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

CASE NUMBER: A3096/2019
TAX COURT CASE NUMBER: 14001

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: NO

In the matter between:

JMN **APPELLANT**

AND

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE **RESPONDENT**

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 30th of April 2021.

DIPPENAAR J:

[1] This is an appeal from the Tax Court, (Francis J sitting as President of the Tax Court) in an appeal under s107 of the Tax Administration Act ("TAA")[1] against the respondent's disallowance of an objection. The objection was lodged by appellant against an additional assessment in respect of the appellant's 2010 year of assessment. The appellant's appeal to the Tax Court included challenges in respect of his 2007, 2008, 2009 and 2010 tax assessments.

[2] The present appeal pertains only to the additional assessment by the respondent for the 2010 year of assessment insofar as it relates to the valuation of appellant's shareholding in N[....] Mining Corporation (Pty) Ltd ("NMC") for purposes of Capital Gains Tax ("CGT") and Donations Tax and the orders granted by the Tax Court in paragraphs 130.4 to 130.7 of its judgment in terms of which the additional assessment was altered in certain respects, together with ancillary relief.[2]

[3] The relevant facts are set out comprehensively in the judgment of the Tax Court and it is not necessary to repeat them herein in any detail, save as they are relevant to the appeal.

[4] The relevant facts are the following. The appellant was the sole shareholder in NMC in his personal capacity. NMC was the sole shareholder of a mining company, U[....] Resources (Pty) Ltd ("U[....]"), established in 2006. U[....] obtained prospecting and mining rights relating mainly to coal in Limpopo, North West, Northern Cape, Gauteng and Mpumalanga. Initially the appellant was the sole director of U[....].

[5] On 19 May 2006, U[....] and Sumo Coal (Pty) Ltd ("Sumo") concluded a consultancy agreement in terms of which, *inter alia*, U[....] and Sumo would conclude a

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[1] 28 of 2011

[2] The Tax Court found that the 2010 additional assessment was to be altered in terms of s129(2)(b) of the TAA as follows: (i) Capital Gain in respect of the disposal of the NMC shares in an amount of R115 700 000 (R231 400 000 x 50%); (ii) donation in respect of the disposal in an amount of R115 125 725 (R115 700 000 – R547 725); It also confirmed the understatement penalty in terms of s222 and 223 of the TTA and the imposition of interest in terms of s89quat of the TTA; The appellant was directed to pay 50% of the costs of the appeal including the qualifying fees of three named experts.

joint venture agreement on certain terms. This consultancy agreement endured until 19 May 2009.

[6] During August 2006, Kalyana Resources (Pty) Ltd acquired a 50% shareholding in U[....] through NMC. The remaining 50% shareholding in U[....] was held by NMC. The disposal of any shareholding in U[....] was restricted in terms of a shareholders' agreement.

[7] During October 2009, the appellant concluded an oral agreement with his family trust, the N[....] Matodzi Family Trust ("the Trust") to purchase his 50% shareholding in NMC at a purchase consideration of R547 275. The date of transfer of the shares is 5 October 2009. The oral agreement was subsequently recorded in a written loan agreement dated 16 November 2012. This share transfer lies at the heart of the appeal. No dividends had been declared in U[....] or NMC by the time the shares were sold to the Trust and no mining had taken place in U[....].

[8] The respondent's view was that the purchase consideration for the shares was not an adequate consideration and the transfer was deemed to be a disposal and donation in terms of s 11(1) and s 58 respectively of the Income Tax Act ("ITA") [3]. In terms of s26A of the ITA, the taxable capital gain of a taxpayer shall be included in his taxable income for the relevant year as determined in the Eighth Schedule, which deals with CGT. It was common cause that the NMC shares transferred to the Trust constituted an asset as defined in s1 of the Eighth Schedule and that the transfer was a disposal as contemplated in s11 (1) of the ITA.

[9] In its additional assessment, the respondent levied donations tax in terms of s58 of the ITA in an amount of R5 481 000.00, together with a 10% penalty thereon. It also levied CGT in an amount of R26 856 900.00 together with a 10% penalty thereon. The remainder of the assessment amounts are not relevant to the present appeal.

[3] 58 of 1962

[10] The respondent's calculation attributed a value of R274 050 000 to the NMC shares transferred by the appellant to the Trust. This calculation was based on a valuation by Venmyn Rand (Pty) Ltd ("Venmyn") and Mr Thayser, commissioned by the respondent, of the underlying value of the minerals in respect of which U[....] had mineral rights at the date of the transfer of the shares, being 5 October 2009. Their valuation was based on a net asset valuation ("NAV") methodology. The value of the minerals in respect of which U[....] held mineral rights was determined, which was accepted as the value of U[....]'s shares. As NMC held 50 % of the U[....] shares, the value of its shareholding was determined as 50% of the value of the U[....] shares, which was determined as the value to be attributed for purposes of CGT and Donations Tax.

[11] The appellant objected to the assessment, utilising a NAV methodology in his calculations. The respondent disallowed the objection, resulting in the appeal before the Tax Court.

[12] In the proceedings before the Tax Court, five expert witnesses were called. The appellant, a qualified mining engineer also testified. The expert witnesses agreed on a mineral valuation of either R152.7 million if the mineral resources were categorized as a "resource target", as contended by the appellant's experts or R232 million, if the mineral resources were categorized as "inferred resources", as contended by the respondent's experts. The experts for both parties were agreed that the NAV methodology, adopted by both throughout the proceedings was the appropriate methodology.

[13] In his application for leave to appeal and notice of appeal, the appellant raised only two issues; one against the merits and one against the costs order granted. In his notice of appeal, the issue was phrased that the Tax Court erred:

> *"In finding that the sixty (60%) percent discount contained in clause 7 of the written consultancy agreement does not create a liability for U[....] Resources (Pty) Ltd but rather a contingent liability in a sense that it might or might not arise*

depending on whether coal reserves were identified and that Sumo Coal (Pty) Ltd had a right to require U[....] Resources (Pty) Ltd to enter into a Joint Venture, but that right was not exercised yet as at 5 October 2009 and therefore did not create any liability for U[....] Coal Resources (Pty) Ltd …".

[14] The second ground of appeal was against the Tax Court's determination that the tax payer be liable for 50% of the costs of the appeal and the qualifying fees of certain experts. This ground was not strenuously pursued in argument.

[15] In his notice of appeal, the appellant set out the particular respect in which the variation of the judgment was sought, in these terms:

> *"The additional assessment for the 2010* [year] *be returned to the Respondent to be altered as follows in terms of section 129(2)(b) of the TAA:*
> *1.1. To reflect a capital gain in respect of the disposal by the Appellant of the shares held by NMC to N[....] Family Trust, in the amount of R46 280 000.00 (R231 400 000.00 x 40% = R92 560 000.00 x 50% = R46 280 000.00) …".*

[16] In his heads of argument dated 1 April 2020, the appellant for the first time, raised two additional issues; the first, challenging the valuation methodology used in valuing the NMC shares and contending that the market value of the shares was not determined. The second, whether the Tax Court was correct in upholding the characterisation of U[....]'s mineral resources as "inferred resources" in terms of the SAMREC Code, rather than as a "resource target". The first issue was the central focus of appellant's argument at the hearing.

[17] In his heads of argument, the appellant also sought to amend the respects in which the order of the Tax Court was to be altered. He sought alterations in three respects, sought in the alternative. The alterations now sought differed from those stated in the notice of appeal. The primary alteration now sought, was that the order of the Tax Court be set aside and the matter be remitted back to the respondent for further

investigation and assessment to determine the value of the appellant's NCM shares transferred to the Trust.

[18] In response, the respondent on 20 April 2020 in its heads of argument objected to those grounds being raised, which it contended were not properly before Court. It pointed out that the applicant had not launched an application for leave to amend its notice of appeal. It nonetheless dealt with the new issues, contending that they lacked merit.

[19] Despite knowledge of the respondent's objection, no formal application for condonation or leave to amend was launched by the appellant nor was a written notice of amendment provided in the intervening nine months before the appeal was heard. This Court and the respondent were notified via email on Sunday, 7 February 2021, the evening before the hearing, that an application would be made to amend appellant's notice of appeal.

[20] An oral application to amend appellant's notice of appeal was made from the bar at the hearing. In argument the appellant contended that the respondent would suffer no prejudice as it had responded to the new grounds raised in its heads of argument. The respondent argued that as the amendment was not raised timeously, the court's discretion should be exercised against granting it.

[21] The issues to be determined in this appeal are:

> [20.1] Whether the appellant should be allowed to orally amend its notice of appeal to raise the new issues;
>
> [20.2] If so, whether either of the new grounds should be upheld;
>
> [20.3] If not, whether the grounds of appeal raised by the appellant in his notice of appeal should be upheld.

[22] Turning to the first issue, the requirements of r 49(4) are peremptory[4]. The rule provides:

> *"Every notice of appeal and cross-appeal shall state (a) what part of the judgment or order is appealed against; and (b) the particular respect in which the variation of the judgment or order is sought".*

[23] The appellant can thus not raise the additional issues unless leave to amend his notice of appeal is granted. No reasons for the delay or the absence of a formal application were provided. The appellant can be criticised for the lateness of the application and the informal way in which it was launched. However, it is not impermissible for an oral application to be launched and, of itself, is not a reason to dismiss the application.[5] Although no notice of amendment was produced, the amendments to the grounds of appeal articulating in what respects the judgment of the Tax Court is appealed against and the respects in which the variation of the order was sought, were articulated in appellant's heads of argument and the respondent received notification thereof. It responded to the new issues in its heads of argument. No prejudice[6] would be suffered by the respondent to raise a ground of appeal that was fully canvassed in the pleadings and traversed in the hearing before the Tax Court, such as the characterisation of the mineral resources as "inferred resources" or "resource target". In my view, leave should be granted to the appellant to raise this further ground of appeal and would be a just exercise of the discretion afforded.

[24] The introduction of the valuation methodology issue, the primary focus of appellant's argument at the hearing, however stands on a different footing and different considerations apply as to whether the appellant can raise this issue on appeal. The challenge to the valuation methodology used in the proceedings before the Tax Court seeks to change the entire focus of the proceedings.

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[4] Sangono v Minister of Law and Order 1996 (4) SA 384 (E)

[5] De Kock v Middelhoven 2018 (3) SA 180 (GP) paras [16]-[17] and the authority cited therein

[6]

[25] In the judgment of the Tax Court, the following finding was made in relation to the valuation methodology:

> *"The above methodology followed by SARS was also followed by Charles Stride ('Stride'), the taxpayer's expert who took the value of the shares in U[....] from Robert Greve's ('Greve') report and attributed 50% of that value to the NMC shares. The methodology followed by SARS and Stride was the same. This was also the methodology that was proposed by the taxpayer in his objection of 24 February 2012 and when he testified in Court he agreed that this was the position."*

[26] The appellant argued that the focus of the valuation ought to have been on the NMC shares but that instead, the focus was on the underlying value of the U[....] mineral resources. The argument focused on the determination of the "market value" of the shares sold and transferred by the appellant to the Trust. It was common cause that such determination is in terms of the Eighth Schedule to the ITA. The appellant characterised the central issue to be:

> *"Whether or not the Tax Court was correct in upholding the respondent's contentions regarding the calculation of the "market value" of the shares in the company, NMC specifically whether the Net Asset Valuation Methodology ("NAV") adopted by the respondent and upheld by the Tax Court was correct, using a straight line extrapolation based on the valuation of the mineral rights of U[....], in which NMC held 50% of the shares for purposes of valuing the appellant's 100% shareholding in NMC both for purposes of Capital Gains Tax and Donations Tax".*

[27] The appellant's argument was predicated on the provisions of s31(3) of the ITA dealing with "market value". The relevant portion of s31(3) of the Eighth Schedule provides:

"The market value of any shares of a person in a company not listed on a recognised stock exchange…must be determined at a value equal to the price which could have been obtained upon the sale of a share between a willing buyer and a willing seller dealing at arm's length in an open market subject to the following: (a) no regard shall be had to any provision- (i)restricting the transferability of the shares therein, and it shall be assumed that those shares were freely transferable… "

[28] The appellant argued that as a matter of law, the Tax Court erred in accepting and adopting the NAV valuation methodology adopted by the respondent to establish the market value of the NMC shares and should have applied the discount cash flow ("DCF") methodology to establish the economic value of the shares and thus that it was open to the appellant to raise the issue on appeal. Reliance was placed on *CSARS v Stepney Investments (Pty) Ltd*[7] *("Stepney")* in support of the contention that the DCF valuation method should have been used to determine the market value of the shares. As held in *Stepney*, the DCF valuation method entails valuing the business of an entity on its future forecast free cash flows discounted back to present value through the application of a discount factor.

[29] In *Stepney,* a base cost for certain shares had to be determined for purposes of CGT. The taxpayer had applied for a casino licence and as part of the process had to provide the anticipated cash flows that would be generated from the licence. At the time, the taxpayer had not commenced with its business or built any infrastructure. A DCF valuation had been prepared by the taxpayer, the contents of which was in dispute between the parties' respective experts. Evidence was presented that the DCF method was the most appropriate method to value unlisted shares. The respondent had conceded that the NAV valuation methodology was inappropriate.

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[7] 2016 (2) SA 608 (SCA)

[30] It is trite that each case must be determined on its own facts. The facts in *Stepney* are in my view distinguishable. A fundamental point of difference is that in *Stepney*, the type and level of information required to prepare a valuation based on the DCF methodology was available and a valuation based on that methodology had been prepared and was presented in evidence before the court a quo. The factual matrix for the valuation was thus fully canvassed in the court a quo.

[31] *Stepney* is further not authority for the proposition that in all instances, the valuation of the market value of unlisted shares should be determined utilising the DCF methodology. In the present instance and from the information available at the relevant time, it cannot be concluded that the NAV methodology was inappropriate as no reliable financial projections could be made regarding the profitability or revenue of U[....] to determine what price a willing buyer and willing seller would agree on at an arms-length transaction in the open market.

[32] In the present matter, the parties' experts were in agreement that the necessary information was not available and that the DCF methodology was thus inappropriate and that rather the NAV valuation methodology should be used.

[33] Our courts have permitted an appellant to rely on a new point of law on appeal as a court will not be precluded from giving the right decision on accepted facts merely because a party failed to raise a legal point as a result of an error of law on his part[8]. A party may also revive on appeal a legal contention expressly abandoned in a court a quo[9]. However, this approach only applies where the issue involved is a pure question

[8] De Beers Holdings (Pty) Ltd v Commissioner for Inland Revenue 1986 (1) SA 8 (A) at 33E-G

[9] Paddock Motors (Pty) Ltd v Inglesund 1976 (3) SA 16 (A) at 23D-24G wherein it was held that a litigant who had expressly abandoned a legal contention in a court below was entitled to revive the contention on appeal as the duty of an appeal court is to ascertain whether the lower court reached a correct conclusion on the case before it. To prevent an appeal court from considering a legal contention abandoned in a court below might prevent it from performing that duty if the appeal court were bound by a mistake of law, resulting in a conformation of a decision that is clearly wrong.

of law covered by the pleadings and turning on facts which have been fully canvassed[10].

[34] A party is further bound by factual concessions and may not present argument in conflict with facts which were common cause in the court a quo or in conflict with the parties' common understanding as to what exactly the issues were in the court a quo[11]. Although it may be open to a party to raise a point of law which involves no prejudice or unfairness to the other party and raises new factual issues, a point raised for the first time on appeal on factual considerations not fully explored in the court below, should not be allowed.[12] Put differently, where an appellant seeks to build a case on a foundation not laid in the court a quo, he should be precluded from doing so[13].

[35] In applying these principles to the present facts, I am not persuaded that the appellant should be allowed to raise the issues surrounding the valuation methodology on appeal for the reasons set out below.

[36] First, the methodology issue was not fully canvassed in the proceedings before the Tax Court. The appellant did not raise in his pleadings or in his evidence that the market value of the NMC shares should have been determined on the basis of a DCF valuation method. In his pleadings before the Tax Court, although the appellant had raised as a point *in limine*, *"the mineral asset valuation of Venmyn has no legal effect*", the issue was predicated on the contention that *"the 2010 assessment issued by the respondent is an estimated assessment as envisaged in s 95 of the TAA"*, a point

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[10] Workmen's Compensation Commissioner v Crawford 1987 (1) SA 296 (A) at 307 F-I; Navidas (Pty) Ltd v Essop; Matha v Essop 1994 (4) SA 141 (A) at148G-149C; BP South Africa (Pty) Ltd v Secretary for Customs and Excise 1985 (1) SA 725 (A) at 773G-H

[11] AJ Shephard (Edms) Bpk v Santam Versekeringsmaatskappy Bpk 1985 (1) SA 399 (A) 413D-416D; F& I Advisors (Edms) Bpk v Eerste Nasionale Bank van Suidelike Afrika Bpk 1999 (1) SA 515 (SCA)

[12] Naude v Fraser 1998 (4) SA 539 (SCA) 558A-E; Ras and Others NNO v Van der Meulen 2011 (4) SA 17 (SCA) at 22 C, para [16]

[13] Ras supra 228C; Administrateur Transvaal v Theletsane 1991 (2) SA 192 (A) 195F-196I and 200G

correctly dismissed by the Tax Court as it was an additional assessment. The methodology of the mineral asset valuation was not challenged.[14]

[37] Throughout the proceedings before the Tax Court, the issue that the NAV valuation was an inappropriate methodology and that the DCF would be the appropriate remedy was never raised. It must be borne in mind that the appellant bore the onus in respect of the valuation of the shares[15]. The appellant did not discharge this onus and did not present any valuation to the Tax Court.

[38] The respondents' experts' evidence was not challenged on the NAV valuation methodology by the appellant during cross examination and it was never put to them that the basis of their valuation was incorrect or that the DCF methodology should be used.

[39] Second, the appellant's witnesses made various factual concessions during the proceedings before the Tax Court pertaining to the determination of the market value of the NMC shares and the methodology used. The parties' respective expert witnesses had agreed on the NAV methodology and had agreed on the values, subject to one area of dispute, being the characterisation of the mineral resources.

[40] The NAV valuation methodology was used by the respondent's expert, Mr Thayes, in the Venmyn report. That methodology was accepted by the appellant's experts, Messrs Stride and Greve. The same valuation method was also used by the appellant in its notice of objection, the dismissal of which resulted in the appeal proceedings before the Tax Court. The application of the NAV valuation methodology was thus common cause in the proceedings before the Tax Court and, on the parties'

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[14] The Tax Court further held: *"Furthermore due to the agreement between the experts in exhibit B (sic* BB) *and the fact that the taxpayer had accepted the values contended for by the experts, this point has become moot".*
[15] S102(1) TAA

common understanding of the issues requiring determination, was not an issue in dispute between them.[16]

[41] Mr Thayes, the respondent's expert, testified:

> *"I can't think what I would do differently. Mine was in essence quite a simple task. It was looking at the various mineral valuations around, deciding on one that looked most reasonable and then using that as a platform on which to arrive at the equity value of U[....]".*

[42] The appellant's expert, Mr Greves agreed that the DCF basis of valuation was not appropriate due to a lack of credible information. He testified:

> *"I note that in the Venmyn report it states that any discounted cash flow valuation completed on the coal properties should be dismissed due to a lack of credible techno- economic parameters and techno-economic parameters are estimates of capital expenditure, working costs, coal grades, coal recoveries, sale prices of products, exchange rates etc, and therefore the coal property should be dismissed, sorry cash flow valuations completed on the coal properties should be dismissed due to lack of credible information and that was a view I concurred with".*

[43] The appellant in evidence agreed that the approach followed by him and the respondent in determining the market value of the shares was the same. Mr Stride, the appellant's other expert, agreed in cross examination that his approach and the respondent's approach was the same. He further testified:

> *"COURT: Let me ask you this: is it the correct approach? MR STRIDE: M'Lord, this is an approach always subject to what are the risks you're taking to get your dividend. And I am saying this is a fair approach to take …"*

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[16] per authorities in fn 10 above

[44] Third, no evidence was presented before the Tax Court that the information necessary to prepare a DCF valuation was available at the date of the share transfer. From the evidence, the DCF methodology could not be utilised due to a lack of credible evidence. The evidence before the Tax Court was that there was no feasibility study done nor any pre-feasibility study[17]. On this issue, Mr Greves testified:

> "*I've seen no pre-feasibility study or feasibility study reports on any of the coal assets. A pre-feasibility study is a study which is concluded in the exploration probably towards the middle or towards the back-end of the exploration phase development of a mineral resource or a mining property and it's an attempt to try and begin a process of detailed technical analysis, everything from detailed geological reports, competent person's reports, estimates of mineral resources. Studies on environmental matters, estimates of working costs and capital expenditure, estimates of the market and where you're going to sell your products, prices for your products, exchange rates etc. one of the benefits of a pre-feasibility report is that you can convert mineral resources into reserves. A benefit of a pre-feasibility is it also gives guidance to the team that will finalise the feasibility study".*

[45] Mr Greve also explained what a pre-feasibility study comprises, being all elements necessary to start calculating the costs and possible profit attainable from the mining endeavours. Mr Greve also testified:

[17] The definition of *"reserve"* in the SAMREC Code requires that a Pre-Feasibility Study must have been done. A "*Pre-Feasibility Study"* is defined in the SAMREC Code to mean:
"A comprehensive study of the viability of a range of options for a mineral project that has advanced to a stage at which the preferring mining method in the case of underground mining or the pit configuration in the case of an open pit has been established and an effective method of mineral processing has been determined. It includes a financial analyses based on realistic assumptions of technical, engineering, operating, economic factors and the evaluation of other relevant factors that are sufficient for a Competent Person, acting reasonably, to determine if all or part of the Mineral Resource may be classified as a Mineral Reserve. The overall confidence of the study should be stated. A Pre-Feasibility Study is at a lower confidence level than a Feasibility Study."

"The beauty about a pre-feasibility study is that it allows you to convert mineral resources to mineral reserves and mineral reserves are far more important with regard to value than resources because you starting to prove that they are economically viable, economically and technically viable to extract."

[46] From the record, it appears that a DCF methodology was for the first time used in the amended statement of claim in arbitration proceedings[18] between Sumo and U[....] some seven months after the NMC share transfer date pursuant to a dispute regarding the conclusion of a joint venture under the consultancy agreement.

[47] A challenge to the valuation methodology raises substantial new factual issues not canvassed before the Tax Court and the appellant is seeking to build a case on a foundation not previously laid[19]. If a consideration of the methodology issue is allowed and upheld, this would necessitate a remittance of the matter back to the respondent for investigation under s129(2)(c) of the TAA. The entire process would start again, requiring a fresh assessment which would be subject to objection and appeal. It is further unclear what purpose[20] would be served to remit the matter back under s 129(2)(c) of the TAA for further investigation, given that the valuation date remains 5 October 2009 at which time it was the parties' undisputed evidence that the necessary information was not available to conduct a DCF valuation.

[48] A further important consideration is the need for finality in litigation[21] and the fact that a referral would result in the nullification of the agreements between the experts and the efforts in that regard. The matter was considered by five experts before the Tax Court. If new valuations had to be obtained, it would come at significant cost to the parties with no indication that any additional information would be available. In fact, the evidence presented before the Tax Court points to the contrary. No grounds were

[18] On 17 May 2010, although the valuation document was not attached to the statement of claim in the record

[19] Ras supra 228C

[20] ABC (Pty) Ltd v Commissioner South African Revenue Services Tax court case no 13251 para [117] and [147] upheld in Africa Cash & Carry (Pty) Ltd v Commissioner South African Revenue Service ("Africa Cash & Carry") [2019] ZASCA 748 (21 November 2019)

[21] Frazer supra 558B

advanced by the appellant that the DCF valuation methodology was possible considering the facts of this matter. It would also significantly extend finalisation of the matter which relates back to the 2010 year of assessment.

[49] I am not persuaded that the consideration of the methodology issue involves no prejudice or unfairness to the respondent[22], a further reason militating against the granting of the amendment.

[50] I conclude that the appellant should not be allowed to raise this issue on appeal and that the application for such amendment must fail. The methodology issue is not a pure legal point to be determined on accepted facts, nor were the factual considerations on which it relies fully explored in the Tax Court.

[51] Even if the appellant were to be allowed to raise this issue on appeal, for the reasons already provided, the appellant has not established that his challenge to the valuation methodology should succeed on its merits.

[52] I turn to whether the Tax Court was correct in upholding the value of the mineral rights of U[....] in an amount of R233 million based on the SAMREC Code as an "inferred resource" rather than characterizing it as a "resource target" with a value of R152.7 million.

[53] In relation to the categorisation of the mineral resources, the Tax Court held:

> "We are satisfied that based on the evidence that was placed before us that the resources reflected in Table 3 of the experts' minute should be categorized as 'inferred' …".

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[22] Naude v Fraser 1998 (4) SA 539 (SCA) 558A-E; Ras and Others NNO v Van der Meulen 2011 (4) SA 17 (SCA) at 22 C, para [16]; Alexcor Ltd v The Richtersveld Community 2004 (5) SA 460 (CC) at 476H-477C, paras 43-44

[54] In reaching this conclusion, the Tax Court accepted the evidence of the respondent's expert witnesses, Mr Clay, in preference to that of the appellant's expert, Mr Greves.

[55] Mr Clay, as a geologist with almost 40 years' experience, properly established his expertise as a "competent person", as defined in the SAMREC Code, required to express an opinion on the categorisation of a mineral resource. His expertise was not disputed by the appellant. Mr Greves on the other hand did not in evidence establish the necessary five years' experience in the style of mineralisation and type or class of deposit under consideration to qualify himself as a "competent person". On his own version, he qualified as a competent person "on the fringes" and conceded that he did not have as much experience as consultants who have worked a long period of time.

[56] It is trite that before the evidence of an expert witness can be accepted, he must satisfy a court that because of his special skill, training or experience, the reasons for the opinion which he expresses are acceptable[23]. On the evidence, Mr Greves failed to do so.

[57] The evidence of Mr Clay further established a sound factual basis for his characterisation of the mineral resources as "inferred"[24]. Those reasons were expressed in the Venmyn report. His evidence was further corroborated in the report of KMJ Technical Services, which included drilling results and other information.

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[23] Menday v Protea Assurance Company Ltd 1976 (1) SA 565 (E) 569B-E

[24] The SAMREC Code defines an "inferred mineral resource" as:

"that part of a Mineral Resource for which volume or tonnage, grade and mineral content can be established with only a low level of confidence. It is inferred from geological evidence and sampling and assumed but not verified geologically or through analysis of grade continuity. It is based on information gathered through appropriate techniques from locations such as outcrops, trenches, pits, workings and drill holes that may be limited in scope or of uncertain quality and reliability….this category is intended to cover situations in which a mineral concentration or occurrence has been identified and limited measurements and sampling have been completed, but in which the data ae insufficient to allow the geological or grade continuity to be interpreted with confidence. Due to the uncertainty that may be attached to some Inferred Mineral Resources, it cannot be assumed that all or part of an Inferred Mineral Resource will necessarily be upgraded to an Indicated or Measured Mineral Resource after continued exploration."

[58] The evidence of Mr Greves was that “resource target” is a reference to *“resources which or property which have potential, some sort of theoretical tonnage which could be strived for as you move into exploration”.* The SAMREC Code does not contain a “resource target” category, nor is it contained in the SAMVAL Code. He contended that the mineral resource of U[....] should be classified as “resource targets” but did not provide a substantiated basis for this categorisation other than to rely on a lack of credible information and geoscientific confidence as there were no geological reports on the deposits and no exploration had been carried out on the properties. In evidence, the factual premise of his opinion was illustrated to be incorrect as there were indeed two reports, the existence of which was not disclosed to him by the appellant. His evidence was further inconsistent with the agreement reached by the experts who agreed on specific tonnages in respect of the various properties.

[59] A court’s approach to expert evidence is trite[25]. Considering the evidence presented, the acceptance by the Tax Court of the evidence of Mr Clay and the conclusion reached, cannot be faulted. It follows that this ground of appeal must fail.

[60] The next issue is whether the Tax Court erred in finding that the 60% discount contained in the written consultancy agreement created a contingent liability and could be disregarded for purposes of determining the market value of the NMC shares. Put differently, the issue is whether there should be a 60% reduction in the value of U[....]’s mineral resources value and the consultancy agreement could justifiably have been ignored on the basis that it was a contingent liability for purposes of valuing the NMC shares as required in terms of s31(3) of the Eighth Schedule to the ITA.

[61] On this issue, the Tax Court held:

> “*KPMG, when compiling the 2010 annual financial statements, also recognised it as a contingent liability in respect of the 2010 year which ended in February 2010. There is therefore no basis for applying a 60% discount to the mineral*

[25] Stepney supra para [16] and the authorities cited therein

values as agreed by the experts. Firstly in law the consultancy agreement does not have the effect of creating such liability and secondly, because the facts do not support such a contention. Even if it is accepted that a 60% discount should apply, the way in which it should be applied is to take into consideration 100% of the JV (R500 million) and then deduct a R300 million liability (60%). That means that the value of Brummersheim will increase to R200 million as opposed to the agreed figure between the experts of approximately R84 million. This would significantly increase the valuation".

[62] In reaching its conclusion, the Tax Court relied on the evidence that as at 5 October 2009, no feasibility study had been concluded. It also considered the wording of clause 7 of the consultancy agreement and the SAMREC code and the evidence of Mr Greve and found:

"*Therefore on 5 October 2009 the consultancy agreement did not create any liability for U[....]. At best it was a contingent liability, which in our view cannot be taken into account for purposes of valuing the mineral resources of U[....]. This was confirmed by Andy Mc Donald".*

[63] Clause 7 of the consultancy agreement provided:

"If at any time during the term of this Agreement, the company [Sumo Coal], in its sole discretion and opinion, resolves that any coal reserves identified by the consultant [U[....]] through providing the Services, are viable for coal mining purposes the company and consultant shall set up a joint venture, either through a joint venture agreement or through the incorporation of a special purpose company incorporated for this purpose (the 'JV') to conduct coal mining activities in respect of the identified reserves it being agreed that the salient features of the JV shall be as follows:
7.1 The company will have 60 per cent … participation interest in the JV and the consultant will have 40 per cent … participation interest in the JV."

[64] The finding of the Tax Court that the liability was contingent, cannot be faulted. Clause 7 of the consultancy agreement set three conditions for the conclusion of a joint venture between U[....] and Sumo, being whether: (i) coal reserves[26] were identified; (ii) it was viable for coal mining[27]; and (iii) Sumo Coal decided to request U[....] to enter into a joint venture.

[65] The evidence did not establish that at the date of transfer of the shares on 5 October 2009, either the first or second of these conditions had been fulfilled, having regard to the evidence and the relevant definitions in the SAMREC Code. No evidence was in fact presented that the conditions were fulfilled. Regarding the third condition, at best there was a dispute between Sumo and U[....] on 5 October 2009 regarding whether U[....] should conclude a joint venture with Sumo in respect of Brummersheim. This dispute culminated in arbitration proceedings which occurred well after the date of the transfer of the shares.[28]. No evidence was presented that a joint venture was in fact formed. There was no misdirection of fact or law on the part of the Tax Court in concluding that the liability under the contingency agreement was contingent.

[66] The appellant's expert, Mr Greve, contended that a 60% discount to the value determined by the experts (Exhibit "BB") should be applied across the board. This contention is flawed for various reasons and was correctly not accepted by the Tax Court. First, it was not proved that the conditions of clause 7 of the consultant agreement pertaining to the joint venture were fulfilled. Second, the evidence established that the 60% discount would only apply in respect of one property, namely Brummersheim, and not all the properties valued by the experts, considering the

[26] Mineral reserve and proved mineral reserve as defined in the SAMREC Code, which must be economically mineable. Under the Code the definition of "reserve" requires a pre-feasibility study to have been conducted, a term defined in the Code

[27] Economically mineable as defined in the SAMREC Code

[28] It was common cause that the amended statement of claim in the arbitration proceedings was delivered on 17 May 2010, the arbitration award was made on 6 September 2010 and the settlement agreement between U[....] Coal (Pty) Ltd and Sumo was concluded on 22 November 2011.

wording of the settlement agreement[29] and the evidence of Mr Greve, the appellant's expert, that the only election was in respect of the Brummersheim property. In terms of the agreement between the experts, the Brummersheim property constituted R84,5 million of the total value of R232 million testified to by Mr Clay.

[67] The respondent's argument, accepted by the Tax Court, was that even if the settlement agreement was taken into account, the effect thereof would be to increase the value of U[....] and not to discount the value by 60%. This is because the R300 million constituted 60% of the anticipated future profits of the Brummersheim mine. Therefore, 100% of the expected profits would be R500 million. In terms of the settlement agreement, R300 million is payable to Sumo, which represent Sumo's 60%. The remaining R200 million represents U[....]'s 40% share in the profits.

[68] The appellant's expert, Mr Stride, further conceded in cross examination that if the R300 million liability was taken into account, the total value of the Brummersheim property of R500 million should also be taken into account as found by the Tax Court. The remaining R200 million is substantially more than the R84.5 million value of the mineral resource of U[....] agreed by the experts as the Brummersheim value. It cannot be concluded that there was any misdirection of fact or law by the Tax Court on this issue.

[69] The appellant in argument did not expressly attack the factual findings of the Tax Court. Rather it was argued that the Tax Court overlooked the entire concept of economic value in focussing on the contingent nature of the liability and how provision was made in the financial statements of U[....]. The appellant's argument on this issue again raised the contention that the Tax Court did not consider the true economic or market value of the NMC shares based on a willing buyer willing seller scenario and challenged the valuation methodology adopted. As stated previously, a challenge to the

[29] It was common cause that the R300 million settlement amount in terms of the settlement agreement dated 22 November 2011 was in lieu of Sumo Coal's entitlement, in terms of the consultancy agreement, to share in future profits in respect of one property, Brummersheim. The settlement agreement was made an award by the arbitrator on 6 September 2010

valuation methodology was not an issue before the Tax Court and cannot be raised on appeal. The challenge now raised by the appellant seeks to make out a foundation for his case not made out before the Tax Court.[30]

[70] The evidence of Mr McDonald, the respondent's expert, testifying in respect of Mr Greve's contention that the settlement agreement (R300 million) should be deducted from the mineral asset value was accepted by the Tax Court:

> *"Deduction of the Settlement Agreement to arrive at the final value is incorrect, for two reasons – it arose after the Transaction Date and in doing so confuses the effect of two valuation approaches. The R300 million settlement amount agreed between U[....] and Sumo on 22 November 2011 related to future profits from the Brummersheim operation and release of U[....] from all other liabilities pertaining to the consultancy agreement. The R300 million was a compromise relative to the approximate R344 million due to Sumo for its 60% share per the Consultancy Agreement based on the discounted cash flow in schedule B attached to the Amended Statement of Claim. Deduction of the R300 million settlement from the value derived from the Market Approach is inappropriate, as it confuses the effect of two different valuation approaches where two valuation techniques are mixed up, i.e. like for like is not compared. Thus R562 million per the Venmyn report less R300 million is not correct. The only way that the settlement amount of R300 million can be considered is if it is deducted from the value determined for the Brummersheim operation based on a discounted cash flow. If the R300 million represents 60% of the value for Brummersheim, the total value for Brummersheim would be at least R500 million (viz the value of R119 million assigned in the Venmyn report)."*

[71] The findings of the Tax Court on these issues cannot be faulted. I conclude that this ground of appeal must fail.

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[30] Ras supra 228C; Administrateur Transvaal v Theletsane supra 195F-196I and 200G

[72] The last issue is whether there is any basis to interfere with the granting of the costs orders by the Tax Court that the appellant be liable for 50% of the costs of the appeal and the qualifying fees of certain experts. There is in my view no basis to interfere with the exercise of its discretion[31] by the Tax Court.

[73] The normal principle is that costs follow the result. There is no basis to deviate from this principle. Considering the complexity of the issues involved, the employment of two counsel was justified.

[74] The following order is granted:

The appeal is dismissed with costs, including the costs of two counsel where employed.

EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG

I AGREE

M SENYATSI
JUDGE OF THE HIGH COURT
JOHANNESBURG

I AGREE

B WANLESS
ACTING JUDGE OF THE HIGH COURT

[31] S 130 TAA

JOHANNESBURG

APPEARANCES

DATE OF HEARING	: 08 February 2021
DATE OF JUDGMENT	: 30 April 2021
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