

SOUTH AFRICA / JUDGMENT

IX Engineers (Pty) Ltd v September and Another (48047/2021) [2023] ZAGPPHC 1829 (26 September 2023) [2023] ZAGPPHC 1829

COURT

North Gauteng High Court, Pretoria

BEFORE

Janse Van Nieuwenhuizen

CASE / FILE NUMBER

48047/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

REPUBLIC

OF SOUTH AFRICA

Case

Number: 48047/2021

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: YES

DATE: 26 September 2023

SIGNATURE: JANSE VAN

NIEUWENHUIZEN J

In

the matter between: IX ENGINEERS (PTY)
LTD
Applicant
and
ASHLEY MARCO SEPTEMBER
First
Respondent
KRESTON
PRETORIA
Second
Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J:

- [1] The applicant (plaintiff) applies for leave to amend its particulars of claim in accordance with a notice of intention to amend delivered on 6 October 2022. The first respondent (first defendant) not only opposes the application, but also instituted a counter application in terms of which he inter alia claims for the dismissal of the applicant's claim.
- [2] The second applicant, Kreston Pretoria, is a firm of auditors and will hereinafter be referred to as "Kreston".
- [3] For ease of the reference the applicant and first respondent will be referred to as such or as "the parties".

INTRODUCTION

- [4] The dispute between the parties centres around the value of the first respondent's shares in the applicant. The first respondent, a shareholder in the applicant, wishes to dispose of his shareholding. In terms of the shareholders' agreement, the applicant is obliged to purchase the shares at a fair market value.
- [5] The fair market value of the first respondent's shares proved to be somewhat of a contentious issue. The parties could not agree on the value of the shares, which prompted the first respondent to apply for the appointment of an independent expert to determine the value of the shares.
- [6] The application culminated in a settlement agreement in terms of which the parties agreed that an independent auditor would be appointed by the applicant to determine the fair market value of the shares in accordance with clause 15.2 of the shareholders' agreement. The parties, furthermore, agreed that the applicant will purchase the shares for such value.

- [7] The applicant duly appointed Kreston to perform the valuation of the shares. In terms of a valuation report dated 6 September 2021, the fair market value of the first respondent's shares was determined at R 4 120 000, 00.
- [8] The applicant did not accept the valuation and instituted the present action on 22 September 2021, claiming a declarator that it is not bound by the valuation and that the valuation is set aside.
- [9] On or about 8 November 2021, the first respondent filed an exception to the applicant's particulars of claim alternatively, that the valuation be set aside.
- [10] The exception was upheld by Van der Westhuizen J on 15 September 2022 and the applicant was granted leave to amend its particulars of claim within 15 days from date of the order.
- [11] On 6 October 2022, the applicant served a notice of intention to amend its particulars of claim by substituting the particulars of claim dated 21 September 2021 with a new set of particulars.
- [12] The first defendant objected to the proposed amendment on the grounds that the proposed amendment contains the same factual allegations against which the exception was upheld by Van der Westhuizen J and that it does not disclose a cause of action.
- [13] In the result, the application brought the present application to amend its particulars of claim.

APPLICATION FOR LEAVE TO AMEND

Cause of action

- [14] The applicant's cause of action is firstly, based on a breach of mandate by Kreston, alternatively on the basis that Kreston did not perform its duties in compliance with the provisions of its mandate or its terms of reference.
- [15] Secondly, the applicant contends that the valuation should be set aside on common law grounds.

Legal principles

- [16] It is apposite at this stage to have regard to the legal principles underlying the relief claimed by the applicant. This is necessary because Mr Kotze, counsel for the first respondent denied that a breach of mandate is a ground for the setting aside of the valuation.
- [17] In *Transnet National Ports Authority v Reit Investments (Pty) Ltd* 2020 JDR 2104 (SCA), the court considered the circumstances in which a determination made by an expert valuer jointly appointed by two parties to a contract is susceptible to being reviewed and set aside.
- [18] In formulating the dispute between the parties, the court held as follows at para [36]:

“.....The crux of the dispute, as I see it, was essentially whether Mr Seota had acted in accordance his mandate from the parties and if so, whether his determination was otherwise manifestly unjust...”(own emphasis)

- [19] In casu, the second respondent was only appointed by the applicant. The first respondent did not agree to the terms of the mandate and is, as a result, not bound by the terms.
- [20] The first respondent's entitlement to payment of the fair market value of the shares emanates from the settlement agreement reached between the parties. In terms of the settlement agreement, the fair market value had to be determined in terms of clause 15.2 of the shareholders' agreement. In the event, that the terms of the mandate given by the applicant to Kreston do not accord with clause 15.2 of the shareholders' agreement, any breach thereof does not sustain a cause of action against the first respondent. The applicant may have other legal remedies flowing from the alleged breach of mandate by Kreston, but such remedies do not concern the first respondent.
- [21] In the result, I agree with Mr Kotze that the applicant may only rely on common law grounds for the setting aside of the Kreston valuation.
- [22] It is trite that the courts will only in limited circumstances set aside the determination of an expert. Where parties have agreed to subject their dispute to an expert valuation which they have agreed will be final in nature, the parties will generally be bound by such a determination. [See: *Chelsea West (Pty) Ltd and Another v Roodebloem Investments (Pty) Ltd & Another* 1994 (1) SA 837 (C)]
- [23] In casu, the ground relied upon by the plaintiff for the setting aside of the Kreston valuation was set out as follows in *Perdikis v Jamieson* 2002 (6) SA 356 W at par [7]:

*“It was held in *Bekker and RSA Factors* 1983 (4) SA 569 (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. ...”*

- [24] In the *Perdikis* matter, a chartered accountant was appointed by the parties to value the share of a partner in a partnership. The court found that the undisputed facts showed that the chartered accountant was given an obviously incorrect figure and thus acted on a wrong assumption of the facts. On the basis of the aforesaid, the court held that the error led to a patently inequitable result and the valuation was set aside.

Averments sustaining the conclusion that the Kreston valuation leads to a patently inequitable result.

- [25] The factual allegations supporting the applicant's contention that the Kreston valuation leads to a patently inequitable result are discussed infra.

- [26] The applicant avers that Kreston failed to have regard to the historical performance of the applicant's business. Appendix D attached to the Kreston valuation report reads as follows: "Historical Past Performance Analysis". The appendix contains a detailed analysis of the historical performance of the applicant's business for the period 2017 to 2019. In the result, the averment is manifestly incorrect and without any merit.
- [27] According to the applicant, Kreston did not employ a Discounted Cash Flow Model because it applied inputs which are inconsistent with the application of a Discounted Cash Flow model, in that, Kreston did not include in the unsystematic risk premium, the additional risk that impacts the plaintiff as a result of its onerous contractual arrangement with employee shareholders. This arrangement places the applicant at risk of fundamental or even fatal cash flow shortages. There are many employee shareholders and this, combined with the contractual obligation to buy out employee shareholders when they leave, can easily place the company into an insolvent position in which it is unable to pay out all employees. An increase in the frequency of employees leaving or a group of employees leaving at once could bring about such an illiquid insolvent position.
- [28] Paragraph 15.2 of the shareholders agreement provides, inter alia, as follows:
- "In so determining the Independent Auditors shall:*
- ...
- 15.2.3 not take account of illiquidity of the equity;"
- [29] Consequently, the averment is in direct contradiction to the express terms of clause 15.2 of the shareholders' agreement and does not support a conclusion that the valuation leads to a patently inequitable result.
- [30] The applicant alleges that Kreston incorrectly included a terminal value in the calculation of the value of the shares, which resulted in a materially higher value outcome.
- [31] Clause 15.2.5 of the shareholders' agreement provides that the independent auditor shall take into account that the transfer of relevant equity does not breach the provisions of annexure "B" attached to the shareholders' agreement. Annexure "B" prescribes the principles relating to the shareholding and clause H provides for the calculation of share value. In dealing with the principles applicable to the Discounted Cash flow model, it is expressly stated that the terminal value must be taken into account in determining the cash flows of the applicant.
- [32] The averment is, once again, in direct conflict with the express terms of the shareholders' agreement.
- [33] The applicant avers that the cash flow forecasts generated by Kreston is based on totally incorrect assumptions of the market and industry in which the applicant operates as:

33.1 the forecast applied by the second defendant included growth profits of 5% or more for the 5 years post the valuation date when in fact, and based upon the historical financial information available to the second defendant at the time of the evaluation, the industry and associated industries were experiencing material difficulties owing to economic downturns, corruption, adverse persistent weather conditions and the impact of Covid-19 pandemic;

33.2 the second defendant arrived at a fair return that was too low, resulting in an overstatement of the value. The fair rate of return used was too low because the second defendant used a market beta of 0.67. The market beta of the plaintiff should be greater than 1. Companies of this nature are more volatile than the market. The second defendant does not site a source for the beta market used.

[34] The same averments appeared in the applicant's pre-amended particulars of claim against which the first respondent lodged an exception. The exception was heard by Van der Westhuizen J and in his judgment, the judge held as follows in respect of the aforesaid averments:

"[24] It follows on a purposive interpretation in the particular context of the plaintiff's particulars of claim, i.e. paragraph 16 thereof, that a comparison was made between what inputs Kreston Pretoria employed compared to that which a reasonable expert in the position of Kreston Pretoria would have employed in the specific determination. The criticism of Kreston Pretoria relates to a value

judgment.

[25] In my view, the exercise of a value judgment by an expert would not per se qualify as a manifest injustice. The whole purpose of appointing an independent expert is to obtain an independent valuation to which the parties are bound. The mere substitution of one value judgment for another can hardly qualify as a manifestly unjust valuation."

[35] I respectfully agree.

[36] In the end result, the proposed amendment of the plaintiff's particulars of claim does not sustain a cause of action for the setting aside of the Kreston valuation on the basis that the valuation leads to a patently inequitable result and stands to be set aside.

COUNTER APPLICATION

[37] In the counter application, the first respondent (hereafter defendant) prays for dismissal of the applicant's (hereafter plaintiff) claim and that the plaintiff be directed to pay the amount of R 4 120 000, 00 to him.

[38] The first question to be answered, is whether a party is entitled to apply for the dismissal of a claim in circumstances where an application for leave to amend subsequent to an exception being upheld, is dismissed.

[39] In *Santam Insurance Co. Ltd. v Manqele* 1975 (1) SA 607 (D), the court did not decide the issue, but remarked as follows at 609H – 610A:

“..His position was, therefore, substantially the same as that of a plaintiff who had commenced action by the issue of summons and had thereafter filed a declaration which was destroyed through a successful exception to it. In such a case if the plaintiff wishes to proceed he will have to file a new declaration setting out amended particulars of his claim and he will only be able to do so with the consent of the other party or leave of the court. If he fails to obtain the necessary consent or leave, it would seem that the defendant would be entitled to apply for absolution from the instance.”

[40] In *Standard Bank of SA Ltd v Van Dyk* 2016 (5) SA 510 GP by Van Oosten J held that an applicant who wishes to apply for the dismissal of a plaintiff's claim, in circumstances where the plaintiff has failed to deliver amended pleadings subsequent to an exception being upheld, must first place the defaulting party under bar in terms of rule 26.

[41] The facts in the *Standard Bank* matter, *supra* differ somewhat from the facts in *casu*. *Standard Bank* failed to deliver amended pleadings within the time period allowed for in the order upholding the exception. *Standard Bank* was therefore in default and the provisions of rule 26 had to be complied with.

[42] In *casu*, the plaintiff did file amended particulars of claim. The first defendant, however, objected to the proposed amendment which led to the present application in which leave is sought from the court to amend the particulars of claim. The court did not grant leave to the plaintiff to amend its pleadings, and in my view, it follows that the first defendant is entitled to apply for the dismissal of the plaintiff's claim.

[43] The second question, is whether the first defendant is entitled to an order for the payment of the value of his shares. Once an order dismissing the plaintiff's claim is granted, the action is finalised and the first defendant cannot claim relief in an action that no longer exists. The first defendant must exhaust the legal remedies to his disposal in order to claim payment of the amount due to him in terms of the settlement agreement between the parties.

COSTS

[44] Costs will follow the cause.

ORDER

The following order is granted:

1. The applicant's application is dismissed with costs.
2. The plaintiff's claim is dismissed with costs.

N. JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE HEARD:

04 September 2023

DATE DELIVERED:

26 September 2023

APPEARANCES

For the Applicant: Advocate D Mahon Instructed by: Nicole Ross Attorneys For the Respondent:
Advocate R Kotze Instructed by: Werksmans Attorneys

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