THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 169/2017

In the matter between

MEDIA24 (PTY) LTD **APPELLANT**

and

ESTATE OF LATE DEON JEAN DU PLESSIS **FIRST RESPONDENT**

CHARLES ARTHUR STRIDE **SECOND RESPONDENT**

Neutral citation: *Media24 (Pty) Ltd v Estate Late Du Plessis* (169/2017) [2017] ZASCA 168 (1 December 2017)

Coram: Bosielo and Saldulker JJA, Plasket, Lamont and Mbatha AJJA

Heard: 21 November 2017

Delivered: 1 December 2017

Summary: Appeal ─ Determination of the price of shares by an independent expert ─ appeal against the decision to enforce the award made by an independent expert ─ whether there was a manifest error in the report of the independent expert in that he went beyond the terms of the mandate ─ whether the court a quo correctly found that there was no manifest error.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Allie J, sitting as court of first instance):

'The appeal is dismissed with costs.'

JUDGMENT

Mbatha AJA (Bosielo and Saldulker JJA, Plasket and Lamont AJJA concurring)

[1] This appeal emanates from the Western Cape Division of the High Court, Cape Town where Allie J found in favour of the first respondent (Estate Late Deon Jean du Plessis). The appellant (Media24) appeals with the leave of the court a quo.

[2] The second respondent (Mr Charles Stride) was appointed by the appellant and the first respondent as an independent person and given a mandate to value certain shares owned by the first respondent pursuant to a contract for the sale of the shares, on the death of Du Plessis, to the appellant. The second respondent valued the shares. The appellant did not accept the valuation and alleged that the second respondent's valuation was tainted by a manifest error. The manifest error was submitted to be the failure of the second respondent to comply with the terms of the mandate pursuant to which he was appointed.

[3] It is necessary to briefly set out the factual background to the dispute between the parties and the events leading to the institution of the proceedings in the court a quo. The appellant and the deceased (Mr Deon du Plessis) whose estate is the first respondent in this appeal, were the owners of the shares in a company known as Daily Sun (Pty) Ltd (the company). The appellant owned 80 per cent of the shareholding and the deceased 20 per cent of the shareholding. The appellant by reason of its shareholding was able to control the affairs of the company and derived the benefit of the bulk of the revenue. At a point in time the appellant embarked on a

restructuring exercise of the company which involved the expansion to other provinces and also the outsourcing of printing services rendered to the company by a company which is a subsidiary of the appellant. This restructuring resulted in an increase of the costs charged to the company. The increased charges were levied by the subsidiary of the appellant. The restructuring significantly impacted upon the direct costs within the company and hence impacted upon the value of the shareholding. The deceased protected his interest in the company by stipulating that upon his death the appellant would acquire the remaining shareholding (10 per cent) at a price which would be calculated having regard to a formula which took account of the company structure prior to the restructure. The contract (referred to as the third agreement) provided that the calculation of the purchase price of the shares to be sold in two tranches and be made by an independent person.

[4] When the deceased passed away the first respondent and the appellant were unable to reach agreement on the purchase price for the shares owned by the deceased and agreed to the appointment of an independent person (second respondent), a chartered accountant by profession, as contemplated by the contract. The appellant and the first respondent instructed the second respondent by way of a briefing document which set out the terms of reference including the ambit of the powers conferred upon him. The appellant and first respondent in clause 4.8 of the briefing document undertook to be bound by the findings and recommendations of the independent person in the absence of any manifest error. They also agreed that any dispute in relation to the document would be resolved by the independent person in accordance with such procedure as the independent person prescribed and also that the findings/decisions of the independent person would, save for any manifest error, be final and binding on the parties.

[5] Paragraph 5 of the briefing document sets out the material terms of the scope of work to be performed by the independent person:

‘5. Scope of the work to be performed by the independent person

5.1 . . .

5.2 The Independent Person shall be responsible for, and its report must include—

5.2.1 the adjustment of annex 1, having regard to the intention, after applying the contents hereof;

5.2.2 the calculations of the Net Profit After Tax ('NPAT'), showing any adjustments made, to be used for each of the following valuation calculations–

(a) Tranche 1, and

(b) Tranche 2 Part 1 (i.e. in relation to "b"); and

5.2.3 a description of the shared cost cap principles applied, and the consequence of such application to annex 1; and

5.2.4 the determination of the purchase price for the first tranche sale shares, as described in clauses 5.1 and 5.2 of the agreement (it being recorded that the Independent Person shall discharge the function of the independent auditors contemplated in these clauses).

5.3 Conclusions should be drawn through establishing [the] contractual intent of the parties as is apparent from the provisions of the agreement. It is apparent that annex 1 to the agreement does not correctly reflect that factual situation which prevailed at the relevant time. Accordingly, in the circumstances, the true intention of Deon du Plessis and Media24 ("the intention") in respect of annex 1 must be gleaned from representations to be made by the representatives of parties with reference to the agreement and other evidence constituting the written record of their discussions/negotiations (if any) taking into account the then factual situation (i.e. having regard to the intention, what would the contents of annex 1 have been had the Parties dealt with the actual and correct factual situation at the time of conclusion of the Agreement).

5.4 Consider the calculations proposed by the parties during the negotiations to date including their cost allocations, methods of splitting of costs between shared costs and direct costs and their shared cost cap calculation. Then determine the calculations to be used such that–

5.4.1 there is a proper allocation of shared costs/increased charges to Daily Sun in light of the specific illustrations and rights and limitations stipulated in Annexure 1, having regard to all relevant facts and the intention;

5.4.2 the shared cost cap calculation protection and/any other agree protections is/are achieved, having regard to the intention and taking into account the principles set out herein;

5.4.3 the intention of the parties in relation to annex 1 to the Agreement, and the impact thereof on the NPAT calculations in relation to which annex 1 is relevant, is given effect to.

5.5 Related to Annexure 1 section titled "Basis of Contributing to Shared Cost" – examine the cost allocations methodologies, rights, obligations and limitations that are stipulated, and examined which additional shared costs (if any) are applicable as a result of the decision to outsource certain functions to external parties and determine the impact thereof on the determinations/calculations contemplated herein.

5.6 Consider and compare the structure of Annexure 1 and the management accounts, examine the differences in structure due to the costs that have shifted among the various

headings and determine an adjustment (if any) to the relevant management accounts, necessary to take the impact of the adjusted annex 1 on such management accounts into account, including the relation to the apportionment of the costs between the shared and direct costs to give effect to the intention of the parties in respect of the agreement, including the provisions of Annexure 1 as read with the remainder of the agreement, and the actual cost model which applied at the relevant time.

5.7 Examine the new IT cost allocation methodology and decide what the split between shared and direct costs should be in light of intent of Annexure 1 and how costs were allocated when Annexure 1 was developed.

5.8 Printing and distribution costs.

5.8.1 Consider the effect on the shared cost cap calculation of moving the majority of the operational costs to external suppliers, and simultaneously transferring these costs from the shared cost section of the management accounts to the direct cost section.

5.8.2 Consider the effect on the shared cost calculation of the implementation of the decision to outsource printing and distribution to Paarl Coldset and On the Dot respectively on the NPAT, and whether the printing and distribution costs charged by Paarl Coldset and On the Dot respectively have increased disproportionately since their outsourcing.

5.8.3 Determine the adjustment necessary to apportion the printing and circulation costs between shared and direct costs to give effect to the shared cost cap calculation.'

[6] It is apparent from the terms of the briefing document that extensive input from both parties was required and that the parties had the right of clarification. The second respondent was entitled to hear representations supported by expert advice engaged by the parties when it was deemed necessary for such advice to be obtained and that a wide ranging set of powers was conferred upon the second respondent who was to exercise such powers as he determined in the course of valuing the shares. The second respondent was empowered to reach decisions which would resolve conflicts, make decisions appropriate to underlying principles, consider the intent of the parties to the contract, consider the impact of that intent on calculations, obtain the relevant data to make the calculations, and to make the calculations necessary to value the shares, as well as generally to take such steps as he deemed appropriate to pursue the implementation of the mandate conferred upon him.

[7] The second respondent was to use the mandate which was conferred upon him by the briefing document to determine the purchase price for the 2 tranches of the sale shares.

[8] The purchase price of the first tranche of shares was set out in clause 5 of the contract:

'5.1 The purchase price payable by Media24 for the first tranche sale [of] shares shall be calculated in accordance with the following provisions:

pp = [a x 6] x 2.5%

where:

pp means the purchase price payable for the first tranche sale shares;

a means the net attributable profit after tax (which shall be a notional charge calculated at the statutory tax rate applicable to the financial year in question) of the newspaper division in respect of the twelve month period immediately preceding the sale date, determined with reference to the audited financial statements of Media24 in respect of that period, and subject to the provisions of 5.4 below.

5.2 Media24 Du Plessis shall jointly instruct the auditors to determine the purchase price within ten business days after the auditors have completed the audit of Media24 in respect of the numerals 12 month period contemplated in "a" If for any reason the auditors refuse or fail to determine the purchase price within 14 days of having been instructed to do so, the purchase price shall be determined by independent auditors appointed for this purpose at the request of either Media24 or Du Plessis by the president for the time being of the Law Society of the Cape of Good Hope or its successor body.

5.3 In determining the purchase price, the auditors or the independent auditors (as the case may be) shall act as experts and not as arbitrators and their decision shall, in the absence of fraud, manifest error or gross negligence, be final and binding on Media24 and Du Plessis.

5.4 The following provisions shall apply in relation to the determination of the purchase price payable for the first tranche sale shares:

5.4.1 the purchase price shall be not less than R1,250,000 and shall not exceed R6,250,000;

5.4.2 in determining "a", all extraordinary and non-recurring gains and income and receipts shall be disregarded;

5.4.3 if "a" is greater than zero, and if the application of the formula results in the purchase price being an amount less than R2,500,000, the purchase price shall be R2,500,000;

5.4.4 if "a" is less than zero, the purchase price shall be R1,250,000.

5.5 The parties attached as annex 1 an illustration of the calculation of “a” which is based on the 2008 business plan financial results extrapolated to 2011. The parties agree that in determining “a” the description of shared cost items as set out in annex 1 shall apply to such determination.’

[9] The purchase price of the second tranche of sale shares was set out in clause 6:

‘6.1.1 . . .

6.1.2 First tranche valuation’ means the value of the second tranche sale shares as at the sale date determined in accordance with the valuation methodology utilised in respect of first tranche sale shares set out in 5, duly adjusted to take account of the difference between the number of shares comprising the first tranche sale shares and the number of shares comprising the second tranche sale shares, and provided that if the first tranche valuation is to be determined for any period other than a completed financial year, the valuation concerned will be determined with reference to unaudited management accounts.

6.2 . . .

6.3 The purchase price payable by Media24 for the second tranche sale shares shall be the value thereof calculated in accordance with the provisions of this clause 6 on the basis that:

6.3.1 . . .

6.3.2 if the sale date is a date earlier than 31 March 2013, the purchase price shall be an amount calculated in accordance with the following formula:

a = b + (c x d/e)

where:

a represents the purchase price payable;

b represents the first tranche valuation of the second tranche sale shares as at the sale date;

c represents the positive difference (if any) between the market value and the first tranche valuation of the second tranche sale shares as at the sale date;

d represents the number of days calculated from 1 April 2010 to the sale date;

e represents the number 1096 being the number of days between 1 April 2010 and 31 March 2013.’

[10] It is apparent from the provisions of the contract that to perform the work the second respondent would need to use his skill, make decisions and obtain the necessary data to which that skill and decision-making were to be applied. The

provisions in clause 5.2 to 5.5 of the contract underpinned the instructions which were given in the briefing mandate and which have been more fully set out above.

[11] The second respondent implemented the mandate conferred upon him and produced a detailed Report in which he deals with each element which he was required to consider in the process of reaching the valuation of the shares. The second respondent's report displays in detail the instructions, documentation, interpretation of the contract, analysis of the contracts, review and adjudication of certain aspects of the agreements, the disclosed data, his comments of NPAT, the deceased's 10 per cent shareholding and compliance with the mandate and his opinion.

[12] The appellant on the other hand submits that there has been a manifest error in that the second respondent deviated from the mandate. There is no submission that second respondent mistakenly expressed himself otherwise than he intended. There is similarly no submission that to determine the error it is necessary to regurgitate the individual facts comprising the decision-making process thereby rehearing the matter which was before the second respondent.

[13] A manifest error is an error that is 'plain and indisputable and that amounts to a complete disregard of the controlling law or the credible evidence on record.' See *Winfield v Dimension Data Holdings Limited & others* 2004 JDR 0307 (T) para 25:

'What does "manifest error" really mean? According to Black's Law Dictionary 7th ed at 563, "manifest error" means "an error that is plain and indisputable". . . In the Chancery Division of Northern Ireland, Bowsher J in *Dixon Group plc v John Andrew Murray-Oboynkski* 86 BLR 32, held that a manifest error was an error that may easily be seen by the eye or perceived by the mind. The learned Judge adopted the approach of Potter J in *Healds Food Ltd v Hide Davies Ltd* (1 December 1994, unreported):

"By the use of the word manifest it is plain that the parties do not thereby intend to widen the area of the court's investigation beyond the ambit of the determination itself and any reasoning within it or discernible on its face.'"

[14] The appellant submits that the second respondent in the process of reaching his conclusion exceeded the mandate which was given to him. In addition the

appellant challenges the determination made by the second respondent of the price of the second tranche of shares as being inaccurately calculated. The appellant relies on a report by Mr A Felet (Felet). Felet is an Australian accountant, who reviewed the second respondent's report. Felet explained that there were misdirections in the report of the second respondent and adverts to matters which have become irrelevant in this appeal save for his discussion concerning the use by the second respondent of Annexure 1.

[15] The primary error alleged to have been perpetrated by the second respondent was the reliance by him upon annex 1. The submission was that annex 1 was outdated and that the second respondent should not have relied upon admittedly outdated information. Annex 1 is a document which forms part of the third agreement regulating the sale of the 10 per cent shareholding by the deceased. It is common cause that annexure 1 correctly reflected figures for the period 2007. Those figures would be incorrect if applied without adjustment to any later period. The mandate to the second respondent recognised that the figures contained in annex 1 could not willy-nilly be applied without adjustment. In terms of the mandate the second respondent was instructed to take into account the numerous factors set out in clause 5 of the briefing document, the deceased's concerns as a minority shareholder regarding the expansion of the business to other provinces, the outsourcing of printing services to a company which was a subsidiary of the appellant and the impact of those decisions upon the shareholding.

[16] The second respondent interpreted the contract with the assistance of senior counsel to ascertain the intention of the appellant and deceased. He calculated the NPAT in line with the terms of the contract and calculated the cost allocations in the business in the manner provided for in the contract which was designed not to prejudice the deceased. Once the second respondent had taken all those factors into account he concluded what the NPAT would have been and made the relevant adjustments required to calculate the purchase price. When he relied upon annex 1 he was acutely aware of its shortcomings and took account of them.

[17] In performing these activities the second respondent was in his view implementing the mandate conferred upon him. If he was implementing the terms of

his mandate the first respondent and appellant would be bound by his findings whether or not there were errors contained therein unless there was a manifest error. It is presumably for this reason that the appellant's submission was confined to a claim that the second respondent was in manifest error by reason of his failure to apply the mandate conferred upon him.

[18] The briefing document contained a clause which bound the parties to the findings and recommendations of the independent person in the absence of any manifest error:

'Clause 4.8

'4.8 The parties undertake to be bound by the findings and recommendations of the appointed Independent Person [Second Respondent] in the absence of any manifest error.'

The briefing document also contained a clause relating to the procedure to be followed by the independent person in resolving the dispute.

An unnumbered clause that followed clause 5.10 provided as follows:

'Any dispute in relation to this document shall be resolved by [the Independent Person] in accordance with such procedure as the Independent Person may prescribe. The findings/decisions of the Independent Person in terms of this document shall, save for any manifest error, the final and binding on the Parties.'

[19] The main complaint in this Court was that the second respondent had applied annexure 1 which, it was common cause, a factually incorrect document. It is apparent from a consideration of the manner in which the second respondent applied annex 1 that he considered the facts contained within the annexure on a proper basis and in accordance with the mandate. He was entitled to have regard to all documents which were referred to him to interpret the documents and to make use of the documents to reach his conclusion. There is no attack upon the way in which the second respondent used the document, the complaint is that he made use of it to base his calculations. The second respondent implemented the mandate which was given to him and reached a conclusion pursuant to the mandate. There was no manifest error. This complaint in my view is unfounded.

[20] The appellant submitted that the market value of the second tranche of shares had never been determined. The price of the second tranche of shares was to be

determined in accordance with the provisions of clause 6. The formula upon which the purchase price was to be calculated is set out in clause 6.3.2 of the third agreement. As appears from the formula the purchase price payable is equal to the first tranche valuation plus the positive difference between the market value of the first tranche valuation and the second tranche sale shares adjusted to reflect the number of days calculated from a date to the sale date as against the number of days calculated from the date to the 31 March 2013. It is immediately apparent that the purchase price of the second tranche is represented by the valuation of the first tranche plus a positive amount. The first respondent abandoned the calculation in respect of the positive amount and sought only a purchase price based on the valuation of the first tranche shares. This being so the purchase price of the second tranche sale of shares is constituted by the valuation of the first tranche sale shares. The valuation of the first tranche sale of shares is not the capped amount which was the purchase price payable in respect of those shares. It is the valuation of the shares. The second respondent valued the shares on that basis and correctly determined what the share price was for the second tranche.

[21] There was accordingly no manifest error in the way in which the second respondent reached the purchase price payable for the second tranche.

[22] Accordingly, the appeal is dismissed with costs.

_____

Y T Mbatha

Acting Judge of Appeal

Appearances

For Appellant:	S F Burger SC Instructed by: Werksmans, Cape Town Lovius Block Attorneys, Bloemfontein
For Respondent:	A Subel SC Instructed by: Baker & McKenzie, Sandton McIntyre Van Der Post, Bloemfontein