



CASE NUMBER: 1165/23

In the matter between:

WAYNE MICHAEL WAGENAAR N.O

First Applicant

BLANCHE JUDITH CLAASEN-HOSKINS N.O

Second Applicant

PATRICIA SHAEN HINCHLIFF N.O

Third Applicant

PETER FRANCES BONAVENTURE GRANT N.O

Fourth Applicant

LESLEY YVONNE HADDOW N.O

Fifth Applicant

NOEL JOHN PEAGAM N.O

Sixth Applicant

The first to sixth applicants are cited in their representative capacity as the trustees for the time being of **THE PINWOOD TRUST**

and

VALUATION APPEAL BOARD FOR

First Respondent

THE CITY OF CAPE TOWN

CITY OF CAPE TOWN MUNICIPALITY

Second Respondent

Coram: Justice Saldanha et Acting Justice Holderness

Heard: 7 June 2024

Delivered electronically: 3 September 2024

JUDGMENT

Holderness AJ

Introduction

[1] The central relief sought in this application is the reviewing and setting aside of the decision and determination of the the Valuation Appeal Board for the City of Cape Town ('the VAB') on 26 July 2022 of the value of the freehold and leasehold right in respect of the property situated at (erstwhile) Erf 3[...] ('the property'),¹ commonly known as Pinewood Retirement Village ('the Village').

[2] The freehold is the bare dominium of Erf 3[...] which is owned by the University of Cape Town ('UCT'). The leasehold is the 99-year notarially registered lease which is held by the Pinewood Trust ('the Trust').

[3] The Trust, represented by Mr Budlender SC, together with Mr Cooper, seeks an order that the valuation be remitted to a VAB, constituted of different members, for a hearing and determination afresh, and that the City pay the costs of the application, including the costs of two counsel.

¹ The land and the rights in respect of the land that form the subject of the valuation are jointly referred to as 'the property'.

[4] It is not in dispute that the determination by the VAB constitutes administrative action in terms of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') and is subject to the provisions thereof.

[5] The order sought in the Notice of Motion was cast in the following terms:

- 5.1 That the decision and determination made by the VAB on 26 July 2022 of the value of the leasehold right in respect of the property be reviewed and set aside.
- 5.2 That the agreement reached by the Trust and the City on 14 February 2022 ('the agreement') with regard to the valuation of the property be confirmed.
- 5.3 Alternatively that the agreement be remitted to the VAB, consisting of different members, for its review.
- 5.4 Further alternatively that the appeal of the Trust be remitted to a VAB consisting of different members, for a hearing and determination afresh; and
- 5.3 That the City pay the costs of this application, including the costs of two counsel.

The issues

[6] Arising from the foregoing, the issues can be distilled as follows:

- 6.1 Whether the determination of the VAB falls to be reviewed and set aside; if so
- 6.2 Whether the matter should be remitted back to the VAB, with or without directions by the Court; and

- 6.3 If so remitted, whether the matter should present before the VAB as differently constituted or constituted as before.

The legal and statutory framework

[7] For the purposes of the levying of municipal rates, all property situated in the municipal area must be valued by the City's municipal valuer in accordance with the Local Government: Municipal Property Rates Act 6 of 2004 ('the Rates Act'). Section 2 of the Rates Act extends the power to a municipality to levy rates on property within its municipal area. The preparation of a valuation roll is central to the recovery of municipal rates.

[8] The Rates Act defines 'property'² as: (a) immovable property registered in the name of a person; (b) a right registered against immovable property in the name of a person, excluding a mortgage bond registered against the property; (c) a land tenure right registered in the name of a person or granted to a person in terms of legislation; or (d) public service infrastructure.

[9] Section 45(1) of the Rates Act provides *inter alia* that:

'Property must be valued in accordance with generally recognised valuation practices, methods and standards, and the provisions of this Act.'

[10] Section 46 (1) sets out the general basis of valuation as follows:

'Subject to any other applicable provisions of this Act, the market value of the property is the amount the property would have realised if sold on the date of valuation in the open market by a willing seller to a willing buyer.'

[11] Section 46 of the Act further provides *inter alia* that:

² In section 1.

(2) In determining the market value of a property, the following must be considered for purposes of valuing the property:

(a) The value of any licence, permission or other privilege granted in terms of legislation in relation to the property;

(b) the value of any immovable improvement on the property that was erected or is being used for a purpose which is inconsistent with or in contravention of the permitted use of the property, as if the improvement was erected or is being used for a lawful purpose; and

(c) the value of the use of the property for a purpose which is inconsistent with or in contravention of the permitted use of the property, as if the property is being used for a lawful purpose.

(3) In determining the market value of a property the following must be disregarded for purposes of valuing the property—

(a) Any building or other immovable structure under the surface of the property which is the subject matter of any mining authorisation or mining right defined in the Mineral and Petroleum Resources Development Act, 2002 (Act 28 of 2002);

(b) any equipment or machinery which, in relation to the property concerned, is immovable property, excluding—

(i) a lift;

(ii) an escalator;

(iii) an air-conditioning plant;

(iv) fire extinguishing apparatus;

(v) a water pump installation for a swimming pool or for irrigation or domestic purposes; and

(vi) any other equipment or machinery that may be prescribed;

And

(b) any unregistered lease in respect of the property.

[12] The Supreme Court of Appeal ('SCA') in *City of Johannesburg v Chairman, Valuation Appeal Board*³ observed that the function of a municipal valuer is of considerable importance and must have regard to various factors in order to determine what a notional willing buyer would probably pay to a willing seller in the open market.

[13] The SCA described the factors as:⁴

'comparable sales of similar properties in the open market, the extent to which parties to previous transactions acted voluntarily and negotiated on equal terms or acted under compulsion; the motivation of the respective parties in previous transactions to buy and sell; restrictions on the use of the property and the possibility of their removal; the improvements on the land and the depreciation thereof; the potential uses to which the land may be put; and the income that may be derived from the property (the list is not meant to be exhaustive)'.⁵

[14] The following statement made more than a century ago by Innes CJ⁶ in *Pietermaritzburg Corporation v South African Breweries Ltd* ('*South African Breweries*'), has been approved by the SCA in a number of cases:⁷

'It may not be always possible to fix the market value by reference to concrete examples. There may be cases where, owing to the nature of the property, or to the absence of transactions suitable for comparison, the valuator's difficulties are much increased. His duty then would be to take into consideration every circumstance likely to influence the mind of a purchaser, the present cost of erecting the property, the uses to which it is capable of

³ 2014 (4) SA 10 (SCA) ('*City of Johannesburg*') para 22 and f/n 15 (and the authorities there cited).

⁴ *Id.*

⁶ *Pietermaritzburg Corporation v South African Breweries Ltd* 1911 AD 501 at 516.

⁷ For example, *Sher and Others NNO v Administrator, Transvaal* 1990 (4) SA 545 (A) at 556F-H; *City of Johannesburg* at para 22.

being put, its business facilities as affording an opportunity for profit, its situation and surroundings, and so on. There being no concrete illustration ready to hand of the operation of all these considerations upon the mind of an actual buyer, he would have to employ his skill and experience in deciding what a purchaser, if one were to appear, would be likely to give. And in that way, he would to the best of his ability be fixing the exchange value of the property.'

The background

[15] The salient facts in this matter are not in dispute. The physical property that is the subject of the disputed valuation is approximately 8 hectares in extent and comprises a fully developed retirement housing scheme, as defined in the Housing Development Schemes for Retired Persons Act, 65 of 1988 ('the Retired Persons Act').

[16] The Village is operated by the Trust as a life right scheme ('the scheme').

[17] The scheme enables retired or elderly persons to buy a life right, which entitles them and their spouse or partner to the exclusive use of a unit situated on the property during their lifetime, dependent on their health.

[18] The Village comprises 197 units or dwellings, 55 one-bedroom units, 87 two-bedroom units and 55 three-bedroom units. There are 34 assisted living units ('ALUs'), frail care units, a couple of hospitality suites and community facilities and buildings.

[19] The relationship between the Trust and UCT is regulated by a number of agreements, which can be summarised as follows:

19.1 A Development Agreement concluded in November 1992 between the Association of Retired Persons and Pensioners Housing Association ('ARP&P') and UCT. The salient terms, for present purposes, were the following:

19.1.1 UCT is the owner of the relevant erf, i.e. the land (clause 1).

19.1.2 UCT and the ARP&P agreed that UCT would enter into a 99-year lease of the land with the Trust as the nominee of ARP&P, for the purposes of establishing a housing development scheme on the land in terms of the Retired Persons Act.⁸

19.1.3 It was a condition precedent of the Development Agreement that the Trust adopt all of the rights and obligations enuring for its benefit and imposed upon it thereunder. These rights and obligations were duly accepted.

19.1.4 The Trust would implement the housing development scheme and sell rights of occupation to persons who qualified.

[20] In March 1994 the ARP&P and UCT concluded the Development Amendment Agreement, which amended the Development Agreement.⁹ The amended clause 6 of the Development Agreement governs the Trust's obligation to pay UCT 55% of the 'excess' from re-sale of each life right.

[21] In April 1994, the Notarial Deed of Lease between UCT and the Trust was registered ('the Notarial Lease'). The Notarial Lease was subject to and conditional upon the fulfilment of all the suspensive conditions contained in the Development Agreement.

[22] In terms of clause 2 of the general conditions of the Notarial Lease, the Trust as tenant is obliged to pay all rates and taxes in respect of the property to the City, all electricity, gas, water and other supplies, refuse removal and insurance premiums.

⁸ The Trust had not yet been established at the time of the conclusion of the Development Agreement, hence the inclusion of clauses 2.1.6, 2.1.8 and 2.1.9 (see also clause 3).

⁹ 'The Development Agreement' hereafter refers to the Development Agreement as amended by the Development Amendment Agreement.

[23] The Development Agreement and the Notarial Lease ('the founding agreements') set out the respective entitlements of UCT and the Trust to their respective shares of the net proceeds of the sale of life rights, in particular, the amended clause 6.7 and 6.8 of the Development Agreement.

[24] UCT has no right to sell or otherwise dispose of any right of occupation of the land or any of the buildings or improvements developed on the land. The rights to use of the land and the improvements thereon, and to sell rights of occupation vest, in terms of the founding agreements, solely in the Trust. UCT is, however, a creditor of the Trust, as a portion of the funds received by the Trust upon the re-sale of life rights must be paid to UCT in two tranches every year,

[25] The Trust summarised its obligations (and the obligations of any notional buyer) as follows:

- 25.1 Upon the termination of a life right, that is when the original purchaser ('resident') leaves the village or passes away, the resident or his or her estate, is obliged to transfer the life right back to the Trust. This is referred to as a 're-transfer' in clause 6.7 of the Development Amendment Agreement.
- 25.2 The Trust is obliged to pay the resident (or his or her estate) the same amount as the price paid by the resident for the re-transfer of the life right ('the original purchase price').
- 25.3 When a life right is subsequently sold by the Trust, the amount received ('the resale funds') are used, in the first instance, to repay the resident or his or her estate.
- 25.4 UCT's 55% share of any net surplus derived from the life right being sold to a new occupier at a higher resale price than that paid by the resident ('the excess'), which will also have to be refunded in due course, is credited to it, after deduction of an allowance of 10% of the

resale price (3% in respect of a provision for restoration costs and 7% in respect of a provision for long-term maintenance costs).

25.5 The total funds due to UCT by the Trust are paid out in two tranches each year. UCT's outstanding entitlement is reflected in the Trust's financial statements under 'accounts payable'.

25.6 The calculation of the excess available for distribution, and UCT's 55% share thereof, is more complicated where a resident occupies one of the 34 ALUs, which may only be occupied by existing residents.

25.7 Where a resident first purchases and occupies an ordinary unit and then moves to an ALU, the excess upon the termination of the life right is calculated by deducting an additional amount in respect of the cost of the assisted living unit.

[26] According to Mr du Toit¹⁰ the additional costs associated with the ALUs equate, on average (i.e. as a percentage of all sales), to 22.4% of all resale funds. The net result is that, on average, for each sale of a unit the following deductions must be made, as a percentage of the selling price, in order to calculate the excess available for distribution to UCT (and to the Trust in respect of the remaining 45%):

26.1 The original purchase price equates to an average of approximately 32.6%.

26.2 Provisions for restoration and maintenance of approximately 10%; and

26.3 Assisted living costs, on average, of approximately 22.4%.

[27] According to Mr du Toit, these are costs payable by any prospective purchaser, as they are obligations contained in the amended Development Agreement and, by incorporation, the Notarial Lease.

¹⁰ As set forth in his Objection Report, defined below.

[28] The Trust alleged that this is the practice that has developed, and that has been agreed to and followed by the Trust and UCT. The result is that, on average, only approximately 34.8% of the total resale funds is available for distribution, 55% to UCT and 45% to the Trust to defray its expenses.

The determination

[29] In April 2019, the Trust lodged an objection against the 2018 valuation of the property determined by the City in the amount of R272 465 000 ('the valuation'). Attached to the objection was a valuation report prepared by the Trust's expert valuer, Mr Jacques Du Toit ('Mr du Toit'), dated 4 April 2019 ('the objection report').

[30] The Trust contended that the valuation of the property should have been considerably lower, which would have reduced the rates payable on the property.

[31] The Trust previously appealed against the City's 2015 valuation. The VAB determined the appeal in favour of the Trust, by adjusting its valuation of R309 855 000 to R96 400 000, in accordance with the Trust's objection. The valuation of R102 830 000 in the objection report was prepared on the same basis as in the 2015 valuation.

[32] The Trust's objection to the valuation was refused by the City. On 23 September 2020, the Trust lodged an appeal with the VAB in terms of section 57 of the Rates Act.

[33] On 14 February 2022, prior to the hearing of the appeal, an agreement was reached between the Trust and the City, in terms of which the property was valued at R 106 500 000, comprised of a freehold value of R58 500 000 and a leasehold value of R48 000 000.

[34] On 15 February 2022, the City, represented by Mr Jurie Fieties, a senior assistant municipal valuer ('Mr Fieties') and the legal representatives of the Trust, appeared before the VAB to inform it of the agreement that had been reached. The

chairperson of the VAB, Adv Martin Coetzee ('Adv Coetzee') refused to accept the settlement and postponed the hearing to 25 March 2022.

[35] On 25 March 2022 the VAB conducted a hearing regarding the values. It heard evidence from Mr du Toit and from Mr Fieties.¹¹

[36] The VAB handed down its determination with reasons on 26 July 2022 ('the determination'). After rejecting the valuation approaches of the Trust and the City, the VAB determined the total value of the property to be R218 500 000, which was comprised of R218 500 000 (the leasehold value) and R0 (nil) (the freehold value).

[37] This determination, which is more than double the amount which the VAB determined as the value of the property for the 2015 valuation roll, is what the Trust now seeks to review and set aside. The Trust's objection to the 2018 GVR was on the same basis as its objection to the 2015 GVR, which the VAB upheld.

The valuation methodology

[38] Ms Pillay SC, who appeared on behalf of the City together with Ms Matala, submitted that in order to properly adjudicate the challenge as to the valuation methodology, this Court must determine whether such methodology is a generally recognised methodology and was properly applied.

[39] Mr Rosenberg SC, who together with Mr de Beer, appeared on behalf of the VAB, emphasised that the SCA in *City of Johannesburg* affirmed that '[v]aluation is ...not an exact science' and that the market value of a property can only be estimated and not precisely determined, and a valuer is called on to exercise professional skill and expertise in a specialised field by expressing an opinion on the market value in monetary terms,¹² and has accordingly recognised that in light of the unique nature of valuing properties, the decision-maker has a wide scope to form an opinion on the appropriate methodology to be employed, as well as its application.

¹¹ These proceedings were recorded, and a full transcript was annexed to the founding affidavit.

¹² *Id* at para 24.

[40] It appears to be generally accepted that when evidence of genuinely comparable sales is available, the comparable sales methodology is the preferred valuation methodology for determining the market value of a property. However, in certain cases the comparable sale valuation method cannot be applied due to the uniqueness of a property. It is incumbent upon the valuer to select and apply the most appropriate method of valuation according to the specific circumstances of the case.¹³

[41] In these proceedings the three valuation methods that present are the VAB's self-styled 'simple and straightforward approach', the comparable sales method (or a modified version thereof), and the income capitalisation approach.

[42] In its answering affidavit the VAB averred that it adopted a 'simple and straightforward approach.' In argument it was contended, for the first time, that in fact it applied a 'moderate comparable sales approach.' No evidence was placed before us to show that either of these approaches, as applied by the VAB, are generally accepted methodologies of valuation as envisaged in section 45 of the Rates Act.

[43] In the answering affidavit filed on behalf of the City, Mr Llewellyn James Louw ('Mr Louw'), a qualified and experienced municipal valuer employed as such by the City, avers that the method 'purportedly' employed by the VAB is the comparable sales method, which is based on the assumption that a purchaser on the open market will pay no more for property than the price at which he or she can obtain similar property elsewhere.

[44] By comparing the property to be valued with similar properties sold, the valuer determines its probable selling price. As many sales as possible must be analysed to establish common denominators and an allowance must be made for differences between the property in question and the properties with which it is being compared.

¹³ *Leopard Creek Share Block Ltd v Valuation Appeal Board for the District of Ehlanzeni and Others* (3258/2020) [2023] ZAMPMBHC 23 (14 April 2023) at par 108.

[45] Mr Louw's evidence is that whilst the comparable sales method is generally regarded as the most acceptable and preferred method of valuation, it is ordinarily not relied upon where sufficient comparable properties do not exist or where the sales are comparable only to a certain extent and require a number of adjustments which render the results less reliable and other valuation methods should be employed.

[46] The City's view is that the VAB applied the comparable sales valuation methodology. The Trust is of the view that the VAB did not apply this methodology, but rather applied an unknown valuation methodology which it referred to in its answering affidavit as the '*simple and straightforward approach*.'

[47] The Trust contends that by applying the '*simple and straightforward approach*' the VAB failed to apply a generally recognised valuation methodology. The Trust contended that the VAB appeared, in part, to apply the income capitalisation methodology rather than the comparable sales method.

[48] The City contended that the VAB did not describe its valuation methodology, but, in substance, rejected the income capitalisation approach and applied a comparable sales methodology. The City did not take issue with the choice of this methodology, but emphatically disagreed with certain of the deductions made which in effect undermined the application of the methodology and valuation.

[49] The position of the Trust, as contended for by Mr du Toit, was that whilst he did not take issue with Mr Louw's exposition of the general principles regarding valuation methodology, the comparable sales methodology could not be used in this instance as there were no comparable sales of any property which has been developed in terms of the Retired Persons Act, and which has been sold as a whole, similar to the property.

[50] Moreover, units subject to life rights could only be sold subject to such rights. In Mr du Toit's opinion, a willing buyer in an open market would take the life rights into account, which would greatly reduce the price that a prospective buyer would be willing to pay.

[51] The Trust pointed out that the issue of comparable sales did not even arise at the hearing of the appeal. Moreover, neither in the lengthy reasons given for its determination nor in its answering affidavit did the VAB contend that it adopted the comparable sales methodology. It only raised its reliance on such methodology in its heads of argument after it having been raised by the City in its answering affidavit.

[52] If the City is correct in contending that the comparable sales methodology could and should have been applied, the review must succeed as the VAB failed to properly apply this valuation method, and therefore failed to consider a highly and materially relevant consideration.

[53] The Trust further contended that a 'fundamental and inexplicable error' in the determination is the VAB's finding that the freehold ownership of the property had no value,¹⁴ where it was indisputable that UCT's ownership of the freehold or land in fact has substantial value.

[54] It cannot be disputed that as the owner of the property, UCT is entitled to substantial payments annually arising from its entitlement to 55% of what is referred to as 'the excess'. The excess as explained is the amount or income available after deductions have been made to give effect to the Trust's obligation to repay the original purchase price to the holder of life rights to a unit when they leave or pass away, plus the maintenance and restoration costs and the costs of the ALUs.

[55] For the period from 1 April 2010 to 31 March 2019, UCT received payments of R39 697 940, while the Trust received R32 780 952. The City asserts that the excess is a key driver of the value of the property.

[56] The Trust contended that the VAB failed to correctly calculate the 'excess' and instead, performed a valuation based on the gross sales of the one-, two- and three bedroom units, together with the ALUs. The Trust submitted that although the allocation of value between freehold (UCT) and leasehold (the Trust) has no

¹⁴ In the determination the freehold value was determined to be R0 (nil).

practical implication as it is liable for all rates and taxes attributable to the property, it amounts to a fundamental error which demonstrates that the VAB fundamentally misdirected itself.

[57] Section 57 of the Rates Act provides that:

‘The functions of an appeal board are –

(a) to hear and decide appeals against the decisions of a municipal valuer concerning objections to matters reflected in, or omitted from, the valuation roll of a municipality in the area for which it was established in terms of section 56; and

(b) to review decisions of a municipal valuer submitted to it in terms of section 52.’

[58] In the determination the VAB recorded that in terms of clause 6.8, in the case of “each resale by the Trust of a right of occupation repurchased by it ‘55% of the excess (difference between the repurchase price and the resale price) shall be paid to the UCT. The remaining 45% shall be for the benefit of a Levy Stabilisation Fund created and administered by the Trust.”

[59] Clause 6.8 of the Development Amendment Agreement provides that:

‘6.8 Each resale by the Pinewood Trust of a right of occupation repurchased by it under clause 6.7 shall be conditional upon:

6.8.1 the issue to UCT of a guarantee meeting with its reasonable approval for the payment to UCT against transfer of the right to, and the due payment to UCT in terms of such guarantee, of fifty-five per centum (55%) of the excess calculated in accordance with the following formula:

$$E = (SP \times 98\%) - PP$$

where

E is the excess.

SP is the price at which the Pinewood Trust shall have re-purchased the right (inclusive, as the cost of re-purchase, of any amount paid or payable in respect of improvements); and

the balance of 2% of SP shall be a contribution to the necessary cost of the resale of the right incurred by the Pinewood trust, including any costs that it may have had to incur to reinstate the premises to which the right relates, to a reasonable state of repair, estate agents commission and administrative fees pertaining to the transfer;

6.8.2 the payment to the Pinewood Trust against transfer of the right, of forty-five per centum (45%) of the excess referred to in sub clause 6.8.1 for the benefit of a levy stabilisation fund created by the Pinewood trust and administered as part of the scheme or for defraying such other expenditure as may have been incurred by the Pinewood trust in connection with the development of this scheme.'

[60] The levy stabilisation fund is described in the Trust's Audited Financial Statements as follows:

'This fund comprises surplus on the resale of units after having deducted 3% of the selling price as a levy for the restoration of the units and a further 7% of the selling price for long term maintenance of the infrastructure of the village. The net surplus is shared between the stabilisation fund (45%) and the owner of the property, the University of Cape Town (55%).'

[61] In making its determination the VAB disregarded the agreement regarding the valuation concluded between the Trust and the City's valuer, where the property was

valued at R106 500, R58.5m in respect of the freehold and R48m in respect of the leasehold.

[62] It further rejected the valuations of the Trust and the City, describing the valuations as 'defective and incomplete.'

The valuation by the VAB

[63] The VAB calculated the value of the 227 units as follows:

63.1 The total number of units, multiplied by their respective selling prices of the life rights;¹⁵

63.2 less the amounts 'according to the development agreement¹⁶' of:

63.2.1 7% of the selling prices for the maintenance levy.

63.2.2 3% of the selling prices for the restoration levy; and

63.2.3 45% of the selling prices for the levy stabilisation fund.

[64] Mr du Toit, adopting the income capitalisation approach, calculated an annual income that the Trust would be likely to receive through the sale of life rights, which is a share of the excess, based on the average sales of approximately 16 life rights over the past nine years, amounting to R12 910 159.

[65] This income, capitalised at a rate of 10%, amounted to R129 101 590, which he split between 55% to the Trust and 45% to UCT (in terms of the Development Agreement). Based on the foregoing, Mr du Toit valued the freehold (UCT) at R71 000 000 and the leasehold (the Trust) at R58 100 000.

¹⁵ Based on prices offered on 1 April 2018 according to a pricelist prepared by the Trust.

¹⁶ There does not appear to be any reference in the Development Amendment Agreement to a maintenance or a restoration levy.

[66] The VAB rejected the income-based approach of valuation of the property adopted by Mr du Toit *inter alia* because it involved ‘*too many imponderables*’ and, *inter alia*, that no explanation or motivation was provided by the Trust for capping the capitalised rate of the income at 10%.

[67] After rejecting the approaches of Mr du Toit and Mr Louw, the VAB:

67.1 Determined what was in its view the most appropriate method to value the freehold and leasehold.

67.2 Did not agree that there were two properties to be valued, as the Trust only paid a nominal rent of R1 per year to UCT. It therefore concluded that the sole value of the property was in the leasehold, as the Trust receives an income from the sale of life rights.

67.3 Agreed that the sale of life rights should be used to determine the market value but was of the view that an income approach was not appropriate as the ‘income’ generated in terms of the development agreement was not ultimately income from the Trust (as it was not used to make a profit, but rather to contribute to a levy stabilisation fund for use in the retirement scheme) and UCT received the other portion.

[68] The VAB found that whilst in general it is not its role to undertake its own valuation of the property, in this specific instance ‘based upon its specific composition, has a greater degree of latitude in using its expert skill and knowledge to correct, complete or reconcile defective or incomplete evidence in order to reach an appropriate valuation outcome.’

[69] Exercising what it described as its ‘wide discretion’, the VAB found that Mr du Toit’s income approach ‘had many imponderables’ and was not appropriate as ‘the income that could be generated from the sale of life rights was highly restricted due to the excess sharing obligations’ between the Trust and UCT.’

[70] The VAB determined that the parties are in agreement that the purchase prices of the individual dwellings should be used to determine the valuation. It found that to determine the market price it did not require that all 197 dwellings are immediately for sale and those that are not for sale would have an occupational right in place. The VAB determined that that as a point of departure the value of the Property must be determined as the total value of at least the 227 units at the prices offered on 1 April 2018, calculated as follows:

1-bedroom cottages: 55@ R1 850 000	=	R101750000
2-bedroom cottages: 87 @ R2 300 000	=	R200 100 000
3-bedroom cottages: 55 @ R2 720 000	=	R149 600 000
Assisted Living units: 30 @ R 1 138 500	=	R 34 155 000
Total:	=	R485 605 000

[71] The VAB further held that the following deductions must be made from this amount in terms of the Development Agreement¹⁷:

Value of all dwellings	R485 605 000
Less contributions to	
(i) Maintenance Levy (7%)	-R 33 992 235
(ii) Restoration levy (3%)	-R 14 568 150
(iii) Levy Stabilisation Fund (45%)	<u>-R218 522 225</u>
Total deductions	-R267 082 261
Valuation	R218 522 239

[72] The Development Agreement and the Development Amendment Agreement do not appear to make provision for the maintenance and restoration levy of 7% and 3% respectively. Clause 6 of the Development Agreement was replaced in its entirety by the new clause 6 appearing at clause 4 of the Development Amendment Agreement ('amended clause 6').

¹⁷ This calculation excludes the Community centre, 12 frail care units and 2 hospitality suites.

[73] The VAB asserted that the evaluation methodology adopted by it was a 'simple and straightforward approach' was correct, namely using the evidence of sale of life rights in 2018 to establish what price a willing purchaser would have bought the property from a willing seller on the valuation date less various deductions it termed "adjustments". It contended that it complied with section 26 of the Rates Act in doing so.¹⁸ As already indicated, despite its professed expertise, the VAB had not described nor explained in its written determination and answering affidavit that it purported to apply the comparable sales methodology until it was raised by the City.

[74] Based on the foregoing, the VAB determined the valuation of the leasehold of the property (Trust) to be R218 500 000 and the freehold (UCT) to be R0 (Nil Rand).

The VAB's argument on review

[75] The VAB opposed the reviewing and setting aside of the determination. In Mr Rosenberg submitted that the Court should defer to expertise and discretion. He contended that it was not up to the Court to prescribe what approach the VAB should have taken, and that the application should accordingly be dismissed.

[76] The VAB argued that it correctly valued the property at R487 000 000 and, in light of the founding agreements, deducted certain amounts, such as the maintenance and restoration levies and the levy stabilisation fund excess in valuing the leasehold to reach its determination of R218 500 000.

[77] The VAB took issue with the Trust's reliance on the 2015 General Valuation Roll ('GVR') valuation, by which it sought to 'anchor' the lower amount, which the

¹⁸ Section 26 provides: 'Method and time of payment

(1) A municipality may recover a rate-

(a) on a monthly basis or less often as may be prescribed in terms of the Municipal Finance Management Act; or

(b) annually, as may be agreed to with the owner of the property.

(2) (a) If a rate is payable in a single amount annually it must be paid on or before a date determined by the municipality.

(b) If a rate is payable in instalments it must be paid on or before a date in each period determined by the municipality.

(3) Payment of a rate may be deferred but only in special circumstances.'

VAB argued could have been in error, set very low. The VAB argued that the mere disagreement with the VAB's opinions or conclusions was insufficient to establish a reviewable irregularity.

[78] The VAB was concerned about the impact of the valuation by UCT and the Trust on the proper determination of the market value of the property. In its view if the income approach proposed by Mr du Toit were adopted, parties could structure their use of immovable property to reduce the market value used for rates valuations, which would have a detrimental impact on municipal income and finances.

[79] Of significance however, is that the VAB made no such claim against the Trust and UCT. There was moreover no evidence that the Trust and UCT had structured their relationship (in any of the agreements or other documents) to manipulate the rates lawfully due to the City. Again, no such contention had ever been made by the City itself.

[80] In applying what it in argument eventually described as a 'modified comparable sales approach', the VAB says that after calculating the 2018 value of all the units, and concluding that the aggregate value of the units could be an acceptable proxy for the value of the developed land, and deducting the levies applicable, which it refers to in its heads of argument as 'adjustments', it reached a fair and appropriate valuation.

The City's stance

[81] The City contends that to determine the merits of the grounds of review, the Court is required engage with the following issues:

81.1 Which valuation methodology was used by the VAB;

81.2 Whether the valuation methodology used by the VAB is a generally recognised methodology, and is a reasonable and rational valuation methodology on the facts of the present matter;

81.3 Whether the valuation methodology used by the VAB was correctly and properly applied by it; and

81.4 Whether the VAB acted in a procedurally unfair manner.

[82] The City submitted that the VAB appeared to apply a comparable sales methodology, but did so incorrectly in respect of the deductions made.

[83] The City's view was that if the court were to find that a reviewable irregularity has been established, a just and equitable order must be granted.

[84] In contrast to the view adopted by the Trust, the City contends that the 2018 selling prices in respect of life rights are the best comparable sales to use for the 2018 valuation of the property.

[85] The City accepted at the outset that the VAB committed certain errors. It submitted that a key issue is whether 'adjustments' can appropriately be used to justify certain deductions. The City however agreed with the VAB's use of the total value of at least 227 unoccupied units as the departure point, in view of the fact that there is no property which can be compared to a 8 hectare retirement village situated in Pinelands or similar.

[86] The Trust took issue with the evidence of Mr Louw, the municipal valuer who deposed to the affidavit filed on behalf of the City in opposition to the relief sought, in his capacity as municipal valuer. It was of the view that the evidence of Mr Louw should be treated with caution as he has, in so doing, stepped out of his role and 'become partisan.'

[87] The City countered that by virtue of his qualifications and expertise, Mr Louw is an expert in the field of valuations and deposed to the City's affidavit in that capacity, and was accordingly well placed to place key information concerning the issue of valuations before the court.

[88] It is well established that an expert is required to assist the court, not the party for whom he or she testifies.¹⁹ Objectivity is the central prerequisite for his or her opinions. In assessing an expert's credibility an appellate court can test his or her underlying reasoning and is in no worse a position than a trial court in that respect. Diemont JA put it thus in *Stock v Stock*:²⁰

'An expert . . . must be made to understand that he is there to assist the Court. If he is to be helpful, he must be neutral. The evidence of such a witness is of little value where he, or she, is partisan and consistently asserts the cause of the party who calls him. I may add that when it comes to assessing the credibility of such a witness, this Court can test his reasoning and is accordingly to that extent in as good a position as the trial court was.'

[89] The City concedes that Mr Louw is not an expert 'in the traditional sense,' but asserts that it is not the mere opinion of the witness which is decisive but his ability to satisfy the Court that, because of his special skill, training or experience, the reasons for the opinion which he expresses are acceptable.²¹

[90] The City, unsurprisingly, took issue with the Trust's acceptance of Mr Louw's criticism of the VAB, in the context of their objection to his independence as an expert, and their objection to his evidence of which valuation methodology was applied by the VAB. Should the court find that the methodology adopted, regardless of which methodology it was, was applied incorrectly, that may in itself constitute a reviewable irregularity.

[91] The parties have starkly differing views regarding which methodology was adopted. The VAB initially describe its approach as 'simple and straightforward' in its answering affidavit, the Trust's view is that it was trying to apply the income capitalisation methodology rather than the comparable sales methodology, and the

¹⁹ *Stock v Stock* 1981 (3) SA 1280 (A) at 1296E-F; *P v P* 2007 (5) SA 94 (SCA) paras 18 and 21.

²⁰ *Stock v Stock* at 1296F; and see *Jackson v Jackson* 2002 (2) SA 303 (SCA) at 324B-C (para 16 of the judgment of Scott JA).

²¹ Phipson, *Evidence*, 11th ed., paras 1280 et seq.; Hoffmann, *Evidence*, 2nd ed., pp. 78 et seq.; *R v Nksatlala* 1960 (3) SA 543 (AD) at p.546.

City argues that that the VAB appeared to have applied the comparable sales methodology albeit incorrectly.

[83] Mr Louw's evidence is, in certain respects, supportive of the VAB's reasoning and findings, and in other respects is critical thereof. This demonstrates an objective approach. There was no basis laid to reject his evidence *in toto*.

[84] In the answering affidavit filed on behalf of the City, Mr Louw acknowledges that life right schemes present certain challenges for the purposes of determining the value of the property. He emphasised that the outcome of this litigation has implications that extend beyond the present matter, as some of the principles as identified by this Court will apply to all of the other seven Life Right Schemes ('the other schemes') within the jurisdiction of the City, the cumulative value of which is R823 096 563, in respect of which the City has over the past year collected rates to the approximate value of R5 204 589.

[85] However no evidence was placed before this Court as to what the details were of each of the other schemes, the contractual configurations in respect of land ownership or leases, nor circumstances peculiar to each of the Schemes. Moreover none of those Schemes are before us nor have they been heard on their positions to assist this Court .

[86] Mr Louw emphasised that in the City's view, when valuing the property, regard must be had to the property in its entirety, including all improvements thereof, and then what falls to be determined is what a notional willing buyer would probably pay to a notional willing seller in the open market.

[87] Mr Louw's evidence was that to properly apply the comparable sales method, as many sales as possible must be analysed to bring about common denominators and allowances made between the property being valued and the comparators.

[88] He explained both the comparable sales method and the income capitalisation approach, and agreed with the VAB that the income capitalisation approach should be used with circumspection as it is 'dependent on many

imponderables.’ In his view the methodology adopted by the VAB was the comparable sales method. He believes that the VAB was correct to reject the income capitalisation approach.

[89] Significantly, Mr Louw agrees with the Trust that the VAB erred in simply applying 45% payable to the Trust to the full resale price.

The grounds of review

[90] The Trust submits that the determination falls to be judicially reviewed and set aside on the grounds set out in:

90.1 Section 6(2)(b) (a mandatory and material procedure or condition prescribed by an empowering provision was not complied with);

90.2 Section 6(2)(c) (the action was procedurally unfair);²²

90.3 Section 6(2)(d) (the action was materially influenced by an error of law),

90.4 Section 6(2)(e)(iii) (irrelevant considerations were taken into account or relevant considerations were not considered),

90.5. Section 6(2)(f)(i) (the action itself contravenes a law or is not authorised by the empowering provision);

90.6 Section 6(2)(f)(ii) (the action itself is not rationally connected to):

99.6.1 (aa) the purpose for which it was taken;

99.6.2 (bb) the purpose of the empowering provision;

²² This ground was abandoned at the hearing.

99.6.3 (cc) the information before the administrator; or

99.6.4 (dd) the reasons given for it by the administrator);

90.7 Section 6(2)(h) (the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; and

90.8 Section 6(2)(i) (the action is otherwise unconstitutional or unlawful).

[91] The Trust relies specifically on the following grounds of review:

91.1 That the VAB's valuation was fundamentally flawed, unreasonable and irrational and the VAB failed to have regard to relevant considerations; and

91.2 The valuation methodology adopted by the VAB is not a generally recognised methodology.

[92] The Trust asserted that by adopting the methodology which it did, the VAB failed to take cognisance of the crucial common cause fact that when a unit is sold, the Trust is obliged to repay the original purchase price, the costs of maintenance and restoration and the costs of the ALUs.

[93] Mr du Toit was of the opinion that any notional willing buyer would take these costs into account, as they arise from and are entrenched in the Retired Persons Act, the Development Agreement and the Notarial Lease. A purchaser of the property could only buy it subject to the rights of occupation of the life right holders.

[94] The Trust argued that as the issue of comparable sales did not arise at and was never addressed at the hearing of the appeal, and if the City was correct that

the comparable sales methodology could and should have been applied, the review application must succeed because the VAB failed to adopt such methodology and therefore did not consider a relevant consideration.

[95] The Trust contended that in making its determination, the VAB committed five reviewable errors, and that if this court finds that any one of the reviewable errors has merit, the determination falls to be set aside and remitted to a differently constituted VAB. The errors relied upon are:

- 95.1 The VAB failed to take into account the repayment of the original payment price to the original purchaser of his or her estate. This equates on average to 32.1% of the gross selling price of the units. In so doing the VAB failed to have regard to a relevant consideration;²³
- 95.2 The VAB erred in deducting the Levy Stabilisation Fund from the total value of the units. In terms of the Development Agreement, the Levy Stabilisation Fund (the 45% paid to the Trust) must be deducted from the profit after the Maintenance Levy (7%) and the Restoration Levy (3%) had been paid. Put differently this levy should have been 45% of the profit after the 10% has been deducted from the selling price.²⁴
- 95.3 The VAB valued all the units as if they were immediately available, in circumstances where there is a waiting list until 2030 and the life right holders have the right to live there rent free for the rest of their lives. The Trust emphasised that only 8% of the units come up for sale each year, therefore 92% are unavailable and that this would be known to the notional buyer. The VAB therefore fundamentally misdirected itself by calculating the gross sales price for notionally vacant unit ignored the fact that no purchaser would pay that price for an occupied unit.

²³ According to the VAB calculation of the gross sales price of R486m, less 32.1% = R335m.

²⁴ At para 61 of the Determination, the VAB states that 45% of the profit payable to the Trust shall be paid into the Levy Stabilisation Fund (that is the difference between the resale and the repurchase price of each unit, however notwithstanding the foregoing, the VAB applied 45% of the full resale price which, the Trust asserts, misunderstands and incorrectly interprets the Development Agreement.

95.4 The VAB determined the value of the freehold to be R0 (nil) in circumstances where UCT is entitled to 55% of the excess, which at present equates to approximately R3.9 million per annum.

95.5 The VAB appears to have initially applied the comparable sales methodology, however there are no comparable sales of occupied units, only of vacant units. Moreover, the comparable sales methodology does not contemplate the deductions which the VAB proceeded to apply.

Evaluation

[96] The grounds of review relied upon by the Trust are that the VAB's valuation was fundamentally flawed, unreasonable and irrational, that the VAB failed to have regard to relevant considerations and that the valuation methodology adopted by the VAB is not a generally recognised methodology.

[97] This Court must determine whether the Trust has crossed the threshold of identifying a reviewable irregularity.

[98] The Trust initially relied on two further procedural grounds, namely that the VAB did not have power to insist that the appeal proceed in light of the agreement reached between the Trust and the City Secondly that the VAB failed to properly understand and consider the evidence and the report of Mr du Toit and that the VAB failed to provide the Trust with the opportunity of responding to its concerns about valuation methodology adopted by the Trust and the methodology (the simple and straight forward valuation) adopted by the VAB before having made its final determination and valuation . Both of these procedural grounds were wisely abandoned at the hearing by Mr Budlender on behalf of the Trust.

First reviewable error – The VAB's failure to deduct original purchase price

[99] The Trust contends that the first error committed by the VAB was that by failing to take into account the repayment of the original payment price to the

resident or his or her estate, which equates on average to 32.1% of the gross selling price of the life rights, the VAB failed to have regard to a relevant consideration.

[100] In the *South African Breweries* decision Innes CJ emphasised that in determining the market value in matters such as this, particularly where there are no comparable properties, the valuer ‘must take into account every circumstance likely to influence the mind of the purchaser.’

[101] In determining what it would be willing to pay for a unit to which a life right is attached, a purchaser would take into account the fact that upon resale of such unit, approximately 32% of the resale price would have to be repaid to the resident. Put differently, if all the units with the attached life rights were sold today, the Trust would have to repay approximately 32% of the purchase price to the residents or life right holders.

[102] In its answering affidavit, the City aligns itself with the Trust on this issue, and points out that in the determination the VAB stated that 45% of the ‘profit’ payable to the Trust shall be paid to the Levy Stabilisation Fund. However the VAB in its calculation does not deduct the original purchase price from the resale price before applying the 45% due to the Trust, and instead applied the 45% to the full resale price. The City asserts that in so doing, the VAB misunderstands and incorrectly interprets the Development Agreement.²⁵

[103] There appears to be merit to the Trust’s and the City’s contention in this regard. It would appear that by failing to take into consideration the repayment of the original purchase price, which is self-evidently a relevant consideration, the VAB made an error which constitutes a reviewable irregularity.

Second reviewable error – VAB’s failure to deduct 10% for maintenance and restoration levy

²⁵ Which would be as amended by the Development Amendment Agreement and in particular clause 6.8 thereof.

[104] The second error contended for by the Trust and City is that the VAB failed to deduct the Maintenance Levy (7%) and the Restoration Levy (3%) from the excess, which according to the City, must be deducted from the excess in terms of the development agreement, before the 45 % is deducted for the Levy Stabilisation Fund. In other words, the 45% should have been applied to the excess after the 10% had been deducted from the resale price.

[105] After carefully considered both the Development Agreement, there does not appear to be any reference to these specific levies, which appear to only be referenced in the Trust's audited financials. Clause 6.8 of the Development Agreement only provides for a 2% levy and stipulates that the excess should be calculated by multiplying the resale price by 98% and thereafter deducting the original purchase price.

[105] It is however clear from the Trust's evidence that over the years the Trust and UCT agreed to and effected deduction of the Maintenance Levy (7%) and the Restoration Levy (3%) from the excess.

[106] In the circumstances the VAB's failure to apply the 45% to the excess after the 10% had been deducted from the resale price amounts to a reviewable error.

Third reviewable error – VAB valued the units as if immediately available

[107] The Trust contends that the VAB erred in valuing the units on the assumption that they are unoccupied in circumstances where not only are all the units occupied, but there is a waiting list for the units to which the life rights attach until 2030.

[108] The Trust asserts that in so doing the VAB failed to take into consideration that no purchaser would pay the price at which the life rights are sold (when a unit has been vacated and is therefore available for occupation) for an occupied unit, particularly where the occupier has the right to remain in occupation for the rest of his or her life.

[109] It is clear that by relying on this false and erroneous point of departure, the VAB misdirected itself and acted unreasonably and irrationally by failing to have regard to relevant considerations.

[110] In terms of the relevant provisions of PAJA, the VAB is required to exercise a rational judgment based on the facts before it and must have due regard to all relevant considerations.

[111] It appears that the VAB failed to properly take the occupancy of the units into consideration, which is clearly relevant to the purchase price, and therefore committed a further reviewable irregularity.

Fourth reviewable error – VAB valued the freehold at R0 (Nil)

[112] The fourth error relied upon by the Trust is that the VAB valued the freehold at R0 (nil), in circumstances where UCT is entitled to 55% of the excess, which amounts to an annual income stream of an approximately R3 900 000 per annum by virtue of its ownership of the property.

[113] The VAB contended that it valued the freehold and the leasehold together as a single property. This cannot be correct, as it clearly valued the freehold separately by attributing a R0 (nil) value to it.

[114] Even if one accepts that the Trust is solely liable for the rates payable in respect of the property, this is due to the contractual arrangement between UCT and the Trust and does not mean that the freehold has no value. This too amounts to a reviewable error on the part of the VAB.

Fifth reviewable error – The VAB failed to correctly apply an acceptable valuation methodology

[115] The fifth, and arguably the most fundamental, error which the VAB is alleged to have made is that it failed to apply a generally recognised valuation method as envisaged in section 45 (1) of the Rates Act.

[116] The municipal valuer in 2015 determined a rental income (10% per annum) in arrears based upon a net income (sell out values of all 197 units at 2015 prices for the cottages) and then capitalised it over 76 years. This resulted in a freehold valuation of R176 655 000 and a leasehold valuation of R133 200 000, totaling R309 855 000.

[117] The VAB *in casu* rejected the income approach and the approach proposed by the City's valuer, which was to value the lease and the freehold separately based on the value of the occupancy rental.

[118] In respect of the Trust and Mr. du Toit's approach, the VAB reasoned that the obligations imposed on the Trust to share the excess of sales of life rights was not contained in the Notaraial Lease Agreement but rather in the Development Agreement. It took the view that the capitalisation rate was inappropriate and was not convinced of the manner in which the excess of sales had been calculated. The VAB contends that it reached such conclusion in compliance with its obligations in terms of the Rates Act.

[119] Whilst accepting that it is not the role of the VAB to undertake its own valuation, it found that in this specific instance the board, based upon its specific composition, has a greater degree of latitude in using its expert skill and knowledge to correct, complete or reconcile defective or incomplete evidence in order to reach an appropriate valuation outcome.

[120] The VAB ultimately agreed with Mr du Toit and the City's valuer that the sale of life rights in the property should be used to determine the market value. However, it found that an income approach was not appropriate as the income in terms of the Development Agreement was not ultimately income from the trust (as it was not used to make a profit, but rather to contribute to a Levy Stabilisation Fund for use in the retirement scheme) and UCT received the other portion.

[121] It further found that an income approach was inappropriate because it had many imponderables, and because the income that could be generated from the sale of life rights was highly restricted due to the excess sharing operations.

[122] In its answering affidavit the VAB stated that it adopted a simple and straightforward approach, which was to ask what price a willing purchaser would have bought the property from a willing seller on the valuation date of 2 July 2018.

[123] The VAB then proceeded to value the units and ALUs according based on the resale value of the life rights, and deducted the 10% maintenance and restoration levy, and the 45% Levy Stabilisation Fund. The community centre, twelve frail care units and two hospitality suites were excluded from the VAB's calculation.

[124] The first time the VAB made mention of 'comparable sales' was in the heads of argument filed on its behalf where it contends that it used comparable sales of life rights in 2018 to determine an initial valuation of R487 million.

[125] It appears that when the VAB became aware of the City's stance and in particular the City's contention that the VAB incorrectly applied what appeared to be 'in substance' a comparable sales approach', by deducting the Levy Stabilisation Fund from the summed value of the units instead of from the profit after the 10% restoration and maintenance levy had been paid, and by applying the 45 to the full resale price, which was based on an incorrect interpretation of the Development Agreement.

[126] In oral argument Mr Rosenberg described the methodology applied by the VAB, for the first time, as a 'modified comparable sales approach.'

[127] The VAB then attempted to justify the deductions, which were incorrectly made in the contractual context of this matter which could not be properly made if the comparable sales approach was applied, by describing such deductions as 'adjustments.' The VAB failed to explain the difference, if any, between 'deductions' and 'adjustments.'

[128] It appears that Mr Rosenberg sought to re-classify the deductions made by the VAB as 'adjustments' to escape the objection that such deductions should only appropriately be made when applying the income capitalisation approach.

[129] It is clear from the City's answering affidavit and argument that it accepts implicitly that the VAB's approach was fundamentally incorrect.

[130] Upon becoming aware of the City's criticism of its approach, the VAB appeared to then tailor its argument in an attempt to justify the shortcomings in its approach. This does not assist the VAB as it was belatedly raised in argument, when in fact the methodology and the manner in which it was applied should have been clearly and adequately set out in the determination when the approach was adopted and in the answering affidavit filed on its behalf. After all, it professed its expertise in the field of property valuations, which it exhorted the Court to accept.

[131] Mr du Toit's approach also appears to also be problematic in certain respects. As pointed out by the City, he appears to have accounted only for a small portion of the total number of units on the property and has determined the profit rental based on an average ownership period of only nine years, whereas the evidence indicates that the average occupation of a unit is twelve years.

[132] Mr Budlender fairly conceded that there was no market evidence to support the 10% capitalisation rate. Using the correct capitalisation rate is fundamental as even a small difference in the rate will make a substantial difference in the valuation results.

[133] In any event, it is not necessary for this Court to determine which approach should have been applied, but rather whether the approach applied by the VAB to this particular scheme met the threshold requirement of an 'acceptable valuation methodology' as set forth in section 45 of the Rates Act, which is case in peremptory terms.

[134] Even if we were to accept the VAB's belated argument that a comparable sales approach was applied based on the gross 2018 selling prices for 227

unoccupied units, which were used as comparators and applied to all of the units for the purpose of determining the market value, these sales were not suitable transactions for comparison as the majority of the units were in fact occupied.

[135] The VAB failed to explain why the fact of occupancy was not relevant to its determination.

[136] The fact that the units are all occupied would self-evidently have a significant negative impact on the market value of the units. Vacancy is a relevant consideration for the comparable sales approach.

[137] The VAB failed to consider this fundamental consideration and therefore committed a reviewable irregularity in applying such an approach, whether it is described as a 'simple and straightforward' or a 'modified comparable sales' approach.

[138] It is also not clear on what basis the VAB failed to take into account the ALU costs, on average, of 22.4%, which are also payable by any prospective purchaser because they are obligations contained in the Development Agreement and, by incorporation, the Notarial Lease. According to the Trust, which would clearly have knowledge thereof, this is the practice that has developed and been agreed and followed by the Trust and UCT.

[139] The VAB furthermore failed to take into account the repayment of the original payment price to the original purchaser of his or her estate. This equates on average to 32.1% of the gross selling price of the units. In so doing the VAB failed to have regard to a relevant consideration, and therefore acted unreasonably and irrationally.

[140] Mr Rosenberg asserted that it is not for this Court to determine if the income approach is correct as it is not qualified to do so and must therefore defer to the expertise of the VAB.

[141] In the circumstances of this matter this argument cannot be sustained. The Court was presented with expert evidence not only on behalf of the VAB, but also on

behalf of the Trust and the City. Even if we accept that Mr Louw is not an independent expert, his evidence does not necessarily fall to be disregarded, particularly as it in some respects supports the VAB's reasoning and findings and in other respects is critical thereof.

[142] The VAB is not specially placed so as to be immune to judicial scrutiny. It is clear from the foregoing that the VAB failed to take several relevant considerations into account and failed properly apply an acceptable valuation methodology as it was required to do in terms of the Rates Act.

Conclusion

[143] Based on the foregoing it is apparent that by failing to apply an acceptable valuation methodology, as it was enjoined to do in terms of section 45 of the Act, by applying deductions which ought not to have been deducted, and by failing to deduct necessary deductions in determining the valuation, the VAB committed a number of reviewable irregularities

[144] For all the reasons set out above, the VAB's determination of the value of the property was neither rational nor reasonable, and falls to be reviewed and set aside, as on the grounds set out in sections 6(2)(b), 6(2)(e)(iii), 6(2)(f)(i) and (ii), 6(2)(h) and 6(2)(i) of PAJA.

[145] The City asked the Court, if it reviewed and set aside the valuation, to remit the matter with directions to the VAB.

[146] The Trust opposed the City's proposal for remittal with directions. It contended that such an order would require expert judgment and that the Court is not possessed with sufficient information to make an appropriate order in this regard. The Trust's concern is that this would amount to an encroachment on the VAB's powers and would offend against the doctrine of separation of powers. Moreover none of the other Retirement Villages in the jurisdiction of the City were parties to these proceedings and their views have not been heard on these important issues.

[147] The VAB has made itself a protagonist in these proceedings by choosing to enter the fray and actively oppose the relief sought, rather than to simply abide the decision of the court. Mr Coetzee, the chairperson of the VAB *in casu*, deposed to the answering affidavit filed on behalf of the Trust. It would be fundamentally unfair if the same board heard the appeal again. The VAB should therefore be differently constituted when the appeal is remitted back for hearing afresh.

[148] Ever mindful of not overstepping in terms of the appropriate remedy, we are inclined to agree that this Court, which does not have the necessary expertise to issue appropriate directions, should leave the valuation to the new board which its faced with the appeal afresh.

Order

[149] In all the circumstances I would make the following order:

1. The decision and determination made by the first respondent on 26 July 2022 of the value of freehold and the leasehold in respect of Erf 3[...], Property CCT 0090355L0001, commonly known as Pinewood Retirement Village is reviewed and set aside.
2. The matter is remitted to the first respondent, to be heard by a valuation appeal board consisting of different members to the members who made the determination on 26 July 2022, for a hearing and determination afresh.
3. The first respondent is to pay the Trust's costs of the application, including the costs of two counsel.

HOLDERNESS AJ

SALDANHA J

**I agree and it is so
ordered.**

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