IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: A113/2022

In the matter between:

DUMISANI CHILTON KHOZA **Appellant**

and

MARKO RADEBE **First Respondent**

MOONGATE 129 (PTY) LTD **Second Respondent**

MUTODO PROPERTIES (PTY) LTD **Third Respondent**

JUDGMENT DELIVERED ELECTRONICALLY
WEDNESDAY, 15 MARCH 2023

NZIWENI J

[1] The appellant, Mr Khoza, appeals against the judgment and order of Goliath DJP (as she then was) handed down on 29 October 2021. The appellant and Mr Radebe (*the first respondent*), are the co-directors and equal shareholders in the second respondent (*Moongate*). The appeal arises from the dismissal of an application brought by the appellant, seeking, inter alia, a declaratory relief that the first respondent's pre-emptive right had lapsed as he had failed to exercise the right

provided for in the Article 23 of the Article of Association (*AOA*) timeously, alternatively that the first respondent had not validly exercised the right of pre-emption.

[2] The appeal primarily turns on the interpretation of certain provisions of Moongate's AOA. The AOA contains a right of pre-emption in favour of the two directors of Moongate in respect of the sale of shares and which was triggered upon an event defined in the AOA.

[3] The relevant provisions of the AOA that inter *alia*, gave a shareholder a right of first refusal to buy the shares of other shareholders before the shares could be sold to a third party, provides as follows:

> '22. If a member of the company desires to sell all or any of his shares of the company he shall give notice, in writing, of his intention to sell, to the directors of the company and state the price he requires for the shares.
>
> 23. The directors shall within one month of the date of receipt of the notice referred to in article 22 advise every other member of the company of the contents thereof and each such member shall be entitled to acquire the shares so offered within one month after the date of the receipt of such advice: Provided that if more than one member makes an offer for all of the shares so offered the shares shall be sold to each such member proportionately, and where fraction proportions of shares remain, such members shall become holders jointly of such fractional proportions of the shares.
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> 24. If the members of the company are unable to agree upon the selling price of the shares, the auditor of the company may be requested to determine the true and

fair value thereof and the members shall accept that value as the selling price of the shares.

25. If none of the members of the company offer to purchase the shares within the time referred to in article 23, or if members of the company offer to purchase a part of the shares so offered, the member who is offering the shares for sale my [sic] offer the shares or the remaining portion of the shares which have not been purchased by members of the company, for sale to any other person.'

Factual background

[4] The salient facts of this matter are largely undisputed. They are briefly as follows. Each of the directors, i.e., the appellant and the first respondent hold equal shares of 50 %. On 17 October 2019, the appellant entered into a sale agreement with the third respondent (*Mutodo*) wherein he offered his shares for sale for the total sum of R12 500 000.00. On the same day, the appellant sent a letter to the first respondent, notifying him [the first respondent] of the offer and gave him the opportunity to exercise his pre-emptive right.

[5] On 21 October 2019, due to an error in the letter dated 17 October 2019, the appellant re-sent an email that rectified the error. According to the appellant, the email of 21 October 2019, gave notice of his intention to sell his shares at a price of R12 500 000. 00. It is common cause that the proposed sale agreement with Mutodo triggered the right of first refusal as provided in the provisions in the AOA referred to above.

[6] The first respondent was sceptical as to the *bona fides* of Mutodo's offer and claimed that the amount of R12 500 000. 00 was grossly inflated. He therefore did not match the price of the shares offered by Mutodo. On the failure by the parties to agree on the "true and fair value " of the shares, the first respondent referred the valuation of the shares to Moongate's accounting officer (*Smartt*), to determine the real value of the shares as provided in Article 24 of the AOA.

[7] On 25 October 2019, the first respondent wrote the following email to the appellant:

> 'Dear Dumisani,
>
> In terms of the Article of Association, once your request to sell the shares is received by the directors (your request must also state the price at which you wish to sell- I take it this is the price you have put into offer, i.e. R12.5m), the directors must forward the request to all the shareholders within one month, for them to request to acquire the shares so offered. In this regard, I confirm that I (Marko Radebe) wish to buy your shares.
>
> Importantly however, if the shareholders cannot agree on the price, the auditors of the company have to determine the true and fair value of the shares as I do not agree with the price you are offering them. I will now instruct Moongate's auditors to value the shares and they will then send us both their determination of the fair market price.
>
> Again, there is no MOI that was signed between us so the Articles of Association need to be followed . . ."

[8] Following the receipt of the email dated 25 October 2019, the appellant sent the first respondent an email dated 13 November 2019, which stated the following:

> ' . . . 2. I agree that we should treat my offer, as you do, as one given in terms of the applicable memorandum and articles of association of the company.

3. I have noted your comments regarding the determination of the purchase price for the shares by the auditors and I do not agree with your interpretation of Article 24, in that the determination by the auditor may only be invoked if both parties agree to refer the matter to an auditor.

4. Article 24 does not create an obligation that once the other member does not accept the price at which the shares are sold, such member is at liberty to invoke the power of the auditor of the company to determine the fair value of the shares. It simply cannot be that the other member is at liberty to reject the offer price that is proposed and to unilaterally refer the matter to the auditor to determine the fair value.

5. Therefore, it is my intention to proceed with the sale of my shares with Mutodo Properties (Pty) Ltd, having provided the relevant notices in terms of Article 22 of the company's articles of association, which remains valid. I expect Marko to reply to the notice by either waiving his pre-emptive rights in accordance with the Articles of association or by offering me the same offer on my shares on the same terms and conditions…'

[9] In an evaluation conducted by Smartt, dated 4 December 2019, the shares were valued at R11 623 912.00. The appraised value of each shareholders interest by Smartt was approximately R5 811 956.00, excluding the value of their individual loan account balances owed to them.

[10] On 04 December 2019, the first respondent caused an email, stating amongst others, the following:

' . . . I have since obtained such evaluation for R13m of 100% of the shares so R6.5m would be the price we would have to pay you. I hereby tender payment of this amount against transfer of your shares to myself (Marko Radebe). . ."

[11] On 05 December 2019 the appellant responded by email to the first respondent as follows:

'. . . 3. Surely you cannot expect me to accept your offer of R6 500 000 for my 50% shares in the company. In fact, I find it surprising that the auditors carried out the valuation without engaging with me as a shareholder and without obtaining the necessary mandate from the board of the Company.

4. I cannot accept the valuation which was prepared by your auditors as it seems that their interest are mainly aligned with yours and not with the Company and therefore cannot accept their independence in this regard.

5. In the circumstances, I will not be entertaining nor accept the offer as tabled by yourselves per your letter. Accordingly, please be advised I shall be proceeding with the offer as received by Mutodo Properties (Pty) Ltd for acquisition of my shares and claims in the Company.

6. Please note that my rights remain reserved.'

[12] On 09 December 2019, the first respondent responded by email to the appellant. He stated the following:

"Hi Dumisani

. . .You can't go ahead with the sale of the shares to Mutodo Properties (Pty) Lt. You don't have my consent and the process is now for me to buy you out as per the Article of Association . . .

I am even prepared to pay R7m for your shares to accommodate further even though only half of the auditors' valuation is what I need to pay for the shares . . .'

[13] On 27 February 2020, the attorneys of the first respondent wrote to the appellant detailing the chronology of events between the parties and recorded that the appellant had, on 12 December 2019, telephonically confirmed that he would accept a purchase price of R8.5 million.

[14] From the myriad of correspondence, I readily discern that further discussion on 12 December 2019, had taken place between the appellant and the first respondent;

wherein the appellant indicated an inclination to accept a purchase price of R8.5 million. There is no evidence that this was disputed.

[15] In an email dated 13 December 2019, the appellant informed the first respondent that he would not be entertaining his offer. The appellant further warned the first respondent that the offer had lapsed, therefore he would proceed with the sale of his shares to Mutodo.

Evaluation

[16] On appeal, the determinative questions are whether:

(i) the right of first refusal, which was triggered by an agreement with Mutodo, should have in fact been exercised by the first respondent within the one month period as specified in clause 23; and whether

(ii) the first respondent validly exercised his pre-emptive right.

[17] It is common cause that an agreed share price was not reached between the appellant and the first respondent when an opportunity was afforded to the first respondent to exercise his right of pre-emption. This was evident from the correspondence between the appellant and the first respondent.

[18] Several arguments were made on behalf of the appellant as to why the first respondent's right of pre-emption had lapsed and why the court a *quo* was wrong in its interpretation of the AOA.

[19] Mr Sibanda, appellant's counsel, maintained during the hearing of the appeal that the first respondent had not exercised his pre-emptive right within the stated time limit. Additionally, he contended that article 23 granted the first respondent the right to "acquire" the shares within one month of the date on which he was informed of the intended sale to Mutodo. According to the appellant, the court a *quo* incorrectly interpreted the first respondent's legal entitlement under the pre-emptive right.

[20] Mr Sibanda submitted that in order to validly exercise the pre-emptive right, he [the first respondent] was required to "acquire the shares so offered" by either accepting the initial price of the shares or having arrived at an agreement with the appellant as to the purchase price and to enter into a valid sale agreement in respect thereof.

[21] The correspondence between the parties, *inter alia*, revealed that after the offer was made by Mutodo and presented to the first respondent; the first respondent in less than five days responded and indicated that he wished to purchase the shares. As correctly pointed out by the court a *quo*, the first respondent thereupon indicated his interest in exercising his right of pre-emption and stated that he did not agree with the price offered by the Mutodo to the appellant.

[22] Among other things, in the email dated 25 October 2019, the first respondent advised the appellant of the confirmation of his wish to buy the shares. The only thing that prevented the first respondent from acquiring the shares was the price issue. The first respondent informed the appellant that he had the specific intention of purchasing

his shares. The first respondent, therefore, conditionally accepted the offer which was made by the appellant to sell his shares subject to the purchase price being settled in terms of clause 24 of the AOA. In this regard it cannot be said that the first respondent never exercised his right.

[23] Importantly, Mr Sibanda explained during the hearing of this appeal that the acquisition of shares occurs in stages. Pursuant to the conditional acceptance of the offer, the purchase price, payment and the delivery of the shares remained outstanding. That meant that when the parties could not agree upon the price, the request of the auditor's determination was triggered, as the acquisition of shares could not be completed. Realistically, all the "stages" in the acquisition could not be completed in the course of one month.

[24] Thus, the court a *quo* correctly found that the first respondent had unequivocally notified the appellant within the prescribed one month period of his intention to purchase the shares. The court a *quo* further noted that, in the email of 25 October 2019 to the appellant, the first respondent clearly expressed his disagreement with the price of the shares and indicated that he would instruct Moongate's auditors to evaluate the shares. It therefore in the context of the matter, due to the share price deadlock, the complete acquisition process could not be completed within the period as referred to in article 23. The first respondent could not acquire the shares within a thirty day period in which he was entitled to do so. In the circumstances, the court a *quo* cannot be faulted for concluding that the email of the 25th October 2019, triggered the provisions of article 24.

Interpretation of the AOA

[25] First and foremost, in spite of a lack of a specific time frame article 24 is not rendered ambiguous nor ineffective.

As stated above, it was the appellant's contention that the first respondent should have acquired the shares within one month after the date of receipt of the advice of the intention to sell the shares.

[26] It is settled law that several factors guide a court's interpretation of statutes and contracts. The purpose of the article in the AOA, the plain meaning of the language and other principles of construction play an important role in its interpretation. It is trite that, where the language of the document is clear and unambiguous and conveys a clear and definite meaning, it should be given its plain and ordinary meaning.[1]

[27] In *Independent Institute of Education (Pty) Limited v Kwazulu Natal Law Society and Others*[2], Theron J (with Froneman J, concurring), stated as follows:

> '[38] It is a well-established canon of statutory construction that "every part of a statute should be construed so as to be consistent, so far as possible, with every other part of that statute . . .'

[1] See *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).
[2] [2019] ZACC 47 at para 38

[28] For a shareholder to be entitled to acquire the other's shares as contemplated in article 23, it is essential that there is agreement between them regarding the share value. Article 23 covers the terms of the right of pre-emption. It may be inferred from the reading of article 23 that it creates a right for the director of Moongate to purchase the shares within one month after notice to him of that right. Against this background, it seems clear that the right to purchase which is created by article 23, is subject to the parties agreeing to a purchase price.

It is important to note that, nowhere does the AOA mention that if the parties cannot agree about the price, the right of pre-emption shall lapse. Notably, the provisions of article 24 are not expressly limited in point of time. As such, article 24 does not provide a specific time frame for the auditor to determine the value of the shares. On the other hand, articles 23 and 25 make explicit mention of timeframes. Hence, article 24 is at the root of the controversy in this matter.

[29] The appellant's contention that the time limit of article 23 is to be regarded the default in article 24 because another article [article 25] of the AOA explicitly adopted the time limit of article 23, is in my view unsustainable.

[30] The fact that the AOA was explicit about time frames in certain articles where does not necessarily suggest that the explicit time frame prevails if the time limit is not mentioned in a different but related article. Similarly, the mention of a time limit in a preceding article does not mean the existence of a default time limit in a following article. Each article must be considered in context to give sense and meaning.

[31] There is therefore in my view, no reason to hold that a time limit in article 23 necessarily extends across to article 24. The fact that article 25 invokes article 23's time frame, but article 24 does not explicitly adopt the limits of article 23, indicates in my view that article 23's time frame does not apply to article 24.

[32] My view is buttressed by the fact that; the valuation of company shares is not necessarily an easy process, especially where there is a dispute about the real value of the shares. Thus, common sense, reality and practicality justify an inference that this process may well endure for more than one month. Needless to say, the valuation process must be attended to diligently and within a reasonable period of time.

[33] The appellant's claim that articles 24 and 23 must be read together, and that the one month provision of article 23 must be read into article 24 is contradicted by the AOA itself. Therefore, the court a *quo* correctly in my view did not apply the one month limit in an article that did not prescribe such a limit.

[34] Additionally, the wording of the AOA does not state nor suggest that if there is a deadlock in the determination of the share price, the discord must be resolved within one month, and if such resolution is not reached within a month, the seller is released from the right of pre-emption.

[35] On a plain reading of the relevant provisions of the AOA, the insertion of article 24 establishes a default mechanism in the absence of agreement on the share price.

It is thus a contingency procedure. The court a *quo* was in my view correct in finding that article 24 envisages a deadlock-breaking mechanism in the event of a dispute relating the sale price of the shares.

Importantly, as mentioned earlier, a close scrutiny of the AOA reveals that article 24 was meant to ensure that shareholders get a fair price for their shares. Consequently, article 24 makes it clear that none of the shareholders has an unfettered discretion to determine the price of the shares. Article 24 seeks to achieve a fair market price between shareholders.

[36] It is important to note that, from a reading of article 24, it is clear that the article presupposes a situation where the first respondent [the right holder] can refuse a price offered by a third party [Mutodo], to the seller [the appellant]. The corollary of this is that, the first respondent, as a holder of the pre-emption right, is not obliged to match an offer that has been agreed to between the appellant and a third party.

[37] On the other hand, the time period in article 23 is to be implemented where the parties agree upon a price. Similarly, article 25 is designed for a situation where no offer is made by the shareholders to buy the shares or if a shareholder of the company offers to purchase a part of the shares so offered. Articles 23 and 25 contemplate situations where there is no dispute that triggers the provisions of article 24.

[38] It was contended for the appellant that, the mere existence of a tie - breaking valuation mechanism cannot change the plain meaning of article 23. This argument is misplaced inasmuch as the court a *quo* did not suggest that the deadlock mechanism changed the meaning of article 23. The argument also ignores the plain language of article 23 which cannot be read in isolation but in context with the other relevant provisions of the AOA. In interpretation, context is important.

Reasonable time

[39] In my view it cannot be said that article 24 gave a director or a member an unlimited time to acquire the shares as suggested by the appellant. At first blush, it may appear so, but that does not mean that the auditor has *carte blanche* to conduct his evaluation without regard to the constraint of a reasonable time.

[40] Clearly, where no time limit is specifically provided, no time limit is intended. Equally, it is settled that if no time is specified, a reasonable time is implied. It would follow that the implementation of the contingency procedure (deadlock mechanism) should occur within a reasonable period of time.

Was the right of pre-emption validly exercised?

[41] It was also contended that the first respondent had failed to timeously make an offer within the one month in that he had to indicate an amount that he wished to purchase the shares for. The provisions of the AOA do not support such a contention. It states that a member shall be entitled to acquire the shares offered within one month after the date of being advised of the intention to sell.

Referral of the price dispute to the auditors.

[42] The court a *quo* concluded that, it would be in the interest of justice that it should make an order related to the appointment of an auditor. A careful examination of the evidence indicates that Moongate did not have an auditor. Both parties are in agreement that the order by the court a *quo* pertaining to the appointment of the auditor as provided for in the order of the court *a quo* cannot stand.

[44] It remains for the second respondent to appoint an auditor in terms of AOA who would be required to do the valuation of the shares within a reasonable period.

Costs

[45] That notwithstanding, the successful party on appeal is the first respondent. There is no reason why the costs of the appeal should not to follow the results.

[46] In the result I propose the following order:

1. The appeal is dismissed with costs.
2. The order of the court a *quo* is amended by deletion of paragraph 43.1 - 43.8 and replaced with the directive that the second respondent shall appoint an auditor to determine the true and fair value of the shares as contemplated in paragraph 24 of the AOA.

[redacted]

C.N. NZIWENI J
JUDGE OF THE HIGH COURT

I AGREE AND IT IS SO ORDERED.

[redacted]

V.C. SALDANHA
JUDGE OF THE HIGH COURT

I AGREE

[redacted]

R.C.A HENNEY

JUDGE OF THE HIGH COURT

Appearances

Counsel for the Appellant:	Adv M Sibanda
Instructed by	Mkhabela Huntley Attorneys Inc. c/o Maderumule Attorneys
Counsel for the First Respondents	Adv D Goldberg
Instructed by	STBB/ Smith Tabata Buchanan Boyes