REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO. A421/01

In the matter between:

STEER PROPERTY SERVICES (PTY) LIMITED
T/A STEER & CO Appellant

and

THE ESTATE AGENCY AFFAIRS BOARD Respondent

JUDGMENT : 22 FEBRUARY 2002

VAN HEERDEN J:

The appellant is a company carrying on business as an '*estate agent*' as defined in section 1 of the Estate Agency Affairs Act 112 of 1976, as amended (hereinafter referred to as '*the Act*'). The respondent, the Estate Agency Affairs Board (hereinafter referred to as '*the Board*'), is a juristic person established in terms of section 2 of the Act. Section 8B of the Act empowers the Board to appoint committees of inquiry, while section 30(2) provides that the Board or a committee of inquiry '*may in the prescribed manner bring and investigate any charge of conduct deserving of sanction against any estate agent*'. Section 30(1) deals extensively with what acts and/or omissions by an estate agent constitute '*conduct deserving of sanction*'.

On 19 October 2000, the appellant was found by a committee of inquiry appointed by the Board to have contravened section 30(1)(c) of the Act, in that

the appellant had failed to pay moneys due by it '*to the Board or in respect of the fund within one month after such moneys became due*'. The '*fund*' referred to in section 30(1)(c) is the Estate Agents Fidelity Fund established under section 12(1) of the Act (hereinafter referred as '*the Fund*'). In terms of section 12(2) of the Act, the Fund is controlled and managed by the Board, which is obliged to '*utilise the moneys in the fund in accordance with the provisions of'* Chapter II of the Act.

Acting in terms of section 30(3) of the Act, the abovementioned committee of inquiry withdrew the Fidelity Fund Certificate of the appellant, but suspended such withdrawal for a period of 30 days on condition that '*the balance of R234 498.00 plus interest be paid to the Board within 30 days*'.

On 8 January 2001, the appellant, acting in terms of section 8C(1) of the Act, lodged an appeal to the Board against the decision of the committee of inquiry, such appeal relating both to its '*conviction*' by the committee of a contravention of section 30(1)(c) of the Act, as also the '*sentence*' imposed upon it by the committee in terms of section 30(3). On 14 May 2001, the Board advised the appellant in writing that its appeal against the '*conviction and sentence of the relevant committee of inquiry of the Board was duly considered by the Board at its recent meeting held on 8 May, 2001*' and that, '*after having had due consideration of the papers which served before the committee of inquiry* ***a quo****, the transcript of the hearing, the written reasons for the decision of the committee of inquiry concerned and the notice of appeal filed … it was resolved by the Board, pursuant to the provisions of section 8C(2)(a) that the finding and sentence of the committee of inquiry of the Board be confirmed.*' According to this written notification, the Board was of the view that the reasons for the finding of the committee of inquiry concerned correctly reflected the position and it accordingly aligned itself fully with these reasons.

The appellant now appeals to this court against both its '*conviction*' and the penalty imposed upon it. Its right of appeal to this court arises from section 31 of the Act, which section provides as follows:

> '*(1) Any person who feels aggrieved by any decision taken by the Board in the exercise of its powers under section 8C, 16, 27, 28 or 30 may at any time after he or she became aware of such decision but not later than one month after the Board –*

a) *has informed him or her in writing of such decision and upon payment of the prescribed fees, request the Board in writing to furnish him or her in writing with its reasons for such decision;*

b) *has in accordance with paragraph (a) furnished him or her with its reasons for such decision and after notice to the Board, appeal to the court against such decision, and the court may thereupon –*

i) *dismiss the said appeal;*

ii) *if it is of the opinion that the Board has not acted in accordance with the relevant provision of the Act, give an order opposite to the decision of the Board or amending the decision of the Board;*

iii) *refer the matter back to the Board for further consideration; or*

iv) *give such other order, including any order as to costs, as it may deem fit.*'

As submitted by Mr **Binns-Ward SC**, who represented the Board in the present proceedings, it appears from the South African case law that these appeal proceedings in terms of section 31 of the Act are *sui generis*, combining certain elements of judicial review of administrative action and certain elements of civil appeal proceedings. See, in this regard, *Lek v Estate Agents Board* 1978 (3) SA

160 (C), *Hanley v Estate Agents Board* 1978 (3) SA 281 (T) at 285G-286G and *Estate Agents Board v Lek* 1979 (3) SA 1048 (A) at 1065C-E.

It is common cause that the appellant was not given any notice of the date of the hearing of its '*appeal*' by the Board, nor was it given the opportunity to make representations at the hearing of such appeal. In its Notice of Appeal in terms of section 31 of the Act, one of the grounds of appeal relied upon by the appellant was that the Board '*erred in not hearing the appeal in the prescribed manner by not conducting a hearing and by not affording the appellant an opportunity to attend the hearing and address the Board at such hearing*'.

Section 8C(2) of the Act provides that an appeal against the decision of a committee of inquiry '*shall*' be heard by the Board '*in the prescribed manner*'. The word '*prescribed*' is defined in section 1 as meaning '*prescribed by regulation*', and section 33(1)(jB) provides that the Minister of Trade and Industry may, after consultation with the Board, make regulations '*prescribing the procedure to be followed in respect of an appeal to the Board and the manner in which the appeal must be heard*'. It is, however, common cause that, at the time of the hearing of the appeal by the Board, (and, it would appear, at the time of the present proceedings) no such regulations had been promulgated. Neither in its Notice of Appeal in terms of section 31 of the Act, nor in the original heads of argument filed on its behalf in the present proceedings, was it contended by the appellant that the absence of the procedural regulations contemplated by section 8C(2) affected the competence of the Board to consider an appeal under the substantive provisions of section 8C.

However, in the supplementary heads of argument filed on behalf of the appellant, Ms **Fichardt**, counsel for appellant before this court, argued that, in view of the peremptory language of section 8C(2), read together with section 33(1)(jB), the Board is itself not empowered to determine the procedure to be followed in hearing an appeal against the decision of a committee of inquiry, and that, in the absence of regulations made by the Minister prescribing the procedure to be followed, **any** procedure adopted by the Board, as well as **any** decision taken by the Board pursuant thereto, would be *ultra vires* the provisions of the Act and accordingly null and void.

Mr **Binns-Ward**, on the other hand, submitted that, in the absence of regulations made by the Minister in terms of section 33(1)(jB), the adoption by the Board of *ad hoc* procedures compliant with the rules of natural justice would be in order and that, although the appellant had admittedly not been given any oral hearing by the Board, the rules of natural justice (in particular, it would appear, the *audi alteram partem* principle) had been complied with, in that the appellant's written notice of appeal in terms of section 8C(1) of the Act constituted a combination of grounds of appeal and arguments in support thereof. Mr **Binns-Ward** argued further that, even **if** this court were to find that the decision of the Board, in respect of both the '*conviction*' and the '*sentence*' was indeed vitiated by procedural irregularities, this court could, and indeed should, substitute its own finding for that of the Board in respect of the appeal from the decision of the committee of inquiry. I will return to this matter at a later stage.

The salient facts on which the committee of inquiry based its decision are common cause.

In terms of section 32(1) of the Act, the appellant, trading as an estate agent, is obliged to open and keep one or more separate trust accounts with a bank and deposit therein all trust moneys held or received by it or on its behalf. Pursuant to this section, the appellant paid all trust moneys received by it for the financial year ending 28 February 1999 into various trust accounts opened by it at various financial institutions. Interest in the total amount of R670 420.33 (R693 396.33, less R22 976.00 paid out in terms of express written mandates) accrued in respect of the said trust monies for the financial year ending 28 February 1999.

Section 32(2)(c) of the Act provides that interest on moneys deposited in trust accounts referred to in section 32(1) '*shall, subject to the express terms of the mandate in question, which shall be in writing, be paid **to the fund** by the estate agent concerned*' (my emphasis), while section 32(2)(d) provides that the Board '*may in the prescribed circumstances refund to an estate agent a prescribed portion of the interest paid by such estate agent **to the fund** in terms of paragraph (c)*' (again my emphasis). In terms of Regulations made by the Minister in terms of the Act, headed '*Trust Account of an Estate Agent and Investment of Trust Moneys*', under Government Notice R1415 (Regulation Gazette 3226, Government Gazette 7648) dated 3 July 1981 (substituting Regulation 4 of the Regulations published under Government Notice R1472 (Regulation Gazette 2506, Government Gazette 5694) dated 29 July 1977 -

> '*Any interest received by or credited to an estate agent in respect of any period ending on the last day of February in each year and payable **to the fund** in terms of section 32(2)(c), shall be paid regularly and promptly but in any event not later than the last day of May in that year, **to the fund or its nominee***' (emphasis added).

Regulation 4.2 of the same Regulations published on 3 July 1981 provides that the Board '*may, in terms of section 32(2)(d), refund 50% of all interest paid **to the fund** in terms of regulation 4.1, to such estate agent*' (again my emphasis).

It would appear that, in practice, estate agents are permitted by the Board to retain 50% of the interest payable by them to the Fund in terms of Regulation 4.1, read together with section 32(2)(c) of the Act, as an amount '*refunded*' to them in terms of Regulation 4.2, read together with section 32(2)(d) of the Act. In terms of this practice, estate agents in reality **pay** over to the Board only 50% of the interest due by them to the Fund in terms of Regulation 4.1 and section 32(2)(c), while retaining the balance (the other 50%) as an amount '*refunded*' to them in terms of Regulation 4.2 and section 32(2)(d). Thus, for the financial year ending 28 February 1999, the appellant should have paid over to the Board, in respect of the Fund, the sum of R335 210.17 by no later than 31 May 1999. Indeed, on 17 August 1999, the Board advised the appellant that an amount constituting 50% of the abovementioned total interest accrued for the financial year ending 28 February 1999 (namely the amount of R335 210.17) was payable by the appellant '*to the Board*' – presumably in the Board's representative capacity as the juristic person controlling and managing the Fund.

Instead of paying the abovementioned amount of R335 210.17, the appellant paid over only the amount of R100 712.17, leaving an unpaid balance of R234 498.00. The appellant's failure to pay this latter amount to the Fund (or to the Board in its representative capacity) gave rise to the disciplinary proceedings instituted against the appellant, which proceedings culminated in the abovementioned decision of the committee of inquiry on 19 October 2000.

The appellant's explanation for its failure to pay the outstanding balance of R234 498.00 was the assertion by it of a claim that it was entitled to deduct from the amount admittedly due by it to the Fund in terms of Regulation 4.1 (read together with section 32(2)(c)), the amount of R234 498.00 (R205 700.00 plus VAT in the amount of R28 798.00) in respect of fees levied by it for administering the trust moneys held in 2 057 trust accounts (ie a fee of R100.00 per annum per account, plus VAT). Indeed, the appellant rendered a so-called '*tax invoice*' dated 21 June 1999 to the Board for this amount, headed '*Management of deposits for Estate Agency Board*', which invoice was received by the Board on 7 September 1999. According to the appellant, it was entitled to set-off the sum of its '*fair and reasonable*' costs and expenses (as quantified by itself) of administering the trust accounts held by and administered by it in terms of section 32 of the Act against the amount of accrued interest due to the Fund in terms of section 32(2)(c) and (d) of the Act, read together with Regulations 4.1 and 4.2.

During the hearing before the committee of inquiry, the representative appearing on behalf of the Board led no evidence, but simply produced the correspondence and other documents upon which the Board relied. The appellant, on the other hand, presented the evidence of a certain Mr John van der Spuy, a director of the appellant, who also deposed to the main affidavit filed in support of the current proceedings.

As pointed out by Mr **Binns-Ward**, there was no suggestion whatsoever in the documentation or in the evidence given by Mr Van der Spuy before the committee of inquiry that the Board had contractually agreed to pay the '*administration charge*' levied by the appellant in respect of the financial year ending 28 February 1999. On the contrary, it appears from the record of the proceedings before the committee of inquiry and from the correspondence between the parties annexed to Mr van der Spuy's affidavit, that the appellant unilaterally '*decided*', for the first time in 1999, to levy these administration fees. From the correspondence attached to the appellant's papers before this court, it would appear that the Board was informed of the appellant's decision in this regard only in September 1999 (see Annexure JVS 5 to the Founding Affidavit deposed to by Mr Van der Spuy).

During the hearing before the committee of inquiry, the basis upon which these administrative charges were claimed to be recoverable by the appellant from the Board was stated by the appellant's attorney to be a '*common law right*'. The precise nature and origin of this so-called '*common law right*' were not identified by the appellant's attorney, such attorney merely stating that '*the normal* [rule] *in practice is if you do work for the benefit of a third party, you're entitled to charge for that work a reasonable remuneration, a reasonable compensation, and that is what Steer & Co have done, and we believe that they are entitled to do it according to law*'.

In the notice of appeal lodged by the appellant in terms of section 8C(1) of the Act, the basis of the appellant's alleged claim against the Board was described as '*a legitimate expectation*'. However, as convincingly submitted by Mr **Binns-Ward** in the initial heads of argument filed on behalf of the appellant, the statements in support of this basis in the notice of appeal were highly unconvincing and, unsurprisingly, Ms **Fichardt** placed no reliance upon this basis in the proceedings before this court.

I am in full agreement with Mr **Binns-Ward** that the appellant failed to establish any legal basis for the existence of an obligation on the Board to pay to the appellant the amount claimed in respect of administrative charges. As indicated above, there is no question of the conclusion of an express contract between the appellant and the Board in this regard. Insofar as the appellant may seek to rely upon a tacit contract (see the appellant's reliance on a '*tacit and/or implied mandate*' in its plea and counterclaim in the action instituted by the Board against the appellant, for payment of the outstanding moneys, after the completion of the disciplinary inquiry), it is my view that the appellant has certainly not satisfied either one of the two apparently conflicting tests for inferring the existence of a tacit contract. These two tests were described by Comrie J (with whom Ngwenya J concurred) in *Muller v Pam Snyman Eiendomskonsultante (Pty) Ltd* 2001 (1) SA 313 (C) as follows (at 320A-H):

'… The first is the "no other reasonable interpretation" test, which was enunciated by Corbett JA in the Ocean Commodities case [***Standard Bank of South Africa Ltd v Ocean Commodities Inc*** 1983 (1) SA 276 (A)] *at 292B-C:*

> "In order to establish a tacit contract it is necessary to show, by a preponderance of probabilities, unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged. It must be proved that there was in fact ***consensus ad idem****."*

The second test is the "most plausible probable conclusion" test which was stated by the same Learned Judge of Appeal in the ***Joel Melamed*** *case* **supra** [***Joel Melamed & Hurwitz v Cleveland Estates (Pty) Ltd*** 1984 (3) SA 155 (A)] *at 165:*

> *"In this connection it is stated that a court may hold that a tacit contract has been established where, by a process of inference, it concludes that the most plausible probable conclusion from all the relevant proved facts and circumstances is that a contract came into existence …"*

The preferred test was left open in that case and in the subsequent decisions of that court. However, Corbett JA added the following comments at 165C-F of ***Joel Melamed****:*

> "It may be that in the light of this the principle as quoted above from ***Standard Bank of SA Ltd v Ocean Commodities Inc (supra)*** *requires reformulation. In this regard, however, there is this point*

> *to be borne in mind. While it is perfectly true that in finding facts or making inferences of a fact in a civil case the court may, by balancing probabilities, select a conclusion which seems to be the more natural or plausible one from several conceivable ones, even though that conclusion is not the only reasonable one, nevertheless it may be argued that the inference as to the conclusion of a tacit contract is partly, at any rate, a matter of law, involving questions of legal policy. It appears to be generally accepted that a term may not be tacitly imported into a contract unless the implication is a necessary one in the business sense to give efficacy to the contract … By analogy it could be said that a tacit contract should not be inferred unless there was proved unequivocal conduct capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged. Be that as it may, this is not the occasion to resolve those problems."*

It seems to me, with respect, that proof of the primary facts on a balance of probabilities is required by either test, and that the main difference between them lies in the strength of the inferences to be drawn from the facts so proven. As Corbett JA observed, that would at least in part be influenced by considerations of legal policy. My own preference, writing as a single judge of first instance, is for the so-called traditional test, the only reasonable interpretation test, provided that the test is applied in a *common sense and businesslike way …*'

(Cf. the decision of the Supreme Court of Appeal in *Gordon Lloyd Page & Associates v Rivera & Another* 2001 (1) SA 88 (SCA) at 95H-96B where Harms JA, purporting to '*restate the ordinary test for proof of a tacit contract*', stated that '*since this case is concerned with the test for absolution at the end of a plaintiff's case … it was, at that stage, at least necessary for the appellant to have produced evidence of conduct of the parties which justified a reasonable inference that the parties intended to, and did, contract on the terms alleged, in other words, that there was in fact* ***consensus ad idem***.' See further *Bourbon-Leftley & Andere v WPK (Landbou) Bpk* 1999 (1) SA 902(C) at 925B-D, *Samcor Manufacturers v Berger* 2000 (3) SA 454 (T) at 461D-G and *Alzu Ondernemings (Edms) Bpk v Agricultural and Rural Development Corporation & Another* [2001] 2 All SA 368 (T) at paras 14-16.)

There would also appear to be no **statutory** basis for the appellant's alleged claim against the Board for administrative charges and no reliance was placed by the appellant upon any such statutory basis. Furthermore, the appellant had no scope to bring a claim based on unjustified enrichment and did not attempt to do so. The '*services*' which appellant claims to have rendered did not occur *sine causa* – the appellant was statutorily obliged to establish and administer the relevant trust accounts and to account to the Fund for the interest accrued upon such accounts (see section 32 of the Act). Moreover, as argued by Mr **Binns-Ward**, the '*service*' of administering the trust accounts would, in any event, appear to be more sensibly characterised as a service rendered to the estate agent's clients and trust account creditors than to either the Board or the Fund.

In view of the above, as the appellant in my view failed to establish any legal basis for the existence of any obligation on the Board to pay the amount claimed by it in respect of administrative costs, the alleged fairness and reasonableness of such administrative charges as contended for by Ms **Fichardt** is totally irrelevant and was correctly regarded as such by the committee of inquiry.

The failure on the part of the appellant to establish any legal basis for its claim against the Board in respect of administrative services allegedly rendered by it to the Board is fatal to the appellant's reliance upon set-off. Moreover, even if the appellant **were** to be able to establish a legal basis for any such claim against the Board, the appellant would not, in my view, be able to set-off such a claim against **the Board** against its (ie the appellant's) statutory obligation (in terms of sections 32(2)(c) and (d) of the Act, read with Regulations 4.1 and 4.2) to pay to **the Fund** interest accrued on moneys deposited in trust accounts by it.
As indicated above, the Fund is established in terms of section 12(1) of the Act, paragraph (e) of which provides that '*interest paid to **the fund** in terms of section 32(2)(c)*' (my emphasis) shall be paid into the Fund. In terms of section 12(2), '*the fund shall be controlled and managed by the Board*, *which shall utilise the moneys in the fund in accordance with the provisions of this Chapter*' (ie Chapter II of the Act).

The nature of the payments which the Board, acting in its representative capacity as the administrator of the Fund, is empowered to make from the Fund is closely regulated by Chapter II of the Act (see, in particular, sections 12B, 12C, 13, 18 and 19 of the Act). As pointed out by Mr **Binns-Ward**, it is clear from the provisions of sections 9 and 10 of the Act that the Board is required to keep its '*business accounts*' separate from the Estate Agents Fidelity Fund account provided for under section 12(3) of the Act.

For set-off to occur, there must be reciprocity of debts – in other words, A cannot set-off against B a debt due by C. Accordingly, a debtor is not allowed to rely by way of set-off on a liability of his creditor to a third party. For the purposes of set-off, a debt owed by or to a person in his or her individual capacity cannot be set-off against a debt owed to or by the same person in a representative capacity. (See, in this regard, Van der Merwe et al *Contract: General Principles* (1993) 389 and Christie *The Law of Contract in South Africa* 4 ed (2001) 557-558, and the authorities cited by these writers.) Thus, any claim which the appellant may have against **the Board** for services allegedly rendered by it to the Board could not be set-off against the amount owed by the appellant to the Board in its representative capacity as administrator of the Fund in respect of interest accrued on moneys deposited in trust accounts held and managed by the appellant in terms of section 32 of the Act.

In view of the above, it would appear that the committee of inquiry correctly found that the appellant had '*failed to pay any moneys due by* [it] *to the Board or in respect of the fund within one month after such moneys became due*' and was, accordingly, '*guilty*' of conduct deserving of sanction in terms of section 30(1)(c) of the Act.

As regards the appeal against the '*sentence*' imposed upon the appellant by the committee of inquiry, Ms **Fichardt** argued that the condition of suspension of the withdrawal of the appellant's fidelity fund certificate, in particular, that the balance of R234 498.00 plus interest be paid within 30 days, **in effect** amounts to a fine imposed by the committee of inquiry upon the appellant. According to Ms **Fichardt**, this '*fine*' is in excess of the prescribed statutory limit of R25 000.00 in respect of a fine which may be imposed by the Board or a committee of inquiry (as the case may be) in terms of section 30(3)(b) of the Act.

I agree with Mr **Binns-Ward** that this argument is lacking in merit. The '*sentence*' imposed by the committee of inquiry was a suspended withdrawal of the appellant's fidelity fund certificate. Section 30(3) of the Act provides as follows:

> '*When any estate agent is found guilty of conduct deserving of sanction by the Board or a committee of inquiry, the Board or a committee of inquiry (as the case may be) may –*
>
> *a) withdraw the fidelity fund certificate of such estate agent…*
>
> *b) impose on such estate agent a fine not exceeding R25 000,00 or such higher amount as may be prescribed by the Minister by notice in the Gazette in order to counter the effect of inflation, and which is payable to the Board;*
>
> *c) reprimand such estate agent:*
>
> *Provided that a fine or any portion thereof or the withdrawal of any fidelity fund certificate may be suspended for a period not exceeding three years and on such further conditions as the Board or committee of inquiry (as the case may be) may determine.*' .'

To my mind, it is quite clear from the papers before this court that the nature of the condition of suspension of the appellant's fidelity fund certificate imposed by the committee of inquiry in the present case was the purging by the appellant of its contravention of section 30(1)(c) of the Act within 30 days. The appellant had to purge its misconduct by payment of the outstanding balance of R234 498.00, plus interest thereon (presumably calculated from 1 June 1999 in terms of Regulation 4.1), still owing by it to the Fund in respect of the financial year ending 28 February 1999, in terms of section 32(2)(c) of the Act. The argument that this condition amounted **in effect** to a fine is completely unacceptable. It is perfectly clear from the record of the hearing before the committee of inquiry, as also from the reasons given by the committee of inquiry for its decision, that payment by the appellant of the outstanding balance, plus interest, would discharge the appellant's outstanding statutory obligation *vis à vis* the Fund in terms of section 32(2)(c) of the Act, read together with Regulation 4.1. The analogy drawn by my learned brother presiding of the suspension of a period of imprisonment imposed on a person convicted of failing to comply with a maintenance order against him or her on condition that the amount of maintenance in arrears is paid to the maintenance creditor is an apt one in this regard.

Viewed in this light, the '*sanction*' imposed upon the appellant by the committee of inquiry was eminently fair and reasonable. Subject to it discharging its outstanding statutory obligation to the Fund within the 30 day period provided for by the condition of suspension, the withdrawal of the appellant's fidelity fund certificate would not take effect and the appellant would suffer no effective penalty whatsoever.

To return to the procedural considerations relating to the appeal to the Board against the decision of the committee of inquiry, in terms of section 8C of the Act, I am prepared to accept in favour of the appellant that, in view of the peremptory language of section 8C(2), read together with section 33(1)(jB), the Board is itself not empowered to determine the procedure to be followed in hearing an appeal against the decision of a committee of inquiry, and that, in the absence of regulations made by the Minister prescribing the procedure to be followed, **any** procedure adopted by the Board, as well as **any** decision taken by the Board pursuant thereto, would be *ultra vires* the provisions of the Act and accordingly null and void. Moreover, even if one were to accept that, in the absence of regulations made by the Minister in terms of section 33(1)(jB), the adoption by the Board of *ad hoc* procedures in accordance with the rules of natural justice would be in order, I am of the view that, by failing to even notify the appellant of the date of the hearing by the Board of its appeal against the decision of the committee of inquiry and to give the appellant the opportunity to make full written or oral representations at the hearing of such appeal, the Board failed to comply with the *audi alteram partem* principle. This failure to my mind constitutes a material irregularity, vitiating the decision of the Board.

I agree with Ms **Fichardt** that the argument by Mr **Binns-Ward** that the a*udi alteram partem* principle was complied with in that the Notice of Appeal lodged by the appellant in terms of section 8C(1) of the Act '*constituted a combination of grounds of appeal and arguments in support thereof*' cannot be accepted. As submitted by Ms **Fichardt**, the Notice of Appeal does not deal, in any way, with the record of the proceedings before the committee of inquiry or make any submissions in respect thereof. It can therefore not be regarded as constituting '*argument*' by the appellant. Furthermore, the appellant was not afforded any opportunity of supplementing its Notice of Appeal, nor was it advised by the Board that the notice of appeal would, in itself, be regarded as '*argument*'.

It follows from the above that the Board's decision in respect of both the finding and the sentence imposed by the committee of inquiry must be regarded as vitiated by procedural irregularities and, accordingly, null and void.

This is not, however, the end of the matter. As indicated above, the proceedings before this court must be regarded as *sui generis*, combining elements of judicial review of administrative action and of civil appeal proceedings. The wide powers of this court in such proceedings are evident from the provisions of section 31(1) of the Act. With reference to, in particular, section 31(1)(b)(ii) of the Act and the powers of the court in judicial review of administrative action, Mr **Binns-Ward** submitted that this would be a proper case for the court to substitute its decision for that of the Board.

As a general principle, a review court, when setting aside a decision of an administrative authority, will not substitute its own decision for that of the administrative authority, but will refer the matter back to the authority for a fresh decision. In determining whether there are exceptional circumstances justifying the review court in substituting its own decision for that of the relevant administrative organ, the overriding principle is that of fairness to both sides (see, in this regard, *Masamba v Chairperson, Western Cape Regional Committee, Immigrants Selection Board & Others* 2001 (12) BCLR 1239 (C) at 1259D-1260E, and the authorities there cited). Although it would appear that there is no *numerus clausus* of situations in which a court may substitute its own decision for that of the administrative organ concerned, a number of guidelines have crystalised from the South African case law in this regard, which guidelines were usefully summarised by Hlophe J (as he then was) in *University of Western Cape & Others v Member of the Executive Committee for Health and Social Services & Others* 1998 (3) SA 124 (C) at 131D-J:

'*Where the end result is in any event a foregone conclusion and it would* *merely be a waste of time to order the tribunal or functionary to reconsider the matter, the Courts have not hesitated to substitute their own decision for that of the functionary … The Courts have also not hesitated to substitute their own decision for that of a functionary where further delay would cause unjustifiable prejudice to the applicant … Our Courts have further recognised that they will substitute a decision of a functionary where the functionary or tribunal has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again… It would also seem that our Courts are willing to interfere, thereby substituting their own decision for that of a functionary, where the Court is in as good a position to make the decision itself. Of course the mere fact that a Court considers itself as qualified to take the decision as the administrator does not* ***per se*** *justify usurping the administrator's powers or functions. In some cases, however, fairness to the applicant may demand that the Court should take such a view … the categories where the Court would be prepared to substitute its own decision for that of an administrative body are not closed. Depending on the circumstances of each particular case, it may be fair for the Court to take the decision itself rather than refer it back to the appropriate functionary.*'

In this case, the facts in question are not subject to dispute and the decision of the committee of inquiry turned entirely on questions of law. Sending the matter back to the Board in such circumstances will result in purposeless delay and administrative inconvenience and expense, particularly in view of the fact that there are still no procedural regulations governing the hearing of an appeal by the Board in terms of section 8C. This is a situation where the court is as well or better qualified to make the decision as the Board.

As regards the costs of the current proceedings, Ms **Fichardt** argued that, in view of the procedural irregularities vitiating the decision of the Board, as also the failure by the Board to furnish the appellant with proper reasons for its decision (as required by section 8C(1)(b) of the Act), the respondent should be ordered to pay the costs of the appeal proceedings, even if this court were to set aside the decision of the Board and substitute such decision by, in effect, confirming the decision of the committee of inquiry and the sanction imposed by it on the appellant.

Mr **Binns-Ward**, on the other hand, argued that should the court follow this route, then the Board would have achieved substantial success in these proceedings and that, in accordance with the general rule that costs should follow the event, the appellant should be ordered to pay the Board's costs in these proceedings. Mr **Binns-Ward** further submitted that, in the light of the stance adopted by the Board from the very outset in respect of the appellant's alleged claim against it for administrative charges, the subsequent conduct of the appellant, both in the hearing before the committee of inquiry and in the subsequent proceedings, was indicative of a lack of *bona fides* on its part. This being so, submitted Mr **Binns-Ward**, the equities favoured the award of costs against the appellant.

It is trite law that an award of costs is in the discretion of the court and that even the general rule, namely that costs should follow the event, is subject to the overriding principle. This discretion must be exercised judicially upon a consideration of the facts of the case. In essence, it is a matter of fairness to both sides. (See, in this regard, A Cilliers 'Costs' in Joubert (ed) *LAWSA* Volume 3 Part 2 (First reissue, 1997) para 292 and the authorities there cited.)

Although the Board may be said to have succeeded on the merits in the present proceedings, the appellant has been successful in its attack upon the procedural aspects of the decision taken by the Board. This being so, the fair outcome is, in my view, that no order as to costs should be made.

In the circumstances, I would recommend that the following order be made:

1. **The decision of the Estate Agency Affairs Board taken on 8 May 2001 confirming the finding of, and the penalty imposed by, the committee of inquiry constituted by the Board dated**

19 October 2000 is hereby set aside.

2. **The decision of the committee of inquiry dated 19 October 2000 to the effect that the appellant contravened section 30(1)(c) of the Estate Agency Affairs Act 112 of 1976 by failing to pay moneys due by it '*to the Board or in respect of the Fund within one month after such moneys became due*' is hereby confirmed.**

3. **The sanction imposed by the committee of inquiry upon the appellant, namely that the Fidelity Fund certificate of the appellant be withdrawn, but that such withdrawal be suspended for a period of 30 days on condition that the outstanding balance of R234 498.00, plus interest thereon, be paid to the Board within 30 days, is hereby confirmed.**

4. **Each party is to pay its own costs of these proceedings.**

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B J VAN HEERDEN

VAN ZYL J: I agree and it is so ordered.

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D H VAN ZYL

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO. A421/01

In the matter between:

STEER PROPERTY SERVICES (PTY) LIMITED	Plaintiff
and	
THE ESTATE AGENCY AFFAIRS BOARD	Defendant

Adv for Plaintiff	Adv L F Fichardt
Attorneys Ince Wood & Raubenheimer	
Adv for Defendant	Adv A G Binns-Ward SC
Attorneys	Pohl & Stuhlinger
Date(s) of Hearing	22 February 2002
Judgment	22 February 2002

CORAM : VAN ZYL et VAN HEERDEN JJ

JUDGMENT : VAN HEERDEN J (VAN ZYL J concurs)