

SOUTH AFRICA / JUDGMENT

Living Waters (Pty) Ltd v Tharisa Minerals (Pty) Ltd (4004/2020) [2020] ZAGPPHC 604 (7 October 2020)

[2020] ZAGPPHC 604

COURT

North Gauteng High Court, Pretoria

BEFORE

E van der Schyff

CASE / FILE NUMBER

4004/2020

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REPUBLIC OF SOUTH
AFRICA
IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA
CASE
NO: 4004/2020

In the matter between: LIVING WATERS (PTY)
 LTD
 APPLICANT
 and
 THARISA
 MINERALS (PTY) LTD
 RESPONDENT

JUDGMENT

Van der Schyff J:

Introduction

1. This is an application for declaratory relief. The applicant seeks an order in the following terms:

‘1. It is declared that the purchase price of all the erven owned by the Applicant in Buffelspoort Ext.2,

Rustenburg is to be determined, upon a proper interpretation of the written agreement between the Applicant and the Respondent (the MOA) and the Agreed Terms of Reference (Annexed to the founding affidavit marked “CFB 4”) without application of the discounted cash flow valuation model;

2. It is declared that the purchase price of the erven determined by the Applicant’s valuer in the amount of R36,267,600.00 plus VAT, is in accordance with the aforesaid agreement and Terms of Reference;
3. Alternatively to prayer 2, a Third Valuer, to be appointed in terms of the agreement, is directed to determine the value of the properties without application of the discounted cash flow model.
4. Costs of the application.’
2. The core issue before me is to consider the interpretation of the agreement in respect of the valuation of property in order to determine whether the discounted cash flow method is applicable or whether it has been excluded in respect of the applicant’s properties (the properties).
3. The respondent raised the following two

issues:

1. Whether this Court is competent to determine the purchase price in these proceedings in accordance with prayer 2; and
2. Whether the procedure for the determination of the purchase price agreed upon by the parties in the MOA (memorandum of agreement), has to run its course before the Court can or should interfere by means of declarators sought in prayers 1 and 3.

Point in limine

4. The respondent raised a point in limine that the application is premature if proper consideration is given to the terms of the agreement between the parties because the procedure for the determination of the purchase price as agreed between the parties in the memorandum of agreement, first has to run its course.
5. The MOA concluded between the respondent and a group of landowners (the landowners), provides that the purchase price of the properties shall be determined by a professional valuer/s by adopting the methodology as set out in the Terms of Reference (TOR).[1] It further provides that any monetary amounts or compensation previously paid by the respondent to any landowner party in consideration of the negative environmental impacts of the respondent’s mine, shall be deducted from the valuation of the properties in

calculating the purchase price thereof.

6. The parties agreed that the purchase price would be determined in the following manner:
 - i. The parties would jointly request the President of the South African Institute of Valuers to nominate six suitably experienced and located professional valuers. The mine would then nominate one of the valuers from the list to prepare a first valuation of the properties. The first valuer would inspect the respective subject properties and determine the value of the Subject Property in accordance with the TOR taking into account the landowner's written disclosure warranty provided in terms of the MOA. The first valuer shall submit its draft valuation and the written warranties to the mine for its consideration before preparing the first valuation. A copy of the first valuation would then be provided to the mine and each landowner party. The landowner parties

could resile from or abide by the agreement and should notify the mine of their choice within 10 days of receiving the first valuation.

If the landowner parties decided to abide by the agreement they could elect to either accept the valuation or to nominate a second valuer from the list of valuers. In the event that the mine confirms that it will abide by the agreement a second valuer nominated by a landowner party would then attend to the valuation of the subject property in accordance with the agreed terms. The draft valuation would then be furnished to the land owner for consideration and comment where after a final second valuation would be provided to the mine.

- ii. Provided that the first and second valuation for any property are within 10% of the highest valuation, the average of the first and second valuations would be deemed to be the true value of the applicable subject property and the purchase price of the said subject property – less any applicable deduction as set out in the agreement;

- iii. If the difference between the first and second valuation is more than 10% of the highest value, the valuers would be requested to consult with each other to find common ground in order to minimise the differences between them on the correct value of the Subject Property as per the methodology set out in the TOR and the relevant written disclosure warranty provided by the landowner. In the event that either the first or second valuer revised their valuation so that the difference between the valuations is equal to or less than 10% of the highest revised valuation, the average of the revised valuation will be accepted as the purchase price, less any applicable deduction.

- iv. In the event that the difference between the first and second valuations remains greater than 10%, the mine and landowner shall agree on a third valuer to prepare a third valuation. Where no agreement can be reached regarding the identity of the third valuer the President of the South African Institute of Valuers would be approached to nominate the third valuer.

- v. The third valuer would prepare the third valuation in accordance with clauses 3.3, 3.4 and 3.5 of the MOA. “The purchase price of the applicable Subject Property shall then be the average of the third valuation and the value of whichever of the first or second valuation is closest to the third valuation, less any applicable deduction in terms of the MOA.
- 7. The first valuer valued the property as a township development using the Discounted Cash Flow (DCF) or residual method. The valuer explained in the valuation report that the DCF method is premised on three basic factors, namely (i) the anticipated income from the project, (ii) the development cost of the project and (iii) the net yield. Based on research on similar developments in the

area he derived a selling period of six years for the subject property. He calculated a total gross income of R36 200 000.00 for the property and explained: ‘In order to arrive at a present value, the gross income has to be spread over the sales period (six years) and discounted to a present value after deduction of all anticipated expenses. Provision is made for Administration and Advertising (2.5%). Sales Commission (5%) and an amount of R300 000.00 for outstanding work on the Waste Water Treatment Works. The normal rate for discounting a township development varies between 25% and 35% to provide for interest, risk and inflation. This was reduced to 15% due to the fact that services have already been installed, thereby reducing the risk.’ In the result the net value (market value) of the applicant’s property was determined as R22 500 000.00.

- 8. A second valuer was subsequently appointed. The second valuer described the property to ‘comprise almost all the erven in a proclaimed township known as Buffelspoort Extension 2, which is situated on Portion 27 of the Farm Buffelspoort 343 JQ. The subject property consists of a total of 25 erven.’ The valuer then refers to the ‘subject erven’. The valuer explains that the evaluation was done strictly according to the ‘market value approach as per item 1 of the TOR document. The valuer, however, stated in his report that –

‘it could be argued that, due to the fact that the subject property comprises a township development that will be marketed, sold and transferred into the name of individual purchasers over a period of time, the net income should be discounted over a reasonable sell-out period. This would entail a Discounted Cash Flow (DCF) calculation.

In this regard, advice from Shepstone & Wylie Attorneys on the interpretation of the Terms of reference was obtained, particularly

in respect to the basis upon which the valuers should value the development. It is clearly stated in this document that the Discounted Cash Flow method should be ignored (please refer to Annexure I). I therefore opted to determine the value of each individual erf on the effective valuation date ...’. The rounded value of the applicant’s property determined by the second valuer is R34 000 000.00

9. The respondent submits that the court is effectively requested to provide an extension to the TOR as agreed upon by the parties in order to exclude a method of valuation which is appropriate in the circumstances. The respondent is only correct insofar as it submits that the applicant approached the court to interpret the MOA in order to determine whether the agreement allows for the DCF method to be applied in the valuation process, or whether it has been excluded. It is not the difference in the amounts

determined by the two valuers that lies at the bottom of the request, but the valuation method employed by the first valuer seen in the context of the instructions as captured in the MOA and the TOR. The court is requested to determine whether on an interpretation of the contract it can be held that the parties intended for the DCF model to be applied in the valuation of the properties. In the result, the point in limine is dismissed.

Principles applicable to the interpretation of contracts

10. It is trite that the golden rule of interpretation is to ascertain the intention of the parties as expressed in the contract – ‘The intention of the parties must be gathered from their language, not from what either of them may have had in mind’[2] but ‘what the language used in the contract means’.[3]
11. The Supreme Court of Appeal restated the principles that must be applied in the process of interpreting contracts in *Auction Alliance v Wade Park* (342/16) [2018] ZASCA 28 (23 March 2018) and echoed the principle as stated in *Bothma*
- *Botha Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) para 12:

‘While the starting point remains the words of the document . . . the process of interpretation does not stop at a perceived literal

meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being . . . Interpretation is no longer a process that occurs in stages but is “essentially one unitary exercise.”

12. This principle is rooted in the earlier decision in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA) para 18, recently affirmed by the Constitutional Court in *Airports Company South Africa v Big Five Duty Free (Pty) Ltd* 2019 (5) SA 1 (CC) para 29:

‘Interpretation is the process of attributing meaning to the words used in a document, ... having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all

these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible ... results or undermines the apparent purpose of the document. ... [B]e alert to, and guard against, the temptation to substitute what [you] regard as reasonable [or] sensible for the words actually used [for] to do so is to cross the divide between interpretation and [divination]. ... The 'inevitable point of departure is the language ... itself', read in context and having regard to [its] purpose ... and the background to the preparation and production of [this] document.'

Text and Context

Aim and purpose of the agreement

13. The specific factual circumstances which the parties endeavoured to deal with by concluding the agreement outline the context within which the MOA and TOR are to be interpreted. It is stated in the MOA that:

'2.1 In consequence of the establishment of the Tharisa Mine the Landowners, whose Properties lies within an area bounded in the North by the N4 and the R104 in the South, claim to have been negatively impacted by some of the environmental impacts associated with their close proximity to the Company's mining operations.

2.2 Following extensive engagement between the parties the Company [respondent] has agreed to purchase the Properties on the basis set out in this agreement which, the Parties are agreed, will fairly compensate the Landowners for any prejudice that they may have suffered by virtue of their close proximity to the Tharisa Mine and will enable the Company to establish an effective buffer zone between the mine and neighbouring land owners and residents.'

ii. Number of properties purchased

14. The respondent concluded the agreement with a number of landowners and 75 properties are listed in Annexure A as the properties constituting the subject properties of the agreement.

iii. Result of extensive engagement between the parties

15. It is apparent from the MOA that its conclusion was preceded by extensive engagement between the parties. It is also evident that the landowner parties were represented by Richard Spoor of Richard Spoor attorneys. In the result it can be accepted that the parties carefully considered the terms of the agreement and the manner in which it was formulated and penned down. This contextual factor emphasises the weight to be afforded to the text of the MOA and TOR and emphasises that 'the inevitable point of departure' in the interpretation process is the language of the MOA itself.

16. In addition to certain textual aspects referred to above, the following provisions in the MOA are of specific significance when the contract is to be interpreted with the aim of ascertaining whether on a proper interpretation of the MOA and TOR the agreement provides for the application of the DCF valuation method:
- i. “The Landowner” means owner of all the Properties whose details are set out in “Annexure A” hereto;
 - ii. “The Properties” means the Properties belonging to the Landowners as described in “Annexure A” hereto, and “Property” means any one of such Properties as the context requires;
 - iii. “Subject Properties” means those Properties in Annexure A which are owned by the Landowner Parties and “Subject Property” means any one of such Properties as the context requires;
 - iv. “The Terms of Reference” or “TOR” means the document as annexed to this agreement as “Annexure B” which sets out the methodology to be used by the Valuer when valuing the Properties;
 - v. Subject to the provisions of this agreement and most pertinently clauses 2.10, 10 and 11 below, the Company will purchase the Subject Properties from the Landowner parties, on the basis provided for in this agreement;
 - vi. The purchase price of each Subject property will be determined by professional Valuers who will value such Properties using the methodology as set out in the TOR, provided that any monetary amounts or compensation previously paid by the Company to any Landowner Party in consideration of the negative environmental impacts of the Company’s mine, shall be deducted from valuation of the applicable Subject Properties in calculating the purchase price therefor;
 - vii. The Company acknowledges that the Subject Properties have been inspected. the company purchases the Properties as they now stand, and save as otherwise expressly provided herein including any warranty in the form of Annexure C, without further warranty or representation as to their condition, nature or extent and subject to such conditions as are mentioned or referred to in the current Title Deed or as imposed by Law. Save as otherwise provided herein, the Landowners shall furthermore not be liable for any defects, patent or latent to the Properties or any damages which the Company may suffer as a result of such defects;
 - viii. No addition to, variation or consensual cancelation of this agreement and no extension of time, waiver or relaxation or suspension of any of the provisions or terms of this agreement shall be of any force or effect unless in writing and signed by or on behalf of all the Parties.’
17. The TOR requirements for the valuation of the properties are:
- ‘ 1. Subject to the provisions below, the value of the Subject Property is to be determined being the estimated amount for which the said property should exchange on the date of valuation, between a willing buyer and a willing seller in an arm’s length transaction,

after proper marketing where the parties has each acted knowledgeably, prudently and without compulsion;

2. The value shall be determined as if the Tharisa Mine, which was established in 2008/9 had not been established, but shall take into consideration inter alia all other mines and other land uses in the vicinity of the Subject Properties;
3. The value shall be determined using the sales comparison approach by reference to comparative sales that took place in the Buffelspoort area before 31 December 2009, adjusted to reflect changes in comparable property prices in the Buffelspoort District since that day, and/or by reference to comparable sales elsewhere in the Buffelspoort District and surrounding areas
4. The value shall be determined taking into account the following:

4.1 the existing use of the Subject Property;

4.2 the zoning, land uses and access to services of the Subject Property including any water rights;

4.3 the physical characteristics of any buildings and other immovable improvements situated on the Subject Property such as age, construction and roof materials, foundations, electrical and plumbing installations, building standards, plans, finishes and general interior and exterior conditions;

4.4 the existence, duration and rental payable in respect of any leases (or other rights or use of occupation) of the Subject Property;

4.5 all and any servitudes and encumbrances applicable to the Subject Property as disclosed in the disclosure warranty given by the owner of the Subject property, and/or registered against the title deed;

5. Notwithstanding clause 4, no value shall be attributed to any business carried-on on the Subject Property, whether by the Landowner Parties or any third party;

5.(sic.) The Valuers shall request and have regard to any relevant submissions by both the Landowner Party concerned and the Company in regard to the valuation of the Subject Property;

6. In support of and as part of his valuation of the Subject Property, each Valuer shall prepare a report which will include (but not be limited to) the following:

‘6.1 The address and legal description of the Subject Property and the owner/s name/s;

6.2 A location map that shows the location of the Subject Property;

6.3 An inspection report concerning the interior and exterior of the Subject Property;

6.4 A clear, descriptive photograph of the Subject Property;

6.5 Details of the size, shape, zoning, land uses and access to services of the Subject Property including any water rights;

6.6 Physical characteristics of any building and other immovable improvements situated on the Subject property such as age, construction and roof materials, foundations, electrical and plumbing installations, building standards, plans, finishes and general interior and exterior condition;

6.7 Details of all and any leases, rights of use, and/or occupation, encumbrances and servitudes referred to in clauses 4.4 and 4.5;

6.8 A summary of all relevant information provided to the Valuer by the Landowner Party and the Company, including the history of the Subject property since 2009;'

7-10 Not relevant to this interpretation.

The parties' respective submissions

- i. The applicant's case as set out in the founding affidavit with its appendices
18. The applicant stated its purpose with the application as obtaining declaratory relief regarding the applicability of the DCF model as an appropriate model for valuation in terms of the agreement between the parties. The applicant contend that it does not apply.
19. In describing the history of the property, the applicant recounts that he bought the land in question from his parents in the 1990's, and started developing the land in 1997. In 2010 the community of landowners in Buffelspoort became aware of problems arising from dust pollution, animals dying, boreholes running dry, structural damage to buildings, houses and structures that have been in existence for decades without any issues. It was then realised that the respondent's platinum mine had been set up approximately 500m from most of the land users.
20. By 2013 the applicant completed the construction of the infrastructure of the entire estate on the land in question, e.g. the perimeter concrete electrified security fencing, roads, electricity to each stand. A Township was proclaimed and the Rustenburg municipality approved the building plans for the proposed townhouses. The building commenced and the gatehouse was completed. The civil works for the platforms of the first individual residential units commenced. It was, however, stopped due to the impact of the respondent's mining operations which, inter alia, negatively affected the newly constructed gatehouse which was built according to building specifications. After extensive engagement between the respondent and affected land owners the parties concluded the agreement that is the subject matter of this application in 2017, with the respondent agreeing to purchase the affected properties within a demarcated area to create a buffer zone for mining operations.
21. The applicant owns 27 stands, consisting of full title stands and sectional townhouse stands within the security estate. The plan was to build residential units and sell it or rent them out. Two of the stands, stands 194 and 195, are beneficially owned by Mr Van Schalkwyk, a

farmer. The applicant submits that the respondent agreed to “purchase the Applicant’s property, being all the erven it owns in a proclaimed township known as Buffelspoort Extension 2. These erven were laid out on portion 127 of the Farm Buffelspoort. The applicant additionally owned portion 96, agricultural land within the security estate and portion 128 zoned for business purposes.

22. The first valuer valued the property and applied the DCF model which resulted in the decrease of the value of the land. The applicant contests the application of the DCF model and avers that the factual matrix against which the MOA between the parties was concluded, included the following:
 - a. The purchase of the properties has been brought about by the respondent’s mining operations which put a hold to any prospect that the applicant had in developing the Property;
 - b. The applicant obtained the property in 1996 and there was no urgency to sell the property for a monetary loss. When the applicant obtained the property the plan was to keep most of the property as a pool of rental properties because of the shortage of such properties in Rustenburg at the time and to sell on an ad hoc basis;
 - c. On 22 May 2015 the Township Register for Buffelspoort Ext 2 was opened and the Registrar of Deeds advised that the Rustenburg Local Municipality could proceed to proclaim the Township. On 9 June 2015 Buffelspoort Ext.2 was incorporated into the Rustenburg Land Use Management Scheme of 2005;
 - d. The applicant is consequently the owner of erven reflected in the Township Register.
- ii. The respondent’s case as set out in the answering affidavit with its appendices
23. The respondent emphasised that the second valuer also indicated that it could be argued that, due to the fact that the subject property comprises a township development that will be marketed, sold and transferred into the name of individual purchasers over a period of time, the net income should be discounted over a reasonable sell-out period, which would entail a DCF calculation. However, on advice from Shepstone and Wylie this method was not applied. This indicates, argues the respondent, that the second valuer instinctively knew that the DCF method had to be applied in the circumstances.
24. The respondent deals with the submission contained in the said letter of Shepstone and Wylie. In the letter it is stated that the DCF method is not applicable in light of the fact that clause 5 of the TOR stipulates that no value shall be attributed to any business carried-on on the Subject Property. They then state: ‘In our opinion this is so because it pre-supposes that the business of property development is applicable’. The respondent submits that clause 5 reflects the well-known valuation principle that ‘what should be valued is the horse and not the jockey’ and that the DCF model is not excluded by this provision as the provision seeks to attribute value to an inherent attribute of the property and not to a business as a shop or factory that is conducted on the property.

25. The respondent substantiates the application of the DCF model as an appropriate valuation method based on the following:

The DCF model is a factual interpretation of the market value and an adjustment to take account of the market. It is a method to determine a discount on the full sales of prices of the individual erven which will be required by the market because of the fact that all the erven are put up for sale in competition with each other on the date of valuation. This is in accordance with the market value definition included in the TOR which postulates a sale of the property on the date of valuation. If there are enough end users in the market for all the erven to be sold at full market price on the same day, there would be no discount. If, however, the valuer determines as a market fact that there are not enough purchasers at full price on the date of valuation, and that it will take a period of time to find purchasers for all the erven, then a discount will apply.

26. In answer to the applicant's submission that the property was destined for rental purposes, the respondent stated that according to the first valuer, the property market has significantly quieted down

in 2013 when the construction of the infrastructure of the township was reportedly completed. As a result, it became increasingly

difficult to realise value for an estate such as the estate developed by the applicant. The respondent reflects on the timeline regarding the development provided by the applicant and points out that the applicant had to have knowledge of the existence of the mine and its alleged negative effects when it commenced with the construction of the gate house and the alleged civil works and platforms.

27. The respondent submits that presently, although a township register was opened, and the erven entered on the General Plan, none of the erven are held under separate title and are still held in terms of the Township

Title. The effect hereof is that:

- i. The applicant is currently the registered owner of 'Portion 127 of the farm Buffelspoort 343, ..., now known as Buffelspoort Ext 2 Township';
- ii. The owner is not the owner of individual erven under separate title in the township as all erven are held by virtue of the Township Title;
- iii. Since a section 82 certificate has been obtained and filed there are no impediments to the transfer of individual erven;
- iv. The applicant is thus not the owner of individual erven as the erven have not been created as the subject matter of separate title in the Deeds Office. Although the property cannot be described as farmland it is most appropriately described as 'township property established and held in terms of one Township Title by the applicant'.

This constitutes a market fact that is relevant for the purposes of the valuation of the property.

28. The first valuer's research reflected that individual purchasers for each of the erven did not exist in the market as at the date of valuation and that the sales period necessary to sell the individual erven would be six years. It is this fact that necessitates the use of the DCF method in order to determine the present value of the property as at the date of valuation. In order to arrive at a present value as if all the erven were sold on one day in competition with each other the gross total income that is spread over a sales period of six years was discounted at 15%. If the DCF method is not used, the applicant will be compensated for more than what he has lost and the applicant will receive more than the market value of the property.

iii The applicant's reply

29. In its replying affidavit, the applicant argues that a proper interpretation of the MOA and TOR would exclude the business of Township development from the property by virtue of inter alia the provisions of clause 5 of the TOR. The DCF model takes into account the business of Township development being conducted on the properties contrary to the express statement in the TOR that business is to be disregarded in valuing the property. It is further submitted that clause 1 of the TOR assumes that marketing has already taken place and marketing costs need not be taken into account, which militates against applying a DCF model.

Discussion

30. The TOR and the MOA, to which it is attached, although referred to as two documents (MOA and TOR) together with the other annexures to the MOA, are to be read and considered as one document constituting the agreement between the parties.
31. The question arising is whether the properties should be regarded as a single township development project or as individual erven, for purposes of valuation. This aspect was brought to the fore by both

valuers and is the result of the properties under consideration being held under one Township Title.

32. Clause 4 of the TOR prescribes that a valuer must take the existing usage and the zoning of the Subject Property into consideration when the value thereof is determined. In casu, it is common cause that the township development process has reached the stage where Portion 127 of the farm Buffelspoort could either be alienated as one single township development, or individual erven could be transferred out of the Township Title. That being so, I am of the view that the respondent's contention that the applicant was not the owner of individual erven under separate title in the township as a result whereof the valuation of the property had to be conducted on a single township, which in turn requires the application of the DCF method, must be rejected.
33. The words 'Property', 'Properties', 'Subject

Property’ and ‘Subject Properties’ are specifically defined in the MOA, and the meaning attributed to these terms are to be carried over to the TOR. The properties are listed in the MOA as individual properties, properly identified by reference to individually allocated erven numbers. There is no indication either contextually or otherwise, that the individually listed erven, which are capable of being sold as individual properties, should be valuated as a single township development project.

34. The maxim *inclusio unius est exclusio alterius* finds application in the interpretation of clause 4 of the TOR.[4] Although to be applied with caution,[5] when the maxim is considered in conjunction with the non-variation clause, I am satisfied that the peremptory terms of the clause

prescribe that the valuation must be conducted on the basis of and upon the considerations specifically set out in the clause, which excludes the DCF model.

35. In casu the parties in clear and unambiguous language, agreed not only to the valuation approach that should be followed in valuing the properties in determining their market value, but also on the factors that should be taken into account when the valuation is done in accordance with that approach. The parties agreed on the ‘sales comparison approach’ to determine the market value of the properties. There is no indication in the MOA or the TOR that any other approach was intended by the parties to be used. It is notably, specifically stipulated that reference should be made to ‘comparative sales that took place in the Buffelspoort area before 31 December 2009, adjusted to reflect changes in comparable property prices in the Buffelspoort District since the date, and/or by reference to comparable sales elsewhere in the Buffelspoort District and surrounding areas’. The factors that the valuers should take into account in the valuation are stipulated in clause 4 of the TOR. The use of the word ‘shall’ in clause 4 is peremptory, and thus obliges the valuator to follow that course. In terms of clause 4 the valuer is moreover restricted to consider only the existing usage of the subject property, the zoning, land uses and access to services, including water rights, the physical characteristics of any buildings and other immovable improvements situated on the subject property, the existence, duration and rental payable in respect of any leases or other rights of use or occupation, and all and any servitudes and encumbrances applicable to the subject property as disclosed in the disclosure warranty. Clause 5 provides specifically that no value shall be attributed to any business carried-on on the property.
36. The respondent submitted that the parties would have included a special assumption excluding the application of the DCF model, had they intended its exclusion. I am unable to agree. The contrary in my view applies: had the parties intended the DCF model to be of application, it would have

been included. There is nothing before me warranting a finding that the DCF model applied, unless excluded. By prescribing the valuation approach and the factors informing a valuation when that approach is used, the discretion of the valuer was roped in and ring-fenced to be exercised within the parameters provided in the TOR. It is accordingly my finding that the applicant is entitled to the relief sought in prayer 1 of the notice of motion.

37. I now turn to a consideration of prayers 2 and 3 of the notice of motion, the terms of which I have already set out above. In view of my finding in respect of the DCF model, the parties should be able,

and are in any event best suited without the assistance or interference of the court, to structure and agree on the acceptance

or otherwise of the valuations.

ORDER

38. In the result the following order is made:

1. It is declared that the purchase price of all the erven owned by the applicant in Buffelspoort Ext.2, Rustenburg is to be determined, upon a proper interpretation of the written agreement between the applicant and the respondent and the agreed Terms of Reference, without application of the Discounted Cash Flow valuation model.
2. The respondent is to pay the costs of the application, such costs to include the costs of senior counsel.

E van der Schyff

Judge of the High Court

Counsel for the applicants:

Adv EC Labuschagne SC

Instructed by:

Shepstone and Wylie Attorneys

Counsel for the respondent:

Adv SJ Grobler SC

Instructed by:

Terry Mahon Attorneys

Date of the hearing:

1 September 2020

Delivered:

7 October 2020

- [1] The term “TOR” is defined in the MOA to mean “the document as annexed to this agreement as “Annexure A” which sets out the methodology to be used by the Valuers when valuing the Properties”.
- [2] Van Pletzen v Henning 1913 AD 82 at 89.
- [3] Worman v Hughes and Others 1948 (3) SA 495 (A) at 505; Shakawa Hunting & Game Lodge (Pty) Ltd v Askari Adventures CC (44/2014)
- [2015] ZASCA 62 (17 April 2015).
- [4] Transnet Ltd v Tebeka and Others (616/2010)
- [2011] ZAECPHC 26 (14 June 2011) para 42; Ndaba v Ndaba 2017 (1) SA 342 (SCA) para 51.
- [5] National Director of Public Prosecutions and Another v Mohamen NO and Others 2003 (4) SA 1 (CC).
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