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Dispute Resolution ALERT

IN THIS ISSUE

All is fair in section 164 appraisal rights:
Much needed clarity on the meaning
and methodology for determining
"fair value"

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All is fair in section 164 appraisal rights: Much needed clarity on the meaning and methodology for determining "fair value"

The recent judgment of BNS *Nominees (RF) (Pty) Ltd and Others v Arrowhead Properties Ltd and Others* [2022] ZAGPJHC 848 has laid down various important principles regarding the novel area of law regulating appraisal rights in terms of section 164 of the Companies Act 71 of 2008 (Act).

The court pronounced on issues relating to, *inter alia* (i) the meaning of "fair value" in terms of the Act; (ii) circumstances in which the court will refer the issue of fair value to appraisers; (iii) which party bears the onus of proving the fair value of the shares; (iv) whether a company can counter-claim for the court to set the price of the shares; and (v) interestingly, whether dissenting shareholders can claim appraisal rights even after acquiring shares after the transaction has been publicly announced.

In terms of section 164 of the Act, where a company's shareholders have voted in favour of some form of corporate restructuring, the dissenting shareholders, who did not vote in favour of the corporate restructuring, obtain the right to sell their shares back to the company for "fair value". However, if the dissenting shareholder is of the view that the offer to purchase the shares made by the company is not in fact the fair value of the shares, it can bring an application asking the court to determine that value.

In this matter, the first applicant, BNS Nominees (RF) (Pty) Ltd (BNS), is the registered shareholder of the shares in the first respondent, Arrowhead Properties Ltd (Arrowhead/the respondent). The second applicant, Breede Coalitions (Pty) Ltd is the beneficial owner of the shares held by BNS (collectively referred to as the applicants).

The applicants submitted an application requesting the court to determine the fair value of the shares held by the applicants in the respondent, or, alternatively, that an appraiser be appointed to determine the fair value of the shares. The respondent, on the other hand, raised a conditional counter-claim in terms of which it sought an order from the court to determine the fair value of the shares at the price initially offered by the respondent to the applicants.



Cliffe Dekker Hofmeyr

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All is fair in section 164 appraisal rights: Much needed clarity on the meaning and methodology for determining "fair value"

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The meaning of "fair value" in terms of the Act

In determining the fair value of the shares, the court first considered what exactly the meaning of "fair value" is in terms of the Act. After considering the provisions in the Act itself, case law, foreign jurisprudence and opinions of different economists, the court noted that the fair value of the share does not necessarily equate to its market value, as the market is prone to various kinds of distortions.

Furthermore, the court noted that there are other factors which may have an influence on the value of the shares at the time, such as the effect of the proposed corporate restructuring. There is also no single price that reflects fair value to the exclusion of others. Thus, fair value may in fact be represented by a range of values, some higher, some lower, but none of them unfair. Accordingly, there are also different methodologies which may legitimately be applied in determining fair value.

In the end, the court considered whether the net asset value (NAV), as argued by the applicants, "represents the magnetic north around which fair value may reasonably cluster". After extensively considering both parties' reasoning as well as several economists' reports, the court found that there are various methods used to establish fair value, but none of them appear to rely on the NAV as the sole indicator of fair value. Rather, the fair value is to be assessed on the basis of a market price not subject to distortions. In this regard, the court offered its own tentative definition of fair value:

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

The court's discretion to appoint appraisers to determine the fair value

The applicants quoted various decisions in their heads of arguments which suggested that the business of evaluation is so complex and open to different methodologies, that it would be best left to the experts to determine. In terms of the Act, the court does in fact have the discretion to appoint one or more appraisers to assist in the determination of the fair value of the shares. However, the court said that resorting to "outsourcing" a judicial obligation would not only amount to an improper use of a discretion, but would be an abdication of a judicial function to an expert. In this specific matter, the court found that it had enough information and documentation at its disposal in the record to help it come to a decision. However, each case turns on its own record and thus its own facts.

All is fair in section 164 appraisal rights: Much needed clarity on the meaning and methodology for determining "fair value"

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Which party bears the onus of establishing the fair value?

Section 164 of the Act does not impose an onus on either the company or the dissenting shareholder to establish fair value. However, the court held that even if one party provides evidence for their claim and argues against the other party's claim, it does not mean the court should not still determine whether there is enough evidence to support the case made by the party arguing for a fair value. In the present case, the court found that the respondent had put up evidence that relies on valuations of expert parties who have no interest in the matter (and are therefore sufficiently independent), as well as reasoning from an expert as to why NAV is not an appropriate methodology to determine fair value. As mentioned, the court found that the applicants' claim did not represent the fair value of the shares. However, the respondent's counter-claim did. Therefore, the respondent's counter-claim was granted.

On the argument of whether the company has standing in terms of the Act to bring a counter-claim, the court held that where the dissenting shareholder seeks to first invoke the mechanism of the appointment of an appraiser, there is nothing wrong with the company contending that the court has enough information before it to determine fair value, and suggesting what that fair value may be.

Can a dissenting shareholder claim appraisal rights after acquiring the shares only after the transaction was publicly announced?

In the final few paragraphs of the judgment, the judge returns to the question of whether a dissenting shareholder may claim appraisal rights after acquiring the shares only after the company restructuring in question was publicly announced. The court was of the opinion that such actions, which it termed "*appraisal arbitrage*" are legitimate and serve a broader social utility as it is probable that the

majority shareholders who voted in favour of the restructuring had an equity foothold therein and could potentially influence the price unfairly.

In the end, this case shows that a company may successfully challenge an appraisal rights claim in terms of section 164 of the Act. Due to the broad notion of "*fair value*", each party is at liberty to present suitable methodologies and expert reports to persuade the court as to the fair value of the shares in question. As this is still a novel area of law, there is sure to be further interesting developments to come.

[Lucinde Rhodie, Kara Meiring and Claudia Grobler](#)

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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