**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO: 19/39482**

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

**…….** **…25/10/2022……**
**SIGNATURE** **DATE**

In the matter between:

**BNS NOMINEES (RF) (PROPRIETARY) LIMITED**
**registration number 1995/012099/07** **First Applicant**

**BREEDE COALITIONS (PROPRIETARY) LIMITED**
**registration number 2017/463156/07** **Second Applicant**

and

**ARROWHEAD PROPERTIES LIMITED**
**registration number 2011/000308/06** **First Respondent**

**AFFECTED DISSENTING SHAREHOLDERS** **Other Respondents**

**Summary:** *Meaning of fair value in terms of section 164(15) of the Companies Act, 71 of 2008 - tentative definition offered; circumstances in which court will refer issue*

*of fair value to appraisers in terms of section 164(15)(iii) discussed; locus stand - whether dissenting shareholder can claim appraisal right even after acquiring shares after the transaction is publicly announced discussed; locus standi - whether company can counter-claim for court to set price for fair value; onus - whether any party has an onus to prove fair value .*

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**JUDGMENT**

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**MANOIM J:**

**Introduction**

[1] The appraisal right afforded to dissenting shareholders in terms of section 164 of the Companies Act, 71 of 2008 ("the Act"), has despite its far reaching and novel implications, attracted little judicial scrutiny to date.[1] In terms of this provision where a company's shareholders have voted in favour of some form of corporate restructuring, the Act allows an aggrieved shareholder, referred to in the legislation as a 'dissenting shareholder' the right to sell its shares to the company for 'fair value'. If the dissenting shareholder is of the view that the offer in response does not constitute fair value, then it can bring an application for the court to determine that value, or in the discretion of the presiding judge, to appoint one or more appraisers to assist it in that task.[2] In the present matter the first and second applicants have received an offer for their shares in the first respondent, which they consider to not constitute fair value and so they seek to exercise their rights in terms of the Act to request the court to appoint appraisers to make that determination. At the same time, they seek further information from the company in order for the appraisers to undertake that exercise.

[2] The two applicants are related. The first applicant, BNS Nominees (RF) (Pty) Ltd ("BNS") is the registered shareholder of the shares in the first respondent,

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[1] In what may well be the first of its kind, this section was considered in *BNS Nominees (RP) (Pty) Limited and another v Zeder Investments Limited and Another* (5643/2020) [2021] ZAWHC 263 (December 2021).

[2] The application is brought in terms of section 164(14) and the courts powers are set out in section 164(15) (c).

Arrowhead Properties Ltd (Arrowhead), while the second applicant Breede Coalitions (Pty) Ltd ("Breede") is the beneficial owner of these shares held by BNS. The 'Other respondents' category is brought about by operation of the Act, which requires that this category of 'affected dissenting shareholders' be cited as a respondent.[3] They were, if there are any of them, not represented in these proceedings.

[3] Arrowhead has opposed the relief sought. In addition, it has brought a conditional counter application in terms of Rule 6(7) of the Uniform Rules. It is described as conditional as it was conditional on the court finding that the applicants had *locus standi*. Arrowhead has since dropped the *locus standi* challenge. However, the counter application remains. In the counter application Arrowhead seeks the following order from the court:"

> "*Determining in terms of section 164(15) (c)(ii) of the Act that the fair value of the shares held by all dissenting shareholders in Arrowgem on 22 August 2019 is R3.75 per share;*

**The section 164 process**

[4] The appraisal process is restricted to two situations specified in section 164(2) of the Act. The first situation is where an amendment proposed to the companies Memorandum of Incorporation may alter a shareholder's rights in a manner that is "*(…) materially adverse to their rights and interests as holders of that class of shares…"* The second, and which is relevant here, is where the company enters into a transaction referred to in sections 112-114 of the Act. These all involve what the Act describes as fundamental transactions viz. the disposal of all or a greater part of the undertaking of the company (112), amalgamations or mergers (113) and a scheme of arrangement (114). The present matter concerns a scheme of arrangement.

[5] An application to court must first be preceded by the dissenting shareholder and the company taking several steps. Since there is no dispute in this case that these steps have been followed, I need not burden this decision by

[3] See section 164(15) (a) which says that all dissenting shareholders who have not accepted the companies offer must be joined as parties to the proceeding and are bound by the decision of the court. This makes perfect sense as it avoids a plurality of proceedings and different courts coming to a different conclusion of what fair value is for the shares.

regurgitating the lengthy series of hurdles that must be jumped.[4] Suffice to say that the process is initially an internal one. The dissenting shareholder must give notice to the company which must respond to the notice by making what it considers an offer of fair value for the shares.

[6] Initially in this case the first respondent (which from now on I will refer to more simply as Arrowhead) took a point *in limine* that Breede was not entitled to exercise appraisal rights because it had only acquired its beneficial interest after the transaction had been announced. However, this objection has no longer been persisted with. I will accept that a shareholder may still qualify as a dissenting shareholder even if it buys those shares after the corporate action has been announced. However, this dispute is still germane to a striking out application that the applicants seek. At the heart of the striking out application is the accusation that the applicants, in particular its controlling mind Mr. Albertus Cilliers ("Cilliers"), have acted opportunistically in this matter to exploit the appraisal right regime to their advantage to turn over a quick profit.[5] But this consideration must wait until I deal with the other issues I have to decide in this case, because they provide context to the assessment of the striking out application.[6]

**History of the claim**

[7] The chronology of this transaction starts in April 2019, when Arrowhead and Gemgrow advised the market of a potential transaction between them, that might take the form a reverse takeover of Gemgrow by Arrowhead, as it was then known.[7] On 8 July 2019, there was another announcement to indicate the companies' firm intention to proceed with the transaction by way of a scheme of arrangement. I will refer to this as the 'firm intention' announcement,' because of its significance in the later chronology. Then on 22nd July the companies sent out a circular which indicated the following: that

[4] These run from subsection 164(2) to 164(13). The court application is dealt with in terms of subsections 164(14) to 164(16).
[5] Cilliers, who is the deponent to all the main affidavits for the applicants, describes himself as the duly authorized representative of Breede and acting under the authority of BNS.
[6] I deal with this later in the section headed 'Striking out application.'
[7] The company is now, post scheme of arrangement and since 23 September 2019, known as Arrowgem Properties, presumably to reflect the amalgamation. However, to avoid confusion since the old name remains the one in the headnote of the application, I will continue to refer to the company as Arrowhead.

the transaction would take the form of a share swap with 0.8237 Gemgrow shares being exchanged for every Arrowhead share; that a meeting to approve the transaction would take place on 22nd August 2019 to vote on the scheme. The circular was accompanied by the necessary report required in terms of section 114(3) of the Act by an independent expert.

[8] On 20 August 2019, BNS gave notice to Arrowhead that it intended to vote against the scheme. It duly attended the meeting on 22nd August and voted against all the resolutions. At the time of the meeting, it is now common cause, BNS was the registered shareholder of 2, 850 000 shares in Arrowhead. Breede held a beneficial interest in the shares held by BNS. However, Breede had acquired this beneficial interest only after the firm intention announcement had been made (8 July 2019). This is what caused much controversy in the initial stages of this case and is pertinent to the striking out application.

[9] On 27 August, Arrowhead advised BNS that the special resolution approving the scheme had been adopted. Three days later on 30 August 2019, BNS exercising its rights in terms of section 164(11) gave notice to Arrowhead to demand to be paid fair value for its shares. On 30 September 2019, Arrowhead responded, and made an offer of R3.75 per share. The applicants have rejected this offer as not representing fair value. What this concept means I get to later.

[10] According the Arrowhead this price (3.75) represents fair value, because it exceeds the market value of the shares on the day the corporate action was approved(R3.09) and is based on the higher of two independent analysts reports of the share. But contend the applicants, the fair value of the share is its net asset value (NAV) (this is because Arrowhead is a property holding company) and that value according to its accounts is R 6.90, thus far exceeding the price they have been offered. Before I analyse this dispute in greater detail it is necessary to have regard to what fair value may mean.

**Defining fair value**

[11] The operative section of the Act on which this application and counter-application turn is section 164(15) (c)(ii) of the Act which states:

> *"The court must determine a fair value in respect of the shares of all dissenting shareholders; subject to subsection 16."* (My emphasis)

[12] Subsection 16 goes on to state:

> *"The fair value in respect of any shares must be determined as at the date on which, and time immediately before, the company adopted the resolution that gave rise to a shareholder's rights under this section.*

[13] Although the Act contains a plethora of definitions it does not define fair value. It is well-known that this concept was borrowed from other jurisdictions where appraisal rights have been incorporated into corporate laws.[8] However, even a cursory examination of some other jurisdictions laws suggests none have defined the term with any precision either. Nor is the case law any less tentative. At most we can borrow some learning that applies in some situations. But those hoping for a definitive answer, a grand definition that covers the field in all situations, will be disappointed.

[14] Perhaps the most articulate statement of the problem comes from the case of *Re Cyprus Anvil Mining Corporation and Dickson*.[9] Here the court explained the dilemma:

> *"…the problem of 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 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*.

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[8] See Zeder, supra. Examples are US states such as Delaware, Cayman Islands and Canada to name only a few.

[9] 1986 811 (BC CA) (1987) 33 D.L.R. (4th) (B.C.C.A.) For this extract I am grateful to have had access to a magisterial doctoral thesis on the subject of appraisal rights by Jaqueline Yeats, to which I was referred by the applicants' legal team, entitled, *"The proper and effective exercise of appraisal rights under the South African Companies Act, 2008,* submitted to the University of Cape Town, November 2015.

[15] The judge went on to observe that:

> *"Parliament has decreed that fair value be determined by the courts and not by some formula that can be stated in legislation. ... In summary, it is my opinion that no method of determining value which might provide guidance should be rejected. Each formula that might prove useful should be worked out, using evidence mathematics, assessment, judgment or whatever is required. But when all that has been done, the judge is still left only with a mixture of raw material and processed material on which he must exercise his judgment to determine fair value."*[10]

[16] Not only lawyers but economists too have grappled with the meaning of fair value. In this extract, two renowned economists, David Evans and Jorge Padilla explain the approaches of their colleagues past and present:

[17] *"There is no generally accepted definition of what an "unfair" price is. For Marxist economists, the "fair" price of a product is equal to the value of labour involved in its production. Classical economists like David Ricardo also held a cost-based theory of value. For neo-classical economists, the "fair" value of a good or service is given by its "competitive'' market price, which is the equilibrium price that would result from the free interaction of demand and supply in a competitive market."*[11] (my emphasis)

[18] In the *Mittal* case, the Competition Tribunal accepted that the definition proffered by Evans and Padilla (the one contained above which I underlined) was a useful pointer to how to determine economic value. But that this notion was not without difficulty to economists emerges from the following passage in the Tribunal's decision:

> *"We adopt the same approach when defining the vexed concept of 'economic value'. Just as the practice of law is comfortable with terms*

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[10] Supra at 652.

[11] David S. Evans and A. Jorge Padilla, "*Excessive Prices: Using Economics to Define Administrative Legal Rules"*, CEMFI Working Paper No. 0416 (September 2004), page 5. This passage was quoted by the Competition Tribunal in a case concerning excessive pricing where one of the terms that had to be unpacked was 'economic value'. See *Harmony Gold Mining Company Ltd and Another v Mittal Steel South Africa Ltd and Another* Case No: 13/CR/FEB04

> *like 'reasonable', terms which have no precise meaning and intrinsic content but are given meaning by their context, so with the term 'economic value' in the discipline of economics. It too has no intrinsic, quantifiable meaning. It is not a fixed level capable of prior specification. That is, there is no fixed point that reflects the intrinsic 'economic value' of a good or service. 'Economic value' like 'reasonableness' is also a product of context, and that context is competition."*[12]

[19] Thus, both economists and lawyers are in agreement that the concept of value and by extension fair value, is elusive, but despite this the legislature's choice to use the phrase and to subject its meaning to the judicial process, obliges judges to make some practical sense of it, if the right given to dissenting shareholders to exercise is to have any effect.

[20] Judges have recognized as the case law shows, that value is a product of market forces, but that this does not mean that if a share is listed on a securities exchange this necessarily equates to the market price on the exchange on the relevant date. In certain cases, and in some of the literature, there is a semantic argument about why the term 'fair *market* value' was not used in a statute as opposed to simply 'fair value.'[13] But this debate over semantics is not particularly useful. The real consideration is to recognize that while securities exchanges constitute markets and thus can provide indicators of value this is not necessarily an indication of a price that represents fair value. Expressed differently, use of the term 'market' suffers from ambiguity. Sometimes it is used to refer practically to a securities exchange or stock market. But the other sense is that of a notional market where we posit how buyers and sellers interact under optimal conditions. It is in this latter sense that we can distinguish fair value from securities exchange value, albeit that sometimes the two values may correspond.

[21] This distinction is important because most economists accept that markets are prone to various kinds of distortion. Here case law has usefully recognized some distortions: a share may be thinly traded so the securities market prices

[12] See *Mittal* supra, paragraph 144.
[13] See discussion in Yeats, supra.

may not reflect a proper equilibrium price, a share price might in the short term be influenced by market speculation or external events such as wars or natural disasters that in the medium term then get discounted in the price. Taking such transient factors into account might again not constitute fair value. Furthermore, time is a factor. We know from experience that forced or coerced sale values achieve lower prices. This too would be a type of distortion.

[22] Another distortion is created by informational asymmetries. If companies have information which the market is unaware of, then informational asymmetries might cause a share to be under or overvalued. This was recognized in a Cayman Island case, the *Integra* case, where Jones J explained in reference to the price of a share trading in a market:

> *"Its reliability would be diminished if there were any tendency for the market to be uninformed or misinformed. Although the petitioner* [i.e.; the company] *had always complied with its formal reporting requirements, during the two years preceding the merger the market had been less well informed about the petitioner compared with similar companies*."[14]

[23] Another distortion that the courts have recognized in evaluating a fairness standard, is the effect the very corporate action giving rise to the dissent, has on the share. It might cause the share to appreciate or depreciate. Whatever the effect on fair value, the courts have held they must disregard this factor. Other judge made factors have been to disregard the fact that the shares might constitute minority holdings, or the tax implications for the shareholder. This then leads me to offer the following tentative definition of fair value in terms of section 164:

> "*Fair value is the value a share would realise in an undistorted market, in the medium term, with free interaction between buyers and sellers with proper information, and without any exceptions being made for*

[14] See in the Matter of *Integra Group Grand court, Financial Services Division* (Jones, J.) [2016 (1) CILR 192].

*minority holdings or the effect of the corporate action which has led to the dissent."*

[24] Nor is there any single price that reflects fair value to the exclusion of others. As the Canadian court recognized in *Re Cyprus Anvil Mining,* there is no precise mathematical value that constitutes fair value. That being the case it means, as Mr. Cockrell for Arrowhead argued, that fair value can be represented by a range of values. Put differently, fair value may exist on a continuum of values, some higher some lower, but none of them unfair, unless it could be shown that the departure from the continuum, was non-trivial and hence unfair.

[25] It is also well-known and accepted in the cases that financial economists adopt various methodologies to determine value. No one method is considered superior to the others. Equally experts using the same methodology can come to different conclusions because the rely on different data or adopt different assumptions.[15] In one of the Cayman Island cases, instead of the court choosing between which competing methodology should be used it decided to rely on both. Since the choice of method meant a different value being realised, the court solved the problem by adopting a weighting for each method, to reach a fair value that was the sum of these two methods.[16]

[26] But one must also caution making use of accountancy standards which refer to valuations to arrive at fair value which as I have shown is an economic value. As the authors of *Economics for Competition Lawyers* point out the two do not use the concept of value for the same purpose and hence caution must be applied when using the former to establish the latter.[17] Companies they state:

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[15] As the authors of a US based business article explain in study of appraisal petitions in the state of Delaware: *"The methodology most often used by courts to determine going concern value is a discounted cash flow analysis, which is based in large part on assumptions and projections that themselves can be highly uncertain, including the company's internally generated projections and speculative data about how the company would have performed if the merger had not occurred."* Epstein, Richter et al, "*Keeping Current: Delaware Appraisal: Practical considerations",* Business Law Today 1 (October 20, 2014).

[16] *See Integra, supra.* The court in this case took a market value and weighted it at 25%, and then a discount cash flow value, and weighted it at 75%, combining both to come up with a fair value.

[17] *Economics for Competition Lawyers*, Niels et al, Oxford 2011.

*"… prepare accounts for purposes such as internal management and external reporting, which means they cannot always be readily used for competition investigations*.". And they go on to caution, *" … for this reason, a key challenge for competition authorities is to interpret and, if necessary, adjust, the available accounting data in such a way as to provide meaningful insight into the economic profitability."*[18]

**Fair value applied to the present matter**

[27] In the present matter the applicants rely on the net asset value (NAV) of Arrowhead to conclude that the price offered to them is not fair value. To reprise the facts again; NAV would be R6.90. This value is based on Arrowhead's interim financial statements for the six-month period ending March 2019. Arrowhead has offered R 3.75. In other words, the offer is priced at approximately 46% of the value the applicants contend represents fair value. Expressed differently, the price of R6.95 is an 84% premium on the offered price (3,75) and a 125% premium on JSE price (3.09). But even if I accept that fair value exists within a range, a discount of this amount is so substantial that it would not be difficult to conclude that it did not represent fair value.

[28] The question then and to which I now turn, is whether in this case NAV represents fair value, or put differently, represents the magnetic north around which fair value may reasonably cluster. The reason that the applicant relies on NAV is they say, because Arrowhead is a Real Estate Investment Trust (REIT). A REIT is a company comprising mainly immovable property. JSE listing requirements for REIT's require independent valuations to be done for the purpose of its yearly and interim financial reporting. This means they argue that the valuations are updated on a regular basis and thus are highly indicative of the underlying value. Moreover, say the applicants, the independent expert who valued the companies for the purpose the share swap also made use of NAV.

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[18] Niels et al, supra, at page 159. Although the authors are here dealing with the issue of profitability as a measure of market power the comments are apposite to the approach to accounting information in relation to fair value.

[29] The first response from Arrowhead to the appraisal demand from the applicants is contained in a letter the company wrote to the applicants on 20 September 2019.[19]

[30] Here Arrowhead offered to acquire the shares for R3.75. Significantly the company admits that this is below that of the merger swap ratio which it states valued Arrowhead A shares at 3.87 per shares (0.8237 Gemgrow shares for every Arrowhead share). But the discrepancy between the swap valuation and section 164 offer of fair value, is explained by the fact that the transaction was a reverse takeover and that the Gemgrow shares at the time were thinly traded in comparison to those of Arrowhead. Arrowhead it is claimed traded at an average daily volume of 1 2000 000 shares whilst Gemgrow' s was less than two thousand shares. Although not stated in the letter what Arrowhead is saying is that the swap needed to consider the fact that Gemgrow shares were undervalued in the market.

[31] In his answering affidavit, Mark Kaplan, the chief executive officer of Arrowhead, elaborates on how the board went about reaching their offer of R 3.75. First, he concedes that the ruling price on the relevant date which was R3.09, was not an appropriate metric for fair value, because the share was thinly traded at the time. He also accepts advice that the stock market exception is not contemplated by section 164 and so the parties are at least *ad idem* on this aspect.

[32] Kaplan goes on to explain the approach the Arrowhead board then adopted. In order to ensure that the listed share price was not the subject of temporary fluctuations, the board decided to have regard to two analyst reports on Arrowhead. The relevance of the analysts' reports is that they serve to advise their clients as to whether to sell, buy or hold the stock in question. In order to do so they need to come to a view on the value of the share. This is not based on the price the share is trading on the stock market but what they believe it is worth from their analysis. For this reason, the board considered these reports served as valuable benchmark for assessing fair value.

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[19] Annexure AAC 9 to the founding affidavit Case Lines 001-123.

[33] The one firm of analysts, Anchor valued the shares at R3.53. The other firm, Macquarie, valued the shares at R 3.75. Kaplan says the board took a decision to accept the higher of the two values and not an average between them. The valuations were done in June 2019. The relevant date for assessing fair value was 31 August 2019 when the share was trading on the JSE at R3.09. The offer price of R3.75 represented a premium of 21.3% on this price.

[34] The applicants have not put up any analyst reports of their own but express criticism of Arrowhead's analysts. They claim that the analyst who wrote the Anchor report is too inexperienced. But the mere allegation of youth is an insufficient basis for rejecting the report. The allegation in relation to Macquarie is that the report is hearsay. But this misses the point. The report is not put up for the truth of its contents but as an indication of what those who influence market prices consider the value of the firm to be. It is an opinion of those with expertise on the subject. It formed part of the reasoning of the board as to how it arrived at its consideration of fair value.

[35] But in its answering papers Arrowhead has also relied on an affidavit from an independent financial expert Professor Harvey Wainer. He was asked to express an opinion on whether NAV was the appropriate benchmark for establishing the fair value of a REIT. His opinion was that it was not. Wainer explains why this is so. His argument is that the fair value of shares listed on the JSE is price determined by the interaction between buyers and sellers properly informed and under no compulsion to act. As he puts it:

> *"Conceptually, the valuation of shares in a REIT depends upon the income streams anticipated to be received from the REIT — which are dependent upon the underlying net cash flows of the REIT expected in the future to be distributed to shareholders, not dependent upon the NAV of the REIT; the net present value of the anticipated future dividends to be derived from ownership of shares in a REIT is the fair value of the shares; the anticipated future income streams are discounted to present value at the date of the valuation at a fair rate of return for future income streams of the particular REIT…;"*

[36] Wainer goes on to explain how the yield on these investments is calculated. He makes the point that this yield to calculate net present value is not the same the same yield as a property valuator might use to value the properties which the REIT owns. What Wainer is contending is that the fair value of a share in a REIT is a share based on a prediction of its future income streams not the present net asset value of its properties. As he succinctly puts his conclusion:

> *"…in a valuation of shares in a REIT, there is no expectation that the NAV can, or will be, distributed to shareholders;"*

[37] Wainer goes on to argue that an evaluation of shares for REITS from 2018 onwards shows that their fair value does not equal their NAV and that *"NAV is not the key indicator of the fair value of the shares in a REIT".*

**The Wainer - Cilliers debate**

[38] Cilliers for the applicants responded to Wainer in a replying affidavit and in turn Wainer filed a second affidavit in response. The essence of Cilliers' critique is that Wainer's relegation of NAV value to the inconsequential is not supported by the approach taken by accounting firm BDO in an evaluation of another REIT known as Resilient, nor the approach taken by the two independent firms (Mazars and Questco) who valued the respective firms (Arrowhead and Gemgrow) for the purpose the share swap, and the reporting accountant and auditor for Arrowhead (BDO). All are included in the circular sent out to shareholders as part of the Act's requirements for a scheme to be considered. Cilliers identifies references in all three where mention is made of the respective firms NAV's.

[39] Wainer's response here is important, because although it occurs belatedly in the pleadings (through no fault of Arrowhead as the respondent) it is the first time there is a proper engagement of the issues. Wainer argues that the reference in these documents to NAV does not occur in a context where there is reliance on them as an indication of fair value.

[40] In the BDO evaluation the authors of the document refer to Resilient' s 'intrinsic' NAV. He points out that the BDO evaluation makes use of a market

approach. When BDO refers to NAV its use of this term must be understood in the proper context. As he puts it.

> *"The BDO report records their opinion that the NAV "is a fair reflection of intrinsic NAV". Intrinsic NAV is not the same as fair value or market value of the shares or the company, otherwise there would be no purpose to the market approach at all, and the NAV would simply have been taken by BDO as the valuation for a Resilient Share in their report".*

[41] The point Wainer is making here is that BDO is not using an NAV approach but what it terms a 'market based' approach. His logic here cannot be faulted. If NAV was the determinant of fair value, why bother with the other valuations. He adopts a similar approach used by the two firms who have referred to NAV in their valuations of Arrowhead and Gemgrow for the purpose of the share swap.

[42] The next point was that Cilliers understands BDO to be saying that the significance is the proximity of the market price (i.e., JSE price) to the NAV. But Wainer says this is a misreading of the report. What BDO's market based approach uses, is the ratio between the market price and the NAV, not the proximity of the prices which is something notionally different.

[43] Wainer also provides context to the use by Questco and Mazars to perform the independent valuation exercises. Questco does not base its finding on NAV. Rather as Wainer points out it uses:

> *"…the "capitalisation of earnings methodology " as Questco's primary valuation methodology and only used the NAV as "corroboratory evidence of fairness".*

[44] Mazars, he says used three different valuation methodologies. He further points out that the NAV's were used in a context of recall what was a share swap to assess the *relative* values of the firms not their *absolute* values.

[45] The rest of the debate involves Cilliers questioning where Wainer got his data from for his assertion that the evaluation of REITS shows that their fair value

does not equal their NAV. But as Wainer points out this information comes from the circulars sent out to shareholders regarding the share swap; i.e., information that Cilliers had access to. The data is again attached to Wainer's second affidavit and nothing further was filed by the applicants to refute it. This fact is very significant in this case because even without access to internal company data on the basis of publicly available information, if Wainer was wrong on this point he could easily have been refuted, both by looking at either Gemgrow's or Arrowhead's trading in relation to NAV in the past, or that of any other listed REIT.

[46] The upshot of this debate is that despite its technical nature on some points, it does not establish the applicants' version that fair value equals, or in its later more diluted form in reply, is 'proximate', to fair value. Rather, what I have in the record is that there are a variety of methods used to establish fair value and none appear to rely on NAV as the sole or proximate indicator of fair value. The reports of Macquarie and Anchor were not prepared for the purpose of this litigation and can therefore be regarded as independent. Neither rely on NAV as a methodology for reaching their price recommendation. Anchor makes use of what it terms a "five-year discount model". While the report refers to the shares market value being then at 62% discount to NAV, it is apparent that this has not led the analyst to move its valuation to eliminate this discount or coming to a valuation more proximate to it. Recall Anchor had valued the share lower at R 3.58. Macquarie uses what it terms a dividend yield methodology. It is their result at R 3.75 which Arrowhead relies on to constitute fair value in its offer.

[47] Whilst Wainer does not perform his own valuation he explains the methodologies used and why reliance on NAV is not a correct approach to decide on a share's fair value.

[48] By contrast the applicants have apart from the submissions made by Cilliers, who is not qualified as an expert, not put forward any evidence to establish their case. Even an article that they attach regarding the valuations of REIT's ends after discussing various valuation methodologies, including NAV that:

> *"While the valuations above can help inform investment decisions, one should remember the limitations of each, and appreciate the context of the investment case while trying to keep the bigger macroeconomic picture in mind."*[20]

[49] Also cited was a definition contained in *Fletcher Cyclopedia of Corporations* 2020 where the following is stated after explaining what NAV is and stating that it is one of the factors to be considered in appraisal proceedings:

[50] The high-water mark in this discussion appears to be the following remark which the applicants quote in their heads of argument:

> *"Valuation based upon the corporation's net assets is proper where the corporation is a real estate holding company. …The resultant valuations have generally concentrated on three principal elements: market value net asset value and investment value. " (emphasis provided)*

[51] But the same source also states:

> *"However, asset value while a factor, must not be overemphasized in arriving at a determination of appraised value, because other factors such as the value based on prospective earnings are vitally important. Every relevant fact and circumstance that enters into the value of corporate property and that reflects itself in the worth of corporate stock must be considered…." The value is not necessarily the proportionate share of the amount realized on the sale of the property."*[21]

[52] Much of the applicants' case has revolved around a critique of the circular sent out to shareholders regarding the merger and justifying the value of the share swap. The complaint is that the circular is not compliant with the requirements of the Companies Act and gives insufficient information about the values on which the swap is based.

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[20] Meyer "*How to evaluate a REIT*" an article published on Sharenet in 2021. Case Lines page 044-732- 044-736.
[21] Fletcher *Cyclopedia of Corporations*, Westlaw 2021. Paragraph 5906.140 Case Lines 044-2100.

[53] There are two responses to this. Whilst Arrowhead does not concede the circular was deficient, it argues, correctly in my view, that even if it was, this is a matter that falls within the jurisdiction of the Takeover Regulation Panel in terms of section 201 of the Act, and not this court acting in terms of section 164 of the Act.

[54] There is a second aspect to this critique which is worthy of more consideration. I have found that fair value is to be assessed on the basis of a market price not subject to distortions. One example of a distortion is a market where there are informational asymmetries between shareholders and the company. It may well be that if material asymmetries exist between a company and its shareholders as to fair value of its shares, and where corporate action is proposed and the circular is insufficient to cure them, that a dissenting shareholder can validly claim that an offer pursuant to it cannot be assessed for fair value unless the court rectifies the situation by giving the kind of relief sought in this matter. That is, to require the company to provide further information to correct the asymmetry and for an appraiser to assess fair value on the basis of the new information.

[55] However, that theoretical situation does not apply in the present case. That is because whatever informational asymmetry may have existed and not been rectified by the circular, the offer to the dissenting shareholders sent out in the letter dated 30 September 2019, does so. It explains that the offer is not based on the value of the share swap but on independent valuations and what they were. In other words, on the facts of this case Arrowhead has cured the information problem (assuming there was one which I take no view on) and its offer is not dependent on the basis of the circular's valuation of the share swap.

[56] Although the applicants' case on the papers is erected around the assertion that NAV represents fair value, its heads of argument are less dogmatic. Rather, the legal argument advanced by the applicants is to use the *Zeder* decision to get the court to exercise its discretion in terms of section 164(15)(c)) (iii). As a means of doing so, numerous decisions are quoted whose net effect is to suggest that the business of evaluation is so complex, so open to

possible methodologies, that it would be best left to the experts. Such was the vehemence which this argument was made out in the applicants' heads of argument, that in oral argument Mr. Cockrell for Arrowhead, suggested that the applicants had abandoned the NAV approach in favour of a *Zeder* approach by which he meant an approach that view the debate over valuation as sufficiently complex and contested to be best left to the appraisers. But in reply Mr. Gordon for the applicants said the reliance on NAV had not been abandoned. I nevertheless address the *Zeder* argument in the next section which deals with the discretion of the court in terms of 164(15) (c) (iii).

**Should the court appoint an appraiser?**

[57] In terms of section 164(15) (c) (iii) *"The court in its discretion may - (aa) appoint one or more appraisers to assist it in determining the fair value in respect of the shares."*

[58] The applicants have in their heads of argument, in the alternative to suggesting that fair value is NAV, or something proximate to it, also urged me to follow the approach taken in the *Zeder* case. That is, they argue that a court should have regard to all the various valuation methodologies, and for this reason, the courts' exercise of its discretion will be enhanced by getting assistance on these issues from expert appraisers.[22] The applicants also seek extensive information from the company as part of this request; inter alia, all the sources of information relied on by the independent experts, Arrowheads asset register, and all contracts it had in the past year " insofar as they relate to the transaction that is the subject of the circular."[23]

[59] It would indeed be tempting for courts to exercise this discretion when faced with appraisal disputes. But to resort to this 'outsourcing" of a judicial obligation would not only amount to an improper use of a discretion but would amount to the abdication of a judicial function to an expert. In this particular matter where the primary dispute concerns the use of NAV as the proper basis for finding fair value, I consider I have enough in the record without

[22] In *Zeder* the court was faced with using either a sum of the parts valuation (SOTP) or a stock market valuation. The learned judge there indicates that he was not yet persuaded by either. He states in paragraph 50.1 "*It may be, in the circumstances of this case, that a fair price is neither the JSE traded share price or the SOTP price."* These facts distinguish *Zeder* from the present matter.
[23] See Draft Order Case Lines 051-7 paragraph 8.

making use of appraisers to assist me. Each case turns on its own record and hence its own facts. The fact that the court took the particular approach it did in *Zeder* is a function of what evidence it had before it in the record. It does not amount to a general principle to resort to expert appraisers simply because there is a dispute over fair value between the dissenters and the company. If it were otherwise the court would be mandated in the Act to refer the matter to appraisers, instead as subsection 164(15) (c) (iii) makes clear, having a discretion to do so.

**Onus**

[60] Both parties were agreed that section 164 does not impose an onus on either the company or the dissenting shareholder to establish fair value. This does not mean that when the one party has put up evidence to support its claim for fair value and argued why the other party's claim for same is not established, the court should not find that there is at least an evidential burden to discharge the prima facie case made out by the one contending for fair value. Arrowhead has put up evidence to support its offer that relies on the valuations of expert parties with no interest in the matter. Moreover, it has put up reasoning from an expert as to why NAV is not an appropriate measure of fair value on the facts of this case.

[61] I find in relation to the main application that the applicants have not made out a case that the offer of R 3.75 per share does not represent fair value. Although this price values the Arrowhead's shares at less than what the company says is the cash value of the swap value, (R3.87) the company points out this was not a payment for the shares in cash, but a share swap that took into account the relative undervaluing of the Gemgrow share. There was no evidence to refute this. Moreover, this discrepancy is so slight (a 3.2% premium on the offer price) that I find in relation to the counter application that the offer does represent a price that is in the range of fair value.[24]

[24] How significant a departure from the range of fair values needs to constitute an unfair value is not capable of numerical certainty. The authors who performed the Delaware exercise noted that the at the low-end appraisal cases were brought when the discount from offer value to fair value as 8.5%. Epstein et al *Keeping Current: Delaware Appraisal: Practical considerations",* Business Law Today 1 (October 20, 2014).

Accordingly, on the evidence before me this means that the main application must be dismissed, and the counter application is upheld.

**The striking out application**

[62] This is an issue that as I indicated earlier, I would return to. The applicants take umbrage to passages in two affidavits by Kaplan suggesting that Cilliers, and through him, the applicants, are using the appraisal remedy as a *"… a mechanism for profiteering at the expense of other shareholders of the company"*. But the accusation goes further than profiteering in this matter. There is also reference to Cilliers past use of the appraisal remedy as this paragraph in Kaplan's affidavit indicates:

> *"I understand that Cilliers may have, directly or via the Second Applicant or via other entities in which he holds a direct or indirect interest, acquired shares in a number of companies, including PBT Group Limited and Sovereign Food Investments Limited, following the announcements by each such company of their respective intention to undertake a fundamental transaction. In each of those cases, Cilliers, directly or indirectly, subsequently exercised his appraisal rights and then refused to accept the offer received in terms of section 164(11) of the Act on the basis that such offer was inadequate and did not represent fair value for the applicable shares.*[25]

[63] The applicants seek to have these paragraphs struck out in terms of Rule 6(15) of the Uniform rules which provides for the striking out from any affidavit matter that is "…*scandalous, vexatious or irrelevant*". But the Rule goes on to provide that *"The court may not grant the application unless it is satisfied that the application will be prejudiced if the application is not granted."*

[64] The argument advanced by Cilliers is that these remarks are defamatory and therefore their retention is prejudicial.[26] The context in which these remarks have arisen, as I alluded to in the earlier history section, arose from the fact

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[25] Case Lines page 009-147 paragraph 143.8

[26] Relying on *Vaartz v Law Society of Namibia* 1991(3) SA 563 where, at 567, the court held that prejudice means something less than the innocent party's chance of success are reduced. It goes on to suggest that if in relation to the offending material *"... it is left unanswered the innocent party may well be defamed. The retention of such matter would therefore be prejudicial to the innocent party."*

that Breede, under the guiding hand of Cilliers, had acquired a beneficial interest in BNS only after the deal had been announced. (In August when the deal had been announced in July.) The argument by Arrowhead is that this purchase was opportunistic. The appraisal remedy it seems on its version should only be available to those who held shares prior to any contemplation of corporate action.

[65] The second critique, contained in the passage I quoted above from Kaplan's affidavit, is directed at Cilliers personally to suggest that he is a 'serial appraisal rights seeker'. Thus, in two senses he and the applicants are accused of "*profiteering*". I accept that the term 'profiteering' is generally used in a pejorative sense, as opposed to 'profit taking', which is seen as legitimate.[27] The likely use of the term in this context is to suggest the applicants are attempting to use the appraisal system to extract an "unfair profit" from the company by contending they are not getting "fair value".

[66] However, there is a healthy debate in the literature about what is termed the arbitrage effects of appraisal rights remedies. Arbitrage occurs when: *"These litigants invest in a target company stock after the announcement of the merger and with the intention of pursuing appraisal. In short this is appraisal arbitrage."*[28]

[67] Do these remedies force companies to pay a premium to dissenters in order to avoid protracted litigation? Or worse still, does it force companies who engage in corporate restructuring to misprice their offers above fair value to avoid litigation? But the contrary argument by some academic writers suggests that appraisal arbitrage has social utility:

> *"The potentially positive role for appraisal is relatively straight forward. Just as the market for corporate control can serve as a check on agency costs from managerial shirking, appraisal rights can serve as a back-end check on abuses by corporate managers, controlling shareholders, other insiders in merger transactions*"

[27] Chambers Dictionary suggests use of the term is derogatory. The Oxford Dictionary explains it meaning "*as one who excessively profits on the sale of necessaries during a time of scarcity."* Shorter Oxford Dictionary.

[28] Charles R. Korsmo and Minor Myers, *"Arbitrage and the future of public company M&A"* Washington University Law Review Volume 92 1551 (2015).

[68] The authors then go on to say:

> *"Similarly, a robust market for appraisal arbitrage could serve as an effective back-end market check on expropriation from minority shareholders in merger transactions. When a merger takes place at a fair price, appraisal arbitrage will not be attractive to outside investors on the merits. If, however, a merger is agreed to at a price far enough below fair value – measured in conventional financial terms – appraisal arbitrageurs will have an incentive to accumulate a position and seek appraisal. In so doing the arbitrageur will serve as a check on low-ball merger agreements and freeze outs."*

[69] In another article where the effects of increasing use of appraisal remedies filed in Delaware was studied the authors concluded that: *" appraisal cases are largely self-selecting for transactions in which the apparent facts provide a basis for believing that the merger price significantly undervalues the company; and, when an appraisal case is brought it is unlikely that the appraisal determination will significantly exceed the merger price in an non-interested transaction that included a meaningful market check."*[29]

[70] Also, as Windell J remarked in a recent South African decision: *"The appraisal right is intended to thwart not only opportunism, but ill-advised business decisions by the board of directors. In this regard the board will be more easily swayed to abandon an unwise transaction if a substantial number of shareholders dissent form it and invoke their appraisal rights."*[30]

[71] In this matter Cilliers points out that Kaplan and other directors held shares in both Arrowhead and Gemgrow.[31] Given that institutions hold disproportionately large holdings on the JSE, it is probable that many of those who voted in favour of the transaction, had an equity foothold in both companies, and hence an economic interest in the swap valuation, that was

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[29] Epstein, Richter et al, supra.

[30] *First National Nominees (Pty) Ltd and Others v Capital Appreciation Limited and another* [ 2021] JOL 50073 (GJ) at page 17.

[31] By way of example the independent valuator's report for Gemgrow states: *"In addition, Mr. Mark Kaplan, a director of Gemgrow and, accordingly, a related party to Gemgrow in terms of paragraph 10.1 (b)(ii) of the Listings Requirement holds 6 000 000Arrowhead shares and will therefore participate in the Scheme, if it becomes operative."*

distinct from those who only held shares in Arrowhead. Thus, the potential for insider preferencing as well as the opaque nature of the merger pricing, provided a legitimate case for making use of appraisal arbitrage. In this sense the actions of the applicants even if privately profitable served a broader social utility. The actions are legitimate. Labelling them as profiteering is misplaced. Nor does it matter that Cilliers has used this mechanism in the past in relation to other companies. But given that I find the actions a legitimate use of the policy objectives in the Act, there can be no prejudice to the applicants despite the unfortunate labelling. For this reason, I consider striking out is not appropriate. It has however influenced my approach to costs as I discuss later.

[72] In their heads of argument Arrowhead's counsel conceded that the motive of the applicants was irrelevant to the determination of fair value. But they argued it was nevertheless relevant to the issue of whether appraisers should be appointed. I do not consider this a relevant consideration either, on the facts of this case. The considerations for the appointment of the appraisers will be based on the evidence put forward by the parties, not speculation over the motives of the dissenter.

***Locus standi***

[73] The *locus standi* challenge to the applicants was not pursued. However, the applicants have challenged the *locus standi* of Arrowhead to bring the counter application. The argument here is that only a dissenting shareholder is given rights in terms of section 164, not the company. However, as Arrowhead's counsel argued this is an overly technical argument. The court is mandated to set a fair price. Where the dissenting shareholder seeks to first invoke the mechanism of the appraiser, I see nothing wrong with the company contending that the court has enough before it to determine fair value and suggesting what that price is. This point too is dismissed.

**Costs**

[74] Arrowhead as the first respondent has been successful in opposing the main application and getting relief as the applicant in the counter application. It is

therefore entitled to costs, including, given the complexity of this case, the costs of two counsel. However, the applicant was put to considerable effort and expense to deal with *locus standi* challenges, which were eventually, quite correctly, abandoned by Arrowhead. Moreover, the criticism of profiteering was unwarranted and whilst I have not considered striking out was appropriate, the issue should find its way into a gesture of censure that can be achieved in relation to costs. For this reason, I would reduce the costs of the main application by a quarter. The same should apply to the counter application as both relied on similar facts.

[75] Arrowhead also asked for attorney- client costs. I do not consider there was any basis for this. This has been an important case, which as I indicated at the outset, is in a novel area in our law. The applicants have brought a considerable amount of useful material to the courts' attention and raised critical issues of public interest.[32] There is no basis for a punitive award of costs simply because they have lost on the issue of fair value. A punitive order would chill shareholders from exercising this right in the future; a result that would serve to frustrate the legislature's purpose in providing this remedy. An award of costs on a party and party basis discounted by a quarter, suffices.

**ORDER: -**

[76] In the result the following order is made:

1. The main application is dismissed.

2. The counter application is upheld in the following respect:

    a. In terms of section 164(15) (c)(ii) of the Act, it is determined that R3.75 per share, is a fair value of the shares held by all dissenting shareholders in Arrowgem, on 22 August 2019

[32] The bundle of case law and academic readings extends to over 2300 pages.

3. The applicants, jointly and severally, the one paying the other to be absolved, are liable for the first respondent's costs of the main application and the applicant's (first respondent's) costs of the counter application, including the costs of two counsel. The costs of both applications are to be reduced by one quarter.

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**N. MANOIM**
**JUDGE OF THE HIGH COURT**
**GAUTENG DIVISION**
**JOHNANNESBURG**

Date of hearing: 13 May 2022
Date of judgment: 25 October 2022

Appearances:

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| Counsel for the Applicant: | R D E Gordon |
| Instructed by. | Pike Law |
| Counsel for the First Respondent | A Cockrell SC |
| | N Ferreira |

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| Instructed by: | Cliffe Dekker Hofmeyr |