**IN THE HIGH COURT OF SOUTH AFRICA**
**(WESTERN CAPE DIVISION, CAPE TOWN)**

**REPORTABLE**

Case no: 5643/2020

In the matter between:

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|---|---|
| **BNS NOMINEES (RF) (PROPRIETARY) LIMITED**<br>(Registration number: 1995/012099/07) | First Applicant |
| **BREEDE COALITIONS (PROPRIETARY) LIMITED**<br>(Registration number: 2017/463156/07) | Second Applicant |
| and | |
| **ZEDER INVESTMENTS LIMITED** | First Respondent |
| **AFFECTED DISSENTING SHAREHOLDERS** | Other Respondents |

**Court:** **Acting Justice Nel**
**Heard:** **15 June 2021 and 24 August 2021**
**Delivered:** **3 December 2021**

**JUDGMENT**

(Delivered by email to the parties' legal representatives and by release to SAFLII. The judgment shall be deemed to have been handed down at 10h00 on 3 December 2021)

**NEL AJ:**

**INTRODUCTION:**

1. The applicants have approached this court in terms of the provisions of section 164(14) of the Companies Act 71 of 2008 ("the Act"). They require this court to determine the fair value of the first applicant's shares in the first respondent, and request this court to appoint an appraiser in terms of section 164(15)(c)(iii)(aa) to assist it in doing so. The matter was initially argued before me on 15 June 2021.

**BACKGROUND:**

2. On 29 August 2019 the first respondent issued a circular to its shareholders which contained relevant information relating to a disposal of all the shares that it was holding in Pioneer Food Group Limited ("Pioneer Foods"), to enable its shareholders to make an informed decision in respect of the resolutions giving effect to such disposal. The circular also incorporated notice of a general meeting in order to consider and, if deemed fit, approve the disposal of the

shares as aforesaid. To this end, a draft special resolution which would be tabled at the general meeting was also circulated to the shareholders.

3. Dissenting shareholder appraisal remedies were introduced into South African company law upon the implementation of the Act. In essence, appraisal rights allow a dissenting shareholder, in certain statutorily prescribed circumstances, to force the company to buy back its shares at a fair value.[1] This affords a minority shareholder, who is unable to prevent a transaction he or she disagrees with, the opportunity to exit the company. The concept originates from the United States of America and has been a part of their statutory law for over a century.[2] The concept is also a part of the Canadian, Australian and New Zealand legal systems.[3] The purpose of the remedy is the protection of the interests of minority shareholders.

4. Appraisal rights under the Act are triggered when certain fundamental transactions occur. Sections 112 to 115 set out certain actions by companies that will be considered a fundamental transaction.

5. The disposal of the shares, in the present matter, as set out in paragraph 2 above constituted such a fundamental transaction as it constituted the disposal of the greater part of the assets or undertakings of the first respondent in terms

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[1] See MF Cassim 'The Introduction of the Statutory Merger in South African Corporate Law: Majority Rule Offset by the Appraisal Right (Part I)' (2008) 20 *SA Mercantile Law Journal* 1 at 19.

[2] Jacqueline Yeats 'Putting Appraisal rights into perspective' (2014) 25 *Stellenbosch Law Review* at 328.

[3] *Ibid.*

of section 112 of the Act, as set out in the circular, and therefore required the approval of shareholders by way of special resolution which required the support of at least 75% of the votes cast by persons entitled to exercise voting rights. Sections 112 read with 115 of the Act accordingly applied to the disposal of the shares which in turn triggered appraisal rights in terms of section 164 of the Act for dissenting shareholders. The circular, as it was prescribed to do, informed shareholders of their rights in terms of section 164 of the Act.

6. The relevant portions of section 164 provide as follows:

> *(2) If a company has given notice to shareholders of a meeting to consider adopting a resolution to—*
>
> *(a) ...*
>
> *(b) enter into a transaction contemplated in section 112, 113, or 114,*
>
> *that notice must include a statement informing shareholders of their rights under this section.*
>
> *(3) At any time before a resolution referred to in subsection (2) is to be voted on, a dissenting shareholder may give the company a written notice objecting to the resolution.*

*(4) Within 10 business days after a company has adopted a resolution contemplated in this section, the company must send a notice that the resolution has been adopted to each shareholder who—*

*(a) gave the company a written notice of objection in terms of subsection (3); and*

*(b) has neither—*

*(i) withdrawn that notice; or*

*(ii) voted in support of the resolution.*

*(5) A shareholder may demand that the company pay the shareholder <u>the fair value</u> for all of the shares of the company held by that person if—*

*(a) the shareholder—*

*(i) sent the company a notice of objection, subject to subsection (6); and*

*(ii) …*

*(b) the company has adopted the resolution contemplated in subsection (2); and*

*(c) the shareholder—*

*(i) voted against that resolution; and*

*(ii) has complied with all of the procedural requirements of this section.*

*(6) ...*

*(7) A shareholder who satisfies the requirements of subsection (5) may make a demand contemplated in that subsection by delivering a written notice to the company within—*

*(a) 20 business days after receiving a notice under subsection (4); or*

*(b) if the shareholder does not receive a notice under subsection (4), within 20 business days after learning that the resolution has been adopted.*

*(8) A demand delivered in terms of subsections (5) to (7) must also be delivered to the Panel, and must state—*

*(a) the shareholder's name and address;*

*(b) the number and class of shares in respect of which the shareholder seeks payment; and*

*(c) a demand for payment of the fair value of those shares.*

*(9) A shareholder who has sent a demand in terms of subsections (5) to (8) has no further rights in respect of those shares, other than to be paid their fair value, unless—*

*(a) the shareholder withdraws that demand before the company makes an offer under subsection (11), or allows an offer made by the company to lapse, as contemplated in subsection (12)(b);*

*(b) the company fails to make an offer in accordance with subsection (11) and the shareholder withdraws the demand; or*

*(c) the company, by a subsequent special resolution, revokes the adopted resolution that gave rise to the shareholder's rights under this section.*

*(10) If any of the events contemplated in subsection (9) occur, all of the shareholder's rights in respect of the shares are reinstated without interruption.*

*(11) Within five business days after the later of—*

*(a) the day on which the action approved by the resolution is effective;*

*(b) the last day for the receipt of demands in terms of subsection (7)(a); or*

*(c) the day the company received a demand as contemplated in subsection (7) (b), if applicable, the company must send to each shareholder who has sent such a demand a written offer to pay an amount considered by the company's directors to be the fair value of the relevant shares, subject to subsection (16), accompanied by a statement showing how that value was determined.*

*(12)* ...

*(13)* ...

*(14) A shareholder who has made a demand in terms of subsections (5) to (8) may apply to a court to determine a fair value in respect of the shares that were the subject of that demand, and an order requiring the company to pay the shareholder the fair value so determined, if the company has—*

*(a) failed to make an offer under subsection (11); or*

*(b) made an offer that the shareholder considers to be inadequate, and that offer has not lapsed.*

*(15) On an application to the court under subsection (14)—*

*(a) all dissenting shareholders who have not accepted an offer from the company as at the date of the application must be joined as parties and are bound by the decision of the court;*

*(b) the company must notify each affected dissenting shareholder of the date, place and consequences of the application and of their right to participate in the court proceedings; and*

*(c) the court—*

*(i) may determine whether any other person is a dissenting shareholder who should be joined as a party;*

*(ii) must <u>determine a fair value</u> in respect of the shares of all dissenting shareholders, subject to subsection (16);*

*(iii) in its discretion may—*

*(aa) <u>appoint one or more appraisers to assist it in determining the fair value</u> in respect of the shares; or*[4]

[4] It is evident when read in context that this word should be "and" not "or".

*(bb) allow a reasonable rate of interest on the amount payable to each dissenting shareholder from the date the action approved by the resolution is effective, until the date of payment;*

*(iv) may make an appropriate order of costs, having regard to any offer made by the company, and the final determination of the fair value by the court; and*

*(v) must make an order requiring—*

*(aa) the dissenting shareholders to either withdraw their respective demands or to comply with subsection (13)(a); and*

*(bb) the company to pay the fair value in respect of their shares to each dissenting shareholder who complies with subsection (13)(a), subject to any conditions the court considers necessary to ensure that the company fulfils its obligations under this section.*

*(Emphasis added)*

7. It is common cause in this matter that all of the procedural requirements set out in section 164 have been complied with. On 20 September 2019 the first

applicant gave written notice to the first respondent that it objected to, and intended to oppose (vote against), the adoption of the applicable special resolution in accordance with section 164(3) of the Act.

8. On 30 September 2019 the deponent to the first applicant's founding affidavit, Mr. Abraham Albertus Cilliers ("Cilliers") attended the general meeting on behalf of the first applicant and voted against the special resolution in respect of the disposal of the shares. On 8 October 2019 the first respondent gave notice in terms of section 164(4) that the special resolution in respect of the disposal of the shares had been adopted. On 22 October 2019 the first applicant sent a demand in terms of section 164(5) to (7) requiring the first respondent to pay to it the fair value of its shares held in the first respondent. On 27 March 2020 the first respondent made a written offer in terms of section 164(11) to acquire the first applicant's shares for an amount of R 4.70 per share. In support of such offer the first respondent attached a statement by its board of directors recording the basis on which it determined the fair value of the shares. It states in paragraph 1 thereof that "*Zeder has appointed an external independent valuation expert ("independent expert") to assist with the determination of the offer price, and has relied on the advice of the independent expert, with which the directors of Zeder agree, in this regard*". The statement continues to state that the unnamed independent expert had regard to various valuation methodologies to be applied in determining the offer price in terms of section 164. Mention is also made, albeit only very briefly, to the sum-of-the-parts ("SOTP") valuation, with the statement concluding that "*Zeder agrees with the view of the independent expert that the share trading price equates to the*

*fair value of the shares and that accordingly, the offer price be equal to the Zeder share price on 30 September 2019 of R 4.70*". Why the identity of the "independent expert" was not disclosed to the shareholders at the time is unknown. Nonetheless, the first respondent in its opposing papers states that it engaged the services of BDO Corporate Finance (Pty) Limited to provide an independent expert assessment and report on the valuation of the shares under section 164 of the Act, on which it relied in making the offer. The report was provided by Mr. Nicolas Lazanankis ("Lazanakis") who also filed a confirmatory affidavit. The identity of the "independent expert" is therefore no longer a mystery.

9. The applicants dispute that the first respondent has complied with section 164(11)(c) and dispute the valuation methodology and the resultant value attributed to the shares. The first applicant accordingly, prior to the lapsing of the offer and within the requisite 30 business day period, issued the present application in accordance with the provisions of section 164(14) of the Act. This the first applicant was entitled to do, in accordance with section 164(14)(b) as soon as it considered the offer made by the first respondent to be "inadequate".[5]

10. As at 30 September 2019, being the agreed date of valuation, the first applicant held 3 100 000.00 shares in the first respondent, constituting 0.18% of the

[5] A shareholder would naturally want the best possible price for its shares. It would therefore prefer a valuation method which would yield the highest value, and it is not necessarily concerned with the valuation that is going to provide the most accurate value of the shares. An inadequate offer as envisaged in section 164(14)(b) therefore means that the shareholder must be of the view, not that the offer was necessarily unfair, but that it was too low.

issued share capital at the time. The first applicant held the shares as nominee for the second applicant.

11. The first respondent is an investment holding company listed on the Main Board of the Johannesburg Stock Exchange ("the JSE"). It is an investor in the broad agribusiness and related industries. It holds investments in other substantial companies, including: Zaad Holdings Ltd, Capespan Group Ltd, Agrivision Africa (Pty) Ltd, Kaap Agri Ltd and The Logistics Group (Pty) Ltd, each of which companies have their own investments and trading operations. The first respondent accordingly alleges it is not therefore a trading entity or one likely to distribute all of its assets.

12. The application was launched in two parts: part A requested an order, *inter alia*, requiring the first respondent to give notice of the application to other affected dissenting shareholders; and part B sought an order for, *inter alia*, an appraiser to be appointed in terms of section 164(15)(c)(iii)(aa) of the Act. The relief sought in Part A is no longer required as the first respondent in its answering affidavit states that all other affected dissenting shareholders have already accepted the offers by it as envisaged in section 164(13) of the Act. At this point in time, therefore, the question to be decided is whether an appraiser should be appointed in order to assist this court at arriving at a fair value for the first applicant's shares in the first respondent, and if so, the terms of such appointment.

13. The first respondent initially raised a point *in limine* in respect of the first applicant's *locus standi* to bring the present application, however, following clarification by the applicants, this point was abandoned and the first respondent concedes that the first applicant is entitled to be paid the fair value, as at 30 September 2019, of the relevant shares held by it.

14. The second applicant on the other hand, as correctly pointed out by the first respondent, has no standing to seek any relief, since it was not, and never has been, a shareholder in the first respondent. Mr. Gordon, who appeared on behalf of the applicants argued that the second respondent was joined as a matter of convenience, however, he conceded that the second applicant does not have a direct and substantial interest in the matter. The application insofar as it is advanced by the second applicant should accordingly be dismissed. This is dealt with in the order I make below.

**The value attributed to the first applicant's shares:**

15. The term "fair value" is not defined in section 164 or anywhere else in the Act and no other legislative guidance is provided as to the meaning, application or content of the term.

16. A wide range of possible valuation methodologies exist, and different methodologies may yield differing results as one can see from the facts of the present matter. Moreover, a valuation methodology which is appropriate in one case may not be appropriate in another. In a nutshell, in the present matter,

the first respondent submits that the fair value equates to the market price *simpliciter* and this Court ought therefore to order payment of the section 164 offer made by it of R 4.70 per share which was its traded share price on the JSE at the relevant time. The first applicant on the other hand submits that fair value does not necessarily equate to the market value. The first applicant contends that the fair value ought to be determined by making use of the net asset value or what is also referred to as the sum of the parts ("SOTP") valuation. There is a significant difference between the JSE traded share price and the SOTP computation, hence the present application to this Court.

17. Given that the appraisal rights remedy is relatively new to South African company law, no significant body of jurisprudence has been developed to serve as a guide to determining the fair value of shares. It is evident from jurisprudence from foreign jurisdictions with appraisal statutes calling for a determination of fair value, that the valuation methodologies which might be applied by a Court in determining fair value are many and varied.[6]

18. A brief examination of a few of these jurisdictions would accordingly be helpful.

[6] See Wertheimer "The Shareholders Appraisal Remedy and How Courts Determine Fair Value" *Duke Law Journal* Vol 47 (Feb 1988) (number 4) 613; and see Yeats "The Effective and Proper Exercise of Appraisal Rights under the South African Companies Act" 2008, Thesis presented for the degree of Doctor of Philosophy Number 2015 at 168 *et seq.*

**FOREIGN JURISPRUDENCE:**

19. At this juncture mention needs to be made of jurisdictions which have the stock market exception (often referred to as the "market-out" exception) which provides that if a company's shares are publicly traded, its dissenting shareholders do not have an appraisal right and must sell their shares in the company on the open market. The South African Act contains no market-out exception and therefore appraisal rights apply equally to the shares of private and publicly traded companies.

20. The market-out exception however applies in thirty-five states in the United States of America including Delaware, New York and California. In terms of the Delaware General Corporation Law the market-out exception applies to all triggering transactions. However, there are certain exceptions to this rule. For example, under Delaware law appraisal rights are permitted in transactions where the shares are those of a publicly traded company (i.e. in a transaction which would ordinarily have been subject to the market-out exception) if the shareholders are required to accept cash for their shares.[7]

21. However, where appraisal rights may be exercised, section 262(h) of the Delware General Corporation Law provides that:

> *After the Court determines the stockholders entitled to an appraisal, the appraisal proceeding shall be conducted in accordance with the rules of*

[7] See section 262(b)(2) of the Delware General Corporation Law.

*the Court of Chancery, including any rules specifically governing appraisal proceedings. Through such proceeding the Court shall determine the fair value of the shares exclusive of any element of value arising from the accomplishment or expectation of the merger or consolidation, together with interest, if any, to be paid upon the amount determined to be the fair value. In determining such fair value, the Court shall take into account all relevant factors. (Emphasis added)*

22. The legislation accordingly also provides for the determination of the fair value of shares. In *Tri-Continental Corp v Battye* Del. Supr., 74 A.2d 71 (1950) the Supreme Court of Delware at 72, in interpreting the aforementioned legislation, held that:

*The basic concept of value under the appraisal statute is that the stock holder is entitled to be paid for that which has been taken from him, viz, his proportionate interest in a going concern. By value of the stockholder's proportionate interest in the corporate enterprise is meant the true or intrinsic value of his stock which has been taken by the merger. In determining what figure represents this true or intrinsic value, the appraiser and the courts must take into consideration all factors and elements which reasonably might enter the fixing of value. Thus, market value, asset value, dividends, earning prospects, the nature of the enterprise and other factors which were known or which could be ascertained as of the date of the merger and which throw light on future prospects of the merged corporation are not only pertinent to an inquiry*

*as to value of the dissenting shareholder's interest, but must be considered by the agency fixing the value.*

23. In the State of Washington, section 23B.13.300 subsection (1) of the Wash. Rev. Code provides as follows:

> *If a demand for payment under RCW 23B.13.280 remains unsettled, the corporation shall commence a proceeding within sixty days after receiving the payment demand and petition the court to determine the fair value[8] of the shares and accrued interest. If the corporation does not commence the proceeding within the sixty-day period, it shall pay each dissenter whose demand remains unsettled the amount demanded. (Emphasis added)*

24. In *Matthew G. Norton Co. v Smyth and Another* 51 P.3d 159 (2002) 112 Wash. App. 865 the Court of Appeals of Washington held that:

> *Under Washington's Business Corporation Act, shareholders are entitled to dissent from certain proposed corporate actions, including mergers, and demand that the corporation pay "fair value" for the shares if the proposed action is effectuated.*[9]

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[8] "Fair value" is defined "*the value of the shares immediately before the effective date of the corporate action to which the dissenter objects, excluding any appreciation or depreciation in anticipation of the corporate action unless such exclusion would be inequitable.*" See 23B.13.010(3) of the Wash Rev. Code.

[9] At 160.

...

*The term "value" is inherently ambiguous... It is clear, however, that our Legislature's use of the term "fair value" was not a slip of the pen—the Legislature did not intend to say "fair market value," instead. Robblee v. Robblee, 68 Wash.App. 69, 77, 841 P.2d 1289 (1992) ("dissenter shareholder statute provides for "fair value" payment, not "fair market value").*[10]

...

*We conclude that the market for minority stock in a dissenting shareholders' appraisal proceeding, absent extraordinary circumstances, is not a relevant fact or circumstance to consider when determining fair value... As noted by this court in Robblee, 68 Wash.App. at 77, 841 P.2d 1289, our statute provides for "fair value" not "fair market value." The Swope court agreed: "[F]air value" in minority stock appraisals is not equivalent to "fair market value." Dissenting shareholders, by nature, do not replicate the willing and ready [sellers] of the open market.*[11]

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[10] At 163.

[11] At 165.

25. In *Shanda Games Ltd v Maso Capital Investments Ltd* [2020] UKPC 2, the Privy Council was called upon to consider the meaning of "fair value" in the context of section 238 of the Cayman Companies Cap 22 (Law 3 of 1961, as consolidated and revised), the relevant portions of which provide as follows:

> *(1) A member of a constituent company incorporated under this Law shall be entitled to payment of the fair value of his shares upon dissenting from a merger or consolidation.*
>
> *....*
>
> *(9) If the company and a dissenting member fail, within the period specified in subsection (8), to agree on the price to be paid for the shares owned by the member, within twenty days immediately following the date on which the period expires –*
>
> (a) *The company shall (and any dissenting member may) file a petition with the Court for a determination of the fair value of the shares of all dissenting members.*
>
> *(10) ...*
>
> *(11) At the hearing of a petition, the Court shall determine the fair value of the shares of such dissenting members as it finds are involved,*

*together with a fair rate of interest, if any, to be paid by the company upon the amount determined to be the fair value. (Emphasis added)*

26. In *Shanda*, the Privy Council was called upon to adjudicate two clearly delineated and discrete issues, namely:

26.1 Whether a minority discount should be applied in the determination of the fair value of the dissenting shareholders shares in the company pursuant to section 238 of the Companies Laws; and

26.2 The particular manner in which interest should be calculated and awarded to the dissenting shareholders.[12]

27. The Privy Council then went on to state expressly that:

*On this appeal the only issue is whether the fair value of the Maso parties' shares is their pro rata proportion of the agreed value for the entire share capital of Shanda, which would broadly correspond with the value of the company's business and undertaking, or whether that value should be reduced by an agreed percentage to reflect the fact that the shares of the Maso parties form part of a minority shareholding in Shanda. That is a very narrow question which does not entail the Board embarking on a detailed analysis of fair value. The Board will so far as possible confine its opinion to those points of interpretation which in its*

[12] *Shanda* para [25].

*opinion need to be decided on this appeal. The Board does not rule out the possibility that, depending on the circumstance, "fair value" could be ascertained using a different methodology from that agreed on by the parties in these appeals.*[13] *(Emphasis added)*

28. In *Shanda* the parties had agreed that a discounted cash flow valuation of the company would be the basis upon which the minority shares would be valued,[14] to which a minority discount would or would not be applied, depending on the finding of the Board.

29. It is against this background that the finding of the Privy Council, relied upon by the first respondent, must be viewed. At para [47] the Privy Council held that:

*...where it is necessary to determine the amount that should be paid when a shareholding is compulsorily acquired pursuant to some statutory provision, the shareholder is only entitled to be paid for the share with which he is parting, namely a minority shareholding, and not for a proportionate part of the controlling stake which the acquirer thereby builds up, still less a pro rata part of the value of the company's net assets or business undertaking.*

[13] *Ibid* at para [28].

[14] *Ibid* at para [11].

30. The first respondent's reliance upon the above finding to support its submission that fair value should equate to fair market value is therefore misplaced when the judgment is read in context.

31. In concluding the Privy Council held at para [55] that:

> *It follows that the judge should not have held that fair value always means no minority discount (see, for example, judgment of the judge, para 93, second sentence). That could not be a bright-line rule to be applied in every case. Similarly, it was not open to CICA to hold that a minority discount should invariably be applied as a matter of law. The legislature's direction is to find the "fair value" of the dissenter's shareholding. Because of the narrow scope of this appeal, the Board is not in a position to rule out the possibility that there might be a case where a minority discount was inappropriate due to the particular valuation exercise under consideration.*

32. Moreover, and recently, in the decision of *Trina Solar Limited*, Grand Court of the Cayman Islands (Financial Services Division) Case No FSD 92 of 2017 (NSJ) (unreported, 23 September 2020) Segal J had the opportunity to consider the *Shanda* decision and held the following at paragraphs [6] to [8]:

> *[6] On 12 March 2019, the Judicial Committee of the Privy Council (Privy Council) had heard an appeal from the judgment of the Cayman Islands Court of Appeal in Shanda Games Limited v*

*Maso Capital Investments Limited and Others [2018] 1 CILR 352 (Shanda CICA). That appeal involved important issues relating to the section 238 jurisdiction.*

*[7]* ...

*[8]* *My decision can be summarized as follows (using the terms defined later in this judgment):*

(a) *I reject the Company's argument that the JCPC Shanda Advice has established a legal rule governing an application to all section 238 cases to the effect that the Court must determine fair value by reference to the price at which the relevant shares would be exchanged between a willing buyer and a willing seller in an arm's length transaction based only on publicly available information. I also reject the Company's submission that the Court must only rely on publicly available information in determining fair value.*

(b) *The court must assess and determine a monetary amount which in the circumstances represents (its best estimate of) the worth, the true worth, of the dissenting shareholder's shares (true worth meaning the actual value to the shareholder of the financial benefits derived and available to him from his shares and by being a shareholder). The*

*reference to fair requires that the manner and method of that assessment and determination is fair to the dissenting shareholder by ensuring that all relevant facts and matters are considered and that the sum selected properly reflects the true monetary worth to the shareholder of what he has lost, undistorted by the limitations and flaws of particular valuation methodologies and fairly balancing, where appropriate, the competing, reasonably reliable alternative approaches to valuation relied on by the parties.*

*(c) The selection of which valuation method to use – alone or in combination with others – is a fact sensitive issue so that in some cases it will be appropriate to give particular weight to market based indicia of value and use a discounted cash flow (DCF) valuation as a means of testing those other valuation methodologies.*

*(Emphasis added)*

33. Furthermore, in British Columbia, Canada, the word "fair value" is similarly not described in Chapter 57 of the Business Corporations Act [SBC 2002]. In *Grandison v Novagold Resources Inc.* 2007 BCSC 1780 at para [152] the British Columbia Supreme Court held as follows:

*In this jurisdiction, courts have declined to equate fair value and fair market value: see, for example, Nunachiaq Inc. v. Chow (1993), 8 B.L.R. (2d) 109 (B.C.S.C.) and Cyprus Anvil Mining Corporation, supra. The reluctance results from the fact that it is not the market value of the dissenter's shares that is the center of attention. The focus is the determination of the en bloc value of all shares in the company, and the allocation of a proportionate share thereof to the dissenter. As a result, the minority discount that would ordinarily be applied when determining the fair market value of a minority interest is ignored. Notwithstanding these differences, it must be acknowledged that en bloc value is the fair market value of all issued shares of the company.*

34. I am in agreement with the sentiments expressed by Lambert JA in *Cyprus Anvil Mining Corporation v. Dickson* (1986), 1986 CanLII 811 (BC CA), 8 B.C.L.R. (2d) 145 (C.A.) at 157 that:

> *...the problem of finding fair value of stock is a special problem in every particular instance. It defies being reduced to a set of rules for selecting a method of valuation, or to a formula or equation which will produce an answer with the illusion of mathematical certainty. Each case must be examined on its own facts, and each presents its own difficulties. Factors which may be critically important in one case may be meaningless in another. Calculations which may be accurate guides for one stock may be entirely flawed when applied to another stock.*

*The one true rule is to consider all the evidence that might be helpful, and to consider the particular factors in the particular case, and to exercise the best judgment that can be brought to bear on all the evidence and all the factors.*

35. Lastly, in Yukon, Canada, section 193(3) of the Yukon Business Corporations Act R.S.Y. 2002 Chapter 20, provides that:

*...a shareholder entitled to dissent under this section and who complies with this section is entitled to be paid by the corporation the fair value of the shares in respect of which the shareholder dissents, determined as of the close of business on the last business day before the day on which the resolution from which the shareholder dissents was adopted.*

36. In *Carlock v ExxonMobil Canada Holdings ULC*, 2020 YKCA 4 the court considered the aforementioned section. I quote extensively from that case as its judgment is helpful in determining the issue before this court. In *Carlock* the court held at paras [7] to [16] that:

*[7] The meaning of "fair value" is not in dispute. Fair value is related to fair market value. Fair market value means "the highest price available in an open and unrestricted market between informed and prudent parties, acting at arm's length and under no compulsion to act...*

*[8]* *The terms are not, however, always equivalent: see Nixon v Trace 2012 BCCA 48 at paras 10 – 13; Grandison v NovaGold Resources In 2007 BCSC 1780 at para 152.*

*[9]* *... Dissident shareholders are entitled to receive a proportionate share of the en bloc value of the company, rather than simply the fair market value of their own shares which might reflect, for example, a minority discount.*

*[10]* *Second, the use of the term "fair market value" might be confused with the "market value approach" to valuation. They are not always one and the same. As Madam Justice Newbury explained in Nixon, "a volume of case law construing "fair value" has developed in Canada which is not tied to market value but considers all available methods and selects the most appropriate in the particular circumstances before the court": at para 12.*

*[11]* *With these points in mind, in this case, "it must be acknowledged that en bloc value is the fair market value of all issued shares of the company": Grandison at para 152. The parties' definition of fair value is appropriate. Fair value in this case means the ratable portion of the en bloc fair market value of all shares in the company, where fair market value is defined as the highest price available in an open and unrestricted market between informed*

*and prudent parties, acting at arm's length and under no compulsion to act.*

*[12] The next question is how one determines fair value using this broad definition.*

*[13] The "one true rule", originating in Cyprus Anvil Mining Corp. v Dickson, [1986] 33 D.L.R (4th) 641 (B.C.C.A) at para 51 is: "to consider all the evidence that might be helpful, and to consider the particular factors in the particular case, and to exercise the best judgment that can be brought to bear on all the evidence and all the factors".*

*[14] As Justice Pitfield explained in Grandison:*

> *[5] On an application of this kind, the court's obligation is to consider all relevant evidence and to exercise judgment in the determination of fair value at... the date on which the special resolution adopting the plan of arrangement was passed... The value attributed to the shares by the plan of arrangement is but one piece of evidence to be considered. Other evidence includes that pertaining to the history of [the acquiring company and target company], the trading price of the shares in the public market, the evolution and formulation of the plan or arrangement and*

*the value of the shares specified in it, and the opinions regarding value expressed by expert witness[es] called by the petitioner and the respondents, respectively.* *(Emphasis added)*

*[15] It is common ground that, broadly speaking, value is approached drawing on five valuation methods: (a) the quoted market price on the stock exchange ("the market value approach"); (b) the valuation of the net assets of the company at fair value ("assets approach"); (c) the capitalization of maintainable earnings ("earnings of investment value approach"); (d) the "discounted cash flow" ("DCF") method taking into account a capitalization of future profits; and (e) a combination of approaches.*

*[16] I pause to observe that viewing the market value approach simply as valuation based on stock market prices may be unduly restrictive where other objective market based evidence is available demonstrating the actual behaviour of market participants in a real market. Where the evidence supports the conclusion that the market is efficient, consisting of multiple informed participants capable of acting in their own self-interest, and there are no material market failures, the result of the market is likely the best and most objective evidence of value. It is rooted in reality and not based on assumptions, theory or predictions.*

## FAIR VALUE IN TERMS OF SECTION 164 OF ACT:

37. Turning to section 164 of our Act, the legislature prescribes that a dissenting shareholder be paid the fair value of the shares held by it. Had the legislature intended that to equate to the fair market value in each case he would have expressly said so. The legislature has therefore called upon this Court, in circumstances envisaged in section 164(14), to exercise a value judgment in determining what a fair value would be taking all of the relevant circumstances into account. In supplementary heads of argument filed on behalf of the first respondent by Mr. Butler SC, he appeared to be in agreement that this is the manner in which section 164(14) ought to be interpreted.[15]

38. It is accordingly not the legislature's intention to enrich a dissenting shareholder by providing for a value which is more than what is fair. It is moreover not the legislature's intention to impoverish a dissenting shareholder by compelling them to accept less than the fair value of their shares. The foreign jurisprudence cited above lends support to this. I am therefore in agreement with the submission made by Mr. Butler SC, in his supplementary heads of argument, that a dissenting shareholder can only be paid what the shares are actually worth. To allow a shareholder to be paid more than what the shares are worth would be prejudicial not only to the company but also the majority of

[15] See paragraph 6.1 of the first respondent's supplementary heads of argument in which it is stated that the argument for the first respondent is not that as a matter of law the listed price of a share must be taken to be the fair value of the share in every instance. Rather the argument for the first respondent is that on the facts of this case, it is the most reliable indicator of the value of the shares in question.

the shareholders of the company. Whilst the JSE listed price might be a good indicator of what the shares are worth, it is not the only relevant indicator.

39. Furthermore, one also has to guard against possible abuses of section 164 of the Act, specifically where shareholders may invoke the remedy for a purpose that it was not intended to serve. To this end, the first respondent contends that the first applicant is not a dissenting shareholder who requires the "protection" which section 164 of the Act provides. It makes various allegations in respect of the timing of the acquisition of the shares by the first applicant, it's actions after the stock exchange news service ("SENS") announcements were made in respect of the first respondent's disposal of the Pioneer Food shares, including interactions with representatives of the first respondent thereafter. I have not gone into detail in respect of these allegations as many of them form part of an application to strike out which has been brought by the applicants. Mr. Gordon, who appeared on behalf of the applicants, has requested that such application stand over for later determination, however, the parties have agreed that should this Court make an order appointing an appraiser to assist it in the determination of a fair value, such appraiser may have regard to those allegations and as such all papers which have been filed at court. It may be that a court considers these facts to be relevant in determining a fair value of the first applicant's shares. However, I express no opinion in this regard and leave it to the court to decide when the application to strike out is heard.

40. However, as a general principal, I emphasize that it is necessary to take into account all of the relevant factors when determining a fair price such as, (a) the

trading price of the shares immediately prior to the adoption of the resolution giving rise to the section 164 appraisal rights,[16] if the company is a listed company, (b) the history behind the adoption of the aforementioned resolution, (c) the opinions regarding the value of the shares expressed by relevant expert(s) engaged by the parties and/or an appraiser appointed by the court as envisaged in section 164(14), and (d) any other circumstances which the court might find to be relevant given the facts of the matter at hand.

**APPLICATION TO THE PRESENT MATTER:**

41. Turning to the facts of the present matter, as stated above, the section 164 offer of R 4.70 per share made by the first respondent was based primarily upon a valuation of its shares on the basis of its traded share price on the JSE.

42. Whilst Cilliers, in the first applicant's founding affidavit, holds himself out to be somewhat of an expert in respect of the valuation methodologies of companies, attaching a screenshot of his LinkedIn profile (which has an abbreviated curriculum vitae) in support thereof, that, together with the allegations in his founding affidavit, fall far short of what is required for him to be regarded as an expert.[17] He, and the applicants, are of the view that a sum-of-the-parts ("SOTP") valuation would be a more suitable valuation in order to determine the value of the first applicant's shares.

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[16] See section 164(16) of the Act.

[17] He is also not a registered financial services provider – see para 36 of the answering affidavit, p A171.

43. The applicants allege that a SOTP approach is generally regarded by valuation experts as the most appropriate valuation methodology to determine the fair value of an investment holding company, such as the first respondent. To this end, the applicants attach a confirmatory affidavit deposed to by Mr. Wynand Rossouw, a qualified Chartered Accountant, who is a director of a professional valuation company, namely Business Valuation Advisors. The first respondent on the other hand alleges that the valuation methodology used in determining the value set out in the section 164 offer did not look at the traded share price in isolation but also considered the discount to the SOTP and whether it was consistent with comparable companies and the historical discount to SOTP for a Zeder share. The first respondent points out that in order to derive a fair value of a share in an investment holding company, such as the first respondent, the SOTP is generally discounted to take into account, *inter alia,* operational costs until the SOTP is realized, transaction costs to sell all assets, and capital gains tax when the SOTP is realized. The applicants, in their replying affidavit, however allege that the first respondent's previous SOTP's per share values were calculated taking some, if not all, of these expenses into account.

44. The difference and what the parties are essentially litigating over is that the applicants appear to be of the view that the shares are worth approximately R 1.52 per share more than the offer. In monetary terms, in light of the fact that the first applicant holds 3 100 000 shares, the difference equates to a value of R 4 712 000.00. In this regard, the first respondent recorded its SOTP value as at 30 September 2019, in a trading statement dated 3 October 2019, as R

6.22 (as opposed to the R 4.70 offer).[18] The question then is whether a discount should be applied to the SOTP value. Lazanarkis, the first respondent's expert, stated in his report that the discount applied by the first respondent of approximately 25% was within market parameters and other investment holding companies had traded at higher discounts to the SOPT value.[19] The applicants, on the other hand, deny that the companies used by Lazanarkis in his report are comparable in determining the SOTP's discount, if any, to be applied.[20]

45. The applicants allege further that the first respondent has consistently made use of a SOTP approach to valuing it shares. This is denied by the first respondent who states that it makes use of SOTP as a measure of performance and not to value its shares.

46. The applicants also allege that by making the section 164 offer at a discount of over 24% to Zeder's stated SOTP value at the time of the meeting, Zeder and its remaining shareholders stand to benefit and profit from buying back the dissident shareholders' shares at a massive discount to their true value. This is denied by the first respondent who, as stated above, alleges that the discount is market-related and is supported by the discounts at which other listed investment holding companies trade to their SOTP's.

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[18] See para 76.8 of the founding affidavit, p A31 read with para 156 of the answering affidavit, p A214.

[19] See para 4 of the report of Lazanarkis, annexure "**JLR 32**" to the opposing affidavit, p A369 – A373.

[20] The applicants allege that the companies used by Lazanarkis are not similar to the first respondent – see p A472.

47. Whilst Mr. Butler SC, filed very helpful heads of argument in which he makes out a compelling case as to why the fair value in the present matter ought to equate to the JSE share price, the fact remains that the first respondent itself deemed it necessary to consult an expert in order to determine the price at which to make the offer in terms of section 164 of the Act. The fact that Mr. Lazanakis concluded that such offer should be made at the JSE share price does not detract from the fact that he undertook the exercise of determining what he deemed to be a fair value for the shares for the purpose of the section 164 offer. It is this value that the first applicant challenges, and this court is now called upon to determine whether that value of R 4.70 is fair, and if not, to then set a fair value.

48. At this juncture it bears mentioning that the first applicant has taken issue with the independence of Lazanarkis, and also his statement that a SOTP's valuation was not the appropriate valuation methodology to be adopted in this matter. They annex to their replying affidavit 15 other valuations which Lazanarkis has undertaken on investment companies in which he has made use of a SOTP value.

49. In determining whether the offer made by the first respondent of R 4.70 per share was a fair price, regard ought to be had to two considerations: Firstly, presiding judicial officers may not have the requisite expertise in order to determine appropriate valuation methodologies and consequent values to be attributed to shares (whether listed or not), including in the present matter, determining what discount, if any, should be applied in the event that the

appropriate valuation is a SOTP's valuation, and the Court would accordingly benefit from the insight and input of an appraiser being a suitably qualified expert in this arena. Secondly, as set out above, our Companies Act does not contain a market-out exception – section 164(9) does not state that the dissenting shareholder ought to be paid the market value of the shares, but rather the fair value. I am of the view that such value can only be set after a consideration of all of the relevant circumstances, as set out above, and which in this matter, includes the assistance of an independent appraiser.

50. I pause to mention that this in no way equates to this Court delegating its responsibility to determine a fair value; the appointment of an appraiser, and the opinion he or she expresses, simply equips this Court to make such a determination with all of the relevant facts at hand. It may be, in the circumstances of this case, that a fair price is neither the JSE traded share price or the SOTP share price.

**TERMS OF APPOINTMENT OF APPRAISER:**

51. The next issue for determination is therefore the terms of the appointment of an appraiser.

52. I requested the parties to attempt to agree upon the terms of a draft order in the event that I was inclined to appoint an appraiser. The parties both presented draft orders and requested this court to hear further argument in respect thereof, which argument was heard on 24 August 2021. The parties ought to

be commended for their attempts in reaching agreement in this regard. It was apparent from the draft orders presented at the hearing that some of the differences between them were mere semantics or close enough to be agreed upon. I accordingly requested the parties to engage with one another in respect of those minor differences. What resulted was further draft orders being submitted to this Court as well as numerous correspondence. I was eventually informed on 2 November 2021 that the parties were not able to agree any further on the terms of the proposed draft orders and I have accordingly been called upon to make a final determination in respect thereof. The parties had however managed to agree to a substantial portion of the terms of the proposed order.

53. The second draft order submitted by the applicants contained new material, which the parties had not had the opportunity of addressing this Court on, and which surprisingly persisted with relief in respect of the second applicant. For the reasons set out above, the application in respect of the second applicant ought to be dismissed. Moreover, the applicants have deleted portions of the third draft order put up by the first respondent which had been agreed to in Court, such as the fact that despite the striking out application standing over for later determination, an appraiser appointed by this Court could have regard to all of the papers filed of record. The applicants moreover seek costs in respect of the hearing of 15 June 2021 whilst having the costs of the hearing on 24 August 2021 stand over for later determination. I am of the view that it would be premature to make an order in respect of costs at this stage. Section 164(15)(c)(iv) of the Act envisages a court making a costs order once regard is

had to the offer made by the company and the final determination of the fair value by the court. This, for obvious reasons, cannot be done at this stage.

54. I am also of the view that one cannot lose sight of the confidential nature of the information which an appraiser would need to obtain from the first respondent in order to draft a report to this court, and that any order which is made needs to provide sufficient protection of such confidential information.

55. I accordingly make the following order, which principally follows the third draft order submitted by the first respondent with a few amendments:

**ORDER:**

1. In this Order:

1.1. "**appraiser**" shall mean the appraiser appointed in terms of paragraphs 2.1 or 2.2, as the case may be;

1.2. "**confidential information**" means any and all information or data in whatever form relating to the first respondent and/or any of its subsidiaries or investees, which by its nature or content is identifiable as, or could reasonably be expected to be, confidential and/or proprietary to the first respondent and/or any of its subsidiaries or investees, as well as any information that the party providing such information to the appraiser asserts to be confidential;

1.3. "**confidentiality undertaking**" means an agreement by the appraiser not to disclose to any person any confidential information provided to the appraiser by the first respondent, save as may be permitted by an Order of this Court;

1.4. "**fair value**" shall mean the appraiser's determination of the fair value of the shares as at the valuation date, held by the first applicant in the first respondent. For the avoidance of doubt, this paragraph shall not be construed as a determination of *fair value* to be assigned to the shares (as defined below) in accordance with section 164 of the Act, on which the Court has not yet made any determination, nor shall it be construed as an endorsement of the appraiser's determination of the fair value;

1.5. "**the shares**" shall mean the shares held by the first applicant in the first respondent as at the valuation date;

1.6. "**valuation date**" means 30 September 2019; and

1.7. "**written report**" means a report by the appraiser setting out the fair value of the shares.

2. In terms of section 164(15)(c)(iii)(aa) of Act, an appraiser is appointed on the following terms:

2.1. Within ten days of the grant of this Order the first applicant and the first respondent shall attempt in good faith to agree the identity of an appraiser. If they are able to so agree, they shall:

2.1.1. Within five days of such agreement, notify the Registrar of this Court thereof; and

2.1.2. Together with such notification deliver a written consent by the agreed appraiser of his/her consent to being appointed as an appraiser, and a confidentiality undertaking acceptable to the first applicant and the first respondent.

2.2. Failing agreement within ten days, the appointed appraiser shall be:

2.2.1. Independent, as that term is understood in section 114(2) of the Act and as defined in Regulation 81(i) of the Companies Regulations 2011;

2.2.2. A chartered accountant with not less than 7 years' experience in valuing companies listed on the JSE Limited ("JSE");

2.2.3. Nominated by the Chief Executive Officer of the South African Institute of Chartered Accountants from one of the following firms:

2.2.3.1. PricewaterhouseCoopers, KPMG, Deloitte or E&Y; or

2.2.3.2. Another reputable independent firm that has appropriate expertise, experience and resources and that has been approved or pre-approved as a valuation expert by the JSE,

which nomination shall, together with a written consent to the nomination and a signed confidentiality undertaking be delivered to the Registrar within five days of the nomination, consent or provision of the confidentiality undertaking, whichever shall occur later.

3. The appraiser shall:

3.1. Call for any information from the parties as he or she may consider appropriate in order to determine the fair value, as at the valuation date, of the shares, and the parties shall promptly comply with any such request(s);

3.2. Compile and provide a written report to this Court by no later than thirty days after his or her appointment, or such later date determined by the court upon written request by the appraiser for an extension of time for the delivery of his report, on the fair value, as at the valuation date, of the shares which report shall describe fully the valuation method(s) used by the appraiser.

3.3. Include in the written report:

3.3.1. a description of the valuation method(s) used for the shares;

3.3.2. the reasons for his or her particular approach to the valuation of the shares;

3.3.3. A schedule detailing:

3.3.3.1. The information requested from the parties;

3.3.3.2. The information disclosed by the parties, provided the schedule merely describes/lists the information provided by the parties;

4. Any confidential information requested by the appraiser from the parties shall:

4.1. Be provided only to the appraiser, who shall treat and safeguard the confidential information as strictly private, secret and confidential and who shall not use or permit the use of the confidential information for any purpose other than to enable it to report on it to this Court on the fair value, in terms of paragraph 3.2;

4.2. Not be disclosed by the appraiser to any person or party, except in accordance with an order of this Court;

4.3. Be omitted from any report of the appraiser to the Court, save to the extent that this Court may specifically direct otherwise.

5. The fees of the appraiser shall, subject to any ruling that the Court may make as to the ultimate liability for costs, be paid on an interim basis as determined by the Court.

6. Any party seeking access to any confidential information may, on notice of motion, apply to this Court for leave to have access to specified confidential information which shall be:

6.1. Motivated by an affidavit setting out:

6.1.1. The reasons why access ought to be granted;

6.1.2. The steps proposed to maintain the confidentiality of confidential information; and

6.2. set down on such date as may be directed by the Registrar.

7. After delivery of the report by the appraiser:

7.1. The first applicant may, within fifteen days thereafter, supplement its papers herein;

7.2. The first respondent may, within fifteen days thereafter, answer the first applicant's supplementary papers;

7.3. The first applicant may, within ten days thereafter, reply to the first respondent's supplementary answering papers;

whereafter any party may set the matter down for hearing, on a date as arranged with the Registrar.

8. The application, insofar as it is brought by the second applicant, is dismissed.

9. The striking out application stands over for later determination. The appraiser shall be entitled to have regard to all paragraphs of the first respondent's affidavits and annexures forming the subject of the striking out application.

10. All questions of costs shall stand over for later determination.

**NEL AJ**