DISPUTE RESOLUTION
ALERT

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Meaning of "*final and binding*" valuations

When negotiating shareholder agreements, most parties can concur that on the sale of shares by one shareholder, the other shareholder(s) should be given right of first refusal to purchase the shares being disposed of.

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Meaning of *"final and binding"* valuations

When negotiating shareholder agreements, most parties can concur that on the sale of shares by one shareholder, the other shareholder(s) should be given right of first refusal to purchase the shares being disposed of.

Some shareholder agreements also contain clauses that require a shareholder sell their shares on the happening of certain events.

On the occurrence of either or both the above events it is not uncommon for disagreements to arise between the shareholders in regard to the value of the shares. For this reason, shareholder agreements almost always contain clauses dealing with share valuation should the parties fail to agree a price.

A majority of these clauses allow for the appointment of an independent valuator to assess the market value of the shares. They are also usually coupled with clauses where the parties agree that such valuation is final and binding on the parties.

The case discussed in this article deals with whether, once the valuation has been published to the parties by the valuer, the valuer is able to consequently, unilaterally, retract the valuation and/or amend it.

Recently this issue was settled by the Supreme Court of Appeal (SCA) in the reportable case of *Tahilram v Trustees of the Lukamber Trust* (Tahilram). The SCA ultimately decided that, unless the shareholder agreement states otherwise, once a valuer's decision has been communicated to the parties, the valuer is *functus officio*. This means that valuer is unable to revoke their decision once it has been made. The valuer is therefore unable to withdraw the valuation in order to replace, alter and/or amend it once published to the parties.

Briefly, Tahilram concerned a situation where the shareholders' agreement (SHA) provided that a shareholder no longer in the employ of A & A Dynamic Distributions (Pty) Ltd (Company) had to offer their shares to co-shareholders on the termination of their employment.

Mr Tahilram, a 30% shareholder of the Company and its Sales Director, left the employ of the Company on

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Meaning of "final and binding" valuations

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27 March 2018. He was deemed to have offered his shares to his co-shareholder, the Lukamber Trust (Trust), on 26 March 2018. The parties, however, could not agree on the fair market value of the shares.

In this instance the SHA prescribed that (i) the determination of the fair market value of the shares would be assessed by the Company's auditors at the time; and (ii) this determination was to be final and binding.

The valuation was conducted accordingly, and the valuation report published in parts on 4 and 13 July 2018.

Following their determination as to the fair market value of the shares, and the publication of their report to the parties, the auditors unilaterally amended the valuation. They amended the report by allocating certain of the Company's assets instead to the trustee of the Trust, and managing director of the Company, Mr Kayser. This had the consequence of reducing the value of the Company and its shares.

Prior to this amendment the parties had both accepted the unamended report. For obvious reasons, the amendments to the report favoured the Trust, as the potential purchaser.

Mr Tahilram challenged the amended report through an application to the High Court. That court drew a distinction between decisions of arbitrators as opposed estimators of value. The decisions of the former being final and binding and decisions of the latter not being so. Finding valuers to be the latter, the High Court decided that the auditors were not *functus officio* following making the original valuation, and were permitted to substitute their original report.

On appeal, the SCA ruled that the distinction between arbitrators and valuers had no bearing on whether the decision of either is final and binding. Rather the SCA considered the SHA itself, which provided that the fair market value, as determined by the auditors, would be final and binding. The SCA concluded that, in the absence of an agreement or waiver by the shareholders to the contrary, the auditors were not permitted to withdraw the original valuation and replace it.

In light of this, the SCA found that the auditors in this matter were *functus officio* once they had published their original report to the parties. They were therefore unable to unilaterally substitute the original valuation with a subsequent one.

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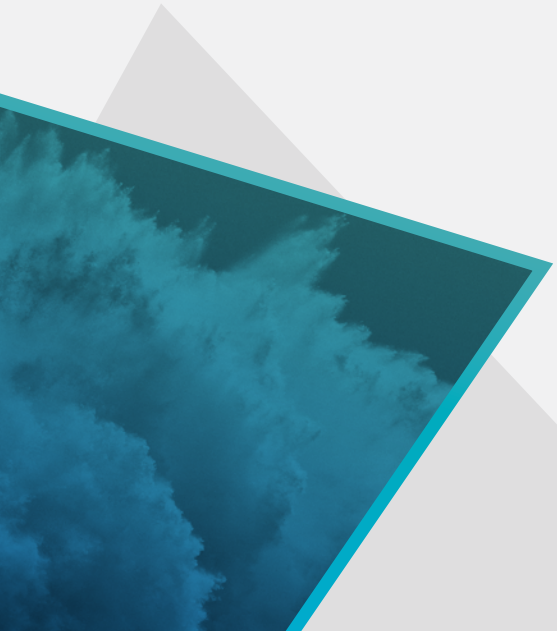

Meaning of "final and binding" valuations

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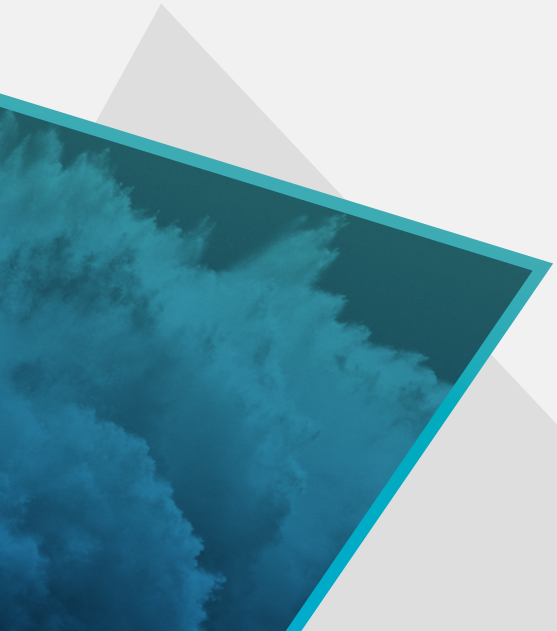
In these instances, only a court would be permitted to interfere with the valuer's determination. And even then, such interference was very limited. Referring to the decision in *Wright v Wright* 2015 (1) SA 262 (SCA), the SCA confirmed that an expert valuator makes factual findings and can only be challenged if his judgment was not exercised reasonably, irregularly or wrongly, resulting in a "*patently inequitable result*". The SCA found that these exceptions did not exist in this case.

The SCA further commented that policy considerations of certainty and finality necessitated that the decision of a valuer cannot be withdrawn and amended indefinitely.

Beyond the practical implications this has where a valuer has made a determination, the SCA's decision also affirms the importance of parties being bound by the terms of their agreement. For certainty to prevail, a valuation must be final and binding upon parties when communicated to them by the valuer.

BELINDA SCRIBA AND
NICHOLAS CARROLL



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