCA 143; 2008 (2) SA 448 (SCA) paras 21-22, was that Andrews was not in truth an arbitrator but a valuer. Ponnan JA, as I have mentioned, found that a finding that Andrews was a valuer would not assist Lufuno

and does not require decision, because the parties intended the Arbitration Act to apply to their agreement.

[23] Comparable to the position in *Ocean Diners (Pty) Ltd v Golden Hill Construction CC* 1993 (3) SA 331 (A) at 341-342, the effect of the shareholders agreement (clause 5.1.8 thereof) *in casu* is to confer finality upon the determination by the valuer of the fair market value of the company's shares should the co-shareholders not reach agreement on such value. Once the valuer's valuation had been communicated to the parties (as was done on 04 and 13 July 2018), the valuation validly issued cannot, in the absence of a contractual provision to the contrary, or agreement or waiver by the parties (neither of which is suggested), be withdrawn or cancelled by the valuer to correct mistakes of fact or value in it. The shareholders agreement does not provide to the contrary; clause 5.1.8, if anything, expressly confirms that there was to be finality as far as the valuer's valuation was concerned. Once therefore the valuer had issued his written valuation report, he was *functus officio*. That being so, the valuer was not legally entitled unilaterally to withdraw or cancel his valuation report and to issue one that altered and amended his definitive pronouncement of the fair market value of the company's shares.

[24] To hold otherwise (as was done by the majority judgment in *Perdikis*) would lead to uncertainty and a lack of finality; how many times then may a valuer withdraw his or her valuation and issue an amended one to correct mistakes of fact or value in a previous one? Values of finality and certainty are foundational, especially to administrative law – even an unlawful and invalid administrative decision exists in fact and has legal consequences until it is set aside by a court in proceedings for judicial review: *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* 2004 (6) SA 222 (SCA) para 26 – and to contract law.

[25] Wearing her academic cap, now retired Justice of the Supreme Court of Appeal, Carole Lewis, '*The uneven journey to uncertainty in contract'* THRHR Vol 76 (2013) 80, states:

'Bargains struck by parties should in principle be observed. That is foundational to our law of contract.' There may be exceptions where public policy determines that the bargain is unconscionable as far as any party to it is concerned. [That prevailing public policy should

determine whether or not a contract is enforceable is a principle applied for decades in South Africa: See in particular *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) cited and followed regularly ever since. Since 1994 the values informing public policy are also to be found in the Constitution.] But where that is not so, commerce requires that parties to a contract must observe it.

. . .

I would argue that the value of certainty in commercial contracts is one that requires protection. The principle that contracts should be complied with (*pacta sunt servanda*) is recognised for that reason. [See Brand and Brodie "Good faith in contract law" in Zimmerman, Visser and Reid (eds) *Mixed legal systems in comparative perspective: Property and obligations in Scotland and South Africa* (2004) 94.] And the importance of the principle has been recognised by the Constitutional Court on many occasions, notably in the majority judgment in *Barkhuizen*. [*Barkhuizen v Napier* 2007 5 SA 323 (CC) para 85. See also, most recently, the minority judgment of Zondo AJ in *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2012 3 SA 531 (CC)]. That does not mean of course that all *pacta* are enforceable. Since Roman times, contracts that appear, on the face of it, to be valid might be regarded as unenforceable if they offend public policy, or are induced by fraud undue influence and duress. This much is trite.

. . .

And if the parties have identified a means of agreement (by a calculation or by reference to a third party, as in *Letaba Sawmills* [*Letaba Sawmills (Edms) Bpk v Majovi (Edms Bpk* 1993 1 SA 768 (A) and *Southernport* [*Southernport Developments (Pty) Ltd v Transnet Ltd* 2005 2 SA 202 (SCA)]) [see also *SAFCOL* [*South African Forestry Co Ltd v York Timbers Ltd* 2005 3 SA 323 (SCA) where the respondent had frustrated the reference to arbitration and was held to be in breach of contract] an important value can be achieved – giving substance to what they had bargained on; holding them to their bargain. [See the authorities listed in para 7 of the judgment in *Southernport*.]'

[26] In their shareholders agreement the parties have identified a means of agreement on the fair market value of the company's shares by reference to the valuer identified by them, and they must be held to their bargain. It is not suggested that their agreement in that regard offends public policy or is otherwise impeachable. Similar to judicial and *quasi*-judicial determinations where it is permissible for a court or arbitrator to address and correct an obscurity, ambiguity, uncertainty, clerical, arithmetical or other error in a judgment or order or arbitral award without thereby altering the sense and substance of the judgment, order or arbitral award (*Firestone* and *Friedman*), the same holds true for written valuation reports issued by expert valuers (the minority

judgment in *Perdikis* and *Civair*). However, those exceptions do not find application *in casu*.

[27] I conclude, therefore, that subject to the above-mentioned exceptions, and in the absence of a contractual provision to the contrary or agreement or waiver by the parties, whenever parties agree to refer a matter to a valuer, then so long as the valuer arrives at his or her decision honestly and in good faith, the decision is final and binding on them and they are bound by it once communicated to them. The valuer is then *functus officio* insofar as the valuation and matters pertaining thereto are concerned. That being so, the valuer is then not permitted to unilaterally withdraw or cancel the valuation in order to alter or amend it. Only a court has the power to interfere with the valuer's decision in review proceedings. The judicial ambit of the court's power to interfere is severely circumscribed, and limited to the narrow grounds as enunciated in this court's jurisprudence to which I have referred.

[28] In the result the following order is made:

(1) The appeal is upheld with costs.

(2) The order of the court a quo is set aside and replaced with the following:

'*(a)* The first respondent is to pay the amount of R2 878 574.70 to the applicant, being the purchase consideration for the sale of his shares in the second respondent to the first respondent.

(b) The first respondent is to pay interest at the rate of 10.25% per annum *a tempore morae* on the aforementioned amount from the date of this order until final payment.

(c) The first respondent is to pay the costs of the application.'

P A MEYER

ACTING JUDGE OF APPEAL

Appearances:

For appellant:	CE Thompson
Instructed by:	Chiba-Jivan Inc., Greenside, Johannesburg
	Symington De Kok, Bloemfontein
For respondent:	IL Posthumus
Instructed by:	Pagel Schulenburg Inc., Bryanston
	Hill, McHardy & Herbst Inc., Bloemfontein