



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

REPUBLIC OF SOUTH AFRICA

CASE NO: 11341/2022

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
(4)	DATE: 11 MAY 2023
SIGNATURE: <i>ML SENYATSI</i>	

In the matter between:

SEAN SUTTIN HOWELL

Applicant

And

KELVIN FREESE

Respondent

Neutral Citation: *Sean Suttin Howell v Kelvin Freese* (Case: 11341/2022) [2023]
ZAGPJHC 458 (11 May 2023)

Delivered: By transmission to the parties via email and uploading onto Case Lines
the Judgment is deemed to be delivered.

JUDGMENT

SENYATSI J:

A. INTRODUCTION

- [1] This is an opposed application in terms of which certain relief is sought in accordance with the shareholders agreement concluded by the parties in this litigation. The relief sought includes the enforcement of the call option in accordance with the shareholders agreement ("the agreement") against payment to the respondent for the shares. The respondent, having resigned from the company, challenges the value that the shares are to be acquired at as will be shown in this judgment.

B. BACKGROUND

- [2] The applicant is the majority shareholder in Redshift Cyber Security (Pty) Ltd ("Redshift") and holds 51% of Redshift's issued share capital. The respondent is a minority shareholder in Redshift and holds 9% of its issued share capital and was also employed by Redshift but resigned on the 30th September 2021. Following his resignation, his shares are to be acquired by the applicant in terms of the agreement. The dispute relates to the fair value of those shares.
- [3] The applicant exercised his call option in accordance with the agreement and the respondent disputes the value for which the shares should be acquired as

being low. Redshift had been valued on a number of occasions, prior to the respondent's resignation and prior to the applicant attracting a significant obligation to make payment to the respondent in terms of the call option contained in the shareholders agreement.

- [4] In an evaluation dated 18th August 2020 that was performed by Outcor Financial Management ("Outcor"), Redshift was valued at R18 096 163,74 using the Forecasted Free Cash Flow Model valuation methodology. In an evaluation dated the 1st of October 2019 that was performed by Outcor, Red shift was valued at R13,796,393,00 using the Forecasted Free Cashflow Model and the Price earnings ratio valuation methodologies. Two months before the resignation of the respondent from Redshift, it was again valued at the amount of R 21,029,914 ,00 using the revenue and projected cash flow valuation methodologies by Cornerstone Tax and Accounting ("Cornerstone Business Valuation").
- [5] According to the Cornerstone Business Evaluation, Cornerstone stated and/or believed the Nett Asset Valuation method was:
- (a) "... A basic calculation used to determine the benchmark or minimum estimated value of Redshift Cyber Security (Pty) Ltd and
 - (b) A valuation of Redshift using the net asset valuation method, "...would be deemed to be the lowest acceptable value of Redshift Cyber Security (Pty) Ltd."

- [6] After the resignation of the respondent on 30th September 2021, there was another valuation performed on the 16th of November 2021 by Cornerstone, who claimed that they were tasked with determining the fair value of the respondent's shareholding. Cornerstone performed another valuation of Redshift using the Nett Asset Valuation method only and believed that the valuation of Redshift was this time around the sum of R 8 753 198,00.
- [7] As a result of the 16 November 2021 evaluation by Cornerstone, the applicant exercised his call option to acquire the shares of the respondent offered in the amount equal to 9% of the valuation. The respondent agreed that the call option had to be exercised in terms of the agreement but disputed the value assigned to his 9% equity in Redshift.
- [8] In rejecting the value assigned to the valuation of Redshift by Cornerstone in the last valuation, the respondent contends that having previously stated that the nett asset valuation method would serve to achieve the minimum estimated or lowest value of Redshift, Cornerstone never explained why or how when tasked with determining the fair value of Redshift and the fair value of the respondent's shareholding, the Nett Asset Valuation methodology was the only one used. The respondent furthermore contends that on Cornerstone's own version and practices, the Cornerstone Report reflects the minimum estimated or lowest value of Redshift.
- [9] Consequently, so contends the respondent, the Cornerstone Report on evaluation must be disregarded by this court because Cornerstone are not a registered firm of auditors and accountants; Miss Chanel Raath who compiled the report and performed the valuation is not an auditor; Miss Raath is not an

expert and the Cornerstone Report does not amount to an expert determination; Cornerstone retained or employed by Redshift on a permanent basis and for that reason, is also controlled by the applicant; there is no evidence to suggest that cornerstone ever determined or were tasked with determining the fair value of the respondent's shareholding or fair value of Redshift. The respondent, also argues that the agreement is inconsistent with the Memorandum of Incorporation ("the MOI") of the company and therefore falls foul of section 15(7) of the Companies Act of 2008 due to the alleged inconsistency. He contends that clause 10 of the agreement is inconsistent with clause 17 of the MOI and the latter provides that in the absence of agreement on fair valuation the fair value of the shares will be determined by an independent auditor whereas the agreement states that the fair value of the shares will be determined by the auditors of Redshift. The respondent contends therefore that the valuation by Miss Raath of Cornerstone is not agreed to by himself because of which, it triggers the mechanism provided by clause 17 of the MOI.

- [10] Consequently, the respondent issued a counter application in terms of which he seeks join Redshift in the counter application as the second respondent. He also seeks a declaratory order that the provisions of clause 10 of the agreement are inconsistent with the provisions of clause 17 of the MOI and the costs of the counter application.
- [11] The applicant argues that the value as determined by Cornerstone following their valuation of the 16th November 2019 should be enforced because when the agreement was concluded the agreement itself defined the auditor to mean Outcor Financial Management or its successor in title, which was subsequently replaced by Cornerstone. He contends that the respondent cannot dispute the

authority of Cornerstone to make a determination of the value because the respondent was part and parcel of the shareholder's meeting which approved the change of auditors. The applicant opposes by the applicant on the grounds *inter alia*, that it was not done on a long form and that it failed to join other shareholders of Redshift.

B. THE ISSUES FOR DETERMINATION

- [12] The dispute in the main application is about the methodology to be used for the determination of the fair value of Redshift to pay the price of the shares to the respondent in accordance with the call option exercised in accordance with the provisions of the agreement. The issue in the counter application is whether or not the respondent ought to have joined the other shareholders of Redshift long form counter application and in addition whether the provisions of clause 10 of the agreement are inconsistent with the provisions of clause 17 of the MOI and stand to be declared void to the extent of inconsistency as provided in section 15(7) of the Companies Act, No 71 of 2008.

D.THE LEGAL PRINCIPLES AND REASONS FOR THE JUDGMENT

Fair valuation of shares and the qualification of Cornerstone

- [13] For convenience sake, I will deal with the fair valuation dispute. The fair valuation of shares in companies are often a feature of shareholder disputes

before our courts. Once the parties agree to a method of valuation of their shares, the agreement is enforceable unless there is a manifest error committed during the evaluation.

[14] The Judgment of *Media24 (Pty) Ltd v Estate of late Deon Jean Du Plessis and Another*¹ provides a guidance on when not to adhere to the agreed method of evaluation where there is a manifest error. The court held as follows on the interpretation of manifest error in the determination of fair value :

“[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.”

I am not persuaded that the evidence by Ms Raath is not credible and that manifest error was committed by Cornerstone in the determination of the fair value of Redshift shares. The valuation was checked by a registered accountant, Mr Bartholomew Thomas Gormley (CA SA) and a practicing accountant in reaction to the challenge by the respondent against the valuation performed by Ms Raath. Mr Gormley opined that:

- (a) Ms Raath took the correct factors into consideration;
- (b) Having reviewed Miss Raath's calculated Nett Asset Value (“NAV”) for Redshift, he disagreed with her NAV as income tax

¹ (169/2017) [2017] ZASCA 168 (1 December 2017)

had not been deducted there from. In his calculation, NAV for Redshift amounted to R7.2 million.

(c) If one is to take Price Earnings ("PE") Ratio picture for the purposes of valuing the shares, the average earnings would be R2 350 per share and this is calculated based on the average nett earnings after tax for the prior 3 years.

(d) Based on historical data, a willing buyer would opt for average endings and would be prepared to pay a PE of 3, so this would be: $R2\ 3350 \times PE\ of\ 3 = R7\ million$, which corresponds to Mr Gormley NAV, i.e, purchase price for the respondent's shares in this scenario (R 634 500) is evidently less than the amount determined by Raath.

(e) Ms Raath's Forecasted Free Cash Flow valuation as per Redshift Business Report was overvalued because the revenue increases year-on-year which is extreme and that using this valuation methodology would be unsound.

[15] The evidence on papers by Mr. Gormley has not and cannot be challenged and the assertion that he should be regarded as a hired gun has no factual basis. I therefore find no basis to interfere with the valuation performed by Ms Raath. In any event, the respondent simply contends in his answering affidavit that there is no evidence to suggest that Cornerstone ever determined or were tasked to determine the fair value of the respondent's shareholding or fair value of Redshift as a business. This contention by the respondent takes the issue of

fair valuation of the shares in Redshift nowhere. Accordingly, the terms of the agreement on the evaluation of the shares finds support of this court.

[16] The answer provided by Mr. Gormley has not been challenged by any other expert evidence from the respondent. Glover² opines as follows about the value of price of the thing to be sold and by extension purchased:

“If the price fixed is not far off a figure which might have been expected in the circumstances, both parties are bound to accept it.³ Having put themselves in the third party person's hands they have no ground to questions such decision.

However, either of them may question a price which can properly be described as ‘unjust’ or unfair or ‘manifestly unjust’ for altogether too high or too low because, in agreeing that a third person or a group of persons should fix the price, the parties ‘did not intend an arbitrary but just estimation’. A price purported to be fixed by the third party which is manifestly unjust or unfair does not have to be paid if it is too high or accepted if it is too low.⁴ If the parties themselves accept that this is the case, there is no problem: the parties route go their separate ways.” The price of the shares is not far off if regard is had to the circumstances of the valuation. If one uses the value as opined by Mr. Gormley, the respondent should be paid R 634 500, but the calculation by Cornerstone is R787 787.80 which in my view should not be interfered with. It should be remembered that the respondent rejected an offer of

² Kerr's Law of Sale and Lease, 4th Edition page 72.

³ See Van Heerden v Basson 1998 (1) SA 715 (T) at 718I-J, 719C.

⁴ See Total South Africa Pty Ltd v Bonaiti Development (Pty) Ltd 1981 (2) SA 263 (D) at 266H.

R900 000 for the purchase of his shares and this was evidently a generous offer.

[17] In *Dublin v Diner*⁵ the dispute was about the sale of shares in terms of a written agreement where the seller was obliged to offer his shares "at the valuation of the shares by the auditors often named by the company." The buyer claimed that the value placed on the shares by the auditors was grossly excessive. The seller then brought an application for an order for the buyer to pay the price against the delivery of the shares and asked for supplementary relief. The court per Miller J⁶ held that:

"if in this present case the respondent (the buyer) were to be able to show that the price determined by the auditors is so grossly excessive that it bears no reasonable relationship at all to the value of the shares at the relevant time, and it is manifestly unjust and unfair price, he would be legally justified in refusing to pay the price now demanded by the applicant.

In the light of the circumstances which I shall outline, it is not necessary for me to decide, for purposes of this application, whether the respondent would be entitled to hold the applicant to the contract on the basis of a price to be determined as fair and just by the court or by any other person, or whether as held by Murray AJP [in the *Gillig*⁷ case] the applicant [the prospective seller] would have the election whether to

⁵ 1964 (1) SA799 (D).

⁶ At 804h-805B.

⁷ *Gillig v Sonnenberg* 1953 (4) SA 675 (T).

resile from the contract or accept a newly determined price. It is sufficient to say that on proof of the manifest injustice of the price fixed by the auditors, the respondent would have a defence to the present claim.” In the instant case, there is no any other choice available to the respondent as he is no longer employed by Redshift.

[18] The facts in *Dublin v Diner* are distinguishable from the present case. In the present matter the respondent was a shareholder of Redshift and was present at the shareholders’ meeting when Outcor was replaced by Cornerstone as the new auditors of Redshift. He supported the change of auditors whose determination of the price of the shares when a call option is exercised is binding on the parties. Accordingly, no justification can be made that Cornerstone have determined an unjustly too low price of the shares to be acquired from the respondent. It does not matter in my considered view whether two months before November 2021 the value of Redshift was determined to be significantly higher.

[19] Once the parties agree in a contract that they will bound by the decision of a person tasked with the evaluation of the shares, the court will enforce the agreement unless the party seeking to declare the agreement as void can point the circumstances that render the agreement unenforceable. In *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another*⁸ the Constitutional Court had to deal with an appeal concerning the challenge where the parties

⁸ (434/06) [2007] ZASCA 143; [2008] 1 All SA 321 (SCA); 2008 (2) SA 448 (SCA); 2008 (7) BCLR 725 (SCA) (22 November 2007)

had agreed in the arbitration proceedings that the award of the arbitrator will be final to determine the dispute between themselves. In dismissing the appeal, where the determination of the dispute by the arbitrator was challenged, the court held as follows:

"[22] It seems to me that the parties intended the Arbitration Act to apply to their dispute, within the limits of their agreement. A finding that Andrews was a valuer would not assist Lufuno and does not require a 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 is 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.¹⁵ It has not been suggested that Andrew's decision was not arrived at honestly and in good faith. Nor was such a case made out on the papers. Here as well therefore, Lufuno must fail." For reasons already spelt out, the court is not entitled to interfere with what the parties agreed to be bound in terms of the agreement on share valuation for the purpose of exercising a call option.

Inconsistency of the shareholders agreement with MOI

[20] I now deal with the contention by the respondent that the agreement stands to be declared void because it is inconsistent with the MOI of Redshift. The law is

settled where the shareholders agreement is inconsistent with the MOI of the company. Section 15(7) of The Companies Act 71 of 2008 states as follows:

“The shareholders of a company may enter into any agreement with one another concerning any matter relating to the company, but any such agreement must be consistent with this Act and the company’s Memorandum of Incorporation, and any provision of such an agreement that is inconsistent with this Act or the company’s Memorandum of Incorporation is void to the extent of the inconsistency.”

[21] The respondent contends that the shareholders agreement is inconsistent with the MOI of Redshift because the shareholders agreement in terms of clause 10 thereof, that the valuation of the shares should be determined by Cornerstone who are not an independent auditor which is in conflict with clause 17 of the MOI which provides that the valuation of shares will be determined by an independent audit if the parties cannot agree on the value.

[22] Clause 10 of the shareholders agreement states with clarity how a fair value would be determined when the call option is exercised in terms of clause 8 of the agreement. Clause 10 states as follows:

“10. FAIR VALUE

10.1. The parties shall in the first instance attempt to agree on the fair value of the allotted shares within 10 business days of the date on which the exercise notice contemplated in clause 8.4 is served, and failing agreement, to be determined by the auditors of the Company, who shall:-

- 10.1.1. determine the fair value of the Option shares at the date on which the exercise notice contemplated in clause 8.4 is served; and
- 10.1.2. shall act as an expert and not arbitrator but may call for and consider any written submissions which any party may wish to submit and the company shall provide the auditor with such information which may reasonably be required for this purpose. The auditor shall use such method of valuation that he, in his sole opinion, deems appropriate in the circumstances;
- 10.1.3. the auditor shall be required to give his decision as soon as possible and in any event within twenty one days after he is appointed;
- 10.1.4. when will the fair value of the option shares, the auditor shall take into account the fact that the Option Shares represent a minority interest;
- 10.1.5. whose decision (except for manifest error) shall be final and binding on the Parties and may be made an order of court."

[23] Clause 17 of the MOI provides as follows:

"17 DETERMINATION OF FAIR VALUE

17.1. the Fair Value of the Shares and the pro rata portion of the claims related thereto which may fall to be determined in this agreement shall, in the absence of agreement, be determined by an independent firm of auditors nominated by the Auditors, on the following basis:

17.1.1. they shall determine the purchase price as soon as possible in the circumstances, taking into account the liquidity of the relevant Ordinary Shares and the shareholder's Loans; and

17.1.2. give each ordinary shareholder an opportunity to make written submission to him/her concerning the manner in which the purchase price is to be determined;

17.1.3. shall hear the matter informally and as soon as possible;

17.1.4. whose decision (except for manifest error) shall be final binding on the Ordinary Shareholders and may be made an order of court;

17.1.5 such auditors shall act as experts and not as arbitrators;

17.1.6. The charges of such auditors shall be paid by the party whose proposal with regard to the fair value may fall to be determined differs most from the determination of the auditors concerned, or, if the proposal with regard to the fair value which may fall to be determined and put forward by each party differs

from the determination of such auditors concerned to approximately the same extent, the charges of such auditors shall be borne by the parties in equal shares; and

17.1.7 they shall notify all interested parties in writing within 20 (twenty) days up to date upon which the matter for determination is referred to them in writing, of their determination, by which such interested parties shall be bound.

17.2. Each interested party shall be entitled to make representation to such Auditors prior to them finishing their decision which written representations shall be finished 2 the other interested party/ties who shall be entitled to respond thereto within seven days off receipt of such representations. The decision of such Auditors thereafter shall be final and binding on the parties thereto.

17.3. In making their determination, search auditors shall take cognisance of *inter alia*-

17.3.1 the business conducted by the company and the market with within which the Company conducts its business;

17.3.2 any prevailing trends in respect of the business conducted by the Company;

17.3.3. the current value of similar companies in the industry in which the company operates at the time of valuation.”

[24] In my view, clause 17 should be read in the context of clause 16 of the MOI which deals with involuntary sale of shares by a shareholder. Clause 16 covers the following scenarios of the involuntary sale of shares where the shareholder:

- (a) is placed under curatorship or sequestrated, liquidation, business rescue proceedings or under a winding up order, whether provisionally or finally voluntary or compulsory;
- (b) commits an act which would constitute an act of insolvency, or is sequestrated;
- (c) take any steps to be deregistered in terms of the Companies Act or the legislation in terms of which it has been incorporated, as the case may be;
- (d) takes any steps to be wound up, liquidated or sequestrated whether provisionally or finally, voluntarily or compulsorily;
- (e) enters into any compromise with his creditors generally, or offers to do so;
- (f) dies; or
- (g) becomes permanently incapacitated.

[25] Clause 16 then proceeds to deal with the steps to be put in place. It is evident in my considered view that the disposal of the shares as a consequence of resignation is not catered for in the instant case. Accordingly, I find no reason why the shareholders would not be permitted to regulate their affairs in a scenario not covered by clause 16 of the MOI. It therefore follows that no conflict exists between the provisions of clause 10 of the agreement and clause 17 of

the MOI. Consequently, clause 10 of the agreement does not fall foul of the provisions of section 15(7) of the Companies Act.

Counter-application

- [26] In his counter application, the respondent seeks an order declaring that clause 10 the shareholders agreement is void as it is inconsistent with clause 17 of the MOI. I have already made a determination that it is not and as a consequence the relief sought in this regard cannot be sustained and stands to be dismissed.

Joinder Application

- [27] The joined of a party to end proceedings is regulated by Rule 10 of the uniform rules of court. In this application, the respondent seeks to join Redshift Underground that it is party to the shareholders agreement. The respondent has not brought a substantive separate application in this regard as required by Rule 10 and for this reason alone, the joinder application stands to be dismissed. The respondent has also failed to join the other shareholders of Redshift who have an interest in the present application because the respondent sought to declare clause 10 of the agreement concluded by all of them to be void. They ought to have been joined and for this reason as well the application for joinder stands to be dismissed.

Merits of the main application

- [28] Having regard to the papers before me regarding the main claim, I am satisfied that the applicant has succeeded in proving his case.

ORDER

[29] An order is granted in the following terms:

- (a) The valuation report by Cornerstone Tax and Accounting Services (Pty) Ltd, dated 16 November 2021, a copy whereof is annexed to the founding affidavit as FA13, is made an order of court;
- (b) It is declared that the fair value of 90 (ninety) ordinary no par value shares held by the respondent in the company known as Redshift Cyber Security (Pty) Ltd, registration number 2015/263246/07, under share certificate number 006 (option shares), is R787 787.80;
- (c) The respondent shall forthwith take all steps required or necessary to transfer the option shares to the applicant or his nominee against payment of the sum of R787 787.80 by the applicant to the respondent;
- (d) In the event of the respondent failing to comply with 3 above, the Sheriff of the above Honourable Court or his lawful deputy is authorised to take all steps as may be required or necessary to effect transfer of the option shares from the respondent to the applicant or his nominee against payment of the sum of R787 787.80 by the applicant to the respondent;
- (e) The respondent shall pay the wasted costs occasioned by his withdrawal of the counter- application on 20 June 2022 on an attorney and client scale;
- (f) The respondent shall pay the costs of the application;
- (g) The counter- application is dismissed with costs.



ML SENYATSI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

DATE JUDGMENT RESERVED: 8 November 2022

DATE JUDGMENT DELIVERED: 11 May 2023

APPEARANCES

Counsel for the Applicants: Adv De Oliveira

Instructed by: KWA Attorneys

Counsel for the Respondent: Adv E Malherbe

Instructed by: Gottschalk Attorneys